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ty as to the future course of events, the emerging rules will be such as to maximize the expected welfare of the community at large. Conversely, rules that are articulated after an outburst of conflict may be strategically biased. Once the future is disclosed to them, parties will tend to articulate rules that maximize their actual welfare, rather than the expected welfare to be derived from an uncertain future. Thus, *ex ante* norms should be given greater weight in the adjudication process.

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

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

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Why States Are Bound By Customary International Law

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

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

Evidence of Law

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

These four methods of finding the law have deep roots in international legal theory. Hugo Grotius discovered the law of nations ("*jus gentium*") in custom ("*usus*"), the views of the learned, and the will ("*voluntas*") of states (*Belli ac Pacis* I.xiv), but explained that the underlying

source of the law is the human need for society (prolegomena.8), as explained by right reason (II.i.5). Custom, will and learning discover the dictates of reason to construct an international society of states (prolegomena.17). So, for Grotius, the customary law of nations corresponds to the *lex non scripta* of domestic legal systems (I.xiv.2). Nations develop customs either by deduction from natural principles or from consent. In either case their customs should be binding. Emmerich de Vattel repeated and reformulated Grotius' observation (*Droit des gens*, preface, viii, and note f.), but added that nations need society amongst themselves much less than individuals do (preface, xviii). Vattel insisted that custom and treaties both derive whatever binding force they have from antecedent natural law (preface, xxii), as deduced through the natural liberty of nations, the common welfare of states, and their interest in trade (preface, xx).

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

Positive Law

To say that law exists to be found and obeyed is not to say that law cannot be made, or made more determinate through the deliberate acts of those in authority (or others, in certain circumstances). Laws exist, in part, to clarify social relations when several equally viable arrangements would be

possible, but one must be chosen. Domestic legal systems often do this by "positive law", by which I mean formal legislation, generated by a recognized process, and enforced by courts. Treaties offer a partial parallel in the international sphere. Between those party to them, treaties may be considered as "legislation", in the same way that contracts create "law" in domestic legal systems. Parties to treaties may be assumed to know best what should be done, in specified circumstances, within certain restrictions, to protect the general good, to prevent unconscionable results, or violations of basic *jus cogens*, derived from nature.

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

Positive law certainly plays a part in international law, as when multilateral treaties clarify previously disputed issues, through quasi-"legislation", but most of international law has less obviously "legislated" origins. States can claim a certain authority, when they agree, but often no agreement exists. Even when states do agree, their own legitimacy to have a voice on what the law is may be questionable. There simply is not enough positive law in the international sphere to build a legal system on. Legal theories based on authority need authorities to make them work, but international society has no universal authority, nor any prospect of finding one.

Obedience to Law

International law, like all law, must claim to deserve obedience. The mystery is what supports this claim, without a recognized international authority to promulgate rules. Domestic legal systems rest on the government's claim to discover or clarify law and justice through established structures of power. No international authority can

make this claim and enforce it. So international law must earn obedience by being persuasive, or right. States or others asserting principles of international law may persuade (1) by force of arms, or (2) by force of argument. When they persuade by argument, states evoke obedience by convincing themselves or others that certain rules deserve to be obeyed.

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

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

The Purposes of International Law

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

Formulations such as this, that privilege peace

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

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

Treaties

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

Understanding the role of treaties and custom as evidence rather than the sources of international law demonstrates how multilateral treaties may

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

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

Conclusion

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

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

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

I. Introduction

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

The debate on *opinio juris*;
The international legal system as a player;
The formation of dispute-resolving customary