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Customary International Law: A Third World Perspective

*By B. S. Chimni**

Abstract

The article offers an alternative account of the evolution, formation, and function of customary international law (CIL) from a third world perspective. It argues that there is an intimate link between the rise, consolidation, and expansion of capitalism in Europe since the nineteenth century and the development of CIL that is concealed by the supposed distinction between "formal" and "material" sources of CIL. In fact, both "traditional" and "modern" CIL sustain the short-term and systemic interests of global capitalism. It proposes a "postmodern" conception of CIL that would contribute to the global common good.

I. Introduction

Article 38(1) of the Statute of the International Court of Justice lists "international custom, as evidence of a general practice accepted as law," or in short customary international law (CIL), as one of the three principal sources of international law.[1] In recent years the International Law Association (ILA) and International Law Commission (ILC) have undertaken the task of clarifying rules concerning the formation and identification of CIL. In 2000, the ILA adopted the London Statement of Principles Applicable to the Formation of (General) Customary International Law (with commentary) consisting of thirty-three principles.[2] In 2012 the topic "Formation and evidence of customary international law" was included in the work programme of the ILC. It was later replaced by the topic "Identification of Customary International Law" and Sir Michael Wood appointed the Special Rapporteur (SR). In 2016, the ILC adopted on first reading a set of sixteen draft conclusions on identification of customary international law.[3] These are "a set of practical and simple conclusions . . . aiming at assisting practitioners in the identification of rules of customary international law."[4]

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[1] The other two being "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states" and "the general principles of law recognized by civilized nations."

[2] International Law Association, London Conference, Final Report of Commission on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law (2000), *available at* https://perma.cc/5CJ8-UTR2 [hereinafter ILA Final Report].

[3] Int'l Law Comm'n, Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee, UN Doc. A/CN.4/L.872 (2016) [hereinafter Draft Conclusions]. This and other International Law Commission materials are available at http://legal.un.org/ilc.

[4] Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, para. 74, UN Doc. A/70/10 (2015).

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The ILC has transmitted the draft conclusions to governments for comments and observations, with the request to receive them before beginning of 2018.

There is a degree of consensus among international law scholars that the two elements that must come together for a rule of CIL to emerge are state practice and *opinio juris sive necessitas*, or the objective and subjective elements respectively. The International Court of Justice (ICJ) in the *Continental Shelf (Libya v. Malta)* case also noted that "[i]t is . . . axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."[5] Likewise, Draft Conclusion 2 adopted by the ILC in 2016 states: "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)."[6] But despite the apparent consensus, different meanings and weights are often assigned to the two elements of state practice and *opinio juris*. Thus, for instance, the ILA in its Final Report stressed that "the most important, component of customary international law [is] State practice."[7] The report went on to state that "what seems clear is that, if there is a good deal of State practice, the need (if such there be) also to demonstrate the presence of the subjective element is likely to be dispensed with."[8] In this view, "the more the practice, the less the need for the subjective element."[9] However, in the ILC, "[t]he two-element approach was *universally welcomed*."[10] Therefore Draft Conclusion 9(1) states: "The requirement . . . that the general practice be accepted as law (*opinio juris*) means that the practice in question must be

[5] Continental Shelf (Libya v. Malta), 1985 ICJ Rep. 13, para. 27 (June 3) (cited with approval in the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, para. 64 (July 8)).

[6] Draft Conclusions, *supra* note 3, at 1.

[7] ILA Final Report, *supra* note 2, at 13. Draft Conclusion 6 defines "state practice" as follows:

Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.
2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.
3. There is no predetermined hierarchy among the various forms of practice.

Draft Conclusions, *supra* note 3, at 2.

[8] ILA Final Report, *supra* note 2, at 40.

[9] *Id.* at 41. However, it is important to draw attention to ILA Principle 19 which states: "It appears that, in the conduct of States and international courts and tribunals, a substantial manifestation of acceptance (consent or belief) by States that a customary rule exists may compensate for a relative lack of practice, and vice versa." *Id.* at 40.

[10] Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fourth Session, at 242, UN Doc. A/69/10 (2014) (emphasis added). This view would appear to have the support of the United States. In the context of identifying customary international law (CIL) rules of international humanitarian law, two U.S. spokesmen have observed: "Although the same action may serve as evidence both of State practice and *opinio juris*, the United States does not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law" (emphasis added). John Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 466 (2007).

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undertaken with a sense of legal right or obligation."[11] A third position that can be identified in the literature is that which distinguishes between "traditional" and "modern" CIL, with the latter relying on an inclusive notion of state practice (so as for instance to include resolutions of international organizations) and relatively greater emphasis on the element of *opinio juris*.[12] As has been pointed out, "[a] focus on *opinio juris* is appealing to those who want to expand the set of norms that are considered CIL";[13] it can be said to represent an ethical turn in thinking about CIL. The "modern" concept of CIL indicates that there is no unique concept of *opinio juris*; it is a cultural concept that changes over time. But there are others that reject the distinction between "traditional" and "modern" approaches to CIL and require a more rigorous approach to *opinio juris*.[14] In sum, the formation of CIL has in recent times been a subject of much reflection and debate among international law scholars with the aim of advancing a coherent theory of CIL and clarifying the elements that constitute it.[15]

The principal objective of the present article is however not to offer either a detailed recitation of standard materials or review ongoing debates on the subject of CIL. It is instead to

[11] Draft Conclusions, *supra* note 3, at 3. Draft Conclusion 10 explains:

Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.
2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.
3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

[12] As Baker points out, "[a]t its core 'modern custom' challenges 'traditional custom's' reliance on the state practice prong in the test for customary international norms. Instead, 'modern custom' seeks to de-emphasize state practice in exchange for a heightened reliance on *opinio juris*, and in this sense is more deductive in its logical reasoning where 'traditional custom' is more inductive." Roozbeh (Rudy) B. Baker, *Customary International Law: A Reconceptualization*, 41 BROOK. J. INT'L L. 439, 446 (2016). Elsewhere he has noted that "the debate over whether consistent state practice and opinio juris are the only building blocks of customary international law is over, because clearly, for better or for worse, they no longer are." Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173, 175 (2010). Andrew Guzman offers a definition of CIL relying on *opinio juris*: "the beliefs of states generate a legal obligation that affects payoffs." ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 195 (2008). Neils Peterson observes, "[i]n cases where there is a divergence between short-term incentives of states and long-term social benefits, we could identify customary rules rather based on *opinio iuris* than on actual state practice." Niels Petersen, *Customary International Law and Public Goods* 11 (Max Planck Institute for Research on Collective Goods 2015/5), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568605. Decades earlier Cheng had proposed the idea of "instant customary international law" to deal with developments in international space law as it had the support of the entire international community. Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law*, 5 INDIAN J. INT'L L. 23 (1965).

[13] GUZMAN, *supra* note 12, at 186.

[14] "A more rigorous approach to establishing *opinio juris* is required. It is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules." Bellinger III & Haynes II, *supra* note 10, at 447. Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001).

[15] Blutman writes that "[c]onsiderable theoretical efforts have been made in the last three decades to explain the formation and operation of customary international law or to propose desirable and viable approaches to it." Laszlo Blutman, *Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories of Customary International Law Fail*, 25 EUR. J. INT'L L. 529, 552 (2014).

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delineate an *alternative* and *distinctive* account of the evolution, formation, and function of CIL. Toward this end, this article advances from the perspective of third world states a set of hypotheses and initial evidence in their support.[16] It argues that past and ongoing debates on the subject are largely ahistorical in nature, encased as these are in formalistic analysis and therefore divorced from a serious examination of linkages of CIL norms to regional and global social structures. The article advances the hypothesis that there is an intimate and inextricable link between the rise, consolidation, and expansion of capitalism in Europe since the nineteenth century and the evolution of CIL.[17] It also contends that the historical role of CIL has been to facilitate the functioning of global capitalist system by filling crucial gaps in the international legal system. These gaps relate to either short term interests of capitalist states or the systemic interests of the global capitalist system.[18]

[16] On a third world perspective to international law, see B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, *in* THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS, AND GLOBALIZATION 47–73 (Antony Anghie, Bhupinder Chimni, Karen Mickelson & Obiora Okafor eds., 2003); Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, *in* THE METHODS OF INTERNATIONAL LAW (Steven R. Ratner & Anne-Marie Slaughter eds., 2004). For the purpose of this article, no distinction is made between emerging powers such as Brazil, China, and India and other third world states. See generally in this regard, *Capitalism, Imperialism and International Law in the Twenty First Century*, 14 OREGON REV. INT'L. 17 (2012).

[17] In his well-known book, *Capitalism and Freedom*, Milton Friedmann defined capitalism as the "organization of the bulk of economic activity through private enterprise operating in a free market." MILTON FRIEDMANN, CAPITALISM AND FREEDOM 4 (1962). On the other hand, following Marx, the British economist Maurice Dobb defined capitalism as follows: "Capitalism was not simply a system of production for the market—a system of commodity production as Marx termed it—but a system under which labor power had "itself become a commodity" and was bought and sold on the market like any other object of exchange. Its historical prerequisite was the concentration of ownership of the means of production in the hands of a class, consisting of only a minor section of society, and the consequent emergence of a propertyless class for whom the sale of their labor power was their only source of livelihood." MAURICE DOBB, STUDIES IN THE DEVELOPMENT OF CAPITALISM 7 (1946). Any reference to capitalism in the essay is primarily to the Dobb understanding of capitalism which can and has assumed a variety of economic and political forms over time. As Friedman observes, you can "have economic arrangements that are fundamentally capitalist and political arrangements that are not free." *Id.* at 10. After all, as he notes, "Fascist Italy and Fascist Spain, Germany at various times . . ., Japan before World Wars I and II, tsarist Russia in the decades before World War I—are all societies that cannot conceivably be described as politically free. Yet, in each, private enterprise was the dominant form of economic organization." *Id.* It only needs to be added that this article proceeds on the assumption that in order to sustain itself there is an inherent tendency in capitalism to expand beyond the boundaries of a nation-state giving rise to the phenomenon of imperialism. It was the German thinker Rosa Luxembourg (1871–1919) who first argued that imperialism is linked to the very survival of capitalism. ROSA LUXEMBURG, THE ACCUMULATION OF CAPITAL (1958). In her time, competitive colonialism was the outcome. Colonialism was followed by neocolonialism and then succeeded by global imperialism. For a history of the relationship between capitalism, imperialism, and international law since the seventeenth century, see B. S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 477–523 (2017); and ANTONY ANGHIE, SOVEREIGNTY, IMPERIALISM AND INTERNATIONAL LAW (2003).

[18] Insofar as the present article links the development of CIL with the rise and spatial expansion of capitalism since the nineteenth century, it differs from the traditional third world critique of the doctrine of CIL. For a recent example of this critique from a third world perspective, see George Rodrigo Bandeira Galindo & Cesar Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 CHINESE J. INT'L L. 251 (2017). Galindo and Yip explicitly rule out dealing with the question as to "why certain norms are designated or evolve as norms of customary international law and others do not." *Id.* at 269 (quoting B. S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT'L L. 1, 15 (2004)). In contrast, this article places emphasis on deep structures and the world of idea and beliefs as opposed to that of simply the factor of power to explain why CIL norms tend to support the interests of advanced capitalist states. It also differentiates between short-term and long-term interests of powerful capitalist states. However, the present author shares many of the traditional third world views on how CIL is conceptualized, formed, and implemented. Many of these matters were touched upon in an earlier essay. *See* B. S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT'L L. 1 (2004). These are also the subject of further comment in Section IV *infra*.

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A direct link between the functioning of global capitalism and CIL is most clearly revealed today in the domain of international investment law (IIL) wherein CIL principles such as the fair and equitable treatment (FET) principle sustain the immediate interests of universalizing capitalism. The general lack of availability of the state practice of third world nations compounds the problem of generating CIL norms that secure the interests of predominantly capital importing nations. The systemic interests of the global capitalist system are secured through the creation of rules that go to lend it both stability and legitimacy. The foundational CIL rule of *pacta sunt servanda*, which makes international law possible in an anarchic international system, is a supreme example of such a rule. Today, CIL rules in the areas of international human rights law (IHRL), international humanitarian law (IHL), international criminal law (ICL), and international environmental law (IENL) are also performing the function of sustaining its systemic interests through legitimizing global capitalism. In performing this role CIL parallels the function of the capitalist state at the national level—to protect and sustain a historical social order, if necessary even at the cost of the short-term interests of the global capitalist class or its dominant fraction.[19] To put it differently, in the absence of a world state its function is in a crucial way being performed by CIL. It is the inability to appreciate the significance of long term or systemic goals safeguarded by CIL that leads to skepticism among many western scholars, especially realist scholars, as to its value as a source of international law.

These scholars see those norms of CIL that do not pertain to the realization of short term interests of powerful capitalist nations as overly constraining. This anxiety is heightened in view of the expansion of the international community of states. In the context of the United States, scholars like Curtis Bradley, Jack Goldsmith, and Eric Posner have expressed the view that domestic courts should restrictively apply CIL.[20] They have also challenged the idea of "modern" CIL which can greatly expand the domain of CIL.[21] Such scholars are unable to recognize that in order to sustain the long-term interests of the global capitalist system the theoretical basis of CIL has to be suitably redefined to generate appropriate norms from time to time. Finally, there is also the lack of appreciation of the different techniques used to prevent third world states from using CIL to frame rules to the disadvantage of powerful capitalist nations, epitomized by the principle of persistent objector. In view of the problems with traditional and modern doctrines of CIL, a postmodern doctrine of CIL needs to be conceptualized to promote the global common good.

This article proceeds to make its arguments in the following way: Section II explores at first the reasons for the current focus on and continuing significance of CIL. It is important to go

[19] In the same way as the task of the capitalist state is not to defend the narrow corporate interests of this or that capitalist but the general interests of the capitalist class or its dominant fraction, CIL focuses on the long term and general interests. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 181 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971).

[20] Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Eric A. Posner & Jack L. Goldsmith, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000).

[21] On the other hand, critics of Bradley et al. correctly point to the importance of CIL rules, albeit without theorizing the interests that these serve. Jordan J. Paust, *Customary International Law and Human Rights Treaties* Are *Law of the United States*, 20 MICH. J INT'L L. 301 (1999).

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over this ground to prevent a rhetorical dismissal of the articulated hypotheses, theses, and critique by stating that CIL presently plays a negligible role as a source of international law. The section also seeks to understand the reasons for the sustained search for a coherent theory of CIL in the advanced capitalist states.[22] It advances the hypothesis that the rapid changes brought about by decolonization, the end of the Cold War, and the accelerated globalization process destabilized the historic consensus on the traditional doctrine of CIL and called for the articulation of fresh theories of CIL. The challenges posed to CIL as a source of international law can be said to have been met in western scholarship in two phases: 1960–1970 and 1980–present. The outcome has been new thinking on CIL that has assumed two principal forms: positing a distinction between "formal" and "material" sources of CIL and that between "traditional" and "modern" CIL. This period has also seen the invention of new doctrines, such as that of the "persistent objector," to meet the challenge of postcolonial states seeking to use CIL to serve the interests of third world states.

Section III challenges the distinction between "formal" and "material" sources of CIL advanced by mainstream western scholarship and endorsed by the ILC and ILA. It is contended that by separating "formal" from "material" sources of rules, the ILA and ILC leave out of the picture the role of culture, power, and interest in the framing, making, and determination of formal sources of CIL.[23] It is argued that from the time of their initial conceptualization, the proposed distinction between "formal" and "material" sources of CIL veiled its roots in the western economic, cultural, and political order and its historic role in furthering the interests of capitalist nations. The positivist method which informs the distinction, the emergence and dominance of which dates back to the era of high imperialism, also allows a particular conceptualization of the formal elements that safeguard the interests of these nations. In essence, it is argued that the continuing analysis of a deeply sociological phenomenon such as CIL through a positivist method can be traced to the need to delink it from the imperialism of our times.

Section IV notes the implications of the positivist method in the face of the lack of availability of state practice of third world nations in determining the formation of CIL. It argues that the non-availability of the state practice of third world countries, and also the paucity of scholarly writings on the subject, allows the identification of rules of CIL primarily on the basis of state practice of advanced capitalist nations and the opinions of their scholars. In other words, while in theory the state practice of all nations is of import in the formation of CIL, this is not so in practice, allowing developed capitalist nations to shape CIL. Even if state practice of third world states is available, the doctrines of specially affected states and persistent objectors undermine their significance. The dearth of scholarly opinion from the third world has also meant that the proposition of separating "formal" from "material" sources has gone largely unchallenged.[24] With the result that assumptions which inform

[22] Indeed, "[t]here are . . . few topics in international law that are more over-theorized than the creation and determination of custom." Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion*, 26 EUR. J. INT'L L. 417, 429 (2015). However, others believe that much of "academic work is atheoretical." GUZMAN, *supra* note 12, at 187.

[23] To put it differently, the rules for identification of CIL cannot proceed in the abstract. It is interesting in these regards that even "States (and other international actors) tend not to address themselves to the principles of customary law formation in the abstract." ILA Final Report, *supra* note 2, at 3.

[24] Honorable exceptions include MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979).

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the western cultural and political order of capitalist nations continue to influence and infiltrate the concept of CIL.

Section V contends that the distinction between "traditional" and "modern" CIL has been advanced to allow its rapid development to fill critical gaps in the international legal system in the era of neoliberal capitalist globalization. The filling of these gaps is crucial to sustaining the global capitalist system in the long run. In order to clarify the formation of "modern" CIL, the concept of "hegemony," as associated with the work of Antonio Gramsci, is introduced. It helps to understand how in the postcolonial era, the voluntary consent of subaltern states and peoples to rules of CIL is secured; in the colonial era, CIL rules were largely imposed through coercion.[25] It is argued that it has always been a combination of ideas and beliefs and power that gives rise to CIL. A distinction is made here between "dominant" and "hegemonic" ideas and beliefs. In the former, power has a greater role to play than when ideas and beliefs become "hegemonic." The formation of CIL through a combination of power and dominant ideas is illustrated with reference to the emergence of the IIL principle of FET in the post Cold War era. The FET principle was articulated in normative initiatives of international institutions and awards of international tribunals, amidst prevailing power dynamics, and goes to defend the short-term interests of global capital. Only the sustained resistance of a global coalition of third world states and progressive forces of civil society can help reorient the FET principle to deliver justice to third world peoples. "Modern" CIL rules embody "hegemonic" ideas and beliefs that are critical to realizing the systemic interests of the global capitalist system. These ideas and beliefs have come to be internalized by third world nations in the postcolonial era. A significant reason is that the ideas and beliefs that inform "modern" CIL tend to have a progressive content. Therefore, these face less resistance from subaltern groups and states.

Section VI touches on the limits of modern CIL and proceeds to identify some bare elements of a postmodern doctrine of CIL that can help realize the global common good. The essence of the postmodern doctrine is the formation of CIL on the basis of deliberative reasoning rather than mere coordination of states. In this context, the dissenting opinion of Judge Antônio Augusto Cançado Trindade in the *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* case is used to distinguish between *opinio juris* as a constituent element of CIL and *opinio juris communis* as representing the juridical conscience of mankind.[26] Second, the possible role of resolutions of international organizations and practices of global civil society in the formation of CIL is briefly discussed. Section VII contains some final remarks by way of conclusion.

II. Significance of CIL: Search for a Theory

There are several reasons for the current focus on CIL. These need to be recapitulated in order to demonstrate that the codification of rules of CIL formation and ongoing debates on it, and more generally on CIL as a source of international law, are not unnecessary or infructuous. In summary form, the reasons for increased attention to CIL include its continuing importance as a source of international law, its direct application by domestic courts, its

[25] This perhaps explains why "[t]here was not a trace of . . . [*opinio juris*] in any of the nineteenth century arbitrations." Anthony Carty, The Decay of International Law? 27 (1986). These arbitrations were between western states and *opinio juris* was presumed.

[26] The judgment is available at http://www.icj-cij.org/en/case/158/judgments.

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invocation by proliferating international tribunals, the diminished opposition from third world states, and the felt need for a coherent theory of CIL. These reasons may be briefly elaborated. First, there is the continuing salience of CIL as a source of international law.[27] As the First ILC Report of SR emphasized:

> Even in fields where there are widely accepted "codification" conventions, the rules of customary international law continue to govern questions not regulated by the conventions and continue to apply in relations with and between non-parties. Rules of customary international law may also fill possible lacunae in treaties, and assist in their interpretation.[28]

This statement does not do full justice to the role of CIL in helping fill critical gaps in the international legal system. Even after the treaty making revolution in the nineteenth and twentieth centuries, CIL plays an important role in the basic areas of state responsibility, international law relating to jurisdiction, state immunity, the use of force, and interpretation of treaties.[29] CIL is playing an especially significant role in the development of specialized fields of international law such as IHRL, IHL, ICL, IIL, IENL, international space law (ISL), and international watercourses law (IWL).[30] To be sure, as the ILC Report notes, many of the rules have been included in treaties. But as Michael Scharf points out,

> CIL expands the reach of the rules to states that have not yet ratified the treaty; further the CIL status of the rules can apply to actions of treaty parties that predated the entry into force of the treaty. Moreover, unlike treaties which permit withdrawal simply by giving advance notice, "customary international law does not recognize a unilateral right" to escape its obligations.[31]

[27] Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 116 (2005).

[28] Int'l Law Comm'n, First Report on Formation and Evidence of Customary International Law, at 15, para. 35, UN Doc. A/CN.4/663 (May 17, 2013) (prepared by Special Rapporteur Michael Wood) [hereinafter ILC First Report] (footnotes in the original text have been deleted).

[29] For instance, Article 3(2) of the World Trade Organization's Understanding on Rules and Procedures Governing the Settlement of Disputes states that an objective of the WTO dispute settlement system is "to clarify the existing provisions" of covered agreements "in accordance with customary rules of interpretation of public international law." Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Ann. 2, 1869 UNTS 401. The primary rules of interpretation are codified in Articles 31–33 of the Vienna Convention on the Law of Treaties, and are viewed as part of CIL, but these are not comprehensive in scope. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[30] While the norms in these domains eventually come to be generated by treaty law there remains a surplus of norms that forms part of modern CIL. As Andrew Guzman and Jerome Hsiang point out, "[t]he consent-based system of international law creates a powerful status quo bias that makes it difficult for the law to adapt as circumstances change. CIL introduces some, albeit modest, flexibility into this system, both by allowing the emergence of some rules without the consent of some states and by allowing other rules to change over the objections of some states." Andrew T. Guzman & Jerome Hsiang, *Some Ways that Theories on Customary International Law Fails: A Reply to Laszlo Glutman*, 25 EUR. J. INT'L L. 553, 557 (2014). They go on to observe that "[t]he consequence of a pure consent-based system is that agreement is impossible unless every affected state benefits. There is simply no way to adopt a rule over the protests of an objecting state. . . . CIL offers some modest relief in certain circumstances." *Id.*

[31] Michael P. Scharf, *Book Review of "Custom's Future: International Law in a Changing World,"* 111 AJIL 206, 208 (2017).

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The evolution of CIL in the indicated areas of international law are crucial in lending stability and legitimacy to an expanding capitalist system in the era of accelerated globalization, necessitating for some the distinction between "traditional" and "modern" CIL, the latter facilitating its swift development.[32] It is of course the claim of the proponents of modern CIL that by helping cope with rapid change, modern CIL benefits the entire international community of states.[33] As Andrew Guzman and Jerome Hsiang observe, while "[t]here is a theoretical possibility that some states could consistently be among those that are harmed . . . in practice this result seems unlikely."[34] The assessment whether rules of CIL advance global common good, however, depends on the perspective that is adopted. This article contends that from a third world perspective, modern CIL, like its traditional counterpart, essentially safeguards the interests of the advanced capitalist nations even as it at times addresses concerns of the entire international community.

A second reason for the attention CIL is receiving is that "the vast majority of national legal systems now recognize custom as directly applicable, at least in principle."[35] It calls for a coherent theory of CIL that is acceptable to the courts of different nations. As an ILC report notes, the "revival of interest in the formation of customary international law, [is] in part stimulated by the attempts, sometimes quite controversial, of domestic courts to grapple with the issue."[36] The significance of domestic law in the internalization and implementation of international law is only likely to grow in the future.[37] This raises a set of concerns among western scholars. There is anxiety that each national jurisdiction may adopt its own understanding of CIL, thus undermining the crucial role of CIL in the international system. The need for authoritative guidance for the identification of CIL is also deemed necessary to prevent proliferation of interpretations and understandings that could limit the movement and operation of global capital. Finally, there is concern that the application of CIL by domestic courts may

[32] *See generally* Isabelle R. Gunning, *Modernizing Customary International Law*, 31 VA. J. INT'L L. 211 (1991); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1 (1995/96); Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J. ENVTL L. 221 (1997); Theodor Meron, *The Continuing Role of Custom in the Formation of International Criminal Law*, 90 AJIL 238 (1996).

[33] Guzman & Hsiang observe "that this is a good thing." Guzman & Hsiang, *supra* note 30, at 557.

[34] *Id.* at 558. They conclude that "[t]he end result is far more likely to be good, from a global perspective, than bad." *Id.* at 559.

[35] Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AJIL 514, 515, 527 (2015). Albeit, they add that "[a]t the same time, a growing portion of countries consider custom to be hierarchically inferior to domestic law, which limits the ability of courts to apply it directly in many circumstances and preserves the legislature's ability to displace customary rules." *Id.* at 515. On the other hand, "domestic courts have invoked the jus cogens status of certain CIL rules to override domestic law, thus effectively giving these rules supralegislative status." *Id.* at 529. *See also* ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW (2011); Wayne Sandholtz, *How Domestic Courts Use International Law*, 38 FORDHAM INT'L L.J. 595 (2015); INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION AND PERSUASION (Dinah Shelton ed., 2011); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUMBIA L. REV. 628 (2007); Int'l Law Comm'n, Memorandum by the Secretariat, Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law, UN Doc. A/C.4/691 (Feb. 9, 2016).

[36] Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third Session, Annex A, para. 2, UN Doc A/66/10 (2011), *available at* http://legal.un.org/ilc/reports/2011/english/annex.pdf [hereinafter Annex A].

[37] *See generally* Anne Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327 (2006).

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constrain the actions of powerful nations. This explains why there has been acrimonious debate in the United States on the authority of domestic courts to apply rules of CIL. As Bradley, Goldsmith, and David H. Moore have noted, "[t]he most contested issue in U.S. foreign relations law during the last decade has been the domestic status of customary international law (CIL)."[38] A principal concern is the determination by courts of the place of CIL in the U.S. constitutional scheme. According to one view, "CIL would provide a basis for federal question jurisdiction, and courts would be authorized to use CIL to preempt inconsistent state law and possibly even to override executive branch action and some federal legislation."[39] According to another view, CIL is not automatically part of U.S. federal law, but only when "its incorporation has been authorized either by the structure of the Constitution or by the political branches, and it is to be applied interstitially in a manner consistent with the relevant policies of the political branches."[40] The latter view offers much more scope for cherry picking CIL rules that promote U.S interests.

Third, there is the proliferation of international tribunals that include the International Centre for the Settlement of Investment Disputes (ICSID), International Tribunal for the Law of the Sea (ITLOS), the World Trade Organization (WTO) Dispute Settlement System (DSS), the International Criminal Court (ICC), and a growing number of international arbitrations. The growth of international tribunals also gave rise to the felt need for a sustainable theory of CIL that provides firm justification for their use. This was especially the case in the field of IIL. If international tribunals had to treat "new" principles of IIL, such as FET and full protection and security (FPS), as CIL, a suitable theory had to be devised. A fitting theory was also necessary to surmount the opposition of third world countries and scholars to principles such as prompt, due and effective compensation for the nationalization and expropriation of alien property.[41] As has been observed:

> The preservation of the authority of arbitral tribunals is what makes the question of the theory of the sources of investment law so cardinal. In other words, the crux of the theory of the sources of investment law is precisely the preservation of the legitimacy of cross-referencing practice of investment tribunals. Theories of sources are necessarily conducive to ensuring the legitimacy and authority of judicial decisions.[42]

In short, in an expanded international community of states, it was no longer possible for international tribunals to continue with an untheorized theory of CIL.

Fourth, the collapse of the Soviet Union and the reduced challenge of third world states to CIL facilitated the possibility of advancing a theory of CIL that would be widely acceptable. In other words, these factors made it possible for western international lawyers, and the codification institutions they dominate, to arrive at a consensus on the procedure for the

[38] Bradley, Goldsmith & Moore, *supra* note 20, at 870.

[39] *Id.* at 872.

[40] *Id.* at 935–36.

[41] Writing in the late 1980s, Asante observed that the principle has "been strenuously challenged since the turn of this century by Latin American jurists, the socialist States of Eastern Europe and, more recently, the newly emergent States of Asia and Africa and by some Western jurists." Samuel K. B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L. Q. 588, 589 (1988).

[42] Jean d'Aspremont, *International Customary Investment Law: Story of a Paradox*, 54 (Amsterdam Law School Research Paper No. 2011-19), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916713.

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identification of rules of CIL. In recent times, as an ILC Report observes, the "ideological objections to the role of customary international law have diminished."[43] It may be recalled that while the Soviet Union had slowly come to accept CIL as a source of international law, a great degree of skepticism remained, explaining its continuing embrace of the theory of tacit consent.[44] The end of the Soviet Union cleared the way for adopting rules for the identification of CIL favored by western states and scholars. The other development was that postcolonial states no longer sternly questioned the rules of CIL. Judge Mohammed Bedjaoui had noted of the earlier period that "[a]s soon as the new States came into being, the content, nature and constituent elements of customary law were called into question."[45] The contestation by Soviet Union and postcolonial states of extant rules for the formation of CIL destabilized what was a relatively untheorized concept of CIL. Historically, as Jean d'Aspremont points out in relation to the critical field of IIL, practicing investment lawyers had "hardly felt the need [to theorize CIL]."[46] They essentially worked with a conception of sources of IIL which bespoke of "a very permissive and loose concept of customary law."[47] Indeed, "[a]ny investigation in the foundations of the sources of investment law . . . seemed overly arcane to such practitioners . . . an invitation to explore its theoretical foundations a purely academic whim."[48] In short, this meant that the doctrine of sources was "deemed an issue of secondary importance in investment law."[49] Western investment lawyers simply went about "affirming the customary character of the international minimum standards which foreign investors were entitled to as all aliens abroad."[50] It is only when it came to be challenged by newly independent states in the 1960s and 1970s, as can be seen from the provisions relating to the compensation for expropriated or nationalized property in the 1962 UN General Assembly Resolutions on the Permanent Sovereignty over Natural Resources (PSNR) and the 1974 Charter of Economic Rights and Duties of States (CERDS), that there was a felt need to theorize CIL so that the understanding advanced by postcolonial states could be contested.[51] This challenge may have diminished in recent years but had to find an appropriate conceptual response.

[43] Annex A, *supra* note 36, para. 2.

[44] *See* G. I. Tunkin, Theory of International Law 127–33 (William E. Butler trans., 1974); Anthony A. D'Amato, The Concept of Custom in International Law 188 (1971). It may also be recalled here that the International Court of Justice (ICJ) has observed that "[I]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 ICJ Rep. 14, para. 269 (June 27). For the ambivalent view of Soviet scholars of CIL, see Richard J. Erikson, *Soviet Theory of the Legal Nature of Customary International Law*, 7 Case Western J. Int'l L. 148 (1975).

[45] Bedjaoui, *supra* note 24, at 134. He noted that "the newly independent States refuse to consider themselves bound by various customary principles when these principles still express relationships of domination, inequality or privilege." *Id.* at 132.

[46] D'Aspremont, *supra* note 42, at 6.

[47] *Id.* at 10.

[48] *Id.* at 6.

[49] *Id.*

[50] *Id.* at 9.

[51] The text of G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962) is available at http://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf. The text of G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974) is available at http://www.un-documents.net/a29r3281.htm. There is a vast amount of literature on the subject that need not be referenced here. *See generally*, Nico Schrijver, Sovereignty over Natural Resources (1997); B. S. Chimni, *Review Article: Permanent*

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Last but not least, the ongoing engagement with the world of CIL is rooted in the fact that it offers deep insight into the history, nature, and character of modern international law. As is being argued in the present article, the evolution of CIL has much to tell us of the role of ideas, beliefs, and power in the lawmaking process in international society.[52] From a third world perspective, CIL reveals the foundational role of the interests of European states, European legal consciousness, and European social and political theories in the making of modern international law. For that reason, the contestation of CIL rules by non-western nations and scholars has to begin there.

Meanwhile, for all these reasons, the traditional understanding of CIL has been revisited by western international law scholars in the postcolonial era. This has happened in roughly two phases. In the 1960s and 1970s, some writings on the subject of CIL appeared that called for placing CIL on a firm theoretical basis.[53] Anthony D'Amato bluntly wrote that "[t]he questions of how custom comes into being and how it can be changed or modified are wrapped in mystery and illogic."[54] The response to the theoretical disarray did not take long in coming. It was in this period that the ICJ, as yet dominated by judges from the western world, made its key pronouncement in the *North Sea Continental Shelf* case.[55] It attempted to clarify the principles applicable to the formation of CIL. A distinction between "formal" and "material" sources of CIL was posited in an effort to disengage CIL from its historical origins. The need to advance a coherent theory of CIL assumed a new urgency beginning in the mid-1980s—from the dawn of the era of neoliberal globalization that, inter alia, called for rules of CIL to protect the interests of hypermobile capital. Furthermore, as an ILC Report observed, "[t]he formation of customary international law now has to be seen in the context of a world of nearly 200 States, and numerous and varied international organizations, both regional and universal."[56] It inaugurated a second phase of engagement with CIL. In the next decades there was renewed recognition that "current notions of CIL are untenable [and] . . . existing views of CIL lack theoretical consistency and integrity. It is past time to adopt a more rigorous approach to analyzing this source of international law."[57] An attempt was made to

Sovereignty over Natural Resources: Toward a Radical Interpretation, 38 INDIAN J. INT'L L. 208 (1998); Asante, *supra* note 41; Francesco Francioni, *Compensation for Nationalization of Foreign Property: The Borderland Between Law and Equity*, 24 INT'L & COMP. L. Q. 255 (1975).

[52] Martha Finnemore and Stephen Toope observe that "[l]aw is a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies. Customary international law displays this richer understanding of law's operation . . . ." Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 INT'L ORG. 743 (2001).

[53] *See, e.g.*, D'AMATO, *supra* note 44. Lon Fuller wrote that "a proper understanding of customary law was of capital importance in the world of today" and pointed to the fact that "much of international law, and perhaps the most vital part of it, as essentially customary law." L. L. Fuller, *Human Interaction and the Law*, *in* LLOYDS INTRODUCTION TO JURISPRUDENCE 911 (5th ed. 1985).

[54] *Id.* at 4. Other writings in the 1970s include: Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 34 (1974–75); HUGH THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 47 (1972).

[55] North Sea Continental Shelf Cases (Ger. v. Den. & Neth.) 1969 ICJ Rep. 227 (Feb. 20). *See generally* R.P. ANAND, STUDIES IN INTERNATIONAL ADJUDICATION 53–119 (1969).

[56] Annex A, *supra* note 36, para. 2.

[57] Guzman, *supra* note 27, at 175. Earlier, Kelly observed that "[i]nternational legal theory is in disarray. Despite the rapid internationalization of commerce and finance, there is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms." J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 450 (2000). He spoke of "the indeterminate and manipulable theory of CIL . . . there is no common understanding of how to determine customary

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salvage CIL as a source of international law by advancing theories that were sufficiently flexible to both protect the immediate and long-term or systemic interests of powerful states.

On the one hand, the distinction between "formal" and "material" sources hardened in this period in a bid to divorce issues of formation of CIL from its distributional consequences. This happened in response to critics like Judge Bedjaoui who, in his seminal work *Toward a New International Economic Order*, expressed deep skepticism about CIL being able to play a role in transforming international law to meet the aspirations of third world peoples. In his view, CIL was inherently undemocratic and unjust and a particular understanding of the meaning of "formal" sources—the constituent elements of CIL—merely veiled that reality. Judge Bedjaoui interpreted the rules for the identification of CIL in a more inclusive manner so as to allow certain qualifying resolutions of international organizations (that satisfy certain criteria such as extended negotiations, broad consensus, clear articulation, and subsequent affirmations) to ipso facto give rise to new rules of CIL that facilitated the creation of the new international economic order. On the other hand, a distinction between "traditional" and "modern" CIL came to be articulated. The proponents of the latter also embraced a more adaptable understanding of the rule of formation of CIL, but did not argue the case for norms backed by third world nations. Thus, while flexible approaches came to be articulated by both western and third world scholars, they were for divergent purposes: the latter relying on CIL to stabilize the emerging neoliberal global order and the former often to challenge it. In the contestation of ideas, power eventually carried the day. It was also the case that third world states were not able to effectively make the argument that changes they wished to bring about were in the interest of all nations. In claiming that CIL was a slow and clumsy source of international law, Judge Bedjaoui failed to appreciate *the double face of CIL*—that it was slow and clumsy only in so far as weak actors are concerned but a dynamic source of international law when it came to powerful actors. A new doctrine of persistent objector also emerged to accommodate the concerns of western nations in an expanding society of international states.[58] The theoretical standpoints regarding the distinction between "formal" and "material" sources and that between "traditional" and "modern" CIL eventually led to the subject being taken up for codification by the ILA and then the ILC. The principal aim was to lend the concept of CIL clarity and acceptability, necessary if it is to play the important role of providing stability and legitimacy to the international system in the era of accelerated globalization. However, in a deeper sense, the effort was to come to terms with the far-reaching contestation by third world nations of the nature and state of contemporary international

norms." *Id.* at 451, 499. *See further* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985); Ted L. Stein, *The Approach of the Different Drummer: the Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985); Frederick L. Kirgis Jr, *Custom on a Sliding Scale*, 81 AJIL 146 (1987); Blutman, *supra* note 15; Maurice H. Mendelson, *The Formation of Customary International Law*, 272 HAGUE ACADEMY OF INTERNATIONAL LAW, COLLECTED COURSES 155 (1998); Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUR. J. INT'L L. 523 (2004); David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law,* 39 GERMAN Y.B. INT'L L. 198 (1996); Roberts, *supra* note 14, at 757.

[58] But a single powerful state like the United States alone may not be able to prevent change. *See* Stephan Toope, *Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 309–13 (Michael Byers & Georg Nolte eds., 2003). He attempts "to demonstrate that attempts by the United States to cast itself as a persistent objector often end in failure." *Id.* at 309.

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law.[59] The distinction between "formal" and "material" sources of CIL was also advanced to displace the challenge being mounted by critical theories demonstrating that international law has always served the interests of powerful actors in the international system.[60]

III. Separating Formal and Material Sources: Colonial Origins of CIL

In his very First Report to the ILC, the special rapporteur proposed that in considering the topic "Identification of Customary International Law," the "formal" sources of CIL should be considered in separation from "material" sources. He observed that in the context of the task assigned to ILC, the term "source" meant a formal source—"that which gives to the content of rules of international law their character as law."[61] The ILC special rapporteur elucidated the distinction between "formal" and "material" sources in a footnote citing A. Pellet who contends that:

> The formal sources of international law are "the processes through which international law rules become legally relevant," while the material sources "can be defined as *the political, sociological, economic, moral or religious origins of the legal rules*."[62]

Earlier, the ILA had noted that "it is concerned *only* with the *formation* of rules of customary international law."[63] It had then proceeded to distinguish between "formal" sources, "which are those processes which, if they are observed, create rules of law (such as treaties and custom)," and "an 'historic' source of a rule (otherwise known as a 'material' source). The latter is *the historic origin of a rule* which only obtains its legal force, however, when it is subjected to a law-making process (a formal source)."[64]

The problem with the distinction between "formal" and "material" sources is that it conceals the historical fact that the twin elements of state practice and *opinio juris* that together constitute the "formal" source of CIL were identified and given meaning in the context of the relationship between European nations with a broadly shared culture and the stage of economic development.[65] Theoretically speaking there is no unique definition of "formal"

[59] As one researcher has reminded, in the final analysis "[t]he theoretical problems of customary international law are the theoretical problems of international law as a whole." Kammerhofer, *supra* note 57, at 536. Blutman writes that "a plausible theory of customary international law cannot be devoid of a theory, thesis or, at least, a hypothesis related to the very nature of a (legal) norm." This rendered the task of attending to CIL even more urgent. Blutman, *supra* note 15, at 538.

[60] *See generally* Chimni, *supra* note 16.

[61] ILC First Report, *supra* note 28, para. 28. Special Rapporteur Michael Wood had earlier observed, that "[t]he present topic . . . aims to provide guidance on how to identify a rule of customary international law at a given moment, not to address the question of which particular rules have achieved such status." *Id*., para. 22.

[62] *Id*. at 12, n. 56 (emphasis added). The distinction has been endorsed in different ways in later reports. For instance, in 2016, the ILC SR observed: "As has previously been agreed, it is not the aim of the topic to explain the myriad of influences and processes involved in the development of rules of customary international law over time, especially given the desire is to keep such processes flexible, as they inherently are." Int'l Law Comm'n, Fourth Report on Identification of Customary International Law, at 5, para. 15, UN Doc. A/CN.4/695 (Mar. 8, 2016) (prepared by Special Rapporteur Michael Wood) [hereinafter ILC Fourth Report].

[63] ILA Final Report, *supra* note 2, at 5 (emphasis added).

[64] *Id.* at 12 (emphasis added).

[65] Blutman expresses this in the following way: "[i]t is misleading to suggest that customary international law is one of the sources of international law. Customary international law forms part of international law. If it is part of international law, then it cannot be its source. (What is the source of a phenomenon cannot be part of this phenomenon at the same time.) It is customary international law itself, as part of international law, which may be said

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sources of CIL or its constituent elements, or the weight to be assigned to them. There can be alternative ways of identifying the formal sources of CIL, as can be seen in the work of those scholars who support the idea of modern CIL relying heavily on the element of *opinio juris*. Indeed, in their essay titled "How Customary Is Customary International Law," Emily Kadens and Ernest Young observe that "the history of customary law indicates a longstanding struggle to find a cogent and functional definition of custom."[66] They go on to conclude that "[t]here is, if you will, no settled customary practice governing how to define customary rules of law."[67] According to Kadens and Young, "[t]he signal lesson is one of indeterminacy."[68] In the same vein, speaking to the element of state practice, Anthony Carty has observed that "within the history of the discipline itself it may always be possible to recover new parameters for exploring the history of state practice . . . by reverting to a different theory of doctrine."[69] The term "civilized nations" that occurs in Article 38(1) of the ICJ Statute (in the context of the third principal source of international law: general principles of law) is a reminder of how the "formal" and "material" sources were historically tied together, facilitating the colonization of non-western nations. Therefore, while in view of the practical nature of the task assigned to the ILC the distinction between them may have some merit, it is made at the expense of denying the common roots of "formal" and "material" sources of CIL in European cultural and material traditions in the colonial era.

It does not therefore come as a surprise that in the postcolonial era, attempts have been made by western international law scholars to conceal the common roots of "formal" and "material" sources of CIL. Its discovery threatened to disclose the parochial and racist origins of the rules of CIL. Therefore, from the very dawn of the decolonization process, the distinction between "formal" and "material" sources came to be advanced. Writing in the early 1950s, Josef Kunz stressed the need to confine (albeit admittedly from the standpoint of a pure theory of law) the meaning of "sources" of international law to "formal sources":

> Our problem must not be confused . . . with the entirely different problem of the foundation of international law, whether understood in a formal sense-as the "basic norm"—or in a material sense as the "ultimate" foundation. *The latter problem is by its very essence a meta-juridical problem, a problem not of the science, but of the philosophy of law.*[70]

Two decades later, looking at the different meanings of the term "source," D'Amato observed that "one has only to look at the numerous definitions [of 'sources'] advanced from time to time to see the ambiguities involved in this term" and went on to identify at least "six planes of

to have a source or sources. What these sources are and how they can be determined are separate questions." Blutman, *supra* note 15, at 532.

[66] Emily Kadens & Ernest A. Young, *How Customary is Customary International Law*, 54 WM. & MARY L. REV. 885, 906 (2013).

[67] *Id.* at 911.

[68] *Id.* at 906.

[69] Anthony Carty, *Doctrine Versus State Practice*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 974 (Bardo Fassbender & Anne Peters eds., 2012).

[70] Josef L. Kunz, *The Nature of Customary International Law*, 47 AJIL 662, 663 (1953) (emphasis added). *See also* Jean d'Aspremont, *The Idea of 'Rules' in the Sources of International Law*, 84 BRIT. Y.B. INT'L L. 103, 109–10 (2014).

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discourse" in the literature, eventually finding none of them satisfactory.[71] What is interesting is that in identifying six different meanings of the term "source," D'Amato did not include its most obvious meaning, namely the social, cultural, and political roots of CIL. He mentioned this meaning only while considering attempts to "solve the problem" of different meaning of "source." In this context, D'Amato cited an essay of Judge Gerald Fitzmaurice who spoke of "material" source as "historical," "indirect," and "remote,"[72] but proceeded to dismiss the need to take cognizance of them. It can be surmised that D'Amato was uneasy about tracing "formal" sources to "material" sources, as pursuing this course of action—the Cold War was still on—inexorably led to the conclusion that CIL, and therefore international law, had historically served the interests of western imperialism. But there is no escaping the conclusion that "formal" and "material" sources of CIL are intimately related to the European social, cultural, and political order that shaped and was in turn shaped by the colonial project.[73] As J. Patrick Kelly has noted, customary norms are the product of societies that "share common values, history and tradition. . . . It is law from below, not hierarchical law imposed from above."[74]

A few more words may be said on the genesis of CIL to substantiate the hypothesis advanced above. There is general agreement that the *modern* doctrine of CIL originated in the nineteenth century. According to Yasuaki Onuma, "[u]ntil the late nineteenth century, customary international law occupied only a marginal place."[75] Carty likewise notes that "[f]rom Suarez to Bynkershoek to Vattel, there was no concept of general customary law."[76] In fact, in his view, "there was no concept of state practice at all, as we now understand it."[77] According to Carty, "the notion of state practice is an invention of international legal doctrine in the course of the 19th century."[78] The reason for the absence of the notion of "state practice" before that can be traced to natural law thinking that dominated the discipline.[79] It did not call for extensive reference to the practice of states; colonialism was justified

[71] D'Amato wrote: "[O]ne has only to look at the numerous definitions [of 'sources'] that have been advanced from time to time to see the ambiguities involved in this term. Among the definitions put forth in the literature, we might discern no fewer than six planes of discourse. On the first plane, one might think of 'sources' of law such as nature, reason, morality, the mind of men, the Deity, the wise elders, and so forth. Second, the source of law might lie in tradition, habit, policy, necessity, or convenience. A third plane would consider sources such as legislation, judicial teachings, treaties, custom, diplomatic correspondence, or the writings of publicists. A fourth interpretation of the term 'sources' might refer to the physical items containing the 'law,' such as books, libraries, microfilms, letters, journals, newspapers, and the like. Fifth, one might argue that the law stems from judges, decision-makers, diplomats, and other authoritative personnel. Finally, a psychological refinement of the preceding category would find sources of law in the psychology of judges, the 'subjectivities' of decision-makers, or the 'shared expectations' of people in a position of power or authority." D'Amato, *supra* note 44, at 264–65.

[72] *Id.* at 265.

[73] *Id.*

[74] Kelly, *supra* note 57, at 464.

[75] Yasuaki Onuma, A Transcivilizational Perspective on International Law 220 (2010). Carty observes that "[a]mong the eighteenth-century positivists it is possible to find a theory of general custom. However, it is lacking a psychological element. This is because custom was understood merely in the sense of a practice which gave rise to a presumption as to future intentions. There was no duty as such to adhere to a customary practice." Carty, *supra* note 25, at 28.

[76] Carty, *supra* note 69, at 974.

[77] *Id.*

[78] *Id.* at 972. Therefore, Carty writes, "[t]here is no comprehensive history of the concept of customary international law." *Id.* at 977.

[79] *Id.* at 977.

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through cogitations on secular natural law.[80] The genesis of CIL can therefore be traced to the emergence of the positivist method in the nineteenth century.[81] However, to understand the relationship between the positivist method and a particular conceptualization of CIL, as also the CIL rules that emerged in the period, reference needs to be made to two other developments.

First, as Milos Vec points out, it is in the nineteenth century that the idea of European states forming a legal community was advanced: "Lawyers frequently mentioned the common history and Christian religion of the continent, the existing foundations of treaties and *the shared idea of legal consciousness* and mutual recognition as common basis of these countries to form 'the international society.'"[82] It is pertinent to recall here that the historical school of law, which influenced the development of the doctrine of CIL, had in the domestic context "rejected any idea that a standard of conduct could be imposed from without. It had to flow organically from within a national culture."[83] In the instance of international law, it meant that the standard of conduct which counted as practice had to spring from organic European culture. To be sure, there was and is no monolithic European "culture." But one may legitimately speak of a hegemonic culture (in the past or the present) and "of legal categories and techniques as *generative* of certain kinds of social, political, and epistemological realities."[84] At the core of organic European culture in the colonial era was the belief in the civilizing mission. It involved the marriage of expanding capitalism with orientalism. To put it differently, imperialism entered a new phase in the nineteenth century that both strengthened European legal consciousness and spurred the development of CIL to facilitate "new" imperialism.[85]

Second, it was believed at this time that "Europe with its customs and political and cultural relations were at the theoretical centre of the emergence of international law."[86] A key question that came to be considered was which nations were to be counted as being part of this international legal community.[87] The Treaty of Paris 1856 "shifted the criteria of inclusion from 'European' to 'civilized,'"[88] a distinction that also came to inform the doctrine of CIL.[89] Thus, the positivist method, and a particular understanding of CIL, was given life in a particular cultural and political milieu that excluded reference to the practice of non-European states which were classified as "uncivilized." To put it differently, the doctrine of CIL came to be embedded in a regional legal consciousness anchored in the distinction between civilized and uncivilized states.

[80] ANGHIE, *supra* note 17, at 13–32.

[81] ONUMA, *supra* note 75, at 221–22.

[82] Milos Vec, *From the Congress of Vienna to the Paris Peace Treaties of 1919*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, *supra* note 69, at 654, 658 (emphasis added).

[83] CARTY, *supra* note 25, at 33. Pierre Legrand observes: "A rule does not have any empirical existence that can be significantly detached from the world of meanings that defines a legal culture; the part is a synthesis and expression of the whole: it resonates." Pierre Legrand, *What "Legal Transplants"?*, *in* ADAPTING LEGAL CULTURES 59 (David Nelken & Johannes Feest eds., 2001).

[84] Annelise Riles, *Comparative Law and Socio-legal Studies*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 808, 776–812 (Mathias Reimann & Reinhard Zimmermann, Online Edition).

[85] CHIMNI, *supra* note 17, at 486–89.

[86] Vec, *supra* note 82, at 668.

[87] *Id.* at 658.

[88] *Id.*

[89] ANGHIE, *supra* note 17, at 54.

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The argument that the "formal" and "material" sources of CIL cannot be separated can also be substantiated by reference to the intellectual resources that contributed to its conceptualization. The doctrine of CIL has its basis in Roman law and European legal philosophy, legal sociology, and legal psychology of the late nineteenth and early twentieth century.[90] Despite their influence, these sources have not been seriously explored, forget any "serious attempt. . . to identify the ambiguities and contradictions in these theories."[91] When these do come to be referred, it is only "in support of the *status quo*."[92] Of particular significance in the conceptualization of the traditional doctrine of CIL was Francois Gény's work, which is said to have identified state practice and *opinio juris* as the constituent elements of a custom.[93] His work was entrenched in natural law with positive law treated "as merely a body of rules adapted to the exigencies of time and place for the purpose of achieving in actual operation the balance of conflicting interests which is the essence of justice."[94] According to Gény, "[o]nly natural law . . . furnishes the indispensable basis for a truly scientific elaboration of positive law."[95] It was of course European culture that informed the meaning of natural law and was the backdrop in which CIL was approached.[96] The French legal sociologist Leon Duguit reinforced this understanding as he derived the obligatory nature of international law "from an international legal consciousness that certain rules are indispensable for the continued existence of the international community."[97] It is true that whereas Duguit relied "on the fact of 'social solidarity' in order to build a system of natural law upon that single concept," Gény vigorously asserted that "a single principle, general and abstract, cannot contain the rich variety of rules necessary adequately to direct social life . . ."[98] But both invoked the importance of natural law that carried background assumptions that helped determine relevant state practice and *opinio juris*, or more specifically what is meant by state practice and *opinio juris*. These were assigned meaning in a Eurocentric world.

The meaning of both state practice and *opinio juris* were sought to be changed by postcolonial states. In the face of their challenge, the old distinction between civilized and uncivilized states could no longer be sustained. The turn to *opinio juris* among proponents of *modern CIL is in many ways a response to the expanded community of states which makes* dependence on state practice problematic, necessitating reliance on ethical reasoning. The argument has larger resonance as well. John Tasioulas, for instance, argues that the most legitimate interpretation of state practice and *opinio juris* is partly a matter of which interpretation has the "greatest ethical appeal . . . determined by reference to the ethical values [international law] is intended to secure . . . [which] include peaceful co-existence, human rights, and

[90] According to Strydom, the sources include: "Roman law concepts of *consuetudo* and *consensus*; Von Savigny's theory of the collective consciousness; the contributions of Francois Gény and the legal sociologists on the sources of the law; and Ernst Bierling's psychological acceptance theory." H. A. Strydom, *Customary International Law: The Legacy of the False Prophets*, 27 COMP. & INT'L L.J. S. AFR., 277, 276–313 (1994).

[91] *Id.* at 277 (emphasis in original).

[92] *Id.*

[93] Kammerhofer, *supra* note 57, at 534. *See also* Peter Benson, *François Gény's Doctrine on Customary Law*, 20 CANADIAN Y.B. INT'L L. 267 (1983).

[94] Thomas J. O'Toole, *The Jurisprudence of François Gény*, 3 VILLANOVA L. REV., 460, 455–68 (1958).

[95] Cited by O'Toole, *id.* at 461.

[96] Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 L. & INEQ. 340, 323–71 (1997).

[97] Strydom, *supra* note 90, at 290.

[98] O'Toole, *supra* note 94, at 461.

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environmental values, among others."[99] While the turn to ethics signals a return to secular natural law, it threatens to expose the historical roots of CIL, which were embedded in the European imagination of an international legal order.[100] It is often forgotten that positivism has no foundations to stand on if the background assumptions of European natural law traditions are taken away. In as much as imperialism was central to the shaping of modern international law, the convenient mix of positivism and natural law arrived at in different historical periods by western legal scholarship reflect its different phases. It is therefore no accident that what has been common since the nineteenth century is that subaltern actors either do not speak or are not assigned adequate weight. But the problem that realist critics of modern CIL have is that it is "a dangerously manipulable, unbearably light source of international norms."[101] But this view disregards the fact that CIL has a "utopian potential,"[102] which can legitimize the global capitalist system in times of system transformation and in the process contribute to "the generation of genuinely communal norms in international law."[103] In other words, modern CIL can help address a range of divides that threaten the equilibrium of the system through appropriate developments in international law. These include the race and gender divides. The short point is that no legal system can secure its legitimacy without projecting its utopian desires. This is the role modern CIL plays through creating norms that hold out the possibility of realizing a capitalist utopia on a global scale. It is another matter that the move to modern CIL undermines the separation of "formal" and "material" sources that helps obscure the social and historical contexts in which rules of CIL emerge and in the final analysis become the carriers of imperial values and understandings.[104]

A final point that needs to be considered with respect to the historical evolution of CIL is the significance of CIL in the nineteenth century. It is often said that the expansion of international law in the nineteenth century took place through treaties because "customary law was not an adequate instrument for the emergence of new principles and rules that were needed under the historical-teleological premise."[105] But while a "treaty making revolution" may have taken place in the nineteenth century,[106] CIL continued to play a crucial role in the creation of rules for the regulation of activities of European states. Thus, the law of the sea, critical to the colonial project, was almost entirely a product of CIL: the doctrine of freedom of the seas, innocent passage, and contiguous zone became its integral part in the nineteenth

[99] John Tasioulas, *Customary International Law and the Quest for Global Justice*, *in* THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 325–26, 307–35 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2009).

[100] Strydom, *supra* note 90, at 276.

[101] Hilary Charlesworth, *The Unbearable Lightness of Customary International Law*, 92 ASIL PROC. 44, 44–47 (1998). *See generally* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413 (1983).

[102] Charlesworth, *supra* note 101, at 44.

[103] *Id.* at 45.

[104] Another example of this is when Bruno Simma and Phillip Alston contend that "material . . . [be] not equated with State practice but . . . [be] rather seen as a variety of ways in which moral and humanitarian considerations find a more direct and spontaneous 'expression in legal form.'" Cited in Lillich, *supra* note 32, at 16. The reference is to Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom,* Jus Cogens, *and General Principles,* 12 AUS. Y.B. INT'L L. 82, 106 (1992). Lillich criticized the two for in the end they tend to reveal the cultural and political sources of customary international human rights law (CIHL). Lillich would on the other hand like to present these as reflecting the practices of states and tribunals.

[105] Vec, *supra* note 82, at 669.

[106] E. Keene, *The Treaty-Making Revolution of the Nineteenth Century*, 34 INT'L HIST. REV. 475–500 (2012).

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century.[107] The same can be said about prize law. David Bederman writes that "[b]y 1815, there had developed a highly elaborate body of jurisprudence dealing with maritime captures, largely administered by domestic prize courts and applying an international customary law on the subject."[108] The situation was no different when it came to the international law relating to the acquisition of territory and law of state responsibility.[109] There was also "a permissive custom of intervention" at this time.[110] In short, the genesis of the doctrine of CIL can be traced to the emergence of Europe as a legal community, common European values, the positivist method, and the needs of nineteenth century imperialism.

Therefore, the ILA and ILC attempts at separating the "formal" from "material" sources of CIL cannot be merely attributed to the pragmatic nature of the exercise. They are, objectively speaking, attempts to veil the fact that the concept of CIL is a carrier of particular epistemology, culture, and values that marginalize third world voices. The doctrine of CIL has deep roots in western culture that define both the *external element* of state practice and the *internal element* of *opinio juris*.[111] To put it differently, the distinction between "formal" and "material" sources underplays the role of the world of ideas and beliefs in the formation of CIL, even as power plays a critical role. However, before turning to the subject of the "dominance" and "hegemony" of western ideas in the postcolonial era, and their role in the formation of modern CIL, it is important to note the fact and implications of the relative non-availability and neglect of the state practice of third world nations. It aggravates the distinction between "formal" and "material" sources of CIL.

IV. Unavailability and Neglect of Practices of Third World States

In determining the emergence of a CIL rule, the evidence of state practice to be considered has been democratized in principle in the postcolonial era, but for a variety of reasons it is far from being the case in practice.[112] There are a number of issues that call for discussion with respect to the absence and neglect of the state practice of third world nations.[113]

[107] David J. Bederman, *The Sea*, *in* The Oxford Handbook of the History of International Law, *supra* note 69, at 359, 372–76.

[108] *Id.* at 371.

[109] *See generally* Brownlie's Principles of Public International Law, ch. 9, 25 (James Crawford ed., 2012).

[110] Robert Kolb, *The Protection of the Individual in Times of War and Peace*, *in* The Oxford Handbook of the History of International Law, *supra* note 69, at 317–37.

[111] As Carty observes of the nineteenth century formulation of custom, "[c]ustom has two essential stages, legal consciousness, as the inner ground, and then external conduct and practice." Carty, *supra* note 25, at 32.

[112] The ILC has attempted to address this problem in various ways. For a summary of the ways in which "making the evidence of customary international law more readily available" has been treated, see ILC Fourth Report, *supra* note 62, at 13–19.

[113] Here we are not concerned with other problems concerned with determining the meaning of state practice. For instance, the distinction between what a state says ("verbal acts") and does ("physical acts") has been the subject of much debate with some stressing the relevance of latter over the former and others otherwise. Kammerhofer, *supra* note 57, at 526. The ILC Draft Conclusion 6(1) states that: "Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction." Draft Conclusions, *supra* note 3, at 2.

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First, there is the general lack of availability of state practice of third world nations.[114] This was a concern expressed by the ILC as early as 1949–1950.[115] The situation has not changed substantially, even seven decades later. As a recent ILC Report laments, "[s]o far there has been only limited response to the Commission's request to States" for relevant materials.[116] The problem is that the practice of third world states is, in many cases, not systematically assembled and published, making it difficult for it to be furnished or taken into account. The reason for this state of affairs can be traced to, among other things, the lack of human and financial resources to gather and disseminate legally relevant practice.[117] It is also perhaps the case that the practice of active documentation and preparation of digests is part of some cultures more than others, revealing once again that the idea of "formal source" is far from being neutral. The issue of language is also pertinent for translation of calls for vast resources to be expended. In any event the historic centrality of western state practice in the formation of rules of CIL continues.[118] As Onuma observes, "[l]eading Western international lawyers chose the practice of a few, yet powerful and influential, Western States, and regarded it tacitly or explicitly as representative of general practice of States."[119]

Kelly likewise writes that "[t]he analysis of state practice in the literature of the West, particularly among Anglo-American writers, is based almost exclusively on Western practice. The practices and attitudes of Japan, China, and the many nations of Africa, Asia, and Latin America are virtually ignored in the Western literature."[120] According to him, "much of CIL is determined by the . . . practices of a minority of states."[121] Furthermore "[j]udges and writers only rarely engage in a detailed inquiry into state practice."[122] But it is no longer acceptable to determine a rule of CIL on the basis of the practice of a few western nations. As Judge Manfred Lachs observed in his dissenting judgment in the *North Sea Continental Shelf* case:

[114] In the instance of western nations, state practice is collected systematically. Thus, for instance, there is the *Digest of United States Practice in International Law*, which is produced each year by the State Department's Office of the Legal Adviser. Editions since 1989 are available at https://www.state.gov/s/l/c8183.htm. It may however be noted that these digests do not address the complicated theoretical questions with regard to the identification of CIL rules. *See also* Galindo & Yip, *supra* note 18, at 258.

[115] ILC First Report, *supra* note 28, at 4.

[116] *Id.* at 49.

[117] MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 153 (1999). In fact, "[o]nly the more affluent States publish digests of their own practice of relevance to international law." *Id.*

[118] According to Guzman, "[a]s a practical matter . . . the evaluation of state practice is fairly ad hoc and heavily favors powerful countries with easily accessible records in a commonly spoken language." GUZMAN, *supra* note 12, at 186. In the past, "[t]he norms characterized as 'customary' were based on the limited practice and *opinio juris* of a small number of the Western Great Powers." ONUMA, *supra* note 75, at 135 (emphasis in original).

[119] ONUMA, *supra* note 75, at 226. Onuma cites Oscar Schachter to the effect that "[a]s a historical fact, the great body of customary international law was made by a remarkably few States." *Id.* at 226–27. In the circumstances "[t]here is a tendency to prematurely conclude that one's policy preferences, particularly when shared by other Western societies, have become customary norms. In making these assessments, Western writers virtually ignore the domestic policies and perspectives of non-Western cultures." Kelly, *supra* note 57, at 468.

[120] Kelly, *supra* note 57, at 472.

[121] *Id.* at 519.

[122] *Id.* at 476. He argues that "[t]he International Court of Justice, when basing a decision on CIL, . . . frequently avoids a detailed empirical inquiry into either element." . . . "Instead, the Court deduces norms that it terms customary from treaties, general principles of law: U.N. resolutions, analogous legal issues and other non-inductive sources." *Id.*

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> [I]n the world today an essential factor in the formation of a new rule of general international law is . . . that States with different political, economic and legal systems, States of all continents, participate in the process. No more can a general rule of international law be established by the fiat of one or of a few, or—as it was once claimed—by the consensus of European States only. . . .[123]

Kelly therefore concludes that "the CIL process lacks procedural legitimacy. . . . Few nations participate in the formation of norms said to be customary. The less powerful nations and voices are ignored."[124] In short, a deep democratic deficit characterizes the formation of CIL. This is particularly the case in courts of advanced capitalist nations. As Ryan Scoville has concluded in a recent article titled "Finding International Customary International Law," in U.S courts:

> International and federal common law have long held that CIL depends upon the existence of both general and consistent state practice and *opinio juris*. Yet citation patterns suggest that federal courts do not follow this doctrine. Courts depend heavily on portrayals of CIL in other U.S. government sources, rarely consider direct evidence of foreign state practice, *focus almost exclusively on the advanced democracies of the West* even when they do look abroad, and cite to Western academics who exhibit a similar tendency to focus on the laws and policies of the West. In short, federal courts are not applying customary international law in any strict doctrinal sense. The *norms they have framed as CIL are domestic and Western norms* that simply may or may not align with the practices and views of a clear majority of states.[125]

This situation is disturbing and needs to change in a world in which the principle of sovereign equality of states is a foundational norm of inter-state relations.

Second, in weighing state practice its representativeness is evaluated in a manner that reduces the significance of the practices of non-western states.[126] Thus for instance the ILA Final Report observes that "[p]rovided that participation is sufficiently representative, it is not normally necessary for even a majority of States to have engaged in the practice, provided that there is no significant dissent."[127] But the lack of availability and accessibility of state practice of third world nations means that the record of dissent of majority of states may not simply be available. The meaning of "sufficiently representative" can then come to be equated with the practice of powerful western nations (and at best the practice of a few non-western nations). This can also be seen from the idea of "representation" that the ILA deployed:

> The criterion of representativeness has . . . a dual aspect—negative and positive. The *positive* aspect is that, if all major interests ("specially affected States") are represented, it is not essential for a majority of States to have participated (still less a great majority, or all of

[123] North Sea Continental Shelf Cases, *supra* note 55, Dissenting Opinion of Judge Manfred Lachs, at 228.
[124] Kelly, *supra* note 57, at 453.
[125] Ryan M. Scoville, *Finding Customary International Law*, 101 Ia. L. Rev. 1893, 1948 (2016) (emphasis added).
[126] *See* Galindo & Yip, *supra* note 18, at 262–63.
[127] ILA Final Report, *supra* note 2, at 25.

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> them). The *negative* aspect is that if important actors do *not* accept the practice, it cannot mature into a rule of general customary law.[128]

The ILA Report then goes on to observe:

> The fact that the test is not purely quantitative may appear undemocratic. But leaving aside the question what is meant by "democratic" in this context, it should be noted that customary systems are rarely completely democratic: the more important participants play a particularly significant role in the process. And certainly, the international system as a whole is far from democratic.[129]

This is in many ways an extraordinary statement coming from the ILA.[130] While couched in neutral language, the idea of "representation" is essentially defined in relation to the criteria of power as against that of (procedural) legitimacy. While other bodies and scholars may not make such a confession it is always the underlying premise in identifying CIL.[131]

Third, at a time when, at least in principle, the practice of a predominant majority of states needs to be given due weightage, a persistent objector rule has been invented to allow powerful states an escape route from particular rules of CIL.[132] Thus, ILC Draft Conclusion 15(1) of 2016 reads:

> Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.[133]

It needs to be stressed that the persistent objector rule is of recent origin. As Kelly points out:

> The modern universal theory had no persistent objector principle until recently. Latin American nations were considered bound to CIL principles in the late 19th century and throughout the 20th century, including the disputed law of state responsibility, despite continuous objections by a large number of nations. This era might better be characterized as one of domination over the expressed will of many nations.[134]

[128] *Id.* at 26.

[129] *Id.*

[130] *Id.* It observes that "in this regard, customary international law is at least in touch with political reality."

[131] Indeed, as one researcher observes, "[t]here is an unspoken assumption that the practices, theories, and perspectives of the United States and the United Kingdom, each of which have been paramount powers in distinctive periods of international law, have preeminent weight. The practices of non-Western cultures are just not taken seriously." Kelly, *supra* note 57, at 473.

[132] *Id.* at 515–16. Kelly writes: "The rise of the persistent objector principle is testament to the fact that the powerful states will not accept norms with which they do not specifically agree. CIL appears to be consensual for some and universal for others." *Id.* at 517. But the SR has noted that: "The inclusion of a draft conclusion on the persistent objector rule was supported by almost all delegations *who addressed the matter* in the Sixth Committee, indicating widespread agreement that the rule does form part of the corpus of international law." ILC Fourth Report, *supra* note 62, para. 27 (emphasis added). *See* Galindo & Yip, *supra* note 18, 266–68.

[133] Draft Conclusions, *supra* note 3, at 4. Draft Conclusion 15(2) clarifies that "[t]he objection must be clearly expressed, made known to other States, and maintained persistently." *Id.*

[134] Kelly, *supra* note 57, at 511. He further writes: "If the persistent objector principle were to become part of CIL theory, it must be demonstrated that the principle has been generally accepted by states. However, this has not been the case and there is no indication that non-Western states have accepted this fundamental change in the structure of international law." *Id.* at 512.

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The rule of persistent objector was developed to safeguard the concerns of western capitalist powers after the beginning of the Cold War. According to Michael Byers, the ICJ first endorsed the rule during the initial years of the Cold War in the 1950 *Asylum Case*.[135] But there was some concern that the rule may be invoked by postcolonial states in IIL, which embodies core interests of powerful states. Michael Reisman's take on the rule of persistent objector is in that instance interesting. Noting that "the formation of customary international law does not require the inclusion of all States nor complete uniformity in State Behavior," he writes:

> A concomitant of this phenomenon is the erosion of the "persistent objector" rule. While it is recognized that a State may, by persistent objection during the formation of a customary rule, succeed in exempting the application of the rule to itself, "with the increasing emergence of communitarian norms, the *incidence* of the persistent objector rule may be limited." Thus, even a persistent objector may not be able to prevent the application of the customary rule to itself.[136]

This is the classic "heads I win and tails you lose" situation. It can be safely presumed that in a field other than IIL it could be invoked by powerful states as promoting democratic lawmaking in a sovereign state system. It can thus be concluded that "[t]he persistent objector principle, far from being a integral part of CIL theory, is a new concept and one of doubtful pedigree."[137] By default it does not apply in the instance of third world States as these do not diligently follow claims about the emergence of a rule of CIL.[138] It is true that the growing number and presence of international organizations allows non-western states to record their vote on many issues, but it is most often not accompanied by any explanation.[139] This reality compounds the fact that in the postcolonial era, the newly independent states did not have the opportunity to contest prior CIL rules. These states were, in the words of Judge Bedjaoui,

[135] BYERS, *supra* note 117, at 180. Galindo & Yip observe that in that case, "the Court only considered the issue in obiter dictum and after acknowledging that the customary norm in question did not exist at all." Galindo & Yip, *supra* note 18, at 267.

[136] W. Michael Reisman, *Canute Confronts the Tide: States Versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 30 ICSID REV. 616, 621 (2015) (emphasis in original).

[137] Kelly, *supra* note 57, at 508. In D'Amato's well-known book on customary international law published in 1971 the term "persistent objector" does not appear in the index. He instead uses the term "protest." D'AMATO, *supra* note 44, at 98. According to D'Amato, "most states most of the time clearly do not issue notes of protest to the actions of other states that they regard as illegal under international law. Foreign offices which do so would have very little time for little else." *Id.* at 99. Elias writes that "[s]ince the publication of the first edition of Brownlie's *Principles of Public International Law* in 1966, the term 'persistent objector' has become a term of art in international law." Olufemi Elias, *Some Remarks on the Persistent Objector Rule in Customary International Law*, 6 DENNING L.J. 37 (1991). In the first edition of the book, Brownlie did not cite a single authority in support of the persistent objector rule. The rationale for the rule according to him was "the fact that ultimately custom depends on the consent of states." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8 (1966). For a skeptical view, see also Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1–24 (1985).

[138] Galindo & Yip observe that "the structure of this legal doctrine does not really do much for developing countries, for two reasons: the impossibility of recently independent states to question customary rules developed during the colonial period and the difficulty to object to a rule during the process of its formation." Galindo & Yip, *supra* note 18, at 268.

[139] A critical gap here is the fact that the privilege of objections is not extended to social movements or activities of global civil society. Their objections to a rule of CIL are not considered relevant.

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"victim of real 'legal venality,' having had to pay ransom or tribute for its entry into the national community."[140] Western scholars justified the situation by arguing that a newly independent state, "by participating in the customary process and relying on customary rules, is implicitly consenting to that process as well as to all of the customary rules which have previously been developed through it."[141] Even the ILA Final Report observed that "newly-independent States or those new to a particular activity are bound by existing rules of customary law. Although the contrary view is occasionally found in the academic literature, this proposition has not been seriously contested by States which fall into either category."[142] The reality in fact was that the third world states had "not undertaken a systematic reevaluation of international customary norms."[143] To correct the situation, Guzman proposes the following rule for the future: "A state should be permitted to object to a rule of CIL at the time of the state's formation. An objecting new state should be treated in the same way as a persistent objector."[144] But the proposal comes too late in the day.

Fourth, there is the problem of inaccessible state practice flowing from "the closure of contemporary archives of States."[145] While this phenomenon admittedly cuts across all states, it impacts third world states more given the general lack of availability of state practice. The reason for the lack of transparency, as Carty points out, is "the distrust that nations have of one another," and, one may add, states of their people, preventing "the disclosure of state intentions and true underlying state practices."[146] Additionally, as Carty goes on to observe, "[d]octrine persists pragmatically with unscientific constructions of this practice, as does international jurisprudence."[147] There is the added problem that classical realists like Hans Morgenthau drew attention to in relation to political treaties[148]—it is that even when disclosed it is difficult to know what "state practice" a political treaty represents, as its meaning is often concealed through the use of ambiguous phraseology.[149]

Fifth, among the materials to be consulted in identifying rules of CIL are "views of publicists, in particular as to the general approach to the formation and evidence of customary international law."[150] ILC Draft Conclusion 14 of 2016 states in this regard that "[t]eachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law."[151] In the past, western writers dominated the process of the creation of "customary" international law.[152] Therefore, during the course of discussions in the ILC, some members stressed that "the selection of relevant

[140] Bedjaoui, *supra* note 24, at 101.
[141] Byers, *supra* note 117, at 77.
[142] ILA Final Report, *supra* note 2, at 24.
[143] Bedjaoui, *supra* note 24, at 135.
[144] Guzman, *supra* note 27, at 173.
[145] Carty, *supra* note 69, at 981. The SR has also noted that: "despite the great mass of materials that is now at hand, coverage of State practice remains limited given that many official documents and other indications of governmental action are still unpublished and thus unavailable." ILC Fourth Report, *supra* note 62, para 46.
[146] Carty, *supra* note 69, at 995.
[147] *Id.* at 995.
[148] Hans Morgenthau, *Positivism, Functionalism and International Law*, 34 AJIL 260 (1940).
[149] *Id.*
[150] ILC First Report, *supra* note 28, para. 47.
[151] Draft Conclusions, *supra* note 3, at 4.
[152] Onuma, *supra* note 75, at 135.

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writings" should not amount to "preference for writers from specific regions but had to be universal."[153] In response, the Special Rapporteur accepted that "the writings of jurists representing different legal systems of the world needed to be reflected in the commentary."[154] The problem once again is that few third world scholars have expressed their views on the subject; the community of international lawyers remains small with poor access to necessary materials. What is more, since third world scholars have been more concerned with the role of CIL in inhibiting reforms in the international legal system, these writings are not, following the distinction between "formal" and "material" sources, considered by the ILC to pertain to the identification of CIL rules. This perhaps explains why Judge Bedjaoui's name does not appear in the extensive references contained in the ILC First Report of Special Rapporteur.[155] In lamenting that rules of CIL were slow to emerge where the interests of weak actors are concerned, Judge Bedjaoui apparently addressed "material" sources.[156] In short, there is very often a certain artificial commonality in the opinions gathered by the ILC on the issue of identification of CIL.

Sixth, as will be touched upon in Section VI, while discussing elements that could constitute a postmodern doctrine of CIL, resolutions of qualifying international organizations are not given adequate weight and practices of global civil society of critical interest to third world states not taken into account.[157]

Finally, it may be noted with respect to state practice, that in determining CIL, "the main method" employed by the International Court of Justice (ICJ) "is neither induction nor deduction but, rather, assertion."[158] In Talmon's view, deductive reasoning is used to "replace or lower the standard of inductive evidence or establish a burden of proof necessary for the inductive method to reach a result."[159] This move is facilitated by the fact that "[t]he inductive method is as subjective, unpredictable and prone to law creation by the Court as the deductive method."[160] To be sure, the ICJ's choice of a particular method is not deployed to reach predetermined end results.[161] But the problem is that the inductive and deductive reasoning used reflects western state practice and western vision of international legal order

[153] Int'l Law Comm'n, Rep. on the Work of Its Sixty-Seventh Session, UN Doc A/70/10 (2015).

[154] *Id.*, para. 103.

[155] Among the bibliography listed in the first instance, only the name of Georges Abi-Saab belongs to the Global South. Indian case law is not considered in the report on the subject. *See* Annex A, *supra* note 36.

[156] BEDJAOUI, *supra* note 24.

[157] *See* Section VI *infra*.

[158] Talmon, *supra* note 22, at 419. Talmon contends that the ICJ combines the use of inductive and deductive methods to arrive at a norm of CIL. He observes that, "[i]nduction and deduction are not two competing or opposing monolithic analytical methods but, in practice, are intermixed." *Id.* at 442.

[159] *Id.* Talmon notes that "[t]he deductive method is not an alternative to the inductive method but, rather, is complementary to it and may be applied whenever the Court cannot ascertain any rules of customary international law by way of induction." *Id.* at 423. Talmon then proceeds to identify three different methods of deduction used by ICJ: "normative, functional and analogical deduction." *Id.* "First, there is normative deduction. New rules are inferred by deductive reasoning from existing rules and principles of customary international law . . . . Second, there is functional deduction. The ICJ deduces rules from general considerations concerning the function of a person or an organization. . . . Third, there is "analogical deduction." *Id.* at 423, 425–26.

[160] *Id.* at 443. Talmon identifies four situations in which the method of induction is "impossible to use." "[F]irst, state practice is non-existent because a question is too new." "Second, state practice is conflicting or too disparate and thus inconclusive." "Third, the *opinio juris* of states cannot be established." "Fourth, there is a discrepancy between state practice and *opinio juris*." *Id.* at 422.

[161] *Id.* at 443.

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respectively. It means that while the ICJ does not formally distinguish between "traditional custom" identified through an inductive process and "modern custom" derived by a deductive process,[162] it often does so in practice. It does so using western understandings of what is good for the international community.

To sum up, in view of the numerous problems and obstacles in considering the state practice of third world nations, it may be asked with Kadens and Young as to "whether a legal theory designed for one type of society [i.e., European society] can appropriately be translated to a markedly different context."[163] One cannot but agree with them when they argue that while "[w]ithin a small and close-knit community, a form of customary law derived from the community's sense of justice may be accepted as legitimate" this may not hold true when "we extend the sphere of that law's application to the international 'community' at large" as it may not possess "shared values or a broader sense of reciprocity."[164] The experience has been that the factors of power and interest have shaped CIL more than the existence of a sense of community. The idea of an "international community" is as yet "a juridical fiction."[165] In such a situation the separation of "formal" from "material" sources of CIL has meant that a regional legal theory shaped in the west continues to be applied as a universal theory of CIL. The sense of justice that prevails is best termed global capitalist justice, with much concern for the interests of advanced capitalist states and little consideration for third world states. However, can modern CIL with its progressive core help promote the goal of justice to third world states and peoples? Can it bring about system change and usher in a post-capitalist global society? Can it overcome the barrier of differential distribution of power?

V. Modern CIL: Role of First World Ideas, Beliefs, and Systemic Interests

For their part, Goldsmith and Posner readily concede that "[t]he content of CIL seems to track the interests of powerful nations."[166] According to them, some of what is called CIL is better thought of as arising from "*coercion*, where a powerful state (or coalition of states with convergent interests) forces or threatens to force other states to engage in acts that they would not do in the absence of such force."[167] Goldsmith and Posner conclude that a careful reading of the historical record reveals that most instances of supposed cooperation or law-like behavior "are best explained as coincidence of interest or successful coercion."[168] In fact, as Oscar

[162] *Id.* at 430, 443.

[163] Kadens & Young, *supra* note 66, at 907.

[164] *Id.* at 912. According to Kadens & Young, "[t]he community problem plagues any system of law that purports to operate at a level that lacks either a shared sense of political and cultural identity or a common set of democratic institutions." *Id.* at 913. In fact, "[h]istorical experience suggests that the success of such law may depend on a much thicker set of communal ties than the abstract theories of the jurists might suggest. The prospects for international custom must be assessed in light of actual experience, not just theory." *Id.* at 913–14.

[165] Gleider I. Hernandez, *A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community,'* 83 Brit. Y.B. Int'l L. 59, 13–60 (2013).

[166] Posner & Goldsmith, *supra* note 20, at 1114.

[167] *Id.* at 1114–15.

[168] *Id.* at 1177. Even a mainstream textbook such as Malcolm Shaw's *International Law* concedes the role of power: "[I]t is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states. . . . Law cannot be divorced from politics or power and this is one instance of that proposition." Malcolm Shaw, International Law 79 (6th ed. 2007). *See also* Galindo & Yip, *supra* note 18.

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Shachter has observed, "[a]s a historical fact, the great body of customary international law was made by remarkably few States."[169] Thus, for instance, in the nineteenth century, the U. K. shaped law of the sea and the law of prize almost singlehandedly.[170]

Yet it would be a mistake to believe that power is the only relevant factor in the emergence of CIL. The role of ideas and beliefs is significant. According to Byers, "[l]ike all institutions and the international system itself, the process of customary international law is nothing but a set of ideas, no matter how tangible the consequences of those ideas may be."[171] Similarly, Guzman speaks of CIL simply as a set of beliefs.[172] These ideas and beliefs have historically been those of advanced capitalist states that have dominated and controlled the workings of the international system.[173] It was seen in the discussion of colonial origins of CIL that ideas and beliefs help naturalize and validate particular assumptions and preferences that are eventually encapsulated in CIL. Their role is critical today, for unlike in the nineteenth century when the U.K. could do so, even a superpower like the United States alone cannot give rise to CIL.[174] A CIL norm is more likely to emerge when there is a coalition of powerful states with "convergent interests" manifesting relevant state practice. This generally happens when states at similar levels of development, such as the advanced capitalist nations, pursue common goals. But in a greatly expanded community of states in the postcolonial era even a handful of powerful states cannot create CIL. They have to convince other states to accept a particular norm as being of value in realizing common interests.[175] For a CIL rule to emerge, it has to be voluntarily accepted by a majority of states, or at least not be actively opposed by them. While the element of power plays an important role in this process, it is also a function of the dominance or hegemony of certain ideas and beliefs. These can sometimes come to be rapidly entrenched, giving rise to "instant" CIL.[176] It is only a combination of power and dominant or hegemonic ideas and beliefs that carry the day.

In the instance of short-term interests, it is perhaps more accurate and analytically useful to use the word "dominance" of certain ideas and beliefs as these may not be the subject of an

[169] Oscar Schachter, *New Custom: Power,* Opinio Juris*, and Contrary Practice*, *in* THEORIES OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOR OF KRZYSZTOF SKUBISZEWSKI 531, 536 (Jerzy Makarcyk ed., 1996). He goes on to note that "[o]nly the States with navies—perhaps 3 or 4—made most of the law of the sea. Military power, exercised on land and sea, shaped the customary law of war and, to a large degree, the customary rules on territorial rights and principles of State responsibility." *Id.* at 536–37.

[170] Shaw concludes that "for a custom to be accepted and recognized, it must have the concurrence of the major powers in that particular field." SHAW, *supra* note 168, at 63.

[171] BYERS, *supra* note 117, at 151.

[172] GUZMAN, *supra* note 12, at 195.

[173] As Sally Falk Moore observed, "[t]he preexisting arrangements, interests, and ideas . . . produce their own developments. These matters are seldom thought of from the beginning as an integral part of the process of inserting a new policy or law. The subsequent altered outcome is often unpredictable, but almost always inevitable." Sally Falk Moore, *An Unusual Career: Considering Political/Legal Orders and Unofficial Parallel Realities*, ANN. REV. L. SOC. SCI. 1, 13 (2015).

[174] As has been aptly pointed out, "the United States alone cannot . . . unilaterally build its own 'custom,' though, like any State, it may launch a process of claim and response that leads ultimately to normative change." Toope, *supra* note 58, at 313.

[175] In order "[t]o shape customary law, the United States cannot rely on its raw material power to exert brute force, because such practice will simply fail to partake of a legitimate process of law creation. . . . Legal power lies in the capacity to persuade." *Id.* at 316. According to Toope, the draw of a rule of CIL is "an expression of the legitimacy of the processes through which it is created and the power of its rhetoric. . . ." *Id.* at 315. The United States also cannot alone stop a CIL rule from forming or being modified. *Id.*

[176] Cheng, *supra* note 12.

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overlapping consensus in the community of states and global civil society. The dominance of ideas and beliefs comes about when it is backed by powerful social forces and organizations including states, international institutions, international tribunals, and academia even as it is contested by subaltern social forces and states. But dominant ideas and beliefs deliver results when they are also accepted by collaborating social forces and ruling governments in the third world.

In the case of ideas and beliefs that support the long-term interests of advanced capitalist nations, they can be termed "hegemonic" as they reflect a widespread consensus in both the international community of states and global civil society on their serving the global common good. The notion of "hegemony" used here is that advanced by Antonio Gramsci and extended to the sphere of international relations by Robert Cox. It is the idea that powerful social forces and states do not sustain their domination in the international system through the exclusive use of power but also through the force of ideas and beliefs that come to be internalized by the subjects of domination.[177] In this respect, Ugo Mattei helpfully distinguishes between two distinct situations of domination through law. First, there is "law as dominance without hegemony, in which the legal system is ultimately a coercive apparatus asserting political and economic power without consent."[178] As he notes, "[t]his area of inquiry and this model have been used to explain the relationship between the legal system of the motherland and that of the colonies within imperialistic colonial enterprises."[179] The idea of "law as dominance without hegemony" can also be extended to the neocolonial era.

A second situation is that of consensual voluntary reception by an admiring periphery of legal models developed and provided for at the center. "It is described by stressing on the idea of consent within a notion of 'prestige.'"[180] In this instance, legal rules are internalized

[177] An understanding of "hegemony" can be found the following observations of Gramsci: "[T]he supremacy of a social group manifests itself in two ways, as 'domination' and as 'intellectual and moral leadership.' A social group dominates antagonistic groups, which it tends to 'liquidate,' or to subjugate perhaps even by armed force; it leads kindred and allied groups. A social group can, and indeed must, already exercise 'leadership' before winning governmental power (this indeed is one of the principal conditions for the winning of such power); it subsequently becomes dominant when it exercises power, but even if it holds it firmly in its grasp, it must continue to 'lead' as well." GRAMSCI, *supra* note 19, at 57–58. More directly Gramsci wrote: "[t]he 'spontaneous consent' given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is 'historically caused' by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production." *Id.* at 12. According to Cox, "[h]egemony in the international level is . . . not merely an order among states. . . . World hegemony is describable as a social, . . . an economic, . . . and a political structure. . . . World hegemony . . . is expressed in universal norms, institutions and mechanisms which lay down general rules of behavior for states and for those forces of civil society that act across national boundaries—rules which support the dominant mode of production." Robert Cox, *Gramsci, Hegemony and International Relations: An Essay in Method*, *in* GRAMSCI, HISTORICAL MATERIALISM AND INTERNATIONAL RELATIONS 49, 61–62 (Stephen Gill ed., 1993). *See generally* Thomas R. Bates, *Gramsci and the Theory of Hegemony*, 36 J. HIST. OF IDEAS 351 (1975); Douglas Litowitz, *Gramsci, Hegemony and the Law*, 2000 BYU L. REV. 515 (2000); Andreas Bieler & Adam David Morton, *A Critical Theory Route to Hegemony, World Order and Historical Change: Neo-Gramscian Perspectives in International Relations*, 82 CAPITAL & CLASS 85–113 (2004).

[178] Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IN. J. GLOB. LEGAL STUD. 383, 385 (2003). He goes on to observe that "[w]hile in the ages of colonialism such political battles for international hegemony were mostly carried on with an open use of force and political violence (in such a way that final extensive conflict between superpowers was unavoidable), in the age of globalization and of economic Empire, political violence has been transformed into legal violence." *Id.* at 386–87.

[179] *Id.* at 385.

[180] *Id.*

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through a process of socialization. This process of socialization is different at the international level from that within a nation state where institutions like the family and school play a significant role in (re)producing consensus on social norms. In the international sphere, such consensus is achieved through the socialization of agents of the states and the global civil society into particular understandings of world order—especially that of the role of capital in promoting the global common good, a particular technology of international law, and modern diplomacy. The universities of advanced capitalist states and the experts of international organizations play an important role as they actively participate in knowledge production and dissemination of hegemonic ideology.[181] It is no accident that "[t]he key proposition stressed by 'modern custom' is that *opinio juris* alone formulates the foundational source of customary international law."[182] The reason is that "modern" CIL is more reliant on consensual ideas and beliefs than on the density of state practice for its concretization.[183] The proponents of "modern" CIL perceptively recognize that in periods of rapid transformation the traditional mode of CIL formation may not serve the end of swiftly filling gaps in the international legal system. The dynamic concept of "modern CIL" ensures that even in the absence of state practice, CIL can emerge.

But while the distinction between dominance without hegemony and consensual acceptance of rules is helpful, Mattei fails to envisage intermediate situations in which power and ideas and beliefs combine in different degrees to produce CIL. The concepts of "domination" and "hegemony" need not have a binary construction. Thus, the concept of "dominance without hegemony" tends to underplay the role of prevailing ideas and beliefs in the creation of CIL, even as these admittedly may not have achieved larger consensus in the international community. On the other hand, the idea of "hegemony" tends to entirely exclude the role of power in explaining the acceptance of CIL rules in the postcolonial period. There is a vast intermediate space that can encompass different combinations of power and ideas and beliefs. To put it differently, power and ideas and beliefs always combine to produce CIL but in some cases power is the central factor and in other instances the voluntary acceptance of certain ideas and beliefs. The former instance is presently illustrated with reference to the emergence of FET principle as CIL.

Power and Dominance: The Case of the FET Principle

The FET principle is said to be at the heart of the international investment regime.[184] While the power of capital and capitalist states has played a critical role in making FET a principle of CIL, the role of ideas and beliefs is no less crucial. These pertain to the construction of a historical narrative that underlines the role of capitalism in promoting global welfare. The ideas and beliefs that inform this account gathered momentum at the end of the Cold

[181] *See* B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

[182] Baker, *Customary International Law: A Reconceptualization*, *supra* note 12, at 446–47.

[183] As Guzman observes: "Once one recognizes that practice is not itself a requirement for the existence of a rule of CIL capable of influencing states, the proper way to interpret practice becomes clear. If practice is used to demonstrate the existence of *opinio juris*, then one should obviously give greater weight to practice that sheds greater light on *opinio juris*. So explicit state action that seems contrary to the short-term interests of the state and that is accompanied by a claim that the state is acting in compliance with a CIL obligation would represent strong evidence of *opinio* juris." GUZMAN, *supra* note 12, at 203.

[184] José E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?*, at 19 (IILJ Working Paper 2016/3), *available at* http://www.iilj.org/publications/1887.

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War that created a climate in which there was no serious challenge to the view that foreign investment was critical to advancing the growth and development prospects of third world nations. This resulted in swift developments in international economic law to facilitate an accelerated neoliberal globalization process. IIL in particular saw rapid developments. A key role was played in this regard by institutions like the World Bank that came out in 1993 with the World Bank Guidelines on the Treatment of Foreign Direct Investment.[185] These Guidelines were followed in 1995 by the Agreements on Trade Related Investment Measures and General Agreement on Trade in Services that were part of the WTO set of agreements.[186] Additionally, there were Bilateral Investment Treaties (BITs), the numbers of which increased rapidly after the end of the Cold War. According to the UN Conference on Trade and Development (UNCTAD), "the number of treaties quintupled" between 1990 and 2000, rising from 385 at the end of the 1980s to 1,857 at the end of the 1990s. The number of countries involved in bilateral investment treaties reached 173.[187] These formal initiatives were backed by norms of CIL that were created and given shape by international tribunals and a burgeoning scholarship on IIL.

Thus, for instance, the FET principle was given historical depth by tracing it back to the early twentieth century. But as has been rightly pointed out, "[t]he consistent practice of multilateral treaties and international organizations up to the Havana Charter of the abortive International Trade Organization (ITO) reveals that states did not view the obligation to provide fair and equitable treatment as deriving from customary international law."[188] In fact international tribunals "have adapted the history of fair and equitable treatment to suit their purpose."[189] Efforts have even been made to trace the FET principle to the minimum standard of treatment of aliens (MST) and even describe it as a version of it so as to be able to establish its CIL status. The imagined history of the FET principle is an important methodological move to give it a telling past in the matrix of a sanguine understanding of the role of capital after the collapse of "actually existing socialism." As a result, "tribunals . . . overstate the protections afforded to investors under customary international law and ignore the historical development of fair and equitable legal concept independent of the customary minimum standard for treatment of aliens."[190] But as José E. Alvarez has noted, "[w]hile references to 'fair and equitable treatment' date back centuries, that guarantee did not receive sustained attention from adjudicators until investor-state claims began being heard in significant numbers starting *in the late 1990s.*"[191] According to Muthuswamy Sornarajah, "[u]ntil NAFTA, despite the fact that the phrase has been used in a large number of treaties, it had not been

[185] The text of the World Bank's Guidelines on Treatment of Foreign Direct Investment is available at https://www.italaw.com/documents/WorldBank.pdf.

[186] *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (1994), *available at* https://www.wto.org/english/docs_e/legal_e/03-fa_e.htm.

[187] UNCTAD, BILATERAL INVESTMENT TREATIES 1959–1999, at iii (2000), *available at* http://unctad.org/en/docs/poiteiiad2.en.pdf.

[188] Theodore Kill, *Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106 MICH. L. REV. 853, 858 (2008). On the ITO Charter being the first enunciation of the principle, see also OECD, Fair and Equitable Standard in International Investment Law, *available at* http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf.

[189] *Id.* at 867.

[190] *Id.* at 858.

[191] Alvarez, *supra* note 184, at 19–20 (emphasis added).

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analyzed by any tribunal because it was not made the basis of any claim."[192] At that point in time, it was doubtful whether, based on a consideration of state practice, FET standard was CIL.[193] While Article 11(1)(b) of the ITO Charter did speak of promotion of international agreements "to assure just and equitable treatment" for foreign investors, it did not come into existence.[194] Since then the meaning of just and equitable treatment was actively contested by postcolonial states in the sixties and seventies, as reflected in texts like the Charter of Economic Rights and Duties of States (CERDS). It therefore does not come as a surprise that "[t]o date, no legal or empirical study has shown that customary international law imposes an obligation to treat investors fairly and equitably."[195] This is not merely an issue of academic interest for in several recent cases under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), claimants have argued that CIL "supports a self-standing claim brought in parallel to a claim under an investment treaty or a contract. If such claims are permissible, customary international law might have a more prominent role to play in ICSID disputes."[196] This has serious implications for third world nations like India whose latest Model BITs make no reference to the FET principle.[197] It can now be smuggled in as a CIL principle and made the basis of claims before international tribunals. The awards can in turn be used to reinforce the claim of CIL. As Reisman points out, "[w]here there is a convergence of practice and *opinio juris* among a significant number of such tribunals, it may serve as evidence of customary international law."[198] He goes on to elaborate the claim that:

> in the context of customary international law in investment law, BITs and decisions of tribunals adjudicating the disputes arising from these investment treaties have come to play a significant role in the ongoing formation of law in this field. These two sources are particularly important . . . because much of international investment law is developed through them—they represent State practice and *opinio juris* in this area of the law.[199]

[192] M. Sornarajah, The International Law of Foreign Investment 349 (3d ed. 2010). He cites Vasciannie as observing in 1999, that "the pronounced reliance on the fair and equitable standard in treaties has not been matched by judicial consideration of the meaning of the standard in particular cases." *Id.* at 349–50.

[193] Kill, *supra* note 188, at 877.

[194] *Id.* at 871.

[195] *Id.* at 880. Under the circumstances, what is one to make of Article 9.6., Section 1 of the Trans-Pacific Partnership which, inter alia, reads: "Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security."

[196] Kate Parlett, *Claims Under Customary International Law in ICSID Arbitration*, 31 ICSID Rev. 434 (2016). It has been observed by another researcher: "The view that is taken on the relationship between treaty and custom; on the applicability of rules of customary international law within the treaty framework and on the content of customary investment law is capable of having a crucial effect on the outcome of particular disputes. . . . If the gold of custom is really capable of being made out of the base metal of treaty practice, it holds out the prospect that it may bind States where no treaty applies." Campbell McLachlan, *Is There an Evolving Customary International Law on Investment?*, 31 ICSID Rev. 257, 258 (2016).

[197] The India Model Bilateral Investment Treaty (2015), *available at* https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf. For observations on an earlier draft that captures most of the changes made in the final draft, see Grant Hannesian & Kabir Duggal, *The 2015 Indian Model BIT: Is This the Change the World Wishes to See?*, 30 ICSID Rev. 729–40 (2015).

[198] Reisman, *supra* note 136, at 622.

[199] *Id.*

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Reisman concludes that "in the aggregate, the investment awards that apply FET and MST are a vital part of the nomo-dynamic process of customary international law."[200] It is however doubtful whether BITs have given rise to such a principle. As Sornarajah has pointed out, the FET principle cannot have emerged as CIL from BITs, as they "are premised on different objectives, and the internal balance that is achieved between sovereign control over investments and the competing notion of the international standards from which there can be no deviation differ from treaty to treaty."[201] What becomes clear from even this cursory discussion is that the FET principle has emerged as CIL even in the absence of sufficient state practice. It is a combination of the idea and belief that foreign investment is critical to help realize the goal of development, and the power of capitalist states which made possible the emergence of FET principle. International tribunals have at first claimed such a status for the principle and then used the very decisions as evidence of the emergence of CIL.[202]

From a sociological standpoint, lifting the veil over states, the FET principle reflects a growing global class divide and the converging interests of an ascendant transnational capitalist class (TCC) of the developed and third world nations in the era of neoliberal globalization.[203] The TCC cuts across nations and creates a consensus in favor of the FET principle. It allows the category "national interests" to be used to represent TCC interests as the unitary will of the international community of states.[204] Carty therefore aptly speaks of the "the failure of legal positivism to accept the need for a political sociology of collective entities."[205] It leads to the flattening of state practice that leaves out of contention the aspirations and actions of some classes, groups, and peoples.[206]

Dominance, Hegemony, and Resistance

It is critical to note at this point that "domination" or even "hegemony" of ideas and beliefs does not mean that a monolith view comes to prevail in the international system. These categories only signal degrees of consensus that emerge on certain values and principles. There are always social forces and actors that offer resistance to any set of ideas and beliefs, albeit with

[200] *Id.* at 623.

[201] SORNARAJAH, *supra* note 192, at 335.

[202] Earlier "arbitral tribunals had independently created 'law' through their awards asserting the existence of an international minimum standard of treatment of aliens, including foreign investors." *Id.* at 334. What is more, critics point out that: "a reference to FET provides an imprecise right to foreign investors that simultaneously provides little guidance to state regulators, delegates considerable 'law-making' power to creative investor claimants and arbitrators, and enables foreigners to claim protections not available to national investors under national law." Alvarez, *supra* note 184, at 20. For possible interpretations of the FET clause, see Alvarez, *id.* at 20.

[203] *See generally* B. S. Chimni, *Prolegomena to a Class Approach to International Law*, 21 EUR. J. INT'L L. 57 (2010).

[204] Anthony Carty, *Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law*, 14 EUR. J. INT'L L. 817 (2003).

[205] *Id.* at 831. His view that "formal logic is the logic of a simplified, abstract world, incapable of expressing the reality of actual social movement" is also entirely appropriate. *Id.* at 832.

[206] One problem is that of "conceptual stretching." Baker explains: "customary international law suffers from a heavily state centric bias that fails to take into account the very real effects non-state forces, such as norm-generating transnational actors, have on the international system. The attempt of 'modern custom' to de-emphasize state practice in favor of *opinio juris* can perhaps be seen then as a way to broaden the array of actors that contribute to the development of international norms but, shackled to the state-centric biases of international legal theory, 'conceptual stretching' has been the only result." Baker, *Customary International Law: A Reconceptualization*, *supra* note 12, at 456–57.

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different intensities.[207] But it is only when a system is in "crisis" or there is deep and sustained resistance, in the international sphere by states and forces of global civil society, that a counter-hegemonic view gains ground.

In the past, the two factors of crisis and resistance came together in the 1960s and 1970s, after the decolonization process with third world nations contesting the principles and norms of IIL. It was hoped that good arguments backed by a coalition of third world states and social movements would succeed in transforming CIL on the subject. But the failure of the developmental postcolonial state, and later the collapse of Soviet Union, saw these states accept the neoliberal economic path promoted by advanced capitalist nations. It undermined the effort for bringing about change in IIL.

Even thereafter the challenges to IIL did not cease, but they were not of an order that threatened the dominant view. Take, for instance, the principle of prompt, adequate and effective compensation that dates back to the period prior to World War II. It was effectively challenged by the third world nations in the first decades after decolonization and an "appropriate compensation" rule incorporated in the PSNR resolution.[208] Later a more radical version of the "appropriate compensation" rule was included in CERDS in 1974.[209] In its wake, Oscar Schachter wrote a decade later that "[t]he argument that the 'prompt, adequate, and effective' formula is 'traditional' international law finds little support in state practice or authoritative treatises and monographs."[210] In 1995, Ian Brownlie contended that:

> [T]here is strong evidence in support of the conclusion that the adoption of resolution 1803 [on permanent sovereignty over natural resources] indicated that the principle of compensation was no longer based upon the "adequate, effective and prompt" formula of Cordell Hull, but upon the principle of "appropriate compensation."[211]

But the modified rule of compensation was reversed by capital exporting nations after the end of the Cold War. At this time, third world nations, under the influence of an emerging TCC, had also become enamored by neoliberal economic ideology, leading to a desperate search for foreign investment to shore up their growth prospects.[212] In fact, developing

[207] More generally, as the French thinker Michel Foucault pointed out, "where there is power, there is resistance." MICHEL FOUCAULT, HISTORY OF SEXUALITY VOL 1: AN INTRODUCTION 95 (1990) (emphasis added).

[208] *See supra* note 51.

[209] On the question of nationalization and expropriation of property Article 2(2)(c) stated:

> Each State has the right: . . .
>
> To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974).

[210] Oscar Schachter, *Compensation for Expropriation*, 78 AJIL 121, 123 (1984).

[211] Ian Brownlie, *Control of Major Natural Resources,* 255 RECUEIL DES COURS 141, 150 (1995).

[212] There is no attempt made in this article to bring in the factor of capital exporting countries from the Global South (such as China and India) as it does not affect the basic argument.

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nations proceeded to sign a large number of BITs promising to pay, whatever the actual phraseology used, the Hull formula. In 2004, Judge Schwebel could confidently observe:

> Customary international law governing the treatment of foreign investment has been reshaped to embody the principles of law found in more than two thousand concordant bilateral investment treaties. With the conclusion of such a cascade of parallel treaties, the international community has vaulted over the traditional divide between capital-exporting and capital-importing states and fashioned an essentially unified law of foreign investment.[213]

In this period, the FET and full protection and security (FPS) principles also congealed as CIL to address the concerns of foreign investors.[214] The inherent element of indeterminacy in unwritten rules was used by international tribunals to advance interpretations that favored foreign investors.[215] These principles also came to be embodied in BITs that helped consolidate their CIL status.

Arguably a crisis informs the global capitalist system today, especially since 2007, opening up the possibility of transformation in the doctrines and substance of international law.[216] A post-capitalist, counter-hegemonic view may therefore gain ground in IIL.[217] Unfortunately, despite the recent global economic crisis, the sanguine narrative of the role of capital, assiduously built after the end of the Cold War, has not come to be challenged. It has left the field open for organic scholars of TCC and international tribunals to advance unchallenged the FET principle as part of CIL. There are of course some voices of dissent. Thus, for instance, according to Sornarajah, "the notion that a customary body of [international investment] law has emerged is illusory."[218] In his view, until the moment developing nations collectively renege from the position assumed in New International Economic Order (NIEO) and CERDS resolutions, "there can be no truly international standard relating to the treatment of foreign investment."[219] But the factor of dominance ensured that capital importing nations do not seriously challenge the "new" rules of IIL. In short, the FET principle was invented and quickly termed CIL in the matrix of the hegemony of neoliberal ideas. This does not mean

[213] Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 ASIL Proc. 27 (2004).

[214] According to Alvarez, "While references to 'fair and equitable treatment' date back centuries, that guarantee did not receive sustained attention from adjudicators until investor-state claims began being heard in significant numbers starting in the late 1990s. Today, with some 600 investor-state arbitral claims either being heard or already decided, this provision has drawn prominent attention at the highest levels of government." Alvarez, *supra* note 184, at 19–20. According to Subedi, the "[v]iolation of the fair and equitable treatment principle by the host state concerned is the most common allegation made by foreign investors before international investment tribunals." Surya P. Subedi, International Investment Law: Reconciling Policy and Principle 63 (2008).

[215] Alvarez writes: "Reference to FET as such does not have a single core meaning. The meaning and scope of this guarantee varies depending on the treaty text, including the context of the provision, the negotiating history of the particular treaty and all the other factors authorized under the traditional rules for treaty interpretation." Alvarez, *supra* note 184, at 22. *See also* Subedi, *supra* note 214, at 64–66.

[216] *See generally* Wolfgang Streeck, How Will Capitalism End? (2016); The Great Credit Crash (Martin Konings ed., 2010); William I. Robinson, Global Capitalism and the Crisis of Humanity (2014).

[217] For some basic principles that could inform a post-capitalist order, see Chimni, *supra* note 17, at 543–50.

[218] Sornarajah, *supra* note 192, at 176.

[219] *Id.* at 334.

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that the element of power did not come into play.[220] It is in fact a combination of consensual and coercive socialization, the latter rooted in structures of global economy that lead to the creation of CIL.

To sum up, CIL can be better accounted for by differentiating short-term and systemic interests of global capitalism safeguarded by CIL; by reviewing its evolution and development in different phases of history; and finally, by introducing the concepts of "dominance" and "hegemony" of ideas and beliefs that accompany the use of power. It can also help explain the fresh conceptualization of the doctrine of CIL in different phases of the development of the global capitalist order. Thus, for instance "modern" CIL emerges in the era of neoliberal globalization and relies more on the element of *opinio juris* than on state practice to address its systemic interests.[221] It has therefore more of an ethical than a practical orientation.[222] It explains why "modern" CIL does not face strong resistance from third world states. But modern CIL has limited potential in bringing about structural changes in the global capitalist order. If that conclusion is correct, can a postmodern doctrine be articulated which can coopt the progressive elements of modern CIL to facilitate the emergence of a post-capitalist global order? What are the elements that may constitute a postmodern doctrine of CIL? These questions are briefly addressed in the next section.

VI. Toward a Postmodern Doctrine

In considering the value and limits of the role modern CIL can play in the contemporary world, it may help to revisit its origins in the matrix of the idea of system change. When fundamental changes take place in the international system, as was the case after decolonization, new rules of CIL emerge to safeguard systemic interests.[223] In an essay on the Grotian moment and CIL, Scharf even defines system change "to denote a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance."[224] In other words, system change necessitates the

[220] Andrew Hurrell, *Comments on Chapters 10 and 11*, *in* United States Hegemony and the Foundations of International Law, *supra* note 58, at 353, 352–56 (emphasis added).

[221] In other words, "the role of 'cultural' and 'ideational' considerations" is critical. As Toope aptly adds, "interests are not exogenous variables at all. They are often deeply affected by the construction of a State's identity, a construction that itself can shift over time." Toope, *supra* note 58 at 305, 314. Gill rightly observes that "in international studies the Gramscian approach is an epistemological and ontological critique of the empiricism and positivism which underpin the prevailing theorizations." Stephen Gill, *Epistemology, Ontology and the "Italian School," in* Gramsci, Historical Materialism and International Relations, *supra* note 177, at 21, 22.

[222] As Roberts observes, "[l]ower standard of practice may be tolerated for customs with a strong moral content because violations of ideal standards are expected." Roberts, *supra* note 14, at 790.

[223] It is possible that rules crucial to the workings of the international system may come to be incorporated in both CIL and treaty law. An instance is the rule relating to the prohibition of the threat or use of force that is fundamental to the stability of the global capitalist system and is part of both CIL and the Charter of the United Nations.

[224] Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 Cornell J. Int'l. L 439, 444 (2010). He however confines the idea of "transformative development" or "Grotian moment" to major developments in a particular phase of international relations. He does not think of it in terms of systemic change as was intended in the original use of the term by Richard Falk—the reference being to the transition from feudalism to capitalism. Scharf writes: "[I]n periods of extraordinary change, whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism, a concept that rationalizes accelerated formation of customary rules is required if international law is to keep pace with such developments. Unlike the oft criticized notion of 'instant customary international law,' the concept of 'Grotian Moment' does not do away with the requirement of state practice or rely solely on General Assembly resolutions; rather, the 'Grotian Moment'

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reconceptualization of the doctrine of CIL in order to facilitate changes in the body of international law. The new concept need not necessarily replace the old doctrine, but may complement it; while a new doctrine does not lead changes in the international system, it can help bring about modifications that lend it stability and legitimacy. The essence of those changes depends on the nature of world order and the systemic transformation that has taken place. But if suitably conceptualized, an innovative concept of CIL can inject progressive ideas and elements into the international legal order. Thus, for instance, the inauguration of the era of neoliberal globalization saw new thinking on CIL. It gave rise to the concept of modern CIL which, to recall, "represents a fundamentally different ontology of international law—one that is discursive rather than behavioral in orientation."[225] Innovative conceptualization of CIL helped the development of international law, especially in the areas of human rights and environmental law, that gave the global capitalist system a human face at a time of aggressive exploitation of subaltern classes, nations, and nature so that this reality did not undermine its stability and legitimacy.[226]

But can modern CIL, given its progressive core, bring about fundamental changes in the international system? Can its emphasis on *opinio juris* advance humankind toward a post-capitalist order that is more humane and respectful of nature? Since modern CIL essentially defends systemic interests, it may at first glance appear to be inimical to the interests of advanced capitalist states, making transformation to a post-capitalist world order possible. But its promise is never fulfilled as it runs up against the structures and processes, and ideas and beliefs, of the global capitalist system that promote the good of dominant social and political forces as against their subaltern counterparts. Thus, for instance, international human rights law harbors great potential to promote the goal of human dignity for all, but its potential remains unrealized because of the constraints imposed by the functioning of an international economic system that systematically produces inequality and oppression.[227] From time to time it is also used to inflict violence on subaltern actors, such as through justifying unilateral armed humanitarian interventions.[228] In other words, the fact that modern CIL prevents the legitimacy of the global capitalist order from being undermined does not mean it can make system change possible. A fundamental reason, of course, is that while CIL performs a constitutive role in international society, it is not the primary determinant of change. If this hypothesis is correct, then even a new and more radical doctrine of CIL cannot

minimizes the extent and duration of the state practice that is necessary during such transformative times, provided there is an especially clear and widespread expression of *opinio juris.*" *Id.* at 467–68. Scharf himself cites Richard Falk who first used the term "Grotian Moment" to mean: "a period in world history that seems analogous at least to the end of European feudalism . . . when new norms, procedures, and institutions had to be devised to cope with the then decline of the Church and the emergence of the secular state." *Id.* at 444. *See* Richard Falk, *The Grotian Quest*, *in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 36 (Richard Falk, Friedrich Kratchwil & Saul H. Mendolovitz eds., 1985).

[225] Daniel Bodansky, *Customary (And Not So Customary) International Environmental Law*, 3 IN. J. GLOB. LEGAL STUD. 105, 115 (1995).

[226] Lillich, *supra* note 32.

[227] This is true even of the advanced capitalist nations themselves. *See* THOMAS PIKKETY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014); JOSEPH STIGLITZ, THE GREAT DIVIDE: UNEQUAL SOCIETIES AND WHAT WE CAN DO ABOUT THEM (2015); WORLD INEQUALITY LAB, WORLD INEQUALITY REPORT (2018), *available at* http://wir2018.wid.world/files/download/wir2018-full-report-english.pdf.

[228] B.S. Chimni, *Sovereignty, Rights and Armed Intervention*, *in* FAULTLINES OF INTERNATIONAL LEGITIMACY 303 (Hilary Charlesworth & Jean-Marc Coicaud eds., 2010).

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transform the extant world order. But a new doctrine, a postmodern doctrine if you like, could help introduce important reforms in the international legal order. While a full account of an alternative doctrine would have to await another essay, some elements of it can be indicated.

Stress on Deliberative Reason

A postmodern doctrine of CIL would require that norm formation is based on deliberative reason and not simply derived from the fact of coordination between states in the matrix of dominant or hegemonic views of advanced capitalist states. It would entail a principle that would reflect

> forms of reciprocally oriented conduct that takes its meaning from a practice of offering claims and counterclaims, challenges and responses. The hallmark of such customs is not the addition of belief (*opinio juris*) to behavior (*usus*), but rather the integration of meaningful conduct into a web of reasons and arguments.[229]

A defining feature of postmodern doctrine would therefore be to *deepen* the role of the discursive element in CIL formation. The formation of CIL would rest on the force of better argument or sounder claims advanced by state and non-state actors.[230] The acceptance of the rules of deliberative reason will help identify, clarify, and realize common interests. It will permit the international community to undertake reforms at least in those areas in which common interests are predominant, such as extreme poverty, gross violation of human rights, forced migration, environmental degradation, and possession, threat, or use of nuclear weapons. Of course, the simplicity of the idea that reason should prevail veils the complexities of international politics and the realities of power: in the real world, power and dominant/hegemonic ideas and beliefs tend to carry the day. The stress on deliberative reason is to be seen as a procedural ideal. In operative terms, a postmodern doctrine of CIL would have a negative and a positive dimension. On the negative side, it would be skeptical of claims unless a predominant majority of weak states, non-state actors, and, more broadly, the global civil society, acknowledge that status. On the positive side, it would allow greater weight to the practice of non-state actors to determine the status of a norm as CIL. The postmodern doctrine will also give the practice of specially affected states a broader meaning to include the interests of both rule makers and rule takers, as the latter are also specially affected.[231]

Opinio Juris *as Universal Juridical Conscience*

The stress on deliberative reasoning would also allow a distinction to be made between *opinio juris* as a constituent element of CIL and *opinio juris* as representing the juridical conscience of humankind. This distinction has been recently elaborated by Judge Cançado Trindade in his dissenting opinion in the *Obligations Concerning Negotiations Relating to*

[229] G. J. Postema, *Custom, Normative Practice, and the Law*, 62 DUKE L.J. 707, 738 (2012).

[230] For the different theoretical underpinnings, see JURGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (1990); JURGEN HABERMAS, THEORY OF COMMUNICATIVE ACTION, VOL. I (1984); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); G. J. Postema, *Public Practical Reason: Political Practice*, *in* NOMOS XXXVII: THEORY AND PRACTICE 345–85 (Ian Shapiro & Judith Wagner eds., 1995).

[231] *See* Galindo & Yip, *supra* note 18, at 260.

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Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India) case.[232] In this case, Judge Cançado Trindade favored CIL status for Article VI disarmament obligations of the Nuclear Non-Proliferation Treaty as it was in accord with the juridical conscience of mankind.[233] More specifically, he contended that there is a clearly formed "*opinio juris communis* as to the illegality and prohibition of nuclear weapons" and observed that "[t]he survival of humankind cannot be made to depend on the 'will' of a handful of privileged States. *The universal juridical conscience stands well above the 'will' of individual States*."[234] Indeed, in his view, "*it is the universal juridical conscience that is the ultimate material source of international law*."[235] What Judge Cançado Trindade is arguing here is that interests of humankind should trump the interests of nuclear weapon states. Where the very survival of humankind was in issue the doctrines of "specially affected states" or "persistent objector" would not apply. He attempted to root his standpoint in a particular interpretation of history and doctrine of CIL:

> *opinio juris* has already had a long trajectory in legal thinking, being today endowed with a wide dimension. Thus, already in the XIXth century, the so-called "historical school" of legal thinking and jurisprudence (of F. K. von Savigny and G. F. Puchta) in reaction to the voluntarist conception, gradually discarded the "will" of the States by shifting attention to *opinio juris*, requiring practice to be an authentic expression of the "juridical conscience" of nations and peoples. With the passing of time, the acknowledgment of conscience standing above the "will" developed further, as a reaction against the reluctance of some States to abide by norms addressing matters of general or common interest of the international community.[236]

Judge Cançado Trindade went on to distinguish between *opinio juris* as a constitutive element of CIL and as a critical element of the very idea of international law:

> *Opinio juris communis* came thus to assume "a considerably broader dimension than that of the subjective element constitutive of custom." *Opinio juris* became a key element in the *formation* itself of international law, a *law of conscience*. This diminished the unilateral influence of the most powerful States, fostering international law-making in fulfillment of the public interest and in pursuance of the common good of the international community as a whole.[237]

[232] Judge Cançado Trindade's Dissenting Opinion is available at http://www.icj-cij.org/files/case-related/158/19146.pdf.

[233] Article VI of the Nuclear Non-proliferation Treaty, 1968 states:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

The text of NPT treaty is available at https://www.iaea.org/sites/default/files/publications/documents/infcircs/1970/infcirc140.pdf.

[234] Dissenting Opinion, *supra* note 232, para. 150 (emphasis added).

[235] *Id.*, para. 119 (emphasis added).

[236] *Id.*, para. 303.

[237] *Id.*, para. 304.

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Thereafter, he went to link *opinio juris communis* with certain UN General Assembly resolutions that have "a much wider dimension than the subjective element of custom":

> *Opinio juris communis*—to which U.N. General Assembly resolutions have contributed—has a much broader dimension than the subjective element of custom, being a key element in the formation of a law of conscience, so as to rid the world of the inhuman threat of nuclear weapons. . . .[238]

He went on to observe:

> The foundations of the international legal order came to be reckoned as independent from, and transcending, the "will" of individual States; *opinio juris communis* came to give expression to the "juridical conscience," no longer only of nations and peoples—sustained in the past by the "historical school"—but of the international community as a whole, heading towards the universalization of international law.[239]

Judge Cançado Trindade thus sought to go beyond the systemic interests of the existing international system to realize the common interests of humanity. In arriving at this conclusion, he squarely rejected the positivist method and observed:

> If we look at conventional international law only, weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed; yet, nuclear weapons, far more destructive, have not been banned yet. This juridical absurdity nourishes the positivist myopia, or blindness, in inferring therefrom that there is no customary international obligation of nuclear disarmament. Positivists only have eyes for treaty law, for individual State consent, revolving in vicious circles, unable to see the pressing needs and aspirations of the international community as a whole, and to grasp the *universality* of contemporary international law—as envisaged by its "founding fathers," already in the XVIth-XVIIth centuries—with its underlying fundamental principles.[240]

This understanding is obviously not acceptable to mainstream international lawyers, especially in this instance, because the nuclear weapon states that are the specially affected states

[238] *Id.*, para. 328. Judge Cançado Trindade recalled that in the ICJ's 1986 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, the Court acknowledged that: "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character." *Id.*, para. 87. Judge Cançado Trindade undertook an extensive review of relevant UN General Assembly (UNGA) and UN Security Council (UNSC) resolutions and submitted that these "provide significant elements of the emergence of an *opinio juris*, in support of the gradual formation of an obligation of customary international law, corresponding to the conventional obligation under Article VI of the NPT." *See id.*, para. 65 He emphasized that "the fact that the Security Council calls upon *all States*, and not only States Parties to the NPT, to pursue negotiations towards nuclear disarmament in good faith (or to join the NPT State Parties in this endeavour) is significant. It is an indication that the obligation is incumbent on all U.N. member States, irrespectively of their being or not Parties to the NPT." *See id.*

[239] *Id.*, para. 305.

[240] *Id.*, para. 77.

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have also been persistent objectors. Most recently, the nuclear weapons states even refused to participate in the negotiations of the treaty prohibiting nuclear weapons.[241]

While Judge Cançado Trindade's views represent a progressive departure from modern CIL, he failed to explicitly decolonize the concept of CIL. Secondly, he did not speak to the nature and character of global order that has to be reformed through a new understanding of CIL. Third, while he did refer to the contribution of resolutions of international organizations, he did not look at the role of global civil society in the formation of CIL. To put it differently, the distinction between *opinio juris* and juridical conscience of humankind must also be reframed and reconfigured to decolonize it and include the practices of both international organizations and global civil society if it is to serve the purpose of facilitating a post-capitalist global order.

Resolutions of International Organizations

A postmodern doctrine would treat qualifying resolutions of international organizations—those that are the outcome of extended negotiations, broad consensus, clear articulation, and subsequent affirmations—as prima facie yielding rules of CIL.[242] Whereas at present, ILC Draft Conclusion 12(1) of 2016 baldly states that "[a] resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law." Likewise, the ILA had concluded that while UN General Assembly resolutions "may in some instances constitute evidence of the existence customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law," these as a general rule "*do not ipso facto create new rules of customary law*."[243] These formulations, by speaking of resolutions being evidence of state practice, leave open the possibility of the formation of "modern" rules of CIL, which have the backing of *opinio juris* among powerful states. But the ILA provided for an exception to the general rule that resolutions of international organizations cannot create CIL in the following terms:

> Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption.[244]

This is a move in the right direction. However, the acceptance of a CIL rule should not merely be viewed as the function of voting patterns but also the outcome of deliberative reason. The resolutions that the ILA had in mind were presumably those like the Universal

[241] The text of the Treaty on the Prohibition of Nuclear Weapons, 2017 is available at http://www.icanw.org/wp-content/uploads/2017/07/TPNW-English1.pdf. *See also* Claire Mills & Lauren Culpin, *A Treaty on the Prohibition of Nuclear Weapons* (House of Commons Briefing Paper Number 7986, July 11, 2017). They note that "the nuclear weapon states refused to participate in the talks labeling them [the Open-Ended Working Group] 'divisive' and lacking 'the vital components that would guarantee both a meaningful collaboration and a productive outcome.'" *Id.* at 1–2.

[242] The resolution of international organizations, as Judge Bedjaoui notes, "holds a real attraction for the countries of the Third World because of its flexibility, its rapidity and the security it gives [third world] countries through their control of the technique as a result of their numbers." BEDJAOUI, *supra* note 24, at 140.

[243] ILA Final Report, *supra* note 2, at 55 (emphasis added).

[244] ILA Final Report, *supra* note 2, at 61.

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Declaration of Human Rights.[245] In practice, the exception as presently formulated may merely allow powerful states to create law through resolutions of international organizations.[246] In the case of third world states, unanimity may be difficult to achieve and the doctrines of specially affected states and the persistent objector rule will come into play.[247] A postmodern doctrine would therefore go further and look at the weight of resolutions through the prism of the global common good. Those resolutions that reflect *opinio juris communis* and further the goals of international human rights law and associated jurisprudence would be considered to have binding effect. In operative terms this would mean that in instances where a qualifying resolution is adopted by an overwhelming majority of votes, undue weight will not be attached to opposing votes if it furthers the cause of global justice.

Practice of Civil Society

A postmodern doctrine would also link CIL formation to progressive ideas, beliefs, and practices in the global civil society. Increasingly, non-governmental organizations (NGOs) have become agents of lawmaking in the international legal order.[248] But at present, the "practice" of civil society organizations is not counted to determine whether a rule of CIL has emerged. ILC Draft Conclusion 4(3) of 2016 states that the practice of actors other than states and international organizations "is not practice that contributes to the formation, or expression, of rules of customary international law."[249] But there are commentators who stress the need to "explore the prospect of permitting transnational and non-governmental groups to have a legal voice in the creation of custom."[250] Indeed, Reisman speaks of "the democratization of the contemporary customary international law process."[251] In his view, the reason that this possibility is not considered by bodies like the ILC is because its "members are selected by governments and whose work is prepared for approval by governments."[252] It therefore "continues to depict the makers of customary international law essentially as the governments of States."[253] However, as Reisman points out, "many categories of

[245] *Id.* at 62.

[246] This would be made possible by Draft Conclusions 12(2) and (3) that read:

> 2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.
> 3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Draft Conclusions, *supra* note 3, at 4.

[247] *Id.* at 61.

[248] Steve Charnowitz, *Non-governmental Organizations and International Law*, 100 AJIL 348 (2006).

[249] Draft Conclusions, *supra* note 3, at 2.

[250] Gunning, *supra* note 32, at 213.

[251] Reisman, *supra* note 136, at 616. *See generally* Laura Pedraza-Farina, *Conceptions of Civil Society in International Lawmaking and Implementation: A Theoretical Framework*, 34 MICH. J. INT'L L. 605 (2013); BARBARA K. WOODWARD, GLOBAL CIVIL SOCIETY IN INTERNATIONAL LAW MAKING AND GLOBAL GOVERNANCE: THEORY AND PRACTICE (2010).

[252] Reisman, *supra* note 136, at 619. But Reisman does not explain why the ILA did the same. The reasons go deeper and lie in the use of the positivist method.

[253] *Id.*

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non-State actors in the different social and economic zones of the complex archipelagos of contemporary international law now participate in shaping expectations and demands of right behaviour."[254] He cites with approval Mahnoush Arsanjani who writes:

> Many factors . . . have opened this process of international law-making and, in particular, expanded the role of the private sector, including non-governmental organizations, private corporate entities and religious groups; as a concomitant, these factors have also reduced the role of States.[255]

Tasioulas also contends that we need to detach "*opinio juris* from necessary connection with state practice" and see that the practice of non-state actors "counts in the process of customary norm formation":

> [W]e can accommodate within the formal structures of international law creation a role for various non-state actors, such as international organizations (e.g. the UN General Assembly, the ICJ, the WTO, etc.), peoples (understood as collectivities conceptually distinct from states), non-governmental organizations (e.g. the International Committee of the Red Cross, Human Rights Watch, Amnesty International, etc.), and so on. . . . This promises to strengthen the legitimacy of international law not only by enhancing its capacity to achieve the ends of global justice, but also by doing so through a procedure that introduces an element of global democratic participation.[256]

In other words, while the focus of Reisman is on the private corporate actor, the case he makes out can be extended to all non-state actors. Thus, for example, the views of trade unions and peasant organizations or the World Social Forum (WSF) could be taken into account in considering the emergence of norms of CIL. To put it differently, there is no reason why "state practice" cannot include the practice of social movements, especially relevant in assessing the assertion by a state of the persistent objector rule. Of course, the necessary evidence of practice of civil society actors will have to be appropriately identified, weighed, and assessed by international tribunals in determining the emergence of a norm of CIL. In this regard, the international law academia will have a crucial role to play.

In sum, a postmodern doctrine will allow a source of international law to be created that facilitates the creation of norms that help deal with common problems confronting humankind. It may not be able to bring about radical changes in the global capitalist order. For this it would have to be accompanied by the transformation of social relations in the advanced capitalist states on the basis of sustained resistance of subaltern actors at the domestic and global levels. But a more meaningful doctrine of CIL would help the international community to gradually work toward a more just world order.

VII. Conclusion

The principal aim of the present article is to offer an alternative account of the historical evolution of CIL. It was argued that the doctrine of CIL originated in nineteenth century

[254] *Id.*
[255] *Id.* at 620.
[256] Tasioulas, *supra* note 99, at 328.

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Europe in the period of the industrial revolution that saw the emergence of a shared legal consciousness and, in its second half, high imperialism. It was also the period in which the positivist method came to dominate the study of international law. Yet, at this point, the inextricable relationship between "formal" and "material" sources of CIL was transparent and undeniable as these developments had roots in the European cultural, social, and political order. The imperial order of the times meant that CIL played a key role in facilitating the colonial project—its rules in the field of state responsibility being a case in point.[257]

The first serious challenge to the Eurocentric doctrine of CIL came after the October revolution. The Soviet Union expressed deep skepticism about CIL as a source of international law as it reflected the practices and *opinio juris* of the leading capitalist powers. Later, the traditional doctrine of CIL came to be actively questioned by the newly independent states advancing a justice critique. These states contended that the traditional doctrine was fashioned by the ideology, interests, and power of metropolitan states. The two critiques necessitated a fresh look at the doctrine of CIL in order to advance a more sustainable theory of CIL that reflected changed times.

A first generation of efforts of western scholars to reformulate the doctrine of CIL appeared in the 1960s and 1970s. These formulations posited a distinction between "formal" and "material" sources of CIL that was given its blessings by the ICJ in the *North Sea Continental Shelf* case. A principal objective of this distinction was to salvage the doctrine of CIL from its historical condition—of being associated with the colonial and neocolonial projects. Besides the fact that the doctrine of CIL was a western construct, its rules came to be derived from western state practice on which the dominant positivist method placed great stress. Even today the lack of the ready availability of state practice in the instance of postcolonial states means that western states carry the day. Any talk of generality of practice or representative practice in the formation of CIL by default became a reference to the practice of western states. The absence of writings of postcolonial scholars contesting the divide between "formal" and "material" sources of CIL further reduced the possibility of supporting the claims of third world states. But western scholars did not allow matters to rest there. The possibility that postcolonial states could use their numerical strength to give rise to a particular rule of CIL that advanced their interests (as in the case of creating a NIEO) led to the invention of the persistent objector rule to offer a possible escape route to western nations from being compelled to undertake obligations that were not in their interest. Defection was made possible only through producing evidence of objection over time. The persistent objector rule did not require deliberative reasons to be considered. There was thus no room for debating the justice of CIL rules.[258] But as has been pointed out, if "conscientious objection" is not permitted "then the parties are entitled to doubt the bona fides of those who insist on the customs as binding in the name of the community as a whole."[259] On the flip side, a

[257] Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase), Separate Opinion of Judge Ammoun, 1970 ICJ Rep. 286–334 (Feb. 5, 1970).

[258] *Id.* at 298.

[259] Gerald J. Postema, *Custom in International Law: A Normative Practice Account*, *in* THE NATURE OF CUSTOMARY LAW, *supra* note 99, at 279, 300.

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dominant majority of members of the community must be in a position to claim that certain practices that advance the global common good have given rise to norms of CIL.[260]

A second generation of attempts to theorize CIL began as the Cold War neared its end and the neoliberal globalization process gathered momentum. The collapse of the Soviet Union and the diminished opposition of postcolonial states in this period saw the distinction between "formal" and "material" sources emphatically endorsed by ILA and later ILC. But this phase also saw the emergence of the idea of "modern" CIL with its inclusive understanding of "state practice" and greater stress on the element of *opinio juris*. The move permitted relatively rapid development in the fields of IIL, IHRL, IHL, ICL, and IENL and the greater use of CIL norms by domestic courts and international tribunals. The essential aim of the "modern" doctrine of CIL is the generation of norms that safeguard the systemic interests of the global capitalist system. These norms sought to make the international legal order responsive in the era of neoliberal globalization to the concerns of the subaltern states, peoples and groups on the one hand and ravaged nature on the other. But the idea of "modern" CIL has caused much anxiety among western realist scholars of international law who are conscious of its negative impact on the ability of advanced capitalist states to realize short-term interests. These scholars are concerned that given the growing internalization of "modern" CIL by domestic courts, the domestic and foreign policies of states may be unduly constrained. In voicing this anxiety, realist scholars like Bradley, Goldsmith, and Posner do not appreciate the salience of "modern" CIL in sustaining the stability and legitimacy of the global capitalist system in the long run.

The ILA and ILC have responded in different ways to the anxiety of realist critics. The ILA has been more sympathetic to the realist view and therefore emphasized the element of state practice in the formation of CIL, even as it has conceded that "where it can be shown that an *opinio juris* exists about a practice that will be sufficient."[261] However, the ILC has given importance to both the elements, leaving room for the expedient invoking of either of them for the rapid development of CIL. From a third world perspective, both the ILA and ILC do not assign sufficient weight to the fact that the state practice of weak states is not easily available and that their *opinio juris* is trumped by the invented doctrines of "specially affected states" and "persistent objectors." Meanwhile, if decision-makers and scholars of weak states are not vigorously contesting the idea of "modern" CIL it is because the rules embody hegemonic ideas and beliefs. The hegemony of ideas and beliefs is, among other things, the function of the growing coincidence of interests between the elites of the first and the third worlds brought about by the ascendance of a transnational capitalist class. It is not that "modern" CIL does not contribute to the global common good, but it does so in an inadequate manner. Its norms can also be turned against subaltern states and actors, as in the case of the doctrine of responsibility to protect. Of course, the role of ideas and beliefs is present even when power and coercion are used to give rise to a norm of CIL. But in such cases, there is more active resistance to them.

[260] Tasioulas, *supra* note 99, at 324. He goes on to explain: "This is because *how much* state practice and *opinio juris* is needed to establish a customary norm, and in what proportion, depends in crucial part on an evaluation of the content of the putative norm. . . . The exact nature of the 'trade off' between state practice and *opino juris* will depend on a judgment about the efficacy of the putative norm in achieving the *goals of international law* (peace, human rights, environmental protection and so on) in a legitimate manner." *Id.* at 325 (emphasis added).

[261] ILA Report, *supra* note 2, at 33.

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In conclusion, it was asked whether a postmodern doctrine of CIL can be advanced to help promote the global common good and safeguard our common humanity. It was submitted that an alternative doctrine must have its roots in a decolonized, self-determined, and plural cultural and political international order in which deliberative reason plays a central role. A postmodern doctrine must therefore, to begin with, rest on the recognition that CIL has historically been an undemocratic source of international law.[262] Indeed, it has been shorthand for norms that accommodate the reality of imperialism. If the dark past of CIL is acknowledged, the distinction between formal and material sources of CIL, endorsed by the ICJ, ILA, and ILC, should be rejected as it veils the harm done to subaltern peoples and actors. A postmodern doctrine would also address the democratic deficit that characterizes the conceptualization and formation of CIL norms. The deficit flows from, among other things, the absence of availability of state practice of third world states, the paucity of writings of its publicists, the lack of adequate weight given to qualifying resolutions of international organizations, and the nonrecognition of the practices of the global civil society. A postmodern doctrine would also distinguish between *opinio juris* as a constituent element of CIL and *opinio juris communis* representing universal conscience in order to inject progressive content into the international legal order. In the final analysis, a postmodern doctrine would redefine the epistemology and ontology of CIL formation in order to help work toward a just world order. Such a doctrine can only be given life through the sustained effort of those social forces that are dissatisfied with the current global order. In this process, the role of critical theories of international law will be crucial as new doctrines are in the final analysis shaped by scholars of international law.

[262] "By nature [CIL] has always been anti-democratic." BEDJAOUI, *supra* note 24, at 135. *See also* Galindo & Yip, *supra* note 18, at 269.

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