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**ABSTRACT**

International law is a legal enigma. Because of international law's unfamiliar aspects and unique challenges, its legitimacy as "true law" is often called into question. This Comment offers a novel application of sociology to international law, tailored to the ambition of reducing the skepticism that international law is not truly law. In a world that is continuously moving toward globalization, international law's importance is increasing.

An application of sociology's three dominant paradigms—structural functionalism, social conflict, and symbolic interactionism—to international law reveals that the skepticism, although not misplaced per se, is frequently misguided. First, structural functionalism shows that States are inclined to comply with international law for either national or global purposes. Second, social conflict illuminates how international law strengthens over time and why international law's strength appears greater in some States than in others. Third, symbolic interactionism demonstrates that unfamiliarity with international law, alone, is often the reason for the fallacious conclusion that international law is not truly law.

Tasked with overseeing the conduct of almost 200 sovereign States and billions of citizens, within the realm of jurisprudence, international law is sui generis. Its uniqueness, however, does not invariably imply the absence of a capability to regulate behavior. Although imperfect, international law remains essential to the functionality of our globalized world. Accordingly, a deeper understanding of international law's legitimacy is imperative. Overall, to properly understand international

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law's place as a legitimate body of law, this Comment posits that sociology's three main paradigms assist in debunking the skepticism that international law is not truly law.

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## I. INTRODUCTION

Is international law truly law?[1] Learned legal scholars and laypersons alike often ask this simple question, yet it never yields a simple answer.[2] Widely differing views—from those who answer—in conjunction with shared unfamiliarity of the subject—from those who ask—perpetuate skepticism as to whether international law is truly law.[3]

1. Public "[i]nternational law has long been burdened with the charge that it is not really law." JACK L. GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (2005). However, "[t]he 'serious students of law' who claim that international law isn't really 'law' make the same mistake that some political scientists make in ignoring norms in order to be 'scientific' in their 'descriptions.'" Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U.L. REV. 1293, 1314 (1984).

2. *See* GOLDSMITH, *supra* note 1, at 3.

3. *See* D'Amato, *supra* note 1, at 1293–94.

Due to the numerous obstacles that international law faces,[4] the instinctive skepticism surrounding it is not misplaced per se; however, an overreliance on that skepticism is misguided for a number of reasons.[5] No savvy international lawyer would proclaim international law to be a puissant force with binding authority over all 193 United Nations Member States.[6] But if international law is not truly law, it would follow that the United Nations would cease to exist.[7]

Therefore, "Is international law truly law?" is the wrong question to ask when inquiring about the practicality of this legal realm. Instead, an inquirer should ask, "Is the skepticism of international law appropriate?" Applying sociology's three dominant paradigms, this Comment answers that question in the negative.[8]

Specifically, this Comment strives to show that the skepticism is unwarranted because, although it instinctively appears reasonable, the skepticism spawns primarily from a lack of understanding of international law's scope and capabilities.[9] To address the skepticism surrounding international law, this Comment analyzes the two primary, traditional sources of international law—treaties and customs[10]—through the lenses of sociology's three dominant paradigms: structural functionalism, social conflict, and symbolic interactionism.[11]

Part II of this Comment discusses treaties and customs to provide an overview of the history and contours of public international law.[12] Part II also explains the frameworks of the three paradigms of sociology.[13] Part III then applies the sociological paradigms to treaties and customs, positing that the skepticism surrounding international law is overstated.[14] Part IV concludes this Comment with a summary of why sociology's three main paradigms help to debunk the skepticism surrounding international law.[15]

4. Two of international law's noteworthy obstacles include the lack of "a comprehensive judicial system with compulsory jurisdiction" and the absence of "a central executive authority to coerce compliance." BARRY E. CARTER ET AL., INTERNATIONAL LAW 8 (7th ed. 2018).

5. *See* GOLDSMITH, *supra* note 1, at 3–4.

6. *See Member States*, U.N., https://bit.ly/3cbvrmz (last visited Dec. 17, 2021).

7. *See generally* U.N. Charter (providing the foundation of the United Nations).

8. *See infra* Sections III.A–C.

9. *See infra* Sections III.A–C.

10. *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102 (AM. L. INST. 1987).

11. *See* HEATHER GRIFFITHS ET AL., INTRODUCTION TO SOCIOLOGY 14–18 (2d. ed. 2017).

12. *See infra* Section II.A.

13. *See infra* Section II.B.

14. *See infra* Sections III.A–C.

15. *See infra* Part IV.

## II. BACKGROUND

Throughout history, sociology has played an important role in contextualizing social issues.[16] In examining the intersection of sociology and law, an indisputable relationship exists between them.[17] Scholars refer to the interdisciplinary approach embodying this relationship as the "sociology of law."[18] This approach enables its users to achieve a deeper understanding of jurisprudence by applying sociological theories and methods to law.[19] The sociology of law is often used to contextualize domestic legal systems.[20] However, as this Comment demonstrates, it can also be used to analyze international law. To better understand how the sociology of law can facilitate a deeper comprehension of international law, this Section first explores the latter subject's main sources of authority—treaties and customs—and then examines sociology's three dominant paradigms.[21]

### *A. Public International Law: The Law of Nations*

Public international law, more commonly referred to as "international law,"[22] focuses on the conduct of "States,"[23] as well as

16. *See, e.g.*, EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 13–35 (George Simpson ed., John A. Spaulding & George Simpson trans., The Free Press 2013) (1897) (analyzing the sociological context behind suicide); *Frontline: A Class Divided* (PBS television broadcast Mar. 26, 1985) (documenting Jane Elliott's *Blue Eyes/Brown Eyes Exercise*); Philip Zimbardo et al., *The Stanford Prison Experiment: A Simulation Study of the Psychology of Imprisonment*, STAN. UNIV. (Aug. 1971), https://stanford.io/3nT7bwJ (studying, inter alia, the role of power in social interaction and human behavior).

17. *See* NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 1 (Martin Albrow ed., Elizabeth King-Utz & Martin Albrow trans., Routledge 2d ed. 2013) (1972) ("All collective human life is directly or indirectly shaped by law. Law is like knowledge, an essential and all-pervasive fact of the social condition.").

18. *See generally* A. JAVIER TREVINO, THE SOCIOLOGY OF LAW: CLASSICAL AND CONTEMPORARY PERSPECTIVES (Routledge 2017) (1996) (offering a comprehensive overview of the different theories of the sociology of law).

19. *See* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 15–22 (1998).

20. *See, e.g.*, Elliott Currie, *Sociology of Law: The Unasked Questions*, 81 YALE L.J. 134, 146–47 (1971) (analyzing the American criminal justice system); Ji Wei-Dong, *The Sociology of Law in China: Overview and Trends*, 23 L. & SOC'Y REV. 903, 905–07 (1989); Frank K. Upham, *What's Happening in Japan, Sociolegalwise*, 23 L. & SOC'Y REV. 879, 879—81 (1989).

21. *See infra* Sections II.A–B.

22. Notably, legal definitions of "international law" differ. *Compare* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 2 (Rüdiger Wolfrum ed., 2006) ("International law is the legal order which is meant to structure the interaction between entities participating in and shaping international relations."), *with International Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[International law is t]he legal system governing the relationships between [States but] more modernly, [international law includes] the law of international relations, embracing not only [States] but also such

"international organizations,"[24] regarding their relations inter se.[25] International law, although an aged concept, continues to be dynamic, especially amid a rapidly linear modern era of globalization.[26] Nevertheless, international law faces numerous obstacles, such as operating with courts that lack comprehensive compulsory jurisdictions[27] and States that possess inherent sovereign rights.[28]

These obstacles perpetuate skepticism that international law is not truly law.[29] While these barriers pose challenges to international law, it does not follow that they render international law illegitimate.[30] Moreover, substantial advancements have corrected several of these impediments.[31] Despite such advancements, the two primary sources of international legal authority—treaties and customs—remain unchanged.[32] Treaties possess deceiving similarities to contracts.[33] But

participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes).").

23. When discussing international law, the term "State" refers to the colloquialisms of "nation" or "country." *See* CARTER, *supra* note 4, at 449–50 ("States are the principal persons under international law . . . . [S]tates can create international law by entering into international agreements or through practice that can lead to customary international law. A [S]tate also has extensive rights and duties under international law . . . .").

24. *See* Int'l L. Comm'n, Draft Articles on the Responsibility of International Organizations, in Report of the International Law Commission on the Work of its Sixty-third Session, U.N. Doc. A/66/10, at 49 (2011) ("'[I]nternational organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.").

25. *See* 44 AM. JUR. 2D *International Law* § 1 (1964); *see also* Garner v. Teamsters, Chauffeurs & Helpers Loc. Union No. 776, 346 U.S. 485, 495 (1953) ("[P]ublic international law is applicable to the relations between [S]tates.").

26. *See* Frederic Megret, *Globalization and International* Law, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1 (Oxford Univ. Press ed., 2006) ("[T]he implications of globalization for international law . . . are intrinsically related to how international law itself evolves.").

27. *See* CARTER, *supra* note 4, at 7.

28. *See* Cynthia R. L. Fairweather, *Obstacles to Enforcing International Human Rights Law in Domestic Courts*, 4 U.C. DAVIS J. INT'L L. & POL'Y 119, 132 (1998).

29. *See* GOLDSMITH, *supra* note 1, at 3.

30. *See id.*

31. The most notable advancement in international law is the inclusion of individual rights instead of a focus on only States' rights. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); *see also Universal Declaration of Human Rights*, U.N., https://bit.ly/3DLLuDu (last visited Dec. 17, 2022) ("The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights . . . . It sets out, for the first time, fundamental human rights to be universally protected . . . .").

32. *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102 (AM. L. INST. 1987); *see also* CARTER, *supra* note 4, at 70 (explaining that treaties may also be labeled "convention . . . , agreement, covenant, charter, statute, and protocol").

33. *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 301 cmt. d (AM. L. INST. 1987) ("A[ treaty], as defined, does not include a contract by a [S]tate, even with another [S]tate, that is essentially commercial in character and is intended to be governed by some national or other body of contract law.").

just as customs are legal instruments unique to international law,[34] so too are treaties.[35]

1. International Treaties: The Agreements of Nations

A treaty is an "international agreement" that creates a shared expectation between States.[36] States have used this legal tool over millennia[37] to legally bind "party States"[38] to a "duty of compliance."[39] A treaty can be a bilateral or multilateral agreement.[40] But regardless of the number of signatories to a treaty, the binding force behind it, "*pacta sunt servanda*,"[41] remains the same.[42]

Latin for "agreements must be kept,"[43] *pacta sunt servanda* is universally recognized among all United Nations Member States.[44] The Vienna Convention on the Law of Treaties ("VCLT")[45] illuminates the rule's gravitas: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[46] Understandably, if States

34. *See id.* § 102(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

35. *See id.* § 102(1)(b).

36. *See* Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331, 333 [hereinafter VCLT] ("'[T]reaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.").

37. *See, e.g.*, *Replica of Peace Treaty between Hattusilis and Ramses II*, U.N., https://bit.ly/3irZNoc (last visited Dec. 17, 2022) ("[The] Kadesh Peace Treaty[, originally a clay tablet dated 1269 B.C.,] is the oldest known peace treaty."); Violet Shillington, *The Beginnings of the Anglo-Portuguese Alliance*, *in* TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 124–32 (1906) (describing the effects of the 1386 Treaty of Windsor, which formed an alliance between Portugal and England); Treaty of Friendship, Commerce and Navigation, Japan-U.S., art. X, Apr. 2, 1953, 4 U.S.T. 2063.

38. RESTATEMENT (THIRD) OF FOREIGN REL. L. § 301(2) (AM. L. INST. 1987) ("'[P]arty' means a [S]tate or international organization that has consented to be bound by the international agreement and for which the agreement is in force."); *see id.* § 324(1) (stating that an obligation is omnipresent for a State who is party to a treaty, "but [a treaty] does not create either obligations or rights for a third [S]tate without its consent").

39. CARTER, *supra* note 4, at 70.

40. *See id.* at 69 ("[Treaties] can be bilateral (i.e., between two countries) or multilateral [(i.e., between more than two countries)].").

41. VCLT, *supra* note 36, art. 26, at 341.

42. *See id.*

43. *Pacta Sunt Servanda*, BLACK'S LAW DICTIONARY (11th ed. 2019).

44. *See* VCLT, *supra* note 36, pmbl., at 332 ("[T]he principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.").

45. *See* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 433 (2004) ("[T]he Vienna Convention . . . [is] a multilateral treaty prepared by the United Nations that codifies the customary international canons governing international agreements.").

46. VCLT, *supra* note 36, art. 26, at 341; *see* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 321 cmt. a (AM. L. INST. 1987) ("[T]he doctrine of *pacta sunt servanda*, . . . lies

suspected that a treaty's purpose was expendable, they would refrain from entering into treaties.[47] Accordingly, under international law, bona fide adherence to a treaty's "object and purpose"[48] is axiomatic.[49]

International treaties, of course, play a significant role on the global level, but the legal effects of treaties also seep into domestic legal systems.[50] For example, in the United States, the Framers[51] cemented the importance of international treaties into the United States Constitution.[52] Article VI of the Constitution enunciates that treaties, coupled with the Constitution and federal statutes, "shall be the supreme Law of the Land."[53] While treaties play an important role in States' domestic laws,[54] they enjoy greater significance in the international context, especially in areas that are inherently multinational,[55] such as warfare, trade and commerce, and international boundaries.[56]

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at the core of the law of international agreements and is perhaps the most important principle of international law.").

47. *Cf.* DUNCAN B. HOLLIS, DEFINING TREATIES, THE OXFORD GUIDE TO TREATIES 20 (Duncan B. Hollis ed., 2012) ("[A]greements do not arise from a single actor *sua sponte*; they involve *mutuality*—an interchange . . . among multiple participants. [And that] interchange must generate a normative *commitment*—a shared expectation of future behavior whether in terms of a change from the status quo or a continuation of existing behaviour.").

48. VCLT, *supra* note 36, art. 18, at 336.

49. *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 321 cmt. b (AM. L. INST. 1987) ("A [S]tate is responsible for carrying out the obligations of an international agreement.").

50. *See* Missouri v. Holland, 252 U.S. 416, 434 (1920) ("No doubt the great body of private relations usually fall[s] within the control of the State, but a treaty may override its power.").

51. For background information on the Framers, see *Meet the Framers of the Constitution*, NAT'L ARCHIVES, https://bit.ly/3qBBjxF (last visited Jan. 25, 2023).

52. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land* . . . ." (emphasis added)).

53. *Id.*

54. *See* Kennett v. Chambers, 55 U.S. 38, 46 (1852) ("[T]reaties, [if self-executing], while they remained in force, were, by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen."); United States v. Jimenez-Nava, 243 F.3d 192, 195 (5th Cir. 2001) ("Ratified treaties become the law of the land on an equal footing with federal statutes United."); Matchett v. Deputy Comm'r of Tax'n, 158 FLR 171, 180 ¶ 34 (N.S.W. Sup. Ct. 2000) ("Provisions of an international treaty to which Australia is a party [can] form part of domestic law [if] incorporated by statute."); *see also* Medellin v. Texas, 552 U.S. 491, 514 (2008) ("[S]elf-executing treaties [are] those 'equivalent to an act of the legislature'[] and non-self-executing treaties [are] those 'the legislature must execute' . . . ." (quoting Foster v. Neilson, 27 U.S. 253, 314 (1829))).

55. *See Foster*, 27 U.S. at 314.

56. *See, e.g.*, Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 (prohibiting the use of biological and chemical weapons in warfare); North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (enacting trade and commerce laws

Moreover, treaties are prominent among States in the domain of national security.[57] For example, on April 4, 1949,[58] 12 party States, including the United States, signed the North Atlantic Treaty to establish the North Atlantic Treaty Organization ("NATO").[59] Fifty years later, after numerous additional States became NATO members,[60] Article 5 of the North Atlantic Treaty[61] permitted a collective response[62] to the September 11th[63] attacks.[64]

While treaties are a foundational aspect of international law's authority, many treaties arise from principles with origins in international customs.[65] Although they are an effective international legal instrument,

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between the United States, Canada, and Mexico); U.N. Convention on the Law of The Sea, art. 57, at 44, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) (establishing the territorial boundaries of exclusive economic zones).

57. *See* U.N. Charter, art. 1, ¶ 1 ("The [p]urposes of the United Nations [include t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . . ."); General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 94 L.N.T.S. 57.

58. The North Atlantic Treaty was drafted shortly after World War II. Broderick C. Grady, *Article 5 of the North Atlantic Treaty: Past, Present, and Uncertain Future*, 31 GA. J. INT'L & COMP. L. 167, 175 (2002).

59. *See* North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

60. NATO members enjoy a strong defensive alliance among Western States. *See* Grady, *supra* note 58, at 176–77.

61. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 ("The Parties agree that an armed attack against one . . . shall be considered an attack against them all and . . . if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense . . . will assist the Party so attacked . . . .").

62. A collective response permits States that were not attacked to participate in a self-defensive response assisting the victim State. *See* Michael N. Schmitt, *The North Atlantic Alliance and Collective Defense at 70: Confession and Response Revisited*, 34 EMORY INT'L L. REV. 85, 86–87 (2019).

63. The terrorist attacks of September 11, 2001, are the deadliest terrorist attacks on American soil in U.S. history. *See generally Terrorists Destroy World Trade Center, Hit Pentagon in Raid with Hijacked Jets*, WALL ST. J. (Sept. 12, 2001), https://bit.ly/3XI0Ovi (reporting, the subsequent day, on the terrorist attacks of September 11th); Steven Rosenbush & Jimmy Vielkind, *U.S. Marks 20th Anniversary of 9/11 with a Day of Memorials*, WALL ST. J. (Sept. 11, 2021, 5:56 PM), https://on.wsj.com/3CdQrDM (reporting, 20 years later, on the everlasting impacts of the September 11th attacks).

64. *See* Press Release, Statement by the North Atlantic Council, NATO Press Release 124 (Sept. 12, 2001) (stating that the 9/11 attacks would be covered by Article 5 of the North Atlantic Treaty, which would permit collective self-defense, if the U.N. Security Council determined they were "directed from abroad against the United States"); NATO Secretary General George Robertson, Press Conference Opening Statement (Oct. 2, 2001) ("On the basis of this briefing, it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 . . . .").

65. *See Statement of H.E. Abdulqawi Ahmed Yusuf, President of the International Court of Justice, Before the Sixth Committee of the General Assembly*, I.C.J. (Nov. 1, 2019), https://bit.ly/3qDLWQU ("Customary international law and general principles of

treaties often leave non-party States untouched.[66] Nevertheless, the other fundamental tool of international legal authority—customary law—augments international law's reach.[67]

### 2. International Customs: The Norms of Nations

International customs have archaic roots stemming deep into the history of civilization.[68] An international custom is an "internationally generated norm[]" that is "accepted by the civilized world."[69] To be binding, an international custom must contain two elements: State practice and *opinio juris*.[70] The former is an action or inaction, taken by a State's government or its diplomats.[71] State practice is considered the objective element of customary law because it focuses on the "widespread and uniform practice[s] of [S]tates."[72]

In contrast, *opinio juris*[73] requires evidence that a State has assumed a "sense of legal obligation" that the State does not feel "legally free to

law are, however, often unwritten, unless they are clearly identified or codified in a specific instrument.").

66. *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 82–85 (1989) ("[R]eliance upon treaties alone provides an ultimately unsatisfactory patchwork quilt of obligations[,] . . . leav[ing] many States largely untouched. [T]reaty law . . . provides a rather unsatisfactory basis on which to ground the efforts of international institutions whose reach is truly universal, such as the General Assembly and the Commission on Human Rights.").

67. *See id.* at 84.

68. *See* CARTER, *supra* note 4, at 123 ("For centuries, international law for the most part consisted of customary law."); 4 WILLIAM BLACKSTONE, COMMENTARIES 66 (1765) ("The law of nations is a system of rules . . . established by universal consent among the civilized inhabitants of the world [and] . . . all the people."); The Paquete Habana, 175 U.S. 677, 686 (1900) (stating that the custom of a prohibition on capturing fishing vessels as a prize of war was "an ancient usage among civilized nations"); *see also The Emergence of the Common Law of England*, CREIGHTON UNIV., https://bit.ly/3EpOZ56 (last visited Feb. 20, 2023) ("Although the island of Britain was a Roman colony for 4 centuries, the influences of Roman Law nearly disappeared during the Anglo-Saxon occupation in favor of customary law.").

69. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

70. *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102 cmts. b, c (AM. L. INST. 1987).

71. *See id.* § 102 cmt. b.

72. GOLDSMITH, *supra* note 1, at 23. To illustrate State practice, if nearly all States pronounced that military installations are lawful targets and civilian installations are not, States' subsequent actions of abiding by the pronouncements would equate to a widespread and uniform practice.

73. *Opinio juris* is short for "*opinio juris sive necessitatis*," which translates to "opinion that an act is necessary by rule of law." *Opinio Juris Sive Necessitatis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term as "[t]he principle that for conduct or a practice to become a rule of customary international law, it must be shown that countries believe that international law (rather than moral obligation) mandates the conduct or practice").

disregard."[74] *Opinio juris* is the subjective element of customary law because its narrow scope focuses on a State's "behavioral regularity" toward an alleged practice.[75] In short, customary law is created when persistent similar State action is coupled with a shared sense of legal obligation vis-à-vis that action.[76]

Notably, international customs are binding sources of international law because the act of violating the prescribed custom is jointly condemned by other States due to "mutual concern."[77] The obligations of a custom only fail to attach to States that qualify as "persistent objectors."[78] A persistent objector is a State that rejects an alleged custom from its emergence, either through actions or statements.[79] Nonetheless, an exception to the exception exists for a limited number of customs that are still binding regardless of States' objections.[80] These peremptory customs—termed *jus cogens*[81]—are unobjectionable because the international community of States unequivocally recognizes them as universally binding.[82]

74. RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102 cmt. c (AM. L. INST. 1987).

75. GOLDSMITH, *supra* note 1, at 24. Illustrating *opinio juris* at a personal level, consider why someone behaves in accordance with certain manners, such as holding the door open or saying thank you. The law does not compel etiquette, but behavior regularity does.

76. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 138–40 (2d Cir. 2010).

77. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 249 (2d Cir. 2003) ("[C]ustomary international law addresses only . . . 'wrongs' that are 'of *mutual*, and not merely *several*, concern' to States . . . . Matters of 'mutual' concern between States are those involving States' actions 'performed . . . towards . . . the other . . . . Matters of 'several' concern among States are matters in which States are separately and independently interested." (citations omitted) (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980); OXFORD ENGLISH DICTIONARY 154 (2d ed. 1989); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975))).

78. *See* Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 131 (Dec. 18) ("In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has *always opposed* any attempt to apply it to the Norwegian coast." (emphasis added)).

79. *See* Committee on Formation of Customary (General) International Law, Rep. of the Sixty-Ninth Conference, *Statement of Principles Applicable to the Formation of General Customary International Law*, INT'L LAW ASS'N, at 738 (2000) ("If whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it.").

80. *See* Siderman de Blake v. Argentina, 965 F.2d 699, 714–16 (9th Cir. 1992).

81. *See* Kane v. Winn, 319 F. Supp. 2d 162, 202 (D. Mass. 2004) ("[A] customary norm with *jus cogens* status can become binding even on a [S]tate that persistently objects to it."); *see also* CARTER, *supra* note 4, at 135 ("Although a [S]tate may object to the application to it of an emerging 'ordinary' customary international law rule, consent is generally said not to be required for jus cogens norms (such as rules against genocide, slavery, and official torture).").

82. *See* VCLT, *supra* note 36, art. 53, at 344.

As briefly mentioned, correlations often exist between customs and treaties.[83] Generally, these correlations derive from States' desires to crystalize customary norms.[84] For example, the prohibition of genocide, although officially codified in the 1948 Genocide Convention,[85] is a *jus cogens*[86] due to its "necessity [in] international public order."[87] Inversely, a treaty may also generate a custom when enough States adhere to the treaty's prescribed rule.[88] Overall, the traditional, unique sources of international law share a symbiotic relationship with the potential to supplement or augment one another, ultimately strengthening international law.[89]

All of these unfamiliar, overt distinctions between binding international law and domestic law[90] perpetuate the skepticism that international law is not truly law.[91] Nevertheless, treaties are unquestionably legally binding agreements between party States,[92] and

83. *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102(3) (AM. L. INST. 1987); *id.* § 102 cmt. i.

84. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 138 (2d Cir. 2010) (defining "law-making" treaties as "treaties that codify existing norms of customary international law or crystallize an emerging rule of customary international law").

85. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

86. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); *see also* Int'l Law Comm'n, Rep. on the Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682, at 189 (2006) (listing the "the most frequently cited candidates for the status of *jus cogens*" to include the prohibitions of genocide, torture, and slavery).

87. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 302 (2006); *see also* Advisory Opinion on Reservations to the Genocide Convention, 1951 I.C.J. Rep. 15, 21–24 (May 28).

88. *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102(3) (AM. L. INST. 1987) ("International agreements create law for the [S]tates parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by [S]tates generally and are in fact widely accepted."); *cf.* CARTER, *supra* note 4, at 854 ("Although a substantial number of nations never signed the [1958] Convention [on the Continental Shelf], in the North Sea Continental Shelf cases, 1969 I.C.J. 3 (Feb. 20), the ICJ recognized that certain articles of the Convention had become customary international law."); United States v. Alaska, 503 U.S. 569, 588 n.10 (1992) (recognizing that the "baseline provisions" of the United Nations Convention on the Law of the Sea, signed by 157 States, are customary international law).

89. *See, e.g.*, North Sea Continental Shelf Cases (Ger. v. Den. & Neth.), 1969 I.C.J. 4, ¶ 39 (Feb. 20).

90. *See infra* Section III.C.

91. *See* GOLDSMITH, *supra* note 1, at 3.

92. *See* VCLT, *supra* note 36, art. 26, at 341 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); *see also* CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 1 (S. Comm. on Foreign Rels. Print 2001) ("Internationally, once in force, treaties are binding on the parties and become part of international law. Domestically, treaties to which the United States is a party are equivalent in status to Federal legislation . . . .").

customary law is binding upon all States, with the exception of persistent objectors to non-*jus cogens* customs.[93] Familiarity with the sources of international law alone cannot fully foster a comprehensive understanding of international law's abilities.[94] It is therefore necessary to analyze international law's sources under a sociological lens to facilitate deeper comprehension of international law's makeup.[95] Before that analysis can be conducted, however, the three dominant paradigms of sociology must each be discussed.

### *B. Sociology: The Discipline of Revealing Societies' Hidden Intricacies*

Prior to Auguste Comte[96] modernizing the term "sociology" in the nineteenth century,[97] people undoubtedly observed social patterns.[98] However, disciplined frameworks to make sense of those patterns were nonexistent.[99] Soon after sociology's formalization in the late-nineteenth century, the field broadly expanded due to its recognition as an academic discipline.[100] The expansion of sociology allowed the field to develop into one of the most prominent social sciences.[101]

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93. *See* INT'L LAW ASS'N, *supra* note 79, at 719 (providing a working definition of customary law, which states: "If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of 'general customary international law' . . . . [S]uch a rule is binding on all States"). Notably, the binding effects of customary law are more ambiguous than treaty law, and these effects largely depend on the State's approach to international law. *See infra* Section III.A.

94. *See infra* Section III.C.

95. *See infra* Sections III.A—C.

96. Auguste Comte lived from 1798 until 1857. Michel Bourdeau, *Auguste Comte*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 1, 2008), https://stanford.io/3lt7fBt. He founded the theory of positivism, which is seen in law, politics, and philosophy. *See id.* Comte was a visionary in the social sciences and innovated various interdisciplinary approaches to "make[] him the first philosopher of science in the modern sense." *Id.* Overall, Comte's social and academic developments are a crux to sociology's foundation. *See id.*

97. *See* GRIFFITHS, *supra* note 11, at 11 (stating that, although the term sociology was "first coined" in an unpublished manuscript by Emmanuel-Joseph Sieyès, the term was "reinvented" into its modern-day use by Auguste Comte).

98. *See id.* at 10 ("In the thirteenth century, Ma Tuan-Lin, a Chinese historian, first recognized social dynamics as an underlying component of historical development in his seminal encyclopedia.").

99. *See id.*

100. *See, e.g.*, *About the Department of Sociology*, UNIV. OF CHI., https://bit.ly/3FkW8BG (last visited Nov. 12, 2021) ("The University of Chicago Department of Sociology . . . [was f]ounded in 1892 as the first sociology department in the United States . . . .").

101. *See* Anthony Carnevale et al., *The Economic Value of College Majors*, GEO. UNIV. CTR. ON EDUC. & THE WORKFORCE 130 (2015), https://bit.ly/3Ctw7kS (finding that sociology is closely behind political science and economics as the most popular social science major, and, together, these three "comprise 77 percent of social sciences majors" in the United States).

Today, the term "sociological imagination" provides a name for the practical ability to apply sociological paradigms to historical and contemporary issues.[102] Coined by C. Wright Mills,[103] the sociological imagination sheds light on how to make sense of observed social patterns.[104] Using the sociological imagination, sociologists investigate qualitative and quantitative aspects of societies to generate studies vis-à-vis social behaviors and their correlated meaning.[105] Indeed, applying the three dominant paradigms of sociology—structural functionalism, social conflict, and symbolic interactionism—to treaty and customary law is an exercise of the sociological imagination,[106] which enables a deeper understanding of international law.[107]

### 1. Structural Functionalism: Interrelated Consequences Crafted by the Society at Large

The first dominant paradigm of sociology is the structural functionalism theory ("functionalism").[108] Sociologists Herbert Spencer[109] and Émile Durkheim[110] laid functionalism's foundation, and,

102. *See* C. WRIGHT MILLS, THE SOCIOLOGICAL IMAGINATION 4–5 (Todd Gitlin ed., Oxford Univ. Press 2000) (1959) (describing the sociological imagination as "a quality of mind" that helps individuals "use information and to develop reason in order to achieve lucid summations of what is going on in the world and of what may be happening within themselves").

103. Charles Wright Mills lived from 1916 until 1962. *C. Wright Mills*, ENCYCLOPEDIA BRITANNICA, https://bit.ly/3eJWyXj (last updated Aug. 24, 2022). Mills was a sociologist known for, inter alia, "appl[ying] and populariz[ing] Max Weber's theories in the United States," developing his own theories on sociological thought, notably through his works of *Character and Social Structure* and *The Sociological Imagination* (1959), and his additions to the social conflict theory. *Id.*

104. *See* MILLS, *supra* note 102, at 5–6.

105. *See* GRIFFITHS, *supra* note 11, at 31–43.

106. *Cf.* MILLS, *supra* note 102, at 5–6 ("The sociological imagination enables its possessor to understand the larger historical scene in terms of its meaning for the inner life . . . of individuals. It enables him to take into account how individuals, in the welt of their daily experience, often become falsely conscious of their social position . . . .").

107. *See infra* Sections II.B.1–3.

108. *See* GRIFFITHS, *supra* note 11, at 15.

109. Herbert Spencer (1820–1903) was an English philosopher and biologist. *See id.* Structural functionalism originated from Spencer's writings. *See id.* His writings described the "similarities between society and the human body; he argued that just as the various organs of the body work together to keep the body functioning, the various parts of society work together to keep society functioning." *Id.* Spencer examined social institutions, such as government and education, and he focused on "patterns of beliefs and behaviors" therein. *Id.*

110. Émile Durkheim (1858-1917) is a predominant figure in sociology and an architect of the field. *See id.* at 80. His "perspective on society stressed the necessary interconnectivity of all of its elements." *Id.* Durkheim emphasized that collective behavior differed from individual behavior, and by studying the former one could understand the society's "communal beliefs, morals, and attitudes." *Id.* He "also believed

although the theory progressed through the works of later sociologists like Robert King Merton[111] and Talcott Parsons,[112] a macro-level scope remains at the core of functionalism.[113] Functionalism analyzes the consequences of social actions at a macro level by examining society's overall operation.[114] To put the theory's name into context, the consequence of a handshake (structure) is socially regarded in modern American society as a greeting (function).[115]

Because functionalism focuses on society collectively, the theory posits that a society bears inherent responsibility for its own actions, regardless of whether the actions result in achievements or failures.[116] Under functionalism, a behavior is analyzed in comparison to the function that the society has deemed normal.[117] Logically, functions that "promote solidarity and stability" prevail over discordant and destructive functions.[118] Therefore, a functionalist may assume citizens generally adhere to criminal laws not because of their moral convictions but rather because society has deemed criminal activity taboo.[119]

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that social integration, or the strength of ties that people have to their social groups, was a key factor in social life." *Id.*

111. Robert King Merton (1910-2003) remains one of the most influential social scientists. *See Robert Merton*, COLUM. UNIV., https://bit.ly/3Ci1n3m (last visited Dec. 17, 2022). The first sociologist awarded the National Medal of Science, "Merton is known for his contributions to the study of social structure, sociology of science, bureaucracy, and mass communications." *Id.*

112. Talcott Parsons (1902-1979) was the 39th President of the American Sociology Society, a Harvard University professor for 32 years, and a distinguished sociologist. *Talcott Parsons*, AM. SOCIO. ASS'N https://bit.ly/3CjKMfA (last visited Dec. 17, 2022). He is best known for developing the general theory of action and his advancements of the structural functionalism theory. *See id.*

113. *See* Janet Levin, *Functionalism*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 24, 2004), https://stanford.io/3kHDkVn.

114. *See Structural Functionalism*, ENCYCLOPEDIA BRITANNICA, https://bit.ly/3FvBgJ6 (last updated Feb. 7, 2022) ("[S]tructural functionalism, in sociology [is] a school of thought according to which each of the institutions, relationships, roles, and norms that together constitute a society serves a purpose, and each is indispensable for the continued existence of the others and of society as a whole.").

115. *Cf.* Kathleen Elkins & Skye Gould, *Here's How to Properly Shake Hands in 14 Different Countries*, YAHOO FIN. (Mar. 5, 2015), https://yhoo.it/3njtEST.

116. *See* ÉMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 54 (Steven Lukes ed., W.D. Halls, trans., The Free Press 1982) (1895) ("What constitutes social facts are the beliefs, tendencies and practices of the group taken collectively.").

117. *See id.* at 3. ("If I do not submit to the conventions of society, if in my dress I do not conform to the customs observed in my country . . . , the ridicule I provoke, the social isolation in which I am kept, produce, although in an attenuated form, the same effects as punishment.").

118. *The Functionalist Perspective*, U.C. DAVIS, https://bit.ly/30ByulN (last updated Dec. 15, 2020).

119. *See generally* Robert L. Burgess and Ronald L. Akers, *A Differential Association-Reinforcement Theory of Criminal Behavior*, *in* SOCIAL PROBLEMS (1966) (analyzing theories for criminal behavior).

The more interconnected and accepted a certain behavior becomes in correlation with its alleged function, the more likely it will evolve into a "social norm."[120] The significance of a behavior becoming a social norm is that the society deems the behavior acceptable.[121] Contrary to functionalism, the social conflict theory rejects the view that social norms hold relevance as a dominating aspect of society.[122]

### 2. Social Conflict Theory: Society Perpetuating Through Conflict Rather than Consensus

Social conflict theory ("conflict theory"), the second dominant paradigm of sociology, derived from the Communist Manifesto,[123] written by Karl Marx[124] and Friedrich Engels.[125] The essence of the social conflict paradigm is to analyze society as a competition for limited resources.[126] Conflict theory grew into a framework that sees society as an arena of inequality, generating conflicts that ultimately cause social change.[127] People's behaviors are therefore best understood in the purview of the tension between competing groups, such as Marx's paradigmatic conflict between the Bourgeoisie and Proletariat.[128] Applying conflict theory to his example, the class that holds the most control within a social arena—the Bourgeoisie—dictates the status quo for others—the Proletariat.[129] Accordingly, conflict theory focuses on the

120. DURKHEIM, *supra* note 116, at 101 ("The more strongly a structure is articulated, the more it resists modification; this is as true for functional as for anatomical patterns."); GRIFFITHS, *supra* note 11, at 15 ("[Social norms] are the laws, morals, values, religious beliefs, customs, fashions, rituals, and all of the cultural rules that govern social life.").

121. *See* GRIFFITHS, *supra* note 11, at 15.

122. *See id.* at 80.

123. *See generally* KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (Joseph Katz ed., Samuel Moore trans., Wash. Square Press 1964) (1848) (outlining the philosophical, social, political, and economic framework of communism).

124. *See* GRIFFITHS, *supra* note 11, at 80 ("Karl Marx (1818–1883) [believed that] society's constructions were predicated upon the idea of 'base and superstructure.' This term refers to the idea that a society's economic character forms its base, upon which rests the culture and social institutions, the superstructure.").

125. For more information about Friedrich Engels, see Oscar J. Hammen, *Friedrich Engels*, ENCYCLOPEDIA BRITANNICA, https://bit.ly/3mUPLgZ (last updated Nov. 24, 2022).

126. *See* GRIFFITHS, *supra* note 11, at 16–17.

127. *See* Moshe Hirsch, *The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System*, 19 EUR. J. INT'L L. 277, 294–95 (2008).

128. *See* MARX, *supra* note 123, at 12 (stating that the "bourgeoisie" dictates the status quo for the larger (but poorer) "working class"—the "proletariats"—because the smaller (but wealthier) bourgeoisie controls the "means of production").

129. *See* GRIFFITHS, *supra* note 11, at 16.

structure of the powerful versus the powerless to critically investigate social dynamics.[130]

Because it focuses on the inevitable competition between social classes,[131] unlike functionalism, conflict theory does not place responsibility on individuals for their achievements or failures.[132] Collective conflict, rather than social consensus, drives society.[133] Nevertheless, like functionalism, conflict theory employs a macro-level analysis.[134] In sociology, a macro-level analysis focuses on the society at large (e.g., American culture), while a micro-level analysis focuses on an individual (e.g., an American's culture). Unlike functionalism and conflict theory, symbolic interactionism focuses on a society at its micro level.[135]

### 3. Symbolic Interactionism: Interpersonal Connection Frames the Individual's Social Reality

The third dominant paradigm of sociology is the symbolic interactionism theory ("interactionism"). George Herbert Mead[136] is the father of interactionism.[137] Mead's grand theory argues that individuals interpret their surroundings based on their own individual experiences.[138] Therefore, interactionism, unlike functionalism and conflict theory, is a micro-level theory focused on the individual alone—not on society as a whole.[139] Put simply, interactionism deems society as a reality that people construct for themselves through encountered interactions.[140]

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130. *See id.*

131. *See generally* RANDALL COLLINS & STEPHEN K. SANDERSON, CONFLICT SOCIOLOGY: A SOCIOLOGICAL CLASSIC UPDATED 204–30 (Stephen K. Sanderson ed., 2015) (analyzing "status competition in America" under the social conflict theory).

132. *See* KIMBERLY ORTIZ-HARTMAN, PRINCIPLES OF SOCIOLOGY: SOCIETAL ISSUES & BEHAVIOR 11 (Salem Press, Inc., 2018) ("For the conflict theorist, those who have power, whether it is economic, political, or social, are the ones who define the norms of a society.").

133. *See* MARX, *supra* note 123, at 21.

134. *See* GRIFFITHS, *supra* note 11, at 16.

135. *See id.* at 17.

136. *See* Mitchell Aboulafia, *George Herbert Mead*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 13, 2008), https://stanford.io/3CiNOR7 ("George Herbert Mead (1863–1931), American philosopher and social theorist, is often classed . . . as one of the most significant figures in classical American pragmatism . . . . He is considered by many to be the father of the school of Symbolic Interactionism in sociology . . . .").

137. *See id.*

138. *See* GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY 5–6 (Charles W. Morris et al. eds., Univ. of Chi. Press 2015) (1934).

139. *See* GRIFFITHS, *supra* note 11, at 17–18.

140. *See, e.g.*, MEAD, *supra* note 138, at 13 ("By a conditioning of reflexes the horse has become associated with the word 'horse,' and this in turn releases the set of responses. We use the word, and the response may be that of mounting, buying, selling, or trading.").

Notably, linguistics—specifically, definitions—play a core role in interactionism.[141] For example, after hearing the word religion, theists will likely think first of their own religion, whereas atheists may instead think of the religion most prevalent in their respective communities.[142] Additionally, as the paradigm's name indicates, symbols are intrinsic to symbolic interactionism.[143] Continuing with the example of religion, many people associate the Cross, the Hilal, and the Star of David with Christianity, Islam, and Judaism, respectively.[144] To individuals who are wholly unfamiliar with these connections, they may see such symbols as mere shapes.[145] Accordingly, under symbolic interactionism, contextual familiarity forms an individual's opinion.[146]

Together, the three distinct paradigms of sociology create a novel framework to analyze many overlooked questions regarding State behavior.[147] Ideologies on the validity of the law do not instantaneously spawn, nor do such ideas exist in a vacuum.[148] As mentioned, the skepticism of international law does not arise from baseless notions.[149] However, analyzing international law under these sociological paradigms reduces the skepticism of international law, and the analysis leads to a more sound understanding of the jurisprudence's capabilities and legitimacy.[150]

## III. ANALYSIS

An application of the three dominant paradigms of sociology can help debunk the skepticism that international law is not truly law.[151] First, the structural functionalism theory reveals why States are inclined to follow international law.[152] Second, the social conflict theory

141. *See id.* at 6.
142. *See* GRIFFITHS, *supra* note 11, at 337.
143. *See id.* at 17.
144. *See id.* at 338.
145. *See id.*
146. *See id.* at 17.
147. *See* Linda A. Mooney, *The Three Main Sociological Perspectives*, *in* UNDERSTANDING SOCIAL PROBLEMS 47 (5th ed. 2007).
148. *See* Donald J. Black, *The Boundaries of Legal Sociology*, 81 YALE L.J. 1086, 1094 (1972).
149. Notably, obstacles to enforcing international law pose a threat to its legitimacy. *See* CARTER, *supra* note 4, at 862 ("The [Permanent Court of Arbitration] has no mechanism to enforce its own rulings."); *see also* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 152 (2d Cir. 2010) (Leval, J., concurring) ("[International human rights law often] leaves the manner of enforcement, including the question of whether there should be private civil remedies for violations of international law, almost entirely to individual nations.").
150. *See infra* Sections III.A–C.
151. *See infra* Sections III.A–C.
152. *See infra* Section III.A.

illuminates how international law strengthens over time and why its strength appears greater in some States than in others.[153] Lastly, symbolic interactionism demonstrates that mere personal unfamiliarity is commonly the basis for the skepticism.[154] Overall, through an application of the three paradigms to treaties and customs, the analysis posits that the skepticism surrounding international law's legitimacy is overstated.

### *A. Applying Structural Functionalism to Treaties and Customs: Populism vs. Liberal Internationalism*

International law's significance becomes clearer after examining, through a structural functionalism lens, how a State's government views the obligation of complying with international law.[155] In other words, States' social norms directly impact the strength of international law.[156] Two social norm theories of international law embody functionalism: populism and liberal internationalism.[157] States, through action and inaction, adopt a form of either approach, depending on their government's ideology as to which approach will create more social stability and solidarity.[158] The end result is that States will observe international law in a way that "rationally . . . maximize[s] their interests."[159]

First, populism assumes that a State must keep its liberty to undertake whatever actions the State subjectively deems optimal for its society.[160] Thus, to promote social stability, a populist government[161] is willing to follow international law primarily when doing so provides a

153. *See infra* Section III.B.

154. *See infra* Section III.C.

155. *See* Jan Klabbers, *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations*, 25 EUR. J. INT'L L. 645, 673 (2014) ("Functionalism has considerable explanatory power, both when it comes to the design of international organizations and with respect to the contents of international institutional law.").

156. *Cf. id.* at 645–47 (describing how functionalism can explain why international organizations possess the power they do).

157. *See* CARTER, *supra* note 4, at 449–50. The terms "populism" and "liberal internationalism" often carry pejorative and complimentary connotations, respectively. *See generally* JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016) (discussing populism); ERIC POSNER, LIBERAL INTERNATIONALISM AND THE POPULIST BACKLASH (2017) (discussing liberal internationalism). However, this Comment does not express an opinion on the merits of either approach; it uses these terms without implicit undertones.

158. *See id.*

159. GOLDSMITH, *supra* note 1, at 7.

160. *See* POSNER, *supra* note 157, at 12 (stating that populists are seen as "national leaders who will advance the national interest rather than global ideals").

161. *See* MÜLLER, *supra* note 157, at 1–6 (providing examples of "left-wing" and "right-wing" populists); *see also* CARTER, *supra* note 4, at 553 (explaining how "Brexit" was demonstrative of populism).

material benefit.[162] Accordingly, under the functionalism lens, populist States comply with international law in a voluntary manner to achieve self-serving domestic goals.[163] For instance, populist governments exclusively enter treaties due to anticipated benefits for their own States.[164] Populists utilize the narrow, domestic focus because they deem preserving unilateral freedom of choice, which creates minimal global restraint, as most strongly favoring their domestic social functionality.[165]

Former President Donald Trump's[166] actions often resembled populism.[167] For example, his decision to withdraw the United States from the Constitution of the World Health Organization[168] exemplified populism because his given rationale was to prioritize domestic success and stability over international prosperity.[169] Accordingly, populist governments contribute to the skepticism of international law because populists' liberty-centric nature pushes them to refrain from regular involvement with other States.[170]

A populist government may participate in international treaty law, but only to the extent that being a party to the international agreement works to its State's benefit.[171] Still, such participation in international agreements illustrates that even populists, who singularly focus on national success, rely on international law to achieve domestic social, economic, and political goals.[172] Because populists are willing to, and indeed do, rely on international law to further their respective States' goals, the skepticism surrounding international law is misguided.

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162. *See* STEVEN R. RATNER & ANNE-MARIE SLAUGHTER, APPRAISING THE METHODS OF INTERNATIONAL LAW: A PROSPECTUS FOR READERS 5–8 (2004).

163. *See id.*

164. *See* Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT'L L. 971, 984–85 (2019).

165. *See id.*

166. For a biography on former President Trump, see *Donald Trump: The 45th President of the United States*, THE WHITE HOUSE, https://bit.ly/346bjBH (last visited Dec. 17, 2022).

167. *See* Donald J. Trump, *Address by Donald Trump, President of the United States of America*, at 11, U.N. Doc. A/72/PV.3 (Sept. 19, 2017) ("As long as I hold my office, I will defend America's interest above all else . . . .").

168. The Constitution of the World Health Organization is the treaty that States must ratify to become members of the WHO. *See generally* Constitution of the World Health Organization, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 (providing the framework for the WHO).

169. *See* Tamar Hostovsky Brandes, *International Law in Domestic Courts in an Era of Populism*, 17 INT'L J. CONST. L. 576, 578 (2019).

170. *See* Krieger, *supra* note 164, at 971–72.

171. *See* STEPHEN C. NEFF, A SHORT HISTORY OF INTERNATIONAL LAW 23–24 (Malcolm D. Evans ed., 4th ed. 2014).

172. *See* Krieger, *supra* note 164, at 984 (arguing populist governments view international law as "a law of coordination rather than a law of cooperation").

Populism also influences States' adherence to international customary laws.[173] Under functionalism, a populist government decides to accept or object to customs based on whether the customs will benefit its State.[174] Populists therefore agree that an international norm must qualify as a favorable national norm and benefit their own social structures before they accept the custom.[175] If an international norm does not promote domestic stability and solidarity, then a populist State will likely persistently object to the custom as being binding international law.[176] Consequently, populist States will emphasize the necessity of *opinio juris*—the subjective element—over State practice, as they generally reject the idea of being controlled by universal international norms.[177] Accordingly, international customary law demonstrates true law because populist governments must observe customary law, even if they do so only to become a persistent objector.[178]

For example, States differ on whether the prohibition of capital punishment qualifies as customary law.[179] The European Union, consisting of 27 States, unequivocally supports abolishing the death penalty.[180] By contrast, despite the European Union's persistent requests for the United States to abolish the practice,[181] the United States does not.[182] Even though the death penalty's abolition is prevalent in many Western States,[183] the United States does not believe that such an

173. *See* Thompson Chengeta, *When at Loggerheads with Customary International Law: The Right to Run for Public Office and the Right to Vote*, 43 BROOK. J. INT'L L. 399, 440–43 (2018).

174. *Cf.* GOLDSMITH, *supra* note 1, at 77 ("[I]n fact, U.S. courts almost always defer to the executive's view about customary international law, and the political branches have the final say about whether and how it applies in the United States and whether or not the United States will comply with it.").

175. *See* MÜLLER, *supra* note 157, at 41–44.

176. *See* Marcela Prieto Rudolphy, *Populist Governments and International Law: A Reply to Heike Krieger*, 30 EUR. J. INT'L L. 997, 999–1000 (2019).

177. *Cf.* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758–760 (2001) (describing the difference between "traditional custom," which heavily focuses on state practice, and the "modern custom," which heavily emphasizes the importance of *opinio juris*).

178. *See* GOLDSMITH, *supra* note 1, at 42–43.

179. *See* Mohammed Hussein, *Infographic: Which Countries Still Have the Death Penalty?*, AL JAZEERA (Oct. 10, 2021), https://bit.ly/3HdcygP.

180. *See* Delegation of the European Union to the United States, *The EU and the Death Penalty*, EUR. UNION, https://bit.ly/3H2dBl3 (last visited Jan. 24, 2023) ("Abolition of the death penalty is a prerequisite for EU membership . . . .").

181. *See* EUR. UNION, *supra* note 180 (providing examples of the European Union's requests for the United States to prohibit capital punishment).

182. *See* Buell v. Mitchell, 274 F.3d 337, 373 (6th Cir. 2001) (rejecting the notion that the death penalty is customary international law).

183. Various definitions exist for the term "Western States," such as States that are geographically in Western Europe and States that are culturally shaped by Western

abolishment constitutes customary international law, and thus, refuses the requests to change its position.[184] Nevertheless, the fact that the United States must act affirmatively by denying the notion that the abolishment of the death penalty is customary law further evinces international law's legitimacy.[185]

Notably, a State's approach to international law is not static.[186] The State's government may incur a political shift when a succeeding governmental administration instead favors a liberal internationalism approach.[187] Contrary to populism, liberal internationalism assumes a commitment to upholding multilateral interests to preserve stability and prosperity.[188]

Therefore, under functionalism, the commitment to international prosperity creates a sense of compulsory compliance[189] because, to promote social stability, various reasons exist—outside of domestic interests—as to why liberal internationalist governments comply with international law.[190] Accordingly, liberal internationalism increases international law's legitimacy because the approach favors using treaties and embracing customs, regardless of whether doing so creates unilateral restraint.[191]

Although a State cannot enter into a treaty involuntarily per se, a liberal internationalist State may enter a treaty due to a feeling of an obligation owed to the world rather than exclusively to the State itself.[192]

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Europe. *See* William H. McNeill, *What We Mean by the West*, *in* ORBIS 514 (1997). This Comment uses the latter definition.

184. *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (holding that the death penalty is not, per se, unconstitutional).

185. *Cf.* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102 cmt. d (AM. L. INST. 1987) (stating that a custom will become binding if States fail to object to it).

186. *Compare* Trump, *supra* note 167, at 10 (stating that the success of the United Nations depends upon the "independent strength of its Members"), *with Remarks by President Obama to the United Nations General Assembly*, THE WHITE HOUSE (Sept. 28, 2015), https://bit.ly/3HmTsE8 (stating that the success of the United Nations depends upon strengthening the "collective capacity" of its Members).

187. *See* Melanie Siacotos, *Populists in International Relations*, 2 PUGET SOUND J. OF POL. 37, 37 (2021).

188. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2616–17 (1997); POSNER, *supra* note 157, at 14 (stating that populism has a national scope, while liberal internationalism has a global scope).

189. *See* Samuel Moyn, *The International Law That is America: Reflections on the Last Chapter of the Gentle Civilizer of Nations*, 27 TEMP. INT'L & COMP. L.J. 399, 407–08 (2013).

190. *See id.* at 407 (outlining the historical and contemporary ideologies of liberal internationalism).

191. *See* The Case of the S.S. "Lotus" (Fr. v. Turk.), Collection of Judgments, 1927 P.C.I.J. (ser. A) No. 10, at 90 (Sept. 7).

192. *See* POSNER, *supra* note 157, at 14.

In particular, former President Barack Obama's[193] actions often displayed a liberal internationalist approach.[194] For example, his entry into the New Strategic Arms Reduction Treaty ("New START")[195]—a treaty in which the United States and Russia both agreed to limit and reduce their respective nuclear arsenals—faced criticism as an unrealistic ambition of nuclear disarmament that compromised national security.[196] Concomitantly, others commended the treaty's effort to deter global security threats and the proliferation of nuclear arms.[197] Thus, the skepticism regarding international law can be reduced by understanding that liberal internationalist governments comply with international law because they inherently feel compelled to support multilateral interests, even if those interests might place global stability above national prosperity.[198]

Functionalism also reveals that liberal internationalist governments typically follow customs willingly because they agree that international norms are universally applicable.[199] To illustrate the liberal internationalist ideology, take, for example, the actions of United States presidential administrations regarding their decisions to remain in Afghanistan with the intent of stabilizing the region.[200] Past presidents emphasized a desire to return troops home from Afghanistan but did not do so for several justifiable reasons; one primary reason being to provide regional stability.[201] Ultimately, the decision to remain in Afghanistan restrained the United States armed forces in exchange for international peace.[202] When President Joe Biden's[203] administration withdrew the

193. For a biography on former President Obama, see *Barack Obama: The 44th President of the United States*, THE WHITE HOUSE, https://bit.ly/3z6awvO (last visited Dec. 28, 2021).

194. *See* PETER RUDOLF, LIBERAL HEGEMONY AND US FOREIGN POLICY UNDER BARACK OBAMA 6–7 (2016).

195. *See* Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. Treaty Doc. No. 111-5 [hereinafter New START].

196. *See* RUDOLF, *supra* note 194, at 4–5.

197. *See* New START, *supra* note 195, pmbl. ¶ 3–5; Macon Phillips, *The New START Treaty and Protocol*, BARACK OBAMA WHITE HOUSE ARCHIVES (Apr. 8, 2010, 10:17 AM), https://bit.ly/3r3hj5F.

198. *See* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1914–18 (1992).

199. *Cf.* Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 UNIV. CHI. L. REV. 469, 477 (2005) (arguing that States comply with international law "not only because [States] expect a reward for doing so, but also because of their commitment . . . to the norms or ideas embodied in the treaties").

200. *See* Amitai Etzioni, *A Liberal Communitarian Paradigm for Counterterrorism*, 49 STAN. J. INT'L L. 330, 335 (2013).

201. *See* Mark Landler, *The Afghan War and the Evolution of Obama*, N.Y. TIMES (Jan. 1, 2017), https://nyti.ms/3r4f6Y1.

202. *See id.*

United States armed forces from Afghanistan, one justification it provided was that the United Nations and other international organizations, per customary international law, would provide the humanitarian support needed to maintain regional stability.[204] Regardless of the subsequent results, the role that customary law played in the decision to withdraw all United States troops from Afghanistan evidenced international law's legitimacy.[205]

In sum, States decide to comply with international law for different reasons and in different capacities.[206] However, self-interest, in either national or global stability, often underlies reasons for following international law.[207] Overall, analyzing international law under the structural functionalism lens provides a better understanding of why States choose to comply and engage with this realm of jurisprudence. If international law is not truly law, then States would neither choose to comply with international jurisprudence nor engage with it because they would gain no benefit from doing so.[208] Applying the social conflict theory to international law principles further reveals international law's legitimacy.

### *B. Applying Social Conflict Theory to Treaties and Customs: How Conflict Changes and Strengthens International Law*

The social conflict theory mitigates the skepticism surrounding international law by shedding light on how it strengthens over time.[209] Conflict theory also illustrates why international law's strength appears greater in some States than in others.[210] As previously mentioned,

203. For a biography of President Biden, see *Joe Biden: The President*, THE WHITE HOUSE, https://bit.ly/33VhXek (last visited Jan. 25, 2022).

204. *See* CLAYTON THOMAS, CONG. RSCH. SERV., R46879, U.S. MILITARY WITHDRAWAL AND TALIBAN TAKEOVER IN AFGHANISTAN: FREQUENTLY ASKED QUESTIONS 37 (2021), https://bit.ly/3IETYyM.

205. *See id.*

206. *Compare* Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT'L L. 195, 203 (2021) (arguing that States comply with international law as compliance provides "rewards"), *with* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1860 (2002) (explaining when and how sanctions effectively encourage State compliance with international law).

207. *See* Guzman, *supra* note 206, at 195–98.

208. *See* Hathaway, *supra* note 199, at 477–81.

209. Of course, conflict is not the only way to advance and strengthen international law. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 21-22, 27–29 (7th ed. 2014).

210. *See* David Bosco, *Time for the African Union to Choose a Path*, INT'L CRIM. CT. PROJECT (Dec. 8, 2014), https://bit.ly/3AIoswE ("Several African leaders and [African Union] officials have decried the [International Criminal] Court as politicized, biased, and dangerous to regional peace processes."); *see also* CARTER, *supra* note 4, at 1175 ("All of the investigations opened by the ICC to date have involved situations in Africa, except for the investigation of Georgia, which the Prosecutor initiated only in

conflict theory posits that conflict is the predominant driving force of society.[211] Perhaps unsurprisingly, conflict theory is a major underlying theme in international law.[212] Continuous conflicts contribute to State reliance on treaties and customs.[213]

Regarding treaties, two specific topics within international law's ambit—war and global economic inequality—demonstrate how conflict theory can be used to better understand international law.[214] First, war unquestionably produces horrific consequences,[215] but it also presents opportunities for social progress.[216] War exposes the greatest shortcomings in humanity and forces States to find sustainable solutions for them.[217] On one hand, war is an oppressive tool that States employ to assert prolonged dominance over their own citizens or other States' citizens.[218] On the other hand, World War I's[219] devastating consequences catalyzed the 1919 Treaty of Versailles,[220] which created the League of Nations.[221] And along with World War II's[222] tremendous destruction and loss of life, the cataclysmic war galvanized the drafting of the United Nations Charter.[223] Accordingly, under social conflict

2016 . . . . All of the persons indicted by the ICC, as of January 2018, were nationals of African states.").

211. *See supra* Section II.B.

212. *See* Benedikt Pirker & Jennifer Smolka, *The Future of International Law is Cognitive-International Law, Cognitive Sociology and Cognitive Pragmatics*, 20 GER. L.J. 430, 434—36 (2019).

213. *See* SHAW, *supra* note 209, at 27-29.

214. *See id.*; CARTER, *supra* note 4, at 17 ("The interests of the new [S]tates of the Third World are often in conflict with those of the industrialized nations.").

215. *See* MARGARET MACMILLAN, WAR: HOW CONFLICT SHAPED US 6 (2020).

216. War-driven "progress and change" includes "an end to private armies, greater law and order, in modern times more democracy, social benefits, improved education, changes in the position of women or labor, advances in medicine, science and technology." *Id.* at xxi–xxii. "As we have got better at killing, we have also become less willing to tolerate violence against each other." *Id.* at xxii.

217. *See id.* at 29.

218. *See* Vivek Swaroop Sharma, *A Social Theory of War: Clausewitz and War Reconsidered*, 28 CAMBRIDGE REV. OF INT'L AFFS. 1, 8 (2015).

219. *See generally* Dennis E. Showalter et al., *World War I*, ENCYCLOPEDIA BRITANNICA, https://bit.ly/31A8uHY (last updated Nov. 30, 2022) (providing a comprehensive overview on World War I).

220. *See generally* Treaty of Peace with Germany (Treaty of Versailles) arts. 1–26, June 28, 1919, 225 Consol. T.S. 188 (providing the framework for the League of Nations).

221. *See Predecessor: The League of Nations*, U.N., https://bit.ly/3JON0Zg (last visited Dec. 17, 2022) ("The predecessor of the United Nations was the League of Nations, established in 1919, after World War I, under the Treaty of Versailles 'to promote international cooperation and to achieve peace and security.'").

222. *See generally* Thomas A. Hughes et al., *World War II*, ENCYCLOPEDIA BRITANNICA, https://bit.ly/3HOyGyb (last updated Dec. 28, 2022) (providing a comprehensive overview on World War II).

223. *See generally* U.N. Charter (providing the framework for the United Nations).

theory, a State's governmental actions, vis-à-vis war, create a double-edged sword, with one side including domestic and global suffering and the other side including advancements in international jurisprudence that can prevent such suffering.[224] Without treaties any attempts to preclude future wars would not be possible.[225] Thus, under the social conflict theory, continuous conflicts, such as war, work to advance the practicality of treaties, which in turn evinces the significance of international law.[226]

Furthermore, conflict theory underlies treaties between States whose economies differ greatly in strength.[227] The division of wide-ranging economic disparity among States is known as global economic inequality.[228] Significantly, global inequality can lead to the formation of "unequal treaties,"[229] which typically regard natural resources and other scarce commodities.[230] Oftentimes, each party State may not have a genuinely equal desire to enter the treaty.[231] Again, under social conflict theory, a double-edged sword is presented: Although the industrialized State gains access to natural resources and the developing State is compensated, the bargaining power may be lopsided when only the former possesses viable alternatives to entering the treaty.[232] In other words, although treaties may have positive impacts on societies, they may also have negative impacts.[233] Under the conflict theory, international law obtains legitimacy on the basis that it enables States to regulate other States' actions, whether for better or for worse.[234]

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224. *See* MACMILLAN, *supra* note 215, at xxii.

225. *See id.*

226. *See* GOLDSMITH, *supra* note 1, at 103.

227. *See* CARTER, *supra* note 4, at 17.

228. *See* Howard F. Chang, *How International Law Could Increase Wealth and Reduce Global Inequality by Liberalizing Migration*, 101 AM. SOC'Y INT'L L. PROC. 311, 311–13 (2007) (explaining the interrelation between international law and global inequality).

229. Stuart S. Malawer, *Imposed Treaties and International Law*, 7 CAL. W. INT'L L.J. 1, 9 (1977) (noting six categories of "unequal treaties," including treaties "concluded through the use of economic force" and treaties "concluded through military force").

230. *See* MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 207 (2d ed. 2004); *see also* CARTER, *supra* note 4, at 17.

231. *See* DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 141–45 (2010) ("Traditionally, developing countries have argued that they cannot devote significant resources to environmental problems, given the multitude of other problems that they face—poverty, infant mortality, and starvation, to name a few. Development, they argue, must take priority over the environment.").

232. *See* CARTER, *supra* note 4, at 17.

233. *See* Shirley V. Scott, *The Problem of Unequal Treaties in Contemporary International Law: How the Powerful Have Reneged on the Political Compacts Within Which Five Cornerstone Treaties of Global Governance Are Situated*, 4 J. INT'L L. & INT'L REL. 101, 122–26 (2008).

234. *See* SORNARAJAH, *supra* note 230, at 207.

Additionally, conflict theory underlies international customs.[235] States operating under authoritarian regimes exemplify the conflict theory because the few concentrated members of the government unilaterally deem the domestic status quo.[236] Nonetheless, irrespective of States' rights to set domestic law, a regime's status quo cannot violate binding customary law, such as *jus cogens*.[237]

To illustrate, the Taliban, which currently acts as an authoritarian regime, controls Afghan society.[238] Under the social conflict lens, the citizens of Afghanistan are not responsible for their society's failure to abide by international customs.[239] Instead, the citizens are merely present in the Afghan society under the Taliban's rule.[240] Still, when the Taliban fails to observe international customs, the whole of Afghan society suffers the negative consequences.[241] In this situation, international law may act as both a sword and a shield in favor of the powerless citizens.[242] Harsh penalties, such as international sanctions justified due to customary law violations,[243] act as a sword, and the Taliban's inability to sustain longevity in power while facing debilitating sanctions[244] acts as a shield. Accordingly, international law may not appear omnipresent, but, in many situations, it can serve as a backstop when a State's domestic law fails to inhibit or prosecute grave violations of customary law.[245]

In sum, the social conflict theory shows that international law evolves through continuous conflict, often growing stronger after

235. *Cf.* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1135 (1999).

236. *See* Hanne Fjelde, *Generals, Dictators, and Kings: Authoritarian Regimes and Civil Conflict, 1973-2004*, *in* CONFLICT MANAGEMENT AND PEACE SCIENCE 198–99 (2010).

237. *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102 cmts. d, k (AM. L. INST. 1987).

238. *See* Anthony H. Cordesman, *Living with the Taliban?*, CTR. FOR STRATEGIC & INT'L STUDS. (Aug. 31, 2021), https://bit.ly/3JOukc1.

239. *See* GRIFFITHS, *supra* note 11, at 80.

240. *See* ORTIZ-HARTMAN, *supra* note 132, at 11.

241. *See* Jeff Stein, *Biden Administration Freezes Billions of Dollars in Afghan Reserves, Depriving Taliban of Cash*, WASH. POST (Aug. 17, 2021, 4:17 PM), https://wapo.st/3n8fvaA ("Sanctions can help force foreign adversaries to adopt U.S. policy by penalizing their trade partners. However, they can also exact brutal humanitarian tolls on civilian populations.").

242. *See* S.C. Res. 2615, ¶ 6 (Dec. 22, 2021).

243. *See id.*; *see also* S.C. Res. 1988, ¶¶ 1–9 (June 17, 2011) (establishing a committee to oversee the United Nations's sanctions against any "individuals, groups, undertakings and entities associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan").

244. *See* Stein, *supra* note 241.

245. *See generally* Francisco Orrego Vicuna, *The Status and Rights of Refugees Under International Law: New Issues in Light of the Honecker Affair*, 25 UNIV. MIAMI INTER-AM. L. REV. 351 (1994) (outlining the advancements in humanitarian and refugee customary international law).

devastating events.[246] The theory also identifies the fact that international law provides certain States greater benefits while subjecting others to detriments.[247] Regardless of the consequence, whether negative or positive, conflict theory reveals international law's ability to regulate State behavior, which in turn reveals international law's legitimacy as true law.[248] Both functionalism and conflict theory mitigate the skepticism surrounding international law's legitimacy from a macro level. But to address the skepticism at a micro level, one must look to symbolic interactionism.

### *C. Applying Symbolic Interactionism to Treaties and Customs: Domestic Familiarity vs. International Unfamiliarity*

As stated, the skepticism surrounding international law is not misplaced per se, but is instead misguided.[249] Unfamiliarity with international law alone can breed a subjective opinion that it is not truly law.[250] Accordingly, simply familiarizing oneself with international law mitigates the skepticism.[251] Unlike the two macro-scope paradigms discussed above, symbolic interactionism develops practical answers for how individuals from one State can view the validity of foreign legal institutions, including international law.[252] Naturally, the construction of a State's domestic law greatly differs from that of international law.[253] Under interactionism, both familiarity with domestic law and unfamiliarity with international law significantly contribute to the idea that the latter is not truly law.[254] Therefore, explaining international law under the interactionism lens creates a clearer understanding of international law's limits and the field's ability to regulate behaviors.[255]

246. *See* Eric Brahm, *International Law*, BEYOND INTRACTABILITY (Sept. 2003), https://bit.ly/3u8o7SX ("International law has emerged from an effort to deal with conflict among [S]tates, since rules provide order and help to mitigate destructive conflict.").

247. *See, e.g.*, Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975, 980 (2000) (arguing that "the principle of special and differential treatment . . . plays a central role in satisfying the moral obligations that wealthier [S]tates owe poorer [S]tates as a matter of distributive justice").

248. *See* NEFF, *supra* note 171, at 24.

249. *See* GOLDSMITH, *supra* note 1, at 3–4.

250. *See* EWICK, *supra* note 19, at 230.

251. *See generally id.* at 15–54 (describing three different legal mindsets people have toward the law, which is shaped by social interaction with the law).

252. *See id.* at 47–49.

253. *See* CARTER, *supra* note 4, at 2–4.

254. *See* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 707–14 (1988).

255. *See* EWICK, *supra* note 19, at 15–30 (applying interactionism to American domestic law).

Using the United States as an example, the word law, to citizens, connotes an institution containing the judicial, executive, and legislative branches, each operating under a framework of exclusive and shared powers.[256] Yet this governmental framework is just one among many.[257] The fact that a United States citizen understands the structure of the American government does not mean that the citizen will understand the structures of other governments.[258] Extrapolating this legal knowledge discrepancy to international law reveals that much of the skepticism persists, not due to ignorance or contention, but rather due to a lack of familiarity stemming from little to no interaction with global jurisprudence.[259]

International law lacks a "comprehensive judicial system with compulsory jurisdiction," as well as a "central executive authority to coerce compliance."[260] The absence of these familiar institutions propels a false dichotomy among average citizens: Either international law persists with forceful strength, or it does not exist at all.[261] But the fallacy that international law's legitimacy is an all-or-nothing proposition overlooks international law's unique and difficult task of crafting law that oversees nearly 200 sovereign States.[262] Nevertheless, although international law's structure fails to mold to one's domestic legal system, it does not follow that international law is not truly law. The paradoxical nature of international law's uniqueness alone does not imply the absence of an ability to regulate behavior in the same manner as true law.[263] A comparison of treaties and customs to United States domestic law illustrates the legitimacy of international law.

256. *See* U.S. CONST. arts. I–III.

257. *See, e.g.*, ÚSTAVA ČESKÉ REPUBLIKY [CONSTITUTION], art. 67 ("The government is the supreme body of executive power. The government shall consist of the Prime Minister, Deputy Prime Ministers and Ministers.") (Czech Republic); BASIC LAW OF GOVERNANCE [CONSTITUTION], ch. 2 art. 5 ("Monarchy is the system of rule in the Kingdom of Saudi Arabia . . . .") (Saudi Arabia).

258. *See* EWICK, *supra* note 19, at 230 (comparing American jurisprudence with Sharia law).

259. *See* Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1015 (7th Cir. 2011) (stating that "evidence of customary international law" is "widely dispersed" and often even "unfamiliar to lawyers and judges").

260. CARTER, *supra* note 4, at 7.

261. *Cf.* EWICK, *supra* note 19, at 31–35, 247 (describing how more than two mindsets of the law exist).

262. *See generally* Benjamin Perrin, *Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials*, 39 OTTAWA L. REV. 367, 371–90 (2008) (analyzing the difficulties in international humanitarian law enforcement).

263. *See supra* Sections II.A—B; *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law . . . ."); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 769–70 (1993) (holding that there are times when principles of

United States statutes resemble the practical functionality of international treaties.[264] Like federal statutes codified in the United States Code, treaties are "passed" by party States and provide written legal boundaries.[265] Moreover, United States executive branch customs[266] are analogous to international customs because both legal tools are unwritten principles that are nonetheless accepted as law.[267] Presidential customs require a "long-continued practice,"[268] which is similar to State practice, and prior implicit approval from Congress, which creates a sense of obligation similar to *opinio juris*.[269] Notwithstanding the oversimplification of this comparison, by analogizing the contours of international law with one's domestic law, individuals may begin to familiarize themselves with international jurisprudence. Under interactionism, this familiarity builds a notion of legitimacy toward international law.[270]

Although international law's barriers contribute to the skepticism that international law is not truly law, interactionism uncovers that unfamiliarity alone may be the largest barrier.[271] Specifically, the skepticism derives from a failure to recognize law outside of the

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international law, such as comity, may justify a domestic court's decision to preclude jurisdiction).

264. *See* Hill v. Babbitt, No. 99-CV-1926, 2000 WL 33912018, at *4 n.37 (D.D.C. Sept. 27, 2000) (comparing treaties with statutes).

265. *See* CARTER, *supra* note 4, at 4; *see also* Mora v. New York, 524 F.3d 183, 193 (2d Cir. 2008) (stating that *when a treaty is self-executing*, a "court resorts to the treaty for a rule of decision for the case before it as it would a statute").

266. *See* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'" (alterations in original) (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915))).

267. *Compare* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102(2) (AM. L. INST. 1987) (defining customary international law), *and id.* § 102 cmt. c ("For a practice of [S]tates to become a rule of customary international law it must appear that the [S]tates follow the practice from a sense of legal obligation . . . ."), *with* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1291 (1988) (describing three elements of executive customs: "executive initiative, congressional acquiescence, and judicial tolerance").

268. *Dames & Moore*, 453 U.S. at 686.

269. *Compare* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637, 646 (1952) (Jackson, J., concurring) (discussing the Solicitor General's argument regarding "customs and claims of preceding administrations"), *and Dames & Moore*, 453 U.S. at 678—80, *with* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102(2) (AM. L. INST. 1987) (defining customary international law), *and id.* § 102 cmts. b, c (elaborating on the definition of customary international law).

270. *See* EWICK, *supra* note 19, at 40 ("By applying schemas from one setting in another; people are able to make familiar what may be new and strange; moreover, they can appropriate the legitimacy attached to the familiar to authorize what is unconventional.").

271. *See id.*

definition with which one interacts on a constant basis.[272] But mistaking international law's lack of a central executive branch or a comprehensive judicial system for a lack of legitimacy is fallacious under symbolic interactionism.[273] Accordingly, interactionism shows that an individual can appreciate the notion that international law is truly law simply through exposure to the subject and familiarizing oneself with its capabilities and limits.

## IV. CONCLUSION

In sum, the skepticism that international law is not truly law is misguided.[274] An application of the three dominant paradigms of sociology to international law can assist in debunking the skepticism. Structural functionalism reveals that States are inclined to comply with international law for national purposes if the State embraces populism, or for global purposes if the State embraces liberal internationalism.[275] Social conflict theory shows that conflicts advance international law's strengths but can also result in unequal distributions of legal restrictions.[276] And symbolic interactionism demonstrates that unfamiliarity should not equate to illegitimacy.[277]

Ultimately, tasked with overseeing the conduct of almost 200 sovereign States and billions of citizens, international law is sui generis within the realm of jurisprudence. Its uniqueness, however, does not invariably imply the absence of a capability to regulate behavior. Although imperfect, international law remains essential to the functionality of our globalized world. Accordingly, a deeper understanding of international law's legitimacy is imperative as our world becomes more inextricably intertwined through globalization. Sociology can facilitate this essential understanding.

272. *Cf.* John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 449 (2015) ("Lawyers and judges are ordinarily schooled in their own domestic law. Day in and day out they think, advise, and argue and dispose of cases in terms of that law . . . . The intrusion of foreign law is an unsettling departure from routine[] . . . ." (quoting BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAW 9 (1963))).

273. *See* EWICK, *supra* note 19, at 230–35.

274. *See supra* Sections III.A–C.

275. *See supra* Section III.A.

276. *See supra* Section III.B.

277. *See supra* Section III.C.