

Brian D. Lepard. ***Customary International Law. A New Theory with Practical Applications.***

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The theory of customary international law is one of the big mysteries of international law scholarship. Every student of international law knows what customary law is. And yet, nobody knows what it actually is. Article 38(1)(b) of the Statute of the International Court of Justice defines custom as consistent state practice coupled with an *opinio iuris*. Although legal scholarship has filled whole libraries trying to come up with a set of rational criteria to identify these two elements, there remain many open questions. In his new book on *Customary International Law*, Brian Lepard intends to advance legal scholarship in the search for answers. He promises to 'develop a new theory of customary international law that . . . helps to solve its theoretical and practical puzzles' (at 11–12).

The core of Lepard's theory is the reduction of the two constitutive elements of customary law to one – *opinio iuris*: a 'customary international law norm arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct' (at 8, 97–98). State practice is not perceived as a mandatory requirement, but merely as evidence of this belief (at 98). With this focus on *opinio iuris*, Lepard follows a popular trend among international law scholars. There have been several recent attempts to diminish the importance of state practice for the identification of unwritten international norms.<sup>1</sup> The rationale behind this

tendency is the strengthening of norms with moral impact, such as international human rights law, as we often observe a divergence between official declarations of states and the actual practice in this area.

For the identification of an *opinio iuris*, Lepard makes two presumptions. The first presumption is inspired by game theory: whether states view a norm as authoritative depends on the structure of the social dilemma. If states face a harmony game, in which all states have unconditional incentives to cooperate, or an assurance game, in which cooperation yields the best individual outcome if all other states cooperate as well, legal norms are not necessary to produce the best social outcome – the social process will produce the best outcome anyway. Therefore, Lepard argues that there is a presumption that states do not desire an authoritative norm (at 103). If we have a coordination problem, in which cooperation equally yields the highest individual pay-offs, but which have multiple *equilibria*, Lepard presumes the desire to establish an authoritative norm. In a prisoner's dilemma situation, finally, states have incentives to defect from the socially optimal solution. Therefore, the author argues that there should be an even stronger presumption that states want to establish an authoritative norm.

However, these propositions concern only the amount of evidence necessary for identifying *opinio iuris*. With regard to the level of consensus necessary for the establishment of a customary norm, the situation is different. Here, Lepard requires the highest level of consen-

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Principles', 12 *Austl Yb Int'l L* (1992) 82; J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *Oxford J Legal Stud* (1996) 85; A.T. Guzman, 'Saving Customary International Law', 27 *Mich J Int'l L* (2005) 115; N. Petersen, 'Customary Law without Custom? – Rules, Principles, and the Role of State Practice in International Norm Creation', 23 *Am U Int'l L Rev* (2008) 275.

<sup>1</sup> See, e.g., B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 *Indian J Int'l L* (1965) 23; B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General

sus in a prisoner's dilemma situation because conflict is most likely in such situations (at 159). In contrast, coordination problems demand a lower level of consensus, and, if the structure of the social dilemma is an assurance game, a 'small' majority is already sufficient (at 158).

The second presumption concerns the ethical framework of Lepard's theory. If certain norms objectively further fundamental ethical principles, we should presume that these norms have legal authority (at 110–111, 140). Where do these fundamental ethical principles come from? Lepard establishes a pre-eminent ethical principle, which he calls 'unity in diversity' (at 78). According to this principle, all individuals are members of one human family, who morally ought to be united, while recognizing that differences in race, religion, nationality, enrich this single human family. Lepard claims that this principle has been explicitly endorsed by states in international treaties and declarations.

From this pre-eminent ethical principle Lepard derives further ethical principles: essential ethical principles, compelling ethical principles, and fundamental ethical principles, which differ in how closely they are 'logically' related to the principle of unity in diversity (at 81–82). These ethical principles comprise certain human rights, such as the right to life, the right to subsistence, and the right to freedom of moral choice, the respect for state autonomy, the punishment of criminals, the principle of open-minded consultation, and the duty to honour treaties (at 82–92).

The presumptions established by Lepard are rebuttable. They are means for setting standards with regard to the required weight of the evidence for an *opinio iuris*. They are not supposed to substitute for it. Nevertheless, both presumptions are questionable. Lepard requires, at the same time, the least evidence and the highest level of consensus for *opinio iuris* in situations where conflict is most likely – when states face a prisoner's dilemma situation. However, the prisoner's dilemma seems to be exactly the situation where deviating from the consensus requirement seems to be worthy of some consideration.

Let us consider an example. Climate change is often perceived to be a model case of a multilateral prisoner's dilemma. The polluting state reaps the benefits of its polluting conduct, while the costs are borne by all members of the international community. However, costs and benefits are not distributed in the same way. Industrialized states draw more benefits from polluting than developing countries, while certain states are more affected by global warming than others. The interests of states with regard to the best solution may therefore diverge significantly, so that some states may rationally oppose the formation of a global norm.

Does this mean that we should respect the autonomy of a state opposing the norm? Not necessarily. Let us assume that we have a highly industrialized state A, the industrial emissions of which contribute significantly to the increase in global warming. Global warming leads to a rise in the sea level, which might endanger the existence of island state B. Imposing emission standards would now certainly interfere with A's autonomy, but *not* imposing them would affect B's autonomy probably to an even greater extent. Requiring a high level of consensus because a certain solution may not be the 'preferred outcome of *any* state' (at 159) thus does not give sufficient consideration to the complexity of the matter. The question is not whether the autonomy of a certain state is restricted, but rather how we resolve the conflict of competing autonomies.

The question of *which* standard to impose is, of course, a difficult one. Even if we agree that the reduction of pollution is socially desirable, we still do not know much about the standards. By how much should emissions be reduced? Are there different obligations for industrialized nations from those for developing countries? Lepard does not address these difficulties by requiring only a minimal amount of *opinio iuris* in such constellations. Unfortunately, he does not explain how this works in hard cases in practice.

With regard to his ethical framework, Lepard derives his pre-eminent ethical principle of unity in diversity from the text of international declarations and treaties. However,

even if we observe that states indeed recognize the principle of unity and diversity, the texts do not reveal that this principle should be the centrepiece of the moral framework of customary international law, and that it should be used as a guiding principle in interpreting and evaluating evidence for an *opinio iuris*. How do we know that? Lepard does not give any analytical reasons. Instead he refers to 'the world's most prominent ethical thinkers', such as Immanuel Kant, John Stuart Mill, or Peter Singer (at 79), and 'the sacred texts of the great religions of the world' (at 80). A more thorough analysis of why the principle of unity and diversity should have such a pre-eminent role would have made his point more convincing.

Lepard then claims that the other fundamental ethical principles he identifies 'logically flow' from the pre-eminent principle (at 81). However, the effort to establish a link between the fundamental principles he lists and the pre-eminent principle of unity in diversity is not always convincing. His reasoning is often apodictic. What we find are citations of international documents mentioning these principles. What we search for in vain, however, are reasons for why they are *logically* related to the pre-eminent principle.

After having laid out his general theory, Lepard continues to discuss the main topics which you would expect in a book on customary international law in the light of his theory. He analyses the amount of consensus necessary for the formation of customary law, the relationship of custom to general principles of law (Article 38(1)(c) ICJ Statute), the sources of evidence for *opinio iuris*, such as treaties and General Assembly resolutions, the role of persistent objectors, as well as the status of *jus cogens* norms and norms *erga omnes*.

In the last part of his book, he finally applies his theory to four examples, of which three emanate from the field of human rights, where his moral framework probably has the biggest impact. The one example which does not originate in the field of human rights is the discus-

sion on whether the arm's length standard in international tax law can be considered to be a customary norm. Lepard answers the question in the negative, as agreements introducing the standard are only bilateral and thus not generalizable. Furthermore, the arm's length standard does not directly realize fundamental ethical principles, so that there is no presumption in favour of a customary norm (at 300). The most interesting analysis in the field of human rights is his argument that there is a customary right to change one's religious beliefs. Lepard cites several international documents supporting such a right (at 348–359), points out the proximity to the principle of unity in diversity (at 360), and even cites Qur'anic verses emphasizing the freedom of religion in support of his argument (at 363).

At large, Lepard has developed an original theory of customary international law. It remains to be seen, however, whether his theory will really have an impact on the solution of the theoretical and practical puzzles of the field. His conception leaves too many questions unanswered. Although he tries to avoid a profuse natural law flavour of his ethical framework by linking it to international documents and the philosophical and religious discourse, the basis of the framework is still nebulous. Concerning the structural analysis of social dilemmata, it is a benefit of Lepard's analysis that he realizes that the question of customary law does not deserve a one-size-fits-all approach. Different incentive structures may require different solutions. However, the concrete analysis of this problem leaves a lot to be desired. Lepard's book is certainly a contribution to the discussion. However, international law scholarship has still some way to go to solve the mystery of customary law.

Niels Petersen

Senior Research Fellow, Max Planck Institute  
for Research on Collective Goods, Bonn

Email: [petersen@coll.mpg.de](mailto:petersen@coll.mpg.de)

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