Customary International Law as Explained by Status Instead of Contract

John J. Chung

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I. Introduction

Customary international law ("CIL") forms the foundation of international law.1 It is the source of such basic principles as

†Associate Professor, Roger Williams University School of Law; B.A., Washington University (St. Louis); J.D., Harvard Law School. I would like to thank my colleagues, Jared Goldstein, Diana Hassel, and Colleen Murphy for their helpful comments on an earlier draft.

1 As Professor Henkin stated: "The core of traditional international law and its principal assumptions and foundations have been unwritten 'customary law,' made over time by widespread practice of governments acting from a sense of legal obligation."
territorial sovereignty and sovereign equality among nations. Its formulation is quite simple: CIL "results from the general and consistent practice of states followed by them from a sense of legal obligation." Yet, there is considerable disagreement as to its formation and content. An influential observer once noted that the development of CIL is shrouded in "mystery and illogic;" another described the theory and doctrine of CIL as an "incoherent . . . mess." Despite its ancient origins, CIL is still poorly explained,

LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 33 (2d ed. 1979). Professor Kelsen wrote: "Custom is the older and the original source of international law, of particular as well as of general international law." HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 304 (1952).


3 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). A useful view of CIL is as follows:

The modern paradigm of customary international legal theory can be stated simply as follows: CIL is formed by the general and consistent practices of states accepted by them as law. CIL binds all states. New members of the international community of states are bound by existing customary law. However, an existing state is not bound by emerging customary law if it persistently objects.


4 ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 4 (1971). Part of the problem results from the fact that the making of CIL may be "informal, haphazard, not deliberate even partly unintentional and fortuitous." HENKIN, supra note 1, at 34.

5 Andrew T. Guzman, Saving Customary International Law, 27 MICH. J. INT'L L. 115, 116-17 (2005) ("Some scholars complain that [CIL] is incoherent, others assert that it is irrelevant or a fiction, and virtually everyone agrees that the theory and doctrine of CIL is a mess."). Kelly had a more scathing criticism of CIL. He observed, "[T]here is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms." Kelly, supra note 3, at 450. He went on to state:

The theory of CIL is, in fact, so undefined and controversial that it does not permit the relatively objective determination of norms, lacks a ritual to mark the normative moment, is inconsistent and incoherent, and does not possess an agreed form to qualify as a secondary rule of recognition. Simply put, we cannot identify customary norms because there is neither a common understanding of how to determine CIL, nor is there an adequate means of determining whether or not the asserted substantive norms of CIL have, in fact, been accepted as binding. It [is] not surprising then that CIL norms are indeterminate, subjective projections that vary from nation to nation and writer to writer.

Id. at 536.
and commentators continue their attempts to provide a coherent explanation.\(^6\)

Many of the attempts to explain CIL are based on analogies to the law of contracts, with States likened to parties entering into express or implied contracts.\(^7\) Professor Hans Kelsen observed that “most of the writers on international law maintain that the international community is based on a contract . . . .”\(^8\) This widely accepted approach suggests that CIL is the result of the exercise of sovereign state autonomy, free will, and consent.\(^9\) The resort to such words triggers the law of contracts.\(^10\) Other prominent scholars have explicitly analogized the formation of CIL to the making of contracts.\(^11\) The appeal of contracts in international law

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\(^7\) See discussion infra Part III.

\(^8\) Kelsen, supra note 1, at 316.

\(^9\) See, e.g., Hans Kelsen, *General Theory of Law and State* 351 (Anders Wedberg trans., 1946) (noting commentators’ efforts to “trace back all international law to the ‘free will’ of the State”). Indeed, the Permanent Court of International Justice stated:

The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.

**S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7).**

\(^10\) For example, scholar P.S. Atiyah stated, “The autonomy of the free choice of private parties to make their own contracts on their own terms was the central feature of classical contract law.” P.S. Atiyah, *The Rise and Fall of Freedom of Contract* 408 (1979). In a similar vein, scholar Michael Trebilcock so described the phenomenon: “[T]he Will or Autonomy Theory of Contract Law, where obligations by individuals to one another arise out of voluntarily assumed, self-imposed obligations reflecting convergent intentions of the contracting parties.” Michael J. Trebilcock, *The Limits of Freedom of Contract* 241 (1993).

\(^11\) Professors Robert E. Scott and Paul B. Stephan wrote: “We believe that contract theory (an umbrella phrase that we use to describe both the law and economics of contracts as well as the separate discipline of the economics of contract) explains much of current practice regarding the enforcement of international law.” Robert E. Scott & Paul B. Stephan, *The Limits of Leviathan, Contract Theory and the Enforcement of International Law*, at vii (2006). With regard to CIL, in particular, they wrote: “[A] growing body of international law, both treaty-based and customary, does entail commitments that require the joint production of collective welfare and thus
is traceable to the heavy influence of John Locke and Thomas Hobbes. This reliance (perhaps overreliance) on the notion of social contract is understandable given that it underpins contemporary Western liberal thought, while international law (for better or worse) is also dominated by a Western orientation. Nevertheless, this reliance gives rise to a false dichotomy in structuring the understanding of CIL. The structure is presented as a binary choice between state of nature, on the one hand, and contract-based ordering, on the other. The purpose of this paper is to suggest that other choices may be available.

The conventional view overlooks the foundational question of whether an explanation of CIL based on contract principles is pertinent or helpful. There are strong arguments that it is. I take a contrary view. I contend that the framework of contract analysis is an ill-fitting, largely inapplicable model to explain the behavior of nations. Contract-based theory does not accurately describe the formation of CIL. For a theory to have any coherence, it should possess some level of descriptive accuracy. A contract-based analysis largely fails in this regard. Indeed, its asserted validity is based on obvious fictions.

Determining the basis of CIL is important because, at its core, it is a manifestation of underlying normative principles. To paraphrase Professor Kelsen, custom does not create law; instead, presents the same fundamental enforcement dilemma that parties face when entering into contracts."

12 JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION 36 (2008). In describing the influence of Locke and Hobbes, Donovan wrote:

Society brought its adopted government into existence by an imagined social contract. Within these theories, the central issue was not the duties owed by man to the state and its law but what rights the citizens possessed, the protection of which had occasioned the need to move out of the state of nature and to join in the contract to create civilization.

Id. The influence of Locke and Hobbes on theories of international law is reflected in the contemporary literature. See, e.g., Matthew Lister, The Legitimating Role of Consent in International Law, 11 Chi. J. Int'l L. 663, 665 (2011) (stating the author shall "make use of a Lockean social contract account to show why actual consent is necessary to legitimize large parts of international law").

13 See, e.g., MARK WESTON JANIS, INTERNATIONAL LAW 44-45 (5th ed. 2008) (analogizing the theory of CIL to implied contracts); SCOTT & STEPHAN, supra note 11, at 29 ("[T]he process by which international law is made [including CIL] is, for our purposes, akin to the process by which people make binding commitments by forming contracts.").
it is evidence of a legal norm.14 This norm is created by something other than custom: "[T]he true creator of law stands—so to speak—behind custom."15 So what is it that stands behind custom? The conventional view clings to the assertion that it is contract—that contract forms the basis of custom, and custom becomes law.16 If contract fails to provide a coherent, organizing foundation for CIL, then it means that our understanding of CIL is fundamentally flawed. Any attempt to understand or explain CIL must first identify its foundational principles.

Instead of looking to contract, I suggest that the analysis should look to the basis of social ordering before contract: status. My analysis draws upon Henry Maine’s famous observation that “the movement of the progressive societies has hitherto been a movement from Status to Contract.”17 By this, he meant that many pre-modern societies were organized and governed under principles of status relationships.18 A century later, Max Gluckman, a leading anthropologist, endorsed Maine’s view of societal development: “This generalization [that societies move from status to contract] is among the most important which scholars have advanced to cover a sweeping movement in human history.”19 Examples of status-based societies include tribal societies in which each person’s role was determined by immutable characteristics such as blood relationship, age, and gender.20 At some point, many societies evolved from

14 Kelsen, supra note 1, at 309.
15 Id.
16 See id. at 314–16.
18 Id. at 113-70.
19 Max Gluckman, Politics, Law and Ritual in Tribal Society 48 (1965). “[Maine] saw the major development of society as from a state in which its law was dominated by status, to a state in which the law was dominated by contract, a generalization which has been validated by subsequent research . . . .” Id. at 17-18. Gluckman reiterated this point with his observation that “it is certain that the tribal-type antedated the differentiated society in the whole march of human history.” Id. at 81. Simply put, primitive society was dominated by status. Id. at xxi. Gluckman is recognized as one of the leading scholars in the field of legal anthropology. See Donovan, supra note 12, at 100-11.
20 See Gluckman, supra note 19, at 19, 48–49.
organization based on status relationships to organization based on contract.\textsuperscript{21} In this sense, individuals were unbound from the constraints of status and became free to establish their own place in society based upon the exercise of personal autonomy through exchange relationships.\textsuperscript{22} In Western Europe, this movement was seen in the transition from feudal, land-based social ordering to the rise of the market economy.\textsuperscript{23}

The conventional description of CIL adopts the view that nations establish their legal relationships through contract-like behavior. This view asserts that nations, through their free and autonomous actions, order their relationships through conduct akin to bargaining and consent.\textsuperscript{24} Thus, a rule of CIL is formed when one or more nations engage in conduct to establish the rule (what might be viewed as an offer), and if other nations do not object to

\textsuperscript{21} MAINE, supra note 17, at 113-70.

\textsuperscript{22} Maine's observation may be viewed as a variation on the theme of the ever-present conflict between individual versus group needs. As Donovan wrote:

The need for norms that limit the range of possible actions by group members should be apparent. Despite the fact that group life satisfies requirements that could not otherwise be met, each individual continues to have his or her own objectives, desires, aspirations, and other personal motivations. The central tendency of those private goals is to drive the group - be it the family, clan, or even city or state - apart. These can be termed the \textit{centrifugal social forces.}

We can expand on this metaphor from physics. In order to overcome forces that would disperse the group, there must be countervailing forces to hold it together. These are the \textit{centripetal forces of social regulation.} Social regulation involves inculcating within group members the norms of acceptable behavior, goals, aspirations, and even emotions while allowing venting of inevitable frustrations, angers, and conflicts in ways that do not threaten the long-term stability of the group.

DONOVAN, supra note 12, at 11 (emphasis in original). These forces, and the inherent conflict between the individual and the group, are embedded in the models of status and contract. Donovan expressly acknowledged this point in his discussion of Maine's theories:

The original condition of society, [Maine] claimed "was not what it is assumed to be at present, a collection of individuals. In fact, and in the view of the men who composed it, it was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the Family, of a modern society the Individual."

\textit{Id.} at 42 (quoting MAINE, supra note 17, at 126) (emphasis in original).

\textsuperscript{23} See, e.g., JANIS, supra note 13, at 167-69 (describing the effect of the Peace of Westphalia on the end of the feudal system and the rise of the sovereign state).

\textsuperscript{24} See, e.g., KELSEN, supra note 1, at 314-16.
the conduct or accept, then the rule is established as CIL (as if a contract has been formed).25

I contend that the development of CIL is more plausibly explained by viewing the behavior of nations through a status-based analysis. By doing so, the analysis abandons the awkward fiction that nations act like contracting parties and that all nations possess the autonomy to participate in the formation of CIL. Status-based theory provides a better description of CIL because it reflects and explains the actual interaction among nations. Some nations hold a status that others do not, and nations of a more powerful status determine the development of CIL. Thus, it is not agreement or consent that lies at the heart of CIL. Rather, it is the status of nations, which is largely reflected in power differences. As simple as this thesis may be, the overwhelming weight of the scholarly commentary adopts the contract-based approach, and little, if any, attention is paid to the possibility of status as the first principle.26 This raises the question of why there is such a blind adherence to the theory of contract, even when its adherents freely admit the incoherence of the theory.

To develop this thesis, Part II begins with a brief summary of CIL. Part III examines why the language of contract holds such an allure to those who attempt to explain CIL and then discusses the problems with using contract in this manner. It is widely, if not universally, acknowledged that the attempts to explain CIL through contract rely on an elaborate set of fictions that simply are not true. These fictions are crucial to the contract-based analysis, which means that the analytical framework of CIL, insofar as it is explained by contract, is based more on fantasy than reality.

Part IV presents status as an alternative to contract to explain CIL. History shows that only a few nations have had the capability to form or heavily influence CIL.27 All such nations have possessed unique features of status (primarily in the form of military power and imperial reach), and I contend that it has been their status that has been the crucial element in CIL. The

25 Cf. id. at 254 (describing formation of law).
26 See, e.g., id. at 316.
27 See Goldsmith & Posner, supra note 6, at 1158-60 (describing how the United States and England used threats and force to enforce the three-mile rule for territorial claims at sea).
discussion also responds to critics of Maine’s theory and explores the possible reasons why status has been neglected as a theoretical model to inform the discussion of CIL. The most likely reason appears to be the view that status implies the presence of power and coercion in guiding behavior. The reluctance to acknowledge such forces in the formation of CIL appears to explain why contract-based theory is the favored approach. The incoherence of contract-based theory, though, is exposed by the historical origins of modern international law. The history of modern international law, in general, and CIL, in particular, is inseparable and results from the exercise of coercion and status by colonial powers, as explained by commentators who have pointed out the ethnocentric biases and assumptions that formed international legal theory.28

To demonstrate the viability and validity of my status-based theory, Part IV then proceeds to two analytical exercises. First, it examines the advisory opinion of the International Court of Justice (“ICJ”) on the legality of the threat or use of nuclear weapons. This opinion is illuminating because the analysis and arguments in that matter are better explained by a status-based model of CIL rather than a contract-based model. Second, Part IV also presents a hypothetical to demonstrate that the development of CIL depends not on agreement but on the identity of the nations driving the development.

Part V discusses the need to reconcile the existence of status with a contract-based model in order to develop a more nuanced and coherent view of CIL. The problem with relying on contract as the sole or overwhelming determinant in the formation of CIL is that every principle of CIL is thereby legitimated by the (largely false) argument that it is the product of consent. Such a view marginalizes nations that are unable to play an active role in the development of CIL by not providing an account of their role or place. Recognizing the role of status provides a more coherent alternative to the tautology that every principle of CIL is legitimate because it is the result of agreement because agreement is the basis of CIL. Part VI concludes this paper.

II. A Brief Summary of Customary International Law

There are two primary sources of international law: treaties

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28 See discussion infra Part IV.C.
and CIL. CIL is regarded as "the oldest and the original source of international law." One of the early, influential commentators described CIL as "certain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law." According to Article 38 of the Statute of the International Court of Justice, international custom is "evidence of a general practice accepted as law." For a practice to rise to the level of CIL, it must: (1) be followed as a general practice (an objective element); and (2) it must be accepted as law. The second of these components is viewed as a

29 D'AMATO, supra note 4, at 4; see also Goldsmith & Posner, supra note 6, at 1113.

30 HENRY J. STEINER, DETLEV F. VAGTS & HAROLD HONGJU KOH, TRANSNATIONAL LEGAL PROBLEMS, MATERIALS AND TEXT 232 (4th ed. 1994) (quoting 1 Oppenheim, INTERNATIONAL LAW 25-26 (8th ed. 1955)). Until the 1900s, CIL was the principal form of international law. JANIS, supra note 13, at 44; see also Curtis A. Bradley & Mitu Gulati, Withdrawing from International Custom, 120 YALE L.J. 202, 208 (2010) ("Before the twentieth century, CIL was the principal form of international law.").


32 Statute of the International Court of Justice, art. 38(1)(b).

33 DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 16 (3d ed. 2010); Goldsmith & Posner, supra note 6, at 1116. Another view lists four criteria for CIL: "(1) 'concordant practice' by a number of states relating to a particular situation; (2) continuation of that practice over a 'considerable period of time'; (3) a conception that the practice is required by or consistent with international law; and (4) general acquiescence in that practice by other states." STEINER, VAGTS & KOH, supra note 30, at 240. These are not "hard" criteria, and many principles of CIL do not meet all four criteria.

Again, these criteria are simple to state, but ultimately give rise to thorny, intractable questions. For example, "there is no agreement on the amount of consistency of practice that is required" and "it is difficult to determine how widespread the practice must be." Guzman, supra note 5, at 124, 125. There is also little agreement as to which types of actions constitute state practice. See Goldsmith & Posner, supra note 6, at 1117. State practice may be evidenced in the form of governmental policy statements, legislation, diplomatic correspondence, treaties, United Nations General Assembly resolutions and other nonbinding statements and resolutions by multilateral bodies. See GOLDSMITH & POSNER, supra note 2, at 23. Nevertheless, do they each hold the same weight? Are some forms of these state actions more binding than others? What if a government says one thing in its official policy statements but does something else in practice?

Furthermore, what is a considerable period of time? The problem with this question is exacerbated by the fact that many observers believe CIL "can change in a moment,
subjective or psychological element, and is known as opinio juris. In sum, the widely accepted view among scholars is that CIL is the product of “implicit state consent,” and CIL rules “form because states engage in or acquiesce in particular practices and eventually recognize them as obligatory.”

For purposes of CIL (and international law in general), States are the primary actors, as opposed to individuals or other non-state entities. A foundational principle regarding States is that each State is equal in law and autonomous. This notion of sovereign equality has been a feature of international law since the emergence of the modern concept of the State. Thus, Andorra and Lichtenstein possess the same legal rights as, and enjoy sovereign equality with, the United States and China.

creating what can be referred to as ‘instant custom.” Guzman, supra note 5, at 157. An example of “instant custom” was the principle of sovereignty over air space which was accepted as CIL after the start of World War I. See Igor I. Lukashuk, Customary Norms in Contemporary International Law, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRYSZTOF SKUBISZEWSK 487, 504 (Jerzy Makarczyk ed., 1996).

34 B EDERMAN, supra note 33, at 17; Goldsmith & Posner, supra note 6, at 1116.


36 B EDERMAN, supra note 33, at 52. The concept of the modern state may be traced to the Peace of Westphalia of 1648, which concluded the Thirty Years War. See MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 36-37 (4th ed. 2011). The treaties memorializing the Peace recognized the right of sovereigns to govern their people free of outside interference. See JANIS, supra note 13, at 168. The 1933 Montevideo Convention set forth the now widely-accepted elements of statehood: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.” B EDERMAN, supra note 33, at 53.

37 See, e.g., U.N. Charter art. 2, ¶ 1.

38 See, e.g., id. (“The Organization is based on the principle of the sovereign equality of all its Members.”).

39 VATT ELL, supra note 31, at 7.
Examples of CIL include the principle of freedom of the sea.\textsuperscript{40} A related principle was the rule of CIL (during most of the nineteenth century and the first half of the twentieth century) permitting states to claim jurisdiction up to three miles into the territorial sea adjacent to its coast.\textsuperscript{41} Another long-standing principle is that states must protect foreign ambassadors.\textsuperscript{42} Violations of CIL include piracy\textsuperscript{43} and the use of torture by a State.\textsuperscript{44} Some customary rules are so strong that States may not contract out of them by treaty.\textsuperscript{45} For example, it is widely accepted that genocide is a violation of CIL and that States may not opt out of this rule.\textsuperscript{46}

Even with the proliferation of multilateral treaties, CIL

\textsuperscript{40} BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, INTERNATIONAL LAW 836 (4th ed. 2003).

Until the twentieth century, almost all of the law of the sea consisted of customary law that was premised on freedom of the sea. The Justinian Code of 529 A.D., for instance, extended its authority only to the high-water mark and not into the oceans. While several nations, especially Spain and Portugal, purported to control all the world’s oceans, these claims were not only short-lived but impossible to enforce. Perhaps the most famous commentary on freedom of the seas is Hugo Grotius’s Mare Liberum, first published in 1609. Grotius argued that no nation could legitimately exercise sovereignty over any of the world’s oceans, and he generally repudiated the notion of a mare clausum (closed sea) as an illegitimate extension of sovereignty.

\textit{Id.}

\textsuperscript{41} Goldsmith & Posner, supra note 6, at 1158-59.

\textsuperscript{42} \textit{Id.} at 1151.


\textsuperscript{44} See Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980). The issue of torture exposes one of the inconsistencies of CIL. Many observers regard torture as a violation of CIL, but they also acknowledge that many nations engage in torture. GOLDSMITH & POSNER, supra note 2, at 24. If many states engage in torture, then how can it be asserted that the ban on torture reflects the widespread and uniform practice of states? See \textit{id.} This reveals a deeper question whether CIL is or should be aspirational as well as descriptive.

\textsuperscript{45} Bederman, supra note 33, at 23.

\textsuperscript{46} \textit{Id.} (“[T]wo States may not conclude a treaty reciprocally granting themselves the right to commit genocide against a selected group.”) Such universal norms are referred to as jus cogens norms. “Jus cogens is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom.” JANIS, supra note 13, at 65. Jus cogens may be viewed as a modern form of natural law. \textit{Id.}
remains vital to international relations because it occupies the wide gaps not governed by treaties. To this extent, CIL is like the tableau upon which the incomplete mosaic of multilateral treaties is laid, with the treaties serving the purpose of altering the tableau, clarifying it, or supplementing it. CIL may also at times provide a quicker means to address new issues (notwithstanding the fact that custom usually requires a lengthy amount of time to develop). A good example is the development of CIL with regard to national airspace in response to the invention of the airplane. Moreover, CIL presents the possibility (remote or not) of imposing jus cogens or peremptory norms, even in circumstances when States seek to avoid such restrictions. After all, a treaty binds only those States that have acceded to it. CIL, at least in theory, is universally binding. Given the continuing importance of CIL, it remains important to explain how it is formed.

III. The Use of Contract to Explain CIL and Its Fundamental Problems

A widely accepted view of State obligation is that no State is bound by any international obligation except for those obligations that it has voluntarily agreed to through practice (CIL) or in treaties. One leading commentator describes the international

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47 See Bederman, supra note 33, at 113-18.
49 Id. at 45.
50 Lori Fisler Damrosch et al., International Law, Cases and Materials, at xxiv (5th ed. 2009). The “positivist” approach to international law takes the position that nothing can be law unless states have consented. Steiner, Vagts & Koh, supra note 30, at 241. The positivist approach views international law as the result of the practice of states as evidenced by customs or treaties (what states actually do), as opposed to the natural law approach, which is “the derivation of norms from basic metaphysical principles” such as divine authority or universal reason. See Damrosch et al., supra at xxiii.

Along the same lines, O'Connell writes: “The positive act of consent by states has been used as both the defining characteristic of treaties and custom and of international law as law.” Mary Ellen O'Connell, The Power and Purpose of International Law 134 (2008). The positivist view of CIL was the foundation of the decision in The Lotus Case. That case arose out of the collision on the high seas between a French ship and a Turkish ship. S.S. Lotus, 1927 P.C.I.J. at ¶ 14. When the French ship arrived in Constantinople, Turkish police arrested the first officer of the French ship (who was a French citizen) and prosecuted him for his role in the collision. Id. ¶¶ 15-17. France objected to this treatment of its citizen and argued the matter before the Permanent Court of International
political system as a product of "international 'social contract.'"51 Professor Kelsen phrased this line of thinking as follows:

There is, however, another theory, mentioned before, according to which customary international law is valid because it is based on the recognition and thus on the consent of the states which are bound by its norms. Hence, there is according to this doctrine no essential difference between customary international law and conventional international law, i.e., law established by treaties, as far as their basis, the reason of validity, is concerned. A treaty is binding upon the contracting parties because both of them have consented to the norm created by their agreement. The basis of the treaty, that is, the reason of validity of the conventional norm, is the common consent of the contracting parties. But why is the common consent, and only the consent,

Justice. Id. ¶ 187. It argued that Turkey had no right to exercise jurisdiction over its citizen regarding a matter that occurred while he was on a French ship on high seas outside of the territorial jurisdiction of Turkey. Id. ¶¶ 9, 57. France argued that Turkey had the burden of showing the existence of a rule under international law granting it the right to exercise jurisdiction over its citizen. Id. The Court rejected this argument, and upheld Turkey's argument that it was permitted to exercise jurisdiction because its exercise of jurisdiction did not conflict with any principle of international law. Id. ¶ 87. In other words, because Turkey had never agreed to any such restriction on its jurisdiction, there was no such restriction. The court observed:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable . . . . In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

S.S. Lotus, 1927 P.C.I.J. ¶¶ 46-47. The issue, or problem, with a strong positivist view is whether it leaves any room for jus cogens norms, which exist independently of state consent.

binding upon the contracting states? The fundamental principle which is at the basis of this theory is the principle of individual liberty, which in the relation between states is called sovereignty. It is the principle usually presented as a rule of natural law, according to which an individual can be bound only by his own will, for the individual is by his very nature free. Hence it is impossible to obligate an individual against his own will. When the individual lives together with other individuals, and when it is necessary to regulate the mutual behavior of the individuals, the only way in which a social order can be established is a contract concluded between the free individuals. They are bound by this contract, for this contract is based on their common consent.52

Thus, the conventional view explicitly equates CIL with contract. Other commentators echo this view.53

52 Kelsen, supra note 1, at 314-15.

53 See, e.g., G.I. Tunkin, Theory of International Law 133 (William E. Butler trans., 1974) (1970) ("[A] customary norm of international law is the result of agreement, that is, of the concordance of the wills of states"). Another commentator stated:

Let us begin with our consideration of the concept of custom by elucidating its essence. In the absence of supranational authority, the consent of independent subjects lies at the root of every international legal norm. It is the only means of creating norms. That is the only way to set the content of the norm and vest it with legal force. Consent has two modes of expression. One of them is in the clearly expressed, generally written, shape of a treaty. The other entails the unwritten form of custom which in the majority of cases is generated not by clearly expressed, but by tacit consent (tacitum pactum). Consequently, the customary norm differs from the contractual not in essence, but in the method of achieving agreement and the form of expressing the latter.

Lukashuk, supra note 33, at 488.

The views of Tunkin and Lukashuk of CIL seem to have been associated with Soviet doctrine, which viewed the difference between treaties and customs as mere differences in form. See Peter Malanczuk, Akehurst's Modern Introduction to International Law 47 (7th ed. 1997). Regardless of the ideological associations of this view, the comparison of CIL to contract-type notions is widespread. This approach to CIL has also been described as the "voluntarist" theory. "Proponents of this, voluntarist, approach tend to equate the creation of custom with tacit agreement: just as treaties are the written, formal expressions of States' will, so custom is its informal manifestation." Rein Müllerson, Comm. on the Formation of Customary (Gen.) Int'l Law, Int'l Law Ass'n, 3rd Interim Report of the Committee on the Formation of Customary (General) International Law, 67 Int'l L. Ass'n Rep. of Conf's. 623, 628 (1996).
These views represent a widely accepted school of thought. Professor Henkin set forth an aspirational form of this view: "In relations between nations, the progress of civilization may be seen as movement from force to diplomacy, from diplomacy to law. The hope of civilized men has long been that nations would cease to pursue their interests by force, and attempt instead to negotiate in quest of agreement."  

Wrapped up in this embrace of a consent-based approach to CIL are lofty (perhaps even wild-eyed) notions of what consent may achieve. Some commentators apparently view a consent-based approach as the vehicle to “solving the evils rampant in the world—war, hunger, poverty, and violence.” Phrased this way, how could anyone object to the use of contract to explain CIL?

Nonetheless, my view is that the key word in Henkin’s observation is “hope.” Many international law scholars appear drawn to the use of contract to explain CIL because they wish that the world were ordered by agreement rather than coercion or force. Their views are grounded in an optimism that enlightened, liberal reasoning will ineluctably lead to what they regard as good and right. I contend, however, that Henkin’s view is not descriptive, but is merely aspirational. In other words, the use of contract to explain CIL is due to wishful thinking and the hope that one day contract (instead of something more realistic, like status) will be the basis of public international law. Thus, even

54 HENKIN, supra note 1, at 1.
55 O’CONNELL, supra note 50, at 135.
56 HENKIN, supra note 1, at 1.
57 It is difficult to deny the allure of contracts to idealists. Contract and promise is viewed as “an expression of the principle of liberty—the will binding itself, to use Kantian language, rather than being bound by the norms of the collectivity. . . .” CHARLES FRIED, CONTRACT AS PROMISE 19 (1981). Relationships based on something other than Contract are described as tyranny.

For the sharing within a family is and must be voluntary. Where the sharing is mandated by a higher authority it becomes despotism. A despotism may be benign, even necessary, as where parents enforce a regime of forbearance between their young children. But such parental enforcement becomes gradually less tolerable as children grow older. Enforced against late adolescents or adults it is pure tyranny.

Id. at 90.
58 See id. at 90-91.
though a contract-based model of CIL is often presented as a means to describe CIL, it is actually a normative model disguised as a descriptive model.

Theories of international law, including the contract-based approach, have long been criticized for a naïve, moralistic view of the world.59 Naïveté may, by itself, explain why the contract-based approach to CIL seems to be the default explanation. Nonetheless, there may be other, perhaps more charitable, excuses as well. The resort to contract-based theory may be a result of historical happenstance: contract-based theorists may simply be unable to extricate themselves from the bindings of historical roots and origins. For over a century, and probably longer, commentators have recognized that modern international law is “largely a product of Western European Christian civilisation [sic] during the [sixteenth] and [seventeenth] centuries.”60 This was the period covering the Age of Enlightenment and the emergence of Lockean theories of social contract.61 Such theories of contract lie at the heart and origins of international law, and it is understandable that this framework would persist. Nonetheless, just because the theory holds historical interest does not mean it has continuing or practical applicability. It is as if contemporary commentators try to force reality into the ill-fitting and ill-suited mold of contract simply because it was *au courant* when international law began taking on a life of its own. It is equally plausible, if not more, that the contract-based approach to CIL is an archaic artifact that has little present-day use. Status is, to many people, a more primitive framework, but its disfavored use may be due to the energy and exuberance of contract-based theories as Western Europe moved forward from its status-based societies. The sheer momentum of contract may have distracted commentators from asking whether contract (which undoubtedly has more force to explain municipal government) even fits the

59 See, e.g., Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. 869, 891-96 (2011). Embarrassment with such naïveté is perhaps the reason why other theorists have turned to game theory in order to introduce a hard element to explain international law. *Id.* at 870-82.


realities of international law and relations.

A. The Problem with Contract as the Framework to Explain CIL

Contract-based ordering enshrines the fundamental concept that parties enjoy freedom of contract. Parties are regarded as atomistic units in possession of enlightened reason and the freedom to exercise autonomy in pursuit of exchange relationships that will enhance the welfare of both parties to a contract. The concept of freedom of contract has an equally important corollary that must be considered: the right of freedom of contract is necessarily intertwined with the right of freedom from contract. Parties are not bound unless they choose to be bound. The fundamental premise of contract is violated when terms are imposed on a party. This notion exposes the irreparable flaw with attempting to explain CIL through the language of contract: Nations do not enjoy freedom from CIL.

CIL rules apply to and bind all States that do not object to each rule as it develops, whether or not there is affirmative consent (unlike treaties in which non-ratifying states are not bound even if it is a general, multilateral treaty). The concept of consent is a pure fiction, especially when seen in the application of CIL to new states and the emergence of new rules of CIL. Hart noted with regard to the fiction of consent:

It has never been doubted that when a new, independent state emerges into existence, as did Iraq in 1932, and Israel in 1948, it is bound by the general obligations of international law including, among others, the rules that give binding force to treaties. Here the attempt to rest the new state’s international

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62 See Scott & Stephan, supra note 11, at 63-64 (stating that a contract can serve as mechanism to facilitate the achievement of a welfare objective).

63 Cf. Atiyah, supra note 10, at 408 (inferring that “the autonomy of the free choice of private parties to make their own contracts encompasses the freedom to refrain from entering a contract).

64 See id. (stating that the court’s role in adjusting rights was “inconsistent” with contract theory).

65 Dunoff, Ratner & Wippman, supra note 35, at 86.

66 Malanczuk, supra note 53, at 47.
obligations on a 'tacit' or 'inferred' consent seems wholly threadbare. The second case is that of a state acquiring territory or undergoing some other change, which brings with it, for the first time, the incidence of obligations under rules which previously it had no opportunity either to observe or break, and to which it had no occasion to give or withhold consent. If a state, previously without access to the sea, acquires maritime territory, it is clear that this is enough to make it subject to all the rules of international law relating to the territorial waters and the high seas . . . [T]hese two important exceptions are enough to justify the suspicion that the general theory that all international obligation is self-imposed has been inspired by too much abstract dogma and too little respect for the facts.67

This observation has been echoed by others: "[CIL’s] contractual device, tacit consent, is an obvious fiction that has little explanatory power."68 It is not surprising that several commentators have noted the obvious fiction of consent in CIL. What is surprising is the persistent resort to this fiction to explain CIL.

The fiction is further exposed by examining how CIL is imposed on States. If the analogy to contract were to have any


68 Kelly, supra note 3, at 510. Kelly goes further by arguing: "CIL lacks authority as law, because such norms are not, in fact, based on the implied consent or general acceptance of the international community that a norm is obligatory. Both implied consent and general acceptance are fictions used at different historical periods to justify the universalization of preferred norms." Id. at 452. There are additional problems with attempting to analogize CIL to contract:

Comparing the voluntary commitments made between states to contractual commitments made between firms may seem inapt to the extent that state actors are less faithful agents than corporate managers. For example, a critic might well argue that the claim that governing elites create international law in order to maximize the welfare of their citizens is far more problematic than the parallel claim that managers of firms seek to maximize shareholder welfare. After all, there are many more conflicts of interest between a dictator and his subjects than there are between a manager and shareholders. To put the point squarely: If a ruthless leader is maximizing his own gain at the expense of the interests of his subjects and he is dealing with a representative democracy, why should we be confident that any agreement that emerges between such different states will be welfare-enhancing for the people of both those countries?

SCOTT & STEPHAN, supra note 11, at 56.
force, the formation of CIL would be the result of bargains made by equally autonomous and contractually active parties. This is not how CIL develops. 69 Only a few nations participate in the development of CIL, and (not surprisingly) those few nations are militarily and politically powerful nations: 70

Although all States are equally entitled to participate in the customary process, in general, it may be easier for more ‘powerful’ States to behave in ways which will significantly influence the development, maintenance or change of customary rules.

... Among other things, powerful States generally have large, well-financed diplomatic corps which are able to follow international developments globally across a wide spectrum of issues. This enables those States to object, in a timely fashion, to developments which they perceive as being contrary to their interests. If more than oral or written objection is required, powerful States also have greater military, economic and political strength which enables them to enforce jurisdictional claims, impose trade sanctions and dampen or divert international criticism. 71

69 See Oscar Schachter, New Custom: Power, Opinio Juris and Contrary Practice, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRYSZTOF SKUBISZEWSK, supra note 33, at 536 (“International law doctrine on customary law tends to obscure the problems by its emphasis on the consent of all States, whether explicitly or by implication, and by its postulate of formal equality of States.”).

70 See Kelly, supra note 3, at 453 (“Few nations participate in the formation of norms said to be customary. The less powerful nations and voices are ignored.”).

71 BYERS, supra note 67, at 37. A more realistic description of the way in which CIL is formed is probably as follows:

When one examines the emergence of such universally applicable customary rules and principles as those relating to diplomatic immunities, the prohibition of piracy and privateering, and sovereign rights over the continental shelf, it is impossible to show that every State positively consented to the emergence of the rule in question. Yet it is virtually unanimously accepted by the authorities that these rules have come to bind all States.

The nature of the process by which these customary rules emerged seems to be more along the following lines. Some States actively created the practice, some by initiating it, some by imitating it, and others still, who were directly affected by the claims in question, by acquiescing in it. This initiation, imitation and acquiescence may plausibly be described in terms of consent. But others still, who were not directly affected, sat by and did nothing, and in due course found
The way in which CIL is actually developed bears little resemblance to contractual notions of the exercise of autonomy and consent and looks more like an imposition of terms on the weak by the powerful.

Even the name, Customary International Law, conflicts with the language of contract. The development of custom is, in large part, the antithesis of the formation of contract:

A custom is not declared or enacted, but grows or develops through time. The date when it first came into full effect can usually be assigned only within broad limits. Though we may be able to describe in general the class of persons among whom the custom has come to prevail as a standard of conduct, it has no definite author; there is no person or defined human agency we can praise or blame for its being good or bad.

In contrast, modern contract law is based upon "the convergence of the wills of the contracting parties." It is about two parties deciding what is best for their respective interests, with or without reference to the world around them. The contract is formed at a particular moment in time, and constitutes the parties' declaration of what is best, under the circumstances, for them. Unlike the formation of contract, which is an exaltation of the will of two individuals, the development of custom is a cultural

Mullerson, supra note 53, at 630.

72 One commentator described "custom" in the following way:

In any primitive society certain rules of behaviour emerge and prescribe what is permitted and what is not. Such rules develop almost subconsciously within the group and are maintained by the members of the group by social pressures and with the aid of various other more tangible implements. They are not, at least in the early stages, written down or codified, and survive ultimately because of what can be called an aura of historical legitimacy.


73 Lon L. Fuller, Anatomy of the Law 40 (1968).


75 See Atiyah, supra note 10, at 408.

76 See id. at 417-19.
phenomenon that subsumes the interests of individuals. Custom and contract are fundamentally different concepts.

Such problems have fueled doubts regarding the usefulness of contract to explain CIL. Some have directly challenged the usefulness of a contract-based approach to explaining CIL. One particularly critical commentator wrote:

It follows also that there is no merit in that trend in international legal theory which supposes that States, as the subjects of customary international law, consent to its formation as if by some specific act of will, as if their participation were a voluntary act. The abusive use of the ideas of the ‘natural liberty’ of States, and hence the need for their ‘consent’ to any abridgement of that liberty, are a cynical misappropriation of some part of the ethos of revolutionary democracy. For the controllers of the public realms of old- and new-regime States, it was good to learn from Vattel that the States were all ‘free, independent, and equal’, fortunate inhabitants of a Lockian ‘state of nature’, so that the making, judging, and enforcement of the law was entirely in their hands. It might have been thought that such a voluntary theory of international law had reached its pitiful nadir in the decision of the Permanent Court of International Justice in the so-called Lotus Case (1927). But the intellectual decline has continued, reaching new low-points in such ideas as: (1) the idea that the formation of new rules of customary international law requires some actual assenting state of mind on the part of States, as if governments, let alone States, had determinable states of mind; . . .

This view reflects the uneasiness with the conventional approach to CIL as something akin to contract. The question remains, however, if contract does not explain CIL, then what does?

Goldsmith and Posner have made a strong case that the behavior of nations and the formulation of CIL can be explained

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77 See MALANZUK, supra note 53, at 35-39.

78 Philip Allott, The Concept of International Law, in The Role of Law in International Politics, Essays in International Relations and International Law 77 (Michael Byers ed., 2000).
by what they described as "rational choice" theory, which has its roots in game theory. In criticizing the traditional view of CIL, they wrote:

A [S]tate’s compliance with the cooperative strategy in the bilateral prisoner’s dilemma has nothing to do with acting from a sense of legal obligation. States do not act in accordance with a rule that they feel obliged to follow; they act because it is in their interest to do so. The rule does not cause the [S]tates’ behavior; it reflects their behavior. As a result, behavior in bilateral iterated prisoner’s dilemmas will change with variations in the underlying payoffs. Cooperation will rise or fall with changes in technology and environment. Although most international law scholars acknowledge that [S]tates are more likely to violate customary international law as the costs of compliance increase, they insist that the sense of legal obligation puts some drag on such deviations. Our theory, by contrast, insists that the payoffs from cooperation or deviation are the sole determinants of whether [S]tates engage in the cooperative behaviors that are labeled customary international law.

Their approach is not hobbled by reliance on assumptions about equal, autonomous States, and the need for mutual agreement. Consequently, rational choice theory offers a better descriptive model than contract-based theory.

There has also been robust discussion of the state of CIL in the post-Cold War era when the United States was considered to be the undisputed superpower. Indeed, one school of thought is based on the observation that "successive hegemonies have shaped the foundations of the international legal system,"—from sixteenth century Spain, eighteenth century France, and nineteenth century Britain, to the United States today. In light of this situation, it is an open question whether CIL is simply the product of the exercise of power by an all-powerful hegemon. In other

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79 GOLDSMITH & POSNER, supra note 2, at 3, 7-14.
80 Id. at 39.
81 Michael Byers, Introduction to United States Hegemony and the Foundations of International Law 1 (Michael Byers & George Nolte eds., 2003).
82 See id.
words, is it even useful to describe CIL as the product of agreement or consent when one state is able to impose its will or strongly influence the development of international law? I do not attempt to answer this question, or even address whether the United States is or is not able, or even if it desires, to impose CIL at will. I refer to this ongoing discussion simply to expose a further weakness in the view that CIL is based on consent.

Moreover, this is not a question unique to contemporary times. The role of hegemonic power has been a recurring feature underlying the development of CIL. The only question is whether commentators have chosen to acknowledge this fact or overlook it. If international law is determined by hegemony, then there is little room for a contract-based view of CIL. More importantly, for purposes of this paper, hegemony is a type of status: Any explanation of CIL based on the asserted phenomenon of hegemonic behavior is necessarily an explanation based on status. Regardless of one's views, it is hard to deny that there are fundamental problems with contract-based view and the consent-based view as the explanation of CIL.

83 See id. As Byers observed:

In the sixteenth century, Spain redefined basic concepts of justice and universality so as to justify the conquest of indigenous Americans. In the eighteenth century, France developed the modern concept of borders, and the balance of power, to suit its principally continental strengths. In the nineteenth century, Britain forged new rules on piracy, neutrality, and colonialism—again, to suit its particular interests as the predominant power of the time.

Id.

84 At a minimum, more nuanced questions and factors that have nothing to do with contract need to be considered. See Andrew Hurrell, Comments on Chapters Ten and Eleven, in United States Hegemony and the Foundations of International Law, supra note 81, at 352.

More specifically, we can quite easily identify a list of power resources potentially relevant to the development of customary international law: (1) Issue-specific power, for example in terms of military technology where the United States has the clear capacity to shape how wars can be fought; (2) what one might call the power of the critical moment and the capacity both to act and to argue in a manner that can help crystallize or catalyze the emergence of a new customary norm; ... (3) institutional power, relevant because of the close linkages that exist between custom and treaty and the ever increasing role of institutional and multilateral forums in norm development; (4) the power to shape the context or background against which customary norms emerge; ... or the capacity of the United States to navigate successfully within transnational civil society and to exploit the role of civil society in norm development to its own advantages; and (5) the power over the complex processes of coercive
IV. Status as a Better Framework to Explain CIL

Status provides a better alternative than the contract-based explanation of CIL because status does not resort to or rely on the fiction of consent. If one accepts the proposition that some, perhaps most, of CIL is an imposition of terms, or at least the proposition that voluntary consent fails to explain CIL, then status is a better model because status relationships do not depend on consent. In status-based societies, parties do what they have to do, not what they want to do. I contend that this simple statement more accurately reflects our real world of approximately two hundred nations of widely varying degrees of power and influence. To develop this line of analysis, it is necessary to define status.

In its purest sense, status is a relationship or web of relationships based on immutable characteristics. An example would be blood ties within a family or tribe. Status is then further refined through more particularized immutable characteristics, such as age or gender, with such status commonly forming the basis of and determining a person’s legal and social positions within a society. This explains why many ancient societies were led by male elders. The inherent nature of status meant that status could not be purchased. One cannot purchase age or a blood relationship. In a status-based society, an individual’s role is determined by his or her set of immutable characteristics.

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socialization by which weaker actors in the system come to accept and to internalize norms originating elsewhere in the system. Coercive socialization represents a political reality that has always threatened to destabilize or dilute the formal concept of consent in international law.

Id.

85 See Jeanne Louise Carriere, From Status to Person in Book I, Title I of the Civil Code, 73 Tul. L. Rev. 1263, 1270 (1998) (quoting PLANIOL & RIPERT, TREATISE ON THE CIVIL LAW 271, n.419 (La. St. L. Inst. trans., 12th ed. 1959)) (“[Status refers] to attributes ‘inherent in the person,’ over which ‘private individuals have no power... They cannot alter or dispose of such attributes by agreements, at their pleasure, as they can do with their property.’”). Similarly, a leading treatise states that status is used with reference to “those comparatively few classes of persons in the community who, by reason of their conspicuous differences from normal persons, and the fact that by no decision of their own can they get rid of these differences, require separate consideration in an account of the law.” EDWARD JENKS, THE BOOK OF ENGLISH LAW 109 (P.B. Fairest ed., 6th ed. 1967).

86 See Carriere, supra note 85, at 1270.

87 Cf. id. at n.31 (discussing the formation of a person’s identity in society).
role is not based on what one wants, but is instead based on what one must do. In such societies, the notion of living one’s life in the free pursuit of liberty and happiness is nonsensical. One must do what one’s status requires. The earliest forms of human societies were based upon status because, like blood ties, they originated from the family.

From a contemporary perspective, status is viewed as a primitive and unenlightened form of social organization, and the emergence of Western society out of a status-based society into modern contract-based society was viewed as progress. In the nineteenth century, Henry Maine observed that the transition from primitive societies to modern societies was marked by a progress from status to contract. Thus, status is equated with primitive societies and contract is equated with modern societies.

This relationship between status and primitive societies makes it even more baffling as to why contemporary scholars insist on using contract-based theory to explain CIL because there seems to be widespread agreement that public international law exists in a primitive state. The reasons why international law is described

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88 See MAINE, supra note 17, at 168-70.
89 Id.
90 The use of the word “primitive” is commonly used by influential commentators. See, e.g., BEDERMAN, supra note 33, at 13 (writing that the “legal system remains primitive and unformed,” and, “[P]ublic international law is not a mature legal system at all—it remains strikingly primitive.”); HENKIN, supra note 1, at 190 (“[I]nternational law remains primitive and develops slowly.”). CIL is primitive because there is no central governing authority with power to enforce the law. As Hart explained:

It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation. A social structure of this kind is often referred to as one of ‘custom’; . . .

HART, supra note 67, at 91. He continued:

International law presents us with the converse case. For, though it is consistent with the usage of the last 150 years to use the expression ‘law’ here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists. The absence of these institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system.
as primitive are familiar: (1) There is no global legislature,\(^9\) (2) there is no executive authority to enforce international law,\(^9\) (3) there is no judicial body with universal binding jurisdiction to resolve disputes.\(^9\)

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\(^9\) Id. at 214.

\(^9\) MALANCZUK, supra note 53, at 3.

\(^9\) See id.

\(^9\) See id. ("The United Nations General Assembly is not a world legislature, the International Court of Justice in The Hague can operate only on the basis of the consent of states to its jurisdiction, and the law-enforcement capacity of the United Nations Security Council is both legally and politically limited."). This sharp distinction between domestic legal systems and international law raises the persistent question whether international law is really law in the first place. See BEDERMAN, supra note 33, at 6-9. Despite the absence of these features, many argue there is nonetheless a international legal system. Gluckman rejected the notion that primitive societies had no law merely because they lacked legal institutions. GLUCKMAN, supra note 19, at 182. He drew the distinction by observing that such societies "have 'law' but lack 'legal institutions.'" Id. Thus, the absence of formal institutions does not necessarily mean there is no international law. Hart added:

To argue that international law is not binding because of its lack of organized sanctions is tacitly to accept the analysis of obligation contained in the theory that law is essentially a matter of orders backed by threats.... Yet once we free ourselves from the predictive analysis and its parent conception of law as essentially an order backed by threats, there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanctions. HART, supra note 67, at 217-18.

Nevertheless, there is also a contrary view. Without institutional enforcement mechanisms, one might ask how international law is different from rules of etiquette. Most people abide by such rules and accept that they are binding, but few would characterize them as a legal system. Moreover, the force of such rules should not be underestimated. For example, when is the last time someone at a dinner party in America or Western Europe observed someone else dig his or her hands into a salad serving bowl? There is no institutional sanction for this behavior, but people refrain from it. Thus, how is international law different from such social norms of behavior? Some would argue there is no difference. A more conventional view holds as follows:

Customary rules of law are to be distinguished from rules of etiquette, known as comity. In the case of customary law, an established pattern of law (for example, diplomatic immunity) is based on a sense of legal obligation (opinion juris) and invites penalties if breached, whereas in the case of comity, it is merely a matter of courtesy (for example, two ships saluting each other's flag while passing at sea). Admittedly, when states engage in certain standard practices toward each other, it is not always clear whether they do so out of a sense of legal obligation or simply out of politeness.


This explanation seems a bit too facile though. Observance of social norms at a dinner party may be called etiquette. Yet, there is the real possibility of punishment for a
If it is correct that the public international law is a primitive system, then why use the framework of contract—which explains the structure of modern societies—to explain it? It seems more sensible to utilize the analytical framework used to explain primitive social systems to explain another primitive system. Public international law has not yet evolved out of status to the point where it makes sense to apply a contractual analysis.\(^\text{94}\)

\(^{94}\) It appears there was an earlier attempt to explain international law on a status-like approach:

In the nineteenth century, Savigny and his colleagues and followers wanted to explain why, say, German law was (and should be) different from French law, Italian law, and so on. What they said was that law—especially customary law—represented the national spirit, the *volksgeist* of the particular people concerned. Customary rules were not the result of a formal, law-making process: they just emerged out of the juridical consciousness of the people. This product of Romantic nationalism has long been discredited as a legal theory; and it seems particularly inappropriate to public international law, where no *volk* with common traditions and culture yet exists, and where customary rules these days do not just grow up, but come into being through the deliberate conduct of the principal actors for the most part.


Savigny's view seems to be a natural extension of classic natural law theory. A former Chief Justice of the Supreme Federal Court of Germany described his view of natural law in a series of lectures delivered in the early 1930s:

There is a law above the nations even when there is no supernational legislator, a law indeed that is in the making and therefore uncertain, but nevertheless a law, like the early law of most Teutonic nations that was a customary and judge-made law applied a very long time before the customs and sentences were collected by a private codificator or even converted into official statute law. Customs and sentences and statutes are themselves like saplings or suckers, sprouting out of a deep, common rootstock, the underlying primordial law of human nature ruling all sorts and conditions of men living together, working together, struggling and quarreling with each other, from the nomad family to the League of Nations. . . . I will only ask where you find the standard to decide whether an international treaty is a just and equitable one if there is no international law but only treaty law? There must be a higher law behind the treaty to judge it. And where do you take the primordial rule that international treaties ought to be kept but from that higher law? Indeed it is a law without a legislature and without an executor; such law has existed in all ages and with all peoples, and it exists today in the most civilized countries, a law in being before it is found out by the judge or the legislator and enforced by the bailiff. It is this law that makes sovereign states responsible. Law in the last instance does not derive its authority from the state, but from God who made mankind to strive after the righteousness of his kingdom.
Public international law should be viewed in its evolutionary context, with recognition that it exists in primitive form, and must be understood and explained with reference to its state of development.95


My thesis differs materially from the Romantic Nationalist view in that my view of status is based on status in the form of power differences between countries and not folk consciousness or similar concepts. Moreover, the Romantic Nationalist view depends on a conception of the state that (for the most part) does not reflect contemporary reality. Its view of the state is based upon the following lines:

All our cultural States were formerly clan-States; and in the unity of blood, the unity of descent, the unity of their view of life, lay their strength. . . . There is an extraordinary communal nerve in this clan connection; and it is comprehensible that all phenomena of life under these conditions are social in character; and that all thought and action unite in the idea that each individual is a member of the tribe whose famous ancestors are worshipped as divine, and that he performs his great deed in the sight of his forefathers.

Josef Kohler, Evolution of the State, in EVOLUTION OF LAW, PRIMITIVE AND ANCIENT LEGAL INSTITUTIONS 88, 88 (Albert Kocourek & John H. Wigmore eds., 1915). The United States is obviously not a clan-state, and even the nations of Europe, which at one time resembled clan-states, no longer fit that description in the 21st century. Thus, any theories of international law based upon notions of the clan-state have no relevance today.

95 Notwithstanding their contract-based view of CIL, Scott and Stephan implicitly acknowledged a status-based view when they wrote: "Under some accounts, an 'invisible college' of international law specialists determines both who belongs to the rulemaking group and uses general normative principles such as human dignity, good faith, and fairness to decide what counts as a binding norm." SCOTT & STEPHAN, supra note 11, at 33. This "invisible college" is like the tribal elders of pre-modern, status-based societies. This reliance on the "invisible college" or tribal elders was the foundation of the ruling in what is probably the most famous American case involving CIL, The Paquette Habana, 175 U.S. 677 (1900). The lasting influence of this case is due to the Court's now famous statement that: "[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." Id. at 700. The court answered if there was a rule of CIL that exempted coastal fishermen from seizure by an enemy navy during wartime. See id. at 686. The Court found there was such a rule, but the manner in which the court determined the rule's existence is noteworthy. The Court stated:

For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.
As with individuals, nations may be described in terms of status. Absent hostile conquests or secessions, nations possess immutable characteristics. For example, Japan is an island nation. Switzerland is marked by its mountainous topography. Such features are immutable, and the cultures of these countries have been shaped and defined by their physical features. Immutability can also be seen in less tangible features. Israel, Saudi Arabia, and the Vatican are defined by their religious identities. Status is also determined by and reflected in the relationship between countries. Great Britain’s status is, to a large extent, the result of two immutable facts: (1) It is a geographical part of Europe, but physically separated from the continent, and (2) it was the colonial founder of what became the United States. Canada’s status is related to the immutable fact that it shares a long border with the United States and lives in the political shadow of its more

_Wheaton places, among the principal sources of international law: “Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.” As to these he forcibly observes: “Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles.”_

_Chancellor Kent says: “In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law.”_

_The Paquette Habana, supra, at 701 (quoting James Kent, Kent’s Commentary on International Law 37 (J.T. Abdy ed., 2d ed. 1878)). With no irreverence intended, I ask how are these distinguished commentators any different from tribal elders in a pre-industrial village. Moreover, who are they? What are their qualifications? Who decided they, and not someone else, would ascend to their elite status? Is there any democratic legitimacy to their status? In sum, how is the reliance on such persons any different from the hierarchy of status-based societies? These questions become more pointed when considered in the context of the ethnocentric roots of international law._
powerful neighbor. Even characteristics that are not necessarily fixed can become relatively fixed over long periods of time. One example is military and economic power. Military and economic powers are not immutable, but they may persist for decades. The United States is the lone superpower for now, and this confers upon it a unique status.

The importance of immutable characteristics is seen in the fact that they have determined the outcome of international legal disputes. *The Fisheries Case,*[^96] a legal dispute between the United Kingdom and Norway before the International Court of Justice, illustrates this principle.[^97] That case involved Norway’s delimitation of its exclusive fisheries zone along its coast.[^98] The dispute arose due to incidents in which Norway seized British fishing boats.[^99] Norway asserted the boats had unlawfully entered its exclusive fisheries zone (in essence, its territorial sea over which it held exclusive jurisdiction).[^100] The United Kingdom objected, and argued that Norway’s assertion was based upon the use of improper baselines to draw the boundaries of the zone.[^101] Both parties agreed that a nation’s territorial sea extended four miles from its coastline.[^102] The United Kingdom argued that international law required the four mile limit to be determined by a baseline drawn from the low water mark on permanently dry land on Norwegian territory or the proper closing line of Norway’s internal waters.[^103]

The court narrowed the issue to whether the relevant low water mark was from the mainland or from what Norway called the

[^96]: Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18) (addressing the application of CIL standards to immutable characteristics of Norway’s coast).

[^97]: *Id.*

[^98]: *Id.* at 125.

[^99]: *Id.* at 124-25.

[^100]: *Id.*

[^101]: See *Fisheries Case*, 1951 I.C.J. at 120.

[^102]: See *id.* at 120, 126. However, this fact should not be interpreted as an affirmation of the role of agreement or consent in CIL. In fact, many nations at that time asserted different distances of jurisdiction for their coastal waters. See Goldsmith & Posner, *supra* note 2, at 59-60. Many nations asserted three, six, or more miles. See *id.*

[^103]: Fisheries Case, 1951 I.C.J. at 120.
The court ruled in favor of Norway and its use of the baseline drawn from the *skjaergaard*.

The court observed that Norway’s method was “imposed by the peculiar geography of the Norwegian coast.” It noted: “The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the *skjaergaard*.”

This case demonstrates the viability of a status-based analysis of CIL. A status-based analysis of this case certainly fits better than a contract-based analysis. The outcome was not based upon notions of agreement or consent. The outcome was the result of Norway’s immutable characteristics: the geographical nature of its coastline.

Status also provides a better explanation for CIL because the over two hundred nations in existence do not have freedom from each other. Freedom of contract is an empty right if there is no freedom not to contract. Using the language of contracts to explain CIL is misplaced because nations do not have freedom from each other in the development of CIL. Nations are not like free market participants that have the freedom to contract or not to contract with other participants. Nations are more akin to two hundred tribal members who live in a remote village surrounded by inhospitable mountains. Whether they like it or not, the two hundred villagers must interact with each other, and they do not have the ability to escape interaction. In this global village, to borrow an overused phrase, roles are determined by status, and custom is influenced by the strong and powerful, not the weak.

Like nations, the villagers did not will themselves or consent to

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104 See id. at 128. The *skjaergaard* includes all the islands, islets, rocks and reefs off Norway’s coast. Id. at 127.
105 Id. at 139.
106 Id.
107 Id. at 127.
108 This is especially true if one subscribes to the view that international law is determined by the wishes of an all-powerful hegemon. This is one reason why nations are unable to live in isolation and withdraw from interaction with others. Myanmar is one example of a nation’s inability to live in isolation. No matter what it does, it is unable to free itself from interaction with and criticism from the United States.
their existence in the village. That is where they found themselves, and there is nothing they can do about the situation.\textsuperscript{109}

At its core, the contract-based approach is a form of rejection of the natural law theory of international law because there is little room for autonomy and consent if law is imposed from above.\textsuperscript{110} To the extent that the development of international law has been a movement away from natural law, there has been an equal reluctance to consider status due to its perceived association with natural law. Nonetheless, status, as the antithesis of contract, is not necessarily based on natural law. Status, at least as it relates to nations, is about how nations actually interact with each other. To that extent, status may be viewed as a form of positivism.

Nevertheless, the conventional thinking seems unable to accommodate this view. For example, one commentator observed: “International law, according to positivists, is decentralized, reciprocal and consensual. Naturalists imagine it to be hierarchial, centralized and coercive whereas, according to positivists, international law possesses none of these qualities . . . .”\textsuperscript{111} Thus, according to this view, a positivist model has no room for coercion, and coercion features only in natural

\textsuperscript{109} The parallels between international relations among states and pre-modern tribal society were noted by Professor Vinogradoff of Oxford in the early 20th century.

\textsuperscript{110} See Martti Koskenniemi, \textit{The Politics of International Law, in The Nature of International Law} 355, 356 (Gerry Simpson ed., 2001) (“From the simple denial of the existence of principles of natural justice . . . follow the three liberal principles of social organization: freedom, equality and the Rule of Law.”).

\textsuperscript{111} Gerry Simpson, \textit{Introduction to The Nature of International Law, supra} note 110, at xxii.
These conclusions are artificial and inaccurate constraints on the understanding of CIL. Status may be hierarchical and coercive, but it does not necessarily reflect the natural order of things. For example, status based on military power is not determined by a higher authority. The explanations of CIL are rife with false choices that have no basis in actual conditions. Such choices hamper the development of a coherent theory and distract from the possibility of status as an organizing principle. Status may be viewed by some as something that was left behind in history, at least as it is in the West. On the contrary, status possesses as much contemporary force as positivism and is not based on outdated notions seen in natural law.

A. A Response to Maine's Critics

Because the foundational premise of this paper is based on Maine's observation that history has been marked by societies' progressions from status to contract, it is necessary to address criticisms of this view. One criticism is that the observation is too general and sweeping, that all societies embody a blend of status and contract.113 Another criticism is that contract has preceded status in some societies.114

112 Id.
114 See id. at 228-29. One commentator summarized the criticism:

Criticism of Maine's theory began in 1950 when it was called into question by the anthropologist Robert Redfield. Redfield took Maine to task for his reliance on Greek, Roman and Indian sources, and for having believed, following evolutionist thinking, that this data could be directly extrapolated to traditional societies which could still be observed. In 1964 Hoebel pursued this analysis. In common with Durkheim, he believed that status and contract were not mutually exclusive, but existed in different degrees.

In 1981 Leopold Pospisil went further in arguing, principally, that the classic evolutionist model should be stood on its head: contract could precede status. Pospisil used the Kapauku (New Guinea) as an example. In the pre-colonial era Kapauku society was characterized by the high degree of initiative and personal liberty accorded to its members. Colonization witnessed the transformation of this society towards the status model; a central power was put in place, which restricted individual liberty.

What, in conclusion, do we make of Maine's ideas and the subsequent criticism of them? In our view, three points emerge. On the one hand, historical and
The first criticism is really a straw man because I do not believe Maine suggested that status and contract are mutually exclusive. Bargained-for-exchange undoubtedly existed in pre-modern times in status-based societies, whether those engaged in it called it that or not. Exchange is an inescapable feature of human interaction. The issue is which model predominates—a question that even the critics concede. Maine’s observation may be summarized as noting that societies have progressed from predominately status-oriented societies to predominately contract-oriented ones.

As for the argument that contract may precede status, that argument misinterprets Maine’s point. Maine’s observation was based on a historical, epochal perspective. Over the course of millennia, many societies have moved from status to contract. Critics’ assertions that contract may precede status is based on momentary events in the sweep of history. They point to discrete political events of a particular country when a government based on contract-like ordering was succeeded by a government based on status-like ordering in the form of elections or non-democratic change. Yes, it is true that Weimar Germany was a predominately contract-based society where market exchange governed social interaction. Indeed, it suffered from a

ethnographic observation demonstrates that it is impossible to find societies which conform exclusively to either the status or contract model: Durkheim and Hoefel were right in stressing that the two modes coexisted in all societies. However, it is also the case that in general each society is characterized by the dominance of one model over the other. This dominance, evolutionist thinking to the contrary, is not chronologically determined. As Pospisil has stated, status can follow contract. Our century offers many examples of such developments: on a number of occasions totalitarian or authoritarian regimes have succeeded democratic systems, determining the rights and duties of individuals principally on the basis of class. Social organizations rather than historical inevitability determines the primacy of contract or status.

See id.

See supra note 19-22 and accompanying text.

See MAINE, supra note 17, at 113-70.

Id.

See ROULAND, supra note 113, at 228-29.

Id. at 229.
catastrophic excess of exchange-based relationships as reflected in and caused by ruinous hyperinflation.121 And yes, it is true that the Weimar Republic was followed by a new political structure based on status where individuals and groups were singled out for persecution by the government based on status and immutable characteristics.122

These facts do not undercut Maine’s observation. This and other similar examples are (hopefully) infrequent blips in history resulting from fleeting political circumstances (as appalling as they are). Such examples do not address or undercut the accuracy of Maine’s observation, which was based on a timeframe measured in millennia, not months.

The reason why Maine is correct is because human society originated from family and blood relationships.123 Parent-child relationships were the result of immutable, biological relationships (before modern reproductive technologies). Such relationships are the quintessential forms of status.124 Even Maine’s critics are forced to acknowledge this.125 Norbert Rouland advances the criticism that status does not necessarily precede contract,126 but he then devotes more than thirty pages to discussions of blood kinship relationships (with diagrams) and their essential role in societal formation.127 Rouland also acknowledges that elementary

122 See id.
123 MAINE, supra note 17, at 126. Maine wrote:

It is full, in all its provinces, of the clearest indications that society in primitive times was not what it is assumed to be at present, a collection of individuals. In fact, and in the view of the men who composed it, it was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the Family, of a modern society the individual.

Id. (emphasis in original). The reference to family is relevant for international law because of the time-worn references to the “family of nations.” See, e.g., James B. Scott, The Legal Nature of International Law, in ESSAYS ON INTERNATIONAL LAW FROM THE COLUMBIA LAW REVIEW 19, 38 (1965). If nations are a family, then why shouldn’t their relationships be viewed through the framework of status?
124 See MAINE, supra note 17, at 170.
125 See ROULAND, supra note 113, at 214.
126 See id. at 124.
127 See id. at 181-216.
social structures rely “exclusively on kinship ties.” This confirms Maine’s point: Human society springs from family relationships (status) then expands to interaction with unrelated people through exchange relationships (contract). What preceded the first family and kinship forms of human social units? The answer is obvious: nothing. Thus, I contend that the core aspect of Maine’s observation remains valid, notwithstanding modern attempts to discredit it.

B. Possible Reasons Why Status Is Not Used to Explain CIL

If status offers a better way to explain CIL, why has it been overlooked or disregarded in favor of contract? A possible explanation may be that status implies the use of force and coercion. Status implies a relationship in which participants do tasks because they have to, not because they want to. Status-based societies are based on obligation as the defining feature of

128 Id. at 165.

129 GLUCKMAN, supra note 19, at 48-49. Gluckman affirmed this point:

[Maine’s observation] stresses that in the early law of Europe, as in the law of tribal society, most of the transactions in which men and women are involved, are not specific, single transactions involving the exchange of goods and services between relative strangers. Instead, men and women hold land and other property, and exchange goods and services, as members of a hierarchy of political groups and as kinsfolk or affines. People are linked in transactions with one another because of pre-existing relationships of status between them.

Id.

130 See VINOGRA DOFF, supra note 109, at 163 (noting the earliest forms of human society “are derived from some form of family organization”). Similarly, Gluckman observed that the earliest forms of tribal organization began “with the small hunting-band, all of whose members are related to one another by blood or marriage and who accept the leadership of one or more of their senior members.” See GLUCKMAN, supra note 19, at 83.

131 I question whether status is always and necessarily based on force or coercion. Such a view would necessarily imply that an individual’s wants are always (or at most times) in conflict with wants of the group. One could imagine situations where that is not the case or an instance when individuals are not even aware of the possibility of individual choice or desire. Another reason why status has been overlooked may be the fact that international law is a ‘predominantly ‘Western’ concept which was created from the viewpoint of a dominant ‘Western’ culture and which does not sufficiently take into account other cultural traditions . . . ’.” A.S. Muller, The Triple Helix of Culture, International Law, and the Development of International Law, in CULTURE AND INTERNATIONAL LAW 43, 50 (Paul Meerts ed., 2008). If what is called “international law” were more influenced by East Asian culture, perhaps the notion of status as a framework for CIL would not seem so foreign.
interpersonal relationships, not choice.\textsuperscript{132} Transactions occur within the strict structure of hierarchy based on kinship or other status relationships; those transactions only have meaning and force within those status relationships.\textsuperscript{133} Unlike in contemporary Western society, individuals in status-based societies are not free to order the world as they see fit, in a world where the only limits are set by individual wants. Thus, this world of status conflicts with everything that is dear to contemporary Western liberal thought and aspiration.

The reluctance to consider status as the descriptive model of CIL undoubtedly lies in the fact that it implies coercion. When relationships are based on what one must do, the implication is that there is some coercive force, usually a stronger party imposing terms on a weaker party. Most theorists raised in a liberal tradition are understandably squeamish about the notion that they may live in a world where the powerful impose terms on the weak.\textsuperscript{134} Such theorists are likely to imagine that the world has progressed far beyond the events of the Melian Dialogue as recorded by Thucydides in \textit{The History of the Peloponnesian War}.\textsuperscript{135} As recorded, the militarily superior Athenians presented the inhabitants of the island of Melos (a weak military force) with an ultimatum: submit to the rule of Athens or be destroyed.\textsuperscript{136} The Melians responded they had always maintained neutrality with respect to Athens and its enemies, and those arguments were based on reason in order to persuade the Athenians to abandon their claims to Melos.\textsuperscript{137} The Athenians made no attempt to disguise

\begin{itemize}
  \item \textsuperscript{132} See \textit{Gluckman}, supra note 19, at 48.
  \item \textsuperscript{133} See \textit{id.} at 49.
  \item \textsuperscript{134} See \textit{Goldsmith & Posner}, supra note 2, at 15. This would explain why there is a proliferation of theories based on the premise that nations comply with international law because it is morally right, which are often intertwined with the notion of consent. Goldsmith and Posner are famous for their rejection of such theories. See \textit{id.} at 14.
  \item \textsuperscript{135} See \textit{id.} at 167-69 (noting that the Athenians did not hide their intentions in the Peloponnesian War through the use of moral rhetoric, which is a kind of openness that has not been observed in many state actions since).
  \item \textsuperscript{136} See \textit{Thucydides}, \textit{History of the Peloponnesian War} 268 (Richard Crawley trans., 2004) (1910).
  \item \textsuperscript{137} See \textit{id.} at 268-72.
\end{itemize}
their intentions or motivations with pretextual justifications.\(^\text{138}\) Their demand is now part of classic lore: "Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must."\(^\text{139}\) To a large extent, the development of modern international law has been an attempt to create a world order that leaves no room for a repeat of the encounter between the Athenians and the Melians. This alone would explain why modern theorists eschew a status-based theories of CIL.

One ignores the obvious, though, if one refuses to consider the role of power in CIL. As stated by one commentator: "The content of CIL seems to track the interests of powerful nations."\(^\text{140}\) To put it bluntly, many norms of CIL may have been the result of the exercise of pure power.\(^\text{141}\)

Most international legal scholars, however, have devoted little energy to considering directly the effects of State inequalities, or international relations-type power relationships, on the processes of international law creation. Studies of treaties, customary international law, general principles of law and the 'subsidiary' sources of international law (i.e., judicial decisions and scholarly writings) usually give short shrift to the possibility that relative power differences among States might affect the development, maintenance and change of rules. Many international lawyers have assumed, to varying degrees, that international law is the result of processes which are at least procedurally objective and in that sense apolitical. It is possible that this relative lack of interest in the role of power, and the

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\(^{138}\) See id.

\(^{139}\) Id. at 269. The Melians refused to submit to the Athenians and were consequently conquered and destroyed. See id. at 272-73.

\(^{140}\) Goldsmith & Posner, supra note 6, at 1114 (emphasis in original).

\(^{141}\) See CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 154 (P.E. Corbett trans., 1968). For example, it is highly plausible that "some particular powerful prince early asserted sovereign or diplomatic immunity, and his lawyers provided conceptual underpinning for it." HENKIN, supra note 1, at 35. This paper's use of the term "power" is borrowed from Professor Byers, who describes power as "the ability, either directly or indirectly, to control or significantly influence how actors -- in this case States -- behave." BYERS, supra note 67, at 5. Two common sources of national power are military strength and wealth. See id.
associated assumption of procedural objectivity, are based, in part, on an overly broad conception of sovereign equality.\textsuperscript{142}

This notion of sovereign equality, however, is another obvious fiction. Only a few countries over the course of history possessed the power or influence to shape CIL.\textsuperscript{143}

As a historical fact, the great body of customary international law was made by remarkably few States. Only the States with navies—perhaps 3 or 4 made most of the law of the sea. Military power, exercised on land and sea, shaped the customary law of war and, to a large degree, the customary rules on territorial rights and principles of State responsibility. "Gunboat diplomacy" was only the most obvious form of coercive law-making.\textsuperscript{144}

According to one prominent naval historian, since the time of the Romans, the dominant nation in world affairs has been whichever nation commanded naval superiority.\textsuperscript{145} A prime example of the role of naval power was President Harry Truman’s 1945 proclamation extending U.S. control over its seabed resources from twelve nautical miles to the edge of the continental shelf.\textsuperscript{146}

\begin{footnotes}
\item[142] BYERS, supra note 67, at 35.
\item[143] See Schachter, supra note 69, at 531.
\item[144] Id. Other commentators have expressed similar views:

But it is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition.

SHAW, supra note 72, at 75. Not all commentators share this view. D'Amato wrote: "Custom is a very 'democratic' modality of law-formation; it gives all states a chance to participate in the practice that constitutes custom. In this sense custom is a perfect reflection of the decentralized international legal system." D'AMATO, supra note 4, at 28.
\item[145] See BERNARD SEMMEL, LIBERALISM AND NAVAL STRATEGY 3 (1986).
\item[146] See BYERS, supra note 67, at 90-91.
\end{footnotes}
At the time it was made, this claim was inconsistent with pre-existing international law. No State had ever made a general claim to control over all of the seabed resources of its continental shelf beyond twelve nautical miles, nor had anything approaching such a claim appeared in any treaty. Yet notwithstanding the initial inconsistency between the [U.S.]*s claim and pre-existing international law, the claim rapidly acquired the status of customary international law as other States followed the lead of the United States and made similar claims to jurisdiction over their own continental shelves... Why was the Truman Proclamation so successful in promoting the development of a rule of customary international law? One important factor was undoubtedly the position of the United States. In 1945 the United States was by far the world's most powerful State, having emerged victorious and relatively unscathed from the Second World War.147

Another example of naval power establishing CIL involves the now unquestioned right to freedom of the seas. It may seem odd to think of a regime where the right to sail the seas is controlled by one country; on the contrary, there was a time when a few countries, such as Spain, claimed control over the ocean.148

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147 Id. at 91-92. Naval power is unique among other forms of military power in its ability to shape CIL. See D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 3-4 (1975).

Navies alone afford governments the means of exerting pressure more vigorous than diplomacy and less dangerous and unpredictable in its results than other forms of force, because the freedom of the seas makes them locally available while leaving them uncommitted. They have the right to sail the seas and the endurance to do so for requisite periods, while land-based forces cannot present a credible level of coercion without overstepping the boundaries of national sovereignty.

Id.

The sea, then, is the only area where armed forces can joust with more or less seriousness in order to promote political objectives; the only area where they can be concentrated, ready for intervention but not overtly threatening to intervene. An army that crosses a frontier represents a use of force altogether different from a navy that crosses the seas.

Id. at 8.

Spain’s abandonment of its claim was not the result of an exercise of free will through bargaining among interested and autonomous parties.\(^{149}\) England and Holland imposed on Spain the CIL principle of freedom of the seas when their “cannon[s] shattered Spain’s claim to oceanic sovereignty.”\(^{150}\)

Given the relationship between power and status, a reader might ask whether there is any difference between the two. In other words, what does the discussion of status add that is not explained by power alone? Although the two are intertwined, power is not, and cannot be, the sole explanation of CIL. Civilized society must be ordered on some basis, and power alone does not provide a sufficient foundation for civilized ordering. Power alone is simply just another name for the state of nature—the law of the jungle, where the strong prey upon the weak as the mood strikes. Status has and does provide a basis for civilized ordering. Although status may not be the foundation in Western countries today, it was in the past and still is in other parts of the world today. Some may argue that status is not an ideal or preferred way to order society, but that is not the issue. There is order, whether it is the type of order one prefers or not, and that distinguishes status from power alone.

Moreover, the favoring of contract as the model to explain CIL because it is based on free will and consent, and not coercion, needs re-examination. The embrace by contemporary theorists of contract may be explained by two general observations. First, the favoring of contract is a rejection of natural law theory. After all, natural law is something imposed by or descended from a higher authority.\(^{151}\) Contract exalts individual autonomy and will over higher authority.\(^{152}\) Thus, contract-based theories of CIL are positivist in nature because they are based on what nations do upon the exercise of autonomy and sovereignty.\(^{153}\) Second,

\(^{149}\) Id.

\(^{150}\) See id. Another example of military power in the role of CIL formation is seen in the development of the CIL rule regarding coastal waters. In the early seventeenth century, the range of onshore cannons became the determining factor to establish the extent of coastal control of natural resources. See O’Connell, supra note 147, at 16.

\(^{151}\) See Kelsen, supra note 9, at 392.

\(^{152}\) See Fried, supra note 57, at 90.

\(^{153}\) See Kelsen, supra note 9, at 392 (explaining that “positivity” is based upon
contract rejects and is inconsistent with coercion. Therefore, because of the premise that contract is based on free will, this point necessarily follows from the first.

The problem, however, is that contract-based theorists cannot escape the presence of coercion. Positivist theories are not free of coercion and actually lead straight back to coercion-based models.\textsuperscript{154} Professor Kelsen explained it this way:

Positive law is essentially an order of coercion. Unlike the rules of natural law, its rules are derived from the arbitrary will of human authority and, for this reason, simply because of the nature of their source, they cannot have the quality of immediate self-evidence. The content of the rules of positive law lacks the inner “necessity” which is peculiar to those of natural law by virtue of their origin. Rules of positive law do not lay down a final determination of social relations. They allow for the possibility that these relations could also be otherwise determined by other rules of positive law, be it subsequently by rules of the same, be it simultaneously by rules of another legal authority. Those whose conduct is regulated in this fashion cannot be assumed to acquire, with these rules, the conviction also of their rightness and justice. It is obviously possible that their actual conduct may differ from what is prescribed by the rules of positive law. For this reason, coercion becomes an integral part of positive law. The doctrine which declares coercion to be an essential characteristic of law is a positivistic doctrine and is solely concerned with positive law.\textsuperscript{155}

Professor Kelsen’s observation exposes the internal incoherence of any attempt to use a contract-based model, with its reliance on autonomy and freedom, to free CIL from the influence of coercion. CIL is based on the actions of nations, and, therefore, nations act or respond based on their power, i.e., their status. Coercion is implicit in status, and status may be viewed as a positivistic doctrine.

The implicit presence of coercion in a theoretical model based

\textsuperscript{154} See id.

\textsuperscript{155} Id.
on freedom of choice (i.e., contract) may seem perplexing. There seems to be widespread confusion and incoherence in various attempts to situate coercion in the language of international law. For example, the positivist view that CIL is free from coercion directly contradicts Professor Kelsen’s observation. The point is that there is no agreement on such a basic issue as whether natural law theory or positive law theory incorporates coercion. What is clear, though, is that coercion appears to be so distasteful that few want to be associated with it, yet reality prevents coercion from simply being wished away. Coercion must somehow be incorporated into any coherent theory.

The inability to accommodate the existence of power and coercion reflects a larger, irreconcilable tension in international law.

Two criticisms are often advanced against international law. One group of critics has accused international law of being too political in the sense of being too dependent on states’ political power. Another group has argued that the law is too political because founded on speculative utopias. From one perspective, this criticism highlights the infinite flexibility of international law, its character as a manipulable façade for power politics. From another perspective, the criticism stresses the moralistic character of international law, its distance from the realities of power politics. According to the former criticism, international law is too apologetic to be taken seriously in the construction of international order. According to the latter it is too utopian to the identical effect.156

To the extent this observation is valid, a status-based theory would fall into the apologist camp because it does not describe what nations ought to do, but that is not the aim of the theory. The aim is to provide an accurate description of reality.

C. The Historical Fallacy Underlying the Primacy of Contract Over Status, and Its Ethnocentric Bias

Contract is embraced because it represents enlightenment and

156 See Koskenniemi, supra note 110, at 360 (emphasis in original).
modernity. Contract-based ordering is the organizing principle of contemporary Western societies. It is not surprising, then, that international legal theorists would want to view CIL through the prism of contract; however, viewing modern international law as a product of contract-based ordering is a historical fallacy. Modern international law is as much, if not more, the product of coercion and status.

The nineteenth century was a period of robust development in what is now considered to be modern international law. During that time, the making of international law was deemed to be the “exclusive province of civilized societies,” i.e., Western European nations and nations settled by Western Europeans. A leading commentator of that era stated that the making of such law was “limited to the civilized and Christian people of Europe or to those of European origin.” The theorists of that time “asserted further that international law applied only to the sovereign [S]tates which comprised the civilized ‘family of nations’.” The (self-designated) civilized nations then imposed the law on colonial subjects in Africa, Asia and South America: the so-called uncivilized world.

These historical facts further expose the flaws with a contract-based approach to CIL. If only a few nations are entitled to engage in international law making based on their history, culture, and ethnicity, then that means law is made as a result of status, not consent or agreement. If that law is then imposed on others who did not participate in its making, then the application of law is the result of power and coercion. Any attempt to justify contract-based

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157 See supra notes 57-58 and accompanying text.
158 See supra notes 16, 21-23 and accompanying text.
159 See supra notes 50-55 and accompanying text.
161 Id. at 53-54.
162 Id. at 54.
163 Id. at 35.
164 See id. at 1-12. Leading casebooks acknowledge this understanding of international law. See, e.g., DAMROSCH ET AL., supra note 50, at 53; CARTER, TRIMBLE & BRADLEY, supra note 40, at 22-25.
based theory on the grounds that it is the product of history from the Age of Enlightenment is misplaced. The historical origins of international law in general and CIL in particular are inseparable from coercion and status.\textsuperscript{165} Thus, referencing Locke and Hobbes to advance contract-based theory misses the wider fact that the ability to craft international law was denied to most of the world.

Treatise writers acknowledge that the foundations of modern international law were based upon a Eurocentric view and that international law developed in a way that “encouraged and then reflected [the] subjugation” of non-European people.\textsuperscript{166} Those writers happily note that such use of international law has now been discredited and rejected;\textsuperscript{167} however, the persistent attempts to explain CIL through contract may be an unfortunate legacy of the colonial era. It is true that the social contract theories of Locke, Hobbes, and others energized and transformed Western European society,\textsuperscript{168} and that the Western European nations viewed each other as equal, autonomous parties capable of ordering their relationships through agreement.\textsuperscript{169} These historical facts, however, have validity only within narrow boundaries. The Age of Enlightenment was a Western European phenomenon, and Western European nations denied international law-making to the non-European world.\textsuperscript{170} To take the principle of contract-based ordering, which has historical validity only insofar as Western Europe is concerned, and then extrapolate it to the making of international law in general ignores the wider historical truths that expose the fallacy of using a contract-based theory to explain the formation of CIL. Asserting contract to explain CIL perhaps reflects an unexamined bias, carrying forward colonial-era thinking that only Western Europe matters in law-making.

This approach is ironic in that international law attracts those

\textsuperscript{165} See SHAW, supra note 72, at 4.
\textsuperscript{166} Id. at 38.
\textsuperscript{167} See id. at 39.
\textsuperscript{169} See SHAW, supra note 72, at 28.
\textsuperscript{170} See id. at 26-27.
with a cosmopolitan view—those who wish to escape the confines of their own domestic structures—and those who shun the narrow concerns of municipal lawyers. Yet, international legal theorists who assert contract as the organizing principle of CIL, in effect, do nothing more than transfer parochial and ethnocentric biases from the local to the global level. International law did not develop through a convergence of will between Western Europe (the colonial powers) and non-Europeans (the colonial objects). Moreover, not every contemporary society exalts individual will over collective concerns. The attempt to define CIL by contract, however, ignores those realities.

D. Two Exercises that Confirm Status as a Valid Theory

If the language of contract is indeed the proper analytical framework to explain CIL, then its vitality should be apparent in legal decisions involving CIL. After all, a theory only has validity to the extent that it is reflected in or has potential application to actual conditions. To test this thesis, I offer two exercises that ultimately demonstrate the emptiness of contract-based theory and the viability of status. The first is an examination of the advisory opinion issued by the ICJ on The Legality of the Threat or Use of Nuclear Weapons. The second is a hypothetical exercise involving the law of the sea, which demonstrates the role of status in forming CIL.

1. The International Court of Justice’s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons

Upon the request of the U.N. General Assembly, the ICJ addressed the following issue: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” By unanimous vote, the court held: “There is neither in customary nor conventional international law any specific authorization of the threat or use of nuclear weapons.” By a
vote of eleven to three, the court also held: “There is neither in
customary nor conventional international law any comprehensive
and universal prohibition of the threat or use of nuclear weapons
as such.”174

While the decisions may be interesting, the relevant aspects of
the opinion for purposes of this paper are the court’s analysis and
the arguments of interested parties, because the analysis and
arguments referenced CIL to inform the resolution of the question
presented.175 If the language of contract has any force or
application, one would expect the opinion to use contract as the
framing structure of the analysis and arguments. Nothing of the
sort is found in the opinion. Contract did not add anything to the
analysis of CIL. In fact, the court identified several norms as
being so important that they bound all nations, whether or not
agreement or assent was present.176 To be sure, there is nothing in
the opinion that states anything like the following: “In arriving at
our opinion, we rely on a status-based view of CIL.”

Nevertheless, I contend that an unstated (perhaps even
unrecognized) reliance on status is woven throughout the opinion
and that status provides the coherent structure of the analysis. The
opinion does not appear to rely on a contract-based approach,
which is all the more surprising given that such an approach falls
within the conventional and traditional mainstream.

In the opinion, the court noted two principles of CIL involving
humanitarian principles: (1) States must never make civilians the
object of attack and must never use weapons that are incapable of
distinguishing between civilian and military targets; and (2) States
must not use weapons that cause unnecessary suffering to
combatants.177 The court stated that these principles were so
widely accepted and so fundamental to the respect of human rights
that they “are to be observed by all States whether or not they have
ratified the conventions that contain them, because they constitute
irreproachable principles of international customary law.”178 The

174 Id.
175 See id. ¶ 64.
177 See id. ¶ 78.
178 Id. ¶ 79.
court also noted that the principle of neutrality (e.g., the inviolability of the territory of a neutral State) is a principle of CIL that is so fundamental that it applies to all nations regardless of agreement or assent. 179

The essential structure of CIL cannot be based in contract if some CIL principles are so fundamental that they bind all nations regardless of agreement or assent. This is, of course, not an original observation; this concept is the basis of jus cogens. 180 The point is that the ICJ’s opinion may be read as an implied (and probably unintentional) departure from the school of thought that seeks to describe CIL as a contract-based structure. If contract is the appropriate framework to view CIL, why was it not used to analyze the issue?

The dissenting opinion of Judge Mohamed Shahabuddeen is even more interesting for purposes of this thesis because it reflects a status-based approach to CIL. 181 Judge Shahabuddeen wrote his dissent to underscore the historically unprecedented dangers posed by nuclear weapons. 182 In so doing, he wrote:

There is not any convincing ground for the view that the “Lotus” Court moved off the supposition that States have an absolute sovereignty which would entitle them to do anything however horrid or repugnant to the sense of the international community, provided that the doing of it could not be shown to be prohibited under international law. The idea of internal supremacy associated with the concept of sovereignty in municipal law is not applicable when that concept is transposed to the international plane. The existence of a number of sovereignties side by side places limits on the freedom of each State to act as if the others did not exist. 183

He went on to add: “It is reasonably clear, however, that the previous stress on the individual sovereignty of each State as

179 See id. ¶ 88.
180 See id. ¶ 83.
182 See id. at 393 (Shahabuddeen, J., dissenting).
183 Id.
**hortus conclusus** has been inclining before a new awareness of the responsibility of each State as a member of a more cohesive and comprehensive system based on co-operation and interdependence.\(^{184}\)

Regardless of how one may interpret these broad remarks, one thing is certain: These remarks are an expression of a view that international law, including CIL, should not be viewed as a means for nations (i.e., contracting parties) to pursue individualistic aims in any manner, for any purpose, so long as no express prohibition exists. Judge Shahabuddeen's view of international law conflicts with the view that international law is or should be like the world of contemporary contract with its emphasis on exchange for individual gain. His view places the needs of the world as a whole over the particular needs of individual nations.\(^{185}\) This is the basis of status-based societies—the subordination of individual wants to the welfare of the group. The judge is, of course, just one person, and one person's particular views may not matter much in the face of seemingly canonical principles (like CIL as contract). Nonetheless, the view of this one judge on the ICJ shows that alternatives to the conventional view may be available.

The dissent is also interesting because it mentions an argument made by some or all of the so-called Nuclear Weapons States ("NWS"), China, France, Russia, the United Kingdom and the United States.\(^{186}\) The argument was that the NWS were "states whose interests are specially affected" and that "a practice involving the threat or use of nuclear weapons could proceed only from States recognized as possessing the status of nuclear-weapon States."\(^{187}\) The NWS are a perfect example of what Edward Jenks described as "those comparatively few classes of persons in the community who, by reason of their conspicuous differences from normal persons . . . require separate consideration in an account of the law."\(^{188}\) In effect, the NWS asserted that their status should

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\(^{184}\) *Id.* at 394.

\(^{185}\) *See id.* at 394-95. Whether such a view should be a normative principle is, of course, left to individual opinion.

\(^{186}\) These nations have publicly acknowledged possession of nuclear weapons and are also the five permanent members of the U.N. Security Council.


\(^{188}\) *See JENKS, supra* note 85, at 109.
govern the issue. How is this different from tribal elders in a pre-modern village asserting they alone have the authority to decide life or death matters for the tribe?

The NWS's position rejects the view that CIL may be formed by any and all nations through their agreement or assent in any matter of their choosing. It exposes the fictional nature of the view that all nations have the ability to participate in the formation of CIL through contract-like behavior. A contract-based view of CIL only has validity if all nations are equal and free to contract. As a corollary, contract cannot be the basis of CIL if all nations are not permitted to agree on its formation. The argument for contract becomes unattainable if only a handful of nations are permitted to agree. The NWS states argued, in essence, that the formation of CIL is based on and inseparable from status. Simply put, if only five nations are permitted to form CIL regarding nuclear weapons, that necessarily means that the right or ability to agree or assent is denied to all remaining nations. Given the power and influence of the NWS, this denial raises serious questions regarding the vitality or usefulness of a contract-based theory of CIL. How can any theory of international law have force if the most powerful nations take positions that directly contradict the theory? If these nations do not adhere to this theory, what use does it have?

2. *A Hypothetical Comparison of Two Sets of Countries*

The limit of a nation’s territorial sea is well settled today under international law. Assume a hypothetical, though, in which the limit is not established. Suppose the five NWS agreed among themselves that their territorial sea extends one hundred nautical miles from their coasts, and further suppose the rest of the world voiced objection to this agreement. Imagine a different situation. Suppose Costa Rica, Gabon, Ghana, Honduras, and New Zealand agreed among themselves that their territorial sea extends one

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190 See id.
hundred nautical miles (one could double the number of states, for good measure, by adding Fiji, Latvia, Peru, Thailand, and Yemen), and further suppose the NWS voiced their objection. In which situation would it be more likely that the one hundred-mile limit would become CIL? If New Zealand chose to demonstrate its objection to the new limit set by the NWS by sailing a flag vessel twenty miles off the coast of China, what would it be able to do in response to a seizure of its ship by the Chinese navy? Along similar lines, if the NWS chose to forcibly demonstrate their objection to the agreement of the smaller countries by sailing their navies within thirty miles off the smaller countries’ coasts, what could these ten countries do about it? The answer is obvious.

These hypothetical scenarios demonstrate the failure of contract-based analysis to explain CIL. As seen in this exercise, agreement is not the dispositive factor underlying the development of CIL. Both hypothetical situations are based on agreement; however, it is not agreement that determines whether the one hundred-mile limit becomes CIL. The outcomes would be entirely different in the two hypotheticals. Thus, asking whether there is agreement or not adds little to the analysis. The key issue is which nations are involved. Thus, whether a principle becomes CIL or not depends on the identity of the nations asserting the limit. If which nation or nations assert a legal principle (and not agreement) determines the outcome, contract is not the ordering principle. Status is.

V. The Need to Reconcile Status and Contract to Explain CIL

Critics may object to the use of status to explain CIL on the grounds that it represents a dark, regressive approach to international law. Theories implicitly based on force and coercion are not likely to win adherents among progressive, cosmopolitan elites (the cohorts that influence international legal theory). There seems to be a reflexive rejection of status, as if no modern, liberal thinker should acknowledge any positive aspects to it. The idea of status as the organizing principle of Western society was relegated to the dustbin of history upon the dawning of the Age of Enlightenment. Thus, the notion of status as having any potency

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192 See Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in
to explain contemporary law or society may simply be too bizarre for anyone whose life has been experienced exclusively within the milieu of Western liberalism.

As disquieting as it may be to some, status simply cannot be wished away. Ignoring it does not push it out of existence. At the same time, however, I do not want to make the same mistake as the proponents of the contract-based approach to CIL make; that is, I do not want to present status in the form of a binary choice, with status as the only alternative to a state of nature. Instead, I offer a more textured, nuanced approach to the understanding of CIL. The formation and theoretical foundation of CIL is not solely (even largely) based on contract. I contend that CIL cannot be fully understood or explained without reference to status; however, I do not go so far as to hold status as the only relevant paradigm. While I submit that status is at the heart of CIL, I do not contend that contract has no role in the discussion. The difficult issue is in determining how much of a role it has. Perhaps the answer is simple and has remained unchanged since the reality of the colonial era: Powerful nations arrive at an express or tacit agreement on a principle of CIL, and weaker nations fall into line in observance of the principle. This may not be what liberal theorists have in mind when they advance contract as the organizing principle of CIL, but this proposition is more accurate than the assertion that small, weak nations are equal partners with large, powerful nations in the formation of CIL.

The coexistence of status and contract in contemporary CIL is amply demonstrated by the nuclear weapons opinion. There is undoubtedly widespread, if not universal, agreement among nations that use of nuclear weapons should be avoided.\textsuperscript{193} At a minimum, it is fair to assert that the use of nuclear weapons is only permitted as a last resort has become a principle of CIL, and this principle is probably the result of agreement. It is equally true, however, that one or all of the NWS will be involved in and, in fact, lead any discussion regarding nuclear weapons.\textsuperscript{194} In other

\textit{Nineteenth-Century International Law}, 40 Harv. Int' l L.J. 1, 2, 6, 8 (1999).

\textsuperscript{193} See, e.g., supra note 172 and accompanying text.

\textsuperscript{194} For example, the position of the United States on the use of nuclear weapons is as follows:

The United States will not use nuclear weapons against any non-nuclear weapon
words, status will drive the discussion. Thus, it is unhelpful to an understanding of CIL to assert that contract alone underlies its development.

Whether or not CIL is formed as a result of contract or status is more than a question of theoretical interest. A more nuanced understanding that incorporates something other than contract may have actual consequences for the way nations interact. If contract is the sole or overwhelming determinant in the formation of CIL, then every principle of CIL is thereby legitimated upon the sole basis that it is the product of consent. Who are we to question the product of anyone’s agreement? The use of contract thus results in an empty formalism where every accepted principle of CIL is deemed legitimate because its formation has complied with the formality of putative contract formation.

Such a view, in effect, marginalizes and denies a voice to weaker nations. If CIL is explained and justified through the language of contract, weaker nations are deemed to have “agreed” and thus have no right to object to the imposition of CIL (notwithstanding the somewhat mythical principle of the “persistent objector”—query whether weak nations are able to have their persistent objections recognized). If the United States, the Western European nations, and China were to agree that CIL did not prohibit actions that raise the level of oceans, then the contract-based approach would conclude that low-lying island nations like Fiji and the Seychelles have “agreed” and are bound by the principle. This is why it is important to acknowledge the role of status in the development of CIL. Recognizing the role of status leads to the recognition that not all nations have a role in shaping, or even in agreeing to, CIL principles. Recognizing the role of status dismantles the tautology that every principle of CIL is legitimate because it is the result of agreement.

state party to the NPT or any comparable internationally binding commitment not to acquire nuclear explosive devices, except in the case of an attack on the United States, its territories or armed forces, or its allies, by such a state allied to a nuclear weapon state, or associated with a nuclear weapon state in carrying out or sustaining the attack.

U.S. DEP. OF STATE, TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS, http://www.state.gov/www/global/arms/treaties/npt1.html (last visited Jan. 22, 2011). While the United States opposes the proliferation of nuclear weapons, this statement makes it clear that the United States reserves the right to use them under limited circumstances.
Recognizing status's role allows for the understanding that perhaps nations like Fiji and the Seychelles did not "agree" to any and all CIL principles decided by others.

There is undoubtedly some irony in the fact that status, which embodies elements of power and coercion, may actually empower weak nations. Nonetheless, recognition that the language of contract may be a disguise to legitimate the imposition of rules on the weak by the powerful (through the soothing language of "agreement" and "consent") may eventually lead theorists back to the first principles of whether the conventional construct of contract is even legitimate. I contend that the language of contract is used as a mesmerizing illusion to cloak the hidden (and distasteful, at least to liberal theorists) elements of power and coercion. By removing this cloak and accepting and acknowledging that status is the predominant force in CIL, a more genuine understanding is possible. Most importantly, this genuine understanding permits the recognition that weak nations often have terms dictated to them, and attempts to soften this reality by saying that the imposition of terms is actually the product of "consent" are pure fantasy. Such an understanding would actually permit weak nations to free themselves from the fictional binds of "consent" and would provide a means to avoid onerous terms imposed by the powerful. Currently, the analysis of the legitimacy of CIL seems to work in the following way: Is a principle of law a part of CIL? If the answer is yes, it necessarily means that the principle of law was the product of agreement; therefore, it must be legitimate. Stripping away "agreement" as the dispositive element permits the analysis to address whether the principle of law is actually just or desirable. Recognizing the so-called agreement as the blunt exercise of power and naked self-interest permits the direct question as to whether a particular principle of CIL ought to be a part of CIL. This is why contract should not be the only—or the predominant—framework to understand CIL.

VI. Conclusion

Many view the development of CIL as an exclusive choice between state of nature versus contract-based ordering. Yet,

195 See supra notes 7-11 and accompanying text.
contract provides a poor basis for explaining CIL, and even the proponents of this theory acknowledge its deep flaws. It is undeniable that the use of contract is based on fiction and fails to account for political reality. The use of contract can only be valid if one assumes nations generally possess the capability to participate equally in the formation or rejection of CIL. Some nations are more influential and powerful than others and are simply more important in the international legal process. This has been the situation throughout history, as seen in the fact that a few States have participated extensively in the creation of CIL. Moreover, it is not agreement that is the dispositive feature in the formation of CIL; the dispositive feature is the identity of the nations behind its development. Given its obvious failings, alternatives to a contract-based model must exist. The binary choice presented by the proponents of a contract-based theory is an empty choice that fails to describe geopolitical reality.

My goal in this paper has been to demonstrate that the resort to the language of contract to explain CIL is a crude, even largely ineffectual, tool that fails in most aspects to provide a coherent theory to explain CIL. What justifies its continuing vitality? There could be several factors: (1) The absence of a better explanatory model (until now, hopefully); (2) cultural bias with historical roots in Western, contract-based social models; and (3) contemporary theorists’ unfamiliarity with status-based social ordering, most of whom have exclusively Western experiences. That said, I do not deny the existence or influence of contract-like behavior to explain some aspects of CIL; however, I do dispute any attempt to insist that status is not an equal or even a more powerful element. It is a false binary choice to argue that CIL is either contract- or status-based because it is readily apparent that both are present. Contract-like behavior probably explains much of the ordering among nations of relatively equal power or shared cultural roots (such as the United States and Western European nations). It is pure fiction to suggest that similar ordering explains the development and application of CIL with respect to weaker nations or nations that do not share cultural roots. To paraphrase Thucydides’ account of the Melian Dialogue, perhaps it is the case that the development of CIL is within the domain of the strong,
and the weak must suffer as CIL is imposed. To that extent, perhaps the world has not progressed as much as liberal theorists would like to believe since the time of the Peloponnesian War.

Status presents a more coherent and viable theory because it accurately explains both the historical origins of CIL (as seen in the colonial relationship between Western European and non-European nations) and the way in which CIL has been formed throughout the modern history of international law. Critics of a status-based theory may argue that it lacks normativity and is merely descriptive. The defense to this is that status-based theory provides an accurate description, unlike the forced application of the ill suited contract-based analysis. If the goal is to influence international law in a normative fashion, we should at least understand and describe international law for what it is. There are more than two ways to describe the world. To that end, the use of status offers an alternative theory to explain CIL in a way that contract cannot.

196 See THUCYDIDES, supra note 136.