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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 Teson'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 caliber 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 definitions, 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 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 work shops, 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 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 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 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, kidnapping 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 and *rolepsia.* At the time of the rise of the nation-state in Europe-roughly from the 14" century-on the private reprisals typically did not involve kidnapping 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 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 1 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 Oppenheirn 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 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 a default 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

Time For Institutional International Law

I agree with Professor D'Amato's conclusion (as I think most lawyers trained in the Anglo-American tradition probably will) that the rules of Customary International Law ("CIL") are best understood as evolving from the resolution of disputes, much the same way that precedents are constitutive of the common law. His effort to integrate the role of the "International Legal System" as an independent actor is a welcome and long overdue development in international law scholarship. I have difficulties, however, with the path that Professor D'Amato has chosen in incorporating these two insights, and more particularly, I find the potential implications of his approach startlingly antithetical to the vision of an international community regulated by the rule of law.

Professor D'Amato's core thesis appears to be that ILS, an intangible entity is a player (albeit a "passive" one) in the making of CIL through its acceptance (and by implication rejection) of certain "rules" that result from the interaction of states the "active" actors. The international system and by inference ILS has systemic interests or "goals" that are separable from (even if typically aligned with) those of the state actor. Two such interests are (1) the negative one of avoiding war; and (ii) the positive one of "increasing the wealth of nations." ILS "does not generate rules; it passively accepts some rules that arise in the practice of states." It does not know a priority which rules will further its own interests, and it has no ability to pick and choose rules on the basis of content. Rather, it adopts those rules that effectively resolve conflicts between states, or that maximize the pursuit of national wealth. These rules emerge not as abstract propositions, but from actual encounters in specific problem-solving situations or in actual experience with the mechanisms of wealth accumulation. By definition, then, these rules will be "rational" and "conservative."

I think there can be valid disagreements over Professor D'Amato's premise concerning the goals of the "International System," and whether ILS "generates" rules or only "passively" accepts rules made by others. (The tenor of the debate would not be unlike that among common lawyers as to whether judges "make" or "find" common law.) Such a dispute would only obscure what are much more fundamental points in his project. The two that I wish to address in this brief comment are: (a) the descriptive bias of the project; and (b) the consequences of this bias for the quest for an international order that is subject to the "rule of law."

Professor D'Amato's explanation of how the systemic interests of the International Legal System yield rules of customary international law is essentially descriptive; indeed so descriptive that he avoids employing normative terms where such terms would seem most appropriate. Thus, he frames the role of the ILS as the "adoption" or "acceptance" of CIL, not its legitimation. Yet, other than describing ILS as an "intangible system," with its own distinct interests and which acts passively, we are provided little else with which ILS can be identified.

This omission does not appear to be an oversight. Professor D'Amato is familiar with the social science literature on "public choice." Clearly, he knows that ILS cannot be presented simply as a black box, any more than the "state" can be. To inquire into the constituencies that he collectively refers to as "ILS," I suggest, would be to undermine the purely descriptive character of CIL which he presents; a presentation that he finds more attractive than the "question-begging" and "circular" formulations of the traditional conceptions of CIL as *opinio juris* whether in terms of his own prior work, or those of Professors Oppenheim and McDougal. What he appears to find problematic in those prior formulations is their incorporation of normative content as in integral component of the definition of CIL. But as Professor D'Amato shows in this piece, excising normative content from CIL can be done only by avoiding inquiry into the identity of the constituencies whose interests CIL reflect and embody. But where economists of the "progressive liberal" bent might be able to counter (and perhaps topple) neo-liberal structural economics with "institutional economics," the sort of institutionalism exemplified in Professor D'Amato's recognition of the systemic interests of ILS as an element of rule-making in CIL while avoiding inquiry into the forces that are thus unleashed by those interests seems to me counter to the nature of law as a discipline, whether viewed in scholarly or practical terms.

Law is of course intimately involved in conflict resolution. Clear and accepted rules always operating in the background preempt many conflicts by regulating behavior. Where prophylactic measures fail, law often provides as Professor D'Amato cogently points out the default rule (and indeed justification) for the attendant resolution of the conflict. Law differs from "power" in these situations precisely because it does not merely describe the relations of the parties inter se, but because it also provides a normative rationale that is sanctioned at least over the long run by those whose conduct it regulates.

Law imposes order, but that order is evolutionary, not spontaneous. This is particularly true of "custom-based" rules. To understand those expedient rules that successfully evolve over time into accepted legal principles, the legal scholar cannot only describe practice, but must inquire into the construction of the institutions and personalities whose expedient needs generate the relevant rules.

In identifying ILS as a participant with independent interests in CIL rule formation, Professor D'Amato is advancing the project of understanding (and by implication prescribing) the norms that legitimate or delegitimize certain practices within the international system. In failing to explore the constituent interests in ILS, he is circumventing a most vital discussion opened by his inquiry. I hope others will follow up.

Maxwell Chibundu
University of Maryland

Creating Customs

Anthony D'Amato has proposed a model for the creation of customary international laws borne out of a controversy between states. He rationalizes that the international law system, as opposed to individual states, essentially adopts the rule as custom in order to advance its objectives of avoidance of war and wealth maximization.

Assuming that the international system has these objectives, a system using the “winner rule" (i.e., the rule favoring the winning state in a controversy) would set hard and fast rules for all states at the time of the resolution. D'Arnato's model omits key elements necessary to establish a system-recognized custom. If the international law system did operate under this model, it would 1) dismiss other predominant evidence of custom traditionally used, and 2) ignore the influence of non-state players on the rules adopted. D'Amato contends the system is advancing its own objectives separate from states by using this method of custom formation. However, if the system were applying this bold method, the system of voluntary customary international law would falter.

Evidence of Custom

Custom is established within the international law system by cumulative evidence of a custom's recognition by states. D'Amato's model would allow the sweeping adoption of a rule without the long-valued characteristics of custom-constancy and duration of practice and a belief that the practice is obligatory. Instead, the thesis assumes that the system can adopt customs from only a singular resolution of a controversy. Importantly, D'Amato's thesis fails to address the possibility that the resolution of a controversy may be the manifestation of an existing practice (and not vice versa), and that the resolution may be a natural progression to a custom.

For the argument here, D'Arnato's model implies that a new rule for the international law system is established by the resolution of a controversy (and not through other means). D'Amato provides the example of a state that strategically plans to defy custom against another state. Applying the model, if the rebellious state prevails in the dispute the custom would be completely reversed, and a new rule adopted by the international system. The model provides no accommodation for the on-going application of similar, alternative or completely contradictory practices or customs among other states.

The purpose of the resolution of the dispute is to harmonize the relations of the states involved. Individual disputes may be decided within a variety of formal or informal venues using differing customs. While a winner rule could be used as evidence of a custom, the function of the rule is not its application to other states. If the winner rule were applied, the voluntary element of custom formation would be abandoned.

If a winner rule were adopted by the system, how effective would it be in- subsequent application? The scope of the winner rule would be difficult to define. States' customs are more likely to be a mosaic of rules depending on, among other things, domestic laws, rules of trade for specific commodities, the disposition of other states, and local or cultural practices. Instead of blanket application, the winner rule simply would be evidence of a custom, and it would be considered among other factors. The winner rule would not stand alone as the custom.

The importance of a resolution as evidence of a custom may be proportional to the affect of the winner rule on states outside the controversy and/or the stability of the system. This returns to D'Amato's proposition: the objectives of the international law system are peace and wealth maximization. Assuming this to be true, the adoption of a winner rule as custom would depend heavily on the practices, duties and objectives of other states. How important is this rule to general application?

D'Amato's thesis-that the international law system adopts a winner rule as custom-does not account for a tremendous variability among the nature of customs and the relative importance of general application. Custom applications span from purely state functions, such as military, to exclusively commercial functions. (Although industrial

regulatory states make few functions absolutely commercial.) The nature of the custom may directly affect its importance as a general custom. For instance, a rule applied to purely state-to-state functions, such as militarization, naturally would have larger implications for the international system. The most obvious example is the current Iraq dispute. The decision on weapons inspections will surely establish strong evidence of a custom for all states. The method of certifying the durability of tennis shoes may be a commercial custom, depending on state's interest in advertising and warranties. Finally, an issue such as the treatment of workers in factories may be somewhere in the middle. Therefore, no winner rule alone is probably sufficient to establish a custom, but it may meet a need for a general custom to prevent some instability in the system. However, a winner rule could only be a custom with other states' support and supplementary evidence of the custom.

The traditional elements required to establish custom constancy and duration of practice and a belief that the practice is obligatory-have been excluded from the D'Amato model. The model does not account for the mosaic of customs between states and the nature of the custom. However, his argument may have more significant implications for customs requiring general application to prevent instability in the system. However, these customs, like others, would be valid only when other evidence of a custom is present.

Non-State Players

In addition to states, the international law system is accountable to the non-state players who may vigorously object to wholesale adoption of rules as a result of a single controversy.

D'Amato's thesis provides no latitude for the influence of non-state players in establishing custom. These individual players establish international standards, provide arbitration, and affect the practices of states and the system. For example, many of these players are concerned with trade, such as the International Chamber of Commerce and the London Corn Trade Association. In a dispute between Canada and Greenland, the rule applied to a controversy about transporting corn would not be applied to all transported corn, because the industry may promote another rule that has been successfully adopted by the system or particular states.

Today, non-state players would have a significant role in D'Amato's example of fair adjudication of merchants. If evolving today, the application of the winner rule as custom may not be necessary. Today's international market player may rely instead on industry practice or their ability to control the circumstances of justice. For instance, contracts may have self containing rules, and private parties may agree to arbitrate before the United National Commission for International Trade Law or a similar non-state party. In addition, these players may split their loyalty among states to promote their role in international trade, so no nation is necessarily responsible for protecting them.

The controversy between nations will surely involve, as acknowledged by D'Amato, consideration of other states and the *projected effects* on the system. However, the controversies (and customs) also are influenced by non-state parties. For instance, the current Iraq dispute involves more than an international security mission. Private businesses in the Middle East rely heavily on Iraq oil supplies, and their interests will significantly influence the role of nations such as Jordan in an armed conflict. D'Amato's model does not account for the function of non-state players in the formation of custom.

The greater objectives of the system-peace and wealth maximization-would not be served if the system was currently operating in this model. The reactions of individual states and non-state players would cause unrest in the system. As discussed above, state customs and practices vary by design. Wealth maximization would be retarded by such a model because artificial limits would be placed on custom or practice among individual states.

Under the D'Amato thesis, states would be subjected to rules that lack the tradition of voluntary custom formation. Instead, the system would force rules, designed for specific parties, onto states that were not involved in the controversy. The winner rule would limit the options of states, non-state parties and the system and prevent the advance of the best practices for customary international law.

Anita Drummond
Washington, D.C.

Reformulating Customary International Law

In his article "Customary International Law: A Reformulation," Anthony D'Amato presents the contentions behind an enticing algorithm, as h, calls it, for the identification of rules of customary international law (CIL). The attempt to identify such norms in the past has resulted in some creative, and sometimes fanciful, mental gymnastics Professor D'Amato's ideas, however, seem both well-grounded in empirical data and logical. -would like to address the issue of one assumption he makes that is somewhat less well-grounded than the rest of his contentions - the idea of the international legal system as a "player."

I agree with Professor D'Amato's assertion that customary international law is created by the actions of states. It seems that identifying the international legal system as an actor, however will result in an overly legalistic analysis of the creation of international legal norms. By assuming that the goals of the international legal system are peace and economic prosperity, and basing his analysis on those assumptions, Professor D'Amato has eliminated the entire range of non-legal, yet equally motivating, factors behind how states will act in certain situations. His theory that customary international rules are created out of "controversies" seems accurate, to a point. However, the fact remains that there are norms that affect state's actions without being "legal" per se. In the process of interacting, states will no doubt consider more than their own short-term well being. They understand that their actions will have effects on the system beyond the immediate scenario. Limiting these considerations to the legal system's objectives of peace and prosperity ignores the fact that states are affected by non-legal norms as much as legal ones, and therefore must consider non-legal effects of their actions as much as legal ones.

In this manner, it seems that it is more appropriate to frame the long-term aspects of interaction, and the resulting rule formation, in terms of a broad concept of reciprocity, much like that Robert 0. Keohane has posited, than two ephemeral goals of the legal system. The concept of long-term reciprocity incorporates Professor D'Amato's assertion that the legal system pursues peace and prosperity, without limiting the application of Professor D'Amato's interactionism to legal norms alone. After all, the core of what Professor D'Amato is getting at in his article is a form of social interactionism, where the interactions of actors in the system result in rules that will either be adopted or not be adopted by the next interaction between or among actors within the system. And it is unproductive to allow formalistic ideas about what encompasses the "legal system" and what is outside of it to influence our analysis of international law, particularly custom.

By proposing that the objectives of the legal system are peace and prosperity, we assume (1) that the international system in general, outside of the legal system, (i.e., states as actors) do not have the same objectives, and would not pursue them were there no international legal system. In looking at diffuse reciprocity as the driving force behind the actions of states-whereby they consider the norm-constitutive effects of their interactions with other states as they will be revisited on themselves we are able to consider the extra-legal influences and outcomes on the interaction process. For there are many norms that are influential, though non-legal, and thus constitutive of the system of norms that regulate state behavior.

Professor D'Amato presents his assertion that the international legal system is a "player," and that peace and prosperity are its goals, as a tool to be used in the identification of customary international law. The international legal system, he goes on, adopts rules of customary international law according to their utility as "controversy-ending." While I agree with the method by which Professor D'Amato asserts that rules of CIL are adopted (it is, in fact, very similar to a constructivist theory of international law), I am uncomfortable with the imposition of normative goals on a system composed of so many actors with varying perspectives and interests, even as a tool or legal fiction. This practice not only artificially frames rules in terms of peace and prosperity, but seemingly limits the application of Professor D'Amato's algorithm to conflicts.

I would submit that conflicts are not the only acts in the international system which are constitutive of international law, and that there is a way to take up the issue of law and legitimacy without attributing goals to it.

Professor D'Amato's assertion that rules of CIL come out of conflicts seems correct. However, conflicts are only one type of social interaction, all of which are capable of creating rules of customary international law. This is especially true in view of the current trend toward the creation of codificatory multilateral conventions by the United Nations. More and more, rules of CIL are coming out of negotiations and other peaceful social interactions. And while these conventions purport to be merely codificatory, it is apparent that the negotiating process that surrounds the creation of these documents has an effect on the final provisions of those conventions. It seems that the assumption that the international system as a player promotes peace and prosperity comprises the creation of a fictional actor (the international legal system) with artificial goals in place of really looking at what the motivations and incentives of the true actors in the system (the states) are. The social interactions between states are what constitute rules of CIL, and so finding the motivating factors in the actions of states that construct CIL seems more productive, especially in light of the importance

of non-conflict processes for the creation of CIL. For, by assuming that the international legal system as a player promotes peace and prosperity, we engage in the same kind of circularity, as discussed by Professor D'Amato in his article, that has plagued the analysis of *opinio juris* in CIL all along.

The idea that social interactions are constitutive of the form and rules of the international system, in connection to Robert 0. Keohane's concept of "diffuse reciprocity," provides an explanation for the tendency toward peace in the international legal system without confusing the outcome with the motivating force behind it.(Robert 0. Keohane, Reciprocity in International Relations, 40 Int'l Org. 1, 8 (1986)) Diffuse reciprocity posits that states will avoid acts, in their relations with other states, which they would not desire be revisited on them at a later date. While this sounds much like an international relations version of "do unto others as you would have them do to you," states as actors implicitly seem to understand that their actions are constitutive of the international system, so that their actions can be used against them. As a result of this phenomenon, the U.S. has been met with resistance from other states in its attempts to push resolutions through the Security Council that appear to create a double standard for the U.S. and its allies vis-a-vis the rest of the world.

Interestingly, the concept of diffuse reciprocity both evidences and plays a role in the social construction of the international system. The fact that states' behavior often sacrifices a short-term gain to establish a rule or practice that they perceive will provide a more long-term benefit explains how actions on the part of a state today will play a part in constructing the world of tomorrow. This is even truer in the context of the formation of CIL, where international lawyers and the International Law Commission scrutinize interactions between states for evidence of rules of CIL. When states know that their actions, or the result of negotiations on the Law of the Sea Convention, for example, will constitute the rules to which the other states in the system will attempt to hold them, they will avoid creating norms with which they could not live in the future.

For example, states come to the aid of other states in the world because they would desire the same to be done for them were they in the same situation, and likewise avoid attacking their neighbors for the same reason. The uncertainty of the future thus imposes a Rawlsian "veil of ignorance" on the policies of system actors. Because states do not know exactly what role they themselves will play in the future-whether victim, aggressor or aid provider-they will attempt to create norms for action with which they could live regardless of which role is theirs in the future. [As an aside - the effects of this are in inverse proportion to the power the state perceives it possesses.]

In this way, justice and legitimacy are injected into the system without resorting to concepts of natural law. Through social construction, states act in ways they feel are just because they implicitly understand-if only sporadically and to a limited degree-that their own actions may be reciprocally revisited on them in the future. They will further act to create rules that will manage the actions of others in ways that the states desire, and by which the states feel comfortable being bound as well.

It is by this process that the problem of legitimacy is also solved. While various states may have many different ideas of what is "just" in any given situation, the concept that is acceptable to system actors as a corpus will be the one that prevails. This is because as actors exhibit behaviors that are unacceptable to the majority of actors in the system, these behaviors will be rejected by the system, either explicitly /verbally, or implicitly/ reactively. States will, as in the recent case of the execution in the U.S. of a foreign national (non-conflictual), or nuclear tests by India (quasi-conflictual), react to situations they consider extralegal in such a way as to demonstrate whether an activity is rule-making or rule-violating. In this way, a state may act with subjective *opinio juris*, but it quickly becomes evident whether the rest of the community believes this act to be consistent with international law. So it really doesn't matter whether a state believes itself to be conforming to international law or not, because the interactions that take place over that issue with other actors in the system will demonstrate what the consensus on the particular rule is. And unless the state explicitly asserts itself as a persistent objector to the rule, the quality of that state's actions will be judged by the rest of the actors in the system. Over time, the behaviors that establish norms and rules that are acceptable to the bulk of states will be the ones that attain the status of law. And, as Professor D'Amato has asserted, the norms which are no longer acceptable will be replaced or modified.

Overall, Professor D'Amato's approach to the identification of rules of CIL seems useful. And it is not readily apparent from the shortened version of his article published here what the role of his assumptions about the international legal system as player are in his algorithm. It is very possible that for the purposes of that algorithm, assuming that the international legal system as a player promotes peace and prosperity are sufficient to achieve an accurate outcome. However, I also think that it is at least worth examining why the system appears to promote peace and prosperity in order to evaluate whether the product of the Professor D'Amato's algorithm is accurate in each case. I look forward to reading the full article.

Andy Fesler
University of Southern California

The Domain of Customary Law: A Functional Approach

This comment resists the idea that all stable international practices are efficient, given the preferences of the participating States. Rather, it suggests that a more accurate analysis of the conditions for the emergence of efficient custom is appropriate.

According to the theory of norms, there are two formative elements of spontaneous social rules: (1) the practice should develop through the spontaneous and uncoerced behavior of the members of a group, and (2) the parties involved must subjectively believe in the obligatory or necessary nature of the emerging practice (opinio iuris). (For a familiar law and economics assessment of these requirements, see Parisi, Toward a Theory of Spontaneous Law, in Constitutional Political Economy, 1995). To an economist, the first element is consistent with a rather standard assumption of rational and free choice. The second element may instead be viewed as a belief of social or legal obligation, emerging in response to social dilemmas or game inefficiencies, in support of rules of behavior that avoid aggregate losses from socially sub-optimal behavior. Contrary to D'Amato's view, the existence of a belief of social obligation is traditionally stressed among the elements that should be considered in their appraisal of the condition of legal necessity and desirability. As an illustration, the law and economics literature considers the two classical strategies of cooperation and defection in response to the usual prisoner's dilemma payoff structure. Without the opinio iuris criterion, all defection strategies (dominant in a static equilibrium) would become enforceable rules of customary law. And this result would defeat the very purpose of a system of customary international law.

While D'Amato's result-neutrality should be appreciated, a functional approach should consider some additional structural conditions for the emergence of spontaneous social rules. The stylized settings considered shed light on the more problematic cases of conflicting incentives with inconsistent individual preferences over alternative outcomes.

As pointed out by Parisi (1995), norms may emerge in response to game inefficiencies in support of rules of behavior that maximize the aggregate well-being of the group. The traditional applications of game theory to the formation of customary law conversely suggest that cases of asymmetric individual incentives with inconsistent preferences over alternative social rules are likely to generate sub-optimal equilibria. It is possible that conditions of stochastic symmetry and reciprocity foster spontaneous processes of law formation even in the hypothesis of original misalignment of individual interests. (The emergence of spontaneous law in both symmetrical and asymmetrical cases is discussed in Parisi "Customary Law" in The New Palgrave Dictionary of Economics and the Law, Macmillan, 1998).

The general assumption of the economic approach is that individuals and States choose among alternative rules following the same logic of optimization that they undertake for all other economic choices. Whenever individual interests are not aligned, one would expect individuals and States to engage in strategic preference revelation. According to the traditional viewpoint, these strategies create potential obstacles for the spontaneous emergence of cooperation. However, game-theorists have suggested that situations characterized by stochastic symmetry or role-reversibility are not affected by strategic preference revelation.

Under those conditions, similar to a Rawlsian setting, the expected costs and benefits of alternative rules are the same among the members of the group. Each individual has the incentive to agree on a set of rules that benefit the group as a whole, consequently maximizing his or her expected share of wealth. Obviously, the emergence of consensus on a given rule does not exclude the possibility that individual members of the group might deviate from the endorsed rule in later periods when the respective roles are reversed. As with any standard enforcement problem, however, the possibility of strategic deviance from the voluntarily chosen rule should not be regarded as undermining its qualitative element. The general acceptance of or acquiescence to a custom is, indeed, primarily related to the expected effect of the norm on the group. Strategies that evolve into norms are those that, if reciprocally undertaken, maximize the expected payoff for each participant. Cases of role-reversibility do, however, leave room for opportunistic articulation or endorsement of rules that are breached once the roles are exchanged. In these cases, norms play a collateral yet crucial-role.

Norms play an important role in the stabilization of desirable social practices, reducing the risk of a breakdown in the system by sanctioning case-by-case opportunism. In the presence of higher payoffs obtainable through unilateral defection, and absent contract enforcement mechanisms, players are tempted to deviate from the optimal strategies and generate outcomes that are Pareto inferior for all parties. The potential accessibility of the off-diagonal, non-cooperative outcomes in Prisoners' Dilemma-type games renders these strategic settings plagued by the dominance of opportunistic

behavior. Parisi (1995 and 1998) has interestingly observed that mechanisms of automatic reciprocity abound in the area of public international law. The relationship among sovereign nations, left to the process of voluntary recognition of rules by member States, implies that when a commonly accepted standard of conduct is absent, lawless freedom applies. Structural reciprocity is pervasive and characteristic of lawless environments. In its original form, custom emerges in the absence of an established legal system or commonly recognized rule of law. Rules of reciprocity are among the oldest principles of customary law.

In a lawless world, reciprocity implies that the parties can do to others what has been done to them, subject obviously to the limits of their reciprocal strengths. Ancient customs of retaliation, based on conceptions of symmetry and punitive balance, provide an intriguing illustration of the principle of reciprocity at work. Although formally discouraging practices of literal retaliation, the principle of reciprocity is recognized as a crucial pillar for the process of international law formation.

Situations of post-contractual behavior capable of modifying States' obligations most commonly arise in the law and practice of international relations. The process of international law formation offers many occasions for opportunistic behavior on the part of States. Hold-out strategies and free riding generate higher payoffs for opportunistic States at the expense of the other nations. If left unconstrained, States' unilateral defection strategies would dominate in equilibrium. The system of international law has developed to cope with this reality and basic norms of reciprocity have gradually emerged under the form of international customary law (e.g. Art. 21(1)b of the 1969 Vienna Convention which articulates an established custom of reciprocity).

Any model that bypasses such qualitative examination of the formative elements of international customary law risks underestimating the strategic dimension of international relations and curtailing the true potential of spontaneous law in such conflictual situations.

Giampaolo Frezza
University of Rome

Playtime

In the seemingly chaotic world of international law, Professor D'Amato has expressed a logical explanation of Customary International Law ("CIL"). This comment, using an analogy to children at play, addresses three issues within Professor D'Amato's theory. The three issues are as follows: 1) governing rules, rather than *opinio* juris, control CIL; 2) governing rules develop from international conflict resolution; and 3) any treaty provision subject to a reservation does not create CIL.

Playtime: The Setting

Abby, Brian and Caty are playing together in the most incredible playroom ever. Each brings different experiences, personalities and resources to this playtime. Each child has been taught to "Share" and "Treat your neighbor as you would like to be treated."

In the best of all possible play worlds, the children, surrounded by hundreds of toys, would communicate and negotiate so that everyone's play desires are fulfilled. For example, one would get exclusive playtime with the toys neither of the other two wanted. For the toys two or more of them wanted to play with, time would be apportioned equally according to the desire. That does not happen in the real play world.

Despite the sharing principles and even though the room is filled with hundreds of toys, a conflict arises: all three want to ample). In effect she is concerned with having peace and maximizing wealth. Mom, as mediator, allots each child fifteen minutes of play time with the red sparkle play-dough, then the play-dough rotates on a continual basis.

In the real play world, the children will respond in several ways to Mom's ruling. First, the strongest child may like the rule because it is to her advantage and enforce it. Second, any or all of the children may lose interest in playing with the red sparkle play-dough, thus reallocating their time and energy. Third, the conflict continues-fifteen minute allotments are not sufficient. Fourth, the strongest child disagrees with the rule and will utilize her advantage to circumvent the rule or to re-establish interaction to her advantage. Regardless of their responses, the children at least have the understanding that with the red sparkle play-dough fifteen minutes at a time is the established rule.

Real World Application: Governing Rules Rather Than Opinio Juris Govern CIL

Opinio Juris as defined by *jus cogens* should be abandoned and replaced by "governing rules" that emerge from international disputes. Professor D'Amato in "Customary International Law: A Reformulation" articulates the circularity of attempting to define CIL in terms of public interest norms or *jus cogens. Pacta sunt servanda,* commonly described as a "norm" governing the interaction between states (setting aside the fact that it is articulated in the preamble of the Vienna Convention on Treaties), is analogous (not literally) to the rules children learn early. For example, most states recognize that agreements should be honored. And, most parents teach their children to "share" and to "treat others as you want to be treated." Most children with good parents learn these rules regardless of their culture; however, not all children have good parents and not all learn these rules. Analogous to Professor D'Amato's theory, the only way to be sure that all the children will share is by relying on an established rule, rather than relying on what we hope their parents taught them. In terms of CIL, treaties articulate what states subscribe to, at which point the elusive "general principle" becomes concrete.

Real World Application: Governing Rules Develop From International Conflict Resolution

Rules governing conduct arise from the interaction of states. Professor D'Amato suggests that governing rules arise from an international conflict; and the resolution is the "birth" of customary international law. As an example, the best of all possible real worlds would work the way the best of all possible play worlds would work. Countries A, B and C would communicate and negotiate so that each country's desires would be fulfilled. If two or more countries wanted a resource, those countries would apportion the resource according to each state's desire. However in the real world, conflicts arise, just as in play, and states are not willing to disclose information. Ultimately, the strongest country, as does the strongest child, prevails either by force or negotiation.

Then the International Legal System (analogous to "Mom") hears of the conflict. The International Legal System has a vested interest in the world not being in chaos. As Professor D'Amato stated the International Legal System's general goals are peace and wealth maximization. The ICJ may hear a case and, for example, allocate each of the countries quotas of fish to catch in certain seas. Or, the two conflicting states may enter into a treaty. In either case, a governing rule develops, as Professor D'Amato stated.

Many may argue the "birth" of CIL is not the treaty /resolution, but rather the practice described in the treaty is the source of the CIL. By this theory, practice is based on *opinio juris.* As previously stated, *opinio juris is* extremely vague and unreliable if not articulated. As soon as states articulate the practice and its logic, the general principle is a foundation- a governing rule. In addition, if a practice develops among some states, other states may not have the opportunity to object. States not participating in the developing practice may not know they need to object; they may believe they are not bound. Thus, determining CIL as a governing rule created from the resolution of an international conflict puts states on notice of the rule and gives them the opportunity to object or to create their own rule.

Countries will respond in several ways to an ICJ ruling or a treaty just as the children responded to Mom's ruling in various ways. First, the strongest country may like the rule because it is to the country's advantage and enforce it. Or, the weaker country make like the rule and coax the international community (i.e. other states with similar interests) into enforcing it. Second, countries may chose to allocate their resources differently in response to the ruling or treaty so that the treaty may no longer have relevance. Third, technology may change and the treaty may not solve the conflict. The developing practices of the states will influence behavior until a new governing rule develops. Fourth, a new practice may develop through adjusted behavior, for example to circumvent the rule. Regardless of their responses, countries are on notice as to what the CIL rule is.

All of these responses to a conflict resolution (i.e. court ruling or treaty) lead to another conflict, because parties have not articulated genera'. principles for the new situations. These practices, behaviors are not the source of CIL, but rather these responses create the situations for CIL to develop. The new conflicts will yield new governing rules, according to Professor D'Amato.

Real World Application: Any Treaty Provision Subject To A Reservation Does Not Create CIL

Any provisions of a treaty subject to a reservation do not generate CIL. According to Professor D'Amato, for law to be customary, it must bind all' states. For example, if Brian persistently objects, telling Mom, "I accept the rotation requirement, but I will not be bound by the fifteen minutes of allotted 'playdough time' if I am in the middle of a project." Neither Mom nor Abby nor Caty would be pleased. In addition, Abby and Caty could invoke the same rule based on the general principle of reciprocity. Note: the reciprocity rule is implicit in the agreement because each child is treated the

same; under the Vienna Convention, the reciprocity rule is automatic. The governing fifteen-minute rule is not universally binding under Brian's reservation, and it is potentially not binding at all.

Some may argue even if treaty provisions are not subject to reservations, they only create binding law on the signatories to that treaty. Professor D'Amato suggests the treaty provisions are the governing rule of the previous conflict (what led to the treaty), and they govern other situations as default rules. D'Amato points out parties are always free to establish a new rule at which point CIL evolves.

So the point is not for every subsequent conflict to conclude in the same fashion the previous conflict concluded. Rather, the governing rule, as opposed to a vague notion of *opinio juris,* acts as the starting point for resolving the next conflict. For example, Abby, Brian and Caty have worked out their differences regarding the red sparkle playdough and subsequently discover the motorized Barbie car from which a conflict ensues. The children would have certain expectations. First, they would expect Mom to intervene if too much chaos develops. Second, they would expect her to apportion play-time equally. Third, they would expect her to create a schedule by which two at a time may ride in the Barbie car, and each may take a turn driving. Eventually the children would progress so that they could solve future disputes in a similar manner with less conflict. This is the development of Customary International Law.

From the nursery to the stage of international law, some behavior is consistent. Three issues in Professor D'Amato's theory-1) governing rules, rather than *opinio juris,* determine CIL; 2) CIL develops by states resolving their international disputes; and 3) treaty provisions subject to reservations may not create CIL-illustrate the benefits of "governing rules" in the creation of CIL.

Kristy Hal
Washington, D.C.

Comments on Customary International Law

Anthony D'Amato, in his summary of "Customary International Law: A Reformulation ' " compares the final resolution of "incidents" in the international arena to judgments produced in cases in domestic courts. He argues that each resolution of an international incident operates as a binding "precedent," until it may be discarded by another resolution of a subsequent incident. This in effect destroys the analogy with the common law, as the purpose of a judgment is to resolve a conflict in accordance with binding precedent. For the resolution of an international incident to have the effect of domestic judgments, the resolution must be made in light of past resolutions.

D'Amato's analogy can work, but only if the qualitative element of the formation of custom is retained. In the United States, when a court encounters a novel issue, it will adopt what will be the most beneficial rule. This resulting rule becomes precedent. What D'Amato describes is the adoption of a beneficial rule which lacks the value of a precedent. By stating an intent to be bound by a practice, international actors create a *possible* source of general custom. As more actors pronounce similar "rulings," with the requisite qualitative component, a general custom develops.

When there is precedent, courts in the United States render judgments according to the doctrine of stare decisis. This doctrine does not freeze the law, however: the highest court in each jurisdiction can negate its own or a lower court's previous ruling, because of changing attitudes or factual situations. Accordingly, by retaining the qualitative element of custom, international law develops much along the same lines. The difference is that, in the international community, the "court" is composed of the states in the international community adhering to the general custom. They decide whether the rule should be change - not individual actors.

In addition, for D'Amato's central thesis, that " the governing rule that results from an international controversy is the birth of a rule of customary international law," to work, he must not abandon his theory of articulation. In his example of states "P" and "Q," D'Amato contends that the rule resulting from the P~Q controversy will operate until subsequent states "R" and "S," in an R-S controversy, either adhere to the result, modify it, or change it. What he describes is the creation of a special custom between P and Q and between R and S, respectively, given a preexisting general custom. For either P and Q or R and S to create the origin for a new rule of custom, in the face of an existing rule, they need to articulate the rule they are invoking in advance of their action. D'Amato advocated this position in his *International Law Anthology,* and he should not abandon it. (D'Amato, 66 (1994), excerpted from *The Concept of Custom in International Law* (1971)).

D'Amato states that his reformulation is consistent with the primary goal of international law: to avoid conflict. By adopting the rule resulting from the resolution of each individual controversy, the whole system is benefited. The reasoning behind this is simple: the rule has resulted in the resolution of a controversy, and therefore the adoption of this rule will resolve future controversies. Logically, however, there is no guarantee that the resolution of an incident, achieved by any means, even by force, will result in fewer conflicts in the future. In fact, the use of successive formulations of custom from individual international incidents would result in a great number of conflicts, as each nation would evaluate its response to each incident in a vacuum. Since each resolution of an incident could form a new custom, custom would have no binding effect, and nations would be drawn into conflict to resolve their disputes. The concept of custom would have no meaning if custom could be abrogated by each new resolution of a conflict.

D'Amato's main example in his summary in support of his theory is of the development of the rule of the prohibition of the denial of justice. This rule, he contends, was the result of successive incidents, from private reprisals to granting letters of marque to the current rule, where there are neither private reprisals nor letters of marque. He states that this is a real-world example of how custom develops, from contested incidents which were never vested with the qualitative component of custom. The system of private reprisals, as well as of issuing letters of marque, cannot be seen as formative of custom, however, because they produce inefficient results. The value of precedent is the reduction of transaction costs. Private reprisals and letters of marque are mere case by case resolutions of conflict; as such, for each there is the cost of conflict. An injustice which does not rise to this cost would be left unchecked. The very function of custom is to bind nations to long-term, mutually beneficial behavior. For example, D'Amato states that the trader denied local remedies has the choice of either going out of business or resorting to self-help. What he does not consider is that the corrupt judges were also faced with a similar decision: refuse remedies often and lose the "business" of the traders, or be only moderately biased and keep the trading business somewhat, if less, profitable. The resulting practice, it seems, was to allow self-help, and later, letters of marque, only to the extent where there was gross injustice, and to allow all other injustices to go unheeded. This is not a custom for good reason: such a scheme would not be beneficial for any nation. The optimal situation, where such reprisals were abandoned in favor of reciprocal obligation, marks where custom begins.

D'Amato describes what often happens in the real world of international relations. However, much of what happens between states does not fall under the control of custom. Many practices do not rise to this level, because states do not see a benefit in binding themselves to such practices. Perhaps this is because such practices have a high potential for producing conflict. Certainly, many practices can lead to conflict; however, the resolution of such a conflict does not necessarily signal the beginning of a binding custom. The resulting practice may be even less desirable than the practice which preceded it, and, therefore, custom should not attach.

Ferdinand Hogroian
Washington, D.C.

Controversy-Resolving Rules

"My thesis is simply this: the governing rule that results from an international controversy is the birth of a rule of customary international law. 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 interstate controversy and war are reduced."

The concept that a particular "rule" that settles a controversy will be added to the composite world of the relationship between the two parties - - and even more optimistically, added to the composite world of relationships in general - -feels immediately *comme il faut* or as it should be. One can imagine the community of nations building upon past relationships, keeping what worked, learning from history ... all admittedly cliche-sounding, and yet alluring. In the attempt to validate the concept and perhaps to distill it to a familiar setting, I analogize to the world of individual relationships and envision a couple experiencing conflict, resolving the conflict and adopting the rule that resolved the conflict into their relationship and into their customary family law. The family chooses to "adopt" the rule because it works... because there is less conflict and less war, just as on the international plain a rule is adopted because it works ... because there L, less conflict and less war.

This "may bring to mind Kipling's just-so stories" (Anthony D'Amato, *Identifying Rules of Customary Law,* 61 (1997).) on some high plain above the clumsy realities of real world events or relationships, but when I try to fill in either he

international or the family instances with a specific example from any one controversy the picture blurs. Just as frustrating as attempting to identify a controversy-resolving rule that emerged from Desert Storm or the Bosnian conflict, is the search for some specific controversy-resolving rule emerging from the ordinary example of a couple in conflict about where to go on vacation. The theory that there is a controversy-resolving rule that can be identified from a single resolved conflict or that this rule is capable of distillation into a customary rule of international law seems to snag on my attempt to picture a clear or tangible example.

Does D'Amato really mean that a rule of CIL results from resolution of an international controversy or is he referring to a longer-term continuing conflict whose eventual resolution, over a course of time grows into a rule of CIL? "…it is verbally peculiar to say that a rule of CIL can be established by a single incident; the term "custom" seems to imply repeated practices over a period of time." *(Id. 106.)* The paper from which "Customary International Law: A Reformulation" is a 'rapid summary' uses three examples to explain how CIL were formed from conflict resolution. The rule of diplomatic immunity, the rule of nationality and the rule of denial of justice are all instances that develop over long periods of time and involve conflicts on multiple fronts before a conflict-resolving strategy emerges. However, the thesis statement is clearly written in the singular ("an international controversy") and D'Amato does not withdraw from claiming a rule from a singular incident. The Turbot War between Canada and Spain is cited for its rule of CIL. *(Id. 97-106.)* The Iraqi invasion of Kuwait is cited for its rule of CIL.

"An example of the content of stability-generating norms is the law of war." "…was Iraq's invasion of Kuwait in *1990.* The reaction of the international community was swift and decisive; Iraq was beaten militarily, and a tax was imposed on its future oil revenues to pay the costs of the international military reaction. Flat-out aggression is no longer tolerable." (Id. 130.)

Is D'Amato saying here that the "law of war" developed from the war America called Desert Storm is that "flat-out aggression is no longer tolerable"? When including events in Bosnia in the equation, does the rule become something more like; "flat-out aggression. against a. country rich with oil is no longer tolerated"; or " it is easier to gather world sympathies against one easily identified 'bad guy' than against multiple, not so easily personified sources"; or does the rule become; "aggression that clearly includes one nation crossing the acknowledged borders of another state will not be tolerated"? It seems to me that this cited "law of war" developed from the environment of a single setting loses strength in attempted application outside its small-only-in-geography comer of the world.

I wonder if the "rule" that results from the resolution of even a single, even a small, controversy can contribute to the universe of CIL without actually developing into a truly reliable rule of CIL until tested and developed across a time and geography span of conflicts. I might question whether the Turbot War was really a single controversy. While certainly the capture of one ship was one instance in time, there was a history of building conflict and bilateral posturing. D'Amato both claims a rule of CIL from the Turbot controversy and states; "We cannot be completely confident in the durability of the exception. [to the freedom of the seas]." He then hypothesizes possible alterations to the rule based on possible alternative future happenings.

There certainly were lessons learned from Desert Storm, and yet, it seems to me to be too great a leap to say that a "law of war"; "flat-out aggression will no longer be tolerated" was bom. Did we learn that aggression is becoming less and less tolerated? We saw that even other Arab nations could and would break bonds of loyalty within the Arab community of nations and ally with nations outside the Arab world if pushed far enough and we saw that "far enough" included the physical invasion of another nation. When added with the current Iraqi situation, are we are seeing that threat of weapon stockpiling is not 'far enough' to loosen the bonds between Arab nations? When added into lessons from Bosnia, shall we observe that aggression -even rape, murder and attempted genocide - will be more tolerated if the victim nation does not export large quantities of an internationally much-needed resource? It does seem that each situation has added to the landscape of CIL without singularly giving "birth" to a stable rule of CIL.

I can imagine that the hypothetical couple mentioned above might come to realize, as to the developing of their own family customary laws, that where they actually go on vacation will not matter nearly so much as how they work toward that decision. Who led? Who followed? What needs were considered? What factors were most valued? What outside sources were consulted? How much did each party value the other's wishes? All the factors that went into the process of deciding will become a part of the landscape of the relationship. Individual factors may be important and signaling of future resolution strategies, but a specific law of interaction that will be applicable and useful across settings and times between the members of this couple and nations will require more. If our couple finally decides to flip a coin to chose destinations, the coin flip cannot be cited as the rule for future resolutions. It is the degree to which each parties wishes were considered or that job considerations ranked higher than family considerations or that issues were discussed at length or passed on quickly ... maybe even that flipping a coin is okay when all other things are equal that will be

learned. The successful couple will, in the spirit of seeking "stability", use again whatever proved useful in this conflict, but that strategy will need applying to varied conflicts and situations over some time before it is ready to be family "law".

Is there clarification within the use of the word "birth" in the thesis statement? If the use of the word "birth" is utilized to intend strictly a beginning from which much growing and developing and meaningful changing will occur, the thesis may prove more applicable both to our hypothetical couple and Desert Storm. However, D'Amato explains that; "the idea of "instant" customary law .... is now generally accepted". (Id. 107.) D'Amato seems to both lean toward rules of CIL developing over periods of time and multiple conflicts (through the choice of his three explanatory examples) and state that a rule of CIL can be created instantly. Interestingly, in the only expounded example of a rule developing from a solitary conflict, the possibility for future growth and change in the rule is expressly included.

I wonder if the mixed signals are representative of the indistinctness of the two options. I offer that it would be equally mistaken to fail to appreciate the lessons of singular conflicts and to confidently expect high degrees of future reliability from rules of customary law created from singular resolutions. It is valuable to observe that aggression is becoming less and less tolerable and it is valuable to observe that some aggression is more tolerated than other aggression. It is valuable to understand that there are some behaviors egregious enough to cause Arab nations to break Arab ties and ally with non-Arab nations and it is valuable to understand that the break of those ties may require more than a threat of weapon stockpiling. It would be a sad loss to fail to appreciate the lessons from singular conflicts and it would be a sad loss to rely on the rule from any one conflict to give the world a reliable rule of international customary law. The same way that an American law student often learns the law of a certain area by reading many cases on the subject to discern the various borders of the issue - - each case important for its contribution, but requiring the other cases to fill in the full picture - - each resolution of each international controversy fills in a fuller picture of a rule of CIL. New cases - - new conflicts - -continue to shape the law. D'Amato points out that "there is nothing in the international law literature or in the reported cases telling us what x is;" (x being the number of times a conflict must be resolved before it can generate a rule of CIL) therefore; "the most defensible assumption is that x=1."(1d. 107.) 1 do not agree that just because we don't know what x is, it must be one. There are imaginably some rare cases and rare international conflicts when issues may seem to be distilled and concrete enough to state rules of law. D'Amato's own examples of such international conflicts are weak. It seems to me, inevitable that one will be weaker than two... will be weaker than three ... etc. D'Amato's paper, read as a whole, seems to acknowledge this even though he also specifically denies "strength in numbers". Perhaps his hedging is itself a vivid illustration of the fluidity of balance and tension between CIL developed from solitary or multiple conflicts.

Janet Ours
Input Solutions, Inc.

Rethinking Opinio Juris: A Law And Economics Perspective

Anthony D'Amato revisits the debated theme of international customary law providing the reader with new and valuable insight. The problems of custom formation have several points in common with the more general issue of spontaneous emergence of norms and principles of justice. Notable philosophers and legal scholars have considered the conditions under which social norms and principles of justice can emerge spontaneously through the voluntary interaction of individual members of a group. As in a contractarian setting, the reality of customary law formation relies on a voluntary process through which members of a community develop rules that govern their social interaction by voluntarily adhering to emerging behavioral standards. In this setting, Harsanyi *("Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility." Journal of Political Economy 63: 315* (1955)) suggests that optimal social norms are those that would emerge through the interaction of individual actors in a social setting with impersonal preferences. The impersonality requirement for individual preferences is satisfied if the decision makers have an equal chance of finding themselves in any one of the initial social positions and they rationally choose a set of rules to maximize their expected welfare. Rawls (A *Theory of Justice.* Cambridge, Mass.: Harvard University Press (1971)) employs Harsanyi's model of stochastic ignorance in his theory of justice. However, the Rawlsian "veil of ignorance" introduces an element of risk aversion in the choice between alternative states of the world, thus altering the outcome achievable under Harsanyi's original model, with a bias toward equal distribution, with results that approximate the Nash criterion of social welfare. (Further analysis of the spontaneous formation of norms and principles of morality can be found in Sen, *"Rational Fools: A Critique of the Behavioral Foundations of Economic Theory."* In: Hahn, E, and Hollis, M. (eds.) *Philosophy and Economic Theory.* Oxford: Clarendon Press (1979); Ullmann-Margalit, *The Emergence of Norms.* Oxford: Clarendon Press (1977); and Gauthier, *Morals by Agreement.* Oxford: Clarendon Press (1986)),

Legal theorists and practitioners have addressed a similar issue when considering the requirements of *opinio iuris.* In attempting to solve one of the problems associated with the notion of *opinio iuris,* namely the troublesome problem of circularity, legal scholars (notably, an earlier contribution by Anthony D'Amato, *The Concept of Custom in International Law,* Ithaca, New York: Cornell University Press (1971)) have considered the crucial issue of timing of belief and action in the formation of customary rules. The traditional approach emphasizes the awkward notion that individuals must believe that a practice is already law before it can become law. This approach basically requires the existence of a mistake for the emergence of a custom: the belief that an undertaken practice was required by law, when instead, it was not. Obviously, this approach has its problems. Placing such reliance on systematic mistakes, the theory fails to explain how customary rules can emerge and evolve overtime in cases where individuals have full knowledge of the state of the law.

In this context, legal theorists have proposed to look past the notions of *opinio iuris* and usage concentrating on the qualitative element of "articulation." Articulation theories capture two important features of customary law: (a) customary law is voluntary in nature; and (b) customary law is dynamic. According to these theories, in the process of ascertaining the qualitative element of *opinio iuris,* relevance must be given to the statements and expressions of belief (articulations) of the various players. Individuals and states articulate desirable norms as a way to signal that they intend to follow and be bound by such rules. In this way, articulation theories remove the guessing process from the identification of *opinio iuris.*

Here, the analytical paths of social scientists and international lawyers begin to diverge. Consistent with the predicament of the economic models, articulation theories should suggest that greater weight should be given to beliefs that have been expressed prior to the emergence of a conflict. The similarity between the legal and the economic reasoning should be self-evident. Articulations that are made prior to the unveiling of conflicting contingencies can be analogized to rules chosen under a Harsanyian veil of uncertainty. States and individuals will have an incentive to articu-late and endorse norms that maximize their expected welfare. Given some degree of uncertainty as to the future course of events, the emerging rules will be such as to maximize the expected welfare of the community at large. Conversely, rules that are articulated after an outburst of conflict may be strategically biased. Once the future is disclosed to them, parties will tend to articulate rules that maximize their actual welfare, rather than the expected welfare to be derived from an uncertain future. Thus, ex ante norms should be given greater weight in the adjudication process.

This predicament seems to be contradicted by some scholars of international law and by the empirical and anecdotal evidence on commercial customary law. Bernstein *("Merchant Law In a Merchant Court: Rethinking the Code's Search for Immanent Business Norms." University of Pennsylvania Law Review* 144: 1765 (1996)) examines customary rules that have developed in various modem commercial trades. Her findings seem to indicate that in the adjudication of business disputes, commercial tribunals tend to enforce customary rules that are quite different from the business norms spontaneously followed by the parties in the course of their relationship. Rather, customary rules develop around practices developed during the conflictual phase of a relationship. In this setting, Bernstein distinguishes between relationship norms and end-of-the-game norms. When adjudicating a case, courts are faced with parties who have reached the end point in their relationship. The end-of-the-game norms of the conflictual phase thus tend to be enforced, while the cooperative norms developed in the course of their relationship remain outside the domain of adjudication.

The simple suggestion of this comment is that the analytical efforts of the law and economics scholars and the methodological rigor of economic modeling may help us unveil additional dimensions of the debate on the structure of customary law. As always, Professor D'Amato is pushing the boundaries of international legal theory towards new directions and it is my personal hope that he will consider a mutually beneficial exchange of ideas with the economists and game-theorists engaged in parallel undertakings.

Francesco Parisi
George Mason University

Why States Are Bound By Customary International Law

Supporters of the international legal system often speak or write as if certain international customs were "law" and binding. Customary international law, to be "law", must claim to bind the nations, states, persons or peoples subject to its jurisdiction. This calls for an explanation why such "laws" should be obeyed.

Various explanations have been offered for why custom binds as law. Positivists, such as Hans Kelsen, typically assert that states are bound by customary law because they *act* as if they were bound by customary law. Anthony D'Amato's reformulation of customary law suggests that states *choose* to be bound, because customary law serves their interests in peace and commerce. I will insist that customary law binds persons, states, and other subjects of international law, *whether they will or no,* for the same reason that any law binds anyone anywhere, which is by providing the best available measure of what would be the right thing to do in a given set of circumstances. To the extent that proposed norms do not do this, their status as "law" is compromised, and they have little binding force.

Evidence of Law

Custom's status as international law was formally recognized by many states through the Statute of the International Court of Justice, adopted by reference through Article 92 of the United Nations Charter. Article 38 of the Court's Statute characterizes "international custom" as "evidence of a general practice accepted as law". The Court also relies on international conventions "expressly recognized by the contesting states"; on the general principles of law recognized by "civilized" nations; and on the judicial decisions and teachings of the most highly qualified publicists of the various nations, "as a subsidiary means for the determination of rules of law".

These four methods of finding the law have deep roots in international legal theory. Hugo Grotius discovered the law of nations ("*jus gentium")* in custom ("*usus*"), the views of the learned, and the will *("voluntas")* of states *(Belli ac Pacis* I.xiv), but explained that the underlying source of the la-vv is the human need for society (prolegomena.8), as explained by right reason (1115). Custom, will and learning discover the dictates of reason to construct an international society of states (prolegomena.17). So, for Grotius, the customary law of nations corresponds to the lex non scripta of domestic legal systems (I.xiv.2). Nations develop customs either by deduction from natural principles or from consent. In either case their customs should be binding. Emmerich de Vattel repeated and reformulated Grotius' observation *(Droit des gens,* preface, viii, and note f.), but added that nations need society amongst themselves much less than individuals do (Preface, xviii). Vattel insisted that custom and treaties both derive whatever binding force they have from antecedent natural law (preface, xxii), as deduced through the natural liberty of nations, the common welfare of states, and their interest in trade (preface, xx).

The observations of Grotius and Vattel may not have much bearing on contemporary lawyers' sense of international custom, but they illustrate the purposes that international custom serves in determining the content of international law. As the statute of the International Court of Justice indicates, custom has never been so much a source of law as it has been the "evidence" of international law. When states make treaties, they indicate their belief that they ought to be bound, in certain circumstances. When the subjects of international law develop and follow customs, they indicate their opinion that they ought to act in certain ways. When civilized nations recognize general principles of law, their agreement is evidence that such principles exist. When learned judges render decisions, they must claim that the law somehow requires the given result. The implication in every instance is that law exists, and that certain indicia. give evidence of what the law is, in a given set of circumstances.

Positive Law

To say that law exists to be found and obeyed is not to say that law cannot be made, or made more determinate through the deliberate acts of those in authority (or others, in certain circumstances). Laws exist, in part, to clarify social relations when several equally viable arrangements would be possible, but one must be chosen. Domestic legal systems often do this by "positive law", by which I mean formal legislation, generated by a recognized process, and enforced by courts. Treaties offer a partial parallel in the international sphere. Between those party to them, treaties may be considered as "legislation", in the same way that contracts create "law" in domestic legal systems. Parties to treaties may be assumed to know best what should be done, in specified circumstances, within certain restrictions, to protect the general good, to prevent unconscionable results, or violations of basic *jus cogens,* derived from nature.

Some "positivists" would look to legislation alone determining the law. The law (on this theory) is simply what those in authority say that it is, and the "sources" of law all derive from some determinate human will, without regard for the purposes that law exists to serve. Such theories do little to explain custom, which has no determinate source. Positivists must view customs as tacit treaties, reflecting the will of those in authority, who tolerate their development, and suffer them to persist. In international law this would mean that customs bind states because those in authority intend that they should bind states, and have legislated, in a sense, by allowing the custom to develop and survive.

Positive law certainly plays a part in international law, as when multilateral treaties clarify previously disputed issues, through quasi-"legislation", but most of international law has less obviously "legislated" origins. States can claim a

certain authority, when they agree, but often no agreement exists. Even when states do agree, their own legitimacy to have a voice on what the law is may be questionable. There simply is not enough positive law in the international sphere to build a legal system on. Legal theories based on authority need authorities to make them work, but international society has no universal authority, nor any prospect of finding one.

Obedience to Law

International law, like all law, must claim to deserve obedience. The mystery is what supports this claim, without a recognized international authority to promulgate rules. Domestic legal systems rest on the government's claim to discover or clarify law and justice through established structures of power. No international authority can make this claim and enforce it. So international law must earn obedience by being persuasive, or right. States or others asserting principles of international law may persuade (1) by force of arms, or (2) by force of argument. When they persuade by argument, states evoke obedience by convincing themselves or others that certain rules deserve to be obeyed.

Custom generates laws, which should be obeyed when custom offers needed standards or rules to coordinate international actors in the service of justice. When several possible solutions exist to problems of international interaction, custom may identify the salient solution, much as a positive law or treaty would do, if states could reach a more formal agreement.

Custom may also identify the substance of law in a deeper sense, by offering evidence of what would be the most just solution, based on the views of a wide variety of states and peoples. *Opinio juris*, or the view that something is law, and binding, offers very good evidence of what is law, and binding, if the opinion is widely shared and respected. Some might consider it "circular" to say that widespread belief that something is international law constitutes good evidence of it actually *being* international law. This confuses the issue by considering custom as a source of law, rather than *evidence of* law, which derives its binding force from reason or justice, applied to the purposes that international law exists to serve.

The Purposes of International Law

Like all law, international law derives it legitimacy from the purposes that it exists to serve, and deserves obedience only to the extent that it is effective in doing so. Anthony D'Amato, for example, suggests that international law exists to serve the interests of peace and prosperity; through maintaining a system of states that trade amongst themselves. Such a system might avoid conflict by taking the most recent resolution to any dispute between states as the default norm, to be applied to the next similar conflict, unless one of the parties objects, in which case a different resolution could be sought. Trade maximizes prosperity, and peace maximizes trade. On this theory peace and prosperity both follow from respecting recent precedents in all disputes, thereby avoiding conflict, and maximizing opportunities to trade.

Formulations such as this, that privilege peace and prosperity over other aspects of justice and the common good, slight some of the fundamental purposes that help customs and law to crystallize around determinate principles and rules. A dispute between two states may be solved at times by the application of rules that do not have much resonance elsewhere, as when the Pope divided the Americas between Spain and Portugal. In such circumstances no customary rule emerges, and the law remains unchanged. Perhaps the example is a poor one, but it would be a mistake to say that "the governing rule that emerges from any international controversy is the birth of a rule of customary international law". There would also need to be a widely shared opinion (or practice) that this result was just and binding as law.

In the absence of an international legislature, inferences from the purposes of international law (justice and the common good), constitute a much more direct source of law than they would in most domestic legal systems. Customary law, discovered in the views and practices of state, provides good evidence of law by revealing either (1) what states or others have agreed to, or (2) what all international legal actors *should agree* to, because it is widely recognized to be just. One might compare this to Coke's old view of the common law or lex *non* scripta as the embodiment of reason, applied to the necessities of human society, as worked out through generations of legal practice. The opinions of judges constitute good evidence of the common law, but they cannot change or create law, only find it. The influence of their opinions depends on the truth (and so on the persuasive value) of their reasoning.

Treaties

Treaties can be evidence of international law in just the same way that customs can, so long as they reflect widespread recognition that certain standards are law and binding; or help to make one solution to international coordination problems salient over others. Treaties can be sources of custom, to the extent that third parties observe or endorse rules that treaties recognize as having binding force.

Understanding the role of treaties and custom as evidence rather than the sources of international law demonstrates how multilateral treaties may bind states and others even in areas where states expressed reservations to the treaties in question. If the treaty reflects a binding norm of international law, widely recognized as law by the community of nations, this may be very good evidence that it is law, notwithstanding the reservations of even the most powerful states.

Treaties enter what one might call the international "common law" or *lex non scripta* in much the same way that English statutes entered Anglo-American common law through the widespread recognition that they capture fundamental elements of the developed law of nations. just as Anglo-American common law after Coke "found" the law, and did not make it, so does international custom finds the law (and does not make it) with or without statutory assistance. In the same way that chapter 29 of Magna Carta represents a central element of the common law, so fundamental that no statute or contract may alter it, so too *jus cogens* exists in international custom, so fundamental that no derogation will be permitted from its strictures.

Conclusion

Customary international law is formed in much the same way that common law was formed, as common law was understood before legal positivism. No single holding can "change" or "make" the law, but taken together the customs and practices of states offer very good evidence of what the law is, which is to say, right reason, in a given set of circumstances.

Whatever the resolution of an international dispute, by force or by agreement, by arbitration or by default, the bindingness of its "holding" depends on its being right. The greater the international consensus that a given result is binding as law, the greater the likelihood that the result is, in fact, binding as law. But determining the binding force of any "precedent" depends on examining the circumstances in which consensus emerged, and the nature, legitimacy and trustworthiness of those consenting. *"Opinio juris"* determines the content of customary international law, but it matters whose opinion is expressed, and why.

Mortimer Sellers
University of Baltimore

Reflections On D'Amato's "Reformulation" Of Customary International law

I. Introduction

I was impressed with the fresh thinking that Professor Anthony D'Amato demonstrated in his short article reformulating customary international law. To me, many of his non-traditional ideas are acceptable or nearly acceptable. For example, I agree with his views on the following. First, that the "international legal system itself" has a role to play in the sense that the existing system contributes to or affects the formation of new rules of customary international law ("CIL") (and of conventional law as well). Second, that the objectives of the international legal system are or should be, *inter alia,* the avoidance of war and the maximization of each nation's wealth, although we must bear in mind that such objectives have been set by the States. Third, that the international community is in need of "rules that point toward peace and interdependence and away from war and autarky" while there are other just and legitimate goals that must be served. Fourth, "the felt need of nations to engage in international trade" has given rise to numerous rules of international law, although I believe the need to engage in non-trade exchanges and intercourse (cultural, political, military, etc.) has played an equally important role. Fifth, "a nation can become richer by trade than by conquest" although, in the example of Japanese aggression of China and the Pacific region, Japan's policy was largely motivated, not simply by economic reasons, but also by its desire for political and military power and domination. Sixth, "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". I may go a step further by saying that treaties, with the exception of those entered into under duress or fraud, represent the strongest evidence of consent or

compromised will of States. I also share D'Amato's views on other points, however, I would like to make some comments and observations on the following matters:

The debate on *opinio juris;*
The international legal system *as a player;*
The formation of dispute-resolving customary international law;
The "generation" of customary law from treaty rules; and
The issue of special or regional customary law.

II. Analyses of the Issues

1. The Debate on Opinio Juris

Mere State habit, practice or usage without more, even though having been exercised by many States, is not enough to constitute custom. There must be the additional element of *opinio juris* (i.e., the element that States *feel* themselves bound by such practice or rule "as law"). This necessary psychological component has been well recognized by international tribunals. The PCIJ stated that only if an act or omission on the part of States 11 was based on their being conscious of a duty to [act or not to act] would it be possible to speak of an international custom" *(The S.S. Lotus* case, **[1927] P.C.I.J., Ser.** A., No. 10). The ICJ, in the Asylum case, asserted the necessity of *opinio juris* sive necessitatis. It held that a usage, though constant and uniform, does not become a customary rule unless the alleged rule has been applied as a right belonging to the States granting asylum and respected by the territorial States as a duty incumbent on them Q1950] I.C.J. Rep. 277). Similarly, in the *North Sea Continental Shelf Cases* (1969 I.C.J. Rep. 3), the ICJ was of the opinion that for the purpose of creating a new customary rule, there would be an indispensable requirement that "within the period in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked, and should more-over have occurred in such a way as to show *a general recognition that a rule or legal obligation is involved" (italics* added). The court continued that "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" (id., at 44). This recognition of the existence of a rule or legal obligation clearly denotes the state of mind *(opinio juris)* of States necessary to turn their habit, practice or usage into custom.

Not every author in the field agrees that *opinio juris,* as a psychological element, is necessary for the presence of international custom. D'Amato, particularly critical of the notion of *opinio juris* in his 1971 book, opposed the reference to *opinio juris* in connection with custom because such reference would result in "circularity". He argued that custom cannot "create law if its psychological component requires an action in conscious accordance with law preexisting the action" (A. D'Amato, *The Concept of Custom in International Law,* 1971, at 52 *et seq. & 66 et seq.).* In his recent paper, D'Amato goes a step further by saying that "[iInstead of trying to work within the notion of *opinio juris, I* should have discarded it entirely" (D'Amato, at 1). Guggenheim was also skeptical about whether State practice was not sufficient and whether *opinio juris* was necessary (Bernhardt, "Customary International Law", in *Encyclopedia of Public International Law, vol.* 7, 1984, pp. 61-66, at 62). These doubts have been in part addressed by Bin Cheng (Bin Cheng, "Custom: The Future of General State Practice in a Divided World", in R. St. J. Macdonald & D.M. Johnston, eds., *The Structure and Process of International Law,* 1983, at 531):

> As regards [the] alleged "circularity", I do not believe that it exists. It is a matter of misunderstand *opinio juris.* While it is true that in the case of a long-established rule, a state in observing it may do so with the conviction that it is acting in pursuance with a pre-existing rule, and that this conviction constitutes that state's *opinio juris* accompanying its action, this being how *opinio juris is* sometimes defined, *opinio juris is* a much broader concept. *Opinio juris is* simply the view that is held by, or that may be said, with effect opposable to that state, to be held by, a state as to what the law is at any given moment. The state concerned accepts that the norm in question is of a legal character (and not simply moral or social), and, therefore as such, carries legal rights and duties *erga omnes. Opinio juris* can be individual or collective. It can also be subjective, as held by the state concerned, or objective, as perceived by others.

Consistent State practice alone may sometimes suffice to prove the existence of a customary rule of international law. This is especially so in situations where the rule is well established and its validity is free from doubt. Yet, this does not mean that the element of *opinio juris* is not present or is not required. Whether actually thinking about it or not, the conviction that a certain pattern of behavior is law and obligates a State to follow it always accompanies, -either expressly or implicitly, the practice itself in respect of any given customary rule. Furthermore, not all State

practices qualify as international custom, for many State activities are based, not on necessary legal conviction, but on expedience and political considerations. Such practices certainly can not be said to have the force of customary rules. After all, "[i]n order to distinguish binding norms from other rules of behavior, the element *opinio juris* cannot be dispensed with" (Bernhardt, *supra,* at 62).

2. The Role of "The International Legal System"

D'Amato states that "the international legal system itself [in addition to states] is also a 'player' in the game of creating international law". This is true to a certain extent. However, we must remember two things. First of all, no matter what role "the international legal system" or other "players" play, any new norms of international law, like any old ones, are in the end created by the States. In the second place, "the international legal system" itself is the creature of past coordination, compromise and agreement among States. These considerations work toward limiting or playing down the role of "the existing international legal system" in creating new CIL.

The existing international legal system does help shape the contents of new rules of international custom and conventions. The "system" may objectively require that a new rule of international law be created in a certain way its contents not to conflict with, but to further the existing system. This is especially true with regard to peremptory norms *Qus cogens)* which are said to be so fundamental, and so well established, that they may not be overridden by new treaties or custom but only by new *jus cogens.* If the system itself has certain purposes at all, such purposes would include, but not limited to, the elimination or avoidance of injustice, chaos and war, and the promotion or maintenance of justice, order and peace. Newly formed customary or conventional international law should not be in contradiction to the above-mentioned and other objectives of the existing international legal system. Proposed new rules or practices with the effect, e.g., of legitimizing aggression or unilateral use of force will likely be rejected by, and prevented from entering, the corpus of the international legal system. The very existence of the system serves as a reminder to the international community that it may not be ignored both in the conduct of States and in any endeavor to create new norms. In this sense, we may say that any proposed new rules contravening existing international law or defeating the purposes of the existing international legal system may hardly have a chance of being *accepted into such system.* And it is in this sense only that we may say that the "system" somewhat functions as a player in the process of helping to form new rules of customary and conventional international law.

We must also make a distinction between the rule-making process and simple State behavior in general. The objectives and contents of international law, to which States have consented, of course have much impact upon the behavior of States in their international relations. It is true that:

> [a state'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 [state] A is thinking of violating a nonn of international law and believes it can "get away with it" as far as state B is concerned, A nevertheless must consider that its intended violation will to an extent degrade the integrity of the system of intemational norms [Tlhere is a "cost" to A above and beyond the effect of its intended violation on any particular combination of projected effects on other states and projected effects upon the system.

Nevertheless, the effects of the system on State behavior should not be identified, or equated, with its effects on the formation of new rules and their contents. I had expressed the view earlier that:

> [t]he causal link between international law and State behavior is a two-way street. On [the] one hand, the formation and development of international law are influence and dominated by the attitude, policy, behavior and practice of States. On the other hand, established rules and principles of international law regulate and influence the attitudes, policies, behaviors and practices of States.

(Jianming Shen, "IL & Int'l Relations: Beyond Instrumentalism and Normativism", 111 [1] *International Legal Theory 12,* at 18 (1997)). However, I did not go so far as to attach to the impact of rules on State behavior any significant and *independent* role in the formation of rules. By using the word *independent I* mean that the effects of rules on State behavior are inseparable from the consent, or from "the compromised will", of States. When isolated from the States that serve as both the law-makers and observers of international law, rules would be meaningless, and thus would not affect State behavior, not to mention any effect on the creation of new rules.

What I mean is the following: International law is created to be observed, although in reality only *almost all* of it is observed by *almost all* nations *almost all* the time (Louis Henkin, Oscar Schachter, Hans Smit & Richard Crawford Pugh,

International Law: Cases and Materials, 3rd ed., 1993, at 1). If the system fails to affect the behavior of States most of the time (if realistically not all the time), then the system no longer has any basis for its existence. The very existence of the international legal system, as agreed upon by the States, necessarily requires that the States behave in accordance with it. Thus, the effects of such system on State behavior are obvious and tremendous, but these are different from its effects on the formation of new rules in terms of scope and gravity. The system itself was not and is *not created to create* new rules. Rather, the States are required by their compromised will to largely follow, or to be restrained by, the system they have created in managing their behavior and ultimately in actively or passively creating new customary and conventional rules of international law. The effects of the system on State behavior are direct and enormous, but its effects on creating new rules are indirect and minimal.

Therefore, while the very existence of the international legal system has the objective effect of influencing the conduct of States in their relations with one another, its effects on States in formulating new norms of international law should not be over-estimated. The personification of the international legal system seems to be less than necessary. The system, though having impacts on State practice and *opinio juris* though, does not itself make customary (nor conventional) law. Rather, the States do. After all, the system reflects the compromised will of "the States" at large. What the system does in affecting the lawmaking process is truly what such will of the States does. I will further explain this in the next part.

**3. The Formation of Controversy
Resolving Custom**

D'Amato goes on to suggest that "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 interstate controversy and war are reduced". I have some doubt on the accuracy or correctness of this suggestion.

In the first place, whether the resolution of each international controversy can give rise to a rule of international custom is highly questionable. Truly, many rules of international law have evolved from the practice of States in resolving disputes between or among themselves. By the same token, the practice of States in dispute resolutions and the resulting "governing rules" have the propensity of becoming customary rules with general applicability. It does not however follow that the resulting "principle" or "rule" governing each particular dispute resolution in question is *bound* to become a rule of CIL. Some practices and governing "rules" (being called "rules" as binding between the interested parties to the dispute only) may be followed, adopted or acquiesced in by a large number of other States and ultimately mature into general customary rules; some others may not. For example, a solution to a controversy between State P (the powerful) and State W (the weaker) that was imposed upon W and would legitimize the use of force by P to open W's markets can hardly be accepted by all other States in a dispute of a similar nature.

In the second place, even with regard to those “controversy-resolving rules" that do tend to be widely accepted and followed afterwards, they do not immediately give rise to general rules of CIL. It is only *unless* and *until* such rules do have become widely practiced with a general legal conviction that we may declare the "birth" of general customary rules. The idea that "the governing rule that results from an international controversy is the birth of a rule of CIL" seems to be incompatible with D'Amato's later observation that "customary law binds all states". If customary law must be of universal application, how can it then be said that a rule that emerged from the resolution of an international controversy between perhaps only two or a few States represents the *birth* of a customary rule? These statements seem self-contradicting.

Thirdly, D'Amato seems to believe that all or nearly all customary rules of international law have emerged from the resolutions of controversies between States. This belief lacks sufficient persuasion. I do not know exactly to what extent the body of international customary law consists of rules resulting from international dispute resolutions. Yet, I do believe that there must be a considerable portion of international custom with general applicability that has emerged from State practice having nothing to do with specific disputes and their resolutions. There are three levels or degrees of agreement and disagreement among States: (1) general agreements; (2) general disagreements; and (3) controversies. All three situations may give rise to customary rules of international law. It is true that States have a wide range of disagreements due to their difference in culture, tradition, religion, political system, *etc.,* but such differences do not necessarily lead to disputes, and resolving disagreements is not the same as resolving controversies. States may wish to make various efforts to narrow down their disparities, but they do not have to do so because they can well co-exist peacefully and in a friendly manner while maintaining their differences. On the other hand, controversies between States are normally troublesome and disturbing enough for them to take a different approach trying their best to resolve the controversy one way or another. In addition, it is perfectly possible for States to share a vast scope of *initial* and *subsequently arrived* at common or similar beliefs and understandings. For example, few would question that all nations

share the view that slavery and the slave trade are immoral and illegal. The emergence of the customary rule against slavery and the slave trade has little to do with particular controversies between States. Similarly, customary rules on diplomatic and consular relations have largely evolved from the practices of States. Such practices involve not so much the resolution of inter-State disputes but rather the need for inter-State cooperation, the need for friendly relations between sovereigns, the need for convenience and the need for rules of comity and reciprocity.

Finally, whether, to what extent, and how the existing international legal system itself can in fact "adopt" dispute-resolving rules (and also other practices and rules having no bearing on dispute resolutions) may also be doubtful. As stated earlier, the system is incapable of acting or behaving on its own. Thus, the system by itself cannot choose State practices and adopt them as new rules of CIL. While the existing system has a regulating and influencing force, it in the end has no say on the creation of rules. What practices or rules are to be developed into the existing body of international law, how they are to be adopted, by whom they will be adopted, and when such "adoption" will take place, all are indeed not answerable by the "system". Only the States act as the decisive actors in determining all these issues. If we do wish to personify the international legal system and allow it to "adopt" State practices and controversy-resolving rules as general customary rules, then such passive "adoption" would remain attributable to the States. The system "adopts" only because the States have adopted, and it "chooses" only because the States have chosen. The system itself really has no choice because the contents of the international legal system as well as its scope of coverage depend on the wishes and decisions of the States.

4. Generation of Customary Law from Treaty Rules

I now turn to the question of whether treaties are capable of generating rules of CIL. D'Amato is of the view that the answer to this question should be in the affirmative, subject to two conditions. He states:

> ..."[T]here are two qualifications to the principle that a rule expressed in a treaty can generate CIL The first is that the rule must be generalizable... The second qualification is 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.

We ought also to recognize that the "system" itself has no creative capability. The system did not bring itself into existence. It did not, and does not, set forth or decide upon its own purposes. It does not directly, nor even indirectly, create international law. The system indeed "does not generate rules", as D'Amato admits. Nor does it have any inherent, self-grown or self-generated force to initiate and more importantly finalize the formation and adoption of new rules. Then who or what play this role? This is largely, if no longer solely, done by the States. It is the States that created or participated in the formation of the existing international legal system. It is the States that collectively (after compromise, of course) attached, and continue to attach, certain goals and objectives to the system they have created. It is the States that did and still do the actual work of *generating rules,* both old and new. Also, it is the States that initiate or authorize the initiation of (in some instances, following or in cooperation with non-State actors such as NGOs) the process of formation of both customary and conventional international law. And it is still the States that finalize such formation. Indeed, without the direct input and consent of States, no rule may be accepted and thus enter into the existing body of international law regardless of how desirable such a rule may be from the point of view of the existing "system". In fact, there is, and should be, no conflict between the basic objectives and contents of the existing system on the one hand and the compromised will of States at large on the other. The latter indeed determines the purposes of the system and its existing and future contents. Thus, if they so agree, the States may even change or modify the objectives of the international legal system.

Four issues here are at stake: (1) Can treaty rules themselves generate customary law? If so, in what way? (2) What types of treaty rules may *become* or *be "generated" into customary* rules? (3) What are the effects of a treaty rule that is subject to reservations? and (4) Are there not special rules of CIL that do not bind all nations but apply only within a region or between two or more States? I will deal with the first three issues here, and the fourth in the next section.

First, can treaties generate customary law? How? I agree that nothing prevents a rule embodied in a treaty or treaties from becoming a more general customary rule, but we must be cautious with the word *generate* which necessarily implies the elements of self-creation. Like the existing international legal system as a whole, the mechanism of treaties is in itself incapable of producing customary rules of international law without more. A treaty, whether purely contractual or mainly lawmaking in nature, does not have the function of directly creating rules binding upon third States. It is the States that create both treaty rules and customary law. We may use treaties as a means of assessing customary

law, since treaties may serve as evidence of the existence, or lack, of State practice and *opinio juris.* They may be codificatory in nature, meaning that what is laid down in a codificatory treaty is merely restatement (and thus evidence) of existing international law (which is mainly customary in nature). Treaty provisions aimed at progressive development of international law may also be indicative of a general trend in the attitude of States. Entering into treaties itself is a form of State practice that demonstrates more clearly than most other forms of practice the legal conviction of the State parties concerned. Between the parties, the rules provided in the treaty can be said to be both treaty provisions and special customary rules (see section 5 below). When a treaty is adhered to by nearly all States, it, at the same time, reflects a general practice and a possible *opinio juris.* Yet, again, the mechanism is merely a means by which rules of international law are created or generated. Such mechanism does not generate general international law. The States do, through treaties and other State practices accompanied with their *opinio juris.*

Second, what kinds of treaty rules may become or be developed into customary rules? I agree that not all rules embodied in treaties may ever *become* or *be "generated" into* general customary rules. Here I use the words *become* and *be "generated" into* to emphasize that a rule expressed in a treaty does not itself generate CIL; rather, it may be developed into a general customary rule by the States. I further agree that rules expressed in treaties must be generalizable in order to acquire the status of general international custom. A solution to problems between two or more States or within a specific region is not necessarily suitable for resolving problems elsewhere or involving other nations. For example, the principles working towards a high degree of economic integration in Europe and the Americas may not apply in Asia and Africa. Higher standards on human rights in one region may not work in another. The delimitation of ocean zones by agreement between two States does not necessarily create a precedent for others. At the same time, the term generalizability can be a relative one. Certain elements of a treaty rule, or the underlying principle of a rule, may be generalizable, while other elements, or the rule itself, may not be. A rule contained in a treaty may seem to be non-generalizable for the time being, but may become universally adopted in the future. In the example of most-favored-nations (MFN) clauses given in D'Amato's paper, the contents of such a clause are not generalizable because preferential treatment by definition almost necessarily excludes certain other States from benefiting from such treatment. However, the underlying principle recognizing the validity of extending preferential treatment by the mechanism of MFN clauses is a general one. With the passage of time, even the contents of a MFN clause may become generalizable, or may become'obsolete, once the MFN status has been accorded to all nations a theoretical possibility.

My analysis above also generally applies to the third issue on the effects of a treaty rule subject to reservations. Whether such a rule may *become* or *be 'generated" into* a customary law is a relative question in terms of both content and time. Provisions contained in a multilateral treaty that are subject to reservations do have a propensity of failing to become a general rule of CIL. Where reservations are not specifically disallowed in a treaty and some State parties do make reservations with regard to certain provisions, such provisions are highly un-likely to develop into general rules of CIL insofar as such reservations are still in effect. For example, rules relating to the seniority of envoys dispatched by the Pope, as embodied in Articles 14 and 16 of the 1961 Vienna Convention on Diplomatic Relations, have been persistently objected to by countries such as the People's Republic of China and it would be difficult for themselves to become universally accepted as customary law (see Wang Tieya, ed., *Guoji Fa International Law),* Beijing, 1995, at 421).. Never-theless, nothing prevents the reserving States from changing their positions in the future and removing the obstacles to the relevant treaty rules from becoming general international law. Some lawmaking treaties generally prohibit reservations unless specifically allowed. Insofar as those treaty provisions, for which only reservations are specifically allowed, are concerned, there may or may not be reservations made at all. If no or very few reservations are made, such provisions would be in a better position to become adopted as general customary rules. Even in cases where there are enough reservations to prevent a given treaty provision concerned from becoming a general rule of customary law for the time being, such a provision may still have a chance of being developed into a general customary rule through a subsequent change in the attitude of States. For example, the United Nations Convention on Contracts for the International Sale of Goods allows reservations for Article 11 and other provisions relating to the formality requirements of contracts. While some State parties have declared that a contract must be in writing, such reserving States may well eventually give up their position on automatically invalidating contracts made by oral means or through the parties' conduct. Another example concerns the widely used reservations to provisions relating to accepting the jurisdiction of the ICJ contained in a number of multilateral treaties *(e.g.,* Article 16 of the 1979 International Convention against the Taking of Hostages). It is hardly conceivable that States will never submit to the compulsory jurisdiction of the ICJ in all types of inter-State disputes.

5. Special and Regional Custom

Finally, I have some doubt on the proposition that "customary law binds all states, and... there cannot in principle be any exceptions" (D'Amato, at 6). Are there not special customary rules that do not bind all nations but apply only within a region or a smaller group of States? What about the effects of persistent objections of States? If we insist that a

custom, in order to be taken as a custom, must have been accepted by all States, then we probably can find very few, if any at all, rules of CIL. The fact is that a lot of general rules of CIL are generally binding and operating on a routine basis while not necessarily all States are bound by such rules. States that have neither followed the pattern of practice of most other States, nor expressed any *opinio juris,* can hardly be said to be bound by a resulting customary rule, even if such a rule has been firmly established among most other States by consistent and uniform practice and *opinio juris.*

Further, while the bulk of general international law comprises the portion of customary rules that are of universal applicability, the existence of particular or special customary rules should also be recognized. It appears that by the words *"general practice"* as contained in Article 38(l)(b) of the Statute of the International Court of Justice, it is not meant that a practice, for the purpose of the Statute, has to be one accepted as law by all States (see Bos, at 67, stating that a "rule of customary international law may be either general or special" and that "[b]oth varieties should be considered to come under the expression 'a general practice' in Article 38, paragraph 1(b)"). When the ICJ in the *North Sea Continental Shelf Cases* stated that State practice must be "both extensive and virtually uniform" for the purpose of "the formation of a new rule of customary international law", it probably had universal custom in mind. But the "extensiveness and uniformity" requirement is equally applicable to a custom that is considered as such only by and among a few States. A "general practice accepted as law" may be either a "general practice" among most or all States (what I call "unqualified general or *universal* custom"), or a "general practice" among only a limited number of States (what I call "special, regional or particular custom).

In the *Right of Passage over Indian Territory* case ([19601 I.C.J. Rep. 6 *et seq.,* Judgment of Apr. 12, 1960), the ICJ was of the view that a particular practice by two States, accepted with *opinio juris,* may give rise to a binding custom between these two States. In the Asylum *Case* ([1950] I.C.J. Rep. 276-277, Judgment of Nov. 20,1950), the ICJ referred to "an alleged regional or local custom peculiar to Latin-American States" and likewise delivered the following opinion:

> ... The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".

It of course goes without saying that a given special custom must not be in conflict with existing rules of conventional or customary international law of universal application, must not affect the interests of third States, and must be such that it does not give rise to protests and objections from other States. Subject to this inherent principle, it is possible, so long as the interests of other States are not affected, for a group of States to adopt a special practice and create a special rule among themselves in the absence of objections from other States. The more protests a particular "custom" receives, the less likely it will become generally established. Conversely, the more followers it has, the more likely a special or local habit, practice, usage or custom will become a general custom.

With the effects of a lack of consent having been recognized, the remaining issue is merely a matter of burden of proof, i.e., the issue of who has the responsibility to present evidence for or against the existence of a special custom. According to Akehurst, where there is no evidence presented against a rule of CIL, a small amount of practice is sufficient to prove the existence of such rule, resting the burden of proof basically on the objecting party. In other words, the claiming party does not have to prove that a given practice or custom has not been objected to, but the objecting party has to prove objections to the custom claimed (M. Akehurst, "Custom as a Source of International Law", 47 B.Y.I.L. 1 (19741975), at 12). Whether this proposition is widely accepted remains to be seen.

Virtually, all customary rules of international law have developed through a process of evolution from a particular habit, practice, usage or custom to a more general practice or custom. A State or a group of States may, for example, claim jurisdiction over certain miles of maritime belt by a unilateral declaration or actual exercise of jurisdiction over such area. Other States have the choice to either protest such practice, which protest must be brought to the knowledge of the claiming State(s), or acquiesce in such practice, knowing of the special practice of the claiming State(s). A special custom becomes "of increasingly general application as more States align their practice to [it]" (N.A.M. Green, International Law: Law of Peace, 1973, at 17). The rapid formation of the regime on the continental shelf represents another vivid example of the evolution of CIL rules from their original particular practice to a general custom (see id., at 19-20, noting that many other sea-coast States not only failed to protest the 1945 Truman Declaration regarding the United States' jurisdiction and control over the natural resources of the sea-bed and sub-soil of the continental shelf beyond the limit of its territorial waters, but also soon followed suit by making similar claims themselves).

III. Conclusions

In summary then, I agree that CIL and its two elements have never been satisfactorily defined, but I would not go so far as to doubt the requirement of the element of *opinio juris*, not to mention, with respect, my further disagreement with a "more radical" D'Amato who now claims he "should have discarded (the notion of *opinio juris*] entirely". No matter how difficult it is to define such a notion, I do not seriously doubt the existence of *opinio juris* as a binding requirement of CIL. Both the element of State practice and the element of legal conviction are necessary for the emergence and continuing binding effects of any customary rule. Mere practice without legal conviction leads to no legal obligation. Mere legal conviction without a certain degree of practice is a legal impossibility. In addition, the role of the existing international legal system in affecting the formation of new international law is limited. The system itself is not capable of creating new rules of CIL. Further, the system cannot even adopt the so-called "controversy-resolving rules" (and other practices) as CIL by itself. All such creations and adoptions require the actions of the States. Likewise, rules contained in treaties do not by themselves "generate" customary rules. It is only through the actions and the will of the States (such as by wide ratification and accession or by actual practice and legal conviction) that such rules may become established in the body of CIL. Furthermore, binding rules of CIL are not limited to those that are universally applicable. Special or local customs do exist and have their utility. For example, customary rules well established in Europe may be challenged elsewhere but no one may doubt their binding effect upon European nations.

Finally, despite D'Amato's suggestion, CIL does not bear much similarity to common law. As I have remarked above, the formation of a rule of CIL does not always begin with the resolution of an international controversy. Even more questionable is the following conclusion in his paper: "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" (D'Amato, at 7). A precedent at common law has binding authority on later similar cases of the same or lower levels of jurisdictions, whereas a rule that governs or emerges from the resolution of an international controversy has a binding effect upon the dispute in question only, and as such creates no precedent for other disputes or other States. D'Amato admits that other States are free to adopt a new rule or a rule that "abolishes" an earlier "rule" governing a prior dispute resolution. However, his admission seems to have been based on or subject to the belief that the prior "rule" operates as a "default rule" and thus automatically has a binding effect upon later disputes or other States if the parties concerned "fail to agree on a new rule". This would essentially equate the incidental rule that governs a dispute resolution, the generality and extensiveness of which are in serious doubt, with fim-dy established CIL whose uniformity and binding authority are no longer in dispute.

The practice or "rule" governing the resolution of a given controversy between State A and State B may be *potentially* significant both for A & B and for others. Yet, in the absence of a firmly established custom, do States C and D, as parties to another dispute, not have the freedom to start afresh as if there were no prior practice or "rule" between other States? Are C and D obliged to take cognizance of the rule between A and B which has not become a general customary rule? If not, how can C and D be said to be bound by a remote practice or "rule" between A and B, when C and D have not agreed upon a solution? Are C and D not free to resolve their disputes in any manner not inconsistent with the existing international legal system, including in a manner that is similar to the "rule" between A and B but not required as a legal obligation? How can a small number of States such as A and B create "default" precedents and CIL for C and D and other States, even if such latter States are said to have the freedom to adopt new rules?

Indeed, the underlying premises of D'Amato's example may require amendment. Unless and until generally practiced and adopted and accompanied with general *opinio juris,* what the resolution of the A-B controversy creates is neither a general rule of CIL nor a precedent. It is merely a special practice, or at most a special custom if accompanied with legal conviction, between A and B. If such practice coincides with, or is followed in, the practices of States C & D, E & F and others, it will more likely become a rule of CIL. If States C & D, E & F and others differ in approach from States A & B in resolving their similar controversies, what C & D and other States do is not "modification" of the "rule" between A & B - there being no rule binding upon C & D and other States, there is no need to talk about modification. The result is not that "the rule of CIL itself becomes modified" (D'Amato, at 7); but rather, the different practices of C & D and others simply decrease the chances of the practice between A & B becoming a general rule of CIL.

Dr. Jianming Shen
University of Hong Kong

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