doi:10.1017/aju.2018.79

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

THE NEED TO BE RID OF THE IDEA OF GENERAL CUSTOMARY LAW

*Anthony Carty**

B.S. Chimni's study of customary international law (CIL) is a review of its role both as a supporter of the existing global capitalist order and as a potential instrument to challenge that order in favor of a postmodern deliberative reasoning as the shaper of a new CIL.[1] It has been my view, since the *The Decay of International Law?* in 1986,[2] that general customary international law is not an intelligible concept and not actually used in practice to demonstrate empirically the existence of any rule of law. I follow Hans Morgenthau, who wrote in 1940 in the *American Journal of International Law* that the manner in which the International Court of Justice (ICJ) uses this concept is to decide what it likes and call it customary law.[3] I reiterated this view in my review of the ICJ in the first edition of my *Philosophy of International Law* in 2007.[4] While Chimni quotes my writings on general custom frequently and very positively in his article, this is always to support a progressive customary law *and never to do what I would propose, which is to make a complete break with CIL in favor of an independent approach to the problems it is supposed to answer.*

Chimni's Failure to Recognize the Disfunctionality of CIL

Chimni accepts the classical view that CIL requires two elements, opinio juris and the element of material practice, although he recognizes the doubtful history of this concept, invented in the nineteenth century. Its history does not go back further, as it was not the dominant framework of legal creativity during the so-called natural law epoch until the mid-to-late-eighteenth century.[5] Chimni cites Anghie for the proposition that, during the epoch of natural law thinking, such thinking could be invoked to justify colonialism.[6] My statement that CIL did not exist before the nineteenth century is taken by Chimni to mean that in the nineteenth century it was needed (and so was invented) to impose "customary" rules through coercion.

However, my intention in *The Decay* and subsequently had been to build an argument that, just as before the nineteenth century, general custom did not exist, so in the nineteenth century it was merely a legal construction of international lawyers. Drawing on the German historical school of law, law is seen as the history of a national

* *Professor of International law, Beijing Institute of Technology School of Law*

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

[2] Anthony Carty, The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs (1986).

[3] Hans J. Morganthau, *Positivism, Functionalism, and International Law*, 34 AJIL 260, 265–66 (1940).

[4] Anthony Carty, Philosophy of International Law 26–49 (2007).

[5] Chimni, *supra* note 1, at 7, 16.

[6] *Id.* at 17.

community and so by analogy the international community has its historical practice.[7] Guggenheim and Ago explain the illusory character of a global historical community whose practices and usages somehow precede the gradual growth of a conviction that these practices were binding as law. In particular, the Roman and Canonist traditions always still supposed a conscious will to create custom, while now, Ago explains, the historicist idea of custom is that it is a growing consciousness that laws have simply grown up spontaneously out of state practice, so that states gradually become aware of them through reflection on the outcomes of their practice.[8] This was an illusion in the mid-nineteenth century and it continues to be an illusion as Chimni searches after a new postmodern, progressive, deliberative reason as the evidence of custom.

Chimni adds to his quasi-Marxist approach to CIL another quasi-Marxist argument, that the subjective and objective aspects of custom can be understood as the formal consent to rules (subjective) and the material forces that produce the consent, i.e., the dominance of capitalist interests.[9] The "modern" view of custom, which Chimni distinguishes from the traditional approach to CIL, dispenses with the material aspect of custom and points to the virtually uncontested views of a unified world capitalist class, where the Third World statesmen and scholars are very largely preempted by a mixture of power and ideas, which Gramsci has already categorized as a hegemonic system.[10] These views are adequately expressed in the subjective element of custom, which now suffices on its own.

Chimni opposes to this his postmodern deliberative approach as the new formulation of the subjective element of custom, which will at least contribute to the progressive development of international law.[11] For instance, "modern" CIL protagonists point to the opinions of tribunals to support their concept of a neoliberal international economic order.[12] Chimni devotes a whole section of his article to demonstrating that the opinions of these tribunals—favoring fair and equitable treatment for foreign investment—should be replaced by the concept of adequate compensation, which represents better the view of progressive and Third World opinion. My consistent view is that there are simply irreconcilable differences here and no rule of custom can emerge.

Chimni is simply engaged in what Morgenthau first recognized in 1940, and which I have repeated since 1986: the tendency of international lawyers to argue that what they prefer is actually CIL, short-cutting any substantive arguments about the merits of their positions. What is called for is to separate two distinctive branches of inquiry. The *first* is to understand and respect the intellectual history of custom as it has come to be used in the international context. What Chimni does is to make a comprehensive list of the opinions of international lawyers on the subject, from which he chooses what suits his ideological proclivities. This is a modified version of the "modern" approach in that it prioritizes the subjective element of custom. Chimni recognizes that such exclusive focus favors an ideological function for CIL, but he claims there is some balance between power and ideals so that some space for justice can arise.[13] Yet this is despite the fact that Chimni himself recognizes that there is no world community of common values—a precondition for an organic development of law through custom[14]—and that Western legal, technical uses of CIL at present are deliberate attempts to obscure the fact that the (Western) concept of CIL veils its own particular epistemology, so as to marginalize Third World voices.[15]

[7] Carty, *supra* note 2, at 30–35; Anthony Carty, Philosophy of International Law 35–43 (2d ed. 2017) [hereinafter Carty, Philosophy].

[8] Carty, Philosophy, *supra* note 7, at 41.

[9] Chimni, *supra* note 1 at 20.

[10] *Id.* at 30.

[11] *Id.* at 20.

[12] *Id.* at 37–43.

[13] *Id.*

[14] *Id.* at 27.

[15] *Id.* at 20.

The *second* branch of inquiry requires precise historical explanations, whether Marxist or otherwise, of the role of international law in the history of modern capitalism. Chimni has a few broad-brush remarks to make about the colonial period. He goes into more detail about the primary flush of economic independence of Third World countries in the 1960s and 1970s, followed by a relapse into a global neoliberal economic order, which he now takes as having produced a virtually monolithic global capitalist class—a transnational capitalist class (TCC). He points out, fatefully for his whole project, that so-called Third World international lawyers are coopted into the functioning of the neoliberal world order.[16]

This should mean there is in fact no place for a "progressive" approach to CIL. Students in so-called top universities in the West or elsewhere will see that it does not serve them to go down this pathway. Chimni's difficulty may well be with the format of a journal article. He does, however, address these questions at length in his book-length study of Marxism and international law.[17]

Here, Chimni proposes to struggle against neoliberalism as reflected in the practice of tribunals and the writings of what he calls "modernist" international lawyers, by fitting himself into a CIL tradition where some protagonists will claim that the practice they prefer upholds their concept of justice, because, in their view, it is a product of deliberative or whatever reason.[18] Others will always be able to argue, from a "realist perspective," that a normative consensus has never arisen, and Chimni also sees the force of their argument.[19] While Chimni fully recognizes the arbitrariness with which CIL is invoked, I believe he does not see the in-operability of the concept, given these differences of historical or political perception. Custom as an idea has integrity if it rests in a community of values, where common standards are able to develop. This is not the nature of international society, as Chimni recognizes. It is not simply the conflicts of interests. There is no intellectual hegemony of normative explanation enjoyed by international lawyers that can explain the evolution, real or desired, of the normative shape of international society.

CIL is merely the lens whereby lawyers choose to describe that society, which Chimni generously recognizes in citing me.[20] By this I mean that within the field of international legal jurisprudence, international lawyers came to talk of states as having a collective opinio juris, but as Guggenheim and Ago have already shown, this is an illusion of historicism. Since the international system is still broadly based upon nation states that are aggressively distrustful of others, there is simply no possibility of any CIL of significance emerging. This is not simply because there are no records of so-called Third World countries. There are no reliable records at all, because such "state practice" as is published consists of official declarations, whose meaning is difficult to evaluate in the absence of background materials.[21] Of course it can be argued that CIL consists of acts and practice, but any human action can only be understood in terms of declared intention. Can the legal value of such an intention be proved? In any case, Chimni constructs his entire argument for reform of CIL by claiming the second material element of custom has in fact disappeared from academic discussion and court jurisprudence, and that now the battle is confined to interpretations of the subjective element of CIL. Yet, as I have argued since *The Decay,* tribunals are not able or willing to explore state practice in any depth. This is a point which Chimni himself appeals to Stefan Talmon to confirm.[22]

[16] *Id.* at 45.

[17] B.S. Chimni, International Law and World Order: A Critique of Contemporary Approaches (2017).

[18] Here he can align himself with Roberts, Postema, and Tasioulas. Chimni, *supra* note 1, at 36, 38, 43.

[19] *Id.* at 5 (citing Goldsmith and Posner, among other realists).

[20] *Id.* at 15.

[21] *See* Clive Parry, Sources and Evidences of International Law 67–68 (1965).

[22] See, for instance, Chimni's description of Talmon's critique of international jurisprudence. Chimni, *supra* note 1, at 26.

It is hopeless to call for more evidence or to designate certain "new entities" such as global civil society as more promising, as this is equally fragmented.[23]

The History of the International System Absent CIL

Chimni has his own account of what he calls a materialist history of international law, which he elaborates elsewhere.[24] However, his is not a history of international law as such but a review of the writings of Marx, Engels, and left-wing historians Christopher Hill, E.J. Hobsbawm, and Nicos Poulantzas. In general terms Chimni says that topics such as the law of territory, the law of the sea, and the law of prize all serve the interests of the Western capitalist powers in their expansion into the non-Western world.[25] Doctrines of civilization and recognition supposedly served to uphold a Western hierarchy here. However, a serious history has to ask itself: was any of this international legal labeling anything other than an afterthought of late-twentieth century left-wing international lawyers? In his materialist legal history Chimni relies almost completely on Anthony Anghie's key work, *Imperialism, Sovereignty and the Making of International Law*, for the critical period of late imperialism in the fifty years before 1914.[26] This omits other important historical analyses of international legal institutions.

In my view, one has to ask whether international law as such was recognizable as part of the international system, historically. Giovanni Arrighi and Beverly Silver provide guidance from a Marxist perspective. They see the stages of capitalist history as beginning with Holland, moving onto the English/British Empire, and culminating with an American empire from 1945 at the latest.[27] In any case, the system is supposed to be now in deep crisis because of the accumulation of finance capital and the transfer of capital to the so-called "rising" (not Third World) powers.[28] Chimni is aware of the extent of globalization and its forms, but even he merely speaks of what he regards as an emerging global law, as if the private law aspects of financial transactions somehow constituted an international order.[29]

While one could say Grotius was "produced" by Dutch capitalism—so that some aspect of independent statehood could play a role in international affairs—it is much more difficult to argue that the British Empire was anything other than a long history of plunder of other European and eventually non-European empires.[30] The role of the supposedly juridical concept of conquest plays a key part here.[31]

The really important third stage of this supposedly materialist history for Arrighi and Silver is the reality of American Empire since 1945, when they say even the semblance of the Westphalian system disappeared. Even the British pretence of a balance of power was abandoned in favor of U.S. constitutional prescriptions globally.[32] Since international law has no place in the dominant American intellectual framing of world society, there can be no place for any form of customary law as a key to its progressive development.

[23] There is a need for new frames of analysis to explore the normative experience of international society. *See* CARTY, PHILOSOPHY, *supra* note 7, at 50–51.

[24] *See* CHIMNI, *supra* note 17, at 477–78.

[25] Chimni, *supra* note 1, at 19–20.

[26] CHIMNI, *supra* note 17, at 493–94.

[27] CARTY, PHILOSOPHY, *supra* note 7, at 251–52.

[28] *Id.* at 286.

[29] See his excellent critique of financial globalization in CHIMNI, *supra* note 17, at 509–15.

[30] CARTY, PHILOSOPHY, *supra* note 7, at 251–52, 257.

[31] Conquest never excluded the possibility of reconquest as a legal concept, so is it really a legal concept? *See* CARTY, *supra* note 2, at 49, 52, 57, 61. Many jurists have doubted whether conquest was ever more than a matter of fact.

[32] CARTY, PHILOSOPHY, *supra* note 7, at 252.

I do not intend to suggest that the assertions in this section are irrefutable. Rather, my ambition is to make clear that any claim to match CIL propositions as normative ideals for world society will be too vague and simplistic. For instance, Chimni's own critique of the Fair and Equitable Treatment (FET) standard in foreign investment law is the inverse of systemic analysis. It simply takes one element of the capitalist system out of context and provides labels for evaluation that do not explain what meaning they have. What is so good about "adequate and appropriate" compensation and how could it replace FET as a CIL standard?[33] The Iran nationalization crisis of 1951–53 was about a distinction between paying for fixed assets or future profits. The violent resolution of this dispute still reverberates today. The same may be said of the Chile copper dispute and the coup against Allende in 1973. These momentous events cannot be explained in terms of the contradiction between fair and adequate compensation. They have to be placed in the wider context of an ongoing American imperialist defiance of any Westphalian order of an equality of states.

Conclusion

The difficulty facing Chimni as a progressive is that the idea of CIL supposes an organic development of a community in which a gradual growth of consciousness of a legal necessity will lead to the necessary element for social coercion to compel the observance of standards. However, global society is bitterly divided not simply in terms of interests but also intellectually in terms of solutions regarded as appropriate. It is simply too easy a way to approach world governance to resort to a universal juridical conscience, as if anything that was not connected to powerful states would constitute pursuit of the common good. This supposed juridical conscience is said to stand above the "will" of individual states on behalf of the international community.[34] Chimni introduces a vague global civil society, which juxtaposes the TCC with so-called (morally superior) subaltern classes.[35] He appears to argue that a rule of CIL exists where there is a consensus of "progressive" world opinion advocating it.[36] Given the deep conflicts of interest about solutions, a proactive deliberative reason is needed instead.

[33] Chimni, *supra* note 1, at 30–36.

[34] *Id.* at 38–41.

[35] These are among many other supposedly morally pure forces. *See* CHIMNI, *supra* note 17, at 499–504.

[36] Chimni, *supra* note 1, at 38.