Opinio Juris in Historical Context

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There may be an assumption in this panel that early conceptions of CIL/opinio juris from the 16th through 19th centuries may provide insights into the importance or relevance of the opinio requirement today. My premise is that one must look beyond the formal requirement of opinio and state practice to the wider context of the political and economic development of international law to understand the role that sources of law played in law development. If we examine the past with our mentality of the modern formal requirements of state practice and opinio juris/acceptance as a legal obligation, we may be disappointed in the level of attention given to these elements and to the stark role that power and natural law justifications played in the development of CIL norms. Many norms that were labeled as CIL had their roots in Natural law and remained deductive despite the label of custom.

From a modern perspective CIL includes those rules and norms borne from the general and consistent practices of states accepted by them as legally obligatory. In the absence of an international legislature or an authoritative court with general jurisdiction, the general acceptance of a norm as legally required or opinio juris provides customary law with its authority and legitimacy. Without this normative dimension, practice is mere habit or convenience. This attitude might be declared by states in their interactions or, more commonly, derived from the general and consistent practice of states. This definition masks whether the source of custom’s authority is state consent or a consensus of the generality of states. In its most forgiving form state consent is implied from acquiescence, that is, the failure of a state to protest or inaction when faced with a threat to or infringement of its rights.¹ As a positivist formulation, states tacitly or impliedly consent to a norm through their behavior exhibiting acceptance of the norm imbedded in practice.² Tacit consent, in most cases, is an obvious fiction.³ Few states have historically participated in the state practice that is said to be formative of CIL. Few states have consented in any sense to much of what is claimed to be CIL. CIL rather appears throughout

¹ See e.g., VATTTEL, THE LAW OF NATIONS.
² See e.g., VATTTEL, THE LAW OF NATIONS.
³ A state’s interest, for example, may not actually be affected in a significant way, the state may be unaware of the practice or a state may conclude that a response may negatively or affect another more important policy decision.
history to be created, by and large, by treatise writers using a variety of methodologies and by arbitration panels tasked with solving disputes often with little guidance. The more widely held view has been that the authority of custom arises from the ‘common consent’ of states by an overwhelming majority of members such that those in dissent are of no importance as compared to the community viewed as a whole. This view is consistent with the concept of customary law in traditional, decentralized societies.

Many international rules and doctrine developed as a means to regularize and justify both peaceful and violent encounters first among European nations themselves and then later between European and Non-European cultures. In the 18th and 19th centuries what might be termed ‘state practice’ often consisted of one state imposing its will on another based on the use or threat of unequal military power. International tribunals, advocates and states often used natural law arguments to support weak customary law arguments. Anthony Angie has argued that much of modern international law and legal structures were forged from the colonial encounter with Non-European civilizations with the newly discovered cultures as the objects of reform. Ileana Porras among others has modified this view by demonstrating that the competition and even violent encounters among European nations for trade and territory were similarly generative of international law. When international law is viewed in this wider political economy context, the technical requirements of CIL pale before the underlying necessity of justifying conquest and regularizing the opening of markets. The general point is that both the earlier natural law Spanish jurists such as Suarez and Vitoria and the later positivists from Grotius to Vattel developed analogous doctrine that performed similar functions. It mattered little whether these analogous doctrines are characterized as having origins in Natural Law ideas utilizing a deductive methodology or are explained using an inductive approach based on state practice and general acceptance as a legal obligation. Both natural law theorists and positivist theorists declared norms to justify war on the one hand and the expansion of trade and investment, not as

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4 LASSA OPPENHIEM, INTERNATIONAL LAW 15-17 (H. Lauterpacht ed. 8th ed. 1955).
an exchange among equals, but rather as the extension of state power through the forcible opening of markets and protection of investment.\(^7\)

Let us examine several areas of the law separated by centuries of history, but with similar templates before suggesting some quite tentative conclusions.

I. The International Minimum Standard for Expropriation

The saga of the international minimum standard of compensation for the expropriation of foreign property is well known and a continuing source of contention. Much of the discussion in the literature over the last 50 years has concentrated on the challenge of the Newly Independent States to the customary rules of investment law including the minimum standard of compensation for expropriation. The general response was that under the reigning theory of CIL new states are bound to universal customary law. These Newly Independent states used their majority at the United Nations General Assembly to pass resolutions declaring sovereignty over natural resources and supporting national treatment as the standard of compensation for expropriation. This formulation was contrary to the long standing view that there was a customary international minimum standard of full compensation under the law of state responsibility that had been long articulated in the major treatises and in international tribunal decisions since the 19th century. Developed countries and many academics responded that New States are bound to universal CIL as either an inherent quality of CIL that binds all or that New States in receiving the privilege of statehood have duties as well as rights. Relatively few scholars examined whether the so-called international minimum standard ever satisfied the requirements of CIL in the first place.

The historical development of this state responsibility to compensate may be conceptualized as a colonial enterprise based on coercive use of power or as an attempt to extend western property concepts to others based on universal principles that encourage economic development. No matter which narrative one chooses it is apparent that there was not, in fact, general acceptance of such a principle by the overwhelming majority of nations. In the 19th century several nations

\(^7\) See this argument in JAMES THUO GATHII, WAR, COMMERCE AND INTERNATIONAL LAW (2010).
of Europe and the United States used military intervention or, the threat thereof, to settle expropriation disputes or collect debts owed to their citizens as bondholders. Several early disputes were terminated by coerced capitulation treaties requiring the capital-importing nations to protect foreign investors.\(^8\) Latin American nations responded with two interrelated initiatives – the Calvo doctrine and the Drago doctrine. Latin American states added Calvo provisions to their domestic statutes and constitutions and inserted Calvo clauses in concession and other state contracts requiring that foreign investors pursue remedies under the domestic law of the capital-importing country on the basis of equal treatment with nationals of that country. It precluded resort to any international minimum standard or armed intervention to collect debt. The Drago doctrine asserted that public debt cannot justify armed intervention or occupation of debtor-states by creditor-states. The Drago doctrine emerged from a specific dispute. Venezuela, after a costly period of civil unrest, refused to pay bondholders from Great Britain, Germany and Italy. Venezuela proposed a commission to settle the claims. Great Britain and Germany launched a military blockade and Venezuela soon capitulated. The Venezuelan Secretary of State Drago protested that the collection of a loan by military means constituted an interference with its territorial sovereignty and the diminution of the sovereign equality of states. Vattel had derived the concept of sovereign equality and its corollary principle of non-intervention from his view of the natural right of sovereignty. At the Second Hague conference in 1906 just a few years later, states negotiated a convention disclaiming the use of armed force by one country on behalf of its citizens to recover public debt from another country.

The Second Hague Conference did not change western assertion of a CIL standard of full compensation for expropriation. Lassa Oppenhiem in the many editions of his treatise, continued to assert the international minimum standard for expropriation.\(^9\) During the nineteenth and early twentieth centuries, Western nations proclaimed and treatise writers chronicled arbitration rulings and events they perceived supported their view that states were responsible for

\(^8\) See e.g., CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 37-64 (1985) (describing the use of armed intervention and other strategies to impose the American and British view of an international minimum standard regardless of national laws or contractual clauses).

\(^9\) OPPENHEIM'S (8th) 52-54 (disputing the view that there exists a separate American international law) and 344-45 (disputing the validity of attempts by Central and South American countries to insert clauses, called "Calvo clauses," in contracts with nationals of foreign states to renounce the protection of international standards).
injury to aliens including an international minimum standard of full compensation for the taking of property. Latin American nations continued to object. One might even say Latin American nations persistently objected asserting that national treatment under the laws of one’s country was the only standard due. The many attempts in the early 20th century to codify the western view that the international minimum standard for compensation was universal CIL failed. At the First Hague Conference for the Codification of International Law in 1930, for example, state delegates could not reach agreement on the principles of state responsibility and adjourned without adopting a convention. An attempted compromise proposal in the Third Committee on a limited version of an international minimum standard received only a narrow majority of 21 to 17 votes. Many Latin America nations did not bother to attend.

The famous statement of Secretary of State Cordell Hull in 1938, in response to Mexico’s expropriation of U.S. owned agrarian properties, that a state owes an international duty of full compensation defined as adequate, effective and prompt became an important justification for the Restatement (Second) position and of several treatises of the late twentieth century, The Mexican Minister for Foreign Affairs did not agree or acquiesce to such a norm, but rather asserted that national treatment was the only duty owed. This dispute with armed intervention now prohibited was settled far below the standard of full compensation.

During the second half of the twentieth century a remarkable change occurred in CIL legal theory. Oppenheim’s ninth edition for the first time included the persistent objector principle, a specific consent idea, while at the same time keeping the formulation of CIL as expressing the ‘common consent’ of nations. This contractual idea provided exit from norms created by the emerging majority of developing nations that were exercising their new clout at the United Nations, but the persistent objector principle was inconsistent with the concept of CIL as universal. If this principle was, in fact, part of the concept of CIL, it created an anomaly. New States were bound by universal CIL rules even though they played no role in their formation, but older, developed states could opt out of any new or modified CIL rules with which they disagreed. Vattel had been resurrected to protect capital-exporting countries from runaway majorities in the UN General Assembly and at international forums. Oppenheim’s ninth edition
also suggested that there may be exceptions to the full compensation standard in certain narrowly defined circumstances.

Today this struggle seems antiquated. Developing countries now compete for foreign investment including investment from newly emerging nations such as Brazil, South Africa and South Korea. Protection for foreign investors has become wise public policy in nearly all nations that participate in the world economy and a major force in reducing poverty. Yet any attempt to codify, as international law, the standard of full compensation for expropriation remains impossible. 

What does this history say about the place of opinio juris in CIL? It may depend on the eye of the beholder. First, from the perspective of treatise writers and developed countries, the encounters between European powers or the United States and states of Latin America demonstrate an era when what we would term opinio juris or general acceptance appears to be neither present nor either necessary or particularly relevant. If opinio means that the views of all states potentially affected are relevant to a conclusion of the existence of a norm of CIL, no such minimum standard exists. One might say that general acceptance was not a necessary, independent element because acceptance may be implied from regularized behavior that either reveals or creates the norm. But the incidents do not reveal implied or tacit acceptance by the states affected, but rather only disagreement as to the appropriate norm. If such incidents helped define and create legal principles, then neither common consent nor specific consent is required.

Second, we would not recognize what was treated as state practice. State practice, if that is the appropriate term, was an exercise of domination and capitulation. Much was made of a few ad hoc arbitrations decisions, but these arbitration panels were in many cases imposed and the arbitrators chosen because they were committed to the western view of protecting investment. The Calvo Clauses in contracts and in State Constitutions prohibiting payment of full compensation were not seen as practice, but as illegal attempts to avoid international legal

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10 Recent globalization of the world economy has led to the largest increase in economic growth in human history and relief from poverty for more than one billion people, see Lawrence Chandy & Geoffrey Gertz, Poverty in Numbers: The Changing State of Global Poverty from 2005 to 2015, (Washington, D.C.: Brookings, 2011).

11 See e.g., the MAI struggle at the OECD and the recent impasse at the International Law Commission.
requirements. Yet the U.S. Constitution’s protections of due process and the payment of just compensation for the taking of the private property without a public purpose were considered important and cited by arbitration panels in the nineteenth and early twentieth centuries. The underlying narrative of an international minimum standard was contained in treatises and diplomatic correspondence, but only the position of one side seemed to have relevance. Does the habit of domination create binding norms? Does regularized behavior in the form of domination create a required standard of behavior? State practice may not necessarily reveal either an underlying communal belief or generate subsequent general acceptance. It may reveal disagreement about applicable norms. States, treatise writers and arbitrators were using assumed prior existing norms from the natural law era and their domestic law because it was in their interest to do so.

Third, this history suggests that much of the law declared as CIL in treatises particularly that of state responsibility may rest on weak foundations and be of questionable legitimacy. Treaties and other consensual arrangements may be necessary to provide greater clarity and legitimacy to norms.

II. The Territorial Sea

The history of the Territorial sea is chronicled elsewhere, and may be of some importance in understanding the degree to which the rules of CIL found in treatises and arbitration panel reports are reliable. By the beginning of the 18th century there was a level of agreement on general concepts such as the freedom on the high seas and a residual band of coastal territory that could be enforced from shore and continuous use. In the nineteenth and early twentieth centuries Great Britain and the United States proclaimed the three mile territorial sea of exclusive jurisdiction as a rule of CIL. These preeminent naval powers did, in fact, enforce this rule within their jurisdiction. While a number of other European nations asserted broader jurisdiction, their views were, by and large, ignored by publicists and jurists writing in English.

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13 See K. Ayashi on Bynkershoek.

14 Oppenheimer
Several of these nations did back down when faced with threats of retaliation by stronger naval powers, but these nations continued to claim broader jurisdiction and exercise in some circumstances. While the extent of the territorial sea might be seen as merely a housekeeping rule that requires only a bright line standard, states have different interests depending upon the strength of their maritime forces and the amount of resources to exploit in their coastal waters. The maritime powers such as Great Britain and the U.S. preferred broader freedom of the seas relatively uninhibited by territorial waters to pursue trade and to project power whereas coastal states want a wide territorial sea to exclusively exploit their resources and maintain security. What is interesting is that the positions of both the United States and Great Britain changed to exert broader jurisdiction in limited circumstances where it was in their interest to do so. As elsewhere publicists tended to accept the position of their government particularly when that government was a preeminent power. Grotius, for example, was paid to be an advocate for positions thought necessary by the Dutch government.

The law concerning the territorial sea, freedom on the high seas and piracy varied among European nations even though these nations were relatively homogeneous and at similar levels of economic development. These nations had quite different interests and different levels of military strength including the capacity of their navies to enforce their point of view and of their economies to exploit coastal resources. There was wide disagreement about the appropriate norm despite the clarity of the law in treatises. Reminiscent of the fate of the minimum standard of compensation for expropriation, attempts to codify maritime rules at the 1930 Hague Codification Conference failed with a significant consensus favoring expansion of coastal state territorial waters at least for some purposes. The asserted three mile customary norm, when it was enforced, was enforced by coercion and overwhelming military power. Because the three mile standard was based on power not general acceptance, it is not surprising that Great Britain, for example, attempted to protect its fisheries at home while asserting expansive trawling rights abroad.

15 Great Britain asserted jurisdiction beyond three miles for purposes of customs inspections and fishing rights. The United States similarly expanded jurisdiction in the Bearing Strait after purchasing Alaska from Russia. GOLDSMITH & POSNER 63-66.
16 Porras at 17 Bederman, The Sea 372-77.
18 Goldsmith and Posner 65.
In the modern era the negotiations that led to the law of the sea convention revealed that there was no prior agreement on the extent of the territorial sea and divergent views remained on the appropriate standard. Nevertheless, the treaty process, as opposed to the customary law process, enabled nations to negotiate, compromise and ultimately to select a common standard that each nation could accept even if it was the preference of few. Naval powers and coastal states were willing to compromise on a twelve mile territorial sea in exchange for a 200 mile exclusive economic zone. General acceptance that was not apparent over the centuries using the customary law process only became possible though the treaty negotiating process.

III. Early Formulations of State Responsibility

If we look back even further in time, the history of international law might be seen as a history of rules developed in the European state system since the 16th century which were viewed as universal and were spread by commerce or domination to non-European states and eventually the entire globe. The nineteenth century formulation of minimum international standards owed to aliens, must be put in context with the earlier era of conquest and its legal justifications. Conquest included both the taking of territory and the confiscation of private property. The general rule was that conquest did not extinguish private property and contracts.19 But powerful states developed exceptions such as the prerogatives of the Crown20 to permit the confiscation of and the allocation of land and other property to settlers among others.21

In the natural law era the international publicists developed principles of international law derived from right reason and then deduced rules that had the support of their benefactors. The views of Vitoria and Suarez had resonance because they coincided with the interests of the emerging colonial powers and justified the Spanish conquest of the Indies. The roots of state responsibility may be seen in their writings. Vitoria recognized that Indians had jurisdiction over territory and as sense of property, but they were subject to *ius gentium* norms a violation of

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20 West Rand Cent. Gold Mining Co. v. King 2 K.B. 391, 406 (1905)
21 See the discussion in JAMES THUO GATHII, WAR, COMMERCE AND INTERNATIONAL LAW 43-69 (2010).
which might justify punitive actions.\textsuperscript{22} Victoria deduced a natural right to hospitality and to sojourn in foreign countries from which he deduced a right to travel and to trade. For Vitoria it was a violation of \textit{ius gentium} to treat foreigners in hospitably and violations of these universal natural rights would justify occupation, conquest and the taking of property as reparations. Grotius emphasized and extended the right to trade by claiming the doctrine of the providential function of commerce is the source of the sacrosanct law of hospitality.\textsuperscript{23} For Grotius a society that excluded or inhibited commerce violated the right to commerce and provided just cause for war. After the age of conquest ended, it is but a short leap to the concept that interference with commerce such as the taking of property permits the forcible taking of reparations as compensation.

Coextensive with these naturalistic formulations of rights there grew a practice of some governments engaging in reprisals for torts against subjects particularly against merchants trading in foreign lands. During the subsequent centuries this was rationalized as diplomatic protection for subjects owed a minimum standard of treatment under international law. As diplomatic practice became more sophisticated reprisals were not justified unless there had been a prior peaceful attempt to obtain reparations for violations of rights under international law. The right to travel and the sanctity of one’s property were now justified in more positivist terms as the right of diplomatic protection that was expanded to protect businessman and their capital. These claims of state responsibility to protect life and property were overwhelming asserted by powerful, capital-exporting nations against Latin American countries and former colonies asserting a broad minimum standard of treatment under international law.

Many of these disputes in the nineteenth and early twentieth centuries were decide by arbitrations effectively imposed by colonial powers. There was generally wide disagreement among states on the law to be applied. The arbitrators appointed to resolve these disputes had the difficult task of finding law upon which to base a decision. Instead of the practices of states and diplomatic correspondence that might reveal state attitudes, arbitrators relied on treatises, natural law principles and state practice based on coercion. The Trial Smelters arbitration at the end of

\textsuperscript{22} Annabel Brett in \textsc{The Oxford Handbook of the History of International Law}

\textsuperscript{23} Porras at 773.
this era demonstrates both the problem arbitrators faced and the methodologies used. The arbitrator found no decisions of international tribunals involving air pollution and no state practice. Rather the arbitrator primarily deduced the norm against causing transboundary harm from the statement in Clyde Eagleton’s treatise, “A State owes at all times a duty to protect other States against the injurious acts of individuals from within its jurisdiction.”\(^{24}\) Eagleton had based this broad statement that would incorporate much of tort law into international law if true on international arbitration decisions from relatively few Latin American disputes under threats of intervention. The arbitrator further relied on the decisions of the U.S. Supreme Court involving suits by one of our states against another state as analogous to international decisions. Just as Vattel had found law from presumed tacit consent, arbitrators created CIL from treatises, domestic court decisions, and international arbitration opinions, not from an investigation of the attitudes of states \((opinio)\) or from general and consistent state practice.

**Some Tentative Conclusions:**

1. The actual history of CIL is considerably different than any of the theories of customary law would imply. Perhaps the origin of norms like the fortunes of kings and landed gentry should not be examined too closely. Much of CIL doctrine was deduced from other sources not from an examination of either the general acceptance of a norm by states or state practice.

2. The compensation for expropriation saga illustrates that proof of general acceptance or \(opinio\) was not necessarily required or of importance in the early development of what was called CIL. Treatise writers created a narrative of customary law based on little state practice or diplomatic correspondence, but great reliance on arbitration panels and general natural law principles. It is striking that both the writings of publicists and arbitration decisions which are formally only subsidiary means for discovering rules of law are treated as of greater importance than the practices and views of states.

3. The centuries long encounter between the nations of Europe and non-Europeans distorted the concept of custom in order justify the exercise of power. What was Natural law in one era became customary law in another era with little state practice or general acceptance by

states. The sources for the ongoing narrative may vary, but the function performed by these sources was similar. Natural Law doctrine to encourage commerce such as a providential right to hospitality and a right to trade might be seen as benign rules to encourage trade and economic development or as the misuse of natural law to justify, for example, the Spanish conquest of Latin America and the appropriation of resources without compensation. What processes for creating law or resolving disputes that were viewed as legitimate by powerful states in one era may raise significant issues of the legitimacy of norms in another.

4. Since that encounter and the later rise of New States, it is difficult to imagine a coherent or plausible international political community that could create a significant number of generally accepted customary norms unless the vast majority of states had similar interests with regard to a norm. States have different political histories, cultures, values and interests.

5. The discussion above has implications for the important role of treaties in law formation. First, the international minimum standard treaty negotiations even from the end of the 19th century reveal that if there ever was either common consent or tacit consent to such a norm, it was among European nations and consistent with the interests of only select group of states. Necessarily such rules had to be premised to a large degree on natural law and deductive reasoning rather than on the general acceptance of norms or opinio. Second, in many areas where there was disagreement about the appropriate CIL norm such as the territorial sea, the contiguous sea and the standard of compensation, the treaty negotiation process permits nations to make tradeoffs among norms, compromise and select common standards that each can accept even if it is the preference of few.