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SYMPOSIUM ON B.S. CHIMNI, "CUSTOMARY INTERNATIONAL LAW: A THIRD WORLD PERSPECTIVE"

CUSTOMARY LAW IN THE POSTMODERN WORLD (DIS)ORDER

Andreas Paulus and Matthias Lippold***

B.S. Chimni's thought-provoking article presents a welcome opportunity to reflect on both the value and the shortcomings of custom as a source in contemporary international law. Chimni convincingly identifies points of concern with respect to the representativeness of the relevant state practice and the availability of non-Western practice. His article is part of a stream of recent scholarship that examines the relationship between public international law and the so-called Third World under the label of Third World Approaches to International Law (TWAIL).[1] The contribution, like much of the TWAIL literature, is helpful in that it reveals the biases of international law in favor of the former colonial powers and identifies the ways in which these inform the identification and interpretation of (customary) international law. Yet we do not agree with some of the premises of Chimni's critique or his suggested remedies. In particular, we would like to offer a different perspective on the importance of power, the distinction between formal and material sources, and the legitimacy of his concept of postmodern custom.

On Power and Customary International Law

Customary international law (CIL) has long attracted scholars' attention, perhaps, as Brigitte Stern has suggested, "because it constantly gives rise to the question of the origin of obligation in a legal system which fairly easily disregards the essential question of the foundation of its obligatory character."[2] If one accepts that any legal order requires a degree of effectiveness in the sense of general adherence to its rules,[3] states' consent, in particular the consent of powerful states, will be of central importance for the effectiveness of international law, given the way the world is likely to remain structured for the foreseeable future. In this sense, it is inevitable that law as such and CIL in particular continue to reflect distributions of power within the international community. Implicit in the concepts of general consent and general practice is the idea that unanimity is not required and that therefore, in principle, a majority may shape the content of customary rules or a powerful minority may prevent a rule from emerging. For many, some from the very Marxist school Chimni seems to espouse, this somewhat flexible

* *Chair of Public and International Law at Georg-August-University Goettingen (Germany); Justice of the German Federal Constitutional Court. This essay reflects only his personal views.*

** *Doctoral candidate at Georg-August-University; Rechtsreferendar (law clerk); LL.M. (NYU).*

[1] *Cf.* Antony Anghie & Bhupinder S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 Chinese J. Int'l L. 77–103 (2003).

[2] Brigitte Stern, *Custom at the Heart of International Law*, 11 Duke J. Comp. & Int'l L. 89, 90 (2001).

[3] Even Kelsen's formalistic doctrine assumed as much. *See* Hans Kelsen, General Theory of Law and State 119 (1949).

concept of consent is not acceptable. Instead, they insist on consent as the only source of international law binding on the state.[4]

However, this does not mean that, as a rule, a majority simply legislates against a minority. Often, one will be able to point to some form of acquiescence on the part of other, less active states. According to the recent International Law Commission (ILC) Draft Conclusion 10(3) on custom, "failure to react over time to a practice may serve as evidence of acceptance as law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction."[5] In order to be in a position to react, the state concerned "must have had knowledge of the practice."[6] In turn, circumstances call for a reaction where "the practice is one that affects—usually unfavorably—the interests or rights of the State failing or refusing to act."[7] Thus, even though states might not have the same capacity to engage actively in a practice, CIL remains a product of the legal community as a whole. For a rule to emerge, practice and corresponding silence in the sense of acquiescence, a general toleration,[8] or lack of protest are all relevant.[9]

In spite of the link between custom and power, the purpose of (customary international) law is not to ensure that the strong do what they can and the weak suffer what they must.[10] By constraining state action, international law, including CIL, regulates behavior, ensures predictability, and also protects the weak. Once established as a matter of treaty law or CIL, legal obligations may increase both legal and political constraints on states' ability to act.[11] The debate on the "unwilling or unable" standard[12] illustrates the difficulty of arriving at a general consensus on whether a new rule of custom has emerged. Furthermore, the examples of the Ottawa Convention against landmines, the Convention on Cluster Munitions, and the Rome Statute illustrate that it is possible for a group of less powerful states to introduce new ideas and principles to the international legal realm, and in turn to shape third states' behavior and affect CIL in a way that influences the views and actions of the powerful.[13] The current attempt at further nuclear disarmament and the draft treaty on business and human rights may also illustrate the point.

The Institutional Development of International Law

In the contemporary international community, customary law provides grounds for basic regulation, whether on statehood, international humanitarian law, or the interpretation and application of international law, including state responsibility. CIL could not perform these functions, however, if it were based exclusively on Western states' acceptance and opposed by non-Western states. While Chimni's focus on the history of CIL is instructive, we suggest a need to pay more attention to the institutionalization of international law after World War II.

[4] *Cf.* Grigory Tunkin, *Politics Law and Force in the Interstate System*, 219 Recueil des cours 227, 260–61, 265 (1989). Regarding sovereignty as an argument for the Third World rejection of existing custom, see Mohammed Bedjaoui, Towards a New International Economic Order 135–36 (1979). On the structural, Western bias of custom, see Mohammed Bedjaoui, *L'humanité en Quête de Paix et de Dévelopement (II)*, 325 Recueil Des Cours 408, 408–09, 410, 411, 414–15 (2006).

[5] Int'l Law Comm'n, Report on the Work of its Seventieth Session, UN Doc. A/73/10, at 140 (2018) [hereinafter ILC Report 2018].

[6] *Id.* at 142.

[7] *Id.*

[8] Fisheries (UK v. Nor.), 1951 ICJ Rep. 116, 138–39 (Dec. 18).

[9] Robert Kolb, *Selected Problems in the Theory of Customary International Law*, 50 Neth. Int'l L. Rev. 136 (2003).

[10] *Cf.* Thucydides, The History of the Peloponnesian War, Bk. V 294 (R. Crawley & R.C. Feetham trans., 1974).

[11] *Cf.* Michael Byers, Custom, Power and the Power of Rules 124–26 (1999).

[12] Jutta Brunnée & Stephen John Toope, *Self-Defence Against Non-State Actors: Are Powerful States Willing But Unable to Change International Law?*, 67 Int'l & Comp. L.Q. 263 (2018).

[13] For a recent scholarly treatment, see Adam Bower, Norms Without the Great Powers: International Law and Changing Social Standards in World Politics (2017).

In spite of Chimni's elaborate account, his claim that CIL in the area of human rights law, international humanitarian law, international criminal law, and international environmental law serve the purpose of "sustaining (the global capitalist system's) systemic interests through legitimizing global capitalism"[14] considerably underestimates and unduly reduces the normative ambitions and aspirations inherent in each of these enterprises. If anything, much of contemporary human rights law, including economic and social rights, attempts, with mixed success, to tame rather than to strengthen capitalism. To name only a few examples, states' compliance with their positive human rights obligations are relevant to labor law disputes between employers and employees, corporate mining activities in areas populated by indigenous peoples, and tax benefits to corporations.[15]

In addition, the establishment of the ILC, its focus on regional representation, its inclusion of non-Western states and former colonies, and its consideration of the views of regional organizations have contributed to the general acceptance of CIL in spite of the "Western" origins to which Chimni refers. Furthermore, the ICJ demonstrated in its case law, notably in the *Nicaragua* judgment after the debacle of the *South-West Africa* cases,[16] that CIL can be applied against powerful Western states too.[17] The current ILC project on CIL illustrates not only that the ILC and other bodies take regional views into account when codifying and developing international law, but also that regional, non-Western organizations have an interest in shaping its codification. Thus, one may observe already some of the discursive elements that Chimni advocates.

The Value of Formalism

In Chimni's view, the distinction between formal and material sources of CIL "should be rejected" on the ground that it "veils the harm done to subaltern peoples and actors,"[18] and "[International Law Association] and ILC attempts at separating the 'formal' from 'material' sources of CIL … are, objectively speaking, attempts to veil the fact that the concept of CIL is a carrier of particular epistemology, culture, and values that marginalize third world voices."[19] However, the ILC enjoys particular authority with respect to "lawyer's law," not with respect to the examination of sociopolitical and cultural-historical background, such as "material sources." In confining itself to the technical question of the identification of custom, the ILC provides guidance for courts and tribunals and leaves room for interpreters to draw their own conclusions when identifying and interpreting CIL. Here, "material sources" may play a role, since a formal approach will include raising background understandings, developing a doctrinal framework, and combining positivist emphasis on existing rules and an application of general principles. "Postmodern" insights may help a judge to reach his or her own reasoned judgment.[20]

[14] B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AJIL 1, 5, 45 (2018).

[15] *Cf.* Kaliña and Lokono Peoples v. Surin., Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, para. 224 (Nov. 25, 2015) (addressing positive obligations to protect against human rights abuses through policies and legislation); Poblete Vilches y Otros v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 349, paras. 100–105 (Mar. 8, 2018) (addressing the direct applicability and justiciability of the International Covenant on Economic, Social and Cultural Rights and the right to health); Lagos del Campo v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 340, paras. 141–46 (Aug. 31, 2017) (stability of labor relations); Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), Report on His Mission to the United States of America, UN Doc. A/HRC/38/33/Add.1, at 4–5 (impact of tax policies on human rights).

[16] South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 ICJ Rep. 6. (July 18).

[17] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 14 (June 27).

[18] Chimni, *supra* note 14, *at 46*.

[19] *Id.* at 20.

[20] Andreas Paulus, *International Adjudication*, *in* The Philosophy of International Law 223 (Samantha Besson & John Tasioulas eds., 2010).

This leads us to question the premises and utility of Chimni's concept of postmodern custom. Chimni's account seems to suggest that Western, or capitalist, states imposed legal structures and arguments such as CIL on so-called Third World states, and that the separation between formal and material sources served the purpose of obscuring this historical truth.[21] However, recently published research suggests a more nuanced picture. For instance, studies by Stefan Kroll[22] and Arnulf Becker-Lorca[23] illustrate that since the nineteenth century non-Western states began to use and to appropriate international law of Western origin for their own purposes, both internally and externally vis-à-vis other states. It might have been precisely a positivist and formalist approach that allowed non-Western states to challenge more powerful Western states based on international law,[24] even though the precise relationship between factual power asymmetries and formal legal equality raises difficult questions.[25] Similarly, Abdulqawi Yusuf describes how African states, which "had reservations about the genesis and process of identification of customary norms,"[26] did not support "a wholesale rejection or repudiation of customary international law" on many rules from which they benefited.[27] Rather, they strategically engaged with CIL in order to contribute to its further development.[28] Formal rules required the inclusion of diverse voices.

Consider another example of the openness of CIL to the interests of different actors. In Chimni's view, the doctrine of the "persistent objector" was invented "to meet the challenge of postcolonial states seeking to use CIL to serve the interests of third world states," such that "even if state practice of third world states is available, the doctrines of specially affected states and persistent objectors undermine [its] significance."[29] The current interactions between the ILC and the Asian-African Legal Consultative Organization demonstrate, however, that non-Western states take an active interest in precisely these doctrines.[30] As Kevin Jon Heller recently argued, "the doctrine of specially-affected states, properly understood, has the potential to provide states in the Global South with more power over the formation of custom than they or Global North states have ever imagined."[31]

Thus, it is by no means certain that a better account of "Third World approaches" and so-called developing states would lead to more inclusive solutions in the sense that Chimni envisions. Rather, the approaches of some non-Western countries to international law are based on the very "Western" concepts Chimni seems to eschew, namely sovereignty, specific consent, and a "my country first" mentality that is often criticized for its inability to solve the collective action problems that he rightly deplores. Furthermore, as Anthea Roberts's analysis of the

[21] *Cf.* Chimni, *supra* note 14, at 44 ("The absence of writings of postcolonial scholars contesting the divide between 'formal' and 'material' sources of CIL further reduced the possibility of supporting the claims of third world states.").

[22] Stefan Kroll, Normgenese durch Re-Interpretation: China und das EuropÄische VÖlkerrecht im 19. und 20. Jahrhundert 123–24, 165–66, 202 (2012).

[23] Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 Harv. Int'l L. J. 475, 477 (2010).

[24] Arnulf Becker Lorca, Mestizo International Law: A Global Intellectual History 1842–1933 56–60 (2015).

[25] Jochen von Bernstorff, *Arnulf Becker Lorca. Mestizo International Law: A Global Intellectual History 1842–1933*, 27 EJIL 1173, 1175 (2016).

[26] Abdulqawi A. Yusuf, *Pan-Africanism and International Law*, 369 Recueil des Cours 161, 244 (2013).

[27] *Id.* at 251.

[28] *Id.* at 239, 255–56.

[29] Chimni, *supra* note 14, at 6, 23–24, 44–45.

[30] For an overview, see Sienho Yee, *AALCO Informal Expert Group's Comments on the ILC Project on "Identification of Customary International law": A Brief Follow-up*, 17 Chin. J. Int'l L. 187–94 (2018).

[31] Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AJIL 243 (2018).

academic discourse on the disputes relating to the South China Sea and Crimea illustrates, this mentality may also extend to each country's international law academia.[32]

Chimni is not unaware of this, which is why he advocates a concept of postmodern custom that is based on a decolonized consciousness of humankind and includes the practices of global civil society.[33] But, needless to say, such an ambitious project raises further questions. Non-state actors, which include a variety of organizations and individuals, play their part in the "community of interpreters" when it comes to the identification and interpretation of rules of CIL, and act as "public watchdog" for their effective implementation. Yet Chimni's proposal that practice for the purpose of CIL may "include the practice of social movements"[34] and other civil society actors raises questions of legitimacy. In contrast to ideally democratic states, non-state actors lack legitimacy to speak for others. Chimni's proposal, according to which international tribunals, together with international law academia, would have to appropriately identify, weigh, and assess such non-state practices might, without clarifying and specifying the criteria to be applied, jeopardize the genuine legitimacy that judges enjoy by forcing them into the role of lawmaker.

Last but not least, many of the current problems are related not to the lack of new norms but to a problematic record of compliance with existing norms. In the context of economic and social human rights, for example, a great deal of noncompliance occurs not because the norms "run[] up against the structures and processes, and ideas and beliefs, of the global capitalist system,"[35] but because of political choices for which the relevant actors must be held to account.[36] That being the case, we are concerned that basing CIL on a vague "consciousness of humankind" will prevent the assumption of responsibility for and the execution of international law by powerful political actors.

Outlook: From Form and Structure to Substance

The world might be more diverse than is suggested by the picture of "one" transnational capitalist class of "elites of the first and the third worlds,"[37] or by the dichotomies between powerful/advanced capitalist nations and subaltern states, or capitalist hegemony and resistance thereto. Nevertheless, Chimni offers an important perspective that raises awareness and calls for reflection.

His search for a doctrine of custom that would contribute to the global common good prompts us to end with a few words of caution, however: Whereas CIL plays an important role in the rule of law, it should not be idealized. It remains a rather primitive, albeit indispensable, set of general rules and principles that enables states to cooperate, facilitates the adjudication of international disputes, and gives effect to legitimate individual and community interests articulated mainly in multilateral treaties, but accepted by states that have not formally endorsed them.[38]

The challenge consists in the painstaking search for the consent of state representatives in the Western and non-Western world to legal principles that can contribute to the solution of world problems, from global warming to poverty, from armed conflict to the violation of human rights. Only custom rooted in state practice expressing the legal convictions of states and their citizenry will be able to muster the acceptance needed for putting it into action.

[32] Anthea Roberts, *Crimea and the South China Sea Connections and Disconnects Among Chinese, Russian and Western International Lawyers*, *in* Comparative International Law 111–39 (Anthea Roberts et al. eds., 2018).

[33] Chimni, *supra* note 14, at 41.

[34] *Id.* at 43.

[35] *Id.* at 37.

[36] *Cf.* Alston, *supra* note 15, at § 17 ("[T]he persistence of extreme poverty is a political choice made by those in power.").

[37] Chimni, *supra* note 14, at 45.

[38] For a recent example of the importance of a treaty for customary international law, see Court of Appeal, judgment of 19 July 2018, [2018] EWCA Civ 1719 (customary international immunity for special missions in a non-party state of the Convention on Special Missions of 8 December 1969, entry into force 21 June 1985, 2400 UNTS 231.