
International Relations Looks at Customary International Law: A Traditionalist's Defence

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Abstract

A recent influential article by two American law professors, one of whom has held high positions in the US Government, asserts that customary international law plays little or no role in decisions by states. It rests this conclusion on the basis of an analysis that relies on game theory or public choice analysis. It attempts to confirm this result by surveying the history of customary international law controversies. It is the purpose of this essay to demonstrate that the article omits many other important controversies in which arguments about custom have exerted considerable influence.

1 Introduction

Recently the whole structure of customary international law has been challenged by two American writers in the international relations discipline, using approaches with such labels as game theory, public choice, and so on. The article by Jack Goldsmith and Eric Posner, while titled 'A Theory of Customary International Law', is basically a theory *against* customary law. It takes the position that such law plays no significant role in the relations between states.¹ 'CIL as an independent normative force has little if any effect on national behavior...', they write.² Considerations of the national interest (quite narrowly defined) and power explain what happens. It is significant that in their other writings Professors Goldsmith and Posner uniformly take positions designed to narrow the scope of the international obligations of the

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¹ Goldsmith and Posner, 'A Theory of Customary International Law', 66 *U Chi L Rev* (1999) 1113; there will also be references to a companion article by them, 'Understanding the Resemblance between Modern and Traditional Customary International Law', 40 *Va J Int'l L* (2000) 639.

² *Ibid.*, at 639, 641. They use the acronym 'CIL' for 'customary international law'.

United States – particularly as they might limit the freedom of the 50 states.³ This is why they are termed ‘the new sovereigntists’.⁴ American foreign relations, rational choice learning is quite unfamiliar in Europe and should be better known if there is to be a constructive dialogue across the Atlantic.

A number of other American writers, operating within various theories of international relations, have taken issue with this position.⁵ It is indeed a major achievement to have provoked as much attention to the otherwise quiescent field of customary international law. What these articles have in common is the argument that other modes of public choice analysis that were not used by Goldsmith and Posner would explain customary international law as a cooperative enterprise among states rather than a strictly confrontational one. These articles have generally left unchallenged the factual basis of the Goldsmith-Posner edifice. Thus, it seemed useful to add a critique from a traditional international lawyer’s perspective to the debate.⁶ The following is divided into three parts. The first briefly summarizes the Goldsmith-Posner analysis. The second is a description and analysis of the activities involved in arguing about, discussing and finding customary international law. Unlike the Goldsmith-Posner piece, it breaks open the black boxes of nation-states and looks at the interactions of the flesh and blood individuals involved. The third part reviews a series of episodes in which argumentation as to customary international law played a significant, if not necessarily decisive, role in the settlement of controversies. Goldsmith and Posner present some anecdotal evidence as to episodes in which custom did not carry the day. This part argues that they have loaded the dice against custom.

2 The Goldsmith-Posner Analysis

Goldsmith and Posner, operating in the game theory of public choice medium develop four strategic positions, using as illustrations variations on the famous fact situation of *The Paquete Habana*.⁷ In that case the controversy centred on the issue whether fishing vessels of one belligerent state (Spain) could lawfully be captured by warships of the other. The first strategic position is coincidence of interest. The cost of diverting naval energies from fighting the enemy to capturing inconsequential fishing smacks is simply not worth it. Accordingly, neither party does it. The second position they term coercion. One of the contending powers is the stronger of the two and threatens

³ See, e.g., ‘Federal Courts, Foreign Affairs and Federalism’, 83 *Va L Rev* (1997) 1617; Bradley and Goldsmith, ‘Treaties, Human Rights, and Conditional Consent’, 149 *U Pa L Rev* (2000) 399.

⁴ Spiro, ‘The New Sovereigntists’, *Foreign Affairs*, Nov./Dec. 2000, at 9.

⁵ Swaine, ‘Rational Custom’, 52 *Duke LJ* (2002) 559; Guzman, ‘A Compliance-Based Theory of International Law’, 90 *Calif L Rev* (2002) 1823; Chinen, ‘Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner’, 23 *Mich J Int’l L* (2001) 143.

⁶ Another defence of customary law that takes modern international relations theory into account – as well as national power and interest – is M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999). Unfortunately it could not take the work of Goldsmith and Posner into account. See also Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, 95 *AJIL* (2001) 757.

⁷ 175 US 677 (1900).

the weaker one with retaliation if it attacks its fishing vessels. Accordingly, the weaker state refrains. Third, we come to cooperation, otherwise known as the 'bilateral repeat prisoners' dilemma'. Some would substitute 'iterated' for 'repeat'.⁸ In this scenario either warring state would be better off seizing fishing vessels so long as the other one did not. However, the second-best situation for both of them is that neither one does any seizing. If both states refrain, believing that the other will follow suit and 'defect', a tacit equilibrium is in place. Finally we have a state of affairs they call coordination. In this variant, states rely upon the development of a single rule because they would be worse off if each state went its own way than if they converged on one solution, perhaps an arbitrary one.

3 The Process of Customary International Law

To understand custom one needs to examine that communications process (the regime) in some detail. One has to disaggregate the states involved. Goldsmith and Posner, for example, talk about the gains realized by states if they seize enemy fishing vessels.⁹ In fact, the interests primarily at stake were not those of the United States but those of the US naval personnel who expected to receive prize money from the sale of the *Lola* and the *Paquete Habana*. Indeed, the forfeiture of the vessels, owned by Cubans, tended to undermine the efforts of the United States to make a friendly and prosperous nation out of Cuba, the ex-colony of Spain. One can read the majority opinion as animated by the plight of the impoverished Cuban fishermen.

A Dialogue among Officials

We use as our centrepiece here a more modern example: the Virginia state police pick up the premier of Vizieristan driving while intoxicated near McLean. The Virginia police, sensing that there is an international issue but not knowing what it is, radio the State Department. The legal adviser on duty checks the books [the notorious publicists] and finds that it is written that there is a customary rule against arresting incumbent chiefs of state. The adviser tells the police 'let him go, international law says he is immune.' The police, quite reluctantly, let him go because they are impressed by the message about law. The process would have proceeded quite differently if neither the police nor the attorney adviser had thought there was a legal problem. Of course, there are cases in which the policy-maker decides to do something despite receiving advice that it violates a customary rule; even such an interchange would be different from one where no law was involved.

⁸ Setaer, 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law', 37 *Harv Int'l LJ* (1996) 139.

⁹ 175 US 677 (1900).

B Custom in the Courts

If the Virginia police had proceeded to arrest the premier that issue might have gone to court. How would a court approach this issue? Here is what Goldsmith and Posner have to say:

When the court is confident which course of action is in the national interest, it will use CIL to rationalize the result When a court is uncertain about the national interest, it can read the indicia of CIL to try to make a more objective determination of dominant pertinent behavioral regularities.¹⁰

One looks at this statement and is reminded of a critique:

Public choice theorists have had far more difficulty modeling bureaucrats' and judges' behavior as compared to legislators and private economic actors, due to the absence of a compelling theory as to what bureaucrats and judges maximize.¹¹

It would be irresponsible to say that no US court would think in the way that the authors expect. But rummaging around in my accumulation of anecdote I find lots of examples to the contrary – unless one concludes that the judges are lying. For example in both *Garcia-Mir v. Meese*¹² and *Tag v. Rogers*,¹³ courts found a rule of customary international law to exist and then found that the United States had decided to violate that rule so that they were bound to follow the decision of the political branches. There are also cases in which the courts have refrained from making determinations of custom because of their complexity and political sensitivity. Thus the Supreme Court in the *Sabbatino* case¹⁴ avoided determining whether Cuban expropriations violated international law. Congress then told the courts that they *had* to make such determinations.¹⁵ In cases under the law allowing aliens to sue for torts against the law of nations, judges draw on scholarship to determine whether there is a rule.¹⁶ Indeed it would be hard to judge what interest, if any, the United States had in the outcome. Of course, different judges may maximize different things. They may wish to feel a glow of humanitarianism and thus find that a rule of human rights law exists, though the evidence for it is scant. They may wish to wind up in agreement with

¹⁰ Goldsmith and Posner, 'A Theory', *supra* note 1, at 1169.

¹¹ Skeel, 'Public Choice and the Future of Public-Choice-Influenced Legal Scholarship', 50 *Vand L Rev* (1997) 647, at 653, n19 (book review). Compare Posner, 'What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)', 3 *Sup Ct Econ Rev* (1993) 1.

¹² 788 F.2d 1446 (11th Cir. 1986). See also *Fernandez v. Wilkinson*, 505 F Supp 787 (D. Kan. 1980)(holding indefinite detention of alien a violation of customary law), *aff'd* on other grounds, 654 F.2d 1381 (10th Cir. 1981). In *United States v. Alvarez-Machain*, 504 US 655, 668 (1992), the majority conceded that the abduction from Mexico 'may be in violation of general international law principles'. The dissent was clearly of that view.

¹³ 267 F.2d 664 (DC Cir. 1959).

¹⁴ *Banco Nacional de Cuba v. Sabbatino*, 376 US 398 (1964).

¹⁵ 22 USC § 2370(e)(2).

¹⁶ The Alien Tort Claims Act, 28 U.S.C. § 1350. Goldsmith has been very critical of the cases in this area. See Bradley and Goldsmith, 'The Current Illegitimacy of International Human Rights Litigation', 66 *Fordham L Rev* (1997) 319. See the response by Goodman and Jinks, 'Filartiga's Firm Footing: International Human Rights and Federal Common Law', 66 *Fordham L Rev* (1997) 463. *Sosa v. Alvarez-Machain*, 124 S Ct 2739 (2004), affirms a modest role for the Act.

other judges, even those in other countries, whose views they respect. Courts in other countries would not recognize the quoted sentence as representing their practice.¹⁷

Possibly the case could reach the International Court of Justice.¹⁸ Indeed, lawyers within the national systems involved may have posed the question: What would the World Court decide about custom in this situation? As the ultimate arbiters of custom the judges of the International Court have the leeway to give a different weight to various factors in their analysis. They may approach the issue rather passively, requiring a strong showing of state practice before recognizing a rule. Or they may regard themselves as authorized to shape custom, much as vigorous American or British judges have assumed the power to revise the common law in order to promote the current welfare of the public as they see it.

C *The Publicists*

Another set of elements in this circuit is constituted by the publicists. It is the publicists who provide the lawyers involved in the process with the data about state practice and *opinio juris* that the actors need to judge the existence of the rule. And writers may nudge the rule in ways that they deem preferable. What do publicists maximize? Seldom will their stand have an impact on their royalty income. The risks and rewards are more intangible. Being out of step with one's colleagues in the field may impose a psychological cost. Publicists have a general interest in expanding the field in which they officiate. They may feel a warm glow after opining that a given action would violate the international law of human rights. It is easy to give in to the temptation to find that the rule one likes is supported by enough evidence to be binding.

D *Public Opinion*

Finally, the general public may, on rare occasions, become concerned about an asserted violation of customary law. This happened during the Trent episode of 1861, a situation which helped edge Britain to the verge of war with the United States. Views of customary maritime law with respect to Germany's unrestricted submarine warfare also played a role in moving the United States from its neutral position to declaring war on Germany in 1917.

E *The Expanded Network*

One of the features of the customary law regime is its ability to communicate data to parts of the system outside of the pair of nations involved in a controversy. Other actors have a chance to evaluate the behaviour of state A or state B and determine whether it is consistent with customary rules. A state loses its reputation within that

¹⁷ German practice is governed by Art. 25 of the Grundgesetz. See G. Dahm *et al.*, *Völkerrecht* (2nd ed., 1989), I/1, at 118–121.

¹⁸ Since the United States has terminated its consent to the optional clause it is hard to see how an American case on custom would get to the Court. An important recent judgment of the Court on customary law is *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports (2003) 3.

circuit for not being law-abiding. Goldsmith and Posner focus on the dyadic relationship between the states and are dismissive of ‘reputational’ losses from defections.¹⁹ They have no empirical way of demonstrating that these losses are insignificant. It is of course true that the United States as a hegemonic power can more safely dismiss reputational losses than other states, but if it aspires to exert leadership on the world stage it does need the cooperation of other governments.²⁰

What one gets from examining this circuit is a sense that *opinio juris* is a real phenomenon. Compared with a determination on strictly policy grounds, a different set of actors is assembled to play different roles in relation to each other. If the question were simply whether an iterated practice should now be abandoned because it is inconvenient, roles and relations would have been very different.

4 Some Episodes of Customary Process

Goldsmith and Posner engage in a protracted survey of episodes involving customary international law issues and conclude from them that the impact of law has in fact been marginal. The thrust of this section is that their selection is highly tilted so as to support their ultimate conclusion. A review of customary practice events over time reveals a substantial number of cases where it did play a significant role. When diplomatic immunity was a matter of customary law there was routine compliance; it would be hard to count the episodes since many of them involved governments silently refraining from actions which would have violated the customary understanding. There were also cases of apologies and compensation, such as cases of damages to embassy property caused by failure to protect them. That history of observance was continued without a visible change in intensity after the adoption of the Vienna Convention on Diplomatic Relations. Custom still plays a similar role with respect to the uncodified law regarding immunity of heads of state and other high government officials who are not diplomats.²¹

History also produces episodes in which assertions that a practice violated customary international law seem to have been an important part of the mix of factors that led the United States or other countries to modify their positions. We start with two episodes quite closely related to points of history evoked in the Goldsmith and Posner text.

A *Neutral Rights at Sea*

Goldsmith and Posner deal extensively with the evolving rules as to neutral rights during a war at sea, including some arising during the Civil War. But they omit the most dramatic of all: the Trent affair. It began in 1861 when a federal cruiser stopped

¹⁹ Goldsmith, ‘Sovereignty, International Relations Theory and International Law’, 52 *Stanf L Rev* (2000) 959, at 985–986.

²⁰ For a fuller exposition of this point see M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (2003).

²¹ For materials on the custom concerning immunities of present and past heads of state see L. Damrosch *et. al.*, *International Law – Cases and Materials* (4th ed., 2001), at 1276–1282.

the *Trent*, a British vessel, on the high seas and took off two Confederate emissaries, Mason and Slidell. Britain protested vigorously, with elaborate explanations as to why this violated customary law. The politicians in London who had favoured the Confederacy seized the opportunity presented by the public indignation at the affront to British rights and honour. They sent troops to Canada and redeployed the navy. Other European states joined in the protests. The United States reacted with arguments about the law, but concluded that discretion would be best and released Mason and Slidell, thereby averting hostilities that might have led to a victory for the Confederacy.²²

A second controversy about neutrality law arose from Germany's adoption of unrestricted submarine warfare in 1917. A president who had campaigned as the man who kept the US out of war asked Congress to declare war. He referred as follows to customary law:

International law had its origins in the attempt to set up some law which would be respected and observed upon the seas . . . By painful stage after stage has that law been built up.²³

The sense that German U-boat warfare violated law was significant in moving Congress and the American people into a pro-war position.

B *The Three-mile Limit*

The article has an extensive exploration of the disputes about the existence (or non-existence) of the three-mile rule and concludes that the rule was very indeterminate.²⁴ But it omits one interesting and important exchange which seems strongly affirmative on the rule. During Prohibition we asserted the right to search foreign flag vessels suspected of smuggling while they were beyond the three-mile limit. As the Supreme Court said, '[p]rior to the Eighteenth Amendment the United States had never attempted, in connection with the enforcement of our customs laws, to board foreign vessels beyond the three-mile limit . . .'²⁵ Vigorous diplomatic protests incorporating arguments about custom ensued. By treaty Britain and the United States recognized a right to search vessels for prohibition law violations out to a point from which the foreign vessel could reach the US coast within an hour's sailing.²⁶ But Article I of the treaty says:

The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.²⁷

²² For a contemporary account see H. Wheaton, *Elements of International Law* (R. Dana (ed.), 1866), 539–549. See also S. F. Bemis, *A Short History of American Foreign Policy and Diplomacy* (1959), at 215–218.

²³ Foreign Relations of the U.S. 1917 Supp. 1, at 196. For a judgment on the importance of submarine warfare to the decision to enter the war see Bemis, *supra* note 22, at 399–403.

²⁴ Goldsmith and Posner, 'A Theory', *supra* note 1, at 1158–1167. For a different analysis of the three mile rule see Byers *supra* note 6, at 114–116.

²⁵ *Cook v. United States*, 288 US 102, 112 (1933).

²⁶ This history is recounted in *ibid*.

²⁷ Convention on Smuggling of Intoxicating Liquors, 43 Stat 1761, 12 Bevans 414, signed 23 Jan. 1924.

The same result was obtained in a number of other treaties; in some of them the three-mile rule was declared to be accepted and in others the question was reserved.²⁸ Under prohibition the United States also forbade foreign vessels from bringing liquor into US ports, even though they regarded a supply of alcohol as an essential portion of a ship's stores.²⁹ The resulting controversy was settled by American legislation permitting foreign vessels to carry alcohol provided that the stores were sealed 12 miles from US shores and not reopened until the 12 miles were passed outward bound – an occasion for celebration.

C *Some Recent Episodes*

In 1981 the United States, in response to the Soviet Union's alleged role in suppressing the Solidarnosc movement in Poland, forbade the delivery of compressors needed to expand the flow of gas from Russia to Europe. It did so on the basis that companies incorporated in Europe but controlled by American firms could be treated as US citizens and thus be subject to export controls. The European Community filed a protest based on customary international law and a court in The Netherlands held a US-owned subsidiary liable for failure to deliver pipeline equipment. Ultimately, the United States asserted victory and retreated from its prohibitions.³⁰

In 1996 Congress enacted the Helms-Burton law penalizing foreigners who 'traffic' in products originating from facilities expropriated by Castro. The President has kept in place orders suspending the application of those penalties in order to keep the peace with Europe, which asserted that customary international law would be violated by this extra-territorial application of US law.³¹ A part of the US justification for the move was the argument that the customary rule that expropriation is valid only if prompt, adequate and effective compensation is paid should be extended to expropriations of the state's own nationals. The prompt, adequate and effective rule is a customary rule that the United States has consistently supported both in argumentation and in its policies.³² It has not been analysed in the literature we are reviewing.

In 1991 the United States Air Force carried out an intensive aerial bombardment campaign against targets in Iraq as preparation for the ground invasion. In the planning process it took into account the requirements stated in the Geneva Convention Protocol I about avoiding inflicting casualties or damages on civilians. Since the US has never ratified the Protocol it was not a matter of treaty law but of a set of customary rules mirroring the treaty requirements. A review of the execution of this policy demonstrates that USAF legal personnel regularly advised the operational commanders

²⁸ *Cook v. United States*, *supra* note 25, at 109, n.3.

²⁹ *Cunard SS Co. v. Mellon*, 262 US 100 (1923).

³⁰ See Lowenfeld, 'Trade Controls for Political Ends', 4 *Chi J Int'l L* (2003) 355, at 360–365.

³¹ See the exchange between Lowenfeld and Clagett, 'Agora, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act', 90 *AJIL* (1996) 419. For a European view see Stern, 'Vers La Mondialisation Juridique: Les Lois Helms-Burton et D'Amato-Kennedy', 100 *Rev Gen Droit Int'l Pub* (1996) 979.

³² The evidence of custom as to the expropriation rule is assembled in Restatement (Third) Foreign Relations Law of the United States (1987) § 712.

about the legality of operations that they had planned and that their legal advice was regularly followed.³³

The influence of customary law on American decision-making is generally similar to that found with respect to episodes in which the United States, acting under the later-in-time rule, overtly defied its treaty obligations.³⁴ Repeatedly, the ultimate result was the negotiation of a new agreement which accommodated the interests of the United States with those of the treaty partners or the avoidance by the United States of further violations.

Thus it is possible to conclude that sending a message through the international law system that this country intends to violate an established rule does put other actors on their guard about the reliability of the actor's commitment to the system of rules and makes other countries more wary of relying on the defector. It also becomes apparent that some concept of *opinio juris* is needed to make sense of the process. While other nations' decision-makers will understand a defection from a continued practice that they do not regard as a requirement of law, they will take a different attitude towards violation of something they judge to have been crystallized into a rule. Thus the Goldsmith-Posner conclusion does not do justice to the problem:

In place of *opinio juris* – the question-begging and confused talisman that accounts for why nations 'adhere' to CIL – it substitutes the much more familiar and plausible notion that a nation acts in accordance with its interests and resources.³⁵

5 The Vitality of Customary Law Today

It is well to be modest about the present role of customary law in United States foreign relations or in the world of international law. The role of codification in such areas as diplomatic and consular immunity, once strongholds of customary law, has been greatly constricted. America's own favourite customary rule, the so-called Hull Rule on expropriations of foreign property, has been reinforced by bilateral agreements, investment insurance and other measures. The growth of the number of states has made it harder and harder to discern unanimous patterns. The problem of the 'persistent objector' raises difficulties about the existence of a 'general' pattern of state practice, particularly if the objector is the United States with its unique power position. It is also true that, as the examples cited by Goldsmith and Posner illustrate, there have been significant defections from asserted customary rules. But there are also significant adherences to custom. Customary law is at its strongest when the controversy is kept within the bounds of the international law epistemic community. It also gains when the consequences of the rule are distributed randomly among nations rather than systemically favouring one. It is also strongest when the costs of compliance are not enormous. Nations, including the United States, find it useful to affirm their commitment to a customary rule when, for some reason, it has not been

³³ Lewis, 'The Law of Aerial Bombardment in the 1991 Gulf War', 97 *AJIL* (2003) 481.

³⁴ Vagts, 'The United States and Its Treaties: Observance and Breach', 95 *AJIL* (2001) 313.

³⁵ Goldsmith and Posner, 'Understanding the Resemblance', *supra* note 1, at 661.

feasible to work out a multilateral agreement on a problem. The Vienna Convention on Treaties and sections of the Convention on the Law of the Sea illustrate this practice. Customary law is not divorced from considerations of power and interest; no thoughtful student of international law has ever thought that it was. Still, the awareness that a pattern of state behaviour has settled into a rule of law introduces a new element into the situation, tending to make the pattern more stable and reliable. Custom lives.