# FURTHER THOUGHTS ON CUSTOMARY INTERNATIONAL LAW

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In two earlier articles, we used the tools of game theory to sketch a positive theoretical account of customary international law ("CIL").[1] Our theory rejected as question-begging the usual explanations of CIL based on legality, morality, *opinio juris*, and related concepts. We argued instead that CIL emerges from nations' pursuit of self-interested policies on the international stage. This approach, we argued, helps explain many overlooked features of CIL, including how CIL originates and changes, why the content of CIL tracks the interest of powerful nations, and why nations change their views of CIL when their interests change. Finally, we examined the practices associated with four supposedly well-settled rules of CIL, and concluded that our theory better explained these practices than competing theories.

Both the theory and the case studies suggested that the behaviors associated with CIL evinced little real multilateral cooperation. Most instances of supposed cooperation appeared to be examples of coercion or coincidence of interest (which means that the behavior consistent with the CIL norm is in the nation's self-interest regardless of other nations' behaviors). We found a few examples of genuine cooperation, most notably in the context of diplomatic immunity, but argued that this cooperation was best modeled as a series of embedded bilateral prisoners' dilemmas rather than as genuine multilateral cooperation. We concluded that "CIL has real content, but it is much less robust than traditional scholars think, and it operates in a different fashion."[2]

Mark Chinen has written a thoughtful response to our prior articles, and we are grateful for the opportunity to react to some of his arguments.

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1. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) [hereinafter *Theory*]; Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000) [hereinafter *Modern and Traditional Customary International Law*].

2. Theory, *supra*, at 1177.

### 1. Theory and Evidence

Our prior papers tried to set forth a positive account of CIL that was theoretically robust and that accounted for the behaviors associated with CIL. We considered and rejected a number of theories—including the positivist theory that Chinen appears to endorse—and offered a theory based on game theoretical principles. Our argument that CIL could not be a "general and consistent practice of states followed from a sense of legal obligation"[3] was based both on theory (multilateral cooperation of this sort is possible only on the basis of extreme assumptions) and our failure to find evidence of such cooperation even in case studies where CIL norms were supposedly robust.

Chinen attacks certain elements of our theory, but says little about the case studies. This is unfortunate, since the cases illustrate persistent features of CIL that any theory of the subject must explain. These features include, but are not limited to: (a) a large number of purported instances of nations following CIL "from a sense of legal obligation" are actually cases of "coincidence of interest" or coercion; (b) numerous deviations from purported CIL norms, and very little "general and consistent state practice"; (c) nations mouthing adherence to CIL norms when it is in their interest to do so, but "reinterpreting" CIL and acting contrary to it when circumstances change and it becomes in their interest do so; and (d) the fact that CIL changes over time almost always tracks the interests of powerful nations.

One problem with traditional theories of CIL is that they do not, and indeed do not even try to, account for these and many other details of the actual practice of nations associated with CIL. (This is too bad, since there is an enormous and well-documented historical database of the behaviors associated CIL, and because we will never truly understand CIL unless we try to match theory to evidence.) Chinen's paper suffers from this failure to tie theory to reality. We believe that Chinen must do two things to refute our view. He must first develop a satisfactory theory that shows that if nations are, as he says, "strong reciprocators," then they would act in a manner that is consistent with traditional understandings of CIL. (More on this in point 4 below.) Then he must show that the theory makes sense of the evidence—and we mean evidence of national behavior, not the writings of international law professors. He has done neither of these things.

3. Restatement (Third) of Foreign Relations Law, § 102 cmt. J (1987).

### 2. Description Versus Evaluation

Chinen argues that even if our descriptive theory of CIL is valid, CIL might nonetheless play an "evaluative" role.[4] Because CIL is used in an evaluative manner, Chinen appears to conclude that our positive theory cannot be valid. As he says, "[o]ne would expect some correspondence between description and evaluation, if for no other reason than that if legal evaluations could not possibly be mapped on to common perceptions of how the world is, their legitimacy would be in serious question."[5]

One problem with this argument is that Chinen says little about how CIL is used as an evaluative tool. He appears to be talking about the rhetoric of CIL—the fact that CIL is frequently invoked as a basis for judging and criticizing state action. And he appears to believe that there would be no basis for invoking CIL in this manner unless CIL itself possessed "legitimacy" that provided the rhetoric with bite.

If this is the argument, it suffers once again from its failure to consider the empirical evidence. Chinen is right to suggest that nations frequently accuse other nations of violating CIL to discredit them. But the rhetoric of CIL is much richer than this. For while nations accuse others of violating CIL, they always argue that their actions are consistent with CIL, no matter how transparently self-interested the actions in fact are. Their justifications under CIL conform to their interests; and when interests change rapidly, so do the CIL rationalizations.[6]

As we have explained elsewhere, there are straightforward game theoretical explanations for these rhetorical patterns that do not depend on the normative gravitational pull of CIL.[7] The rhetoric of CIL can convey meaningful information about focal points when nations face a coordination problem. This is arguably what explains, for example, the success of Truman's famous proclamation about control over resources in the continental shelf. Or the rhetoric of CIL can be viewed as a pooling equilibrium in which all nations avoid the inference that they are unreliable cooperators by mouthing adherence to CIL. This makes sense of Hitler's insistence that his invasions of Austria, Czechoslovakia, and Poland were legal under international law even though he had no desire to comply with that law. These and related explanations for the rhetoric of CIL are consistent with our positive theory of CIL, and have nothing

4. Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001), Section II, especially 155–56.

5. *Id.* at 156.

6. For the basis of these claims, *see* Jack Goldsmith and Eric Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEG. STUDIES (forthcoming 2002).

7. *Id.*

to do with the traditional positivist account. If Chinen wants to refute our theory by reference to the evaluative role of CIL, his counter-theory must once again be consistent with the evidence, including the evidence that nations employ CIL rhetoric strategically.

We have an additional comment on Chinen's claims concerning the relationship between descriptive and normative theory. Chinen argues that the "standard account" of CIL is consistent with our claim that the behaviors associated with CIL are best explained as coercion, coincidence of interest, or a series of bilateral prisoners' dilemma. He argues:

> As long as most states refrained from [attacking other states' coastal fishing vessels], it is plausible to find as a legal matter that the behavioral regularity is general and consistent. As long as there is a practice, it should not matter why it is followed . . . and nothing in the standard account of customary international law requires otherwise.[8]

But of course the standard account does require otherwise. It requires that the behavioral regularities be followed *from a sense of obligation.* Under the standard account, this motivational component ("why it is followed") is crucial, for it is what separates CIL from "mere" comity or accident. In making his point, Chinen purports to be setting aside this "important question of *opinio juris*" in order to show that CIL need not have a unitary logic. But this is nonsensical under the standard account, for the unitary logic is precisely that the behaviors associated with CIL are followed from a sense of legal obligation. If our account of CIL is correct, the motivational element of the traditional theory—*opinio juris*—drops out as irrelevant. Chinen's focus on the behavioral side of the standard theory alone, without a harmonized defense of *opinio juris* as well, cannot save the traditional account.

Finally, Chinen says that our view that CIL "lack[s] normative force in and of [itself]," leads one to "wonder what this means about the status of international law."[9] He also suggests that our work "attack[s]" and "threaten[s]" CIL and international law. It is true that our prior articles do not seek to achieve "the establishment of international order and justice under the rule of law," as David Bederman has suggested all "sincere" international law scholarship must.[10] Nor do we see our "pedagogic practice as persuasion and defense of international public order," as David Kennedy claims is true of professors who teach international

8. Chinen, *supra* note 4, at 178.

9. *Id.* at 157.

10. David Bederman, *I Hate International Law Scholarship (Sort of)*, 1 CHI. J. INT'L L. 75 (2000).

law.[11] But we did not intend to question CIL's "status" (whatever that means), or to attack or threaten CIL. Rather, we simply sought to understand how CIL works, and in doing so we argued that our theory rather than the positivist theory was more coherent and better explained the evidence. Chinen's characterization of our work as an attack on the status of CIL itself might rest on a mistaken identification of international law with the positivist theory of international law. Or it might be grounded in the international lawyer's typical *a priori* commitment to international law as a powerful normative tool for influencing international behavior and achieving world justice. In any event, it is a characterization that we do not share.

### 3. CIL and Treaties

Chinen observes that the texts of 40,000 treaties are deposited at the United Nations, and seems to argue that the existence of so many treaties shows that states can cooperate, and if states can cooperate through treaties, then they can cooperate through CIL. Further, he points out that CIL emerges from treaties and also underlies them; thus, the existence of so many treaties implies the robustness of CIL as a supplementary device for international cooperation.

There are many things wrong with this argument. We start with the purely rhetorical appeal to the number of treaties. The number 40,000 is large but must be placed in context. If each of 190 states entered just two treaties—say, an extradition treaty and a treaty of amity—with every other state, this would amount to about 36,000 treaties. And yet all of these treaties would be bilateral treaties that might (at best) reflect genuine bilateral cooperation but would say nothing about multilateral cooperation. We do not suggest that this explanation accounts for 36,000 of the 40,000 treaties; it does not. But we do suspect that many (and probably the large majority) of these treaties—ones that govern bilateral relations, ones that aren't enforced, ones that express mere aspirations or don't demand real sacrifice—don't even purport to reflect multilateral cooperation.[12]

Even if many of these treaties did remove barriers to cooperation, it does not follow that they reflected meaningful cooperation. One must ask, compared to what? There could be millions of opportunities for cooperation, with the treaties covering only a small fraction of low-value cases. Would we nonetheless conclude that the treaties manifest robust

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11. David Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 329, 335 (1994).

12. Compare George Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 380 (1996) (making similar point).

cooperation; or would we conclude instead that the treaties manifest a small *rate* of cooperation. These questions are, we think, unanswerable. The point is that the number of treaties, or their growth rate, tell us little about the existence of international cooperation. However, they might tell us, if we studied their terms and tried to observe their effect on national behavior, whether states are more likely to pursue their ends through the use of treaties, as opposed to other devices.

Chinen might mean to argue that the existence of treaties shows that it is *possible* for states to cooperate. If this is what he means, we do not disagree. Indeed, we have argued, using standard points from the institutionalist literature, that treaties might facilitate cooperation even if they are viewed as emerging endogenously from the rational behavior of states.[13] But even though we agree to this extent, we still do not understand why Chinen thinks the existence of a large—really an arbitrary—number of treaties casts doubt on our claims about CIL.

Finally, we are puzzled by Chinen's argument about the interaction of CIL and treaties. It is true that treaties often grow out of CIL, and it is also true that much of what we today call CIL—especially the CIL of human rights—is based on treaties. We do not see why this indicates anything about the nature of CIL. Indeed, these facts about the relationship between treaties and CIL are perfectly consistent with our theory of CIL. If, as we believe, the CIL of diplomatic immunity is best conceptualized as a mix of coercion, coincidence of interest, and a solution to a bilateral prisoner's dilemma, it is nonetheless easy to imagine the practices that constitute this CIL to be used as a basis for a multilateral treaty of diplomatic immunity. And if, as we believe, the CIL of human rights sometimes reflects cooperation but more often reflects coincidence of interest and coercion, there is no reason why the rhetoric of CIL associated with such behaviors could not draw on human rights treaties.

### 4. Individuals Versus States

Chinen points out that experimental games and common experience indicate that people do not act in as self-regarding a way as game theory ordinarily assumes. People share surpluses when the rules of the game permit them to take them; people retaliate against cheaters even when they expect to gain nothing by doing so. Models from evolutionary biology show that populations can in equilibrium contain other-regarding members as well as self-regarding members. Chinen concludes that some individuals are "reciprocators," that is, they will not try to cheat people who cooperate with them, and they will retaliate against people who cheat them; and that other individuals might use "other types of

13. *See* Theory, *supra* note 1, at 1170–72.

other-regarding strategies, including ones at higher levels of sophistication, that would begin to share features normally associated with law and a sense of legal obligation."[14]

We agree that not all individuals are purely self-regarding, but we do not see how this proposition can be an explanation for CIL. There are many reasons why individuals would be less self-regarding than nations. They are less self-sufficient than nations, and socialization is thus more central to individual than national survival. Similarly, individual action takes place in a much denser institutional environment than national action, and norms among individuals tend to be clearer and more readily enforced than those among nations. In addition, even if nations were led by leaders who were strong reciprocators, the leaders usually have powerful countervailing reasons, grounded in the desire to continue in office, to further the interests of their constituents regardless of their own predilections as a reciprocator on the international stage. For all of these reasons, the fact that individuals are reciprocators might not apply to nations in their dealings with one another.

And even if nations led by a "strong reciprocator" were more inclined to engage in acts of reciprocity, nothing about compliance with CIL would follow, for there are many dimensions of reciprocity besides CIL. Suppose that a "strong reciprocator" becomes the leader of a state that has customary relationships with various other states. Chinen assumes that this leader would comply with existing CIL as long as other states comply with them. But the leader might instead violate these norms in order to satisfy his urge to reciprocate. He might decide, for example, that he can best reciprocate the aid of an ally by repudiating CIL norms that the ally finds irksome. In short, a leader's urge to reciprocate does not mean that he will only, or even usually, reciprocate with respect to CIL.

### 5. Bilateral and Multilateral Prisoner's Dilemmas

Chinen argues that game theory permits multistate cooperation and coordination under certain conditions, and that that these conditions prevail on the international stage.[15] Although we disagree with some of the details of his analysis, we want to emphasize that we never argued that multistate cooperation is impossible. Here, we must make a distinction that Chinen elides, that between coordination games and PDs. We think

14. Chinen, *supra* note 4, at 184.

15. *Id.* at 167. Chinen mentions Axelrod, but Axelrod's tournament did not conform to the ordinary assumptions of game theory. It was an example of evolutionary game theory, like Peyton Young's, and we discuss them together below.

that in some cases focal points permit states to solve *n*-player coordination games, and we gave examples in our earlier papers.[16]

We also agree that it is possible, given the assumptions of game theory, that states can solve *n*-player repeated PDs. Our prior work emphasized bilateral PDs because we found implausible the claim that *n*-player PDs could be solved in a decentralized way. Theory says that *n*-player PDs can be solved (in the sense of high joint payoffs being achieved), but only on the basis of strong assumptions under which the solution takes place. States must adopt very tough strategies of retaliating against states that "cheat" and also against states that fail to retaliate against states that cheat, and so forth. We do not observe such strategies in the real world; indeed, as we explained in our prior work, we see prominent examples of non-retaliation by third parties in the face of clear violations of CIL.[17] Further, to overcome an *n*-player PD, states must have tremendous information about the behavior of other states, so that they can reliably distinguish moves that count as cheating and moves that do not. And in the case of CIL, all of this must be done in a decentralized way, without the benefit of much express negotiation and agreement.

It is theoretically possible that these conditions can be met, but unlikely. And in our view none of the standard examples of well-settled CIL appear to satisfy these conditions or to otherwise evince the logic of an *n*-player PD. We are happy to be refuted by evidence to the contrary. Chinen, however, has provided none.

### 6. Evolutionary Game Theory

Chinen argues that evolutionary game theory might explain CIL. He discusses Axelrod's tournament and the theories of the economist Peyton Young. We agree that evolutionary game theory might provide insights for understanding CIL, but we do not understand how this weakens the arguments in our earlier papers.

The first problem is one that we have already mentioned: All the theorizing in the world will not show that CIL reflects true multilateral cooperation if the theory is not tied to the evidence—evidence that, in our view, belies assertions of strong multilateral cooperation.

On the theory front, Chinen argues that evolutionary game theory shows that cooperation among large groups of players is possible. This is true in a narrow sense, but evolutionary game theory makes special assumptions that can be applied to international relations only with difficulty. One such assumption is bounded rationality. Models in evolu-

16. *See* Theory, *supra* note 1, at 1130–31.
17. *Id.* at 1154–55.

tionary game theory typically assume that players are boundedly rational: they mechanically imitate strategies that yielded the highest payoffs in earlier rounds rather than choosing an optimal strategy based on calculations of expected utility; and further, players have limited information and cannot rationally invest in order to acquire more information.

At first sight, these assumptions seem attractive, especially in comparison to the assumptions of the rational actor model, which are clearly false. Forced to choose between the assumptions that states are perfectly rational and boundedly rational, most observers would choose the latter. States are governed by human beings, and human beings are boundedly rational.

The problem with this view is methodological: there is no standard model of bounded rationality that one can use to guide empirical testing. Indeed, evolutionary game theory typically does not take a position on the degree of bounded rationality, and derives results that are the function of the decision procedures attributed to agents. Multilateral cooperativeness, for example, becomes more stable as states become more boundedly rational—that is, more imitative rather than calculating.[18] To propose a theory of CIL, however, one must take a position on where states fall along this continuum. If national leaders are sufficiently imitative and information constrained, cooperation becomes more likely. But how do we decide whether they are, or not?

There are other problems with using evolutionary game theory to guide empirical inquiry about CIL. The models typically assume a given population of strategies (such as the well-known Tit for Tat) in a population: the models' results depend heavily on the kind of strategies, and their proportions, in this population when the game "starts." But what would it mean empirically to say that among the 190 existing national states, Tit for Tat (at some initial stage) constituted X percent of the population of existing strategies? What were the other existing strategies?

The models also make strong assumptions about the role of randomness: the correct amount of random error—not too much and not too little—are necessary to support a favorable equilibria. But what would it mean empirically to say that when a state decides on a move, it errs with a probability of P?

Finally, the models are vague about the time period during which events take place: they can generate, in Young's terminology, stochastically stable equilibria in which cooperativeness and conflict alternate

18. Jonathan Bendor and Piotr Swistak, *The Evolutionary Stability of Cooperation*, 91 AMER. POL. SCI. REV. 290 (1997).

over very long periods. We could be in a stochastically stable equilibrium today, and yet not enjoy the gains of coordination, because the 20th and 21st centuries happen to correspond with a phase of transition, with coordination finally being achieved in the 22nd century and thereafter. Even if we could measure all of the variables on which the model depends, we might not be able to learn whether CIL exists until many centuries pass. Try to get a NSF grant to conduct *that* empirical study.

Chinen also appeals to Young's story about driving customs. One should initially observe that in this model players do not enter prisoner's dilemmas. Rather, they play a coordination game. Thus, Young's model provides no basis for holding that CIL permits the kind of cooperation that overcomes prisoner's dilemmas. The theme of Young's work is that repeated interaction over time can solve coordination games in a decentralized fashion—rather than through a central authority announcing the focal point around which the players should coordinate. The boundedly rational players imitate the moves of other players, but occasionally act randomly. The fact that payoffs are higher when coordination is achieved puts pressure in favor of coordination—and when there are multiple equilibria, of higher value coordination. However, as Chinen points out, Young's model permits players to jump out of value-maximizing outcomes as well. It is only on average that parties achieve value-maximizing coordination.

In the end, Young's model is just a more complex version of our coordination theory of CIL. The additional complexity does not, in our view, make international behavior any easier to understand, and thus parsimony counsels against it. It does not, unlike our theories, provide direction for empirical research—or if it does, Chinen does not show how. But what is most important to understand is that evolutionary game theory does not do the work that Young wants it to do. It does not show that CIL reflects multilateral cooperation, nor does it show—and we do not understand how it could show—that CIL influences nations through their sense of legal obligation.