of such intent. Some of the legal rules applied by the Court in *Oil Platforms*, the *Israeli Wall* advisory opinion, *Genocide (Bosnia v. Serbia), Merits*, and others receive similar scrutiny and criticism.

This chapter also presents the author's view that a number of the Court's exercises in treaty interpretation failed to apply, or to apply properly, the rules of treaty interpretation set forth in Articles 31–32 of the Vienna Convention on the Law of Treaties. Among the cases receiving unfavorable attention in this regard are *Certain Expenses*,[21] *LaGrand*,[22] *Avena*,[23] *Israeli Wall*, and *Genocide (Bosnia v. Serbia), Merits*. The chapter concludes with the author's reflections on a number of outcomes that he regards as having been shaped by "strategic" concerns involving the Court's own institutional interests, not necessarily rigorous legal analysis (pp. 325–36).

Weisburd's fifth and final chapter seeks to explain the reasons for what are seen as the Court's "performance problems," offering "with some trepidation" (pp. 339–40) possible explanations of varying persuasiveness. These lead, in the author's view, to an inference that "the Court is not really independent, free to decide cases, without considering any issue beyond the legal merits" (p. 362). Given its role as an organ of the United Nations, facing a caseload that increasingly presents legal issues with significant political overtones, and reluctant to accept a doctrine of justiciability that recognizes courts' institutional limitations, "the Court will have reason to avoid rendering judgments that will anger significant groups of states, are likely to be disobeyed, or that can lead to negative consequences for which it does not care to take responsibility" (p. 363).

Readers may not agree with the author's positivist view of international law, or accept his overall assessment of the Court and its work. Neither is required in order to benefit from this well-written book. The ICJ is, after all, a court. It is fair and useful to subject any court's procedure, fact-finding, and legal analysis to careful analysis from the perspective of legal craft. That is what the work largely accomplishes. The author, an international lawyer, but clearly of the common law persuasion, subjects a significant cross section of the Court's work to a common lawyer's critical search for rigor, consistency, and coherence. He finds some of it seriously wanting. Many specific criticisms of the Court's past work come unsettlingly close to the mark. Both the author's criticisms and conclusions are clearly presented for readers to assess and accept or reject.

The previous paragraph referred to "some" of the Court's work. It should be noted that, except for a critical discussion of the Court's 2014 decision in *Peru v. Chile*,[24] Weisburd has relatively little to say about the Court's work in addressing land and maritime boundaries, which, after all, constitutes half or more of its workload. (The author notes that seven of the eleven active cases pending at the time of writing involved either territorial disputes or maritime delimitations.) These are cited as evidence that states will "invoke the Court's jurisdiction only in cases they can either afford to lose entirely or in which they expect that the Court will not leave either party completely empty-handed" (p. 364). Libya and Chad, Cameroon and Nigeria, the United States and Canada, and many other states that have resorted to the Court to resolve vexing boundary or delimitation disputes may find this a bit glib.

JOHN R. CROOK
Of the Board of Editors

Custom's Future: International Law in a Changing World. Edited by Curtis A. Bradley. Cambridge, New York: Cambridge University Press, 2016. Pp. xii, 379. Index. $125.
doi:10.1017/ajil.2016.13

Curtis Bradley's new edited book, *Custom's Future: International Law in a Changing World*,

[21] Certain Expenses of the United Nations, Advisory Opinion, 1962 ICJ Rep. 151 (July 20).

[22] LaGrand Case (Ger. v. U.S.), Judgment, 2001 ICJ Rep. 466 (June 27).

[23] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 ICJ Rep. 12 (Mar. 31).

[24] Case Concerning Maritime Dispute (Peru v. Chile), Judgment, 2014 ICJ Rep. 3 (Jan. 27).

https://doi.org/10.1017/ajil.2016.13 Published online by Cambridge University Press

boldly tackles the questions at the forefront of the contemporary debate about customary international law (CIL): what constitutes state practice; how much state practice is enough; how much time is required; what demonstrates a sense of legal obligation; what is the extent to which treaties and soft law documents serve as evidence of customary law; what is the role that nonstate actors play in generating or confirming rules of customary law; and what does the future hold for CIL?

Custom's Future has all the hallmarks of a highly influential collective work. The topic is extremely timely and of great theoretical and practical significance, and the authors are among the leading scholars in the field, with expertise in a variety of specialty areas, who bring creative and original thinking to bear on their contributions. As someone who recently published a book with Cambridge University Press on this topic,[1] this reviewer was surprised at the number of fresh insights and the amount of new historic facts I picked up from the writings of Bradley, a professor of law and public policy studies at Duke University, and his contributing authors.

As the concept of CIL predates the creation of the modern state system, one might be tempted to conclude that there is not much more of import that could be written on this subject. But continuing and new debates about the formation and content of CIL prompted the UN's International Law Commission (ILC) to take up the subject for a multiyear project in 2011. Bradley is to be lauded for including a chapter in his book coauthored by Michael Wood, the ILC's Special Rapporteur on the topic of CIL. At the same time that Bradley's book was going to press, Wood and his colleagues at the ILC were promulgating a set of conclusions with commentaries about CIL. The initial sixteen draft conclusions/commentaries were issued in 2016, along with an announcement that the ILC would publish a revised final text in 2018 based on the reactions of states and experts.[2]

In this chapter, Wood and his coauthor Omri Sender remind us that CIL "has withstood the test of time, as well as significant political and doctrinal challenges, and remains both useful and credible" (p. 369). They write that the ILC's current work on the subject has verified that "the once-fashionable notion that custom is in crisis, in decline, or even 'dead,' was never much more than an academic (or political) conceit; it had no basis in reality, no support among states, and no following among practitioners" (pp. 367–68).

Bradley includes among his chapter contributors some who are highly critical of CIL and argue that CIL has outlived its usefulness,[3] but the majority of the chapters attempt to assist the international community to better understand and apply CIL, not argue for its demise. Before examining some of the chapter authors' proposals, it is helpful to briefly examine custom's contemporary significance.

Judge Theodor Meron, the President of the International Criminal Tribunal for the Former Yugoslavia, recently wrote that "[c]ustomary international law now comes up in almost every international court and tribunal, in almost every case, and frequently has an impact on the outcome."[4] Notwithstanding extensive codification over the past seventy years, there are four ways that CIL continues to have vitality.

First, CIL still plays a significant role in uncodified areas of international law. For

[1] Michael P. Scharf, Customary International Law in Times of Fundamental Change, Recognizing Grotian Moments (2013) [hereinafter Scharf].

[2] Int'l Law Comm'n, Identification of Customary International Law, UN Doc A/CN.4/L.872 (2016).

[3] Monica Hakimi, for example, opines that the process of formation of customary international law is best described as "chaotic, unstructured, and politically charged" (p. 149). John Tasioulas comments that CIL's nature "remains stubbornly opaque or conceptually problematic" (p. 95). Joel Trachtman expresses doubts about CIL's continued usefulness in addressing the world's problems, and argues that "states and international organizations should focus their international legal analytical resources on legislated law" (p. 204).

[4] Theodor Meron, *Customary International Law: From the Academy to the Courtroom, in* The Making of International Criminal Justice: A View from the Bench 29–30 (2011).

https://doi.org/10.1017/ajil.2016.13 Published online by Cambridge University Press

example, departing from the holdings of the International Court of Justice (ICJ) in *Nicaragua v. United States* and *Democratic Republic of Congo v. Belgium*, the UN Security Council unanimously confirmed in November 2015[5] that the United States and its allies had a CIL right of self-defense to attack ISIS targets in Syria where the government of Syria was unable or unwilling to quash the threat to Iraq and the international community posed by the nonstate actor.[6]

Second, in some ways, CIL possesses more jurisprudential power than does treaty law—meaning that it can have a more significant effect upon international behavior.[7] For example, unlike treaties, which bind only parties, CIL binds all states, save those who persistently objected during its formation.[8] Some international law rules coexist in treaties and custom, and thus CIL expands the reach of the rules to states that have not yet ratified the treaty; further the CIL status of the rules can apply to actions of treaty parties that predated the entry into force of the treaty.[9] Moreover, unlike treaties which permit withdrawal simply by giving advance notice, "customary international law does not recognize a unilateral right" to escape its obligations.[10]

Third, while conventional wisdom suggests that treaties are more precise than customary rules, the reverse is sometimes the case. That is because multilateral treaties may be filled with intentional ambiguity to facilitate diplomatic agreement among parties with diverse interests, whereas custom is often derived from decisions on specific questions in concrete cases.[11]

And fourth, while the traditional view is that customary norms take decades or even centuries to ripen into law, the reality is that CIL may in some cases form at a faster pace than the negotiation and entry into force of multilateral treaties.[12] This is especially true with respect to fundamental technological, environmental, cultural, and humanitarian developments.[13]

A rule of CIL is usually deemed to exist when, in the words of the ICJ Statute, there is "a general practice accepted as law."[14] This traditional definition has two elements: (1) widespread state practice that is (2) followed out of a sense of legal obligation (referred to as *opinio juris*). Bradley and several of the book's authors find troubling the so-called "chronological paradox" that the traditional definition of CIL raises (p. 2). They ask how can a new rule of CIL emerge if custom requires a sense of legal obligation from the start? In other words, they suggest that the first state to invoke a new rule of CIL cannot seriously entertain the view that it is acting in accordance with the law. Rather, as a custom pioneer, such a state is self-consciously seeking to change the law. In accord with this criticism, Judge Lachs famously observed in the *North Sea Continental Shelf* cases that to require a conviction that the conduct is already a matter of legal obligation is to deny the possibility of developing new rules of customary law.[15]

A number of the book's authors take issue with the conventional answer to this quandary, namely that the custom pioneers are simply acting in the mistaken belief that the new practice reflects existing law. Sharing their skepticism of the mistaken belief riposte, this reviewer has written that it is more likely in such a case that the pioneers of the customary rule believe it would be desirable if the preferred rule were the law so they purposely "couch their innovation in the language of existing law, even when they know they are actually breaking new ground."[16]

[5] S.C. Res. 2249 (Nov. 20, 2015).

[6] Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 15 (2016).

[7] Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. INT'L & COMP. L. 305, 309 (2014).

[8] *Id.*

[9] *Id.*

[10] SCHARF, *supra* note 1, at 30.

[11] *Id.* at 31.

[12] Scharf, *Accelerated Formation, supra* note 7, at 309.

[13] In CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE, I explore several case studies of accelerated formation of customary international law. SCHARF, *supra* note 1.

[14] Statute of the International Court of Justice, Art. 38(1)(b).

[15] North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ Rep. 219, 231 (Feb. 20).

[16] SCHARF, *supra* note 1, at 49.

https://doi.org/10.1017/ajil.2016.13 Published online by Cambridge University Press

Desiring to improve the definition of CIL to avoid this paradox, several of the book's chapter authors advocate new formulations and approaches. For example, Bradley argues in his chapter, "Customary International Law Adjudication as Common Law Adjudication," for a more "forward-looking and progressive" approach than the standard two-element formulation, contending that "adjudicators look to past practice but necessarily make choices about how to describe it, which baselines to apply in evaluating it, and whether and when to extend it to new situations" (pp. 5, 34). Brian Lepard, in turn, contends in his chapter "Customary International Law as a Dynamic Process," that CIL should not be conceived as a static form of law "embedded" in international practice, but rather "as a dynamic method of lawmaking" (pp. 5, 63–64). He proposes that CIL should be reconceptualized "as a belief by states generally that it is desirable now or in the near future to have an authoritative legal principle or norm prescribing, permitting, or prohibiting certain conduct, apart from treaty obligations" (pp. 5, 63). And John Tasioulas, in a chapter titled "Custom, *Jus Cogens*, and Human Rights," argues that "*opinio juris* involves the judgment that a norm is already part of customary international law and that (compliance with) it is morally justified . . .; or that, as a moral matter, it should be established as law through the process of general state practice and *opinion juris* . . .; or else some mixture of these two attitudes" (p. 97).

Referencing the work of Professor Maurice Mendelson,[17] I have written that the paradox can be solved by understanding that the ICJ's formulation—"accepted as law"—can have two concurrent meanings. At the early formation stage, "acceptance" means consent to an emerging rule, and in the later stage "acceptance" means acknowledgment that the rule has gained the force of law.[18] The advantage of this view is that it does not require the international community to embrace a brand-new formulation. Where the authors of *Custom's Future* are critical of the ambiguity surrounding the negotiating record and wording of the ICJ Statute, Mendelson avows that the ambiguity actually represents a simple and elegant solution to the paradox.

Other chapters of *Custom's Future* make an important contribution by providing empirical data and analysis about how courts and tribunals recognize and apply CIL in a variety of contexts. The chapter by Stephen Choi and Mitu Gulati, titled "Customary International Law: How Do Courts Do It?," for example, establishes that three kinds of evidence that are aspirational in nature in fact play a large role in CIL determinations, namely "UN resolutions, other UN material (committee reports, conference reports, etc.), and domestic statutes" (p. 133). Similarly, Monica Hakimi's chapter, "Custom's Method and Process: Lessons from Humanitarian Law," discusses evidence indicating that "nonstate actors who are charged with finding CIL can be extremely influential in making CIL" (p. 163). In a chapter titled "The Strange Vitality of Custom in the International Protection of Contracts, Property, and Commerce," Chin Leng Lim documents CIL's importance in international economic law, particularly in the interpretation of investment treaty clauses. And Larissa van den Herik's chapter, "The Decline of Customary International Law as a Source of International Criminal Law," examines the impact of CIL on the jurisprudence of international criminal tribunals.

The final chapters, written by Niels Petson, Andrew Guzman, Jerome Hsiang, Laurence Helfer, Timothy Meyer, Jan Wouters, Linda Mamid, and culminating with Omri Sender's and Michael Wood's concluding chapter, "Custom's Bright Future: The Continuing Importance of Customary International Law," examine various theories that explain the continuing relevance of CIL and discuss the outlook for CIL's future. Michael Wood tells us that the original title for Bradly's book was "Custom in Crisis: International Law in a Changing World," but these chapters and the general tenor of the book are more optimistic and Bradley wisely went with a more neutral title.

[17] MAURICE H. MENDELSON, THE FORMATION OF CUSTOMARY INTERNATIONAL LAW 283 (1998).

[18] SCHARF, *supra* note 1, at 50.

https://doi.org/10.1017/ajil.2016.13 Published online by Cambridge University Press

At the end of his introduction, Bradley writes that "this book aims to make its own contribution to custom's future" (p. 10). Given the timing of its publication, the credentials of its chapter authors, and the useful empirical data and insightful analysis it contains, Bradley's book will undoubtedly influence the content of the ILC's exposition on the formation and content of CIL, as well as serve as the touchstone for the continuing contemporary debate on this subject. Without overstatement, I can recommend *Custom's Future* as essential reading for anyone practicing or writing in the field of international law.

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The Puzzle of Peace: The Evolution of Peace in the International System. By Gary Goertz, Paul F. Diehl, and Alexandru Balas. Oxford, New York: Oxford University Press, 2016. Pp. vii, 225. Index. $27.95.
doi:10.1017/ajil.2016.11

Despite the tragic violence we bear witness to in the world—from the Syrian civil war, to the renewed threat of genocide in South Sudan, to armed conflict in Afghanistan—war is less common today than it has been for much of human history. Scholars have provided convincing data that tracks the decline of war over the past several decades.[1] When wars do occur, they are less deadly; fewer people die on the battlefield.[2] These and related statistics are often heralded as grounds for arguing that our world has entered a new, more peaceful era.[3] The logic for such is binary: if war is declining, then peace must be increasing. But this logic has remained largely untested and unproven, until now.

The Puzzle of Peace: The Evolution of Peace in the International System takes the critical discourse on war to new theoretical and methodological grounds. The book audaciously, yet convincingly, argues that the world is, indeed, becoming more peaceful. Even to assert such a claim, the book has to conceptualize, for the first time, how to study peace as a positive phenomenon and not just as the absence of war. Through this "not-war" framework, the authors explain that "[p]eace does not just happen; it is created by the actions of states and other important political players" (p. 225). The authors then provide the first comprehensive data set of factors that give rise to peace in the international system. To do so, they trace the evolution of peace from 1900–2006 by studying data about the stability of relationships between nations on a scale of peace, ranging from security community to severe rivalry. Through this novel tracing of the evolution of peace in the international system, they establish an empirical case that "[t]he international system has become significantly more peaceful over time" (p. 70).

Written by three political scientists, all noted experts and authors on international conflict, *The Puzzle of Peace* breaks new ground in the study of war and peace.[4] In chapter 3, the authors present their argument that "[t]he world is much more peaceful in 2006 than in 1946 or 1900 when there was little or no positive peace" (p. 70). They convincingly articulate that the rise of peacefulness between states is linked to the decline of conflict over territorial issues. This is, in part, because there is less territory to fight over in the post-World War II world, and they find

[1] JOSHUA GOLDSTEIN, WINNING THE WAR ON WAR: THE DECLINE OF ARMED CONFLICT WORLDWIDE (2011).

[2] *See* Uppsala Conflict Data Program (2014), *at* http://ucdp.uu.se (providing data sets on the number of conflicts 1975–2015, number of deaths per conflict 1989–2015, and more).

[3] STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED xxi (2011) ("[V]iolence has declined over long stretches of time, and today we may be living in the most peaceable era in our species' existence.").

[4] Gary Goetz is a professor of political science and peace studies at the Kroc Institute for International Peace Studies at the University of Notre Dame who has previously written about international norms and other causes of peace. Paul F. Diehl is the Ashbel Smith Professor of Political Science at the University of Texas at Dallas. He directed the Correlates of War Project providing the largest global data collection on international conflict. Alexandru Balas is the Director at the Clark Center for International Education and an Assistant Professor at the State University of New York at Cortland.

https://doi.org/10.1017/ajil.2016.13 Published online by Cambridge University Press