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Chair: *Nicholas Onuf, Florida International University*
Vice-Chair: *Jianming Shen, University of Hong Kong*
Editors: *Francesco Parisi, George Mason University*
Mortimer Sellers, University of Baltimore

Letter From The Chair

Two questions trump all others in the realm of international legal theory: Is international law truly law? How is customary law possible? Anthony D'Amato has addressed both questions in the course of his remarkable career as a scholar. Here he returns to the second question. His short paper – actually, a summary of a far longer paper – offers a new and challenging theory of customary international law formation. Several scholars took up the challenge, and their lively and thoughtful responses follow professor D'Amato's "reformulation."

The next issue of ILT will feature another short and provocative essay by another eminent scholar: Fernando Téson's *Two Mistakes about Democracy.* I encourage any member of our Interest Group to send the editors a response by October 15th. Indeed, the group's main purpose is to expedite scholarly exchange by doing away with extensive citation, full-dress review, and the sometimes excessive caution that these practices foster. At our recent business meeting (held in April at the ASIL annual meeting), members reaffirmed the Interest Group's commitment to the discussion of important theoretical issues, chiefly through the pages of this journal.

The current issue of ILT is a model of what we hope to achieve. We can continue to offer scholarly exchange of this calibre only with your help. Why not try your work out on the rest of us before putting in final form for publication? The editors welcome all submissions suiting ILT's format.

Nicholas Onuf
Florida International University

Customary International Law: A Reformulation

My book on customary law that was published in 1971 was an attempt to make objective the idea of *opinio juris.* I began *The Concept of Custom in International Law* with an account of the subjectivity of that notion and the impossible and self-contradictory formulas it engenders. Then I attempted to place *opinio juris* on an objective basis by arguing that it called for a combination of quantitative and qualitative elements in the practice of states. My work was considered radical by other scholars; with the passage of time I have reluctantly concluded that it may not have been radical enough. Instead of trying to work within the notion of *opinio juris*, I should have discarded it entirely. For the unalterable paradox with *opinio juris* is that it begs the question of customary law. Consider Oppenheim's elegant definition of *opinio juris* as state practice "under the aegis of the conviction" that the practice is "according to international law, obligatory or right" or take the standard Restatement of Foreign Relations' definition of *opinio juris* as a "sense of legal obligation." These and other definitions of *opinio juris* inevitably insert "law" or "obligation" into the definiendum, thus assuming that which is attempted to be proven. A similar circularity appears in the work of Myres McDougal, because you will find words such as "authority" or "prescription" or "legitimacy" always and inextricably included within any definition he or his associates give of customary international law ("CIL"). Consider also the many recent attempts to make an end-run around the notion of CIL by substituting terms such as "public interest norms" or "jus cogens" upon analysis

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these also incorporate question-begging cognates of law and legitimacy into the definiendum.

In the past couple of years I arrived at a new approach to this age-old problem. I wrote a draft article, presented it at some academic workshops, and sent it to various colleagues for comments and criticisms. I engaged in a huge amount of interaction with my word processor, with particular emphasis on the "Delete" key. The current version is an article of 134 pages that offers an algorithm for identifying rules of CIL. The following, for your consideration, is a rapid summary of the main contentions.

The International Legal System as a "Player"

We normally think of international law from the vantage point of states (or in the human-rights context, persons). But the international legal system itself is also a "player" in the game of creating international law. It has a longer-term perspective than most states, because its existence depends on international peace and world order. General anarchy would signal the demise of the international system, whereas the system can survive localized anarchy such as an all-out war between states A and B, so long as the war can be limited and contained. In other words, A or B may be willing to jeopardize their individual existence by going to war, but the system cannot accept a similar risk for itself.

Thus, in any "practice" of states that purportedly gives rise to a rule of CIL, the states *and* the system are "players." The states are the active players; they call the shots. What the system does is *adopt* the rule that arises out of the play of the states, under certain conditions, which I will describe below. The system does not generate rules; it passively accepts certain rules that arise in the practice of states. Of course, since the system is intangible, ultimately international lawyers argue, with more or less persuasion, that the "system" has adopted certain rules.

Under the recent economic-legal theory known as "rational choice," one might argue that any explanation contributed by the international legal system could alternatively be explained from the foreign-policy perspective of the states; hence it is redundant to consider the system as a player. Theoretically this may be true, but the complexity of analysis that would result from omitting the system would be so huge as to bog down the entire project. The reason is that state A's foreign policy not only includes its assessment of the reactions of other states, but also includes its perspective of the system's perspective. For example, if A is thinking of violating a norm of international law and believes it can "get away with it" as far as state B is concerned (perhaps A is much more powerful than B, or perhaps it has a side deal with B), A nevertheless must consider that its intended violation will to an extent degrade the integrity of the system of international norms. That system protects so many of A's other vital interests—for example, the sanctity of its borders, the immunity of its ambassadors, the rights of its citizens traveling abroad—that there is a "cost" to A above and beyond the effect of its intended violation on any particular state such as state B. Hence it is parsimonious to explain A's strategy as a combination of projected effects on other states and projected effects upon the system of legal norms as a whole.

Empirical evidence supports the claim that the goal of the international legal system is peace. On the assumption of political scientists that an interstate war involves at least 1,000 annual battlefield deaths, and using war data compiled by J. David Singer and Melvin Small, I found that in the period 1816-1980 the average nation was at peace 96.1% of the time. This period included two world wars. From 1980 to the present, although statistical data is not readily available, a reasonable estimate is that the average nation has been at peace over 99% of the time. Moreover, if we look at the content of the international rules of war, we find an overwhelming propensity to contain the war (the elaborate rules of neutrality), reduce its severity (the Hague and Geneva conventions), and bring military hostilities to an end (the rule that a peace treaty is valid despite the coercion of the losing side). Not only is peace an empirical generalization (Locke, and not Hobbes, was right), but peace is furthered by the content of international rules.

In addition to the negative goal of avoiding war, the international legal system has the positive goal of increasing the prosperity of nations (what Judge Posner calls "wealth maximization"). Most of the content of international law grows out of the felt need of nations throughout history to

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engage in international trade. Under the Doctrine of Comparative Advantage, articulated by Adam Smith and David Ricardo, state A benefits from trading with state B even if every single product B produces can be produced more efficiently in A. The lesson of Japan shows that a nation can become richer by trade than by conquest. Japan was always a "processor" nation; lacking in natural resources, it has always imported raw materials, processed them, and sold the products abroad. The protectionist tariffs that Europe and the United States erected in the late 1920s impeded Japan's exports (and also triggered the Great Depression of the early 1930s). There was nothing Japan could do about the protectionist tariffs except pay them, but doing so took all the profit out of exports. The only solution was to drastically cut the cost of imported raw materials. A militarist-industrialist combination took over the Japanese government and embarked on a program of conquest of suppliers of raw materials in China and Southeast Asia. The Chinese thrust was a costly stalemate, but by 1942 Japan had conquered Hong Kong, the Philippines, Malaya, Singapore, the Dutch East Indies, Indochina, Siam, northwest New Guinea, Burma, and numerous South Pacific islands. Yet, surprisingly, raw material exports to Japan from these newly colonized territories actually declined from 1942 to 1945. By 1945, Japanese coal imports were down 92% from the 1941 preconquest level, iron ore down 95%, iron and steel down 82%, and rubber down 74%. The declines in 1944-45 were of course largely due to Allied interference with Japanese shipping, but in 1942-43 that interference was only sporadic and yet the raw material decline was steep. Aside from the fact that Japan lost the war (a big "aside" for some purposes, but not for present purposes), the lesson could not be clearer that its program of conquest was not cost-effective. People don't work hard under slave-labor conditions, and a non-productive Army has to be maintained to supervise the labor. By contrast, today demilitarized Japan is one of the richest nations in the world. You actually make more money by trading with another country than by owning it.

Of course, there is nothing to stop nations from going to war for irrational reasons. (World War I may have been a prime example of irrationality.) But I am not making an empirical prediction. I contend only that the international legal system will adopt rules that are rational and conservative, rules that point toward peace and interdependence and away from war and autarky. These goals affect the choice of rules of CIL.

Forming a Rule of Custom

The international legal system does not know *a priori* which rules will further its own interests of international peace and wealth-maximization. It has no ability to pick and choose rules on the basis of content. But it can do the following thing: it can adopt those rules that govern the resolution of specific conflicts between states. Let us call a conflict between states P and Q a "controversy" (to distinguish it from a "case" under domestic law). P acts or threatens to act; Q reacts or threatens retaliation; military force or economic sanctions might or might not be employed; and eventually the controversy is resolved. In extreme conflicts that result in war, the resolution of the controversy may see its first expression in the treaty of peace between P and Q. In rare instances, where either P or Q go out of existence (for example, P absorbs Q), there is no resolution, and no rule of CIL can emerge. However, most of the time when there is a resolution of the dispute, we identify the *rule* the parties ended up with. Let us call this the "governing rule." Identifying it is exactly like identifying the "holding" in a case: we pick the rule that was necessary to the result that was reached. My thesis is simply this: the governing rule that results from an international controversy is the birth of a rule of CIL. It joins other rules of CIL precisely because it has led to the resolution of a controversy. The international system "adopts" controversy-resolving rules because, with each adoption, the chances of further inter-state controversy and war are reduced.

In the longer paper, containing the analysis that I am summarizing here, I try to show how several rules of CIL are formed. For present purposes, let us focus on the rule that has come to be known as the prohibition of denial of justice, which presently enjoys the status of a classic rule of international law.

Suppose that state P is the home country and Q is the host country and the time is centuries ago. Traders from P go to Q to sell P's products to nationals of Q and to buy Q's products for export

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and sale to P. The traders rely on the commercial law of Q to support their trading activities and the government of Q (which values the trade between the two countries again the Doctrine of Comparative Advantage) encourages the traders to rely on its commercial law. Invariably commercial disputes arise that have to be settled before the magistrates or judges of Q. The government of Q typically wants these disputes to be adjudicated fairly; otherwise the traders might quit and go home, cutting off the mutually lucrative trade. The traders are sophisticated business people; they know that adjudication is not perfect; sometimes you lose a case you should have won and sometimes you win a case you should have lost. But occasionally a magistrate or judge will render an outrageously unjust decision, either because of corruption or plain antagonism against the trader who is a foreigner. In the early days of trading, it was hard for a central government to ensure that its judges and magistrates were impartial, a problem that still exists today but undoubtedly to a far lesser degree. Defining an outrageous judgment is not easy. Vattel in 1758 defined "denial of justice" as a refusal to allow the foreigner access to the ordinary tribunals, or "pretended delays, for which no good reason can be given," or "by a decision manifestly unjust and one-sided." Naturally there is a subjective element in this latter definition, not wholly saved by Vattel's added qualification that "the injustice must be evident and unmistakable."

A trader who is faced with what he perceives to be a significant denial of justice normally will have recourse to higher courts in the judicial system of Q, if there are any (what we now call "exhaustion of local remedies"), but assuming that doesn't work, he can either go out of the trading business or resort to self-help. Many affluent traders (they were often richer than local princes) would mountain expeditionary force and invade the host country. At the time of the ancient Grecian city-states, kid-naping was the preferred strategy: the trader would round up a number of citizens of Q, take them back to P, and hold them hostage until the government of Q made good on the denial of justice. The Greeks called this type of private reprisal *androlepsia*. At the time of the rise of the nation-state in Europe—roughly from the 14th century—on the private reprisals typically did not involve kidnaping but rather consisted of the seizure of valuable property from innocent citizens of the host country. The trader kept the seized property in compensation for his damages and to pay his mercenaries.

On its face this system of private invasions into the host country, causing embarrassment and disruption to the host government, appears to be a recipe for fomenting war. Thus it would appear to violate the basic negative assumption of the international legal system that I stated previously: avoid war. But it also fulfills the basic positive assumption of the system: encourage trade for mutual wealth-maximization. We know as a matter of history that private reprisals kept international trade alive; without them, trading would have been entirely frustrated as a result of an escalation of local denials of justice.

The government of P clearly needed some mechanism to reduce the potential friction resulting from reprisals conducted by P's traders in Q, especially because, if left unregulated, traders might begin to resort to pretexts to mount profitable raiding expeditions in Q. What evolved was the remarkable institution of "letters of marque and reprisal" (or more simply, "letters of marque.")

Assuming P cannot get the government of Q to consent in advance, P decides to act unilaterally. It begins to issue letters of marque to its traders. The typical letter of marque contained a description, sworn to by the trader, of the circumstances of the denial of justice in Q. It would also recite that the trader had unsuccessfully petitioned the magistrate or judicial system in Q for redress. The letter then authorized the trader to mount a reprisal in Q for the limited purpose of obtaining financial satisfaction. The letter would usually name the towns or villages where the reprisal may take place, specify a time limit, and even specify the maximum monetary value of the property the trader could seize an amount that would cover his losses resulting from the denial of justice plus the costs of mounting the mercenary expedition. One might imagine (although who can tell the exact value of seized property?) that the figure included a certain extra amount as penalty a principle justified as recently as 1978 for computing a lawful countermeasure in the U.S.-France arbitration of the Air Services Agreement of 27 March 1946 *(54 Int'l L. Rep. 304)*. Kings were

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clearly put in the position of having to grant some letters of marque, or else the traders would go ahead without them. But they could also withhold some grants if it appeared that the trader was overreaching. The system was far from perfect, but it reduced the occasions where reprisals triggered all-out war.

But there was a corresponding risk. If letters of marque had not been invented, and Philip the Trader mounts a reprisal in Q, the government of P could have disavowed Philip's action, hoping that Q would refrain from initiating war against P. But once P gives Philip a letter of marque, Q might be justified in regarding it as an act of war by P. Yet P would contend that, far from being an act of war, the letter of marque was designed to restore justice to Philip that had been denied him by Q's judicial system. We thus have an example of a "controversy" between P and Q in the sense I described earlier. The potential "governing rule" is the rule of "denial of justice." If P and Q resolve their controversy by adopting, agreeing to, or acquiescing in that rule, then the potential war between P and Q is averted, the controversy is resolved, and denial-of-justice is born as a rule of CIL. On the other hand, if Q disputes the rule and goes to war against P, the rule of denial of justice may be defeated—certainly, while the war is going on, it is not a rule that the international system (speaking metaphorically) would adopt, because it seems to be a war-producing and not war-averting rule.

But even if war ensues between P and Q, it is possible that at its conclusion Q might come to realize that P's traders had a right to justice in Q's system, that denying justice to them was wrong, and that wars in the future might be averted by taking steps to ensure that Q's judicial system (as well as P's) will not deny justice to aliens within its territory. And this indeed is what occurred. The Peace Treaty of Ryswick of 1697 contained in Article 12 a denial-of-justice rule:

> The ordinary course of Justice shall be free and open on both sides, and the Subjects both of the one and the other Dominion may pursue their Rights, Suits and Pretensions, according to the Laws and Statutes of each Country, and then without any Distinction obtain all. The Satisfaction that is justly due to them.

In 1713 the Treaty of Utrecht contained a similar provision in Article 7, "that it may be free for all the Subjects on both sides to prosecute and obtain their Rights, Pretensions and Actions; according to the Laws, Constitutions, and Statutes of each Kingdom," and in particular, that "care shall be taken that the Damages be forthwith made good, according to the Rules of Justice."

Some writers in the positivist tradition, taking their cue from Hall and Oppenheim at the turn of the century, would say that any rule in a treaty cannot be formative of custom because a treaty is nothing more than a contract between two states that creates a special law for them. In my book in 1971 I took the opposite tack, enlisting James Madison for support. Madison, citing a treaty, asked whether "*express* consent [can] be inferior evidence" of consent under international law. Surely if two states consent to a rule that governs the resolution of a controversy, and choose to express their consent in a treaty (rather than tacitly, or by an exchange of correspondence), the treaty format does not invalidate the consent. Hall and Oppenheim were simply wrong in equating international treaties with domestic contracts.

However, there are two qualifications to the principle that a rule expressed in a treaty can generate CIL, one of which I included in my book in 1971 and the other which I wish I had included. The first is that the rule must be generalizable. I used the example of a most-favored-nation clause in a treaty of amity, commerce, and navigation. Such a clause is by its nature non-generalizable, since it presupposes less-favored-nations. On the other hand, many provisions in human rights and environmental treaties are generalizable; the parties would in principle welcome the extension of such rules to nonparties. The second qualification is one that I introduce now: that any provision in a multilateral convention that is subject to reservation cannot generate customary law by virtue of the fact that customary law binds all states, and thus there cannot in principle be any exceptions. (Indeed, this second qualification follows from the first; it just took me a long time to think of it, and no one else ever suggested the idea in the interim.)

This second qualification gets rid of what otherwise would be an anomaly in CIL. Suppose, for example, that the United States ratifies a human-rights convention but makes a reservation as to one of its provisions. Assuming the treaty is self-executing, all its provisions except the one

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reserved to are binding in the United States as the supreme law of the land. But now if CIL, as part of federal common law, were to import that same provision into US law, we would be in the anomalous position of having rejected a treaty rule only to have it come in through the back door by way of customary law. Perhaps it is worth repeating that, as I see the qualification operating, all rules in multilateral treaties that are subject to reservation (rules that pass the *Reservations to the Genocide Convention* test of the ICJ) cannot be constitutive of customary law, whether or not any nation has in fact entered a reservation to those rules.

The practice of issuing letters of marque eventually died out (it is one of the listed powers of Congress in the U.S. Constitution, but was only used once during the "undeclared war" with France from 1798 to 1801). But the rule of denial of justice became an ordinary rule of CIL, enforced either through diplomatic correspondence between states or by international arbitral tribunals.

Conclusion

Customary law is formed in much the same way that common law is formed. In a common-law jurisdiction, we start with a dispute between two parties, a conflict as to which rule of law (whether it is an old rule or one that is advanced as the best rule for the occasion) is applicable to their dispute, and a resolution of the dispute by the court. The court's "holding" is the rule that governs the dispute (sometimes the court does not make the holding explicit). In the international system, customary law also begins with a dispute (between two or more states). There is a conflict as to which rule of law (even if it is a newly formulated rule) governs the situation. The difference between the domestic case and the international controversy is that in the latter there normally is no authoritative decision-maker. Nevertheless, the controversy eventually gets resolved, even if it takes a long time and even if it comes at the end of a war. The rule that characterizes the winner of the dispute can be called the "governing rule" of the controversy. This rule is formative of custom, and operates just like a "precedent" rule operates in common law. Thus, like a precedent, the rule analyzed in this essay—the rule of denial of justice—hovers in the background so that the next two states, R and S, are on notice that a rule of custom is in place resulting from the P-Q controversy. R and S are of course free to adopt a different rule, even a rule abolishing denial of justice. But if they fail to agree on a new rule, the old denial-of-justice rule operates as a default rule and is binding on them to the same extent that any rule of customary international law is binding on them, or in the same way that adefault rule in domestic contract law operates if the parties do not agree on an alternative rule. It is no part of my claim that all states subsequent to the P-Q controversy will adhere to the P-Q rule; indeed, such an unrealistic claim would entail the freezing of customary law for all time. Rather, the P-Q rule operates until two states modify or add to it or change it; and if R and S adhere completely to the rule, then it acquires additional force and weight (just as a judicial precedent becomes more important the more that courts follow it). If they modify it, then—like a judicial precedent that is modified in later cases—the rule of CIL itself becomes modified.

In the longer paper on file with the editor of this publication, I give other examples of the formation of rules of CIL, but you now have the general idea. I would be most grateful to receive your reactions, comments, and criticisms. Please e-mail them to me at *a-damato@nwu.edu* and I will be delighted to respond.

Anthony D'Amato
Northwestern University

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