

CONCEPT AND CONTRACT IN THE FUTURE OF INTERNATIONAL LAW

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INTRODUCTION

How will international law deal with the problems of large-scale cooperation the peoples of the world now face and will continue to face in the future? This is the very big question that Joel Trachtman deals with in his book *The Future of International Law*.¹ Trachtman's book builds on a theme from Wolfgang Friedmann's classic 1964 book, *The Changing Structure of International Law*. Friedmann argues that international law is moving, and should move, from an international law of coexistence, governing inter-state diplomacy, to an international law of cooperation, governing "the pursuit of common human interests."² Trachtman argues that "international law may grow in a way similar to municipal law: establishing basic property rights and rules of security first and turning to creation of public goods and regulatory purposes later."³ International law, according to Trachtman, "evolves functionally: it changes as its constituents determine new uses."⁴ In this rich account, Trachtman shows how international law will have to be more extensive, broader in scope, more comprehensive in the kinds of things it regulates, and more

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1. JOEL P. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT* (2013) [hereinafter *FUTURE OF INTERNATIONAL LAW*].

2. WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* i (1964).

3. TRACHTMAN, *FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 1.

4. *Id.* at 1.

effective, to deal with “expected changes in globalization, economic development, demography, technology and democracy.”⁵ International lawyers should readily appreciate the basic insight of the book, as they divide their work between the law of coexistence of states and matters of a regulatory nature.

The book’s subtitle is boldly phrased “Global Government.” Trachtman does not suggest that there will be any such thing as a world state with a world government.⁶ Rather, the first sentence of the book captures his claim: “International law is the precursor of international government, and international government is nothing more than an intensification of international law.”⁷ Trachtman favors “government” over “governance” because he wants to focus on the “formal rules and organizations: law.”⁸ He rejects the notion that a “certain institutional intensity or scale is required in order for a mechanism to be considered governmental.”⁹ Rather, government is “infinitely scalable” and it is therefore “easy to say that international government exists.”¹⁰ According to Trachtman, describing the government established by international law as “rudimentary” because it does not look like national governments is wrong given that the functions of these two sorts of governments differ.¹¹ Perhaps the reason why Trachtman contends that it is easy to say that international government exists is because he bases his work on the idea of the “function” of international law and organization. Early work dealing with functionalism in international law and organization, which Trachtman cites, contends that if increasing functions are given to international organizations, loyalties to these organizations might follow.¹²

Trachtman’s emphasis on functionality should be understood in the context of the methodological toolkit he uses, found in new institutional economics, in which he includes constitutional economics as a subfield.¹³ Trachtman is one of the most preeminent proponents of this particular school of thought as a way of understanding international law. His 2008

5. *Id.* at 2.

6. *Id.* at 11.

7. *Id.* at 7.

8. *Id.* at 8.

9. TRACHTMAN, *FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 9.

10. *Id.* at 9.

11. *Id.* at 9.

12. *Id.* at 13–16; *see also* DAVIE MITRANY, *THE PROGRESS OF INTERNATIONAL GOVERNMENT* (1933).

13. TRACHTMAN, *FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 13.

book, *The Economic Structure of International Law*,¹⁴ is one of the most influential on the economics of international law and has become required reading in the field.

In this Article, I examine and critique two parts of *The Future of International Law*. I then go on to explore how custom will fare in the future of international law, as that future is understood in the book. First, I deal with what I call the contractarian features of Trachtman's explanation for the existence and purpose of international law. Using the tools of new institutional economics and constitutional economics, Trachtman seeks to describe the features of an international legal system. This is positive political theory or at least relates substantially to the methods of positive political theory. I want to suggest a different approach to understanding international law, one which connects to normative political theory. In its ambitious sense, this approach sees international law essentially as a form of moral argument, and in its modest sense, which I favor, it offers a procedure for moral justification of international law distinct from a conceptual analysis to identify it as law. Second, I reframe what Trachtman calls the "fragmentation" of international law to expose it to moral critique. The problem of fragmentation, as Trachtman and others see it, is that there is no single international legal system, but rather, distinct regulatory regimes, in international law. Trachtman's functional approach looks at fragmentation as a practical problem of international law not reaching its full functional potential. I contend that fragmentation poses a serious moral problem for international law, in addition to the practical problem that Trachtman identifies. Finally, I address the role of customary international law. Does it have a role in an international law of cooperation? I agree with Trachtman that it does and that its role will be supplementary and diminished. In the future of international law, it is likely that custom will play a role as part of the general international law applicable to the various fragmented *lex specialias* of treaty obligations. We must, moreover, be careful to distinguish custom from general principles of law and other sources of international law.

I. A CONTRACTARIAN EXPLANATION OR PREDICTION FOR THE FUTURE OF INTERNATIONAL LAW

The *Future of International Law* relies on a contractarian theory about international law. In this section, I very briefly set forth the

14. JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008) [hereinafter *ECONOMIC STRUCTURE*].

groundwork for this contractarian account. It is what we might understand as positive political theory, about the way constitutions might actually form or around how constitutionalization might actually occur. It might be more broadly understood as connecting to a contractarian form of moral argument, but this first requires that we accept that law could be understood or justified from a moral point of view. If we accept the moral account, what we are saying is that the formal structure of norms in international law is either contractarian or should be so to be morally justifiable and that these questions can be answered in a rational bargaining account. Trachtman is an influential proponent of the economic but not necessarily the moral version of contractarianism. He appears to only accept contractarianism as a description or explanation of international law or to use it in predicting the future of international law, but not as a form of moral argument about international law or its justification. Below I connect the rational bargaining model to a philosophical tradition. Much economic thinking historically grounds in some philosophical tradition (Hobbes, Hume, J.S. Mill, etc.), and we may as well identify at least some of the connections relevant to our concerns here if we are going to be clear on what economists are doing. I identify the main elements of the bargaining account as Trachtman has set forth in the book, and I also set forth my account, which could be classified as normative political theory, and which could be understood as in the tradition of contractualist moral theory. A contractualist form of argument about the law situates around the idea that the law must be reasonably acceptable, or more closely to T.M. Scanlon's formulation, around principles for the general regulation of behavior that no one, suitably morally motivated, could reasonably reject.¹⁵ I advocate that another way to justify the norms of international law is through contractualism. Contractualism as moral and political philosophy predicts nothing. Rather, it provides a way to justify law from a moral point of view. I have given the reader almost nothing but a skeleton of how we shall proceed, so bear with me as we work out the argument.

Let's start with Trachtman's contractarian account. It is set forth in more detail in his earlier book, *The Economic Structure of International Law*, but his latest book provides a shorter yet adequate account for our purposes here. Chapter 3 of *The Future of International Law* deals with the function of international law and organization as a "system of

15. T. M. SCANLON, WHAT WE OWE TO EACH OTHER 5 (1998) [hereinafter WHAT WE OWE].

transnational political linkage.”¹⁶ In that chapter, Trachtman argues:

The future of international law is a set of functional, nuanced, differentiated, and organic links between the political systems of different states. As these links grow in terms of their mandatory character, specificity, and institutional support, they will increasingly ascend the scale from a more contractual type of international law to mechanisms that appear to have more of the characteristics of government.¹⁷

Using the insights of game theory, Trachtman develops a “policy-exchange contractual theory of international law, focusing on the advancement of domestic preferences through international law.”¹⁸

Chapter 11 of *The Future of International Law* deals with international law from a constitutional standpoint. The chapter outlines three functions for international constitutional norms: enabling, constraining, and supplementing.¹⁹ An enabling norm aids in the formation of international law. A constraining norm limits the formation of international law. A supplementing norm fills gaps in domestic constitutional law, arising from globalization.²⁰ The discussion of the constitutional aspects of international law is grounded in constitutional economics and relies substantially on the work of Nobel laureate James Buchanan and Gordon Tullock, who pioneered the field in such works as *The Calculus of Consent*.²¹ As Trachtman explains:

Under this approach, constitutions are simply instruments of human interaction: mechanisms by which to share authority in order to facilitate the establishment of rules. In Buchanan’s phrase, they are instruments to facilitate gains from trade—not from trade in the conventional sense, but transactions in authority. In a transaction cost or strategic model, constitutions are assumed to be designed to overcome transaction costs or strategic barriers to Pareto superior outcomes. Once this is accepted, it follows that constitutional rules are not natural law; instead, they are

16. TRACHTMAN, *FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 41.

17. *Id.*

18. *Id.* at 64.

19. *Id.* at 254.

20. *Id.* at 255.

21. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

political settlements designed to maximize the achievement of individual citizens' preferences.²²

There is a lot to unpack in this quote, and it is a good launching point for working out what economic contractarianism is and what its alternatives are.

The above quote suggests that we have two choices, either a contractarian or a natural law account.²³ If we look at the history and theory of international law, the natural law tradition was influential from the sixteenth and seventeenth centuries. The "Grotian view" of international law, as Philip Bobbitt explains, "was taken to mean the assertion of a duty on the part of the individual state to serve the interests of the society of states as a whole" and is to be distinguished from a "Hobbesian view" that "international society can have no legal rules because there is no sovereign to organize and maintain the collaboration among states"²⁴ The Grotian view may be traced to thinkers pre-dating Grotius, such as the Spanish Scholastics de Vitoria and de Soto, as well as to Gentili, who held the post of Regius Professor of Civil Law at Oxford.²⁵ When the law and economics scholars became prominent in the twentieth century, they were using logical positivist models of economics, which exclude ethics, morality, and connections to the history of ideas. In this sense, their approaches could be seen as

22. TRACHTMAN, *FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 260.

23. Legal positivists have been criticized for ignoring international law. For the latest foray, see Jeremy Waldron, *International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?*, in LUÍS DUARTE D'ALMEIDA, JAMES EDWARDS & ANDREA DOLCETTI, *READING HLA HART'S THE CONCEPT OF LAW* 209–23 (2013). Bentham invented the phrase "international law." JEREMY BENTHAM, *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., 1970); *see also* THE WORKS OF JEREMY BENTHAM (John Bowring ed., 1843); H.L.A. HART, *THE CONCEPT OF LAW* 231 (1961). Bentham was referring to a law of coexistence. It is widely understood that Hart's famous Chapter 10 in *The Concept of Law* was meant to be a favorable treatment to be contrasted with those of earlier positivists. The difficulties that legal positivism has encountered in elucidating the concept of international law are historical, but its contemporary version, which has left the need for a sovereign behind, should encounter no special difficulties. Legal positivism sometimes gets misunderstood because it is falsely associated with the need for a sovereign law-giver or with a blind obedience to an unrealistic notion that what counts as positive law must only be municipal law.

24. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY* 513 (2002).

25. Martti Koskeniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1 (2011); Randall Lesaffer, *The Classical Law of Nations (1500-1800)*, in ALEXANDER ORAKHELASHVILI, *RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW* 408 (2011); DAVID ARMITAGE, *FOUNDATIONS OF THE HISTORY OF MODERN INTERNATIONAL THOUGHT* 9 (2013).

alternatives to the natural law tradition in what was known as the law of nations to the natural lawyers. This narrative provides a sense of progress, which may indeed be a false sense, from a law of nations, a law of coexistence, to a full-fledged international law of cooperation. Friedmann says in his classic work that “the principal preoccupation of the classical international law, as formulated by Grotius and the other founders, was the formalization and the establishment of generally acceptable rules of conduct in international diplomacy.”²⁶ Trachtman says that “[t]his was an international law of coexistence.”²⁷

This is a debate that continues to this day. There appears to be the beginnings of a new natural law turn in international law. In a posthumously published article in *Philosophy and Public Affairs*, Ronald Dworkin advocates a “return to what I take to be the golden age of the subject, seventeenth-century European politics, to an at least partially moralized conception of international law.”²⁸

I have a few worries about the suggested duality between natural law tradition of international law versus the economics of international law. It is incomplete. From the philosophical, as opposed to the economic side of the argument, it jumps from the early modern to the contemporary. It leaves out the eighteenth century and a good deal of what went on in the nineteenth and twentieth centuries. It skips the Enlightenment. Why skip Kant? This is something of a recurring theme in international law, given that the field is widely accepted to have risen from the Grotian view. International lawyers have characterized the divide somewhat differently from Trachtman—as one between natural law and legal positivism.²⁹ I do not want to suggest a strict adherence to Kant here or to his work on international society, *Towards Perpetual Peace*.³⁰ And, I certainly do not want to ignore the considerable Kantian tradition in

26. FRIEDMANN, *supra* note 2, at 5.

27. TRACHTMAN, *FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 3.

28. Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2, 13 (2013). Recently, Jeremy Waldron has argued for a contemporary *jus gentium* to discern common legal principles that state legal systems share, to regulate relations within states. See generally JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND:” FOREIGN LAW IN AMERICAN COURTS (2012). Waldron wants us to use Dworkin’s concept of principles across municipal legal traditions. These moves by Dworkin and Waldron roughly parallel the concepts of *jus inter gentes* and *jus gentium*, though it is by no means clear that they want us to treat the formal legal categories as entirely distinct.

29. Friedmann exposes the arguments and concludes that a natural law approach to the evolution of international law “is not a solution but a camouflaging of the real problems.” FRIEDMANN, *supra* note 2, at 77. But, note that Friedmann took what might be considered to be the wrong view of positivism.

30. Immanuel Kant, *Towards Perpetual Peace*, in IMMANUEL KANT PRACTICAL PHILOSOPHY 317 (Mary J. Gregor, ed. & trans., 1996) (first published in German in 1795).

international law.³¹ We should not forget that Kant criticized Grotius, Pufendorf, and Vattel as “sorry comforters” of a status quo supporting offensive war.³²

The project I advocate here is something like that of normative jurisprudence about domestic law. While recognizing that, in the history of ideas since about the seventeenth century, there has been a division between internal and external affairs of state, and between municipal and international law, this intellectual history should not be ignored.³³ Though he was writing about how-to-do moral philosophy, I follow Tom Hill’s lead: A line of work with Kantian aspirations that does not strictly adhere to Kant’s practical philosophy can flourish. Kantian-inspired moral theorists, sometimes known as Neo-Kantians, respect the dignity of each person in their accounts and decide upon moral principles from an “impartial” standpoint.³⁴ In fact, a variety of moral theories that would violate fundamental precepts of Kantian moral theory are still widely accepted as Kantian inspired. Contractualism is one of them.³⁵

The distinction I want to draw is between contractualism and contractarianism. It is a distinction made by Samuel Freeman, between interest-based and right-based contractarianism, though, following Stephen Darwall, I and others use the word “contractualism” for the right-based version.³⁶ I contend that a suitable, Kantian-inspired procedure of moral justification for international law can be developed along contractualist lines. The basic elements of a contractualist account to law or morality would include the following:³⁷

- a. *Justification to others.* This element is usually formulated as a requirement that we justify our action on general principles to regulate our behavior on terms others must reasonably accept, or in Scanlon’s formulation, no one can reasonably reject. Think of these notions in terms

31. For just two examples: see, e.g., FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* (1998); Amanda Perreau-Saussine, *Immanuel Kant on International Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 53 (Samantha Besson & John Tasioulas eds., 2010).

32. Kant, *supra* note 30, at 326.

33. ARMITAGE, *supra* note 25, at 10.

34. THOMAS E. HILL, *VIRTUE, RULES AND JUSTICE* 1, 197, 201–02 (2012).

35. Let’s bracket as beyond our limited discussion here T. M. Scanlon, *How I Am Not a Kantian*, in DEREK PARFIT, *ON WHAT MATTERS, VOLUME TWO* 116 (2011).

36. Samuel Freeman, *Moral Contractarianism as a Foundation for Interpersonal Morality*, in *CONTEMPORARY DEBATES IN MORAL THEORY* 57 (James Drier ed., 2006) [hereinafter *Moral Contractarianism*]; STEPHEN DARWALL, *CONTRACTARIANISM/CONTRACTUALISM* (2002).

37. What follows is influenced by Friedmann. See FRIEDMANN, *supra* note 2.

of demands a person might make on another person, or an obligation a person might have to another person. We give content to demands, obligations, and judgments about right and wrong. That content comes from putting ourselves in the place of others, and those others doing the same for us.

b. *Reasonableness not rationality.* Reasonableness relates to the idea of justification to others. My demands have to be reasonable to you and yours to me. Reasonableness specifies the normative. Rationality, in contrast, concerns how people actually behave. We want people to act reasonably, but their actual behavior may conform to means-ends rationality or to some other norm, as human behavior is understood from the standpoint of behavioral economics, psychology, or other social sciences. Rational behavior can be unreasonable and does not form the basis for moral principles.

c. *Moral equality.* In contractualism, each person is of equal dignity and respect. Moral equality affects the way we understand moral accountability to each other. It is a basic notion that affects what is permissible in a hypothetical agreement and the reasonableness of putative moral principles.

d. *Idealized deliberation and hypothetical agreement.* Contractualist moral theories rely on hypothetical agreement among moral equals, usually in some sort of idealized conditions such as Rawls's veil of ignorance in the original position. Scanlon argues that we can deliberate hypothetically without Rawls's conditions.³⁸ What is left in the culmination of this work out are principles with the weakest objections to them. Contractualist methods do not aggregate interests except in limited conditions. Agreement is not the subject of a bargain. Bargaining permits people to take power and position into account and can lead to unreasonable principles.

e. *Normative not naturalistic.* Contractualism is not social science. It is justificatory and not predictive. It is not designed to offer predictions about the way people actually behave or about how institutions might arise as a result of incentives and behavior. People may actually behave

38. SCANLON, WHAT WE OWE, *supra* note 15, at 5.

quite differently from the way they should behave if judged by the standards of properly deliberating moral agents. Contractualism is a theory about how persons justify their behavior to others in a moral sense. It is not a theory external to the way people actually reason morally. Rather, the focus is gaining clarity on the form of the moral argument. Its method of justification, however, wide reflective equilibrium, requires us to take into account all considered judgments, not just moral judgments, particularly when extended into the realm of law and public policy.³⁹ Such questions help us to articulate moral principles that are suitably interpersonal and agent relative.

f. *Nonreductionist*. Contractualism is what Samuel Freeman calls right-based, which means that moral principles are not explained by some other non-moral facts, such as self-interest or prudence.

g. *General principles for the regulation of human action and deliberation*. Hypothetical agreement can result in general principles to regulate human action. Here, moral principles can be used to evaluate or justify legal rules.

h. *Actual world application*. Though the hypothetical agreement is one of idealized conditions, the principles it produces make claims on actual persons in the actual world.

i. *Interpersonal and agent relative*. In its notion of agreement, contractualism takes into account the reasonable plans, purposes, and relationships of moral agents. Things that give a person's life meaning are taken into account. The truth of moral judgment depends on these personal interests.

With these basic elements at hand, we can see why contractualism is to be distinguished from contractarianism. Both approaches share the notion of agreement among persons, but from there they differ considerably. In interest-based contractarianism, self-interested persons make bargains relating to cooperation or (coexistence) based on rational self-interest. Rationality in an interest-based contractarian world is means-end rationality. Interest-based contractarianism gives content to legal rules as reflecting the outcomes of hypothetical bargains in which

39. SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT 18–20 (2007).

persons are permitted to take their rational self-interest into account. Justification to others has no role. Partiality is entirely acceptable and indeed quite predictable in contractarianism. People, and in the case of international society, states, can freely use their power in contractarian bargaining to get what they want. In right-based contractualism, persons reach agreement on the terms of their cooperation (and coexistence) based on impartiality and standards of reasonableness. Right-based contractualism justifies legal rules as reflecting the outcomes of hypothetical agreements that no moral agent could reasonably reject. In a contractualist world, states are required to take impartial standpoints in dealing with other states in international law-making activities and international law would have to comply with moral principles appropriately suited to international institutions.

It is important that we clarify the concepts we are using. Trachtman's contractarianism is economic. He does not deploy it in a strategy of moral justification. Rather, his argument is predictive and explanatory. It is social science. As an explanatory or predictive theory, Trachtman carefully identifies the limits of cooperation. Cooperation is unlikely unless it is in the interests of the participants to cooperate and transaction costs are low enough. But, if these conditions exist, then what would be the purpose of law in the first place? This is a Coasean ideal in which people can bargain to an efficient result regardless of the law. In the domestic variants of this model, when transaction costs are high enough, we need a sovereign. If we need a sovereign, we have to accept the Hobbesian view: no law without a sovereign. This reasoning played out in the literature when economic accounts of international law were beginning to take hold.⁴⁰ Trachtman comes out on the side of international law. His basic claim is that international law is the form that state cooperation takes.

Trachtman's economic contractarianism and my moral contractualism are complementary in their roles. If we enter into the realm of cooperation, and we value law from a moral point of view, then we need a theory-like contractualism to justify that cooperation. We might use game theory to predict when cooperation might occur or to evaluate actual compliance with the law, but the law itself should also have the sort of moral legitimacy that a contractualist procedure of moral justification can provide, if we value law's legitimacy in a moral sense. The easy acceptance of the use of power for private gain in the moral

40. Compare TRACHTMAN, *ECONOMIC STRUCTURE*, *supra* note 14, at ix–xi, and ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008), with JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006).

version of contractarianism is problematic for norm formation in international law.

Why not simply do as Dworkin says and return to the humanist “golden age?” After all, contractualism, as well as contractarianism, is typically associated with the social contract tradition. Should we not limit its relevance to what happens in states? I offer three responses to these doubts.

First, contractualism as a moral theory is about the form of moral argument, not about the political obligations of citizens to each other in states.⁴¹ Second, as explained above, the humanist tradition in international law was designed for an international law of coexistence, and frankly, justified some questionable action. It produced the worst sorts of justifications for colonial expansion, offensive war, predation, and exploitation. In a world of pervasive global cooperation, we need a theory to deliver a justification for law to set that cooperation in motion in a way that appeals to the considered moral convictions of peoples in societies who may be in worse-off positions than monarchs and trading companies, or in the contemporary context, elites, the rich and powerful, and multinational enterprises.

Consider these issues from the standpoint of trade. Trade was central to the humanism of the sixteenth and seventeenth centuries, which conceptualized as natural the connection between use of force and freedom to trade. The natural lawyers argued, among other things, that freedom to trade is a natural right; that man cannot establish institutions to get in the way of free trade; that land, if not properly cultivated and used productively in a European sense, could be freely appropriated because it is God’s creation being wasted; and that self-help to enforce nature’s law is justified.⁴² Humanist-inspired accounts may not

41. See T.M. Scanlon, *The Aims and Authority of Moral Theory*, 12 OXFORD J. LEGAL STUD. 1 (1992).

42. See generally RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* (1999); MARTINE JULIA VAN ITTERSUM, *PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES (1595–1615)* (2006); Peter Borschberg, *Hugo Grotius’ Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)* 34 (Inst. of Int’l Law & Justice, Working Paper No. 2005/14, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=871752.

Friedmann argues, reminiscent of Bentham, about natural law: “Any attempt to stamp a particular social order as being consonant with nature, and correspondingly, another as being contrary to nature, is a disguised way of giving the halo of perpetuity and sacrosanctity to a particular political or legal philosophy.” FRIEDMANN, *supra* note 2, at 78. In this passage, Friedmann cites to a work by a well-known arbitrator of the time, F.A. Mann, who argued that the payment of prompt, full, and adequate compensation in a nationalization of a foreign investment is a principle of natural law. These principles were

need to go down this route and can deviate from their intellectual ancestors, just as Kantian-inspired accounts do. Whether they will lose something fundamental about the natural in such a progression remains to be seen.

Third, strategies of moral justification influenced by the Enlightenment have been successful in identifying the moral relevance of institutions. Continuing with the trade discussion, in the sort of large-scale cooperation that Trachtman addresses in *The Future of International Law*, trade requires institutions. Institutions comprising a global order for economics and commerce create what Matthias Risse calls shared membership in the global order.⁴³ Institutions are human-created social practices. Markets are not natural entities like planets or trees. They do not exist in a state of nature. Their structure is not inevitable, existing outside the reach of any government. In fact, their structure depends on government. How we design markets is up to us and based on what we value. The inequality that comes from markets is within our control. When we deliberate about what we value, it is unlikely that we will only consider economic efficiency or economic liberty as relevant. We might want some form of fairness to set the terms of a cooperative endeavor, though we might disagree on what fairness requires. If it is the case that markets cannot exist without institutions, or cannot exist to the extent that they do as national and global economies without institutions, then we might want to be able to justify economic inequality brought about or perpetuated by these institutions. We also want to know how state power in trade negotiations may be exercised legitimately. These are questions that contractualism is well-equipped to answer.

Contractualism is about the moral legitimacy of international law. It might come into the formation of international law if we accept that states (and their officials) have what Dworkin calls a duty to improve the moral legitimacy of international law.⁴⁴ Contractualist principles might also lead to particular reactive attitudes about the actions of states and their officials. But, even with contractualism as a moral theory, we still need a way to pick out which social practices are norms of international law. We could adopt Dworkin's strategy and fuse concepts about law into a form of moral argument. I suggest a less ambitious approach, cohering with the distinction between analytical and normative jurisprudence

probably controversial at the time of Friedmann's writing, before the rise of neoliberal economic order starting in the late 1980s.

43. See MATTHIAS RISSE, ON GLOBAL JUSTICE (2012).

44. Dworkin, *supra* note 28, at 19–22. Is this a theme about duty of officials going back to Wasserman?

about domestic law and with the way that many moral philosophers engage with questions of moral justification.

How we go about picking out which social practices are norms of international law will depend on the beliefs and attitudes of persons who use and are subject to the law. Subordination to a hierarchy known as a sovereign is unnecessary for a positivist account of the law. As Alexander Orakhelashvili explains:

It is . . . difficult to see how the positiveness of law—that its postulation in an externally intelligible manner to repeatedly apply to facts covered by its content—inherently includes the element of subordination through command. It is right to say that such subordination is one way of creating positive law but portraying such subordination as the necessary condition for that would entail a logical conceptual overstretch.⁴⁵

My account of a transnational conception of legal positivism tries to dissolve the notion of the sovereign as an enabling condition for the law. A transnational conception of legal positivism, one which removes the state as an enabling condition for a legal system, might require that any candidate for legal practice meet five conditions: (1) acceptance by the participants in the legal system, the norm users, of the rules of the order as valid, binding, and authoritative; (2) systemic qualities of normative consequence within the putative legal system, making the normative order the system represents intelligible or comprehensible to the participants; (3) secondary rules and secondary rule officials, though they can be distributed across different state and non-state hierarchies, serving mainly an epistemological role in assisting in the identification of valid legal rules, particularly given conditions; (4) shared agency between secondary rule officials demonstrating sufficient mutual responsiveness and joint commitment for a legal system; and (5) primary rules dealing with issues that legal systems usually deal with, such as property, contract, rights, duties, and dispute resolution. The fourth condition relies on Scott Shapiro's planning theory of law, which is based on Michael Bratman's descriptions of shared agency, in particular his notion of a shared intentional activity.⁴⁶ I have used this account to elucidate the features of transnational commercial law.⁴⁷ It can be extended to

45. Alexander Orakhelashvili, *Introduction*, in RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW, *supra* note 25, at 8.

46. SCOTT SHAPIRO, LEGALITY 119–20 (2011).

47. John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN STATE L. REV. 119, 198 (2009).

fields of international law.⁴⁸

II. FRAGMENTATION

In *The Future of International Law*, Trachtman identifies the property of fragmentation in international law. He explains that international law is fragmented because “it tends to make and administer rules in separate functional categories, often without a clear and effective system for integrating the resulting rules.”⁴⁹ Fragmentation, according to Trachtman, comes from the “rudimentary” nature of international law.⁵⁰ “Greater integration” of international law might be required to deal with particular circumstances: (1) “natural overlaps between policy measures”; (2) to facilitate “broader and longer-term reciprocity when making agreements”; (3) when one type of agreement “might serve to balance out the distributive effects” of another; and (4) when “economies of scale or scope in the development of institutions” exist.⁵¹ Fragmentation relates to what Trachtman calls “congestion” in international law, the situation in which international law is increasingly called upon to regulate more areas or existing areas more intensively.⁵² “With congestion comes collision” and if the collision produces undesirable consequences, then we might say it is because of the fragmented nature of international law.⁵³ It is a “developmental problem of the international governmental system, in which there is a lag between congestion and measures to produce coherence.”⁵⁴ Fragmentation receives ongoing attention in the academic literature.⁵⁵

48. John Linarelli, *International Law: Practical Authority, Global Justice*, 103 AM. SOC'Y INT'L L. PROC. 382, 383 (2010).

49. TRACHTMAN, *FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 9.

50. *Id.* at 9.

51. *Id.* at 9–10.

52. *Id.* at 217.

53. *Id.* at 217.

54. *Id.* at 222.

55. See, e.g., MARIO PROST, *THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW* (2012); Joel Trachtman, *The International Law of Financial Crisis: Spillovers, Subsidiarity, Fragmentation and Cooperation*, 13 J. INT'L ECON. L. 719 (2010); Eyal Benvenisti, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007); Tim Stephens, *Multiple International Courts and the "Fragmentation" of International Environmental Law*, 25 AUS. YBIL L. 227 (2006); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self Contained Regimes in International Law*, 17 EURO. J. INT'L L. 483 (2006). Martti Koskenniemi deals with fragmentation in the context of custom and its codification. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 389–97 (2005).

A way to understand fragmentation exists which, I think, is illuminating, but which may not be obvious to international lawyers. It connects to the contractualist discussion of the prior section, and it comes from Rawls. Rawls uses the concept of a “well-ordered society” in his political philosophy.⁵⁶ For Rawls, a well-ordered society is one in which all reasonable persons within it accept the same public conception of justice, their acceptance and the principles of justice are public knowledge, and the principles of justice are reflected in the society’s laws and institutions, in what Rawls calls the basic structure of society.⁵⁷ Well-ordered societies can be “liberal” or “decent.”⁵⁸ Reasonable members of well-ordered liberal societies conceptualize themselves as free and equal and as having a liberal conception of justice.⁵⁹ Reasonable members of well-ordered decent societies may accept hierarchy in their societies but accept a non-liberal common good conception for their society.⁶⁰ In *The Law of Peoples*, Rawls argues that the best we could hope for is a “reasonably just society of peoples” comprised of these well-ordered societies.⁶¹ On this foundation, Rawls specifies eight principles, which parallel well-accepted doctrines of public international law, citing to Brierly’s *Law of Nations*.⁶² In effect, Rawls specifies an international law of coexistence for well-ordered societies.

In Rawls’s theory, a well-ordered liberal society has a public conception of justice and that conception of justice is implemented in the basic structure of society. The basic structure of society includes a domestic legal system, though the debate continues about the legal categories included in the basic structure of society and hence subject to Rawlsian principles of justice.⁶³ We could also draw rough comparisons to

56. See John Rawls, *A Kantian Conception of Equality*, in COLLECTED PAPERS 254–55 (Samuel Freeman ed., 1999).

57. JOHN RAWLS, A THEORY OF JUSTICE 453–54 (rev. ed. 1999); JOHN RAWLS, POLITICAL LIBERALISM 15 (1993); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 8 (Erin Kelly ed., 2001); JOHN RAWLS, THE LAW OF PEOPLES 4–5 (1999) [hereinafter LAW OF PEOPLES].

58. RAWLS, LAW OF PEOPLES, *supra* note 57, at 3.

59. *Id.* at 3–4.

60. *Id.* at 4.

61. *Id.* at 124.

62. *Id.* at 37 n.42 (citing J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE LAW OF PEACE (6th ed. 1963)). Rawls also cites to TERRY NARDIN, LAW, MORALITY AND THE RELATIONS OF STATES (1983). Nardin is a political theorist.

63. See Kevin A. Kordana & David H. Blankfein Tabachnick, *The Rawlsian View of Private Ordering*, 25 SOC. PHIL. & POL’Y 288, 288–89 (2008); Kevin A. Kordana & David H. Tabachnick, *On Belling the Cat: Rawls and Tort as Corrective Justice*, 92 VA. L. REV. 1279, 1288–90 (2006); Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598, 598–600 (2005).

Raz's earlier writings about the claims of comprehensiveness, supremacy, and openness of municipal legal systems.⁶⁴ So, at the domestic level, we have both a public conception of justice, reflected in the legal system and institutions of government of the state in question, and which that legal system and these institutions claim to be comprehensive in scope of coverage. Trachtman calls this the "gold standard" for a legal system, which could be read to mean that he does not ascribe anything essential to the properties of a legal system I have just described.⁶⁵ But I do think that there is a significant explanatory power in the distinctions that I am drawing here.

I have just very summarily sketched that part of Rawls's *The Law of Peoples* offering an ideal theory, an exploration of human possibilities in the form of a "realistic utopia."⁶⁶ Part of his argument is that we could not conceive of a realistic utopia for the world which would require his two principles of justice to apply outside of or across societies.⁶⁷ For Rawls, the sort of "social cooperation" (a phrase essential to Rawls's contractualist theory)⁶⁸ which would be necessary for a realistic utopia of global justice,⁶⁹ implemented through international law and international government, would simply be too incredible for us to accept.

But, if international law evolves into a law of cooperation, and if the political philosophers are right that a global basic structure of society already exists or is on the rise,⁷⁰ might we start holding international law to something like a public conception of global justice? Is a utopia demanding more rigorous principles of justice starting to become more realistic? Trachtman argues that fragmentation may or may not be a problem depending on the circumstances. I believe it is more generally a problem because it relates to a form of social cooperation that would be needed for international law to truly become a law of cooperation. Fragmentation is not contingent or dependent on circumstances, nor is it occasional. It is conceptual. It is a general structural feature of international law, applicable across all of the categories of international

64. If we do so, we should bear in mind the very different projects Raz and Rawls undertook. See JOSEPH RAZ, *THE AUTHORITY OF LAW* ESSAYS ON LAW AND MORALITY 116–20 (1979); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* (1980).

65. TRACHTMAN, *FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 27.

66. RAWLS, *LAW OF PEOPLES*, *supra* note 57, at 6.

67. *Id.* at 36.

68. The citations would be numerous. See, e.g., Rawls, *POLITICAL LIBERALISM*, *supra* note 57, at 22.

69. Such a global justice would include distributive justice.

70. Charles Beitz produced the early influential work, but there are many others. See CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979).

law.

To understand why fragmentation is a serious problem for international law, we first need to get clear on what we mean by cooperation. In game theory, cooperation is something to be predicted; the terms of that cooperation are usually the result of the behavioral assumptions we make about the players and about their payoffs. Cooperation in game theory usually requires a set of conditions to produce a narrow set of cooperative outcomes, such as common pools resources or limited forms of collective action such as infinitely repeating exchanges.⁷¹ A more ambitious moral approach to game theoretic cooperation is the rational bargaining solution to social cooperation, discussed above, an interest-based contractarian account.⁷² The difference between economic and moral contractarianism, as explained in the prior section, is that the moral contractarian argues that contractarianism is a theory about moral justification, in addition to (or instead of) being an explanatory and predictive theory about how people behave.

These differences suggest a two-fold classification for understanding cooperation: one in which we ask why people cooperate and the other in which we ask about the terms of that cooperation. If we are only asking why people cooperate and we are trying to predict when cooperation will occur, then the terms of the cooperation might not be so important to us. In these cases, fragmentation may not concern us, or at least not concern us in all cases. But, if we evaluate the terms of that cooperation, then fragmentation becomes a bigger problem. If we evaluate fragmentation using the terms of cooperation set by familiar moral concepts of right or good, which require that cooperation help people lead decent lives, then fragmentation means there is no cooperation, and that cooperation has failed in a moral sense, even if it is succeeding in a predictive or economic sense.

Let's add into the discussion the problem of agency (in an economic and not a moral sense) that international law faces. At the international level, no "government" exists that might be said to be an agent of people, at least not directly so. This is a familiar and well-examined issue in international law scholarship, one which *The Future of International Law* addresses.⁷³

71. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); RUSSELL HARDIN, COLLECTIVE ACTION (1982).

72. See, e.g., DAVID GAUTHIER, MORALS BY AGREEMENT (1986); Freeman, *Moral Contractarianism*, *supra* note 36.

73. TRACHTMAN, FUTURE OF INTERNATIONAL LAW, *supra* note 1, at 269, 282–83.

International law has a long way to go to get close to being a law of cooperation, if we understand cooperation in its moral sense. Though we may not be able to hold actual domestic legal systems to Rawlsian ideals either, we can say without reservation that international law is seriously disordered, more so than at least developed and mature domestic legal systems. And with disorder comes fragmentation. This serious disorder should not surprise us. It comes from years of power and sovereignty being the ultimate arbiter of what counts as international law.

Examples of serious disorder are numerous. Fragmented regulatory regimes are necessarily partial to what they are regulating. An example that many like to use is trade and the environment. The World Trade Organization Appellate Body made a significant advance in its *Shrimp/Turtles* decision by effectively creating a balancing test for evaluating the legality of trade measures to protect the environment. General Agreements on Tariff and Trade (“GATT”), article XX(g) provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.⁷⁴

The Appellate Body interpreted GATT, article XX(g) to provide for a balancing test: “[T]he measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.”⁷⁵ In finding U.S. measures overbroad and not the least restrictive means to achieve non-trade aims, the Appellate Body in *Shrimp/Turtles* ruled that the U.S. failure to engage in international efforts to achieve its intended aims weighed against a finding that the

74. World Trade Organization, General Agreement on Tariffs and Trade, art. XX, TIAS 1700 (1947).

75. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 151, WT/DS58/AB/R (Oct. 12, 1998) (quoting Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996)); see Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333, 361–64 (1999) [hereinafter *Shrimp and Shrimp Products*].

U.S. measure was lawful under GATT, article XX(g).⁷⁶ While dispute settlement decisions of this sort go a long way to deal with fragmentation, still specialized tribunals are limited in what they can achieve. A single counterexample makes the point: there could be a case in which an environmental treaty requires a WTO member to do something that is clearly not the least restrictive means available from the standpoint of international trade, and there is nothing the Appellate Body could do other than to rule against the WTO member in any WTO dispute settlement proceeding. Of course, this WTO member would probably be unlikely to agree to any such treaty in the first place, if the WTO lawyers advise him or her that entering into such a treaty would violate preexisting WTO obligations. This is an example of how fragmentation produces disorder in international law.⁷⁷

Fragmentation will persist in the forms of “limited government” we currently have in international law and organization. The focus on order versus disorder and moral versus economic forms of cooperation hopefully can assist in the search for solutions that are both efficacious and just.

III. WHAT ABOUT CUSTOM?

What is the role of customary international law as international law moves towards an international law of cooperation? There seems to be no clear position on this question in *The Future of International Law*, which is perhaps telling about the decline in importance in custom if we are to move towards an international law of cooperation. In the discussion of fragmentation in the book, we receive a clear signal of why this is true. To quote, “when customary international law was the primary means for making international law, and its products were generally universal, fragmentation was a significantly less pressing issue.”⁷⁸ Two reasons for this are offered. First, custom “had the ability to be nuanced, and to take into account varying concerns—after all, it was socially rooted in behavior, not produced at diplomatic conferences narrowly focused on a particular issue.”⁷⁹ Second, to the extent custom is universal, the problem of multiple legislators did not exist.⁸⁰ Fragmentation, says Trachtman, “is largely an artifact of treaty law made in different fora, with different

76. *Id.* at ¶¶ 168, 169, 177.

77. Of course, I do not deal with the effects of a subsequent treaty on the legal obligations under a prior treaty under domestic law.

78. TRACHTMAN, *FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 226.

79. *Id.* at 226.

80. *Id.* at 226.

groups of parties.”⁸¹

In his 1964 book, Friedmann foresaw the decline of customary international law:

It is an obvious reflection of the radically different character and methods of international relations in our time that custom can no longer be as predominant or important a source of law as it was in the formative period of international law. [C]ustom is too clumsy and slow moving a criterion to accommodate the evolution of international law in our time, and the difficulties are increased as the number of subjects of the law of nations swells from a small club of Western Powers to 120 or more “sovereign” states. More importantly, custom is an unsuitable vehicle for international “welfare” or “co-operative” law. The latter demands positive regulation of economic, social, cultural and administrative matters, a regulation that can only be effective by specific formulation and enactment. It is only because the classical international law was overwhelmingly concerned with the mutual obligations of abstention and tolerance governing the diplomatic intercourse between nations that custom, arising out of state practice, could play a predominant role. It must be replaced by more articulate and specific instruments of law-making, *i.e.* in the absence of an international legislative body, by bilateral or multilateral treaties Even in some of the domains of classical international law, as in the various aspects of the Law of the Sea, multilateral conventions arising out of the preparatory work of international bodies and international conferences, tend to replace custom.⁸²

Friedmann was not simply negative about the role of custom in the future of international law. His conclusion was that custom, “while plainly inadequate as a major source of modern international law, in the rapidly expanding, complex[,] and articulate pattern of modern international relations is still an important factor in the evolution or modification of the principles of classical international law, governing the adjustment of national sovereignties.”⁸³

Olufemi Elias and Chin Leng Lim, in *The Paradox of Consensualism in International Law*, citing Friedmann, made this point again in the 1990s, but in the context of providing a defense for custom as an

81. *Id.* at 226.

82. FRIEDMANN, *supra* note 2, at 121–22.

83. *Id.* at 123 (citation omitted).

important source of international law:

The nature of customary international law (based traditionally as it is on the accumulation of the individual practices and perceptions of States) and the consequent tardiness in the customary law-making process tend to result in the view that international custom is unable to address these issues satisfactorily. Customary law would seem to be better suited to an international law of coexistence as distinct from the demands of an international law of cooperation and interdependence.⁸⁴

Elias and Lim went on to argue that a treaty is effective primarily when a preexisting “political consensus” supports it.⁸⁵ In other words, “the continued efficacy of a treaty is not a question of treaty law.”⁸⁶

In his contractarian account, Trachtman has developed, with George Norman, a repeated multilateral prisoner’s dilemma model for the formation of and compliance with customary international law.⁸⁷ In *The Future of International Law*, Trachtman extends this account to deal with the decision-making process and lobbying within states and to the formation of and compliance with international law generally.⁸⁸ This form of rational cooperation may lead to alternative institutional design choices, including treaties. There may also be cases in which customary international law might be binding when the conditions of the game are not met and those situations just might be the acid test of why customary international law has the force that it does, or in the terminology of new institutional economics, why customary international law matters.⁸⁹

Friedmann can be said to be making five claims about the role of custom in a future international law of cooperation. First, he claims that custom cannot provide the sort of concrete, fine-grained, positive rules necessary for regulation.⁹⁰ Second, he claims that custom is “too clumsy and slow moving” for an international law of cooperation.⁹¹ Third,

84. OLUFEMI A. ELIAS & CHIN LENG LIM, THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW 173–74 (1998) [hereinafter CONSENSUALISM IN INTERNATIONAL LAW] .

85. *Id.* at 190.

86. *Id.*

87. George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541 (2005).

88. TRACHTMAN, FUTURE OF INTERNATIONAL LAW, *supra* note 1, at 54–64.

89. I borrow a catchphrase of new institutional economics loosely here. See Rudolf Richter, *The Role of Law in New Institutional Economics*, 26 WASH. U. J.L. & POL’Y 13 (2008); John N. Droback, *Law Matters*, 76 WASH. U. L.Q. 97 (1998).

90. FRIEDMANN, *supra* note 2, at 122.

91. *Id.* at 122. Elias and Lim use the word “tardiness.” ELIAS & LIM, CONSENSUALISM IN INTERNATIONAL LAW, *supra* note 84.

customary international law is meant for a small club of “Western powers” and does not reflect the realities of international society.⁹² Fourth, customary international law has a limited domain, dealing only with coexistence.⁹³ Fifth and finally, Friedmann argues that customary international law tends to get replaced by convention anyway as the law and activity relating to it becomes more complex.⁹⁴ Each of these claims will be addressed in turn.

First, the argument that customary international law is unsuitable for an international law of cooperation because it does not provide concrete, fine-grained, and positive rules seems to fail. Let’s assume for the sake of argument that customary rules are more general or open textured than treaty rules. This is a dubious generalization, as many legal rules found in treaties are similar in the respects that Friedmann finds problematic. Compare the most favored nation and national treatment provisions of a typical trade treaty with the legal rules of use of force in self-defense, for example. That rules have this structure, however, does not mean they are unsuitable for a law of cooperation. Similar rules are in abundance in the domestic law of political communities, in which robust principles of justice are relevant, if one accepts the sort of contractualist political theory discussed in the prior sections. The codes of legal systems in the civilian tradition are full of such general principles, as is judge-made law in countries of the common law tradition. The meanings of these simple rules are often “filled in” through commentary, by case law, through restatements, and so on. These arguments do not require us to accept the naïve notion that general rules of law fully determine every case that comes before a court or a tribunal. The basic point here is that what Friedmann identifies is an issue for law generally, domestic or international, and indeed for any sort of cooperation by humans that seek to be governed by rules.

Second, Friedmann claims that custom is “too clumsy and slow moving” for an international law of cooperation.⁹⁵ Whether this is true depends on what international lawyers mean when they refer to customary international law. My worry here is that confusion persists on that very basic question of a conceptual nature.

The *Statute of the International Court of Justice* identifies custom as “evidence of a general practice accepted as law.”⁹⁶ It has been a

92. FRIEDMANN, *supra* note 2, at 122.

93. *Id.* at 122.

94. *Id.* at 122.

95. *Id.* at 122.

96. Statute of the International Court of Justice, art. 38(1)(b), 59 Stat 1031 (entered into force Oct. 24, 1945).

longstanding practice to identify custom using two elements: state practice and *opinio juris*. In the merits decision of the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua*, the court deemphasized the state practice element, finding customary international law prohibiting use of force and prohibiting intervention from statements such as General Assembly resolutions and finding that it was sufficient if state practice was generally consistent with statements of rules in such documents.⁹⁷ The dilution of the state practice element is problematic. The decision has been the subject of much discussion.⁹⁸ We want to avoid the problem identified by Sir Robert Jennings: “[M]ost of what we perversely persist in calling customary international law is not only *not* customary law; it does not even faintly resemble a customary law.”⁹⁹ Koskenniemi identifies the problem: “Sometimes standards are included in custom regardless of whether they have been backed by a history of general compliance. ‘Custom’ has become a generic name for nearly all non-conventional standards, including acts and decisions of international organizations and conferences.”¹⁰⁰ He laments:

A remarkable fact about custom is that it is constantly in danger collapsing either into tacit agreement or a naturalistic principle. The function of a separate doctrine about custom is to make room for a law between these two; a law understood in an ascending fashion (as agreement) and a law understood in a descending way (as non-consensual principle).¹⁰¹

Conceptual distinctions should be made between rules: (1) derived from a reasoning process; (2) seen as self-evident in a natural law sense; and (3) identified as social practices, such as customary rules. If we ignore these concepts, we risk conflating custom with general principles

97. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 99100 (June 27); see Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758–59 (2001).

98. See, e.g., Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRALIAN YEARBOOK OF INT'L L. 82 (1992); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. OF INT'L L. 757 (2001).

99. Roberts, *supra* note 97, at 759.

100. KOSKENNIEMI, *supra* note 55, at 392 (citation omitted).

101. *Id.* at 397 (citation omitted).

of law, another distinct source of international law.¹⁰² More generally and perhaps more seriously, confusion about concepts could lead to mistakes in making determinations about legal obligations.

Of course, maintaining clarity on the concept of custom does not mean that we have to maintain strict formal boundaries around the sources of international law. The process of deriving customary norms from treaties of widespread significance was partly at issue in both *Nicaragua* and the *North Sea Continental Shelf* cases, the most important of ICJ decisions on the role of customary international law.¹⁰³

The relevance of this discussion for Friedmann's second claim is that if we dilute the state practice element for the formation of customary international law, it will be formed more quickly and so its slow-moving formation may be less a worry, though its clumsy nature may still persist, whatever that may mean. If the primary inquiry to find custom is *opinio juris*, then judges might have more discretion to find it. The bigger worry just might become its coherence.

Third, Friedmann criticizes customary international law as unsuitable for an international law of cooperation because of its homogeneity. According to Friedmann, it is meant for a small club of "Western powers" and does not reflect the realities of a pluralistic international society. This claim seems to contradict the validity criteria for custom. We now have to account for an increasing number of states, all of which have state practice, and their sense of legal obligation (*opinio juris*) has to be evaluated in any process of identifying custom. These facts suggest to us that custom just might be more difficult to find, unless we take an ambitious view of *Nicaragua* and continue to weaken the state practice element. Friedmann's claim may be a product of the times of his writing, when post-colonial states struggled to construct a new international economic order in which particular aspects of classical international law were seen to be in the way of true independence. While published sometime after Friedmann's book, one can sense the tension in Prosper Weil's well-known article lamenting the relative normativity of international law, published in the *American Journal of International Law* in 1983.¹⁰⁴

102. Statute of the International Court of Justice, art. 38(1)(b), 59 Stat 1031 (entered into force Oct. 24, 1945) ("the general principles of law recognized by civilized nations"); see Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL DOCTRINE, PHILOSOPHY AND THEORY* (Ronald St. John McDonald & Douglas M. Johnston eds., 1983).

103. *Nicar. v. U.S.*, 1986 I.C.J. 14; *North Sea Continental Shelf*, 1969 I.C.J. 3 (1969).

104. Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983). On Weil's article, see John Tasioulas, *In Defence of Relative*

Fourth, Friedmann argued that customary international law has a limited domain, dealing only with coexistence. Much of customary international law does indeed deal with coexistence. Some of those rules on coexistence are fundamental in nature, relating to, for example, the lawful use of force.¹⁰⁵ The domain of customary international law has to be understood in the context of its relationship to other sources, and in particular, to treaties. We can think of general international law as having a constitutional function in the international legal system. The rules of at least universal customary international law are binding on all states.¹⁰⁶ They may be seen as filling gaps left by treaties.¹⁰⁷ Beyond gap filling, custom interacts with treaties in a number of nuanced ways. Relating to Friedmann's fifth argument, some treaties codify custom. Others go further and reflect progressive development of international law. Customary rules may have relevance in treaty regimes on dispute settlement.¹⁰⁸ Custom may develop out of treaty rules that are widely accepted and get incorporated into state practice.¹⁰⁹ Treaties may rely on custom for various legal standards, and states and tribunals may have to resort to this preexisting custom when applying a treaty. Treaty interpretation may solidify into custom about the particular meanings of treaty provisions.

Trachtman is right to conclude that custom will have a subsidiary role in an international law of cooperation. On this issue, he is well-supported by Friedmann and others. Returning to Trachtman's functionalism, the various areas of international activity that he has identified as in need of more international law will be in need of treaties as the primary source of international law. As treaty-making among states develops further in the areas of cyberspace and cyber-security, environmental protection and public health, global finance, and economic liberalization, it would be worth further study at a future date to see what has happened to customary international law and to determine whether the predictions of this section as to its fate are accurate.

Normativity: Communitarian Values and the Nicaragua Case, 16 OXFORD J. LEGAL STUD. 85 (1996).

105. See Ian Brownlie, *International Law and the Use of Force by States, Revisited*, 1 CHINESE J. INT'L L. 1 (2002).

106. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535-36 (2001).

107. *Id.*

108. *Id.* at 537.

109. See *North Sea*, 1969 I.C.J. 3; *Nicar. v. U.S.*, 1986 I.C.J. 14.

CONCLUSION

The Future of International Law performs an important function for international law. It guides us on what a new institutional economist might call the possibilities for an “institutional design” for a global society. Given its grounding in new institutional economics, it is pragmatic about the possibilities of cooperation, looking closely at the social costs of such cooperation and the strategic behavior of international actors. This is important work.

In his 1977 work, *Just and Unjust Wars*, Michael Walzer, writing in the context of the United Nations Charter as a legal instrument during the Cold War, said: “The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in.”¹¹⁰ He also argued:

Policy[-]oriented lawyers are in fact moral and political philosophers, and it would be best if they presented themselves in that way. Or, alternatively, they are would-be legislators, not jurists or students of the law. They are committed, or most of them are committed, to restructuring international society—a worthwhile task—but they are not committed to expounding its present structure.¹¹¹

The divisions Walzer identifies are instructive but may not capture fully the work that many academic lawyers undertake, going beyond description and exercises in elucidating the internal coherence of international law. Many contemporary “policy-oriented” international lawyers operate in a middle ground. They are not Kant’s “sorry comforters,” nor have they abandoned traditional legal analysis. Depending on the tradition in which they work, policy-oriented lawyers can use a thorough knowledge of the positive law for critique, in evaluation, in putting the law through a procedure of moral justification, in developing policy choices, in advising on institutional design, and in exposing ideologies. These tasks take both knowledge of the law and an understanding of another discipline, usually in the social sciences or philosophy. *The Future of International Law* successfully takes this

110. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* xx–xxi (1977). These arguments remind us of Onora O’Neill’s concerns about reliance on positive law of human rights. See ONORA O’NEILL, *BOUNDS OF JUSTICE* 99–100 (2000).

111. WALZER, *supra* note 110, at xxi. Walzer went on to explain his own task to be “to account for the ways in which mans and women who are not lawyers but simply citizens (and sometimes soldiers) argue about war, and to expound the terms we commonly use.” *Id.*

middle ground and promotes a significant advance of our understanding of international law.