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Custom's Method and Process

Lessons from Humanitarian Law

Monica Hakimi

A central question in the literature on customary international law (CIL) goes to method: what is the proper method for “finding” CIL – that is, for determining that particular norms qualify as CIL?¹ The traditional method is to identify a widespread state practice, plus evidence that states believe that the practice reflects the law (*opinio juris*). That method has long been criticized as incoherent, unworkable, and out of touch with modern sensibilities.² Thus, much of the CIL literature addresses its perceived problems. The principal goals of this literature are to help resolve whether norms that are claimed to be CIL are *really* CIL, and thus to reduce the volatility and susceptibility to abuse in CIL.

I argue in this chapter that the method for finding CIL might be so elusive because the question itself is misconceived. The question of how to find CIL presupposes that finding CIL is an objective exercise and somehow removed from the process for making CIL. This process is notoriously undisciplined and politically charged. To make CIL, disparate actors advance and respond to one another's legal claims,

¹ See, e.g., Int'l Law Comm'n, *First Report on Formation and Evidence of Customary International Law* (by Michael Wood, Special Rapporteur), ¶ 22, UN Doc. A/CN.4/663 (May 17, 2013) [hereinafter *Wood's First Report*] (reviewing literature on method and asserting that the goal of the International Law Commission's project is to “provide guidance on how to identify a rule of customary international law”); International Law Association [ILA], *Statement of Principles Applicable to the Formation of General Customary International Law*, at 4 (2000) [hereinafter “*ILA Report*”] (“[I]t was felt that what would be most useful was . . . some practical guidance” for finding CIL.).

² See, e.g., Robert Y. Jennings, “The Identification of International Law,” in *INTERNATIONAL LAW: TEACHING AND PRACTICE* 3, 4–6 (Bin Cheng ed., 1982) (describing the method as incoherent and full of “inner mysteries”); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 29 (1995) (“The definition is easy to state but not easy to interpret and apply, and it continues to raise difficult questions, some ‘operational,’ some conceptual-jurisprudential.”); Jonathan I. Charney, “Universal International Law,” 87 AM. J. INT'L L. 529, 543–45 (1993) (arguing that the traditional method is inapt, given the increased number and diversity of states and the expanded subjects of international regulation).

as they pursue their own interests.³ The methodological question assumes that CIL finding is distinct – that actors who find CIL do not advance their own agendas but rather assess the evidence objectively and thus that their decisions help settle CIL and weed out invalid claims. I use the recent rise of CIL in international humanitarian law to show that these assumptions are flawed. CIL finding is deeply entangled with CIL making. The two exercises operate in much the same way and through the same process, so they share similar limitations.

My argument has two practical implications. First, nonstate actors who are charged with finding CIL can be extremely influential in making CIL. Some of these actors play a much larger role in the formation of CIL than the literature now recognizes. 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 *undisciplined* and *disordered*.

THE QUESTION OF METHOD

The frustrations with finding CIL stem directly from the nature of the CIL process. This process is chaotic, unstructured, and politically charged. The participants make and respond to competing claims on the law as they advance their own agendas. Because the process lacks any structure, these claims and counterclaims can take multiple forms and appear in varied arenas. Some CIL claims are advanced collectively, such as through international organizations.⁴ Others appear in national documents or press briefings. Still others are communicated nonverbally, as states act and react in concrete cases. In short, the process produces vast amounts of disconnected raw data – disparate claims and counterclaims on an issue.

The methodological question asks how to identify the claims that pass successfully through that process and emerge as CIL. For all the attention that that question receives, its answer is still only rudimentary and shifty. Consider three methodological guideposts that will again be relevant in the discussion on international humanitarian law. First, there is broad agreement that *states* generate almost all of the relevant input for finding CIL.⁵ The extent to which other kinds of actors participate in CIL's

³ See Myers S. McDougal, Editorial Comment, "The Hydrogen Bomb Tests and the International Law of the Sea," 49 *AM. J. INT'L L.* 356, 357 (1955) (describing the process as one of "continuous interaction ... in which the decision-makers ... unilaterally put forward claims ... and in which other decision-makers ... weigh and appraise these competing claims ... and ultimately accept or reject them").

⁴ See Charney, *supra* note 2, at 543–50.

⁵ Int'l Law Comm'n, *Second Report on Identification of Customary International Law* (by Michael Wood, Special Rapporteur), Draft Conclusion 5, UN Doc. A/CN.4/672 (May 22, 2014) [hereinafter "*Wood's Second Report*"] ("[I]t is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law."); Christiana Ochoa, "The Individual and Customary International Law Formation," 48 *VA. J. INT'L L.* 119, 135 (2007) ("What is remarkable in

formation is unclear. For example, the dominant position in the CIL literature is that international courts and tribunals do not help make CIL.⁶ Judicial decisions do not qualify as state practice and are, at best, only indirect evidence of *opinio juris*. Yet as a practical matter, global actors rely on these decisions to determine whether particular norms qualify as CIL – that is, to find CIL.⁷ Separately, state-comprised bodies of international organizations, such as the UN General Assembly, are known to participate in the formation of CIL. Questions remain on when these bodies participate,⁸ and on the extent to which bodies that are *not* comprised of states also participate.⁹

Second, a CIL finding will be uncontroversial if the data clearly show a widespread state practice plus strong evidence of *opinio juris*. But where – as is usually the case – the data are inconsistent or ambiguous, the independence and relative weight of each of those elements is contested.¹⁰ Some argue that CIL may be found on the basis of the practice alone, without much evidence of *opinio juris*.¹¹ Others argue the opposite.¹² Still others contend that a bounty of one element can compensate for a dearth of the other.¹³ And those who accept that both elements might be necessary

this literature is that virtually all of it has accepted the core premise that only states can form CIL.”); Yoram Dinstein, “The Interaction Between Customary International Law and Treaties,” 322 *RECUEIL DES COURS* 243, 267 (2006) (“[States] have a quasi-monopoly over the formation of custom.”).

⁶ See, e.g., *ILA Report*, *supra* note 1, at 18 (“Although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice.”); Dinstein, *supra* note 5, at 317 (“[I]nternational judicial bodies – not being the organs of any single State – never contribute as such to the practice of States.”).

⁷ See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 495 (Sept. 2 1998) (citing an ICJ decision to find that the Genocide Convention reflects CIL); Panel Report, *Korea – Measures Affecting Government Procurement*, ¶ 7.123, WT/DS163/R (May 1, 2000) (“Since this article has been derived largely from the case law of the ... PCIJ and the ICJ, there can be little doubt that it presently represents customary international law.”).

⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8) (“General Assembly resolutions ... can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”).

⁹ *Reservations to Convention on Prevention and Punishment of Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 22 (May 28) (considering the UN Secretary General’s statement but suggesting that other evidence was weightier); *Wood’s Second Report*, *supra* note 5, at ¶ 43 (asserting that secretariats can produce relevant data but that such data should be given less weight than the output of bodies that are comprised of states).

¹⁰ *Wood’s Second Report*, *supra* note 5, at ¶ 3(a) (“[I]t was recognized that the two elements may sometimes be ‘closely entangled,’ and that the relative weight to be given to each may vary according to the circumstances.”).

¹¹ See, e.g., Anthony D’Amato, Comment, “Customary International Law: A Reformulation,” 4 *INT’L LEGAL THEORY* 1 (1998); Maurice H. Mendelson, “The Formation of Customary International Law,” 272 *RECUEIL DES COURS* 155, 250, 289 (1998).

¹² See, e.g., Andrew T. Guzman, “Saving Customary International Law,” 27 *MICH. J. INT’L L.* 115, 153 (2005); Rudolf Bernhardt, “Custom and Treaty in the Law of the Sea,” 205 *RECUEIL DES COURS* 247, 266 (1987).

¹³ See Frederic L. Kirgis, Jr., “Custom on a Sliding Scale,” 81 *AM. J. INT’L L.* 146 (1987); *ILA Report*, *supra* note 1, at 40.

still debate whether the same evidence may be “double counted,” once as state practice and then again as *opinio juris*.¹⁴

Third, treaties and CIL are known to interact, but the question of how they interact in particular contexts – that is, what a treaty provision signifies for CIL and vice versa – remains open-ended. The International Law Association’s high-profile study on CIL summarized the conventional wisdom as follows: a treaty provision might be irrelevant to the formation of CIL, it might reflect preexisting CIL, or it might help create CIL.¹⁵ Although the International Law Association did not say so, most scholars accept that CIL can also, in rare cases, *displace* a contrary treaty provision.¹⁶ The upshot is that a treaty provision cannot be presumed to have any one of these effects; the provision must be assessed in light of the other evidence for and against the CIL claim.¹⁷

All of this imprecision in the method for finding CIL breeds uncertainty in CIL and is thought to weaken it as a source of law.¹⁸ A CIL finding might well turn on how a particular decisionmaker interprets the raw data; whether she considers only data generated by states or also other kinds of data; whether she focuses more on the operational practice or on the *opinio juris*; and what she makes of any treaty provision on the issue. As the methodological variance expands, so too does the range of plausible interpretations of the raw data – and the indeterminacy on the CIL status and substantive content of the putative norm.

Many scholars argue that the indeterminacy undercuts CIL’s efficacy in shaping state behavior.¹⁹ They argue that, because CIL allows so much discretion at the

¹⁴ *ILA Report*, *supra* note 1, at 7.

¹⁵ *ILA Report*, *supra* note 1, at 43–48; *see also* Wood’s *First Report*, *supra* note 1, at ¶ 34 (“[I]t is generally recognized that treaties may be reflective of pre-existing rules of customary international law; generate new rules and serve as evidence of their existence; or . . . have a crystallizing effect for emerging rules of customary international law.”).

¹⁶ *See infra* note 108 and accompanying text.

¹⁷ *ILA Report*, *supra* note 1, at 43–48; *see also* Curtis A. Bradley & Mitu Gulati, “Withdrawing from International Custom,” 120 *YALE L.J.* 202, 213 (2010) (“[A]lthough treaty and CIL obligations frequently overlap, there is debate over whether and to what extent treaties can serve as evidence of CIL.”).

¹⁸ *See, e.g.*, ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 6 (1971) (“When the rules for finding the rules of law are themselves vague or ambiguous, law becomes unpredictable.”).

¹⁹ *See, e.g.*, Andrew T. Guzman & Timothy L. Meyer, “Customary International Law in the 21st Century,” in *PROGRESS IN INTERNATIONAL LAW* 197, 197 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (“This lack of a defining procedure creates considerable confusion as to the content of CIL and its relevance to state behavior.”); K. Wolke, “Some Persistent Controversies Regarding Customary International Law,” 24 *NETH. Y.B. INT’L L.* 1, 15 (1993) (noting “the frequently expressed doubts about the present usefulness of customary international law” and asserting that, “[c]onsidering the complexity, imprecision and relative slowness of international custom as a law-generating instrument, such doubts seem to be fully justified”).

point of application, it invites states to make CIL claims that evade regulation.²⁰ These claims can be difficult to refute because the CIL process is, at bottom, decentralized: no actor is formally designated to settle CIL or, in most cases, to apply a putative norm to specific facts. Moreover, even if CIL can effectively regulate states on some issues, its fluidity and lack of structure might make it particularly ill-suited for addressing complex modern problems, like climate change and nuclear nonproliferation. Such problems typically demand detailed regulation, tradeoffs among differently situated states, and some institutional oversight.²¹

Separately, CIL's indeterminacy is said to undercut its legitimacy as law. The argument here is that, because CIL is so malleable, it is easily infected by factors, such as raw power, that ought to be exogenous to the law.²² For example, Jean d'Aspremont recently proclaimed that many CIL norms are so "*dangerously* indeterminate" that "their authority is gravely enfeebled."²³ Fernando Tesón characterizes as deeply problematic what he calls "fake custom" – "pieces of advocacy disguised as law."²⁴ The idea that CIL is easily abused or opportunistically invoked is sprinkled throughout the CIL literature.²⁵

²⁰ This kind of argument is commonly made not just about CIL but about ambiguity in international law more generally. See, e.g., JEAN D'ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW* 29–30 (2011) (asserting that "uncertainty regarding the existence of international legal rules prevents them from providing for meaningful commands" or "generating any change in the behavior of its addressees"); Andrew T. Guzman, "A Compliance-Based Theory of International Law," 90 *CALIF. L. REV.* 1823, 1863 (2002) ("As the uncertainty of an obligation increases, the reputational cost from a violation decreases."); Thomas M. Franck, "Legitimacy in the International System," 82 *AM. J. INT'L L.* 705, 714 (1988) ("Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance.").

²¹ See Niels Peterson, "Customary International Law and Public Goods" (in this volume); Joel Trachtman, "The Growing Obsolescence of Customary International Law" (in this volume).

²² See e.g., J. Patrick Kelly, "The Twilight of Customary International Law," 40 *VA. J. INT'L L.* 449, 451 (2000) (asserting that, because CIL is indeterminate, "it cannot function as a legitimate source of substantive legal norms"); Philip R. Trimble, "A Revisionist View of Customary International Law," 33 *UCLA L. REV.* 665, 716–31 (1986). Like the efficacy argument, this legitimacy argument is made not just about CIL but about ambiguous international legal norms more generally. See, e.g., Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium," 100 *AM. J. INT'L L.* 88, 93 (2006) (arguing that the most important element of a norm's legitimacy is its determinacy); Martti Koskeniemi, "Solidarity Measures: State Responsibility as a New International Order?" 72 *BRIT. Y.B. INT'L L.* 337, 341 (2002) ("[V]ague clauses would give too much room for political abuse.").

²³ D'ASPREMONT, *supra* note 20, at 164 (emphasis added).

²⁴ Fernando R. Tesón, "Fake Custom," in *CUSTOMARY LAW* (Brian Leard ed., forthcoming 2015), available at <http://ssrn.com/abstract=2527523>.

²⁵ ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 21 (2007) ("Uncertainties about the existence and content of rules of customary law allow opportunistic claims."); Pierre-Hugues Verdier & Erik Voeten, "Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory," 108 *AM. J. INT'L L.* 389, 413 (2014) ("[S]tates often appear to assess state practice opportunistically in the context of specific disputes or when arguing for a desired rule.").

These criticisms of CIL are largely what motivate the persistent focus on method: if the method for finding CIL were more refined, states and other global actors would have less discretion to characterize as CIL their own, parochial policy preferences – and the uncertainty and susceptibility to abuse that are the hallmarks of CIL might be reduced. Indeed, the International Law Commission has explained its current project on CIL in precisely these terms:

The view was expressed that the ambiguities surrounding the identification of customary international law had given rise to legal uncertainty and instability, as well as opportunistic or bad faith arguments regarding the existence of a rule of customary international law. The proposed effort to clarify the process by which a rule of customary international law is identified was thus generally welcomed.²⁶

Of course, those who focus on method recognize that CIL finding involves some interpretive discretion. Still, the goal is to limit that discretion by making the exercise more methodologically disciplined.

In short, although different methods vary in the relevance and weight that they attribute to particular data, they all present the same detached question: do the data support this or that CIL claim? The methods also have similar goals: to help resolve whether norms that are claimed to be CIL are really CIL and thus to reduce the volatility and political excess in CIL. And they rest on a set of common assumptions. They assume that CIL finding is an objective exercise – and thus that it stands apart from and can impose order on the process for making CIL. The recent experience in international humanitarian law (IHL), the law that governs the conduct of hostilities in wartime, suggests that these assumptions do not hold. CIL finding is entangled with CIL making and part of the same chaotic process.

THE DEMAND FOR CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

Customary IHL presents a tidy case for studying the methodological question because the recent shift in this area has been so drastic and undeniable. From the mid-nineteenth century until the end of the twentieth century, IHL was dominated by treaties. There are now dozens of IHL treaties, the principal ones being the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.²⁷ Customary

²⁶ Rep. of the Int'l Law Comm'n, 56th Sess., May 6–June 7, July 8–Aug. 9, 2013, ¶ 75, UN Doc. A/68/10.

²⁷ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *Geneva Convention I*]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter *Geneva Convention II*]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Geneva Convention III*]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287

IHL was always understood to operate alongside these treaties but was thought to do little independent work. Well into the 1990s, the dominant position in the literature was that customary IHL, at best, reflected the most minimal provisions of the IHL treaties.²⁸ Customary IHL has since flourished; it is now widely understood to *exceed* the scope of the IHL treaties.

That shift in customary IHL resulted from a concerted effort to “fix” two perceived deficiencies in the treaties’ scope of application.²⁹ First, the treaties bind only state parties. This is not an issue for the Geneva Conventions because they are universally ratified. But dozens of states, including militarily active ones, have either declined to ratify or attached reservations to the Additional Protocols. Most significantly, the United States and Israel refused to ratify the Additional Protocols because of fundamental disagreements with certain provisions. Several other states, including states that participate in the North Atlantic Treaty Organization, ratified the Additional Protocols with reservations.³⁰ These nonparties and reserving parties create gaps in the treaty regime.

Second, IHL developed primarily to regulate interstate conflicts (“international conflicts”), so the treaties under-regulate most conflicts involving armed nonstate groups (“non-international conflicts”).³¹ Of the hundreds of provisions in the Geneva Conventions, only Article 3 – which is common to all four Conventions – applies in non-international conflicts. Common Article 3 establishes minimal protections for people in wartime.³² Additional Protocol II also applies in non-international conflicts, but this protocol is much more rudimentary than the first, which applies in international conflicts. Moreover, Additional Protocol II applies by its terms only in extreme cases: when an armed nonstate group operates under responsible command,

[hereinafter *Geneva Convention IV*]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Additional Protocol I*]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *Additional Protocol II*].

²⁸ See, e.g., Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), ¶ 52, UN Doc. S/1994/674 Annex (May 27, 1994) (“It is probable that common article 3 would be viewed as a statement of customary international law, but unlikely that the other instruments would be so viewed.”); Sandesh Sivakumaran, “Re-Envisaging the International Law of Internal Armed Conflict,” 22 *EUR. J. INT’L L.* 219, 228 (2011) (“Until the 1990s, the view that there were more than simply a handful of customary rules applicable in internal armed conflict was never seriously entertained, and identifying even those rules proved rather problematic.”).

²⁹ See 1 JEAN-MARIE HENCKAERT ET AL., *INT’L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* xxxiv (2005) [hereinafter *ICRC Study*].

³⁰ See Julie Gaudreau, “The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims,” 849 *INT’L REV. RED CROSS* 143 (2003).

³¹ IHL now classifies as “international” one set of conflicts against nonstate groups: conflicts involving national liberation movements. See *Additional Protocol I*, *supra* note 27, art. 1.

³² *Geneva Conventions I, II, III, IV*, *supra* note 27, art. 3.

controls part of a state's territory, and carries out "sustained and concerted military operations."³³ As late as 1977, then, states collectively decided that international law would lightly regulate non-international conflicts.

That decision became untenable with the maturation of international human rights law. Human rights law's initial impact on IHL was not doctrinal. Although both regimes aim to protect people from harm, each developed for a different context. IHL was designed primarily for interstate wars, while human rights law focused on a state's everyday relations with its own people. The two regimes might reasonably establish different rules for each context. Rather, human rights law's initial impact on IHL was conceptual. By declaring that international law *is* concerned with how states treat nonstate actors, human rights law painted as outmoded the minimal regulation of non-international conflicts under IHL.³⁴

Using CIL to correct perceived deficiencies in the treaties was an ambitious goal. States had deliberately limited the treaties' scope of application and had not shown an appetite for altering that arrangement. Moreover, the extent to which states were exceeding, let alone meeting, their treaty obligations – so as to create parallel substantive norms that apply more broadly as a matter of CIL – was, to say the least, unclear. Compliance with IHL has long been a problem. Nevertheless, the customary IHL project has been extremely successful. Although global actors still quibble about the content or CIL status of particular IHL norms, the prevailing view is now that customary IHL applies in all conflicts and is modeled not after the minimal treaty provisions for non-international conflicts but after the much more robust provisions for *international* conflicts.³⁵

THE PROCESS FOR CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

The experience with customary IHL exposes a conceptual flaw in the literature on method. Asking how to find CIL assumes that CIL finding is a distinct thing – specifically, that it is meaningfully distinguishable from CIL making. Studying the rise of customary IHL shows that, in fact, CIL finding looks and operates much like CIL making. Both exercises involve constructing the preexisting data to make a prescriptive claim. Both are susceptible to opportunism and abuse – claims that push hard to change or undercut expectations, even as they pretend to reflect expectations. And both depend for their relevance on their reception within the

³³ *Additional Protocol II*, *supra* note 27, art. 1.

³⁴ See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.").

³⁵ See *infra* notes 51–52, 57–74, and accompanying text.

chaotic CIL process. The fact that the two exercises overlap so heavily calls into question the assumption that CIL finding is objective and disciplined, even as CIL making clearly is not.

Law Finding as Lawmaking

Decisions that purport to find CIL look a lot like decisions that aim to make CIL. The CIL process produces a mass of disconnected, ambiguous, and inevitably contradictory data. “Finding” CIL entails sifting through and advancing a prescriptive claim on the data – a claim that the data should be interpreted as supporting this or that CIL norm.³⁶ Such decisions are usually articulated as if they describe an objective phenomenon: “CIL is X.” In fact, the decisions construct the data and push CIL in a particular direction.³⁷ Decisions that aim to make CIL use very similar moves. They usually assert that CIL is X in an effort to shift CIL toward X.

Indeed, because the CIL process is so unstructured, it lacks the formal controls that might inhibit the participants from pushing hard for particular norms – making the opportunistic claims that methods for finding CIL are supposed to weed out. Such claims are an ordinary part of the normative contestation that occurs during the process for making CIL.³⁸ Actors that participate in CIL making, such as states or nongovernmental advocates, might benefit from treating their own contested claims as law. Their legal decisions thus might contain very tendentious CIL claims. Actors that are specifically charged with *finding* CIL are presumed to stand apart from that process and to assess the evidence objectively. But their decisions sometimes also contain opportunistic or tendentious CIL claims.

Consider the 1995 *Tadic* decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY).³⁹ *Tadic* determined that, in addition to replicating Common Article 3 and “the core of Additional Protocol II,”⁴⁰ customary IHL prohibits certain tactics that the treaties proscribe only in international conflicts.⁴¹

³⁶ See, e.g., STARKE’S INTERNATIONAL LAW 36 (I.A. Shearer ed., 11th ed. 1994) (“The difficulties involved in extracting a customary rule or principle of international law from the mass of heterogeneous documentation of state practice . . . are not to be minimised.”).

³⁷ Cf. Curtis A. Bradley, “Customary International Law Adjudication as Common Law Adjudication” (in this volume) (arguing that courts “find” CIL by constructing and evaluating the past practice, assessing state preferences, and accounting for social or moral considerations).

³⁸ See DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 57 (2002) (describing the process as one of “struggle and resistance,” and as a “‘marketplace in which states affirmatively (and self-consciously) ‘bid’ and ‘barter’ and ‘trade’ in new rules of conduct”); D’AMATO, *supra* note 18, at 266 (“[C]ustom represents a type of structured legal argument that has recurred in many claim-conflict situations.”).

³⁹ *Tadic*, *supra* note 34.

⁴⁰ *Id.* at ¶ 98.

⁴¹ *Id.* at ¶ 119.

This position was extremely expansive for the time.⁴² The overwhelmingly dominant view was that customary IHL at best reflected the minimal treaty provisions for non-international conflicts.⁴³ Although *Tadic* purported only to find CIL, it pushed hard to create CIL. It drove customary IHL toward the treaty law for international conflicts.⁴⁴

The literature already recognizes that CIL finding bleeds into CIL making. But even scholars who underscore this point go on to ask the methodological question – and thus to assume that the two exercises are, in some way, distinct.⁴⁵ For example, Maurice Mendelson explains in his Hague Course that CIL creation and CIL application often occur simultaneously.⁴⁶ Still, Mendelson insists that global actors need a method for finding CIL.⁴⁷ His course then works through the methodological question. Likewise, Anthea Roberts recognizes that CIL finding involves some level of CIL making and that the two exercises can look alike.⁴⁸ However, Roberts's stated purpose is to offer a new method for finding CIL. Brian Lepard's chapter in this volume is similar. Lepard argues for conceiving of CIL as a dynamic lawmaking process. Nevertheless, Lepard proposes a method for finding CIL. He argues that CIL should be found by sifting through a broad range of evidence and identifying the position that states generally believe to be desirable.⁴⁹

⁴² See, e.g., Christopher Greenwood, "International Humanitarian Law and the *Tadic* Case," 7 *EUR. J. INT'L L.* 265, 278 (1996) ("[T]he Appeals Chamber has gone further than other bodies by determining that there are rules applicable to internal armed conflicts which are not based upon either common Article 3 or Additional Protocol II.").

⁴³ See *supra* note 28 and accompanying text.

⁴⁴ To be clear, *Tadic* recognized certain differences between the customary IHL that applies in all conflicts and the treaty law that applies in international conflicts. *Tadic* explained that "only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts." *Tadic*, *supra* note 34, at ¶ 126. But as Sandesh Sivakumaran has explained, "the consistent approach of the ICTY" has been to "analogize to the law of international armed conflict." Sivakumaran, *supra* note 28, at 230. Given the preexisting view of customary IHL, *Tadic*'s push toward the treaty law for international conflicts was significant.

⁴⁵ See also, e.g., KAROL WOLKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 53–54 (2d rev. ed. 1993) (recognizing that CIL "formation and ascertainment, are of course closely interdependent," but then insisting that "the formation of a custom and the ascertaining of custom or customary rule are two different notions"); Nicholas Greenwood Onuf, "Global Law-Making and Legal Thought," in *LAW-MAKING IN THE GLOBAL COMMUNITY* 1, 14–19 (Nicholas Greenwood Onuf ed., 1982) (asserting that "law-making and law-using tend to be aspects of the same phenomenon," but then addressing the question of how to find CIL).

⁴⁶ Mendelson, *supra* note 11, at 176 ("[I]t is not always possible or helpful to label one part [of the process] 'creation' and another 'application.'").

⁴⁷ *Id.* (explaining that decision makers must be able to determine "whether, at the moment the appreciation is being made, the practice has matured into a rule of law").

⁴⁸ Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," 95 *AM. J. INT'L L.* 757, 761, 763 (2001).

⁴⁹ Brian D. Lepard, "Customary International Law as a Dynamic Process" (in this volume).

Perhaps the distinction between CIL making and CIL finding is intended to capture the idea that CIL decisions vary in the extent to which they reflect, rather than challenge, preexisting expectations. Decisions might be said to shift from CIL making toward CIL finding as their prior support increases. Yet that distinction elides both the fluidity of the CIL process and the prescriptive effect of later-in-time decisions. Because the CIL process is always ongoing, the meaning and relevance of a CIL norm fluctuate as different actors engage with it over time.⁵⁰ Any decision relating to the norm – even a decision that might reasonably be characterized as a “finding” – has some prescriptive effect. As I elaborate below, *Tadic* would have made a prescriptive move even if it had more accurately reflected expectations. Adopting the then-dominant position on customary IHL would have helped solidify that position as law. This prescriptive effect might seem trivial if the position were already widely accepted as CIL. But in that event, any *finding* that the position was CIL would also be trivial. Decisions that purport to find CIL are most relevant when the CIL norm is uncertain or contested – and thus when it benefits from more prescription.

Law Finding, Lawmaking, and the CIL Process

Decisions that purport to find CIL and decisions that push to create CIL do not only look alike and make similar moves. They also operate in similar ways in the CIL process. This process is highly unstructured; it lacks a central authority for settling the law or a designated forum for ratifying or challenging particular decisions. All CIL decisions – decisions that aptly reflect preexisting expectations and decisions that push hard to alter expectations – feed into the same, chaotic process. In this process, a decision’s relevance and impact turn not necessarily on the decision’s prior level of support but on its reception among other actors going forward. To the extent that other actors seize on a decision and treat its claim as law, the claim grows stronger and solidifies as CIL. To the extent that they instead reject or continue to debate the claim, it remains vulnerable and unstable. As a practical matter, this means that norms that are claimed to be CIL vary considerably in their strength. Norms that are widely accepted and treated as law tend to be strong. Norms with shallower or narrower support are weaker; they might be treated as law only by some actors, in particular venues, or in certain respects. Decisions that purport to find CIL do not weed out invalid claims or stabilize CIL because they operate like other prescriptive claims do; they become part of the lawmaking mix.

Consider again the *Tadic* decision. *Tadic*’s position on customary IHL is now widely accepted not because it accurately reflected the customary IHL at the

⁵⁰ See W. Michael Reisman, “International Incidents: Introduction to a New Genre in the Study of International Law,” 10 *YALE J. INT’L L.* 1, 4–5 (1984); Mendelson, *supra* note 11, at 175.

time – it did not – but because of how the lawmaking process unfolded. States essentially adopted that position in the Rome Statute of the International Criminal Court.⁵¹ Like *Tadic*, the Rome Statute maintains a distinction between international and non-international conflicts. The statute's list of war crimes is more abbreviated for non-international conflicts.⁵² But like *Tadic*, the statute identifies as war crimes much conduct that the IHL treaties do not specifically proscribe in non-international conflicts. States effectively converged on *Tadic*'s claim in the Rome Statute.

Tadic would have fed into the same process even if it had come out the other way. Adopting the then-dominant position on customary IHL would have helped strengthen that position and weaken any competing claims on the law. These competing claims would have been more difficult to sustain because their pretense of simply reflecting reality would have been less plausible; they would have looked like unilateral efforts to change the law. Still, solidified CIL norms *can* deteriorate. The then-dominant position would have remained viable only so long as it sustained a base of support.⁵³ States might have agitated against that position by, for example, behaving in ways that reflected their discontent, openly promoting a change in the law, or simply adopting the Rome Statute.

Most CIL decisions are unlike *Tadic* in that they are not rapidly and collectively endorsed. Their relevance is diffuse and drawn out. The customary IHL study that the International Committee of the Red Cross (ICRC) published in 2005 is illustrative.⁵⁴ This study is much more ambitious than *Tadic* or the Rome Statute; it addresses almost all of IHL, not just the most serious violations that qualify as war crimes and trigger the jurisdiction of international criminal courts.⁵⁵ The ICRC purported to find 161 rules of customary IHL that largely replicate the treaty law

⁵¹ Rome Statute of the International Criminal Court, art. 8(2)(a)–8(2)(b), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*]; cf. Jean-Marie Henckaerts, "Customary International Humanitarian Law: A Response to U.S. Comments," 89 *INT'L REV. RED CROSS* 473, 486 (2007) [hereinafter Henckaerts, *A Response to US Comments*] ("[E]very humanitarian law treaty adopted since 1996 has been made applicable to both international and non-international conflicts."). On this development, see Allison Marston Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War," 59 *VAND. L. REV.* 1, 25–37 (2006); Claus Kress, "War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice," 30 *ISR. Y.B. HUM. RTS.* 103, 104–07 (2000).

⁵² Compare *Rome Statute*, *supra* note 51, art. 8(2)(a)–8(2)(b), with *id.* art. 8(2)(c), 8(2)(e).

⁵³ See, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 89 (6th ed. 2008) ("Generally, where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate."); THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990) (arguing that noncompliance undermines a norm's "compliance pull," making it less likely that others will comply going forward); Michael J. Glennon, "How International Rules Die," 93 *GEO. L.J.* 939, 960 (2005) ("[A]t some point state practice that is inconsistent with a norm is simply too thick to justify the conclusion that states really accept the norm as obligatory.").

⁵⁴ *ICRC Study*, *supra* note 29.

⁵⁵ The study excludes from its scope a few discrete aspects of IHL. See *id.* at xxxvi–xxxvii.

for international conflicts but apply more broadly: to states that are not parties or have attached reservations to the Additional Protocols, and in non-international conflicts.⁵⁶ As the ICRC proudly proclaimed, “State practice ... has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts.”⁵⁷

No matter to what extent the study reflected prior expectations – and there is good reason to believe that some of its conclusions were heavily prescriptive⁵⁸ – it is now part of the CIL process and input for further lawmaking. The ICRC invokes and applies its own CIL positions when it educates people about IHL and tries to influence warring parties to comply.⁵⁹ It thus helps create the expectation that its positions are law. Moreover, some of these positions have clearly resonated with other actors and helped shape customary IHL. For instance, since the study was published, several states have incorporated into their national laws or military manuals specific conclusions from the study. A few states have even replicated the study’s precise language.⁶⁰ Similarly, international and national courts have cited the study as evidence of CIL.⁶¹ Courts most often cite the study for rules, such as the

⁵⁶ The study recognizes that several rules (rules 3, 4, 41, 49, 51, 106–08, 114, 130, and 145–47) might apply only in international conflicts. Most of these rules concern combatant status or occupations. In addition, the study formulates a handful of rules (rules 124, 126, 128–29) differently for international than for non-international conflicts. See Malcom MacLauren & Felix Schwendimann, “An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law,” 6 *GERMAN L.J.* 1217, 1228–29 (2005).

⁵⁷ *ICRC Study*, *supra* note 29, at xxxv.

⁵⁸ The study was strongly criticized on methodological grounds. See, e.g., John B. Bellinger, III & William J. Haynes, II, “A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law,” 89 *INT’L REV. RED CROSS* 443 (2007) (raising a litany of methodological objections); Daniel Bethlehem, “The Methodological Framework of the Study,” in *PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 3, 10 (Elizabeth Wilmschurst & Susan Breau eds., 2007) (arguing that the practice was too often equivocal or sparse to support the claimed CIL norms); Yoram Dinstein, “The ICRC Customary International Humanitarian Law Study,” 36 *ISR. Y.B. HUM. RTS.* 1 (2006) (questioning the weight that the study attributed to different kinds of data); George H. Aldrich, “Customary International Humanitarian Law – An Interpretation on Behalf of the International Committee of the Red Cross,” 76 *BRIT. Y.B. INT’L L.* 503, 507 (2005) (asserting that the study’s “credibility crumbles” as a result of its overly expansive claims). For examples of the ICRC’s responses, see Jean-Marie Henckaerts, “Customary International Humanitarian Law – A Rejoinder to Judge Aldrich,” 76 *BRIT. Y.B. INT’L L.* 525 (2006); and Henckaerts, “A Response to US Comments,” *supra* note 51.

⁵⁹ On the ICRC’s work, see Steven R. Ratner, “Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War,” 22 *EUR. J. INT’L L.* 459 (2011).

⁶⁰ See, e.g., ICRC, *Practice Relating to Rule 54*, CUSTOMARY IHL DATABASE, retrieved from https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule54 (last visited Sept. 18, 2014) (Spain); ICRC, *Practice Relating to Rule 120*, CUSTOMARY IHL DATABASE, retrieved from https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule120 (last visited Sept. 18, 2014) (Guinea and Mexico).

⁶¹ See, e.g., *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Judgment, ¶ 90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005) (on command responsibility); *Janowiec v. Russia*, App. 55508/07, 58 *Eur.*

ones that define and prohibit attacks on civilian objects, that were already widely regarded as CIL before the study was published.⁶² The study has a reinforcing effect on these rules. As global actors repeatedly endorse a CIL claim, it grows stronger and more difficult to refute. It solidifies as CIL.

The reactions to other positions in the study have been more mixed, and the normative contestation that is endemic to CIL remains apparent. Consider the study's core claim that customary IHL is modeled after the treaty law for international conflicts. This claim is now widely accepted at a high level of abstraction.⁶³ But the claim's relevance and meaning continue to be unstable. IHL experts who take the claim for granted still disagree on how to translate into the customary IHL for non-international conflicts the treaty law that was designed for international conflicts.⁶⁴ This disagreement is evident, for example, in the controversy surrounding the ICRC's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities*.⁶⁵ The *Interpretive Guidance* was meant to help clarify an issue that lies at the heart of IHL: when may someone be targeted for attack? IHL treaties answer the question for international conflicts: members of state armed forces generally identify themselves as such, comprise the fighting class, and are targetable.⁶⁶ The rule for civilians is the reverse: civilians are generally *not* targetable because they are presumed not to participate in the fighting. Under Additional Protocol I, civilians are targetable only if they directly participate in hostilities.⁶⁷ Those treaty rules translate poorly to non-international conflicts in which the combatant-civilian distinction breaks down.⁶⁸ The *Interpretive Guidance* sought to resolve the targeting

H.R. Rep. 30 ¶ 157 (2014) (on duty to investigate war crimes); *Hamdan v. Rumsfeld*, 548 U.S. 557, 632 (2006) (on trying people before a "regularly constituted court"); *Al-Sirri v. Sec. State for Home Dept.*, [2013] 1 A.C. 745, 787 (U.K.) (on attacking peacekeeping personnel); HCJ 3799/02, *Adalah Legal Center v. IDF Central Commander* [2005] (2) Isr. 206, ¶ 20 (Isr.) (on advance warnings of attacks that might affect civilians).

⁶² Compare, e.g., ICRC Study, *supra* note 29, at 29–32, with *Prosecutor v. Kordić and Čerkez*, Motion to Dismiss for Lack of Jurisdiction, No. IT-95-14/2-PT, ¶ 15–31 (Mar. 2, 1999); *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-AR73.3, Decision on the Joint Defence, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2005); and *Prosecutor v. Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, n. 130 (Feb. 8, 2010).

⁶³ See SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 56–57, 61 (2012).

⁶⁴ For a discussion and critique of this method, see Monica Hakimi, "A Functional Approach to Targeting and Detention," 110 MICH. L. REV. 1365 (2012).

⁶⁵ NILS MELZER, ICRC, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* (2009).

⁶⁶ On the people who qualify as combatants, see *Geneva Convention III*, *supra* note 27, art. 4; and *Additional Protocol I*, *supra* note 27, arts. 1(4), 43–44. On the point that members of state armed forces must identify themselves as such, see *Geneva Convention III*, *supra* note 27, art. 4; and *Additional Protocol I*, *supra* note 27, art. 44(3). On the well-accepted exceptions to this targeting rule, see *Additional Protocol I*, *supra* note 27, art. 41.

⁶⁷ *Additional Protocol I*, *supra* note 27, art. 51(3).

⁶⁸ See Hakimi, *supra* note 64, at 1377–79, 1398–03; see also Laurie Blank & Amos Guiora, "Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare," 1 HARV.

rules that apply, mostly as a matter of customary IHL, in these conflicts. Its conclusions were heavily criticized.⁶⁹

Separately, the ICRC's core claim is under pressure from actors who question the extent to which customary IHL, as modeled after the treaty law for international conflicts, is even the appropriate regulatory framework for modern conflicts. Now more than ever, domestic courts, human rights institutions, and civil society groups appraise situations involving armed nonstate groups. These decisionmakers are not especially invested in "pure" IHL, and they regularly invoke and apply hybrids that mix IHL with norms from other sources.⁷⁰ For example, the Israeli Supreme Court has used domestic law to modify the norms that, in its view, would have applied as a matter of customary IHL.⁷¹ The European Court of Human Rights has repeatedly applied human rights law, instead of IHL, to situations that are also covered by IHL.⁷² And civil society groups regularly invoke their preferred versions of IHL to condemn conduct that is consistent with more mainstream positions on IHL.⁷³ IHL purists might insist that these moves do not affect IHL because they are

NAT'L SECURITY J. 45, 53 (2010) (asserting that "new warfare" is "characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects").

⁶⁹ For an analysis of the areas of agreement and disagreement, see Hakimi, *supra* note 64, at 1377–79, 1398–93. For evidence of the disagreement, see, for example, W. Hays Parks, "Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect," 42 N.Y.U. J. INT'L L. & POL. 769 (2010); Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis," 1 HARV. NAT'L SECURITY J. 5 (2010); Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance," 42 N.Y.U. J. INT'L L. & POL. 641 (2010); Bill Boothby, "'And for Such Time as': The Time Dimension to Direct Participation in Hostilities," 42 N.Y.U. J. INT'L L. & POL. 741 (2010).

⁷⁰ The ICRC study incorporates human rights law to the extent that the norms in human rights law are analogous to the ones in IHL. However, the study does not try to resolve any discrepancies between the two regimes. See ICRC Study, *supra* note 29, at xxxvi–xxxvii.

⁷¹ HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Israel*, 2006(2) Isr. Rep. 459, 490–95 [2005] (Isr.).

⁷² See, e.g., *Isayeva v. Russia*, App. No. 57950/00, 41 Eur. H.R. Rep. 791 (2005); *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2011). The court's approach in these cases might be justified on the ground that the court's mandate is to apply human rights law, not IHL. This justification is incomplete. Other bodies with similar mandates have occasionally applied IHL. See, e.g., *Bámaca Velásquez v. Guatemala*, Case 11.129, 2001 Inter-Am. Ct. H.R. (ser. C) No. 70, at 321 (Nov. 25, 2000); Human Rights Comm., *Concluding Observations: Croatia*, ¶ 9, UN Doc. CCPR/C/79/Add.15 (Dec. 28, 1992).

⁷³ Compare, e.g., *Geneva Convention IV*, *supra* note 27, art. 19 ("The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy."); and HUMAN RIGHTS WATCH, *OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ* 73 (2003) ("By using hospitals as military headquarters, Iraqi forces turned them into military objectives."); with ANTHONY H. CORDESMAN, *THE "GAZA WAR": A STRATEGIC ANALYSIS* 65–66 (2009) (claiming that Hamas used a hospital as a military base during the 2008–2009 Gaza conflict); and DAN MAGEN, "ILL MORALS": GRAVE VIOLATIONS OF THE RIGHT TO HEALTH DURING THE ISRAELI ASSAULT ON GAZA 41–44 (Ran Yaron ed., Saul Vardi et al. trans., 2009) (condemning Israel's attacks on hospitals in Gaza in 2008–2009).

external to the regime or plainly opportunistic. But the moves unquestionably shape expectations on whether and how IHL applies – either as a matter of treaty law or as a matter of customary law that is modeled after the treaties. The ICRC's "finding" that customary IHL is modeled after the treaty law for international conflicts has not suppressed these competing positions or stabilized the law in this area.⁷⁴

In short, although the ICTY and ICRC purported only to find CIL, they actually helped make CIL. They advanced particular CIL claims. These claims fed back into the CIL process, as other prescriptive claims do. And like other claims, their viability has turned on how the process has unfolded. Some claims already had support and have grown stronger. Other claims were tendentious when they were made but have since gained legal traction. Still others are contested, which means that the putative norms will continue to be invoked and applied inconsistently, depending on who is acting and in which forum.⁷⁵ This is how the CIL process works. It works this way no matter to what extent a particular decision aims to reflect or to challenge preexisting expectations.

IMPLICATIONS

The argument that CIL finding is not meaningfully distinguishable from CIL making has two important practical implications. First, nonstate actors who are charged with finding CIL can be extremely influential in making CIL. Second, no method for finding CIL is likely to discipline these actors or help settle CIL, so long as the process for making CIL remains as it is. I address each of these implications in turn.

Participants in the Process

Because CIL finding and CIL making are intertwined, nonstate actors who are charged with finding CIL sometimes play a significant role in making CIL. The dominant view in the literature – which all but the most esoteric methods for finding

⁷⁴ Indeed, even the ICRC acknowledges that "the study should not be seen as the final word on customary IHL because it cannot be exhaustive and because the formation of CIL is an ongoing process." Henckaerts, *A Response to U.S. Comments*, *supra* note 51.

⁷⁵ Cf. W. Michael Reisman, "The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application," in *DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* 15, 28–29 (Rüdiger Wolfrum & Volker Röben eds., 2005) [hereinafter Reisman, *Democratization*]:

Because the question of whether international law will be effective in a particular dispute will increasingly depend upon the arena or forum in which the dispute is heard, scholarly and practitioner statements of what the law is, which are provided to clients to assist them in their planning, will increasingly have to be qualified by reference to *where* a potential dispute in the future may be initially characterized in terms of law and *where* those characterizations will thereafter be put to political use.

CIL reinforce – is that *states* drive the formation of CIL.⁷⁶ That view rests, again, on the distinction between CIL finding and CIL making. Nonstate actors are known to find CIL but are said to play a marginal or subsidiary role in making CIL. The experience with customary IHL suggests otherwise. The ICTY and ICRC have not just participated in making CIL; they have had a significant impact.

The conventional view is incompatible with the very nature of the CIL process. Because the process is unstructured, it lacks the formal mechanisms that might exclude certain participants. Anyone can make a claim on CIL. Of course, some actors are more influential than others; some push harder, command a broader audience, or are more effective in promoting their views.⁷⁷ Yet there is no reason to believe that states alone are capable of exercising outsized influence. Other kinds of actors might be influential in part because they are *not* states – and thus are perceived not to be advancing particular, nationalistic agendas. International courts and tribunals, high-level officials of intergovernmental bodies, and expert nongovernmental groups often have an authority, at least in the eyes of some relevant audiences, that individual states lack.⁷⁸ These actors can be extremely influential in shaping expectations about CIL. In the face of ambiguity or competition – “CIL is X,” “no, CIL is Y” – the claim that appears authoritative tends to be sticky.⁷⁹ Competing claims might still be advanced, but these claims become harder to sustain. Their pretense of describing CIL becomes less credible once an actor with some authority has said otherwise.

The literature already recognizes that two nonstate institutions – the International Court of Justice (ICJ) and the International Law Commission – sometimes shape CIL. A recent volume on the ICJ concludes that its “decisions are accorded ‘a truly astonishing deference’” in international law.⁸⁰ Several CIL claims that were

⁷⁶ See sources cited at *supra* note 5.

⁷⁷ North Sea Continental Shelf (Ger., Den., Neth.), Judgment, 1969 I.C.J. 3, 43 (Feb. 20) (explaining that states that are especially invested in an issue play a larger role in creating the relevant CIL than do states that are disengaged); Michael Byers, “Introduction: Power, Obligation, and Customary International Law,” 11 *DUKE J. COMP. & INT’L L.* 81, 84 (2001) (explaining that powerful states can play an outsized role).

⁷⁸ See Harlan Grant Cohen, “Finding International Law, Part II: Our Fragmenting Legal Community,” 44 *N.Y.U. J. INT’L L. & POL.* 1049 (2012); W. Michael Reisman, “International Law-Making: A Process of Communication,” 75 *AM. SOC’Y INT’L L. PROC.* 101, 110 (1981).

⁷⁹ Cf. Fernando Lusa Bordin, “Reflections of Customary International Law: The Authority of Codification Conventions and the ILC Draft Articles in International Law,” 63 *INT’L & COMP. L. Q.* 535, 547 (2014) (“[I]t is the inherent uncertainty by which customary international law is characterized that accounts for the influence that non-legislative [i.e., non-binding] codifications exercise.”); Andrew T. Guzman & Timothy L. Meyer, “International Common Law: The Soft Law of International Tribunals,” 9 *CHI. J. INT’L L.* 515, 516–17 (2009) (characterizing as “soft law” the decisions of institutions that, although lacking in formal authority, shape expectations about the law).

⁸⁰ Christian J. Tams, “The ICJ as a ‘Law-Formative Agency’: Summary and Synthesis,” in *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 377, 379 (Christian J. Tams & James Sloan eds., 2013).

controversial when the ICJ endorsed them have since “come to be accepted.”⁸¹ Similarly, the International Law Commission is known to engage in some lawmaking as it codifies CIL.⁸² Its prescriptive moves can be significant. For instance, the provisions on countermeasures in the Draft Articles on State Responsibility were extremely controversial during the commission’s work on that project.⁸³ Now that the commission has adopted those provisions, they are regularly cited as CIL.⁸⁴

And yet, the conventional view is still that nonstate actors participate in CIL making only at the margins or by “finding” what states do or believe. Much of the literature posits that nonstate actors have, at best, a peripheral or subsidiary role in CIL making.⁸⁵ A common refrain is that they participate only to the extent that states delegate lawmaking authority to them or subsequently endorse their CIL positions. For example, Allison Danner has argued that *Tadic*’s effect on CIL is best explained by states’ tacit delegation of lawmaking authority to the ICTY.⁸⁶ Anthea Roberts and Sandesh Sivakumaran likewise cite *Tadic* for the proposition that “[a]ny role that state-empowered bodies play in law creation is thus dependent on initial state consent and at least some level of ongoing state consent.”⁸⁷

⁸¹ *Id.*; see also, e.g., Antonio Cassese, “The International Court of Justice: It is High Time to Restyle the Respected Old Lady,” in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 239, 240 (Antonio Cassese ed., 2012) (“Once the ICJ has stated that a legal standard is part of customary international law, few would seriously challenge such a finding.”); Mahnoush H. Arsanjani, “The United Nations and International Law-Making,” 362 *RECUEIL DES COURS* 11, 29, 38 (2012) (“[T]he International Court has been involved ... on occasion, in making international law, by declaring a particular practice as having become ‘customary international law.’”).

⁸² BOYLE & CHINKIN, *supra* note 25, at 174; Bordin, *supra* note 79, at 542–46.

⁸³ See Koskeniemi, *supra* note 22, at 340.

⁸⁴ See, e.g., *Archer Daniels Midland Co. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, ¶¶ 125–80 (Nov. 21, 2007), retrieved from <http://icsid.worldbank.org/ICSID/Index.jsp> (search “Archer Daniels”); *Corn Prods. Int’l v. The United Mexican States*, ICSID Case No., ARB(AF)/04/01, Decision on Responsibility, ¶¶ 144–92 (Jan. 15, 2008), retrieved from <http://icsid.worldbank.org/ICSID/Index.jsp> (search “corn products”).

⁸⁵ See, e.g., Ochoa, *supra* note 5, at 144 (“Even if (or when) the individual is formally recognized as a legitimate participant in the creation of CIL, the state will continue to hold this position of prominence.”); Mendelson, *supra* note 11, at 203 (asserting that nonstate actors participate only indirectly in the formation of CIL, by influencing other actors); cf. Reisman, *Democratization*, *supra* note 75, at 19–24 (underscoring that nonstate actors regularly participate in international lawmaking but noting that treaty law and CIL are still largely made by states). As discussed, the literature does recognize that the ICJ can play a significant role in CIL making. But many scholars who recognize this point still try to link the ICJ’s role to states. See, e.g., Eyal Benvenisti, “Customary International Law as a Judicial Tool for Promoting Efficiency,” in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* 85, 86–87 (Eyal Benvenisti & Moshe Hirsch eds., 2004) (arguing that the ICJ “has, in fact, the authority to invent the custom,” as “a sort of trustee acting in the best interests of the states and the global community,” and that “States accept and welcome such leaps.”).

⁸⁶ Danner, *supra* note 51, at 47–48.

⁸⁷ Anthea Roberts & Sandesh Sivakumaran, “Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law,” 37 *YALE J. INT’L L.* 107, 117–18 (2012).

Those accounts are unconvincing. Any delegation of lawmaking authority to the ICTY or ICRC was, at best, implicit and incomplete. Danner herself recognizes that, when the ICTY was created, several states asserted that the ICTY was only to apply existing CIL, not to help make CIL.⁸⁸ In addition, states had not committed to accepting the ICTY's positions. True, *Tadic's* CIL positions *were* soon endorsed by states, but the same cannot be said of the ICRC's. The ICRC study is very much a nongovernmental product. States did not participate in drafting the study, and most states responded with silence when the study was released.⁸⁹ Nevertheless, the study has clearly been shaping customary IHL.

Of course, states continue to play a role in this process. A CIL claim that many states reject will have little legal traction, no matter whether that claim is advanced by a nonstate actor, such as the ICRC, or by a state. The point is that nonstate actors can participate in the formation of CIL just as – and sometimes more effectively than – individual states can. Where a CIL norm is uncertain or contested, a nonstate actor's "finding" can tip the scale toward one side or the other. Indeed, the principal threat to the ICRC's core claim on customary IHL appears to be coming not from states – which are still equivocal when engaging with IHL – but from other nonstate actors. Recall that human rights institutions and civil society groups are resisting the idea that customary IHL, as modeled after the treaty law for international conflicts, is the appropriate regulatory framework for many modern conflicts.

Method as Discipline

One response might be to criticize the ICTY and ICRC for exceeding their mandates and trying to make CIL. Sure, all CIL finding involves some level of CIL making. But those who are charged with finding CIL are supposed to be objective and disciplined; their prescriptive discretion should be constrained.⁹⁰ And, the

⁸⁸ Danner, *supra* note 51, at 21 ("Many delegates asserted that the Tribunals could not create new law."); see also UN Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 34, UN Doc. S/RES/808 (May 3, 1993), reprinted in 32 ILM 1163 (asserting that the ICTY was to apply only norms that were "beyond any doubt part of customary law").

⁸⁹ The International Conference of the Red Cross and Red Crescent – which consists of states – did ask the ICRC to prepare a report on customary IHL. ICRC, *From Law to Action: Report on the Follow-Up to the International Conference for the Protection of War Victims*, 26th International Conference of the Red Cross and Red Crescent Res. 1 (Dec 3–7, 1995). But this request cannot reasonably be characterized as a delegation of CIL making authority or an endorsement of whatever substantive positions the ICRC would take. States did not themselves work on the study. And to the extent that governmental experts were consulted, they were consulted in their personal capacities and only once the study was very far along. See Iain Scobbie, "The Approach to Customary International Law in the Study," in *PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 58, 15, 16–17.

⁹⁰ Cf. D'ASPROMONT, *supra* note 20, at 168 ("[T]he idea that courts and tribunals are expressly endowed with custom-making power is not yet accepted."); Mendelson, *supra* note 11, at 178 ("[T]he role of the

logic goes, their discretion *might* be constrained if the proper method for finding CIL were refined. Indeed, this logic motivates much of the focus on method in the CIL literature: identifying the proper method for finding CIL should impose some discipline on and help settle CIL. However, global actors are unlikely to be methodologically disciplined, unless they believe that using an accepted method matters – for example, that it enhances the efficacy or legitimacy of their decisions. The evidence that they do is weak. After all, their decisions feed into the same chaotic process no matter whether they are or are not methodologically restrained.

The proper method for finding CIL is especially contested where, as in IHL, the relevant norms relate to human dignity or security. States commonly endorse these norms discursively but deviate from them in the operational practice. The methodological question asks how to assess those inconsistencies – specifically, how to account for the abhorrent physical practice. That practice arguably prevents the norms from attaining the status of CIL. Many international lawyers thus defend the so-called modern method for finding CIL.⁹¹ This method generally downplays the unsavory physical practice and emphasizes instead the positive verbal pronouncements.⁹² Different variants of the modern method give the physical practice more or less weight.

The variant that is now within the mainstream of legal thinking – but not by any means universally accepted⁹³ – is the one that the ICJ endorsed in *Military and Paramilitary Activities in and against Nicaragua*.⁹⁴ The *Nicaragua* court made two key methodological moves. First, it treated verbal acts as state practice.⁹⁵ Verbal acts that support a norm thus might counterbalance the physical acts that undercut the norm. Second, the court discounted the physical acts that states themselves did not own.⁹⁶ Bad physical conduct might not detract from a CIL finding if states condemn or try to justify that conduct by reference to the norm.

judge is to be an impartial third party, and so far as possible to take an objective photograph, as it were, of the state of the law, frozen at a particular moment in time.”).

⁹¹ See e.g., Henckaerts, *A Response to U.S. comments*, *supra* note 51, at 478–80 (defending this approach in the ICRC study on the ground that the alternative is to permit “violators [to] dictate the law or stand in the way of rules emerging”).

⁹² See Roberts, *supra* note 48, at 758–60.

⁹³ See, e.g., Bruno Simma & Philip Alston, “The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles,” 1988–89 *AUSTL. Y.B. INT’L L.* 82; Prosper Weil, “Towards Relative Normativity in International Law?” 77 *AM. J. INT’L L.* 413, 434–35 (1983).

⁹⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 183–207 (June 27). For scholars who embrace this method, see, for example, THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 94 (1989); and Charney, *supra* note 2, at 545–46.

⁹⁵ *Nicaragua*, *supra* note 94, ¶¶ 183–207; see also *ILA Report*, *supra* note 1, at n.32 (citing *Nicaragua* for the same).

⁹⁶ *Nicaragua*, *supra* note 94, ¶ 186.

As the *Nicaragua* court articulated its method, it licensed CIL finders not to ignore the bad practice but rather to weigh that practice against the data that support a putative norm. Yet when the court applied its method, it appeared not even to account for the bad practice. *Nicaragua* relied entirely on verbal evidence to support its CIL claims.⁹⁷ That approach to method is part of a broader pattern: the ICJ does not consistently use the method that it itself propounds.⁹⁸ The court regularly finds CIL on the basis of scant evidentiary support or without conducting the kind of exhaustive review that its method seems to require.⁹⁹ Still, the court *does* focus on method; once it articulates a particular method, it arguably limits its discretion to “find” the CIL norms that it prefers. At the very least, *Nicaragua* needed solid verbal evidence to offset the unsavory physical practice.

The ICTY and ICRC decisions are striking, however, in that they expressly endorse very unconventional methods.¹⁰⁰ *Tadic* plainly pushed past *Nicaragua*. Whereas *Nicaragua* insisted that the operational practice matters, *Tadic* did not.¹⁰¹ *Tadic* offered “a word of caution” about even trying to consider that practice:

[I]t is difficult, if not impossible, to pinpoint ... whether [troops] in fact comply with, or disregard, certain standards of behavior. This examination is rendered extremely difficult by the fact that not only is access to the theater of military operations normally refused to independent observers ... but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse,

⁹⁷ See, e.g., John Tasioulas, “In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case,” 16 *OXFORD J. LEGAL STUD.* 85, 97 (1996).

⁹⁸ See, e.g., BOYLE & CHINKIN, *supra* note 25, at 279 (“[T]he [ICJ] has not been consistent in applying its own criteria for the determination of customary international law.”); Rudolf H. Geiger, “Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal,” in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA* 673, 692 (Ulrich Fastenrath, et. al. eds., 2011) (“In general the Court does not follow its self-proclaimed method of finding customary international law.”).

⁹⁹ See, e.g., Alain Pellet, “Shaping the Future of International Law: The Role of the World Court in Lawmaking,” in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 1065, 1076 (Mahmoud H. Arsanjani et. al., eds., 2011) (asserting that the International Court of Justice has a “marked tendency to assert the existence of a customary rule more than to prove it”); see also Stephen J. Choi & Mitu Gulati, “Customary International Law: How do Courts Do It?” (in this volume) (showing that international courts generally ignore the traditional method and instead “find” CIL by looking to treaties).

¹⁰⁰ Judge Meron has asserted that the ICTY and ICRC used fairly rigorous methods for finding CIL. See Meron, “The Revival of Customary Humanitarian Law,” 99 *AM. J. INT’L L.* 817, 817 (2005). However, Meron calls these methods rigorous against a background understanding that the proper method is generally quite relaxed and flexible. He endorses a method that allows for considerable prescriptive discretion – and that many others reject.

¹⁰¹ *Tadic*, *supra* note 34, ¶ 99; see also Theodor Meron, “The Continuing Role of Custom in the Formation of International Humanitarian Law,” 90 *AM. J. INT’L L.* 238, 239–40 (1996) (explaining that the tribunal used verbal acts to “compensate for scarcity of supporting practice”).

often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.¹⁰²

The tribunal here is not using an accepted method for finding CIL. It does not even pretend to be methodologically disciplined.

The ICRC's approach was different. The ICRC at least claimed that the operational practice mattered.¹⁰³ Yet like the court in *Nicaragua*, the ICRC appeared to pay little, if any, attention to that practice.¹⁰⁴ The data that it collected to support its CIL claims are overwhelmingly verbal in form.¹⁰⁵ Further, after claiming that the operational practice mattered, the ICRC invoked an extremely expansive method that rendered that practice irrelevant. The ICRC asserted that certain norms qualify as CIL, notwithstanding the extensive practice to the contrary and the absence of any *opinio juris*: "It appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when the rule is a desirable one ... for the protection of the human person, *provided that there is no important contrary opinio juris*."¹⁰⁶

However one assesses the ICTY's and ICRC's methods in the abstract, they become much more dubious as applied to IHL. Neither institution seriously grappled with the IHL treaties that contradicted its CIL claims. Several states expressly rejected the treaty provisions that the ICTY or ICRC characterized as CIL.¹⁰⁷ And the states that negotiated the treaties deliberately did not extend to non-international conflicts the panoply of norms that govern international conflicts. The literature on method suggests that CIL can supersede a contrary treaty arrangement only if the treaty parties so intend; the evidentiary burden is thought to be substantial.¹⁰⁸ The ICTY and ICRC did not

¹⁰² *Tadic*, *supra* note 34, ¶ 99.

¹⁰³ *ICRC Study*, *supra* note 29, at xxxviii, xliiv–xliv.

¹⁰⁴ Elizabeth Wilmshurst, "Conclusions," in *PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 58, 401, 402–03 (summarizing the views of several commentators by concluding that "the authors of the Study have sometimes adopted an approach which is less conservative than is claimed" and on occasion "fairly relaxed").

¹⁰⁵ See generally ICRC, *Practice, CUSTOMARY IHL DATABASE*, retrieved from <https://www.icrc.org/customary-ihl/eng/docs/v2> (last visited Sept. 23, 2014).

¹⁰⁶ *ICRC Study*, *supra* note 29, at xlviii (emphasis added).

¹⁰⁷ The ICRC study claimed to pay particular attention to the practice of states that are not party to the Additional Protocols. *ICRC Study*, *supra* note 29, at I. But the weight that the ICRC gave to this practice is unclear. The ICRC also took into account the practice of states that *are* party and "the fact that, at the time of this writing, Additional Protocol I has been ratified by 162 States and Additional Protocol II by 157 States." *Id.*

¹⁰⁸ See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, n. 4 (1987) ("Provisions in international agreements are superseded by principles of customary law that develop subsequently, where the parties to the agreement so intend."); Michael Akehurst, "The Hierarchy of the Sources of International Law," 47 *BRIT. Y.B. INT'L L.* 273, 276 (1977) ("[S]ubsequent custom can terminate a treaty only when there is clear evidence that that is what the parties intend.").

even try to satisfy that burden. The ICRC, in particular, was criticized for trying to use CIL to circumvent the limitations in the IHL treaties.¹⁰⁹

Surely, the ICTY and ICRC realized that their methods were outside the mainstream. They presumably used these methods because more conventional ones would have complicated their efforts to achieve their desired results. Their mandates to find CIL did not constrain them from openly invoking and using dubious methods to try to make CIL. And their methodological indiscipline appears to have had little, if any, effect on how their decisions were received. Refining the method for finding CIL is unlikely to alter this incentive structure. Rather, actors who have a normative agenda are likely to continue advancing heavily prescriptive claims, even when they are charged only with finding CIL. These claims will sometimes be effective.

CONCLUSION

The question of how to find CIL assumes that finding CIL is an objective exercise that stands apart from the messy process for making CIL. I have used the experience with customary IHL to cast doubt on that assumption. My argument here should not be entirely surprising. The scholarly literature already recognizes that CIL finding entails some degree of CIL making; that actors who purport to find CIL commonly help shape CIL; and that these actors routinely disregard their own professed CIL-finding methods. What is surprising is that, even as the literature recognizes these points, it insists that CIL finding is different from CIL making and can impose some order on the CIL process. This persistent focus on method reflects, at bottom, a deep discomfort with the volatility and political excess of that process. Global actors sometimes invoke and treat as CIL norms that are, in fact, novel or contested. Methods for finding CIL are, I have argued, unlikely to discipline these actors or to reduce the contestation and uncertainty in CIL.

These methods might do other work. At the very least, the methodological guideposts provide a shared language that disparate actors use to advance varied

¹⁰⁹ See, e.g., Kenneth Anderson, *My Initial Reactions to the ICRC Customary International Humanitarian Law Study*, KENNETH ANDERSON'S LAW OF WAR AND JUST THEORY BLOG, retrieved from <http://kennethandersonlawofwar.blogspot.com/2005/11/my-initial-reactions-to-icrc-customary.html> (accessed Nov. 14, 2015) ("In very important, very disturbing ways, the Study represents a sort of customary law 'end run' around the failure of Protocol I to achieve near universal or customary status itself."); Scobbie, *supra* note 89, at 34 ("Can States be expected to accept as customary that which they have rejected as a conventional obligation?"); Bethlehem, *supra* note 58, at 8 ("Particularly when heavy reliance is placed on treaties to which a number of States are not parties, initiatives to derive customary rules may be seen as an attempt to circumvent the requirement of express consent necessary for a State to be bound by the treaty-based rule."); Aldrich, *supra* note 58, at 505–06 ("[S]ubstantive and public dissent by at least some [non-parties] to various provisions of the Protocol makes it impossible to suggest that the Protocol ... should be considered to represent as a whole a codification of customary international humanitarian law.").

international norms. Moreover, any individual actor might craft and use a method that helps achieve its own goals. For example, the U.S. Supreme Court now uses a method in the human rights context that is intended to restrict the CIL claims that U.S. courts assess or endorse.¹¹⁰ A nongovernmental advocate might use a very loose method to pressure states to change their behavior. The point is that no one method for finding CIL is likely to help settle or impose order on CIL.

This does not mean that “anything goes” in CIL. It means that the limits on CIL must – and do – come from *within* the CIL process. Actors might refrain from advancing controversial CIL claims for all sorts of reasons that are internal to that process. A controversial claim might be less stable and therefore less appealing to advance than is a widely accepted compromise. The controversial claim might detract from an actor’s credibility with particular audiences. Or the claim might be challenged or ignored. Indeed, this is probably the strongest constraint on CIL: for a CIL claim to be effective, it must actually resonate with other actors. Others must be willing to treat the claim as law.

¹¹⁰ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (“[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”).