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

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Customary international law (CIL) is in many respects the foundation of international law. It comprises the principles that govern international relations even in the absence of a treaty, and is one of the means by which states register changes in the international system and represent them as law. It is understandable, then, that CIL has been the subject of intense and extensive theorizing, and that the most distinguished international lawyers, members of the International Law Commission, and the International Law Association have devoted so much time to its study and systematization. While CIL has traditionally been dominated by the West, scholars from the former Soviet Union and the non-European world have emerged to formulate their own distinctive views on CIL, seeing it as a Western invention designed to further Western interests. B.S. Chimni's recent article, *Customary International Law: A Third World Perspective*,[1] supplements this tradition by offering a comprehensive, Third World perspective on the development and future of CIL. The essays in this symposium engage with Chimni's analysis in a variety of ways, and in doing so contribute fresh perspectives on one of the foundational sources of international law.

Chimni makes new and important contributions to the literature on CIL. First, he shows that CIL accompanied the rise of capitalism in the nineteenth century. On this account, CIL safeguarded the interests of advanced capitalist economies and European colonial rule over the non-European world. Second, Chimni rejects the bifurcation of formal and material sources of CIL, which he traces to the 1960s and 1970s. According to Chimni, formal sources emphasize opinio juris and underemphasize state practice, while material sources "are the political, sociological, economic, moral or religious origins of the legal rules."[2]

He shows that this division serves to obscure the colonial origins of CIL, and further argues that studying CIL based only on its formal sources legitimizes global capitalism. Chimni attributes the bifurcation between formal and material sources of custom to Western scholars who reformulated CIL doctrine in response to critiques from Third World states.

Chimni acknowledges that power plays an important role in the formation of CIL, but he places more emphasis on "the deep structures and the world of ideas and beliefs" to show how CIL safeguards the interests of advanced capitalist states.[3] From his perspective, CIL reflects "the dominance or hegemony of certain [Western] ideas and beliefs" to such an extent that Third World states have internalized and independently promoted it.[4] The modern legacy is complicated. Customary law "safeguards the interests of the advanced capitalist nations even as it at times

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

[2] *Id.* at 14 (citing the International Law Commission).

[3] *Id.* at 4 n.18.

[4] *Id.* at 28.

addresses the concerns of the entire international community."[5] It also "naturalize[s] and validate[s]" certain Western assumptions and preferences.[6] Ultimately, Chimni argues in favor of a postmodern doctrine that would overcome these shortcomings.

Six essays engage Chimni's article, with a number of them focusing on his proposal to recreate customary international law from a postmodern perspective. Jean d'Aspremont and J. Patrick Kelly agree with Chimni's diagnosis of the limitations of CIL, but disagree about the proper remedy. While d'Aspremont is supportive of reinventing CIL's formation around "'the progressive ideas, beliefs, and practices of the global civil society'" and the "'common good,'" he is skeptical that this is sufficient to upend "global capitalist justice."[7] Rather, he argues that to produce a CIL supportive of the Third World, it is also necessary to empower international lawyers outside the First World to take advantage of the flexibility of CIL sources and reject uncritical representations of customary law. In his view, these measures would help put an end to the complicity of the current doctrine in perpetuating a hegemonic center.

For his part, Kelly argues that Chimni's efforts to rehabilitate custom should be channeled through democratic political institutions rather than unrepresentative actors such as global civil society, subaltern groups, other underrepresented groups and interests, and even international tribunals.[8] Kelly concedes that even though many governments are not democratically elected, they are more likely to have democratic legitimacy than these other actors. For him, natural law serves to constrain the power of states more effectively than the progressive values and norms that Chimni argues could emerge from attention to nonstate actors.

Brian Lepard also agrees with Chimni's conclusions about the pro-Western bias and capitalist and colonial roots of CIL. However, he argues that the best cure is to make opinio juris rather than state practice the most important source of CIL. For a norm to become CIL under this approach, it has to meet the test of what he calls "fundamental ethical principles,"[9] examples of which are found in the Universal Declaration on Human Rights. He also argues that unity in diversity is another example of such a principle. This principle, he argues, would incorporate CIL norms that reflect the views of all states—whether powerful or not, rich or not—and, in effect, the people who elected their governments. From this perspective, Lepard argues that CIL can play an important role in combating the systemic injustices that Chimni identifies.

Andreas Paulus and Matthias Lippold acknowledge Chimni's historical critique of CIL's pro-Western and capitalist biases, but argue that our attention should focus on the institutionalization of international law after World War II.[10] From this vantage point, they argue that non-Western states and former colonies have already contributed to the shaping and codification of international law in the way that Chimni advocates with respect to CIL. Paulus and Lippold argue that small states, the Third World, and developing states have appropriated international law to advance their interests, and that a primary challenge in international law today is compliance, rather than the alleged failure to reflect a more diverse set of sources. Thus, for Paulus and Lippold, the key challenge is to produce CIL rules that will garner the acceptance and implementation of all states.

Vasuki Nesiah's contribution to the symposium finds strong resonances between Chimni's critique of the formal/material distinction in CIL and feminist critiques of the public/private distinction.[11] Nesiah argues that

[5] *Id.* at 9.

[6] *Id.* at 28.

[7] Jean d'Aspremont, *A Postmodernization of Customary International Law for the First World?*, 112 AJIL Unbound 293 (2018) (quoting Chimni, *supra* note 1, at 42).

[8] J. Patrick Kelly, *Revolution by Customary International Law?*, 112 AJIL Unbound 297 (2018).

[9] Brian D. Lepard, *"Customary International Law: A Third World Perspective": Reflections in Light of an Approach to CIL Based on Fundamental Ethical Principles*, 112 AJIL Unbound 303 (2018).

[10] Andreas Paulus & Matthias Lippold, *Customary International Law in the Postmodern World (Dis)order*, 112 AJIL Unbound 308 (2018).

[11] Vasuki Nesiah, *Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence*, 112 AJIL Unbound 313 (2018).

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feminist critiques of the public/private distinction showed how international law privileged formal state practice, which was in effect "men's law," and in so doing unmasked the gendered structures of power embedded in the field.[12] She draws parallels between these feminist insights and the manner in which Chimni's Marxist critique demonstrates how CIL marginalizes and excludes Third World social realities, norms, and practices. To complement Chimni's invitation to reshape CIL, she invites us to consider three examples that could help to create a new international law. The first is the Five Principles of Coexistence, which President Sukarno of Indonesia, Jawaharlal Nehru of India, and others proposed in the post-World War II period.[13] The second concerns first-nations' approaches to environmentalism, citizenship, and hospitality, which open a repertoire of legal practice that includes ceremonial performances and not merely historical records. The third concerns the fugitive practices of freedom that emerged in maroon communities across the Americas. These examples, she argues, require forward-looking or "rebel imagination" rather than a simple recounting of neglected customs in the name of inclusion and historical completeness.[14]

Last but not least, Anthony Carty situates Chimni's view of CIL in the broader context of his Marxist scholarship on international law.[15] He also maps Chimni's critique of CIL in the context of Marxist debates of international law and Marxist critiques of capitalism. He is skeptical that Chimi has proved CIL's role in the development of world capitalism because he is pessimistic that international law had any role to play in the evolution of the international system. For Carty, it is not fruitful to explain the evolution of international society through a normative account, especially because there are neither reliable records of state practice nor an authoritative interpreter. As such, he argues that it is "hopeless" to seek more evidence, such as from civil society, to ground a new CIL.[16] Carty argues that Chimni's postmodern invocation of the subaltern masses as a source of new norms for a more democratic CIL sits quite uncomfortably with Chimni's view of contemporary international politics as riven by a conflict between anxious right-wing populism and a neo-liberal market democracy, where both are being manipulated by the hegemonic power of the transnational capitalist class.[17] Carty notes that what is needed instead is a rigorous deconstruction of the rhetoric of free trade in capital and goods that pays attention to the ownership of resources.[18]

Chimni's article and the contributions to this symposium deal with a wide variety of themes relating to the history and theory of CIL, the techniques for assessing CIL, the potential for it to represent the interests of marginalized peoples, the relationship between custom and natural law, and the contemporary relevance of international law in general, to name a few. As such, they offer a rich and detailed view of many of the current debates relating to the enduring theme of CIL and its place in the international system.

[12] *Id.* at 314.

[13] These are (1) mutual respect for each other's territorial integrity and sovereignty; (2) mutual nonaggression; (3) mutual noninterference; (4) equality and mutual benefit; and (5) peaceful coexistence. *See* External Publicity Division, Ministry of External Affairs, Government of India, Panchsheel.

[14] Nesiah, *supra* note 11, at 317.

[15] Anthony Carty, *The Need to Be Rid of the Idea of General Customary Law*, 112 AJIL UNBOUND 319 (2018).

[16] *Id.* at 322.

[17] *Id.* at 321.

[18] *Id.* at 323.

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