# Introduction

## *Custom's Future*

*Curtis A. Bradley*

Customary international law (CIL) is, along with treaties, one of the two principal sources of international law. Before the proliferation of treaty making in the twentieth century, CIL was the predominant source, regulating issues such as diplomatic immunity, rights at sea, and the conduct of war. In recent years, however, there have been increasing questions about CIL's continued relevance. Most areas of international law traditionally regulated by CIL are now also regulated by treaties. Treaties, moreover, have potential advantages as a source of law as compared with CIL: they are typically written, making their content easier to determine; they are expressly negotiated and ratified, making them more consensual; and they can be crafted with more precision, making them a potentially better vehicle for addressing the complexity of modern problems.

CIL is also subject to a variety of conceptual and evidentiary uncertainties. The conventional view today is that CIL arises out of state practice that is followed out of a sense of legal obligation.[1] Agreement on this "two-element" definition of CIL, however, has the potential to obscure a lack of agreement over issues such as what constitutes state practice; how much state practice is enough; and what materials demonstrate a sense of legal obligation (also known as *opinio juris*). There is also little agreement about the extent to which treaties can serve as evidence of CIL, and about the role that non-state actors, including international institutions, can play in generating or confirming rules of CIL. In addition, the increasing resort by nations to "soft law" has raised new questions about the relationship between nonbinding norms and the development of CIL, and even about whether there should be a

[1] *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); North Sea Continental Shelf Cases (Fed. Rep. Ger./Denmark), 1969 I.C.J. 4, 44 (Feb. 20) ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.").

sharp distinction between nonbinding norms and CIL in an international system that relies heavily on informal methods of enforcement.

More generally, the two-element definition of CIL has itself faced substantial criticism. Part of the concern is normative: by tethering CIL so heavily to what states do, CIL is potentially too regressive, leaving little room for aspirational legal development. A different concern is empirical: there is suspicion that institutional actors may voice the two-element definition but do not actually follow it in practice. The two-element definition also implicates deeper jurisprudential questions about CIL as a source of law. One famous such question is known as the "chronological paradox": if a rule of CIL can arise only after states are following a practice out of a sense of legal obligation, it is not clear how this sense of legal obligation develops in the first place. While it might be tempting to dismiss this paradox as a mere pet concern of legal philosophers, it may provide further reason to doubt that the standard account of CIL accurately describes how this body of law operates in practice.

For these and other reasons, scholars have been attempting to gain a better understanding of the nature of CIL and how it operates in the international system. This scholarly focus has produced a substantial body of work that reflects a willingness to reconsider standard accounts of CIL. Some scholars have questioned the continued vitality of CIL as a source of international law.[2] Others have questioned whether CIL operates as a genuine constraint on state behavior.[3] Still others have proposed new ways of thinking about CIL in an effort either to revitalize it or better explain it.[4] Not confined to doctrinal legal analysis, some of this modern scholarship encompasses interdisciplinary insights from empirical research, economic theory, philosophical inquiry, and historical study.

Efforts to better explain CIL extend beyond the academy. In 2000, the International Law Association adopted an extensive "statement of principles" concerning the formation of CIL, after years of work by a special committee.[5] Although rightly regarded as a major contribution, the statement provoked controversy by

[2] *See, e.g.*, J. Patrick Kelly, "The Twilight of Customary International Law," 40 *Va. J. Int'l L.* 449 (2000).

[3] *See, e.g.*, Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* ch. 1 (2006).

[4] *See, e.g.*, Anthea E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," 95 *Am. J. Int'l L.* 757 (2001); Andrew T. Guzman, "Saving Customary International Law," 27 *Mich. J. Int'l L.* 115 (2005); Pierre-Hugues Verdier & Erik Voeten, "Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory," 108 *Am. J. Int'l L.* 389 (2014).

[5] *See* International Law Association, London Conference, Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000), adopted at the sixty-ninth Conference of the International Law Association in London, on July 29, 2000.

de-emphasizing the *opinio juris* requirement for CIL. Debate about the methodology for determining CIL rules also emerged in the wake of a widely discussed study in 2005 by the International Committee of the Red Cross on customary international humanitarian law.[6] Then, in 2012, the UN's International Law Commission initiated an important new project on CIL. First entitled "Formation and Evidence of Customary International Law," and then re-titled "Identification of Customary International Law," the project seeks to explain how to identify rules of customary international law and their content in order to assist nonspecialists in international law. This project has already generated substantial commentary and likely will continue to do so for years to come.

In the meantime, new books about CIL continue to appear.[7] CIL, moreover, is invoked with some frequency by international adjudicatory institutions such as the International Court of Justice (ICJ), with an especially noteworthy example being the ICJ's extensive consideration of CIL as it concerns sovereign immunity in the *Germany v. Italy* decision in 2012.[8] In addition, debates about CIL were triggered in 2013, when Great Britain claimed that there was a CIL exception to the UN Charter's limitations on the use of military force for certain instances of "humanitarian intervention."[9] CIL, in short, seems to be receiving more attention than ever just as claims about its growing obsolescence have intensified. It is therefore an ideal time to be considering the future of this body of international law.

The roots of this particular book can be traced to collaborations with my colleague and close friend, Mitu Gulati. In 2011–12, we managed a school-wide project at Duke Law School on "Custom and Law." With the generous support of our dean, David Levi, we organized a series of workshops and conferences on this crosscutting topic, including a symposium that produced a diverse set of articles by our faculty in the *Duke Law Journal*.[10] Mitu and I had previously published an article on CIL in

[6] *See* Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (2005); *see also, e.g.*, John B. Bellinger, III & William J. Haynes II, "A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law," 89 *Int'l Rev. Red Cross* 443 (2007); Jean-Marie Henckaerts, "Customary International Humanitarian Law: A Response to US Comments," 89 *Int'l Rev. Red Cross* 473 (2007).

[7] *See, e.g.*, Noora Arajarvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (2014); Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (2010); Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (2013).

[8] *See* Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99 (Feb. 3).

[9] *See* Chemical Weapon Use by Syrian Regime – UK Government Legal Position (Aug. 29, 2013), at https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version.

[10] *See* volume 62, issue 3 of the *Duke Law Journal*, at http://dlj.law.duke.edu/archive/volume-62-number-3-december-2012-special-symposium-issue-on-custom-and-law/.

the *Yale Law Journal*,[11] and Duke's international law journal published a collection of commentary that was focused on that article.[12] Important commentary was also published in the *Yale Law Journal Online*.[13] To continue exploring the rich theoretical and practical issues surrounding CIL, I organized a conference in Geneva in the summer of 2012, as part of the Duke-Geneva Institute in Transnational Law, on "The Role of *Opinio Juris* in Customary International Law." A number of the authors in the present volume participated in that conference.

Professor Ingrid Wuerth at Vanderbilt Law School was also a participant in the Geneva conference, and she persuaded me that the ideas generated at the conference should be developed into a book, with a focus on CIL more generally rather than just on *opinio juris*. She and I recruited a number of additional authors for this volume, for the sake of methodological and subject matter variety. Unlike with some edited volumes, we made a conscious effort to promote a dialogue among the authors, so that the volume would be a collaborative enterprise. To foster that dialogue, we held a conference at Duke Law School in October 2014, at which the authors met to discuss their draft chapters. We also encouraged the authors to reach out to each other after the conference with comments, and the two of us offered editorial feedback to each of the authors. Unfortunately, Ingrid was unable to continue serving as coeditor of the book project, but her initial work on the project was invaluable, and this volume benefited greatly from it.

It was originally envisioned that the book would be entitled *Custom in Crisis*. At the conference at Duke, however, it became apparent that this title would not encompass the full range of perspectives on CIL represented in the volume and might sound more alarmist than was intended. After consulting with the authors, I decided to re-title the book *Custom's Future* to better capture the diversity of views reflected in the chapters, and also to highlight the book's effort to contribute to the study of CIL's role going forward. My hope is that, with the benefit of the differing accounts presented in this book, readers will be in a better position to form their own judgments about the direction that CIL will, and should, take in the future.

[11] *See* Curtis A. Bradley & Mitu Gulati, "Withdrawing from International Custom," 120 YALE L.J. 202 (2010).

[12] *See* volume 21, issue 1 of the *Duke Journal of Comparative & International Law* (2010), with contributions from David Bederman, Rachel Brewster, Samuel Estreicher, Laurence Helfer, Barbara Koremenos & Allison Nau, Dino Kritsiotis, C. L. Lim & Olufemi Elias, Christiana Ochoa, Anthea Roberts, Paul Stephan, Edward Swaine, and Joel Trachtman, at http://scholarship.law.duke.edu/djcil/vol21/iss1/. *See also* Curtis A. Bradley & Mitu Gulati, "Customary International Law and Withdrawal Rights in an Age of Treaties," 21 DUKE J. COMP. & INT'L L. 1 (2010).

[13] *See* forum for volume 120, *Yale Law Journal Online*, with contributions from Lea Brilmayer & Isaias Yemane Tesfalidet, William Dodge, David Luban, and Carlos Vazquez. *See also* Curtis A. Bradley & Mitu Gulati, "Mandatory Versus Default Rules: How Can Customary International Law Be Improved?" 120 YALE L.J. ONLINE 421 (2011).

The book begins with a chapter by Emily Kadens on "Custom's Past." As Professor Kadens reminds us, many of the difficulties surrounding the use of custom as a source of law are longstanding. Indeed, she suggests that "publicists' arguments today look little different from those of medieval jurists, and the decisions of the International Court of Justice rather resemble those of premodern courts."[14] In particular, Professor Kadens notes "the insistence on a definition of custom that may describe no phenomenon that truly existed in the real world of communities governing themselves bottom-up without enacted law."[15] She also provocatively contends that "when we assert the existence of a custom of international law we essentially perform an act of legislation or invention."[16]

Continuing this emphasis on the legislative aspect of custom identification, my own chapter follows on "Customary International Law Adjudication as Common Law Adjudication." This chapter contends that the application of CIL by an international adjudicator "is best understood in terms similar to judicial development of the common law: that is, an approach whereby adjudicators look to past practice but necessarily make choices about how to describe it, which baselines to apply in evaluating it, and whether and when to extend it to new situations."[17] Understanding the adjudication of CIL in this way, the chapter further argues, "avoids many of the difficulties surrounding the standard view of CIL."[18]

Under a common law account, CIL can potentially be more forward-looking and progressive than under the standard, two-element view. A similar effort to conceptualize CIL in such terms characterizes Brian Lepard's chapter on "Customary International Law as a Dynamic Process." Continuing themes from his 2010 book, Professor Lepard contends that CIL is "in a jurisprudential crisis," and he argues that the way to resolve this crisis is to conceive of CIL not as a static form of law "embedded" in international practice, but rather "as a dynamic method of lawmaking."[19] In particular, he suggests that the *opinio juris* element of CIL should be reconceptualized "as a belief by states generally that it is desirable now or in the near future to have an authoritative legal principle or norm prescribing, permitting, or prohibiting certain conduct, apart from treaty obligations."[20] Such an approach, Professor Lepard explains, "permit[s] new rules to be recognized quickly to solve urgent problems."[21]

[14] Emily Kadens, "Custom's Past" (in this volume), at 11.
[15] *Id.* at 12.
[16] *Id.* at 33.
[17] Curtis A. Bradley, "Customary International Law Adjudication as Common Law Adjudication" (in this volume), at 34.
[18] *Id.*
[19] Brian D. Lepard, "Customary International Law as a Dynamic Process" (in this volume), at 63, 64.
[20] *Id.* at 63.
[21] *Id.* at 93.

John Tasioulas, like Professor Lepard, thinks that the traditional account of CIL needs revision. In his chapter on "Custom, *Jus Cogens*, and Human Rights," Professor Tasioulas sketches a "moral judgment-based account" of CIL, which he contends "makes best sense of what custom as a source of international law has become in recent decades."[22] As he explains, under this account, "*opinio juris* involves the judgment that a norm is already a part of customary international law and that (compliance with) it is morally justified; or that, as a moral matter, it should be established as law through the process of general state practice and *opinio juris*; or else some mixture of these two attitudes."[23] Professor Tasioulas considers implications of this account for international human rights law in particular, including for *jus cogens* norms.

In contrast with Professor Tasioulas's chapter, the focus of the chapter by Stephen Choi and Mitu Gulati is empirical rather than normative. In "Customary International Law: How Do Courts Do It?," Professors Choi and Gulati study what the International Court of Justice and other international tribunals actually cite in support of their determinations regarding CIL. Compiling a dataset of 175 different CIL determinations, they find that "the type of evidence that looks to be the most important for determinations of CIL is the international treaty."[24] They also find that "three other forms of evidence that are largely aspirational in character also play a big role in CIL determinations," namely "UN resolutions, other UN material (committee reports, conference reports, etc.), and domestic statutes."[25] By contrast, they find relatively little citation to traditional forms of state practice. They conclude that "the question that jump-started our inquiry – how do judges apply the CIL definition that seems both analytically impossible to apply and normatively unattractive – has a simple answer: they ignore it."[26]

That the method for determining CIL may be somewhat elusive is not necessarily a vice, as Monica Hakimi points out in her chapter, "Custom's Method and Process: Lessons from Humanitarian Law." Echoing some of the earlier chapters, Professor Hakimi contends that "CIL finding is deeply entangled with CIL making," and she describes the CIL process as "chaotic, unstructured, and politically charged."[27] Focusing on international humanitarian law, she suggests two conclusions: "First, nonstate actors who are charged with finding CIL can be

[22] John Tasioulas, "Custom, Jus Cogens, and Human Rights" (in this volume), at 115.
[23] *Id.* at 97.
[24] Stephen J. Choi & Mitu Gulati, "Customary International Law: How Do Courts Do It?" (in this volume), at 132.
[25] *Id.* at 133.
[26] *Id.* at 147.
[27] Monica Hakimi, "Custom's Method and Process: Lessons from Humanitarian Law" (in this volume), at 149.

extremely influential in making CIL.... Second, no particular method for finding CIL is capable of disciplining global actors or imposing order on CIL, because the process for making CIL is so heavily *un*disciplined and *dis*ordered."[28] This does not mean that "anything goes" in determining CIL, she explains. Rather, "It means that the limits on CIL must – and do – come from *within* the CIL process."[29]

Many of the remaining chapters in the book reflect more generally on the future of CIL. In "The Growing Obsolescence of Customary International Law," Joel Trachtman has doubts about CIL's continued usefulness in addressing the world's problems. His chapter discusses in detail a number of CIL's limitations and notes the comparative advantages of treaties and other "legislated law." While acknowledging that CIL has certain benefits that make it useful in particular situations, Professor Trachtman contends that "in general these benefits seem to be outweighed by the related detriments."[30] He also conducts an extensive study of the overlap between CIL and existing treaties, finding that "there are few asserted rules of CIL that have not been included in conventions."[31] Professor Trachtman suggests, among other things, that "states and international organizations should focus their international legal analytical resources on legislated law."[32]

Chin Lim contests some of Professor Trachtman's assessment in "The Strange Vitality of Custom in the International Protection of Contracts, Property, and Commerce." In particular, Professor Lim "defend[s] custom's continued importance in international economic law, particularly in the interpretation of investment treaty clauses, that is, in the protection of property and contracts."[33] He also questions some of CIL's purported limitations, arguing that "(i) custom is at least as susceptible as treaties to detailed customization in design, (ii) like treaties, customary lawmaking can also be formed through complex tradeoffs ... and, finally, (iii) custom's lack of predictability is overstated."[34] In addition, Professor Lim contends that "increased treaty lawmaking and the increased institutionalization of international law create a greater, not lesser, role for custom in modern international economic law and regulation."[35] Instead of the displacement of CIL through treaties, he finds that in

[28] *Id.*
[29] *Id.* at 171.
[30] Joel P. Trachtman, "The Growing Obsolescence of Customary International Law" (in this volume), at 174.
[31] *Id.* at 194.
[32] *Id.* at 204.
[33] C. L. Lim, "The Strange Vitality of Custom in the International Protection of Contracts, Property, and Commerce" (in this volume), at 205.
[34] *Id.* at 206.
[35] *Id.*

the area of international economic law, CIL and treaties have become intertwined, such that "custom's fate is bound to that of treaty law."[36]

The next chapter, by Larissa van den Herik, also focuses on a particular area of international law, in this case international criminal law. In "The Decline of Customary International Law as a Source of International Criminal Law," Professor van den Herik explains that, although CIL has played a significant role in adjudication in the ad hoc criminal tribunals for former Yugoslavia and Rwanda, the establishment of the International Criminal Court has led to a decline in CIL's role in international criminal law. As she explains, "The codification movement and the gradual maturation of [international criminal law] made resort to CIL less necessary in a practical sense."[37] In addition, she notes how reliance on CIL for international criminal adjudication presents particular difficulties, both with respect to legality concerns as well as methodological issues relating to the nature of the relevant state practice.

Shifting to another subject area focus, Niels Petersen considers CIL's ability to address global public goods problems, such as climate change. In "Customary International Law and Public Goods," Professor Petersen argues that "economic theory and experimental evidence show that the establishment of public goods through decentralized cooperation is difficult."[38] He concludes, therefore, that CIL, which is a form of decentralized lawmaking, has limited potential in this context. Even some of the proposed "modern" approaches to CIL are unlikely to be especially useful in this context, suggests Professor Petersen. A more promising avenue for protecting global public goods, he argues, is through initially unilateral actions by states to extend their authority.

A more optimistic picture of CIL's continued importance is presented in "Reinvigorating Customary International Law," by Andrew Guzman and Jerome Hsiang. The authors emphasize in particular that CIL is "a tool that can promote cooperation in situations where consent-based rule making proves impractical."[39] Although they acknowledge that "CIL in its current form is not entirely coherent conceptually," they believe that it can be "reinvigorated for the cooperative benefit of modern states."[40] They put forth a "rational choice" understanding of how CIL works, pursuant to which "states are incentivized to act in certain ways by reputational consequences attached to compliance with international law."[41] Under this account,

[36] *Id.* at 229.
[37] Larissa van den Herik, "The Decline of Customary International Law as a Source of International Criminal Law" (in this volume), at 251.
[38] Niels Petersen, "Customary International Law and Public Goods" (in this volume), at 273–74.
[39] Andrew T. Guzman & Jerome Hsiang, "Reinvigorating Customary International Law" (in this volume), at 275–76.
[40] *Id.* at 276.
[41] *Id.* at 293.

they argue, the *opinio juris* element of CIL should be understood as "stand[ing] for the subjective beliefs of observing states regarding the legality of a rule," and proof of state practice should not be formally necessary as a separate element.[42] As they explain, "To the extent that observing states believe there exists a legal obligation, the potential violator faces the reputational consequences of violating CIL."[43]

A social science perspective also characterizes the next chapter by Laurence Helfer and Timothy Meyer. In "The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence," the authors consider a shift by the UN's International Law Commission in recent years away from codification efforts to "principles, conclusions, and draft articles that it does not recommend be turned into treaties."[44] Using principal-agent theory, the authors explain the shift by positing that "increasing political gridlock in the [UN] General Assembly . . . has led the Commission to modify the form of its work to preserve its influence in shaping the evolution of international law."[45] Professors Helfer and Meyer also contend that "the shift away from draft treaties increases the salience of the methodology that the ILC uses to enhance its influence when the traditional constraint of UNGA review is unavailable due to gridlock."[46] The authors predict that the ILC will "select and, relatively consistently, adhere to a methodological approach aimed at attracting the support of the audience it hopes to persuade."[47] Viewed this way, they suggest that the ILC's current project on the identification of CIL "promises to limit, and by so limiting also expand, the ILC's importance in a post-treaty world."[48]

Jan Wouters and Linda Hamid similarly consider CIL against the backdrop of a shift away from codification, but their focus is on CIL's relationship to "informal international lawmaking," which includes, but is not limited to, soft law. This informal international lawmaking has expanded in recent years, they explain, at the same time that there has been a slowdown in traditional international lawmaking. Instead of replacing traditional international law, they contend that informal international lawmaking "exists alongside it."[49] Nevertheless, Professor Wouters and Ms. Hamid point out that informal international lawmaking offers an alternative to CIL, while avoiding some of CIL's conceptual, methodological, and normative limitations. Ultimately, they conclude that "there is a domain for both informal law, as well

[42] *Id.* at 291.
[43] *Id.* at 302.
[44] Laurence R. Helfer & Timothy Meyer, "The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence" (in this volume), at 305.
[45] *Id.*
[46] *Id.* at 306.
[47] *Id.* at 327.
[48] *Id.* at 329.
[49] Jan Wouters & Linda Hamid, "Custom and Informal International Lawmaking" (in this volume), at 341.

as custom," but that "in an age of increasing informality, custom's domain is quite limited."[50] At the same time, they note some ways in which informal international lawmaking can contribute to the development of CIL, and they wonder whether soft-law instruments might "emerge as the 'new' custom of the twenty-first-century global governance, gradually replacing state-centred notions of custom."[51]

The book concludes with a chapter entitled "Custom's Bright Future: The Continuing Importance of Customary International Law." In this chapter, Sir Michael Wood, the special rapporteur for the International Law Commission's project on CIL, and Omri Sender, who has since 2012 been working with Sir Michael closely on the project, deny that CIL is facing a crisis and instead contend that it "is now more necessary and important than ever."[52] The recent work of the International Law Commission on CIL, the authors suggest, shows that there is consensus on many issues surrounding the identification of CIL. The authors also observe that "the theoretical torment that accompanies custom in the books simply does not impede it in action."[53] The authors make clear, however, that they do not expect the Commission's work to resolve all of the theoretical issues surrounding CIL. "That is not to be regretted," they note, since "those engaged in the practice of law may benefit much from such debates, as did members of the [Commission]," and they graciously observe that "the present volume, too, contains very valuable contributions to the doctrinal discussions."[54]

As indicated by these brief descriptions of the chapters, the book contains a range of perspectives and methodological approaches. A number of recurring themes emerge: that CIL faces new challenges in a world in which treaty making and soft law seem better suited than CIL for addressing modern problems; CIL may not operate the same way across different institutional contexts; it is important to probe doctrinal categories in order to better understand how CIL actually operates in practice; the identification and application of CIL is in part a creative exercise and is affected by baseline assumptions and prescriptive judgments; and that, along with its virtues as a source of law, CIL has structural and normative limitations. In addition to shedding light on these and other issues as they relate to the current state of CIL, many of the chapters offer insights into how this traditional body of international law might be revitalized going forward. In that sense, this book aims to make its own contribution to custom's future.

[50] *Id.* at 350.
[51] *Id.* at 357.
[52] Omri Sender & Michael Wood, "Custom's Bright Future: The Continuing Importance of Customary International Law" (in this volume), at 369.
[53] *Id.* at 365.
[54] *Id.* at 369.