Cooperative States:

International Relations, State Responsibility and the Problem of Custom

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The recent trend towards interdisciplinary research in international law and international relations has left a number of informal rules, such as the law of state responsibility, largely unexamined, if not the subject of outright skepticism. This is not surprising given state responsibility’s predominantly customary character, the breadth of its scope, and its lack of any centralized enforcement mechanism. These characteristics are, however, entirely consistent with the role these rules play in the maintenance of international order. Rather than serving primarily as a guide for international adjudication, the law of state responsibility facilitates continuous bilateral cooperation, made possible by underlying configurations of interests between states. It achieves this end by improving communication, coalescing states’ expectations around specific focal points, and refining cooperative solutions. This hypothesis explains many of the salient features of the United Nations International Law Commission’s recent final series of articles on state responsibility. It also suggests that other customary regimes may play equally complex roles and should not be set aside as mere ‘behavioral regularities’ devoid of normative content without further examination.

**INTRODUCTION**

The most significant recent development in international legal studies has undoubtedly been the collapse of the intellectual barrier between the disciplines of international law and international relations. In large measure, this development has been made possible by the work of institutionalist international relations scholars within their own field. Drawing on the resources of public goods analysis and game theory, they have solidly established the possibility and conditions for rational cooperation in an anarchic milieu, thus defeating realist propositions that states must always remain entangled in sterile competition over resources, security and relative power. This work allowed the rescue of international law from its intellectual status as an epiphenomenon of “realist” power politics by showing how rational cooperation can explain the emergence and functioning of specific international legal institutions.¹ Not surprisingly, the same scholars, joined by international

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¹ See, e.g. ROBERT O. KEOHANE, AFTER HEGEMONY 182-216 (1984); Stephen D. Krasner, Structural Causes and Regime Consequences: Regimes as Intervening Variables, in INTERNATIONAL REGIMES 1 (Stephen D. Krasner ed., 1983) (other contributions to this collection are also instructive). For a more comprehensive review of the earlier literature on regime theory
lawyers, have also made some of the most valuable contributions to the new interdisciplinary field.²

Yet, despite these fundamentally important insights, it is surprising and rather disconcerting to note that institutionalism, or, for that matter, all strands of contemporary international relations theory, have largely ignored an entire category of international legal rules and institutions. International lawyers have long recognized that a broad range of informal practices form an integral part of the law, most notably through the recognition of international custom as one of its formal sources.³ Yet, since institutionalist scholars have focused on formal regimes established by multilateral treaties, they have neglected the customary norms and regimes that form the backbone of many fundamental areas of international law.⁴ Such is the case of the law of state responsibility, with its customary and only partly codified rules, decentralized (and often non-existent) adjudication and enforcement, and general rather than subject-specific orientation.⁵

Conversely, while state responsibility has been a favorite subject among international law scholars, few accounts have provided meaningful discussions of the policy behind its specific rules and applications. Of course, international lawyers have long struggled with questions relating to the efficacy of international law. But this debate has traditionally taken place on an “existential” level, separate from the descriptive task of defining positive rules. While considered fit matter


for the occasional introductory chapter or critical comment, such considerations are often viewed as largely irrelevant to the professional role of the international lawyer. This focus on positive rules at the expense of policy analysis has become increasingly problematic as international law has steadily gained in importance and demands for its accountability have increased.6

In this article, I will argue that institutionalist analysis can be used to explain the functions performed by the law of state responsibility and other similar secondary rules in the maintenance of international order. State responsibility facilitates international bilateral cooperation where made possible by underlying configurations of interests between states, a clear example being the iterated prisoner’s dilemma. It achieves this facilitation by improving communication between interacting states, providing more precise definitions of the moves that constitute “cheating” or “defection,” and thus potentially attracting retaliation, and refining the cooperative solution, often in the mutual interest of the parties. More specifically, I will explore this hypothesis in two parts. Section I of this essay will outline the recent game-theoretical approach to customary international law advanced by two leading scholars, Jack Goldsmith and Eric Posner. An examination of how the law of state responsibility fits within this analytical framework, however, will reveal some of its limits, while leading to the hypothesis that the primary function of state responsibility is to facilitate rational cooperation between states. Section II will show that the principal substantive features of the law of state responsibility conform to this hypothesis. Finally, in the Conclusion, I will attempt to expound some of the broader implications of these findings for international legal theory, in particular as it concerns customary international law.

As this analysis will show, the law of state responsibility’s institutional bias toward bilateral cooperation sheds light on many of its substantive features, and assists in resolving specific difficulties raised by previous approaches. As such, this model provides a normative framework for interpreting, applying, and codifying state responsibility rules.7 More importantly, by demonstrating that stable general rules of


7. The recent adoption by the United Nations International Law Commission (ILC) of the final version of its articles on state responsibility is helpful, as it provides a stable restatement of the relevant rules that can serve as a foundation for policy analysis. Report of the International
customary law can emerge to support cooperation in discrete bilateral situations under assumptions of strict rationality, this analysis provides a tentative answer to the recent charge against the normativity of international custom by law and economics scholars. Overcoming this radical challenge is a necessary first step toward a more comprehensive theory of customary international law that would, among other things, provide insight into the development of an international legal culture that might shift the preferences of states by creating expectations of and dependence on continued cooperation.

I. RATIONAL COOPERATION AND THE PROBLEM OF CUSTOM

A. A Realist Theory of Customary International Law

In a recent article, Goldsmith and Posner have developed a theory of customary international law using rationalist premises and game theory.\(^8\) Traditional custom doctrine insists that customary rules are the result of a combination of generality and consistent state action, upon which is superposed a sense of legal or moral obligation. Starting from this premise, Goldsmith and Posner set out to analyze the situations in which, assuming rational behavior by two states, underlying configurations of interests can lead to the kind of consistent behavior characterized by custom.

Such “behavioral regularities” can be produced by four simple configurations of interests. First, coincidence of interests arises when each state has an individual incentive to behave a certain way. For instance, in the context of a naval conflict, it may be militarily disadvantageous for each of two belligerent states to waste its respective naval resources on attacks against the other’s fishing vessels. Accordingly, both states will refrain from doing so. Coercion, the second configuration, arises when a more powerful state is able to intimidate a weaker state into complying with its wishes. Thus, a powerful state, preferring to save its navy for other purposes, can simply

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use the threat of overwhelming force to prevent a weaker state from attacking its fishing boats. In both situations, the states will consistently abstain from attacking their opponent’s fishing fleet, thus creating behavioral regularity. International lawyers would conclude that consistent state practice reveals the existence of a customary rule prohibiting attacks against a belligerent’s fishing vessels.

In the third configuration, multiple mutually advantageous equilibrium solutions enable each state to be better off only if both states pursue the same mutually advantageous end. In this case, each state has an interest in coordinating its action with the other side but neither knows in advance what its counterpart will do, so the kind of independent action normally associated with custom will rarely produce an optimal solution. For this reason, coordination problems will be better solved by direct communication, such as through the negotiation of a treaty, than independent action.9

Finally, the fourth configuration is the familiar iterated prisoner’s dilemma, examined in more detail below. In this configuration, the optimal outcome can only be achieved if both states subordinate their individual preferences concerning the result of each iteration in order to achieve a mutually optimal outcome over a series of interactions. Following the example developed above, assume that the belligerent states would be mutually better off if neither attacks the other’s fishing vessels than if both do, but that each state would be independently better off by attacking its enemy’s fishing fleet when its opponent’s battleships remains idle. Thus, each state will have an incentive to attack knowing that it will gain an advantage if its opponent does not and prevent its opponent from gaining an advantage if it does. Since both states follow the same reasoning, each will attack the other’s fishing vessels, producing a mutually sub-optimal outcome. Nevertheless, under the right conditions—the states attributing sufficient value to future payoffs, interaction continuing indefinitely, and the payoffs from defection not being too high relative to those from cooperation—the development of limited retaliative strategies can lead to a sustained cooperative result.

All four of these configurations generate behavioral regularities that

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9. Although coordination problems play a relatively minor role in our analysis of informal bilateral relations, it is interesting to note that many of the newer variations on classic game theoretical models aim at finding solutions to such problems in multilateral contexts. See Andrew Kydd & Duncan Snidal, *Progress in Game-Theoretical Analysis of International Regimes, in Regime Theory and International Relations* 112, 112-15 (Volker Rittberger ed., 1995). This article, however, will focus on a relatively simple cooperation model. While I will not directly address this issue here, it is noteworthy that Goldsmith and Posner’s approach to the potential role of customary rules in solving coordination problems may be unduly restrictive. See infranote 28.
international lawyers would describe as instances of consistent state practice and—given the loose evidentiary requirements for the establishment of opinio juris—customary international law. Yet, in none does the purported “rule” play any normative role. Even in a cooperative equilibrium states do not act out of a sense of legal obligation, but rather follow their own interest given the configuration of payoffs they face. The resulting consistent behavior is little more than coincidental (such that describing it as “law” can only be misleading), as it cannot survive a change in payoffs through the modification of external circumstances or the actors’ preferences.

After laying out this model, Goldsmith and Posner test it against empirical data in three areas of customary international law: the prohibition on the seizure of neutral ships during wartime, ambassadorial immunity, and the rules relating to the territorial sea. Their conclusions are that customary rules are indeed little more than descriptive, that they have consistently changed along with the underlying state interests, and that their independent normative pull has been weak or altogether nil.

B. The Basis of Strategic Cooperation

Goldsmith and Posner’s theory constitutes a broad and powerful attack on the traditional conception of international custom. In fact, it could more properly be described as a non-theory of customary international law, as it concludes that custom as international lawyers understand it is functionally meaningless. The model’s simplicity and elegance shed light on perennial questions regarding the efficacy of international law, as well as many specific rules. Yet, while this approach is of great importance to the study of customary international law, it is not sufficient to support its authors’ radically skeptical conclusions on the normativity of custom. Within the paradigm of rational state behavior, other customary rules can play more complex roles than Goldsmith and Posner recognize. The example I will use is the law of state responsibility, which governs the consequences of

violations of international law between states.

It is useful to return now to the rational cooperation paradigm described above by considering the classical payoff matrix for a prisoner’s dilemma scenario (Table 1). Such a configuration of payoffs typically (but not invariably) arises when two states could collaborate to attain a mutually beneficial objective, but where each state would be better off if the other were to shoulder the entire burden of producing the desired result. Assuming that each state cannot prevent the other from benefiting from its efforts, interaction of rational actors leads to a sub-optimal outcome. If state 1 chooses to cooperate, state 2 will find it advantageous to defect, since defection will allow it to attain its preferred outcome, with state 1 bearing the cost of its benefits. However, since state 1 knows the parameters of state 2’s choice, it too will choose to defect to avoid its least preferred outcome and attain one less detrimental, thus precluding a mutually beneficial outcome. State 2 has no incentive to cooperate, as cooperation would be met by state 1’s defection, its least-preferred outcome. A single iteration of the game will lead to an equilibrium situation in which both states defect—not a Pareto-optimal outcome since both states would be better off with mutual cooperation. In an iterated version of the game, each state has an interest in finding some manner of attaining the goal of mutual cooperation while avoiding unilateral defection by the other state.

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<td>Cooperate</td>
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<td>State 1</td>
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One way in which the Pareto-efficient cooperative outcome may be

12. For a more elaborate explanation of basic concepts relating to the normal-form game, see DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994). For an application of the prisoner’s dilemma paradigm to international relations, see Arthur A. Stein, Coordination and Collaboration: Regimes in an Anarchic World, in INTERNATIONAL REGIMES, supra note 1, at 115, 120ff.

13. Pareto optimality is described as:
A state of a given system (e.g. a distribution of a given quantity of goods) is Pareto optimal, and thus efficient, if and only if there is no feasible alternative state of that system (e.g. no feasible alternative distribution of those goods) in which at least one person is better off and no one is worse off.

attained in an iterated prisoner’s dilemma is through the independent use of strategies based on identification of defections and retaliation. Robert Axelrod, after running a large-scale computer simulation pitting strategies designed by several leading game theorists against one another, concluded that the most effective tactic was a simple “tit-for-tat” approach. In this strategy, a player cooperates on its first move and then adopts a move identical to its opponent’s previous move in each successive iteration, thus punishing defection by defection and rewarding cooperation by cooperation. Other effective strategies exist, but the crucial point is that they all depend on each player’s capacity to distinguish instances of cooperation from defection so as to correctly mete out punishments and rewards, and successfully assess its opponent’s strategy in order to anticipate retaliation in response to certain of its own actions.

In the real-world context of complex interaction between states, such identification may be less obvious than in the simplified world of game-theoretical models. Uncertainty over the meaning and consequences of actions by rival states may trigger unnecessary defensive defection, where states defect so as to avoid facing losses when their opponents defect, either willingly or because of underdetermined criteria for cooperation. Such penumbras of uncertainty also create opportunities for offensive defection where states defect to take advantage of the higher benefits of unilateral cheating, and justify such cheating by a self-serving interpretation of imprecise rules. While such interpretations are often transparent, there are numerous cases in which it is unclear whether the breaching state actually intended to renego on its obligations and break the pattern of cooperation. Did the rule providing for exclusive exploitation of fish stocks within a state’s Exclusive Economic Zone (EEZ) also cover straddling fish stocks, thus allowing the seizure of a foreign fishing vessel beyond the limits of the EEZ? Was the breach of an agreement to build jointly a hydroelectric complex justified by a state of necessity that temporarily made the discharge of an obligation too onerous to the breaching state? For rational cooperation to be sustainable, states must have a way to answer such questions.

C. The Function of State Responsibility

For cooperating states to distinguish actions that count as breaches (and thus trigger retaliation) from those that do not, it is useful for them to have a number of pre-established guidelines, with commonly invoked justifications for apparent breaches, and a criteria for successful justification. According to Goldsmith and Posner, this need provides the principal motivation for the existence of international treaties. Such treaties refine cooperation by openly identifying actions that will be counted as cooperation in iterated prisoner’s dilemma scenarios and those that will bring about the greatest mutual benefits in coordination situations.16

Conventional guidelines can also circumscribe the parameters for optimal cooperation by excluding actions that, even though not “cheating” in the strictest sense, nonetheless result in sub-optimal outcomes, thus refining the cooperative outcome so as to make it truly Pareto-optimal.17 For instance, by providing an (hypothetically positive) answer to the first question above, a treaty may create a level of certainty in bilateral relations sufficient to restore the possibility of cooperation, as each state can then tailor its strategic response to exploitation of straddling fish stocks on the borders of its EEZ in full knowledge that a state engaging in such activity intends to defect (or at least expects its actions to be interpreted as defection) from the pattern of cooperation. Such a treaty can also reflect the common interest of both states in circumscribing the optimal cooperative outcome, assuming the rule it establishes is predicated on the empirical answer to the question: Are both states made better off (or at least no worse off) by allowing for the protection of straddling fish stocks as a sub-rule within the EEZ protection regime?18

There is no a priori reason why such reasoning could not extend to informal institutions and, in particular, to certain rules of customary international law. Indeed, the rationale outlined above applies to the law of state responsibility, which serves an essential function by facilitating the attainment of cooperation or coordination in informal as well as formal settings. The existence of rules of state responsibility makes

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17. The significance of this point stems mainly from the fact that complex international interactions are not usually reducible to a simple 2x2 matrix—there may be more than one cooperative outcome and one may be optimal as compared to the others. The resulting game can be analyzed as a case of coordination within cooperation.
18. This statement assumes, of course, that this question has an answer. When it does not, the chosen solution may be the result of compromise across issue-areas. Cooperation may also simply be impossible between these two particular states on this specific question until further extrinsic developments occur.
some degree of "clear and authoritative communication between interested states"\textsuperscript{19} possible, thus facilitating cooperation in some areas even without formal arrangements.

This facilitation of cooperation occurs in several ways. There are myriad bilateral situations where rational cooperation is possible given the payoff structure but where no formal agreement has been reached between the states. In such cases, cooperation can emerge through the mutual adoption of an appropriate "reward-and-punish" strategy (especially if each state chooses cooperation as its first move), leading to a sustained Pareto-optimal outcome. While truly optimal cooperation on all (or even most) substantive levels may be possible only through precise description in a formal treaty of the mutual obligations undertaken by the parties, transaction costs will often render such a solution impracticable. That foreign relations staffs may not turn their attention to every opportunity for beneficial cooperation between two given states does not in itself, however, reduce the incentives for such cooperation. As described above, Goldsmith and Posner recognize that such patterns may emerge, as long as the states involved have sufficiently low discount rates, the game continues indefinitely, and the payoffs from defection are not too high relative to the payoffs from cooperation.\textsuperscript{20}

In such situations, the need for improved communication, definition of the moves that will count as defection, and refinements in cooperation are no less pressing than in more sophisticated interactions where such needs are fulfilled through formal agreement. While, as demonstrated, general and informal rules may not fulfill those needs at the same level of precision as a substantive agreement, many of the possible sources of ambiguity that may arise recur and form patterns that can be described with reasonable precision. In other words, the excuses that a state may invoke to try to justify defection on its part are unlimited in form but not in substance. In fact, the law of state responsibility, particularly the rules regarding circumstances excluding wrongfulness, aims at solving many of the most common instances in which states make such excuses. It defines the limited circumstances in which a state may renege on a previous pattern of cooperation without attracting the sanctions attached to defection, not by the legal rules themselves, but by its opponent's strategy.\textsuperscript{21}

\textsuperscript{19} Goldsmith & Posner, \textit{Theory of Custom}, supra note 8, at 1172.
\textsuperscript{20} Id. at 1125-27.
\textsuperscript{21} In these respects, the law of state responsibility's function is similar to that of 'default' (or suppletive) rules of contract law. See Jeffrey L. Dunoff & Joel P. Trachtman, \textit{Economic Analysis of International Law}, 24 \textit{Yale J. Int'l L.} 1, 33-35 (1999).
For instance, by answering the second question above, the law of state responsibility enables a country affected by a state of necessity to predict the circumstances in which breach of its obligations will be met by retaliation and result in loss of the benefits of cooperation. It also equips other states to take into account accurately the history of interaction in devising their own strategies, thus improving the effectiveness of those strategies.\textsuperscript{22} This article turns now to how this theoretical framework can be used to explain specific salient features of the law of state responsibility.

II. RATIONAL COOPERATION AND THE LAW OF STATE RESPONSIBILITY

The law of state responsibility and other analogous customary rules differ significantly from substantive customary rules such as those studied by Goldsmith and Posner.\textsuperscript{23} For the purposes of this analysis, I will parallel the established terminology by referring to substantive international law rules, whether customary or not, as “primary rules,” and to the rules of state responsibility as “secondary rules.”

The distinction between these different types of rules reflects a difference in function. As demonstrated by Goldsmith and Posner, primary rules of customary international law play a relatively minor normative role in international affairs,\textsuperscript{24} as they are often mere descriptive statements of existing behavioral regularities.\textsuperscript{25} For instance, the answer to the question of whether the EEZ includes straddling fish stocks (assuming the absence of a formal agreement) may depend on the economic importance of straddling stocks, the relative power of the competing states, the difficulty of monitoring migrations, and a number of other political, economic and military factors. Secondary rules, on the other hand, play the facilitative role of enabling state cooperation, as described above. Quite apart from particular substantive disputes, states have a mutual interest in, for instance, pre-determined criteria for determining when a state of necessity can be invoked as a justification.

\begin{itemize}
\item \textsuperscript{22} AXELROD, supra note 14, at 30.
\item \textsuperscript{23} Supra note 11; Goldsmith & Posner, Modern and Traditional Custom, supra note 8, at 641-54 (analyzing the rule protecting coastal fishing vessels from seizure in wartime).
\item \textsuperscript{24} This is so even though their precise formulation as it evolves through time and gathers agreement among the relevant states will also be useful in identifying deviations.
\item \textsuperscript{25} Statements of this nature will be pitched at a level of generality or specificity appropriate to the number of states among which the conditions for cooperation hold. This flexibility allows regional, and even bilateral customary rules, to coexist alongside general custom. See Haya de la Torre Case (Colom. v. Peru), 1951 I.C.J. 71, 80-82 (June 13) (regional custom); Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6, 12-14 (April 12) (bilateral custom).
\end{itemize}
for defecting from a cooperative arrangement. Thus, the distinction between these two types of rules also reflects a difference in mode of formation, as the behavioral regularities described by primary rules result from the diverse underlying configurations of state interests, while the emergence of uniform secondary rules reflects a general coincidence of interest in facilitating mutually beneficial cooperation in a broad range of situations. Several conclusions may be drawn from the special status of the law of state responsibility and similar secondary rules.

A. Enforcement and Effectiveness

This explanation renders the usefulness of state responsibility entirely independent of any enforcement of its rules qua rules, thus resolving (at least partially) the traditional dilemma concerning the efficacy of international law absent reliable centralized enforcement. While rational cooperation requires mutual capacity for credible threats of retaliation in case of cheating, this is not the same as enforcement of the state responsibility rule itself; the rule only facilitates cooperation by specifying the conditions under which retaliation is justified, and should not itself be interpreted as defection. Thus, violations of a primary rule will not result in direct enforcement measures by the international community, but in retaliatory action by the counterparty to the cooperative interaction, thus depriving the breaching state of the benefits of cooperation. Moreover, since the possibility of credible threats is assumed in the prisoner’s dilemma payoff matrix, coercive interaction is outside the scope of state responsibility. When rational cooperation is possible, however, the responsibility rule contributes to sustaining the stability of the substantive primary “rule,” even though the latter may well be little more than descriptive per se.

B. Substantive Rules of State Responsibility

Stable cooperation is attainable to a significant extent independent of the actual content of the substantive responsibility rules. This is because the creation of focal points and improved communication are guaranteed by the existence of determinate rules, regardless of their specific prescriptions and the nature of the focal points actually chosen. This independence could mean that elaboration of precise rules on release and remediation by a small number of international lawyers, first through the various organs of scholarly exchange and later within the confines of an organization detached from immediate state interests, such as the United Nations’ International Law Commission (ILC), may
not constitute a significant problem from an international relations perspective. These rules will be effective in promoting interstate cooperation if states are willing to accept them as guidelines for application of their bilateral cooperative strategies. There is no immediate reason for them not to do so, since any rule that enables more effective cooperation will benefit them in absolute terms.\textsuperscript{26}

Secondary rules are not, of course, completely exempt from the normal balancing of interests between states. They may themselves be objects of rational interaction resulting from various configurations of interest,\textsuperscript{27} or a state may, in specific cases, resort to self-serving interpretations of the law of state responsibility. Nevertheless, common interest in streamlining and improving cooperation is likely to make coincidence of interests the dominant model of interaction for secondary rules, as well as to gradually marginalize instances of cheating.

The following analysis aims at demonstrating that many of the most important substantive features of the law of state responsibility reflect its functional orientation towards facilitating interstate cooperation. It will, however, be limited to some of the most well-established general principles governing state responsibility for breach of bilateral international obligations, since the rationalist assumptions I have adopted severely limit the spontaneous emergence of rational cooperation in multilateral situations. For this reason, I will not directly consider the increasingly important rules attempting to integrate a treatment of \textit{erga omnes} obligations within the general framework of state responsibility. This is not to deny, of course, that customary state responsibility rules may be relevant to breaches of multilateral treaty obligations, or that custom may serve a coordination function in some multilateral situations by encouraging states to adopt a uniform pattern of behavior when there are little or no incentives to defect.\textsuperscript{28} Such

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\item \textsuperscript{26} This statement makes the rather safe assumption that significant states are typically engaged in at least some bilateral relationships where cooperation can be permitted or improved by the existence of stable rules.
\item \textsuperscript{27} Since the rules are of general application, there is little probability that they are themselves the result of rational cooperation under an iterated prisoner’s dilemma.
\item \textsuperscript{28} Goldsmith and Posner clearly do not consider such instances to be genuine examples of custom since the behavioral regularity does not arise ‘spontaneously’ through constant and independently adopted state practice. Goldsmith & Posner, \textit{supra} note 8, at 1128-31. Goldsmith and Posner instead claim these instances arise as \textit{a de facto} the result of a preliminary agreement or statement of intention. This is why, in a coordination context, the functional line between treaties and custom may be blurred, as they can both play a “cheap talk” role. See Kydd & Snidal, \textit{supra} note 9, at 123-27 (discussing “cheap talk” in the context of international regimes). In a way, my analysis of secondary rules in a cooperation context could also be seen as a “cheap talk” explanation—statements of unilateral intent may facilitate cooperation by coalescing state expectations regarding certain possible deviations from previously established regularities (framed as customary norms). I intend to argue, however, that this particular type of stable cheap-
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functions are of lesser interest because they do not relate directly to the rationalist critique of the traditional theory of custom, and because their substantive content could only be elucidated by a more sophisticated approach based on public goods analysis.

1. Responsibility Without Fault

The first important rule of state responsibility is that states are to be held "absolutely" liable for breaches of international law. When an act constitutes a "breach of an international obligation of the State," that state will be held responsible regardless of its diligence in trying to prevent the breach, unless of course the underlying primary obligation itself provides that due diligence shall exclude responsibility. This rule is a substantial one, and, to some international lawyers, surprising divergence from the rules of extracontractual liability as they exist in most domestic legal systems.

This difference, however, can be traced to a fundamental distinction between the functions of the two systems. Domestic tort law (or similar regimes of civil liability) seeks to achieve an optimal level of social care by limiting victims' compensation to cases in which the risk-takers' negligence can be proven. From an economic perspective, negligence is defined as the adoption of a sub-optimal level of care, i.e., a level where the cost of prevention is lower than the cost of the expected harm (the average cost of an accident times the probability of its occurrence). Thus, parties that engage in potentially harmful activities have an incentive to spend up to the socially optimal level on prevention when such spending would be cheaper than compensating accident victims for their injuries. Moreover, the doctrine of contributory negligence similarly encourages potential victims to exercise an optimal level of care with respect to their own actions or else bear the financial burden of their injury on their own. Both of these incentives would be

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29. ILC Report, supra note 7, art. 2(b). This expression is defined as "a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character." Id. at art. 12.

30. See IAN BROWNLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 440-41 (5th ed. 1998) (explaining the term 'culpa'); see also Crawford Report I, supra note 5, ¶ 122 (addendum 4); ILC Report, supra note 7, at 69 (article 2, commentary para. 3).


32. The "Learned Hand formula" was first articulated in a rather crude form in U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), before being formulated more rigorously by Richard A. Posner in A Theory of Negligence, 1 J. LEG. STUD. 29, 32-36 (1972) and McCarty v. Pheasant Run, Inc., 826 F.2d 1554 (7th Cir. 1987).

33. This is analogous to 'moral hazard' analysis in the insurance context.
absent if the law provided for unqualified strict liability of the party creating the risk.\textsuperscript{34}

Such a neat explanation of liability regimes is, however, unavailable at the international level. First, as has often been pointed out, the international legal system comprises no reliable process for factual determinations of negligence.\textsuperscript{35} Under contemporary conditions, proving a state’s negligence would be almost impossible, since it would require the production of the relevant evidence, most of which is likely to be in possession of the indicted state.\textsuperscript{36} Moreover, international jurisdiction being consensual,\textsuperscript{37} affected states could not obtain an authoritative determination of negligence without the indicted state’s consenting to the process. Absent such consent, unilateral retaliative actions or threats thereof—while essential to the maintenance of a long-run cooperative equilibrium—would be tainted with uncertainty, as the breaching state could rightly argue that they were the result of an \textit{ex post facto} unilateral determination of breach. Even with consent, the delays associated with third-party adjudication of fault would result in extended periods of mutual suspicion and suspended cooperation, creating substantial transaction costs and disruptions to cooperation.

Second, and more fundamentally, most breaches of international law are intentional, and thus lack the issues of optimization of social care that underlie domestic fault-based systems. It is because of the intentional nature of breaches that the law of state responsibility deals with facilitating the efficient operation of unilateral retaliative strategies aimed at preventing opportunistic defection. As most breaches of international custom do not result in direct, measurable harm to another state or its citizens, but rather in the loss of the benefits of cooperation, comparison of “care” and “damage” at even an abstract level is often all


\textsuperscript{37} See ICI Statute, \textit{supra} note 3, art. 36.
but meaningless.\textsuperscript{38}

Some areas have nevertheless emerged in which there is a clear risk of accidental damage and a sufficient nexus between the states and the hazardous activity for a fault-based rule to be effective. Such is the case, for instance, for transboundary environmental pollution and damage caused by space objects. As technological progress continues to broaden the scope of transboundary human activity, this category of circumstances will undoubtedly expand similarly. An optimal care standard can, however, be better applied through substantive cooperative regimes\textsuperscript{39} than through the crude application of the general doctrine of state responsibility.\textsuperscript{40} These differences explain the gradual marginalization of earlier attempts to integrate a treatment of fault-based liability for “acts not prohibited by international law” in the general law of state responsibility and the parallel development of specific agreements for various types of potential transboundary damage, which pose complex public goods and collective action issues of their own.\textsuperscript{41} These and other international regimes may well include due diligence obligations, but they will generally provide for comprehensive dispute-resolution schemes preempts most state responsibility rules.\textsuperscript{42}

\textsuperscript{38} Direct transposition of domestic legal norms to the international system without taking into account these fundamental structural differences remains, unfortunately, a pervasive approach to the problem. See, e.g., Gattini, supra note 36, at 254. Recent restrictive formulation and judicial application of the 'circumstances precluding wrongfulness' (see below) makes clear that their scope in insufficiently broad to sustain Gattini's argument that they effectively reintroduce the fault rule by allowing exculpation in cases where no fault was committed.


\textsuperscript{40} Even authors who maintain that such rules still fall within the general ambit of state responsibility point to significant differences between the legal regimes governing the two types of responsibility. See Julio Barboza, Sine Delicto (Causal) Liability and Responsibility for Wrongful Acts in International Law, in INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION 317 (1997).

\textsuperscript{41} Mohammed Bedjaoui notes:

However conscious States might be of the vital nature of the interests at stake, it is only on a conventional basis that it has been possible for them to feel bound by this new, more onerous and stringent form of liability. This is one of the distinctive characteristics of this form of liability as compared with the classic type, which has customary roots.

Bedjaoui, supra note 36, at 214; see also Horst Blomeyer-Bartenstein, Due Diligence, in 1 ENCYCLOPEDIA OF PIL, supra note 36, at 1110, 1113-14; Brownlie, supra note 30, at 446-48; Crawford Report I, supra note 5, ¶ 110(b).

\textsuperscript{42} See ILC Report, supra note 7, art. 55 (lex specialis—special rules of international law will take precedence over rules governing state responsibility).
2. Rules of Attribution

While they have been the object of much debate since the first attempts at codification, the rules of attribution have settled on a configuration that generally provides for state responsibility only in cases where the impugned state exerts de facto control over the organs responsible for the breach of international law. Under this rationale, a state incurs responsibility for the acts of its own organs (even when acting ultra vires), persons acting in fact on its behalf, and organs placed at its disposal by third parties, but not organs of another state on its territory, insurrectional movements (unless they become the government of that state), or other persons not acting on its behalf.

This rule benefits international cooperation by avoiding retaliation for breaches that do not reflect action by a state in conformity with its own evaluation of its interests and application of its interactional strategy. Even though a defection is technically defined by its effect on the benefits to the parties, strategies for mutual cooperative behavior cannot emerge if random acts unrelated to a party’s consciously adopted pattern of behavior can attract retaliation. Indeed, retaliation in such circumstances risks being interpreted as a breach itself, and thus destabilizing emerging mutual expectations, as well as introducing inaccuracies in a state’s record of interactive behavior (“reputation”), which is crucially important to other states developing their own strategies.

Minor inconsistencies with this hypothesis, such as the imposition of responsibility for ultra vires acts of organs of the state, can be justified on account of the excessive transaction costs associated with a determination of de facto control and the probability that a modern state can exercise such control, though sometimes through informal means, over most of its organs. Likewise, attribution of the conduct of an insurrectional movement that becomes the new government of a state recognizes that internal political events may break the continuity of

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43. For a review of the international case law on this matter, see Crawford Report I, supra note 5, ¶¶ 200-07 (addendum 6); ILC Report, supra note 7, at Part I, ch. II, ¶ 2 (the article commentaries in chapter two further expound this idea).

44. See ILC Report, supra note 7, at Part I, ch. II (attribution of conduct to a state).

45. These costs will almost always be considerable, since factual evidence will generally be available exclusively to the breaching state. Often an objective determination will be impossible, as when another organ of the same state (such as a tribunal) is called upon to rule on the ultra vires nature of the act, thus giving the breaching state de facto control over the determination itself. If the act is determined to have been ultra vires, appropriate compensation may still not be awarded to the affected state. If article 7 did not apply, such a situation would result in deprivation of benefits but no possibility of attribution under the law of state responsibility. On the general topic of ultra vires, see Brownlie, supra note 30, at 452-55, and Crawford Report I, supra note 5, ¶¶ 235-43 (addendum 6).
interstate cooperation and that, in such cases, previous patterns of behavior are of little relevance. The attribution of acts of territorial government entities is harder to justify on such grounds. It may properly be seen as an anomaly whose persistence results from the availability of federal clauses circumventing it at the level of the relevant primary obligation in most significant contexts.\textsuperscript{46}

All this, of course, does not exclude the possibility that acts by a third party may have the same effect as a defection by one of the interacting states (i.e., depriving the other of the benefits of cooperation). If the effects of the act are only temporary, the rules preventing retaliation for acts not attributable to the first state, while permitting one of the parties to benefit from this effective breach for some time, will preserve cooperation in the long run by avoiding that a pattern of mutual retaliation be triggered by this “accidental” defection.\textsuperscript{47} If, however, the effects of the third-party intervention are permanent, the external event will have altered the configuration of payoffs thus precluding rational cooperation in favor of another form of interaction. The state adversely affected by temporary maintenance of cooperative behavior under the new configuration will eventually cease to follow the primary rule describing the behavioral regularity existing previously. Even if this change is legally characterized as a breach, the practical consequences will not be the same as for a defection under conditions in which cooperation could be restored. On the contrary, the resulting situation will better reflect the new configuration of state interests under which cooperation would have been impossible in the longer term. In any case, the rules on countermeasures will limit retaliation by the state initially favored to a proportionate response, which should ordinarily be simple cessation of cooperation.\textsuperscript{48}

3. \textit{Circumstances Precluding Wrongfulness}

Along with the ILC’s proposals on international crimes of states, the


\textsuperscript{47} AXELROD, supra note 14, at 37-39 (describing this type of defection as an “echo” effect).

\textsuperscript{48} See infra Part II.B.4 (discussing countermeasures). In the context of treaty obligations it seems that rules of release, such as “fundamental change in circumstances,” aim at recognizing this type of situation. Vienna Convention on the Law of Treaties, May 23, 1969, art. 60, 1155 U.N.T.S. 332, 346 [hereinafter Vienna Convention].
rules regarding "circumstances precluding wrongfulness" have provoked heated debate within the international legal community.\textsuperscript{49} I have already alluded to the primary function of these rules, which is to provide a predictable and mutually recognized framework for evaluating apparent breaches of international obligations. The common interest of states in maintaining bilateral cooperation provides some additional grounds for explaining particular features of these rules.

Consent\textsuperscript{50} does not pose particular problems, as a state will not ordinarily concur in a disadvantageous breach of cooperation unless some ulterior motive leads it to expect a correlative increase in utility sufficient to compensate for the loss sustained through the other party's defection. Consent through coercion, while possible, is the result of a configuration of interests making cooperation impossible because of the incapacity of the coerced state to threaten credible retaliation, and is thus outside the scope of rational cooperation. While the ILC maintains that this provision implicitly prohibits such action,\textsuperscript{51} the relevance of international law in cases where coercion is feasible is doubtful at best.\textsuperscript{52} Force majeure, as defined by the ILC,\textsuperscript{53} fits within the explanation given above for the rules of attribution, since such an event, not being within the de facto control of the state, should not be allowed to disrupt cooperation if its effects are only temporary.\textsuperscript{54}

The more general exception of state of necessity is predictably framed by strict conditions, and its negative formulation makes clear that the breaching state bears the burden of demonstrating its applicability to a particular case.\textsuperscript{55} First, the systemic bias for

\textsuperscript{50} ILC Report, supra note 7, art. 20.
\textsuperscript{52} See infra Part II.2.d (discussing countermeasures).
\textsuperscript{53} ILC Report, supra note 7, art. 23 ("[t]he occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.").
\textsuperscript{54} This also explains why article 23 is inapplicable when "[t]he situation of force majeure is due. . . to the conduct of the State invoking it." Id. at art. 23(2)(a); see also Crawford Report II, supra note 51, ¶ 261.
\textsuperscript{55} Article 25(1) of the ILC Report provides that:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
maintaining cooperation in appropriate situations by allowing additional iterations of bilateral interaction\textsuperscript{56} explains the stringent conditions imposed on a rule that could allow premature termination of a cooperative relationship. Opportunistic states will seldom be able to successfully argue that breaching an international obligations constituted the "only means of safeguarding an essential interest of the state," as recently confirmed by the International Court of Justice.\textsuperscript{57} Second, as predicted by rationalist analysis, the "serious impairment" element of the test bases the availability of the exception on the impact of the breach on the other party. Thus, the Draft Articles provide the correct criterion, which accords with the affected party's likely interpretation, that if the breach causes it to lose the benefits of cooperation, it will rightly construe it as a defection, and retaliate appropriately. If, however, the effect is insubstantial, the party to whom the obligation is owed should not be able to invoke the breach as justification for a retaliatory defection that would, at best, allow it to reap temporarily the benefits of unilateral defection and, at worst, trigger a series of bilateral retaliatory measures depriving both parties of the benefits of cooperation for an extended period. The exception thus results theoretically in an optimal outcome, as it enables the affected state to safeguard its essential interests through a purely formal breach that does not affect the interests of the other state, while not providing the latter with an excuse for opportunistic defection.\textsuperscript{58}

The practical effect of limiting the prohibition to actions "seriously impair[ing] an essential interest of the State or States toward which the obligation exists"\textsuperscript{59} remains in doubt, as there is disagreement over the meaning of "essential interest." The ILC should have defined this mirror requirement more precisely, so as to avoid a result where essential interests would be determined as a function of the type of obligation rather than of the actual damage or loss of benefits to the "creditor" state. Such a definition would dispel any doubts as to whether necessity can be invoked on the basis of minimal state interests, regardless of the nature of the obligation involved,\textsuperscript{60} and allow this exception to play a

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\textit{ILC Report, supra} note 7, art. 25 (emphasis added). The International Court of Justice recognized a previous, and essentially identical, version of this article as accurately codifying international custom on the subject in The Gabčíkovo-Nagyváros Project (Hung. v. Slov.), 1997 I.C.J. 7, 39-40 (Sept. 25) (paragraph 51 discusses the burden of demonstrating the existence of the necessary elements).

56. See Setear, Iterative Perspective, supra note 15, at 201-03.
58. The extent to which this effect might be offset by transaction costs associated with factual determinations is unclear and would require further empirical study.
59. \textit{ILC Report, supra} note 7, art. 25(1)(b).
60. See Jean J.A. Salmon, Faut-il codifier l' état de nécessité en droit international?, in
rudimentary but important role in permitting temporary efficient breaches of international law to occur without jeopardizing long-term patterns of cooperation.

4. Countermeasures

The rules on countermeasures are of fundamental importance within the legal regime of state responsibility, which controls their exercise through the two cumulative criteria of necessity and proportionality. A common starting point for the analysis of such rules, especially in the context of multilateral conventional relationships, is optimal-deterrence theory, which is often applied to institutions such as fines and punitive damages in domestic legal systems. According to this theory, an optimally deterrent threat is one in which the threatened harm is greater than or equal to the expected benefit of the breach times the probability that the breach will be detected. In this situation, a rational, risk-neutral (or risk-adverse) actor would choose not to violate the underlying rule, as the expected harm from the breach is equal to or greater than the potential benefit. Thus, the analysis goes, since breaches of international law are likely to go undetected in a significant number of cases, state responsibility rules on countermeasures should allow for disproportionate retaliation in order to achieve optimal deterrence. Limitations, such as the proportionality rule, result in underdeterrence.

However, this approach to the problem, while relevant to the collective enforcement of multilateral treaties, is inappropriate for purposes of maintaining bilateral cooperation. First, within the rational cooperation paradigm, it is not realistic to assume that international law can effectively limit the extent of retaliation on the part of a state that has the capacity for disproportionate countermeasures. A state with such capacity need not and will not cooperate when it can simply coerce the other state into acting in furtherance with its preferred outcome.


63. For a more detailed description of this analytical framework, see Setear, Release and Remediation, supra note 35, at 81-85.

64. One may think of, for instance, collective action under the auspices of the United Nations Security Council against threats to international peace. U.N. CHARTER arts. 39-51 (chapter VII).

65. See Goldsmith & Posner, Theory of Custom, supra note 8, at 1123.
However, if the assumption that state responsibility is only relevant in situations where cooperative outcomes are possible is correct, it follows that the capacity for retribution will in fact be limited to an approximately proportionate response. The rule can only play a limited role, as more powerful states will, even in situations of cooperation, retain their capacity for retaliation across issue-areas. The proportionality rule, insofar as it is effective, aims at preventing the exercise of such capacity as would radically change the payoffs and make cooperation unsustainable. But because the proportionality rule itself is not subject to enforcement (either centralized or decentralized) and thus lacks force, it is not surprising that disproportionate responses to perceived breaches of international law are not entirely uncommon occurrences.

Other aspects of the rules on countermeasures are consistent with the rational cooperation hypothesis. Its prohibition on breaching obligations to third states through the exercise of countermeasures keeps the initial breach from contaminating other bilateral cooperation relationships.

66. Retaliation may include, for example, the imposition of heavy trade sanctions in response to a relatively minor breach of diplomatic immunity.

67. On sustaining cooperation by ‘forcing’ additional iterations of the game unto the players, see Setar, Iterative Perspective, supra note 15. This rationale is very close to the ‘spiral of misperceptions’ theory evoked by Setar to ‘rescue’ the rules of remediation. Setar, Release and Remediation, supra note 35, at 94-98; see James Crawford, Third Report on State Responsibility, International Law Commission, 52nd Sess., ¶ 329, U.N. Doc. A/CN.4/507 (2000) [hereinafter Crawford Report III] (addendum 4). Routine use of disproportionate retaliation tactics would effectively transform many instances of cooperation into coercion and presumably lead to a net loss in overall welfare (the weaker state loses the benefits of cooperation and is probably even worse off than in the mutual defection outcome; the stronger state gains some benefits but coercion is expensive and cannot in most cases be sustained simultaneously against several states). The gradual abandonment of proposals to include punitive damages in the ILC Draft Principles, culminating with the recent elimination of the ‘crimes of state’ concept, thus accords with rationalist analysis. For a description of these developments see Nina H.B. Jørgensen, A Reappraisal of Punitive Damages in International Law, 68 BRIT. Y.B. INT’L L. 247, 262-66 (1998). In contrast, simple implementation of a principle of reciprocal countermeasures seems to be impracticable as the breach itself may render strictly reciprocal retaliation impossible. Crawford Report III, supra, ¶ 328.

68. Although former article 47(3) of the Draft Principles has been eliminated in the latest version, the principle it embodied has been confirmed by the ICJ. The Gab-ikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 55 (Sept. 25) ("[Countermeasures] must be directed against that State ‘having committed’ a previous international wrongful act."). This principle was also implicitly retained by article 50(1) of the new draft, according to the Special Rapporteur:

[S]ince it is already clear that countermeasures only allow the suspension of performance of an obligation as between the injured State (or, perhaps, some other State or States acting on its behalf) and the responsible State, there is strictly speaking no need to refer to the position of third States. By definition their rights (i.e. the performance of obligations by the injured State which are owed to them) are unimpaired.

Crawford Report III, supra note 67, ¶ 347.
Some of the prohibitions on specific countermeasures may be based on idealistic principles, or attempt to control situations of effective coercion, but others, like the protection of diplomatic immunity and prohibition on the use of force, insulate some of the fundamental rules of long-term coincidence of interests from violations resulting from short-term disputes. Finally, the exercise of countermeasures by "injured states" only, along with a more restrictive definition with respect to multilateral treaties than to bilateral treaties, accords with public-goods analysis: release from multilateral cooperative agreements should be strictly limited where there are opportunities for states to free ride on the collective effort.

5. No Requirement of Damages

Finally, the absence of a requirement for damage as part of the definition of an internationally wrongful act of state appears to be incompatible with rationalist analysis. Retaliation should only be permitted when a breach deprives the non-breaching state of the benefits of cooperation. Otherwise, it could use any purely formal breach as an excuse for opportunistic defection under the guise of retaliation. Transaction costs associated with a determination of damage may, for the reasons set out in the analysis of the fault requirement above, go some way towards explaining the absence of a specific rule. Moreover, several approaches have been devised to deal with the problems raised by this absence. In many cases, the underlying primary obligation will specify the type of damage that can be interpreted as resulting in a breach, or its formulation will implicitly be such that a breach is impossible absent any damage. The doctrine of proportionality of countermeasures also limits retaliation in cases where no substantial damage is caused. Nevertheless, despite the associated transaction costs, a formal requirement of damages would probably be less costly than the instability produced when opportunistic states invoke formal

69. This could be the case with article 50(1)(b) and, in some cases, article 50(1)(d) of the ILC Report, supra note 7.
70. See id. at art. 50(a), (d) (50(d) only in cases where peremptory norms reflect a common interest in the provision of a public good, such as the case with environmental norms).
71. See id. at arts. 42(b), 49(1).
72. See the analysis of article 60 of the Vienna Convention in Setear, Release and Remediation, supra note 35, at 15-68.
73. See Crawford Report I, supra note 5, ¶ 116.
74. Crafty interpretation of treaty provisions and imprecise customary rules offers limitless possibilities.
75. See Crawford Report I, supra note 5, ¶¶ 116-22 (addendum 4).
76. See ILC Report, supra note 7, art. 51.
breach as a justification for their defection. 77

C. **General Rules of Bilateral Application**

One of the most important conclusions to be drawn from the preceding analysis is that, contrary to Goldsmith and Posner's thesis, some customary rules—the secondary rules of state responsibility—can have universal application even though multilateral situations do not always meet the conditions for rational cooperation. This situation results from a general coincidence of interests between states in the existence of rules facilitating bilateral cooperation in situations where it can lead to mutual gains. While this alignment of interests is probably insufficient to allow rational cooperation in most multilateral situations ("genuine" multilateral custom), the paradigmatic case of a situation regulated by international law remains the bilateral relationship. Indeed, until recently, all international obligations were analyzed as bilateralizable and subject to the general principle of reciprocity. 78

Most patterns of bilateral cooperation can only be described as potentially ephemeral "behavioral regularities." These regularities are entirely dependent on the underlying payoff structure, and are liable to change under the influence of external pressures. Secondary rules, however, are different. They are generally applicable in bilateral relations and facilitate cooperation between states. Their mere presence is more important to this function than their actual substantive and instrumental content. While particular cooperation patterns may "collapse in the face of exogenous shocks (like economic or technological change), high payoffs from defection, misunderstandings about what constitutes cooperation, and changes in the 'patience' of the nation, which itself is a function of ever changing internal institutions, leadership, and national character," 79 the aggregate existence of bilateral opportunities for cooperation is unlikely to change in such a drastic manner.

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77. Of course, there is an argument that an implicit requirement of this nature already exists: "[I]e dommage se trouve compris implicite dans le caractère anti-juridique de l'acte." Atilia Tanzi, *Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?*, in *UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 1*, 11 (Marina Spinedi & Bruno Simma eds., 1987) (citing Dionisio Anzilotti, *La Responsabilité internationale des États à raison des dommages soufferts par des étrangers*, 13 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 13 (1906)); see also Rainbow Warrior (N.Z. v. Fr.), 82 INT’L L. REP. 499 (1990). This argument, however, is unsatisfactory. Such a conception, while aimed at reducing uncertainty over the content of obligations, would only worsen it by encouraging self-serving interpretation and opportunistic defection.

78. See **Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law 88-105 (1999).**

Improvements in the mutual payoffs from cooperation, as well as improvements in communications that allow stable cooperation to arise in borderline cases, inure to all states involved in bilateral interaction. There are no clear corresponding disadvantages to those rules, since (i) the opportunities for cheating they prevent have, ex hypothesi, a lesser aggregate value than the opportunities for cooperation they create (states would not otherwise want any such rules to begin with), and (ii) many of the opportunities for cheating would in any case not exist in a world in which rational cooperation were severely limited by the absence of secondary rules. These factors suggest the existence of a strong and durable coincidence of interests between states in the existence of such rules.

These observations also suggest that further analysis of other major areas of customary international law, especially relating to matters involving multiple states, may reveal more complex rationales and patterns of interaction than the ones described by Goldsmith and Posner. For example, the law of the sea predated codification, as did the law of treaties; both are complex regimes that the behavioral regularities model likely cannot adequately address. Indeed, the limit of this model may be that, in its quest for analytical simplicity, it chooses to believe that international custom is what it claims to be—law arising out of behavioral regularities\textsuperscript{80}—rather than what often it is: the result of extensive interaction between many states over a considerable period of time interspersed with changes in relative power, and by communication at many levels, from official diplomatic correspondence to scholarly publications. Of course, any scholar designing a model to describe such complex phenomena faces a difficult choice when deciding the appropriate level of abstraction. As mentioned above, Goldsmith and Posner’s model proves extremely useful within the scope of the examples it addresses, as well as many similar and relatively simple situations of bilateral interaction. It does not, however, justify the authors’ wholesale skepticism regarding the normativity of international custom.

**CONCLUSION:**

**FROM STATE RESPONSIBILITY TO COMMUNITY INTEREST?**

One can thus, while respecting the fundamental tenet of institutionalism that “[i]nstitutions that facilitate cooperation do not

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\textsuperscript{80} This conception of international custom has already been the subject of much criticism. In addition to the references in note 10, supra, see PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 236-41 (2nd ed. 1993).
mandate what governments must do; rather, they help governments pursue their own interests through cooperation,\textsuperscript{81} discover international customary rules based on a solid and durable coincidence of interest. It is hard to imagine them being disrupted by anything less than a radical change in world order, e.g., a move to strict bipolarity where coercion would be the most widespread model of bilateral interaction. Such a prospect is unlikely, especially considering that even the cold war failed to bring about such a clear-cut situation, although opportunities for cooperation were more limited than they are now.

The particular characteristics of the secondary rules analyzed above are relevant to a broader theory of international law in several ways. First, institutionalist theory recognizes that institutions based on long-term coincidence of interest in cooperation can acquire staying power, and survive even as the configurations of interest undergo considerable change.\textsuperscript{82} This institutional inertia results from the fact that maintenance of existing arrangements requires less effort than modification, unless justified by fundamental changes in underlying interests. For instance, minute rules of state responsibility could subsist as an integral part of the system even though their particular purpose may be subject to exogenous factors. This staying power would also explain the persistence of some rules based on rather antiquated conceptions of interstate relationships, such as the absence of a requirement of damage or the automatic attribution of the acts of regional governments.

Second, the persistence of even a relatively small number of general secondary rules of international custom may play a role in creating state dependence on international cooperation, as such rules allow states to reap increased benefits from their interrelationships. Moreover, each progress in the exhaustiveness and determinacy of these rules enables cooperation to occur in some borderline cases where it was previously unprofitable, thus providing marginal benefits to international lawmaking. Such increasing dependence will be reflected by changes in the states' preferences when approaching further opportunities for cooperation.\textsuperscript{83} For example, the rise of internal institutions and pressure groups that benefit from international cooperation, such as exporting industries and diplomatic administrations, and their influence on redefinition of state interests among policy elites, contributes to the shift in national interests.

State preferences thus end up being modified to some extent by their

\textsuperscript{81} See Keohane, supra note 1, at 246.
\textsuperscript{82} See id. at 246-47.
\textsuperscript{83} See Robert O. Keohane, The Demand for International Regimes, 36 INT'L ORG. 325 (1982).
participation in the system, even though such participation may have been motivated initially by purely instrumental concerns. Several institutionalist scholars have recognized this possibility, which may serve to explain many of the more recent rules of state responsibility that I have not directly addressed due to their seeming lack of instrumental foundation. Explanations of this nature could probably be applied to the case of rules dealing with responsibility for the breach of \textit{erga omnes} obligations and singular promises, collective sanctions, and some types of prohibited countermeasures. Such rules may reveal conscious perception of a community of interest in maintaining large-scale cooperation, and hint at the possibility of a conception of the common interest on a broader base than that of the nation-state, even beyond the limited context of bilateral cooperation, at least for some issue-areas. As more states redefine their interests to attribute intrinsic value to cooperation, more and more bilateral interactions can be expected to fit within the coincidence of interests model. In such a world, international law gradually loses its purely facilitative function and acquires a measure of independent motivational power more akin to domestic law.

It is difficult and perhaps pointless to try to evaluate the stage that this progress has already attained, the setbacks it may yet endure, and where it will eventually end. There are, however, indications that transformations of the international system, such as the decline of colonialism, have profoundly influenced the historical development of state responsibility. Realizing the importance of this evolution

84. See Dunoff & Trachtman, supra note 21, at 21-22; Robert O. Keohane, \textit{International Relations and International Law: Two Optics}, 38 \textit{Harv. Int'l L.J.} 487, 490 (1997) ("[I]nstrumentalism cannot deal very well with situations in which choices today affect what people will believe tomorrow when the interests can be reinterpreted.").

85. See, e.g., Crawford Report \textit{III}, supra note 67, ¶¶ 334-43; ILC Report, supra note 7, art. 37 (satisfaction); \textit{id.} at arts. 40-41 (serious breaches of essential obligations to the international community); \textit{id.} at art. 50 (obligations not affected by countermeasures); \textit{id.} at art. 58 (recognition of possible individual responsibility).


underscores the importance of studying international law as a process and an aspiration, as a propriété emergente rather than as a system of norms that can be fully expounded by positivist analysis. At a time when the international legal order faces radical challenges, it also provides some preliminary insights into how the idea of law may contribute to the reconstruction of the international order from a realm of power politics to one where cooperative ideals may take root.

