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

REVOLUTION BY CUSTOMARY INTERNATIONAL LAW?

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B.S. Chimni's *Customary International Law: A Third World Perspective*[1] announces a provocative normative approach to customary international law (CIL) designed to develop progressive norms by deemphasizing state practice and promoting deliberative reasoning as the basis for opinio juris rather than the general acceptance of states. Many of his historical concerns are compelling: the unfairness and dubious validity of the persistent objector principle, the lack of access and attention to non-European state practice, and the questionable legitimacy of CIL norms developed without the participation of a majority of states or their consent. While Chimni makes a compelling case for the problematic origins of much of CIL, his approach to reform raises serious legitimacy and practical questions that undermine the viability of his proposed solution. Problems such as extreme poverty, environmental degradation, and nuclear weapons are best resolved through democratic political institutions rather than weak and undemocratic international tribunals. I will analyze Chimni's approach first as a theory of customary law and then as a theory of the role of international tribunals. Finally, I will raise concerns about his normative goals.

Customary or Normative?

Make no mistake, Chimni's proposal is not only a critique of the history of international lawmaking, but also a revolutionary method of lawmaking squeezed into a reborn form of CIL. Chimni criticizes both the traditional view of CIL based on state practice recognized as legally binding and the more modern view that expands the importance of opinio juris as expressed in discursive documents. In his view, traditional CIL imposed European values upon indigenous people in support of the global capitalist system. He criticizes the modern view as inadequate to inject progressive values into the global capitalist order. His approach would expand "practice" to include the views and practices of global civil society and resolutions of international organizations to link CIL to progressive ideas. International tribunals would then weight this wider view of practice using deliberative reasoning to advance the global common good (*opinio juris communis*).

I have several concerns with this redefined, postmodern version of CIL. First, Chimni's methodology does not attempt to discern whether a norm is in fact customary or whether it is legally required. CIL is based on what states do and believe. Some components of global civil society may add voice to underrepresented groups and interests, but many of its organizations are not democratic. The members of NGOs are generally neither elected nor broadly representative. International NGOs provide invaluable expertise, experience, and competence, but they consider

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

themselves as advocates for their respective missions and principles, not as the representatives of a broad constituency. This advocacy role enables NGOs to promote their mission and ignore compromise.[2]

Second, global civil society, properly so called, is composed of many, diverse groups with different values and interests. A broad view of civil society would include a variety of religious organizations from World Vision to the Catholic Church, business entities, and labor unions that are not necessarily progressive but should, in principle, have a voice. Seen in this way, global civil society comprises a wide variety of often conflicting interests and values that do not cure the democracy deficit. The result is a cacophony of voices and policy views with little guidance on their relevancy.

Third, in greatly expanding what counts as evidence of custom, Chimni would significantly increase the indeterminacy of CIL. As the volume of practice increases to include the aspirations of civil society as well as nonbinding instruments, international tribunals will have nearly unfettered discretion to choose among an even greater diversity of practices and views to construct norms. The result may well be ideology masked as CIL untethered to state preferences and politics.

Fourth, Chimni's approach intensifies international law's legitimacy problem. Legitimacy has traditionally been premised on the consent or general acceptance of the community of states. States have a measure of democratic legitimacy because their officials are often democratically elected or are, at least, creatures of their domestic culture and polity. What is the democratic legitimacy of deliberative reasoning toward progressive values, and who determines those paramount values or the global common good? The views of international civil society replicate the variety of interests that lobby domestic legislatures. But the international tribunals that would weigh these considerations and interests are neither legislatures nor representative. Chimni would substitute the perspectives of a small group of international legal elites for that of domestic representatives.

Fifth, Chimni's deliberative reasoning methodology is more extreme than other normative approaches because it is driven by assumed and undefined values rather than near-universal state acceptance. Most normative approaches to CIL would cabin discretion by grounding customary law in state beliefs. Brian Lepard, for example, would expand opinio juris to require that states believe that it is desirable now or in the near future to have a binding legal norm.[3] This expands CIL from state belief that a norm is legally required to a widespread belief that the norm should be legally required. Fernando Teson would further require that CIL norms be articulated specifically and precisely by states.[4] While Teson does view some norms as morally binding, these appear to be limited to a small class of morally compelled human rights. Nonstate actors may influence state beliefs and provide evidence of community opinion, but it is states that have the authority to articulate CIL.

In contrast, Chimni's normative approach is a broad-ranging public policy excursion to "undertake reforms … to realize common interests" including a reduction in extreme poverty and environmental degradation. Yet the outcome of deliberative reasoning depends on which value premises are selected and who choses them. Which is more important for the Third World: economic development or preserving the environment? People of good will, including normative scholars, might well reach different conclusions. Chimni, for example, views international humanitarian intervention as a gross interference with sovereignty while Fernando Teson sees it as a necessary means to secure fundamental norms.[5] Some fundamental rights are universal assumptions of civilization and appropriately treated as custom. Their legality has been confirmed in binding human rights treaties. However, to expand this small universe to environmental degradation, or even to the possession of nuclear weapons is

[2] *See* Kenneth Anderson & David Rieff, *Global Civil Society: A Skeptical View*, *in* Global Civil Society (Helmut K. Anheier, Mary Kaldor & Marlies Glasius eds., 2005).

[3] Brian D. Lepard, Customary International Law: A New Theory with Practical Applications (2010).

[4] Fernando R. Teson, *Fake Custom*, *in* Reexamining Customary International Law (Brian D. Lepard ed., 2017).

[5] Fernando R. Teson, *Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention*, 1 Amsterdam L.F. 4 (2009).

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to stretch what are fundamental moral concerns into the domain of policy decisions best left to more democratic processes. In my view, as a general matter, CIL should not be a normative exercise removed from state behavior and attitudes.

Revolution by Judiciary? Of Natural Law and Positivism

What institutions or entities will determine and apply CIL as envisioned by Chimni? While his article is somewhat opaque on this issue, CIL, if it is to have legitimacy, should be articulated, at some point, by authoritative institutions. Assuming that international tribunals would be the primary institutions to develop his naturalistic jurisprudence, is it wise to inject natural law ideas termed progressive to resolve international issues?

Chimni is clearly right that European values and culture supplied the context and meaning of the two elements of CIL, and that this necessarily led to norms reflecting that culture. International law from the sixteenth to the early twentieth century was openly European, and its norms imposed on indigenous cultures without general acceptance.[6] History, however, provides a cautionary tale for those who would broadly apply natural law[7] reasoning to promote the common good. The positivist approach to CIL was not a cause of imperialism nor would natural law have been the savior. The imperial adventures of Spain, Portugal, and the Netherlands were justified by the natural law fathers of international law utilizing natural reasoning said to be universal as would Chimni. Francisci de Vitoria, for example, viewed international law (*jus gentium*) as natural law discoverable by all through natural reasoning and applicable to non-European societies against their will.[8] In his view, indigenous resistance to Spanish incursions was cause for war and justification for reparations, occupation, and even conquest to repair this injustice.[9] Hugo Grotius used his version of universal reason to deduce fundamental rights, the violation of which entitled a sovereign to wage a just war on indigenous peoples. Natural law did not protect the weak, but rather justified the extension of state power through the forcible opening of markets and the protection of investment.[10] The problem was not the form of jurisprudence, but rather unchecked power spurred by superior technology.[11] Naturalistic reasoning can justify oppression just as facilely as positivism.

In my view, Chimni's article misconstrues the proper role of natural law in the international system. Natural law is best used as a constraint on state power rather than as a source of socioeconomic rights that are best left to politics. Natural law and positivism should be seen as complementary. Natural law is a necessary safety valve when positivism fails. When positivism is used to support oppression, as it did in Nazi Germany and Apartheid South Africa, natural law provides a source of fundamental moral norms. When natural law reigns supreme, democratic rule is subverted. Ideology and tyranny may follow. Any legal system, including the international one, needs natural law underpinnings to safeguard its most fundamental values. Without clear positivist sources, Nuremberg initiated concepts such as crimes against humanity and individual criminal responsibility. The Nuremberg Principles could not properly be termed CIL until the passage of the 1946 UN General Assembly Resolution 95(I), which unanimously affirmed the principles in the Charter and Nuremberg Tribunal judgments.[12] In my view the prohibitions

[6] J. Patrick Kelly, *Customary International Law in Historical Context*, *in* Reexamining Customary International Law, *supra* note 4.

[7] I use natural law in the broad sense of law extrinsic to positive sources of law and accessible by human reason, whether characterized as based on human nature or a universal juridical conscience.

[8] Antony Anghie, Imperialism, Sovereignty and the Making of International Law 29 (2007).

[9] Francisci de Victoria, De Indis et Di Ivre Belli Rellectiones 151–55 (Ernest Nys ed., 1917).

[10] *See* James Thuo Gathii, War, Commerce and International Law 145–90 (2010).

[11] *See* Jared Diamond, Guns, Germs and Steel: The Fates of Human Societies (1999).

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

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against torture, ethnic cleansing, and enslavement are properly seen as natural law even if there were not a clear case that each is now CIL.

Policy decisions, as a general matter, are properly within the domain of politics because they require the reconciliation of conflicting values and interests. Environmental degradation, world poverty, and even nuclear weapons are polycentric issues with many alternative tools and imperfect solutions, each with tradeoffs more appropriate for legislative-type decision-making. Policy innovations even by the ICJ will undermine its legitimacy and be unlikely to influence state behavior. Most importantly, policy decisions are political decisions in the most important sense of the word. They require a *demos*, a political community to provide legitimacy to decisions that benefit some and disadvantage others. With a global parliamentary government impractical, states are the best-positioned to inject a measure of democratic legitimacy.

Consider climate change, a potentially devasting problem whose solution is a clear common good. An international tribunal might adopt Chimni's *opinio juris communis* jurisprudence and draw on the UN Framework Convention on Climate Change (UNFCCC) that committed governments to a "non-binding aim … to reduce … greenhouse gases." The tribunal might recognize that the majority of states have undertaken obligations to reduce carbon emissions and observe scientific reports that the world is at grave risk. Using deliberative reasoning to promote the common good, an international tribunal might announce a customary norm requiring states to reduce their carbon emissions.

But an effective solution requires an examination of alternative policy approaches, each with advantages and disadvantages. Should there be a global carbon tax, a cap and trade system, or a mandated standard of a 30 percent reduction of greenhouse gases by 2025? Who would monitor compliance and enforce violations? International tribunals, or even law professors, should not be making these decisions. Effective compliance requires both an international administrative agency to monitor compliance and a commitment by states to comply through their domestic political processes.

Treaty regimes with all their weaknesses have become the de facto international legislative process. Regimes such as the Ozone Treaty, the World Trade Organization, and the UNFCCC utilize norm-setting processes that are more deliberate and inclusive than the CIL process. The Law of the Sea provides insights into how treaty negotiations might resolve conflicting interests and positions. Attempts to codify customary practices, such as the three-mile territorial sea, said to be mandatory, revealed major disagreements among countries. The CIL narrative favored powerful maritime states, which could impose their will by boarding ships in their waters, had greater influence over the literature, and could select arbitrators and judges that reflected their positions.[13] Once all affected nations participated and interests and positions were revealed, trade-offs could be made and a consensus on norms reached. Even if this negotiated package of standards was not the first preference of any nation, the parties ultimately agreed on new common standards that each nation was willing to accept. Ongoing treaty regimes for environmental degradation and foreign investment law may well be more legitimate and effective than the formalistic debates about what constitutes evidence of opinio juris.

Is the Problem Capitalism or Unchecked Power?

Chimni's approach springs from a sincere concern about social justice and the tragedies of the past. He believes we are in a period of global imperialism with the Third World disadvantaged. Yet he undermines his thesis when he assumes no distinction between the poorest nations and emerging economic powers such as China, Brazil, and India that have reduced poverty and inequality.[14] When developing nations emerged from colonialism, they were

[13] Kelly, *supra* note 6, at 74–78.

[14] *See* Chimni, *supra* note 1, at nn.16–17.

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rich in culture but economically underdeveloped. The world has changed radically since then. Economic power is more diffuse. Global poverty has been greatly reduced. Many formerly Third World nations such as China, India, South Korea, Indonesia, Malaysia, Singapore, Thailand, South Africa, Botswana, Brazil, Chile, and Vietnam, since it adopted a mixed economy with private property, are reaping the benefits of globalization and the spread of technological innovation.

There is a burgeoning literature on the decline of poverty and improvements in the quality of life in developing countries.[15] Extreme poverty worldwide has fallen from 34 percent in 1993 to roughly 9 percent in 2017.[16] In China and India extreme poverty has dropped from 42 percent in 1997 to less than 1 percent in China and 12 percent in India by 2017.[17] Meanwhile average world life expectancy increased from thirty-two years in 1900 to sixty years in 1973 to seventy-two years by 2017.[18] With the dispersal of vaccinations, improved water quality, the near eradication of childhood infectious diseases, and programs for AIDS relief, world health has radically improved with the goal of "a grand convergence in global health" by 2035.[19] International inequality has declined substantially even while the world population has doubled since 1970.[20] There are still unacceptable levels of global poverty, and inequality remains a significant problem, but the direction is encouraging.

Rather than hinder this progress, market capitalism has spurred globalization and the technological revolution in communications, transport, and information technology that has increased productivity, wealth, and income. This new economic context, including the rise of a middle class in developing economies, has impacted the law on the protection of foreign investment. Nearly all states have signed bilateral investment agreements to protect investment. These states—even communist ones—agree to these investment safeguards because they perceive that it is in their interest to attract foreign investment to promote more rapid economic development. As a result incomes have risen, life expectancy has increased, and there is a vibrant drive among youth to succeed.[21] Many developing countries have had large, sustained growth rates of six to twelve percent per year for extended periods, whereas developed countries have had much lower growth rates.[22]

Nor are these changes necessarily a product of Western capitalism. The states of Asia, for example, have industrialized with much of the foreign investment coming from Asian nations rather than Europe, reflecting the ongoing redistribution of economic power. While these benefits have not accrued to everyone in developing countries or in the West, inequalities are being addressed by municipal social policies including universal health care, access to affordable education, and pension systems. The most progressive nations are capitalist countries with the means of production in private hands and social policies supported by popular will, such as Norway and Sweden.

The underlying problem of imperialism has not been an anthropomorphic capitalism's search for new markets. Imperial adventures have been a fact of world history from the Roman Empire to the Ottomans to the dynasties of China to the Ashanti Empire of Ghana and even to the Soviet Union, with many occurring before the advent of modern capitalism. Imperial empires are the product of unequal power, asymmetrical technology, human greed,

[15] Two recent books are particularly persuasive on world economic progress. *See* Steven Pinker, Enlightenment Now: The Case for Reason, Science, Humanism and Progress (2018); Hans Roling, Factfulness: Ten Reasons We're Wrong About the World—and Why Things are better Than You Think 53–56 (2018).

[16] Roling, *supra* note 15, at 52–53.

[17] *Id.* at 53.

[18] *Id.* at 53–56.

[19] Pinker, *supra* note 15, at 62–67.

[20] *Id.* at 97–120, particularly 104–05.

[21] The number of people in the working middle-class in developing countries nearly tripled from 1991 to 2015. United Nations, Millennium Development Goals Report 4 (2015).

[22] Michael Spence, *Globalization and Unemployment*, Foreign Aff. 23 (July/Aug. 2011).

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and the thirst for power and territory, not a particular economic system. Chimni has analyzed the problem well, but empowering judges to make important policy decisions with his normative version of CIL will undermine the legitimacy of international tribunals and be ineffective in achieving his goals.

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