3

Customary International Law: A Transformative Force in the Landscape of IHL

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I. INTRODUCTION

In our twenty-first-century world that offers so many varied avenues for the expression of explicit consent, it is a matter of some mystery that so many foundational areas of international law continue to be governed by custom, rather than treaty law. Indeed, despite often being seen to be a primitive method of norm-creation, it is often said that customary international law remains the "formal nest for the foundational doctrines of international law."[1] Many of the core structural rules of international law relating to key concepts such as legal personality, State responsibility, statehood, treaty interpretation, *jus cogens*, and the principle of *pacta sunt servanda* either have, or had, their source in custom.[2] Customary international law has also had, and continues to have, a profound influence in forming and shaping the substantive rules of many core areas of public international law, with international humanitarian law (IHL) being no exception.

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1. Jean d'Aspremont, The Discourse on Customary International Law 113 (2021). *See also* J. Kammerhofer, *Between Pragmatism and Enchantment: The Theory of Customary International Law after the ILC Project*, *in* The Theory and Practice of Customary International Law 3 (Panos Merkouris, Jörg Kammerhofer, & Noora Arajärvi eds., 2021).

2. D'Aspremont, *supra* note 1, at 114–15; James Crawford, Chance, Order, Change: The Course of International Law, at 57 (2014).

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Indeed, while the role of customary international law in this area stretches back to as long as public international law (and warfare) began, in the last four decades a "customary revolution" has taken place in this field.[3] Customary international law has transformed understandings of what norms apply to different actors, and when and also how norms of international humanitarian law are constructed and should be interpreted.

The purpose of this chapter is to analyze the role that custom has played in the making and shaping of international humanitarian law and to comment on some of the methodological problems, controversies, and puzzles which accompany this body of law, both as a creature in a general sense and in the specific arena of international humanitarian law. The chapter starts, in section II, with a historical review that makes two broad points. First it shows that while customary international law is one of the oldest sources of international law governing armed conflict, understandings of how it is made have changed quite a lot over the years. Secondly, it briefly points out the long heritage of the entanglement between custom and treaty law in this area. The chapter then moves into the twentieth and twenty-first centuries to demonstrate the contribution that customary international law has made to the modern field of international humanitarian law, explaining why it has been so heavily relied upon and identifying some of the main contributions that it has made in normative terms (section III), despite being a source of law fraught with controversy (section IV).

The chapter then progresses by focusing on three particular issues. Section V considers the relationship between treaty norms and customary norms today, in terms of the norms themselves and the methodology used to ascertain or interpret them. Section VI analyzes customary international humanitarian law's influence on the manner in which customary international law is understood. Section VII explores the way in which customary international humanitarian law in this area might develop, considering some of the methodological challenges, puzzles, and dilemmas that it has faced over recent years. When addressing these issues, the chapter shows that the story of the role of custom in the making and shaping of international humanitarian law is interwoven with the story of the role of international humanitarian law in the making and shaping of custom. It demonstrates that as a key and core field of public international law, international humanitarian law can be seen as a microcosm, in which many of the same developments and challenges that are also seen in the wider field of public international law play out and are illustrated. These relate to the role of customary international law, its relationship with treaty law, its method of ascertainment, the role of non-State actors, and broader questions relating to the future of the field.

3. Giovanni Mantilla, Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict 170 (2020).

II. CUSTOM AS THE FOUNDATIONAL SOURCE OF THE LAW OF WAR

When reviewing ancient legal texts demonstrating the role of customary international law in regulating warfare, it quickly becomes apparent that what constitutes custom has changed significantly over the centuries.[4] In his famous treatise on the Law of War and Peace in 1625, Hugo Grotius identified the law of nations as one of the main sources of the law of war. He stated that the "proof" of the law of nations lay in "unbroken custom and the testimony of those who are skilled in it."[5] In order to prove that something was "unbroken custom," Grotius engaged in a wide review of theological, historical, and classical sources that ranged from the Bible, the writings of Roman lawyers and historians, such as Livy, and examples of battlefield practice from ancient Greece and Roman history.[6] In the seventeenth and eighteenth centuries, custom continued to be relied upon as a source of the laws of war. In these centuries, marking a move toward positivism, authors relied less on ancient history, historical texts, and natural law as a means of establishing authority and more on practice that evidenced tacit agreement or mutual consent between States. Appreciative that customary rules could evolve over time, there was a greater focus on *recent* practice that demonstrated State consent and there was less deference to the rules of "natural reason," "natural law," and "the law of nature" as a force that could create binding obligations.[7]

It also quickly becomes apparent that the history of customary international law was already deeply entangled with treaty law in these centuries, to the extent that at some moments it is difficult to tell whether custom is catching up with treaty law or treaty law is catching up with custom. This was particularly the case in the

4. When thinking about the way that the laws of war have developed, it is important to note that several recent studies have illustrated that traditional narratives of the making and shaping of international humanitarian law centered around the United States and Europe are vastly incomplete. In particular, attention has recently been brought to the "forgotten histories" of the codification of international humanitarian law in Latin America. *See, e.g.*, Tania Ixchel Atilano, *The 1871 Mexican Criminal Code as the Missing Piece in the History of Criminalizing Violations of the Laws of War*, 104(920–21) International Review of the Red Cross 1650 (2022); and Alonso Gurmendi, *Latin Lieber: Uncovering the History of the Treaty on the Regularisation of War*, Opinio Juris (June 10, 2022), https://opiniojuris.org/2022/06/10/latin-lieber-uncovering-the-history-of-the-treaty-on-the-regularisation-of-war/. Presumably there are many more forgotten histories of customary international law to be uncovered.

5. Hugo Grotius, De Jure Belli Ac Pacis: Book I, at 32 (Stephan Neff ed., 2012).

6. *See, e.g.*, Randall Lesaffer, *Siege Warfare in the Early Modern Age: A Study on the Customary Laws of War*, *in* The Nature of Customary Law: Legal, Historical and Philosophical Perspectives 176–202 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007) (for a review of different treatises of war and how findings of custom were made by Pierino Belli (1502–1575), Albericus Gentilis (1552–1608), Balthasar de Ayala (1548–1584), and Hugo Grotius (1583–1645).

7. Lessaffer *supra* note 6, at 198–200; Crawford, *supra* note 2, at 64.

nineteenth century, when there was a general move toward the codification of international law, with the convening of many international conferences intended to produce treaties and multilateral agreements. In these years, it is sometimes hard to decipher whether particular conferences were codification or law-making initiatives. Some of the earliest attempts to codify the law of war were described as attempts to write down the laws and customs of war. For example, Francis Lieber decided to write his "little book on the Law and Usages of War. . . . which Congress might feel inclined to recommend to the Army," after giving a series of lectures on the "laws and usages of war" at Colombia University.[8] Similarly, the tsar of Russia convened the Diplomatic Conference in Brussels in 1874 with the intention to deliberate an "international agreement respecting the laws and customs of war."[9]

While many of these early treaties of international humanitarian law declare that they articulate the "laws and customs of war," it seems likely that what constituted custom at that time was controversial. For example, the drafting of the Brussels Declaration came just after the Franco-Prussian war of 1870–1871 when there had been multiple disputes regarding whether the actions of the two parties had complied with certain rules of the laws of war.[10] Changing forms of warfare and changes to State power were causing States to adopt "discordant and contradictory views on the old customs," to the extent that it had become unclear what the rules were.[11] There was particular disagreement on the question of the status of irregular forces.[12] Baron Johmini of Russia opened the debates at Brussels stating that "very contradictory ideas prevail concerning war."[13] Indeed, when one looks at accounts of these conferences' proceedings, it is clear that their purpose was probably not so much to write down the "customs and laws of war" as much to debate and clarify understandings of custom with the purpose of establishing the content of the

8. Jordan Paust, *Dr Francis Lieber and the Lieber Code*, 95 Proceedings of the Annual Meeting of the American Society of International Law 112, at 113 (2001). *See also* Richard Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Orders No* 25 (100) International Review of the Red Cross 171 (1963).

9. Although this conference was unsuccessful in the sense that it did not produce a treaty text, the outcome (the "Brussels Declaration") was very important. It provided the first draft of the text that would later become the 1899 Convention respecting the laws and customs of war and its Annex "Regulations respecting the laws and customs of war." This treaty and its attached regulations—which were revised again in 1907—contained multiple references to the "laws and customs of war."

10. Eyal Benvenisti & Doreen Lustig, *Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874*, at 31(1) European Journal of International Law 127, at 153 (2020).

11. Tracey Leigh Dowdeswell, *The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification*, 54(3) Osgoode Hall Law Journal 805, at 812 (2017).

12. *Id.* at 812.

13. As cited by Dowdeswell, *supra* note 11, at 813.

law.[14] It is telling that although the rules in the 1907 Convention and its Annex announce themselves to be "declaratory of the laws and customs of war," the International Military Tribunal concluded many years later that at the time of their adoption, they "undoubtedly represented an advance over existing International law."[15]

III. CUSTOMARY INTERNATIONAL LAW IN THE TWENTIETH AND TWENTY-FIRST CENTURIES: SHIFTING TECTONIC PLATES

After the Second World War, customary international law continued to be a key force in shaping the legal landscape of international humanitarian law. In fact, it is no exaggeration to say that a "customary revolution" occurred in the second half of the twentieth century, when the effect of customary international law on the modern landscape of international humanitarian law was monumental and transformative.[16] The start of this customary revolution can be traced to the early decisions of the ad hoc international criminal tribunals applying customary international law. These decisions and judgments lay many of the foundation stones of modern international humanitarian law, establishing the temporal scope of its rules and the consequences of their breach. Examples of such core structural rules include the finding that breaches of international humanitarian law in non-international armed conflict (NIAC) give rise to individual criminal responsibility, the finding on the threshold test of both international and non-international armed conflicts, and the development of the overall control test to determine whether a conflict is "internationalised" due to the involvement of a third State.[17] There were also many decisions on the applicability of certain IHL norms to non-international armed conflict *as a matter of custom* and multiple clarifications of how certain substantive terms in IHL should be defined and interpreted.[18] This early case law from the ad hoc tribunals—which has sometimes been criticized

14. Benvenisti & Lustig, *supra* note 10, at 805.

15. International Military Tribunal, Judgment of 1st October 1946, at 80, https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf.

16. Mantilla, *supra* note 3, at 170.

17. Prosecutor v. Dusko Tadić, Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 70 and 128–37 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995); Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997); Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 145 (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999).

18. Shane Darcy, *The Reinvention of War Crimes by the International Criminal Tribunals*, *in* Judicial Creativity at the International Criminal Tribunals 106, 116–26 (Shane Darcy & Joe Powderly eds., 2011).

as adopting a rather "cavalier attitude to the existence of customary international law"[19]—is nevertheless widely considered to have been revolutionary, because it made significant strides in humanizing IHL, in the sense of clarifying the material, temporal, and personal scope of its treaty provisions.

Indeed, it was likely the existence of this early case law on customary international humanitarian law that gave the International Committee of the Red Cross (ICRC) the self-confidence to proceed with its monumental study on the customary rules of IHL in the 1990s.[20] In many ways, the ICRC's study deliberately set out to be transformative in the landscape of international humanitarian law. The raison d'etre of the study lay in the perceived insufficiency of the treaty law regime as it applied to both international armed conflicts (IAC) and non-international armed conflicts.[21] In the area of international armed conflicts, the problem was not a dearth of treaty rules but their formal non-application due to non-ratification of the relevant instrument. Although the treaty law that applies to international armed conflicts was detailed, several States (e.g., the United States) had not ratified Additional Protocol I, which contained inter alia a fundamentally important articulation of rules on the conduct of hostilities. In non-international armed conflict, the problems in treaty law were more severe. The treaty law provisions that applied to non-international armed conflicts were widely felt to be insufficient. This was a problem of some significance as non-international armed conflicts were proving to be the most commonly seen kind of armed conflict. The final text of Additional Protocol II, which had been hugely scaled back during the drafting process, was significantly less substantive than Additional Protocol I and contained hardly any rules on the conduct of hostilities. It was also subject to an application threshold that was generally considered to be too high for it to be applied to many armed conflicts.[22] Not only that, many of the States that faced insurgencies or restive populations had not ratified it—meaning that, in reality, common Article 3 was one of the only treaty law provisions containing

19. *Id.* at 118. For further critique of the ICTY's custom finding methodology, *see* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 80(2) American Journal of International Law 238, at 240 (1996).

20. For the word "self-confident," *see* John R. Morss & Emily Forbes, *And in the Darkness Bind Them: Hand-waving, Bootstrapping, and the Interpretation of Customary International Law After Chagos*, *in* Merkouris, Kammerhofer, & Arajärvi, *supra* note 1, at 440. Robert Cryer notes that the ICRC relied heavily on the jurisprudence of the ICTY and the International Criminal Court Statute, Robert Cryer, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11(2) Journal of Conflict and Security Law 239, at 240, 242 (2006).

21. *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87(857) International Review of the Red Cross 175, at 177–78 (2005).

22. *See* Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609.

fundamental humanitarian guarantees that applied to many of the armed conflicts that were taking place.[23]

Many of the problems of treaty law were formally bypassed by the study on customary international humanitarian law, which the ICRC was mandated to prepare in 1995.[24] When it was published in 2005, the study found that many of the rules on the conduct of hostilities in Additional Protocol I were of customary status and applied in both IAC and NIAC.[25] Moreover, of the 161 rules that the study identified, only 12 applied *solely* to IACs. As a result, the study continued the ICTY's previous work by taking huge strides in closing the gap between the protections available in IACs and NIACs, especially when it came to weapons and rules on the conduct of hostilities.[26] By extracting the core rules from many of the treaty articles and subarticles and grouping them into thematically organized sets of "rules," the customary international law study provided a version of the law of armed conflict that has proved to be temptingly citable.[27] It is no exaggeration to say that this study has had an effect of tectonic-plate shifting proportions in the landscape of international humanitarian law. It has been relied upon by domestic courts, commissions of inquiries, and the International Criminal Court and is cited in many military manuals.[28] As will be shown later, it has also informed the manner in which we think about this body of law, its scope, its making, and its name. This is quite significant when it is realized that certain aspects of its methodology and findings are quirky and certainly not preordained.

23. Article 19 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 also applied to non-international armed conflicts, but only related to the protection of cultural property.

24. 26th International Conference of the Red Cross and Red Crescent, Geneva, December 3–7, 1995, *Resolution 1, International humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims*, https://www.icrc.org/en/doc/resources/documents/resolution/26-international-conference-resolution-1-1995.htm.

25. Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

26. *See* Henckaerts, *supra* note 21, at 187–90, for a summary of the Study's main and most significant findings. For the ICTY's previous work in this area, *see* Meron, *supra* note 19, at 243–44.

27. Yoram Dinstein argues that the whole project is "upside down" in that he would have found it more logical for the study to systematically analyze the treaty law article by article, rather than presenting an independent set of rules. Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 82 International Law Studies 99, at 101 (2006).

28. *See* Jean-Marie Henckaerts & Els Debuf, *The ICRC and the Clarification of Customary International Humanitarian Law*, *in* Reexamining Customary International Law 161, at 168–79 (Brian D. Lepard ed., 2017) (for a review of the incredible impact achieved by the study). For a very detailed study of the extent to which the ICRC has been referred to, *see* Marko Milanovic & Sandesh Sivakumaran, *Assessing the Authority of the ICRC Customary IHL Study*, 104(920–21) International Review of the Red Cross 1856 (2022).

IV. CUSTOMARY INTERNATIONAL LAW: A HOUSE WITH SOLID FOUNDATIONS?

The story of the role played by custom in the making and shaping of international humanitarian law is interwoven with the story of customary international law more generally. This is evidenced by the different discussions that international humanitarian law has sparked regarding how customary international law more generally is and should be made and ascertained. Indeed, it is important to note that in the same decades that customary international law proved to be such a transformative force for international humanitarian law, it sustained a barrage of criticism as a source of law. It has been said to be riddled with indeterminacy and "ripe for manipulation, even invention—when the time came to prove a custom in a dispute."[29] The process of analysis through which its existence is assessed has "long been shrouded in confusion and scepticism."[30] It has been declared to be "unbearably light,"[31] "elastic,"[32] and vulnerable to being faked.[33] For some scholars, their cynicism has become so extreme that they have lost faith in custom as a valid source of law. Joyner writes: "[I]f CIL [customary international law] were Tinkerbell she'd be dead now. We just don't believe in her any more."[34] Generally, the reason for a loss of faith in the substantive norms of customary international law are linked to concerns about the process by which their existence is said to be ascertained. There has been endless and often unresolved academic debate on questions that were raised by the reasoning in several cases before the International Court of Justice (ICJ): Should a proper method of ascertainment be more inductive than deductive? Connectedly, should more reliance be placed on *opinio juris* than State practice in some instances? If so, what does that say about the role of State consent in the framework of customary international law? Can the same act be both State practice and *opinio juris*? The questions have been numerous.[35]

It is no surprise then that although the publication of the ICRC study was greeted with resounding admiration and appreciation, there was also a swathe

29. Emily Kadens & Ernest A. Young, *How Customary Is Customary International Law*, 54 William & Mary Law Review 885, at 897 (2013).

30. Monica Hakimi, *Making Sense of Customary International Law*, 118 (8) Michigan Law Review 1487, at 1489 (2020).

31. Hilary Charlesworth, *The Unbearable Lightness of Customary International Law*, 92 ASIL Proceedings 44 (1998).

32. Hakimi, *supra* note 30, at 1501.

33. Fernando R. Tesón, *Fake Custom*, *in* Lepard, *supra* note 28, at 86.

34. Daniel H. Joyner, *Why I Stopped Believing in Customary International Law*, 9 Asian Journal of International Law 31, at 45 (2019).

35. *See, e.g.*, Crawford, *supra* note 2, at 70; Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 American Journal of International Law 146, 148–49 (1987).

of critical comments from academics picking over exactly these aspects of the study's methodology and asking many of the same questions identified above but then applied to international humanitarian law. Attention was given to inter alia the study's employment of the persistent objector rule,[36] a matter still controversial in legal doctrine, its seeming prioritization of *opinio juris* over State practice, its so-called "double counting" of acts as both State practice and *opinio juris*,[37] its perceived overfocus on written materials, its alleged overreliance on military manuals without taking due consideration that they were perhaps reflections of policy not law,[38] its exclusion of the practice and *opinio juris* of armed groups, its treatment of State silence,[39] its overly accepting reliance on the case law from the ICTY,[40] the insufficient attention given to the relationship between treaty norms and custom, and its failure to give due regard to the practice of specially affected States.[41] There were also questions asked about whether areas of law other than IHL, such as IHRL, should have been included in a study of international humanitarian law, and if so, the extent to which they should have been considered.[42] Some authors accused the study of confusing *lex lata* with *lex ferenda*.[43] One author compared the study to a "blunderbuss: indiscriminate and firing in all directions, hitting some targets but arguably damaging a great deal else besides."[44]

In many ways, these criticisms were predictable given the magnitude of the study's ambition and the amount of scholarly critique customary international law had been subject to in the same decades. In embarking on its study, its authors had had to cut through numerous Gordian knots relating to methodology before they could proceed with the task at hand. Readers accused the authors of making findings of significant legal import in a "breezy manner."[45] Yet given the

36. Malcolm MacClaren & Felix Schwendimann, *An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law*, 6(9) German Law Journal, 1217, at 1224 (2005); David Turns, *Weapons in the ICRC Study on Customary International Law*, 11(2) Journal of Conflict and Security Law 201, at 207 (2006).

37. John Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89(866) International Review of the Red Cross 443, at 445 (2007).

38. Dinstein, *supra* note 27, at 103; Bellinger & Haynes, *supra* note 37, at 445.

39. Turns, *supra* note 36, at 210.

40. Cryer, *supra* note 20, at 255–56.

41. Bellinger & Haynes *supra* note 37, at 455–57.

42. François Hampson, *Other Areas of Customary Law in Relation to the Study*, *in* Perspectives on the ICRC Study on Customary International Humanitarian Law 50 (E. Wilmshurst ed., 2009).

43. Turns, *supra* note 36, at 208; Dinstein, *supra* note 27, at 108.

44. Turns, *supra* note 36, at 203.

45. *Id.* at 201.

enormity of some of these methodological questions, one can imagine that that the conversations behind the scenes at the ICRC were anything but breezy. The project was carried out with the assistance of research teams based in around fifty countries, international research teams, a steering committee, and an ICRC Research Team. Comments on the drafts were sought from numerous academic and governmental experts.[46] It is likely because its positions on some of these points had been well thought out beforehand that the ICRC was ready to preempt and later meet the criticisms that it received with well-reasoned explanations for its approach.[47] Its efforts to defend its methodology were also assisted by the States that welcomed the study and by the ILC project on customary international law which was finished in 2018.[48] Indeed, the draft conclusions that emerged out of the ILC project provided support for several methodological decisions that had been adopted by the ICRC, confirming, for example, that the two constituent elements of customary international law may be "intertwined," that official statements of the ICRC can contribute to the development and determination of customary international law (despite not being practice), that verbal acts may be counted as practice and that the conduct of armed groups is neither creative nor expressive of customary international law.[49]

To an observer, these enduring critiques of customary international law as a body of law might appear to delegitimize its ability to be taken seriously as a source of law. Alternatively, they might invite a conclusion that it is more or less impossible to ascertain what constitutes custom in any given situation.[50] However, it is notable that some key individuals that have been entrusted with high-profile roles relating to custom's ascertainment have shrugged off these concerns. In some ways, one could even argue that the very existence of the ICRC study is evidence that the process of finding customary international law is "workable" and the theoretical concerns regarding the finer points of its constitution are just that: "theoretical."[51] Of course, a cynic might also say that there are advantages associated with the characteristics that many scholars find to be the source of indeterminacy. As the International Military Tribunal identified long ago: "This

46. *See* Henckaerts, *supra* note 21, at 184–86, for a summary of how the study was organized in terms of consultation, collection of courses, and collaboration.

47. *See* Henckaerts, *supra* note 21; Jean-Marie Henckaerts, *International Committee of the Red Cross: Response of Jean-Marie Henckaerts to the Bellinger/Haynes Comments on the Customary International Law Study*, 46(5) International Legal Materials 959 (2007); Henckaerts & Debuf *supra* note 28.

48. For a review of positive State reactions, *see* Milanovic & Sivakumaran, *supra* note 28, at 1872–74.

49. International Law Commission, Report of the International Law Commission, Seventieth Session, April 30–June 1 and July 2–August 10, 2018, U.N. Doc. No. A/73/10, 128, 132, 133, 141.

50. Crawford, *supra* note 2, at 57.

51. Henckaerts & Debuf, *supra* note 28, at 179, writing that the Study demonstrates that the two-element approach (State practice and opinio juris) is "workable."

law [unlike treaties] is not static, but by continual adaption follows the needs of a changing world."[52] It is noteworthy that scholars—even the drafters of the ICRC's Customary International Humanitarian Law study—have commended the progressive, fluid, and changing nature of custom indicating that it facilitates a degree of flexibility and allows it to adapt to the new realities on the ground.[53] As a body of law, it opens the door for the making of authoritative statements on "what the law says," while avoiding the need for fraught treaty drafting sessions that conveners worry may do more harm than good.[54] The fact that a variety of methodologies have been employed by the ICJ in different cases and there has been a debate among scholars about which one is "right," almost inevitably provides more space for progressive interpretations to be adopted which facilitate a particular outcome or satisfy a particular interest group, whether it be humanitarian or military. The fact that custom presents an opportunity to progress the law was identified early by Antonio Cassese, who wrote that "forward looking" IHL jurists should work to strengthen the new law through "progressive interpretation."[55] Indeed, one has the impression that the ICRC and international criminal tribunals have widely and unashamedly seen customary international law as a "fixer" body of law that holds potential to solve all the perceived defects in the treaty law system.[56]

The fact that custom has played this role in the landscape of international humanitarian law shows again that there are similarities with the role that custom plays in the landscape of international law more generally. For example, the fact that custom has been used to provide a tool to fix the problems of treaty law in this area is far from unique to international humanitarian law. In many substantive areas, custom has been turned to precisely because "treaty law leaves large gaps, and often those gaps exist in those areas with the most pressing need for law."[57] Given that reality, customary law is often perceived as a convenient "stop-gap"

52. IMT Judgment, *supra* note 15, at 54.

53. Henckaerts & Debuf, *supra* note 28, at 163, stating that "the formation of customary law has allowed IHL to adapt—perhaps in a more flexible manner than treaty law is able to do—to changes in the conduct of contemporary armed conflicts."

54. Mantilla, *supra* note 3, at 172.

55. Antonio Cassese, *A Tentative Appraisal of the Old and New Humanitarian Law of Armed Conflict*, *in* The New Humanitarian Law of Armed Conflict 500–01 (Antonio Cassese ed., 1979).

56. *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87(857) International Review of the Red Cross 175, 177 (2005): "The purpose of the study on customary international humanitarian law was to overcome some of the problems related to the application of international humanitarian treaty law." *See also* Monica Hakimi, *Custom's Method and Process: Lessons from Humanitarian Law*, *in* Custom's Future: International Law in a Changing World 154 (Curtis A. Bradley, ed., 2016).

57. Kadens & Young, *supra* note 29, at 886.

that helps "fill possible lacunae in treaties, and assist in their interpretation."[58] Indeed, perhaps the most compelling reason why custom is attractive is that it negates any argument that there was ever a gap in the first place. To say that something is "custom" is precisely to argue that there is no gap *in law*, only a gap in treaty law. The fact that customary international law has found itself "the residual receptacle"[59] for international legal obligations that cannot be found in treaty law has several consequences for how customary international law is conceived, vis-à-vis treaty law. Perhaps most importantly, it partly explains the tendency to employ deductive methods when ascertaining custom, as a treaty provision that does not apply but already exists is held up as a norm against which an assessment of custom can be made. This method has been used time and time again by the ad hoc criminal tribunals which used the treaty text as a benchmark for the identification of the norm under consideration, and then engaged in an assessment of whether it also existed as a matter of custom. It was also to some extent used by the ICRC when assessing whether norms which applied in IAC also applied in NIAC.[60]

V. THE EVER-EVOLVING RELATIONSHIP BETWEEN CUSTOM AND TREATY LAW

The fact that customary law and treaty law are so "entangled" in this area means that the field of international humanitarian law provides a microcosm of the wider dilemmas associated with the "ever-evolving relationship between treaty and custom."[61] It has been commented already that the close connection between customary law and treaty law in this area first materialized in the early nineteenth-century efforts to codify the laws and customs of law. It was also seen in the judgment of the International Military Tribunal, which was forced to rely on custom for its consideration of "war crimes" charges, due to the argued non-application of the Hague Convention to World War II.[62] These are good examples of the tendency for the life cycles of treaty and customary law to become entangled, in the sense that (1) norms may exist in both bodies of law simultaneously, and (2) over time, a norm in one body of law may become the inspiration for a norm in the

58. Michael Wood & Omri Sender, *Custom's Bright Future: The Continuing Importance of Customary International Law*, *in* Bradley, *supra* note 56, at 341 and 365.

59. D'Aspremont, *supra* note 2, at 122.

60. It is noted however that the ICRC did not conduct an article by article review of the treaties to determine which were customary. *See* Henckaerts, *supra* note 21, 197; Dinstein, *supra* note 27. Both asked why the ICRC did not adopt this methodology more fully.

61. For the word "entangled," *see* Oscar Schachter, *Entangled Treaty and Custom*, *in* International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne 717 (Yoram Dinstein ed., 1989).

62. IMT Judgment, *supra* note 15, at 79–80.

other body of law.[63] As a matter of methodology, the entanglement of customary international law and treaty law raises many crucial (and still largely unanswered) questions. These include how the existence of a separate norm of customary international law should best be determined when the norms are already the subject of a treaty. An old dilemma remains: How do you decide whether State practice and *opinio juris* is evidence of the constituent parts of a separate norm of customary international law or simply evidence of a State's adherence to its treaty obligations?

Indeed, as Richard Baxter pointed out long ago in an argument that has become known as the "Baxter paradox," it is particularly difficult to discern separate State practice and *opinio juris* evidencing a belief of customary (rather than treaty) obligations when the treaties under examination are, like the Geneva Conventions, universally ratified.[64] This is because there is no possibility of using the practice of non-parties as a benchmark to help differentiate from the practice of parties.[65] Of course in these circumstances, considering that the States are bound anyway by treaty law, it is a dilemma that may have little practical relevance. One potential area of relevance is at the domestic level, in States where customary international law automatically forms part of the domestic law while conventional international law does not. As a matter of outcome, the dilemma has more acute practical consequences when there are States that are not parties to the relevant treaty (i.e., the treaty is not universally ratified). In this instance, a finding that a treaty norm has become binding as a matter of custom will have more far-reaching consequences because it indicates the creation of new obligations for States that are non-parties to the treaty. However, there is also more likelihood in these situations that the content of the treaty law provision versus a customary law provision on the same issue will diverge.[66] Indeed, it is for these reasons that findings that some of the provisions in Additional Protocol I to the Geneva Conventions were of customary status were especially contentious. It is noteworthy that when reviewing rules codified in this document, the authors of the study did not limit themselves to reviewing only the practice and *opinio juris* of the thirty-odd States that had not ratified Additional Protocol I because it found that such an approach would not comply with the requirement that custom be based on widespread and representative practice.[67] Instead, it also reviewed the

63. *North Sea Continental Shelf, Judgment*, I.C.J. Rep. 1969, 3, ¶¶ 69 and 71.

64. The "paradox" that as the number of parties to a treaty increases, it becomes harder to demonstrate the state of customary international law outside the treaty was identified by Baxter, *in* Richard Baxter, *Treaties and Custom*, 129 Recueil des Cours 64 (1970). *See* Theodor Meron, *The Geneva Conventions as Customary International Law*, 81(2) American Journal of International Law 348, at 365–67 (1987). *See also North Sea Continental Shelf, Judgment*, I.C.J. Rep. 1969, 3, ¶ 76.

65. *See* Crawford, *supra* note 2, at 116–17, for a discussion of this paradox. *See* Meron, *supra* note 64. *See also North Sea Continental Shelf, Judgment*, I.C.J. Rep. 1969, 3, ¶ 76.

66. Schachter, *supra* note 61, at 728.

67. Henckaerts, *supra* note 21, at 184.

practice and *opinio juris* of the 162 States that had ratified Additional Protocol I. The United States, which is not a party to Additional Protocol I, challenged the ICRC's findings on precisely this point, stating that the supposed *opinio juris* of the States which had ratified the Geneva Conventions merely evidenced the commitment of those States to their treaty obligations.[68]

While the Untied States' criticism on this issue relies on Baxter's age-old thorny legal problem, in fact it seems hard to sustain the position that the practice of parties to a widely ratified multilateral treaty cannot be taken into account in an appraisal of custom. Indeed, it sits uncomfortably with later findings by the ICJ confirming that norms contained in widely ratified treaties—like the UN Charter—can simultaneously exist as norms of customary international law.[69] As James Crawford points out, the Court's acknowledgment that custom and treaty can exist simultaneously is evidence of the fact that "Baxter's paradox" is not actually a "genuine paradox" because it can be avoided in two ways.[70] Firstly, by understanding widespread participation in a treaty as a presumption of *opinio juris*. Secondly, by understanding that the custom-making process extends far beyond the treaty-making process, meaning that in theory even a ratifying State could consider the customary version of a particular treaty norm to be *different* from the treaty version. To its credit, the ICRC was very careful on this issue, making considerable efforts to compare the practice of non-parties with that of parties, sometimes making a finding that particular provisions of the Additional Protocol I were not of customary status on the basis of negative practice and *opinio juris* of non-contracting parties.[71] These include the prohibition of reprisal attacks against civilians, which is found in Article 51(6) of Additional Protocol I.

In recent years, the knotty entanglement between customary international law and treaty law, has entered a new life-cycle iteration in the ICRC Commentaries project. This project has seen customary international law norms feeding back into the treaty law system via the ICRC's interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties.[72] Indeed, the ICRC has taken the position that the principle of systemic integration articulated in Article 31(3)(c) (referring to "any relevant rules of international law applicable in the relations between the Parties") requires it to have reference to "customary international humanitarian

68. Bellinger & Haynes, *supra* note 38, at 446.

69. *See, e.g.*, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Rep. 1986, at 14, ¶ 188.

70. *See* Crawford, *supra* note 2, at 142–43

71. Henckaerts & Debuf, *supra* note 28, at 182.

72. This is a practice which has been seen in other areas of public international law. In its *Nuclear Weapons* Advisory Opinion, the ICJ used the customary interpretations of "necessity" and "proportionality" to interpret conventional self-defense under Article 51 of the UN Charter. *See* Crawford, *supra* note 2, note 143–44.

law" in its interpretation of treaty law.[73] This means that there are many instances where the ICRC argues that a provision of the Geneva Conventions needs to be interpreted "in the light of . . . [its broader] customary equivalent."[74] For example, although common Article 3 does not list specific judicial guarantees, the ICRC states in its commentary that the article needs to be interpreted in the light of what both Additional Protocol II and customary international law says about "judicial guarantees."[75] The Commentary takes the same approach when interpreting the term "humane," referencing the obligation in Additional Protocol II that persons deprived of their liberty are able to maintain family links, an obligation that it notes has become customary international law. A further entanglement is found in the fact that the commentaries to the treaties sometimes refer to the same State practice for the purposes of interpretation, as has already been referred to in the customary international law study.[76]

In the future, if the findings of the ICRC's customary international law study are updated at a later date, and the commentaries to the Geneva Conventions are used as a source, the feedback loop between treaty law and customary law may go full circle.[77] As fantastical as the idea that "treaty law may become custom, may become treaty law, may become custom" may seem, it is actually not that far-fetched. Indeed, the idea that customary international law can be subject to interpretation is a topic that is increasingly being explored and justified in legal scholarship.[78] Some scholars argue that the process of ascertaining the form of customary international law norms cannot help but include a process of interpretation that

73. Commentary on the First Geneva Convention, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 10 (2016).

74. *Id.* at 232, ¶ 684. In many ways, as long as the methodology employed for the finding of custom is sound, interpreting treaty norms through customary international law is less controversial than a finding of the existence of custom, on the basis of treaty law, because customary international law is seen to be a "general law" that is binding upon all States. As a result, there is no such thing as "non parties" of general custom, meaning that as long as a State is not claiming to be a persistent objector, a party to a treaty will not be able to argue that the rules of custom are not binding upon it. One instance where this argument could potentially hold any sway would be where customary norms that are accepted to apply in international armed conflicts are applied to help interpret treaty norms that *only* apply in non-international armed conflicts.

75. *Id.* at ¶ 684 notes that Article 6 of APII is now considered customary international law. It is noted that the commentary to Common Article 3 regularly relies on Additional Protocol II, without always providing its view that the provision in question is customary international law.

76. *Id.* at ¶¶ 593–94.

77. *See* Meron, *supra* note 19, at 247 for an early appreciation that the interpretation of the treaties may affect developing customary international law.

78. Marina Fortuna, *Different Strings of the Same Harp: Interpretation of Rules of Customary International Law, Their Identification and Treaty Interpretation*, *in* Merkouris, Kammerhofer, & Arajärvi, *supra* note 20, at 393–94 (concerning the newness of the enquiry).

enquires into their content.[79] John Morss and Emily Forbes have argued that "form and content are intermingled, if not circular, in the context of CIL."[80] Certainly when the act of custom interpretation is defined as "construing the relevant norm in a way that contributes to the solution of the dispute,"[81] much of the analytical discussion regarding the scope of a particular provision in the case law of the international criminal tribunals can be easily categorized as "interpretation." In some of these situations, the rules of the Vienna Convention on the Law of Treaties have even been cited by judges for the purpose of clarifying the interpretation of the equivalent customary provision.[82] In that sense, international humanitarian law will surely prove to be a prime test-site to explore the notion of how customary international law may be interpreted.

Considering the manner in which treaty law and customary international law are being used to reinforce each other in a self-reinforcing feedback loop, it can be seen that the existence of customary international law is contributing to an incremental thickening process that is taking place within the landscape of international humanitarian law. This thickening process is the product of the interaction between the two bodies of law. Commenting on this matter, Theodor Meron noted that when a norm is strengthened on two sides, by treaty on the one hand and custom on the other, "rhetorical strength" is added to the "moral claim" for their observance.[83] The notion that customary international law and treaty law will be self-reinforcing assumes of course that their content is more or less identical or substantially similar. While this will be generally the case when it comes to the norms of the Geneva Conventions due to their universal ratification, there is more scope for divergence when it comes to Additional Protocol I and II, which are not universally ratified. In instances where the content of treaty and customary norms diverge in either substance or scope, there is a danger that rather than reinforcing each other, they may have the opposite effect. In particular, extra care must be taken to ensure that any articulation of customary international norms reflecting or going beyond treaty norms that have not been universally ratified or are not thought to be declaratory of custom is well founded, so that they are not rejected out of hand.[84] Likewise, some care needs to be taken that the circularity of citation

79. Morss & Forbes, *supra* note 20, at 444.

80. *Id*. *See also* Fortuna, *supra* note 78, at 394 and 398.

81. *Id*. at 407.

82. *See* Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 103 (Int'l Crim. Trib. for the former Yugoslavia Nov. 30, 2006).

83. Meron, *supra* note 64, at 350.

84. For examples of specific norms in the study which have been challenged, *see* Dinstein, *supra* note 27, at 110 (he argues that the study "suffers from an unrealistic desire to show that controversial provisions of API are declaratory of customary international law (not to mention the occasional attempt to go beyond API)." As examples, he examines inter alia Rule 65 on perfidy, Rule 4 defining combatant, Rule 6 articulating civilian protection, Rule 55 on humanitarian

between the customary international law study and the commentaries project remains legitimate, so that it does not lead to what has been called "bootstrapping."[85] Equally, while State practice alone may be sufficient to prove the correct interpretation of a treaty obligation, it is not on its own enough to prove the emergence of a customary international law norm. In the words of Crawford: "Just as baking flour alone does not make a cake, relying on one element of State practice alone does not make custom."[86] This raises questions about the extent to which it would be legitimate in the future as a matter of methodology for an international criminal tribunal (or any other body) to use the outcomes of the commentaries project (which may be based solely on State practice) to interpret customary norms.

VI. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: AN INFLUENCE BEYOND IHL

When considering the role that customary international law has had in the making of international humanitarian law, it becomes clear again that the life stories of the two bodies of law are intricately intertwined. Most particularly, several developments in the field of international humanitarian law on the subject of custom have not only had an effect on the making and shaping of international humanitarian law but also on custom more generally. A first example of this phenomenon emerges from the very title "Customary International Humanitarian Law." It is actually a fact of some perplexity that customary international law—often thought of and referred to as a general law—can be conceptualized as having developed a generic specialized strand defined by subject matter.[87] Indeed, because customary international law emerges from the manner in which States approach concrete factual situations in the real world, there is no reason to imagine that the State practice and *opinio juris* defining these actions should be limited to "international humanitarian law."[88] This reality is seen in the ICRC's customary international humanitarian law study, which frequently draws upon practice linked to both international humanitarian law *and* international human rights law. Indeed, it can be assumed that especially in situations away from the battlefield, a State's practice and *opinio juris* in relation to a particular situation will be informed by

access). *See* MacLaren & Schwendimann, *supra* note 36, at 1225; Turns, *supra* note 36, at 236. *See also* Cryer, *supra* note 20, at 244 for a discussion of this point.

85. Morss & Forbes, *supra* note 20, at 435.

86. CRAWFORD, *supra* note 2, at 142.

87. For an opposite view, *see* Robert Kolb, *Selected Problems in the Theory of Customary International Law*, 50 NETHERLANDS INTERNATIONAL LAW REVIEW 119, at 128 (2003).

88. For discussion of this point, *see* Hampson, *supra* note 42, at 53–56.

multiple sources of international law in addition to international humanitarian law, for example, refugee law, human rights law, or the law on diplomatic relations.

A powerful example of this point can found in the prohibition of arbitrary detention in non-international armed conflicts identified by the study, which on close inspection is grounded almost wholly out of international human rights law norms and practice.[89] The study first notes that the prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice, including military manuals, national legislation, and official statements. Commenting briefly on these sources, it then goes on to provide details of the human rights treaties enshrining the right to liberty and/or the prohibition on arbitration deprivation of liberty, including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the European and American Conventions on Human Rights. One of the peculiarities of calling the resultant norm part of "Customary International Humanitarian Law" when citing practice as broad as this is that it subsumes these other bodies of law into international humanitarian law. It is not considered to be a compound norm of international law that has been created out of State practice and *opinio juris* more generally, that may in some circumstances emerge out of a variety of treaty law obligations. Another key problem in citing human rights–related State practice and *opinio juris* to support a finding that a particular norm of international humanitarian law applies to non-international armed conflicts is that it pays insufficient attention to the fact that human rights–related State practice and *opinio juris* provides objective and subjective evidence of States' view that *they* (as States) are bound by the substantive underlying norm. It is unclear how this same State practice and *opinio juris* can be understood as the basis of a resultant norm that is not only binding upon States but also upon armed groups.[90]

A second development in the field of international humanitarian law that has had an effect on the making and shaping of custom more generally is the way that international humanitarian law has impacted upon understandings that customary international law is a "general law" in a unitary system. This refers to the idea that customary international law is binding upon all States in an identical manner (persistent objectors aside).[91] Indeed, the idea that there is a category of customary international law that applies *only* to NIACs interferes with traditional understanding of customary international law, which holds that it is a general body of law that applies identically to all subjects of international law. By finding

89. *See* Rule 99, *supra* note 25, at 347.

90. Katharine Fortin, *How to Cope with Diversity While Preserving Unity in Customary International Law? Some Insights from International Humanitarian Law*, 23(3) Journal of Conflict and Security Law 337, at 353 (2018).

91. For the idea that customary international law is important to the unity of international law, *see* Mario Prost, The Concept of Unity in Public International Law 98 (2012). For a longer discussion of the concept of unity in international humanitarian law, *see* Fortin, *supra* note 90, at 337.

that the law that applies to IACs is different from the law that applies to NIACs, the ICRC customary international humanitarian law study implicitly finds that different subjects of international law are bound by different bundles of customary international norms. Whereas States are bound by the full range of CIHL norms, armed groups are bound by a different, and less extensive, category of norms and are certainly not bound by the small bundle of norms that *only* apply in international armed conflicts. While international humanitarian lawyers may have long come to accept this state of affairs as a given, it apparently remains quite a radical prospect for lawyers who are more accustomed to understand customary international law as applying generally to all subjects of international law in an identical manner.[92]

Ironically, from an international humanitarian lawyer's perspective, what is more noteworthy when considering this theme is not that the body of customary international humanitarian law applies differently to different actors, but that customary international humanitarian law only has one category of norms for non-international armed conflict instead of two, that is,Common Article 3 (CA3) and Additional Protocol II (APII). This outcome demonstrates how during the custom-making process, some of the sharper corners of treaty law relating to its temporal and material thresholds can become smoothed over or knocked off. This observation goes back to and reinforces the point made previously in relation to human rights law. It is a further demonstration of the fact that because custom emerges out of situational responses by States in the form of State practice and *opinio juris*, it has the ability to create norms where the normative or temporal boundaries that exist in treaty law are collapsed and conflated. It is likely that the ICRC ended up setting out only one "threshold" for non-international armed conflicts because despite treaty law identifying different thresholds, State practice and *opinio juris* apparently demonstrated that States do not always find the differentiation between a CA3 conflict and an APII conflict important.[93] The truth of this can be seen in the customary rule confirming that, at the end of hostilities, authorities in power must endeavor to grant the broadest possible amnesty to persons who have participated in the non-international armed conflict. Although as a rule this originates in Additional Protocol II, the practice referred to justifying the finding of the customary rule is not exclusive to States that have ratified

92. *See also* Zhuo Liang, *The Practice of Non-State Armed Groups and the Formation of Customary International Humanitarian Law: Towards Direct Relevance?*, *in* Merkouris, Kammerhofer, & Arajärvi, *supra* note 20, 298, at 313, where she notes at footnote 78 that K. Fortin "even asserted that 'different subjects of international law are bound by different forms of CIL.' " For discussion, *see* Fortin, *supra* note 90.

93. It is important to note that some States do find this distinction important in some areas. For example, the Military Manual of the UK distinguishes the rules that apply to an APII conflict. United Kingdom Ministry of Defence, the Manual of the Law of Armed Conflict ¶ 3.7 (2004).

Additional Protocol II. Likewise, much of the State practice referred to support the rule hardly ever refers to Additional Protocol II, supporting the idea that the practice and views of States regarding amnesties have not emerged solely out of Article 6(5) APII. As a result, the emergent customary rule appears to exist separately from APII's rather high threshold of application set out in its Article 1.[94]

VII. *QUO VADIS* CUSTOMARY IHL? *QUO VADIS* CUSTOM?

Considering the intimate relationship between the development of customary international law and the development of international humanitarian law, it becomes interesting to consider what insights the two bodies of law bring to how the other could develop over the next few years. When reflecting on this question, it is helpful to think back to the beginning of the chapter, which shows how significantly ways of thinking about custom have changed since the time of Grotius. While customary international law used to be thought of as a legal framework emerging out of long usage, toward the end of the nineteenth century it began to be increasingly thought of in positivist terms as a legal framework created by States, by virtue of their consent. Indeed, according to the modern theory of customary international law, it is a body of law made up of State practice and *opinio juris* which together demonstrate evidence of "obligations" between States. Of course, even in the most traditional conception of custom, it is important not to overemphasize the role played by State consent. The rule that the practice of specially affected States is given more weight in determining whether a particular rule exists implies that the practice and *opinio juris* of States does not count equally.[95] Relatedly, the ICJ has indicated that practice only needs to be "widespread and representative" rather than universal and that new States are automatically bound by norms to which they have not contributed.[96] These are all examples of the fact it would be erroneous to portray customary international law as a system based solely on State consent.

That being said, when evaluating the current state of customary international law in this field, it is helpful to remember that it has long been generally accepted that customary international law emerges out the behavior of States. Like other forms of customary law, it is understood as a "self-generative and bottom up

94. For example, amnesty agreements are referred for conflicts to which APII would not have applied because the State in question was not yet a party to the Protocol, e.g., Honduras, Nicaragua, Serbia, Philippines, and Sudan. Practice relating to Rule 159: Amnesty, ICRC Study on Customary International Humanitarian Law, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule159.

95. *North Sea Continental Shelf, Judgment*, I.C.J. Rep. 1969, 3, ¶ 73.

96. *Id.*

process of production normativity."[97] It is for that reason that Lon Fuller described customary law as "a language of interaction."[98] He explains:

> To interact meaningfully [individuals] require a social setting in which the moves of the participating players will generally fall into some predictable pattern. To engage in effective social behaviour [individuals] need the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn.[99]

In other words, customary law is often thought to emerge out of a network of interactional and reciprocal behaviors between a certain group of actors or "from a dialogue between international actors over time."[100] This interactional and reciprocal behavior is said to be generative, because it creates a reciprocal network of obligations that are then deemed binding upon those same actors and govern their interactions.

Yet the validity of describing customary law as "a language of interaction" has been increasingly challenged in recent years in the field of international humanitarian law by a string of developments that are not necessarily related to one another but arguably end up having a cumulative effect on the legal framework. The first is the increased tendency of international courts and tribunals, particularly in the field of international humanitarian law and human rights law, to adopt a deductive method of custom ascertainment.[101] Deductive methods are characterized by a greater emphasis on *opinio juris* than State practice, a phenomenon that has been called "contra-factual custom." Instead of placing an emphasis on the behavior of States, it places an emphasis on principles such as humanity, a supreme common will, and statements of States.[102] A move toward deductive methodologies in this field is often rationalized on the basis that the practice of States is characterized by too many violations to form a reliable basis for an

97. D'Aspremont, *supra* note 1, at 6.

98. Lon Fuller, *Human Interaction and the Law*, 14(1) American Journal of Jurisprudence 1, at 2 (1969).

99. *Id.* at 2. The text in square brackets marks the insertion of gender neutral language.

100. Crawford, *supra* note 3, at 82.

101. *See, e.g.*, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Rep. 1986, at 14. For discussion of this case, *see* Meron, *supra* note 83, at 351–70, and Kirgis, *supra* note 35.

102. For an account of the move from inductive to deductive methodology in the ascertainment of customary international law, *see* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, Australian Yearbook of Human Rights, 88–90 (1992).

inductive process or simply unavailable or impossible to discern.[103] It has also been explained with reference to an assessment of how "destabilizing or morally distasteful the activity" underassessment is.[104]

The second development is the idea that the practice and *opinio juris* of States can produce legal obligations binding upon a different category of actors than those whose behavior is being studied, namely, non-State armed groups. While it has long been debated whether armed groups should have more of a role in the creation of custom, it remains the position of many scholars and the ICRC that this is not necessary.[105] In fact, many scholars have pointed out that the idea that armed groups' practice and *opinio juris* should be counted alongside that of States raises many questions that seemingly have no answer, the main one being how should the practice and *opinio juris* of armed groups be counted relative to that of States.[106] Yet the current belief that State practice and *opinio juris* can produce an obligation that is binding upon third parties may be seen as equally problematic, not least because it takes understandings of *what customary international law is* even further away from the idea that customary law emerges out of interactional reciprocal behavior connected to the norm. It introduces the idea that customary international law can have a unidirectional dimension, in the sense that dialogical or behavioral relations between one category of actors are capable of producing imperatives for third parties (i.e., armed groups).[107]

A third development can be found in the growing turn to understand international humanitarian law not only as a framework of horizontal obligations between the parties to the armed conflict but also as a set of vertical obligations binding upon the parties to the armed conflict and owed to rights-bearing individuals on the ground, who also have obligations.[108] These individuals may be prisoners or war, but may also be ordinary civilians who are living under the control of one of the parties. When note is taken of this element of verticality in the legal framework,

103. Kolb, *supra* note 87, at 124–26.

104. Kirgis, *supra* note 35, at 142.

105. Henckaerts & Doswald-Beck, *supra* note 25, xiii. For a review of this academic debate, *see* Fortin, note 90, 348–50. *See also* Marco Sassòli, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare 49–51 (2019); and Ezequiel Heffes, Detention by Non-State Armed Groups under International Law 117–18 (2022) (for more recent discussions).

106. Fortin, *supra* note 90, at 351–53.

107. For the term "projecting an imperative," *see* Fuller, *supra* note 98, at 21.

108. *See, e.g.*, Lawrence Hill-Cawthorne, *Rights under International Humanitarian Law*, 28(4) European Journal of International Law 1187 (2018); Anne Peters, *Direct Rights of Individuals in the International Law of Armed Conflict*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-23 (Dec. 19, 2019), https://ssrn.com/abstract=3506742 or http://dx.doi.org/10.2139/ssrn.3506742. For the idea of ordinary individuals also having obligations, *see* Sassòli, *supra* note 105, 197–98.

it is seen that the interactional characteristic of customary international humanitarian law is again thrown off balance because the customary norms it contains is perceived to be binding upon yet another set of actors (i.e., individuals) whose interactional behavior is not taken into account. Indeed, it becomes notable that in the traditional custom-making process, there is no room for a consideration of practice and *opinio juris* determining the "rights" and "obligations of individuals," and there has so far been little consideration of this question in the scholarship.

When wondering what, if anything, can and should be done about these developments, it becomes important to note that the custom-making process has traditionally focused on the ascertainment of "obligations" rather than their corresponding "rights." Yet one wonders whether future iterations of customary international (humanitarian) law might be encouraged to find more space for the concept of "rights." Indeed, it is interesting to note that in the *Asylum* case, the ICJ indicated that what was required was "constant and uniform usage practiced by the States in question" and that the "usage" should be an "expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State."[109] The Court's recognition that State practice may be evidence of both rights and duties is curious and signals an area that warrants further exploration in scholarship. Notably, a connected discussion has recently taken place with regard to the doctrine of "specially affected States." It is noteworthy that some States have argued that this doctrine should be interpreted to take account of the practice of the States that bear the most pressing obligations in this area. For example, the United States and the United Kingdom have argued that "nuclear powers" and "other military powers" are the ones that are "specially affected" in the realm of IHL.[110] It is perhaps as a result of these types of interpretations that this is a doctrine that is often thought to be "easily abused by powerful States."[111] Yet it has been argued recently that there is room to question this approach.

Indeed, Kevin Jon Heller has argued that a wider interpretation of the doctrine of "specially affected States," which includes States from the Global South, holds a "transformative potential" in the realm of customary international law, which has hitherto been much underutilized and explored.[112] It is interesting to note that the ICRC has taken a wider view in its study of customary international

109. Asylum Case (Colombia v. Peru) (Judgment) [1950] I.C.J. Rep. 6, [266], [276–77].

110. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Letter Dated 20 June 1995 from the Acting Legal Adviser to the Department of State, Together with Written Statement of the Government of the United States of America, 1995 ICJ Plead. 8–9 (June 20) ("With respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected"); *id.*, Verbatim Record, Statement of the United Kingdom, CR 95/34 (Nov. 15, 1995) at 63, as cited by Kevin Jon Heller, *Specially Affected States and the Formation of Custom*, 112(2) American Journal of International Law 191, at 204 (2018).

111. Gennady Danilenko, Law-Making in the International Community 96 (1993).

112. Heller, *supra* note 110.

humanitarian law that includes not only the State whose behavior is under scrutiny for the purposes of obligations but also the State that would suffer as a result of the obligation's violation. For example, in considering the rule preventing the export of cultural property from occupied territory, the study notes the practice of "States specially affected by occupation."[113] In a similar vein, the U.S. Department of Defense Law of War Manual indicates that both "occupying or occupied" States might qualify as "specially affected."[114] The idea that occupied States' practice can be relevant in the ascertainment process of IHL norms applying in situations of occupation is noteworthy, because arguably occupied States have no specific *obligations* under Section III of Geneva Convention IV pertaining to occupation law. Instead, the obligations are those of the Occupying Power. Understanding the "specially affected" test to provide scope for an examination of the State practice and *opinio juris* of States that are on the receiving end of particular violations and/or have a legal interest in the adherence of particular rules goes some way to showing that the customary international law ascertainment process potentially holds conceptual space to take account of practice relating not only to obligations but also rights.

A further related development that could provide room for such a conceptual shift in the future lies in the concept of *opinio juris communis*, which opens the door to considering the interests of civilians (or other individuals) in the custom-making process. As far as I can tell, this concept was first invoked by Oscar Schachter in 1989 in his chapter on "Entangled Treaty and Custom."[115] It was a concept that was not very developed in the chapter, perhaps more of an afterthought, where Schachter commented that he found it "highly unlikely" that "the exercise of military and economic power" was an effective manner to enforce rules in specific situations, particularly those of a global nature. He indicated that he thought that treaty law was a better medium to deal with such issues or "declarations of the *opinio juris communis*." Failing to define this term fully, Schachter merely stated that such declarations should "serve common interests" and be "accepted generally by the international community."[116] The concept has more recently been developed by, among others, Judge Cançado Trindade during the course of his distinguished career as a judge at the ICJ. In his Dissenting Opinion in *Marshall Islands v. Pakistan*, he accused the court of having exercised an "inter-state myopia," such that it has considered the survival of the "hypothetical State . . . rather than that of peoples and individuals, and ultimately of humankind as a

113. Customary International Humanitarian Law, *supra* note 25, Part I, xliv, 135. It is not clear whose practice was consulted here, but it seems likely occupied States.

114. Heller, *supra* note 110, at fn. 75. For the quote, *see* Office of the General Counsel, U.S. Department of Defense, Law of War Manual § 1.8.2.3 (rev. ed., Dec. 2016).

115. Schachter, *supra* note 61, at 737–38.

116. *Id.*

whole."[117] In an early lecture on the topic, he indicated that "[g]eneral or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions) but rather from the *opinio juris communis* of all subjects of international law (States, international organisations, human beings and humankind as a whole)."[118]

Interestingly, there is a similarity between Trindade's *opinio juris communis* and a related theoretical discussion that took place in the 1990s in human rights scholarship. In that discussion, the question arose as to how customary international law relating to human rights law could best be ascertained as a matter of methodology. Scholars were troubled by the fact that the customary norms of human rights were supposed to emerge out of State practice and *opinio juris*, whereas the performance of most human rights obligations "lacks this element of interaction proper [because] . . . it does not 'run between' States in any meaningful sense," but runs between States and individuals.[119] Some scholars engaging with this dilemma suggested that the answer lay in an acknowledgment that there are "universal norms of conduct that result from legitimate human expectations and that these expectations are as important a source of law."[120] Indeed, Philip Alston famously argued that human rights norms operate at three levels: "as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community."[121] A reader considering these ideas may wonder how such expectations could ever be surveyed and why indeed this question even matters in the field of customary international humanitarian law. While it would be too difficult to provide an answer to the first question here, the answer to the second question is more straightforward. Giving thought to whether there could and should be a greater role for civilians (and arguably other individuals) in the making and shaping of international humanitarian law is important because (1) it would (potentially) make customary international law more interactional when conceived as a vertical (as well as horizontal) system, and (2) civilians are the true victims of every war.

117. Dissenting Judgment of Judge Antônio Augustus Cançado Trindade, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands versus Pakistan), I.C.J. Rep. 2016, 552, ¶¶ 150 and 165.

118. Antônio Augustus Cançado Trindade, *Jus Cogens: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law*, *in* XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano 3–29 (2008).

119. Simma & Alston, *supra* note 102, at 99.

120. Harold G. Maier, *The Role of Experts in Proving International Human Rights in Domestic Courts: A Commentary*, 25 Georgia Journal of International and Comparative Law 205 (1995/6).

121. OHCHR, "Report on the Special; Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Sri Lanka" (Mar. 27, 2006) U.N. Doc. E/CN.4/2006/53/Add.5 ¶¶ 25–27.

Indeed, this thought experiment is also important because orthodox conceptions of customary international law and the methods for its proper ascertainment have undoubtedly been colored by the fact that most judgments and advisory opinions on the topic emerge from or are related to inter-State complaints or judicial institutions without an individual applicant. It is thought-provoking to wonder whether the methodology could have been radically different and more civilian-orientated, if there had ever been a court called upon to make determinations of custom where individuals were the applicant. It is also important because when it is noticed how much custom has changed over the past three centuries, it becomes obvious that it is highly likely that it will continue to evolve over the next century. Cognizant of this, it is important to engage in "design-thinking" that considers and reimagines the different ways in which this body of law *could* and *should* change in the future to take into account the interests of the panoply of actors who are affected by and involved in armed conflict. Lastly, it is important because it points out that if custom survives at all in the next century, there could be value in an ascertainment process that takes better account of it as based in interactional behaviors, and the practice not only of (powerful) States but also less powerful actors who are most at risk of being on the receiving end of military action.

VIII. CONCLUSIONS

This chapter has shown that custom has played a fundamental role in the making and shaping of international humanitarian law ever since the branch of law came into existence. It has shown that despite being a source of law that is ever plagued by scholarly debate and crises of legitimacy, it continues to be heavily relied upon. It is a source of humanitarian law that is robust and flexible enough to take account of changing needs and deficits of treaty law. Yet the chapter has also shown that there are some dangers of relying upon customary international law, especially when as a body of law it is developing in ways that seem hard to explain when considering its interactional conceptual roots. Contemporary developments that have the cumulative effect of turning customary international law into an increasingly unidirectional set of prescriptions that are divorced from the actions of its addressees—States, armed groups, and individuals—create grounds to worry about its "health and contemporary legitimacy," especially as it is increasingly being leant upon as a fixer or remedy, in a world where treaty-making initiatives show little hope of success.[122]

122. For further discussion of the "health and legitimacy" of IHL, *see* Mantilla *supra* note 3, at 172.