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Afterword

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AFTERWORD

Mark A. Chinen

Professors Goldsmith and Posner have given an insightful reply to my Article. It has been a pleasure to engage in a discussion of these issues with respected colleagues via this exchange of writings, and I am grateful to the Journal for providing the opportunity to do so. Most of the positions I have taken are already adequately discussed in the body of the Article, and this afterword is not intended to summarize all of the arguments made there. However, I wanted to address some of the points Professors Goldsmith and Posner make in their reply. I have organized this afterword using their numbering.

1. Professors Goldsmith and Posner are quite right to point out that I have not supported my arguments with empirical evidence, whereas they have proposed several examples of state behavior in support of theirs. Although I discuss some state behaviors to illustrate my points, my primary task has been to explore the application of game theory to customary international law from a theoretical perspective.¹ As I say at the conclusion of the paper, more historical and empirical research is required to confirm or contradict my arguments.

2. I do not intend to link the evaluative function of customary international law to its rhetorical function, although the two functions are closely related. My point is that, at least when I think about the way in which customary international law operates in the world, I view it more as an evaluative tool than as a descriptive one. Perhaps the better term to use is “predicative” rather than “evaluative”—that is, customary international norms are applied to form part of the predicate that in turn justifies a decisionmaker or advisor in attaching some legal consequence to a state’s actions. To be sure, justification smacks of rhetoric, but I have in mind cases, such as in the *Nicaragua* case when the International Court of Justice finds that the United States has violated customary international law, or when the WTO Appellate Body is asked to consider whether there is customary international commercial law. I might be guilty of being an essentialist in this respect, but adjudication implies the ability to cut through rhetoric to decide whether there has been a violation of, or compliance with, an international norm.

I have been careful to point out that Professors Goldsmith and Posner expressly do not purport to attack customary international law as

1. In passing, I should say that I am an agnostic with respect to positivism. I am trying, however, to see whether the traditional concepts of a general and consistent practice and *opinio juris*, should be abandoned from a game theoretic perspective or whether they still have meaningful content.

law.² At the same time, it is fair to discuss whether their arguments with respect to customary international law as a description of state behavior have any implications for our use of customary international law as rules of decision. Would a judge who accepts Professors Goldsmith and Posner's arguments about the purported failure of customary international law to describe what really goes on between states be more or less inclined to apply customary international law to resolve a dispute? In my view, at least, this is why it is appropriate for this discussion to appear in an international law journal as opposed to an international relations journal. Further, as I point out, there are times when Professors Goldsmith and Posner appear to hint at such implications.³ I would welcome further discussion from them about whether there are any links between their descriptive project and the normative features of international law.

Lastly, I realize that I have separated my analysis of general and consistent practices from a sense of legal obligation and that eventually, the two, as it were, have to be brought back together. In my view, that is justified because the problem of accounting for legal obligation using game theory, let alone matching legal obligation with a set of uniform behaviors, is very difficult in and of itself. This is not surprising since standard game theory with its presupposition of self-interest, obviates legal obligation as a motivating force. So it is appropriate to separate the two concepts for now since there is more than enough work to do to account for both elements of customary international law, although they cannot remain separated forever.

3. I agree that it is almost certain that the large majority of the 40,000 treaties deposited with the United Nations are bilateral treaties. And there is little doubt that treaties represent only a small fraction of the interactions between states (Professors Goldsmith and Posner are right—if every country of the world entered into two bilateral treaties with every other country in the world, this would account for 36,000 treaties). This may indeed be a matter of the glass being half-empty or half-full, and Professors Goldsmith and Posner have persuaded me that it is problematic to speak of levels of cooperation.⁴ At the same time, I do not think that these points detract from my basic argument—that it is more likely than not that treaties, whether bilateral or multilateral, are a result of states finding themselves in a prisoner's dilemma or coordina-

2. See Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 141, text accompanying notes 48–51.

3. *Id.*

4. I still reserve judgment about what it might mean for cooperation if it were found that the number of treaties has been increasing over time or that the rate of increase has been accelerating.

tion game under conditions that make it preferable to cooperate and that make such cooperation possible.⁵ Nor, in my view, do these points weaken my argument that the same conditions or methods that encourage and enable states to enter into treaties could also encourage and enable states to engage in behavioral regularities that could serve as the basis for a customary norm.⁶

What follows is more a question than an argument. If it is true that one cannot speak meaningfully of levels of international cooperation, does not the problem cut both ways? That is, suppose that there are millions of opportunities for cooperation and that we have no way of determining how many of those opportunities are 'taken advantage of.' By the same token, we also cannot assess how often states decline to cooperate when opportunities to do so arise. That is, it is problematic to speak of levels of non-cooperation. That could mean that even if we could determine the number of behavioral regularities that stem only from coercion or a coincidence of interests, we have no way of telling whether that number is significant. It may be that faced with millions of opportunities for cooperation, states take advantage of them, but that such cooperation is not manifested in any legally recognizable form. Since we cannot yet speak of levels of cooperation or non-cooperation, we can only ask whether it is plausible that the conditions exist among states that make cooperation preferable and possible, an issue on which Professors Goldsmith and Posner and I have differing views.

4. Professors Goldsmith and Posner and I also do not agree about the significance of individuals for customary international law. I have given my reasons in the Article (with some qualifications) for attaching more significance to the results of experiments with individuals than they do,⁷ and will not repeat them here. I, too, would not expect a strong reciprocator always to comply with customary international law. But my reasons for discussing the strong reciprocator are linked to my hypothesis that game theoretic accounts of pro-social behaviors like strong reciprocity are the starting point for game theoretic accounts of law and legal obligation.⁸ The strong reciprocator serves as a game theoretic model of someone who sometimes chooses against self-interest, which, if Professor Tesón is to be believed, must be possible if someone is to comply with law.

5. I agree that the relationship between customary norms and the bilateral or multilateral prisoner's dilemma and the conditions that make

5. See Chinen, *supra* note 2, text accompanying notes 59–60.

6. *Id.*

7. See *id.* text accompanying notes 81–82 and text immediately following note 130.

8. See *id.* text accompanying notes 150–55.

possible solutions to these games require more study. But I am still not persuaded by Professors Goldsmith and Posner's arguments for a number of reasons. First, they appear to take the position that a customary norm must arise as a solution to a multilateral game. But suppose there are 10 states in the world, each of which is in a bilateral prisoner's dilemma with each of the remaining 9. If, in a significant majority of these games, the strategy chosen were to cooperate instead of defect, I would argue that this outcome would be as much a candidate for a general norm as would a similar outcome from a 10-player game. Second, I agree that it would be highly unlikely that a multilateral prisoner's dilemma would be solved in a decentralized way, but I am not sure that all customary norms do arise in such a manner. If I am correct that the formation of treaties and customary norms are closely related⁹ and that international fora such as the United Nations often serve as the locus for the creation of customary international law,¹⁰ then the problem of decentralization is ameliorated to some extent. Third, I do not think that states are barred from communicating with one another when customary norms are being created.

6. My reason for citing Professor Young's work¹¹ is not so much to criticize Professors Goldsmith and Posner's models per se, as it is to show that there are alternative game theoretic models of cooperation, which hold the potential for providing a different set of insights into the emergence of cooperation on the international level. As I discuss in the Article,¹² if, for example, an international driving standard starts with individuals playing the coordination game on roadsides, then I think it is yet one more reason why it is appropriate from the perspective of the emergence of international norms, to examine how individuals play the various types of games.¹³ It seems plausible that international norms did not emerge out of a vacuum—that, for example, the rule that the use of armed force is justified in the case of armed attack finds its origin in the experience of individuals or groups who have been the targets of violence.

Now, there may in fact be no hope for obtaining NSF funding for evolutionary game theory research. Professors Goldsmith and Posner are quite right to point out the methodological problems one encounters in moving from standard game theoretic models to those based on some

9. See *id.* text accompanying notes 61–77.

10. See *id.* note 97 and text accompanying notes 109–11.

11. See *id.* text accompanying notes 119–30.

12. See *id.* text immediately following note 132.

13. If Professors Goldsmith and Posner are correct that Professor Axelrod's Tit for Tat is really an evolutionary model, that of course, is an example of an evolutionary game theoretic account of cooperation in repeated prisoner's dilemma.

form of bounded rationality. But it must be remembered that one of the motivations for the emergence of evolutionary game theory was the growing sense that standard game theory had been hobbled by its need for hyper-rational players and the problem of multiple equilibria. Since it is implausible that such hyper-rationality exists in the world, it is reasonable to experiment with models that do not presuppose such rationality.

In short, both standard theory and evolutionary theory are limited in their ability to model aspects of human behavior. In this regard, much more work is needed to determine whether the methodological problems facing evolutionary game theory are insurmountable. In the meantime, the methodological difficulties themselves already tell us something important about the world in which we live. For example, the fact that the results of evolutionary models are highly dependent on initial states is consistent with a growing recognition that many developments, for example, the emergence of Seattle as a center for the aerospace industry, has less to do with efficiency-maximizing decisions, and more to do with chance.¹⁴ That, in my view, is an important insight verified by the evolutionary models, even though the models themselves cannot determine initial states.

In the end, an accurate game theoretic account of human behavior (let alone human behavior on the international level) will have to take into account the fact that humans do use reason in developing strategies vis-à-vis others, but at the same time, are influenced by processes that may have very little to do with our ability to reason. As yet, neither approach has all of the answers and there is much work to be done.

14. See PAUL R. KRUGMAN, *RETHINKING INTERNATIONAL TRADE 2* (MIT PRESS PAPERBACK EDITION 1994). (Of course, Professors Goldsmith and Posner might argue that although the emergence of Seattle as an aerospace hub was due to the fact that Boeing needed to start somewhere, Chicago's emergence in this area because of Boeing's relocation of its corporate headquarters to Chicago is completely rational.)