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REFLECTIONS IN LIGHT OF AN APPROACH TO CIL BASED ON  
FUNDAMENTAL ETHICAL PRINCIPLES**

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

“CUSTOMARY INTERNATIONAL LAW: A THIRD WORLD PERSPECTIVE”:  
REFLECTIONS IN LIGHT OF AN APPROACH TO CIL BASED ON FUNDAMENTAL  
ETHICAL PRINCIPLES

*Brian D. Lepard\**

B.S. Chimni’s stimulating article<sup>1</sup> makes an important contribution to the burgeoning literature on customary international law (CIL) by examining CIL from the perspective of developing states, a perspective underrepresented in this literature. His article articulates well many valid points about the sociohistorical biases of CIL. At the same time, there may be reasons for more optimism than Chimni appears to possess about the ability of CIL to serve global interests, including those of the Third World. Furthermore, some of Chimni’s proposals merit further refinement. In this essay I propose to evaluate the strengths and potential shortcomings of Chimni’s arguments in light of an approach to CIL that I have developed that is based on fundamental ethical principles recognized in international law. After laying out an alternative theory that still has many resonances with Chimni’s proposals, I discuss critically three of the key theses articulated by Chimni: First, that CIL is inherently colonialist and inconsistent with the values of Third World peoples; second, that even contemporary customary international human rights law (IHRL) is a means of furthering global capitalism to the detriment of Third World peoples; and third, that the remedy for CIL’s biases lies in the creation of a “postmodern” doctrine of CIL that incorporates reference to the “juridical conscience of humankind.”

*The Potential of a Theory of CIL Based on Fundamental Ethical Principles*

Elsewhere I have proposed that CIL should be reconceptualized as an informal mode of lawmaking among states that complements the more formal method of treaty-making.<sup>2</sup> In short, I have suggested that a new CIL norm emerges when “states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct.”<sup>3</sup> This definition incorporates, in effect, a more dynamic and forward-looking concept of *opinio juris* than the traditional one. Furthermore, according to my theory, state practice is one source of evidence that states believe a particular principle or rule is desirable, but it is not the only source of evidence and it is not an essential precondition for the formation of a customary law norm. In short, the revised definition of *opinio juris* is the “essence” of CIL.

\* *Harold W. Conroy Distinguished Professor of Law, University of Nebraska College of Law.*

<sup>1</sup> B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AJIL 1 (2018).

<sup>2</sup> See Brian D. Lepard, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* 151 (2010).

<sup>3</sup> *Id.* at 8.

I have demonstrated that this conception of the evidentiary role of state practice and of *opinio juris* as the core element of CIL is actually more consistent with the way that courts, and particularly the ICJ, have identified CIL norms than the traditional “two-element” definition, especially in areas such as human rights.<sup>4</sup> This is so even though the two-element definition is widely recited, including in the Draft Conclusions recently adopted by the International Law Commission.<sup>5</sup>

A critical element of the approach I have outlined is that the CIL norm-creation process, and the evaluation of the status of particular norms as CIL, must be viewed within an ethical context. I have attempted to explicate this context through the idea of “fundamental ethical principles” already endorsed by states and articulated in multi-lateral expressions of values, including the UN Charter and the Universal Declaration of Human Rights (UDHR). The foundational ethical principle anchoring this background ethical system is that of “unity in diversity,” which maintains that states and peoples ethically ought to seek cooperation and unity, while respecting their cultural and other differences.<sup>6</sup> A related ethical principle, very relevant to the experience of Third World countries, is that of significant state autonomy and sovereign equality.<sup>7</sup> Furthermore, a right to democracy is also a fundamental ethical principle. Accordingly, I have argued that the process of CIL norm-recognition should indeed be more “democratic” in that it should (1) incorporate the views of all states in the global community, whether powerful or weak, and rich or poor, including Third World states,<sup>8</sup> and (2) give more weight to the views of states that take into account, through elections or otherwise, the views of their people.<sup>9</sup>

One way in which my theory resonates with some Third World values is that it explicitly articulates an ethical background system for evaluation of CIL grounded in the concept of unity in diversity. While all states can find roots of this concept in their religious and philosophical traditions, historically Third World peoples were more apt to emphasize cooperation and unity over competition.<sup>10</sup> We also find in many Third World cultures, and especially indigenous cultures, the practice of consultation among members of a tribal council or community members aimed at creating a solution to community problems through open discussion and mutual learning. I have referred to such a process as “open-minded consultation.”<sup>11</sup> Chimni implicitly endorses such consultative values in all of his proposals aimed at “democratizing” CIL and making it more pluralistic.

<sup>4</sup> See *id.* at 128–38.

<sup>5</sup> See Draft Conclusion 2, entitled “Two Constituent Elements,” in Int’l Law Comm’n, [Fifth Report on Identification of Customary International Law, Annex, Draft Conclusions Adopted on First Reading, with the Special Rapporteur’s Suggested Changes](#), UN Doc. A/CN.4/717, at 57 (March 14, 2018) (prepared by Special Rapporteur Michael Wood) (“To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law.”); see also Michael Wood, [Foreword](#), in REEXAMINING CUSTOMARY INTERNATIONAL LAW xiv (Brian D. Lepar ed., 2017).

<sup>6</sup> See LEPARD, [supra note 2](#), at 78–81.

<sup>7</sup> See *id.* at 87.

<sup>8</sup> See, e.g., *id.* at 153 (“The preeminent ethical principle of unity in diversity furthermore points to the imperative of at least considering the views of a broad array of states representing a wide range of cultures and perspectives, including non-Western cultures.”).

<sup>9</sup> See *id.* at 156.

<sup>10</sup> To give two examples, the most revered book in Hinduism, the Bhagavad-Gita, affirms that the “whole world” is “united,” while African culture has long emphasized the principle of *ubuntu*, which essentially maintains that “people are family.” [Bhagavad-Gita 11.7](#), in THE BHAGAVAD GĪTĀ 55 (Franklin Edgerton, trans., 1972); M. Munyaka & M. Motlhabi, *Ubuntu and Its Socio-Moral Significance*, in AFRICAN ETHICS: AN ANTHOLOGY OF COMPARATIVE AND APPLIED ETHICS 63, 71 (M.F. Murove ed., 2009).

<sup>11</sup> See generally LEPARD, [supra note 2](#), at 90–91. For examples of support for this concept in non-Western as well as Western religious and philosophical traditions, see BRIAN D. LEPARD, [RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS](#) 69–71 (2002).

*Is CIL Inherently Colonialist and Inconsistent with the Values of Third World Peoples?*

Chimni's central argument is that CIL has colonialist roots that have made it inimical to the interests and values of Third World peoples. He thus affirms that "the doctrine of CIL originated in nineteenth century Europe in the period of the industrial revolution that saw the emergence of a shared legal consciousness and, in its second half, high imperialism."<sup>12</sup> He notes that the "imperial order of the times meant that CIL played a key role in facilitating the colonial project."<sup>13</sup> And he critiques even reformist versions of CIL that purport to be more universal, maintaining that the "essential aim of the 'modern' doctrine of CIL is the generation of norms that safeguard the systemic interests of the global capitalist system."<sup>14</sup>

Let me first explain how the approach to CIL I have proposed may validate many of Chimni's points, while also providing a way to alleviate some of his concerns. Most importantly, the approach does not preclude a critical analysis of the adverse impact of particular CIL norms on Third World peoples. For example, there is no doubt that many norms that at one time were accepted as CIL were blatantly designed to serve the economically avaricious interests of Western powers. These include the doctrine of "conquest." Thus, in 1823, Justice John Marshall of the U.S. Supreme Court was able brazenly to declare in relation to U.S. government title over Native American lands that "[c]onquest gives a title which the Courts of the conqueror cannot deny. ... The title by conquest is acquired and maintained by force."<sup>15</sup>

At the same time, while Western capitalist interests may have historically lobbied for recognition of certain norms favorable to them as CIL, there is strong evidence that many norms today commonly accepted as CIL do not uniformly benefit these interests and may actually favor Third World states. For example, the ICJ has recognized as CIL the norm of a state's permanent sovereignty over its natural resources—a norm that clearly favors resource-rich states (many of them Third World states) vis-à-vis transnational corporations (TNCs) and other states that seek to exploit these resources unjustly.<sup>16</sup> Thus, a fair assessment of whether recognized norms of CIL favor Western states must be a mixed and nuanced one.

Stepping back from an examination of particular CIL norms, there are also reasons to doubt that CIL in theory is inherently biased in favor of Western states. Chimni appears to suggest that CIL is wholly a creation of Western imperialist powers. It may be true that if we take a limited view of CIL doctrine, focusing on accounts of it by Western jurists, we might be led to make such an assumption. Yet viewed more broadly, there is nothing "Western" about CIL, and indeed one might even consider it to be more "Third World" than Western in character. This is because most Third World countries incorporate a domestic version of customary law in their legal systems and scholars have in fact studied the great potential of domestic customary law to further sustainable development.<sup>17</sup>

The idea that various practices among actors in a society may become legally binding through a shared belief among members of that society that the practices should be legally binding is pervasive in Third World cultures.<sup>18</sup> Indeed, prior to colonization these cultures tended to have informal lawmaking traditions based on this idea. Thus,

<sup>12</sup> Chimni, *supra* note 1, at 43–44.

<sup>13</sup> *Id.* at 44.

<sup>14</sup> *Id.* at 45.

<sup>15</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588–89 (1823).

<sup>16</sup> See, e.g., *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 ICJ REP. 168, 251–52 (Dec. 19) (recognizing as CIL "the principle of permanent sovereignty over natural resources" as expressed in various General Assembly resolutions).

<sup>17</sup> See, e.g., PETER ØREBECH ET AL., *THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT* (2005).

<sup>18</sup> See Peter Ørebech and Fred Bosselman, *The Linkage Between Sustainable Development and Customary Law*, in *id.* at 12, 17 (affirming that for a local custom "to acquire the status of law it must carry a popular perception of valid legal obligation (*opinio necessitatis sive obligationis*)").

it is not entirely accurate to state, as does Chimni, that it is “historical fact” that “the twin elements of state practice and *opinio juris* that together constitute the ‘formal’ source of CIL were identified and given meaning in the context of the relationship between European nations with a broadly shared culture.”<sup>19</sup> That might be true at a doctrinal level, but not at a substantive one. Third World societies also developed extensive customary laws governing their mutual relations. This Third World-inspired CIL has been obscured by the Western bias in accounts of CIL that have focused only on the behavior of Western countries. Fortunately, this situation is beginning to change.<sup>20</sup>

*Is Customary IHRL a Means of Furthering Global Capitalism to the Detriment of Third World Peoples?*

Chimni appears to suggest that even customary IHRL, which has sought to erase discrimination based on race, ethnicity, nationality, and religion (discrimination that was a hallmark of imperialist policy), in reality serves to support the long-term functioning of Western neoimperialism and capitalism.<sup>21</sup> He argues that new conceptions of customary IHRL, rather than reversing this support, instead served to give the global capitalist system “a human face at a time of aggressive exploitation of subaltern classes, nations, and nature so that this reality did not undermine its stability and legitimacy.”<sup>22</sup>

As noted above, we can acknowledge that certain CIL norms historically supported the interests of global capitalism, and in particular Western-based TNCs. However, it is doubtful that most norms of customary IHRL today support these interests. On the contrary, the rise of IHRL has posed a serious challenge to all governments and to TNCs. Post-UDHR treaty-based and customary IHRL also developed in symphony with the push for decolonization, as exemplified by recognition of the right to self-determination in the very first operative article of the two 1966 covenants on human rights.<sup>23</sup>

Many Western governments clearly disfavor emerging CIL norms such as those relating to the right to food and to a sustainable environment. These norms threaten the existing social order in Western countries rather than perpetuate it. Likewise, it is not at all clear that TNCs would wish to erect the current customary IHRL normative order even to serve their long-term self-interests. There have been too many examples in recent decades of TNCs exploiting workers and local populations, in violation of such customary law norms as the right to just and favorable conditions of work.<sup>24</sup> In part because TNCs did not want to be legally bound by these norms, TNCs were very skeptical about the United Nations’ attempts to impose them on TNCs in the so-called “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,” which were formulated by the former Sub-Commission on the Promotion and Protection of Human Rights in the early 2000s.<sup>25</sup>

<sup>19</sup> Chimni, *supra* note 1, at 14.

<sup>20</sup> For accounts of non-Western systems of international law, including CIL, see, e.g., JEREMY I. LEVITT, *ILLEGAL PEACE IN AFRICA: AN INQUIRY INTO THE LEGALITY OF POWER SHARING WITH WARLORDS, REBELS, AND JUNTA* 7–16 (2012); K.R.R. Sastry, *Hinduism and International Law*, 117 *RECUEIL DES COURS* 503, 567–80 (1966); *THE ISLAMIC LAW OF NATIONS: SHAYBĀNĪ’S SIYAR* 9 (Majid Khadduri trans., 1966).

<sup>21</sup> Chimni, *supra* note 1, at 5.

<sup>22</sup> *Id.* at 37.

<sup>23</sup> See, e.g., *International Covenant on Civil and Political Rights* art. 1(1), Dec. 16, 1966, 999 UNTS 171.

<sup>24</sup> See, e.g., *Universal Declaration of Human Rights* art. 23(1), GA Res. 217A (III) (Dec. 10, 1948).

<sup>25</sup> See UN Sub-Comm’n on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). On the opposition of many business groups to the Norms, see David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 *HUM. RTS. L. REV.* 447, 448–50 (2006).

In short, there is a fundamental tension between CIL human rights norms and corporate profiteering that underscores the radical challenges posed by contemporary IHRL to both governments and TNCs. Moreover, Chimni's argument does not take into account that some TNCs may not only be motivated by profit, but genuinely seek to better the conditions of their workers and the communities they serve.

These observations are not meant to deny that the gross disparities of wealth in global society today pose a grave threat to the realization of rights recognized in modern-day customary IHRL. However, we cannot lay the blame for this systemic injustice at the feet of customary IHRL itself; rather, customary IHRL is a critical tool to combat it.

#### *Can a Postmodern Doctrine of CIL Based on the "Juridical Conscience of Humankind" Make CIL More Just?*

To cure CIL of its proglobal capitalist biases and "help promote the global common good and safeguard our common humanity,"<sup>26</sup> Chimni proposes a "postmodern" doctrine of CIL with certain key features. Among others, he argues for recognition of the "juridical conscience of humankind," or "*opinio juris communis*," in addition to traditional *opinio juris*, "in order to inject progressive content into the international legal order."<sup>27</sup>

Chimni's proposal to incorporate the "juridical conscience of humankind" in the identification of CIL norms is welcome and merits serious reflection. It implicitly signals the imperative of evaluating CIL norms and their impacts from an ethical perspective anchored in the idea of a global community of states and peoples. I have similarly argued that the assessment of CIL must be made within an ethical context, and have rejected the pretense that CIL norms can be made "neutrally" (a process that may be identified with the notion of "formal" custom to which Chimni refers), without regard to either the ethics of the process that generates them or the ethical consequences of the resulting CIL norms.

However, the idea of a "juridical conscience of humankind" is very amorphous. The effort to ascertain the CIL status of particular norms with serious ethical implications is fraught with difficulties, requiring the balancing of competing ethical concerns (such as, for example, respect for the sovereignty of states regarding the use of their natural resources, on the one hand, and respect for the global environment, on the other). It is not clear that there exists a universal conscience among jurists based on a shared conception of the global common good that can resolve these tensions without additional guidance. It is preferable instead, as I have suggested, to determine the CIL status of a norm in light of a more sophisticated set of ethical principles, including that of unity in diversity, that have been explicitly endorsed by states in documents such as the UDHR, and which coincide with many Third World values, such as cooperation and consultation.

#### *Conclusion*

Chimni's article rightly asks us to look critically at the process of CIL lawmaking and ensure that it adequately reflects the voices of Third World states and peoples. His article legitimately demands, too, that we reevaluate norms of CIL to ensure they are not the product of bias against the Third World, and do not perpetuate or exacerbate global economic inequality. Chimni makes important proposals to help CIL serve all states and peoples. I have recommended here a few refinements to his perceptions and proposals.

<sup>26</sup> Chimni, *supra* note 1, at 46.

<sup>27</sup> *Id.* at 38, 46.