Opinio Juris: Three Concepts Chasing a Label

Discussion Paper of Stephen C. Neff

There are three rival schools of thought as to what opinio juris actually is. Before going into that, it is well to point out that there is deeper issue underlying the disputes on that subject: a dispute as the very nature of customary international law itself. A brief exploration of the rival positions on that question is in order first. Then attention will be turned directly onto opinio juris as such.

Customary International Law – Two Rival Views

The two rival positions on the nature of customary international law may be stated briefly. Some hold customary law to be, in essence, the same as treaty law. It is the unwritten counterpart of the written law of treaties. We may refer to this as the “contractual” view of customary law, for obvious reasons. Just as a treaty or contract is binding only on the parties to it, without having effects on outside parties, so a rule of customary law is binding only on those states which participate in its making, through a combination of practice and opinio juris.

The opposing position on customary law may be termed the “legislative” one. According to this school of thought, the process of formation of rules of customary law is analogous not to treaty-making but rather to legislation, with the states of the world regarded as a kind of global legislative body. As is the case with legislative bodies generally, the will of the majority prevails over that of the minority and is binding on that minority. Opponents of an emerging rule of law are free to dissent from it when it is in the course of formation – but a law is enacted into law, all are bound by it, including those who opposed its adoption.
In terms of customary law in general – i.e., not specifically customary international law – the legislative view is the older of the two, by a very large margin. In fact, in classical and medieval times, custom was regarded, basically by definition, as a particular kind of legislative process: legislation from below, by the initiative of the people themselves, in contrast to legislation from above, promulgated by a sovereign (such as an emperor, king or legislative assembly). As Gratian stated in his famous canon-law Decretum of the mid-Twelfth Century, “That which is put into writing is called ordinance or right. That which is not rendered in writing is simply called by the general name of custom.” (Porter, at 92) Custom, in other words, is, in essence, unwritten legislation.

For an exposition of this same idea in the specific context of international law, we can look to Vitoria in the Sixteenth Century. The ius gentium, he averred, “does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment (lex).” He immediately went to state that “[t]he whole world, which in a sense is a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations. . . . No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.” (On Civil Power, at 40) More explicitly still, he maintained that “the consent of the greater part of the world is enough to make [customary law] binding, especially when it is for the common good of all men.” This collective consent serves to give the force of law to a customary practice, “even if a minority disagree.” (American Indians, at 281)

Of similar view was Alberico Gentili. “[A]s the rule of a state and the making of its laws are in hands of a majority of its citizens,” he maintained, “just so is the rule of the world in the hands of the aggregation of the greater part of the world.” He went on to stress that “this is especially true of the unwritten law; for a custom is binding upon all the members of a state and is called the custom of the entire state, even if every citizen has not agreed to it, but haply some have even opposed it.” (Law of War, at 9)

In the great age of natural-law thought, from c. 1600-1800, this legislative stance fell from favour, to be replaced by a contractual view of customary law. This meant that, like contracts in general, customary rules were binding only on parties to the practice in question, i.e., on states which voluntarily accepted the obligation. Bynkershoek, for example, held international law to originate in “tacitly accepted and presupposed agreements founded upon reason and usage.” (Questions, at 190)

Christian Wolff identified two categories international law which called the “stipulative” and “customary” portions of international law. These comprised obligations
which arose out of the agreement of states – in contrast to natural law, which was binding on states by the nature of things, without any need for agreement. These two categories of law were simply the written and unwritten counterparts of one another – the stipulative law comprised treaties, or written agreements, while the customary law comprised unwritten agreements. (Law of Nations, at 7, 18-19) Vattel, in this regard as in so many others, faithfully followed Wolff. (Law of Nations, at 8) This contractual position also won the approval of the United States Supreme Court. (Ware v. Hylton (1796), at 227).

The positivist writers of the Nineteenth Century may have dropped natural law out of their system – at least to the extent that it was now regarded as not, per se, legally binding. But they largely retained the legacy of the contractual image of customary law. The positivist tendency was to regard international law not as a universal, transcultural set of norms (as natural law was), but instead as the fruit of a particular set of historical developments in the relations between European states specifically. We find explicit endorsements of contractual view of custom in various writers, including Wheaton (Elements, at 48), Funck-Brentano and Sorel (Précis, at 3), Woolsey (Introduction, at 27) and Holland (Studies, at 152). It is expressed with particular force by Anzilotti. (Cours, at 67-68, 73-77). This outlook found perhaps its most famous expression in the characterisation of international law by Oppenheim (and no doubt many others) as a law between nations rather than as a law above nations.

An important consequence of the contractual theory is that there cannot be a strictly universal rule of customary law, apart from the marginal case in which truly all states choose to adhere to a custom. What was often spoken of, somewhat inexacty, as customary international law was actually a regional customary law – a set of practices devised by the European states. William Edward Hall was notably explicit on this point. International law, he insisted, was “a product of the special civilization of modern Europe” and, as such, was what he called “a highly artificial system” which “cannot be supposed to be understood or recognized by countries differently civilized.” (Treatise, at 40) Westlake was of similar mind, holding customary law to be a “general consensus of opinion within the limits of European civilisation” rather than a system of truly universal scope. (1 International Law, at 16, 40-41) Other states, such as Japan, Turkey or China could, to be sure, join this circle of states. But that joining-in had to be a conscious process. It was not automatic.

With this brief background in mind, we may return to the specific question of opinio juris and its role in international law.
On opinio juris, we may identify three schools of thought on the relationship between opinio juris and state practice. Only two of them can be regarded as viable at the present time, but all three will be identified here for the sake of sketching out a full picture of the issues at stake. As they lack commonly accepted labels, simple descriptive labels are provided.

**The historical-school approach**

One of the approaches – the one that does not command a significant following – was the one devised by the historical school in the Nineteenth Century. It had much to say about customary law generally, though not in the context of international law. According to this view, opinio juris is the primary and fundamental component of customary law, with practice serving the subsidiary and superficial role of merely providing evidence of what opinio juris comprises. This is a reflection of the historical school’s general view of law as the outer expression of the inner features of a culture. (See Kletzer, at 130-37). Law is seen as a mirror of the values held by a particular society – values which, in turn, are the product not of universal, eternal truths but rather of the specific historical experience and cultural heritage of that society. What actually makes a practice legally binding, on this view of things, is its acceptance as law – with the general practice merely providing the external evidence of that acceptance. As the philosophers would put it, state practice is merely “epiphenomenal,” i.e., a superficial external sign or index of the true law-making mechanism, the collective consciousness of the law-making community.

This same point may be put in terms of causation. The collective consciousness of a given society is what causes particular customary practices to arise. Put in international-law terms, it would be said that state practice is the product of opinio juris, i.e., there would be no state practice to observe, were it not for the existence of a prior and underlying opinio juris
causing it to occur. In short, state practice and opinio juris are not, on this view, independent of one another. They are intimately connected, as cause and effect.

It is easy to dismiss this approach as metaphysical moonshine, unworthy of hard-headed, realistic persons of the world – as many international lawyers take themselves to be. It may be noted, though, that the phrasing of Article 38 of the Statute of the World Court seems to imply this viewpoint. It describes “international custom,” in rather cloudy terms, as “evidence of a general practice accepted as law.” This could be taken to suggest that custom is not binding in its own right, but only insofar as it constitutes an accurate reflection of the fundamental fact of acceptance of the practice as law.

The voluntarist or “psychological” viewpoint

A second approach to opinio juris holds that opinio juris and practice are independent of one another – and that both must be present before a rule of customary international law can be held to exist. Customary law is therefore seen as a kind of alliance between state practice and opinio juris. They are, as it were, the two horses pulling the carriage of customary law – with the clear understanding that neither horse on its own would not be up to the task.

This approach is, in essence, the orthodox or mainstream positivist one. The label “voluntarism” is sometimes attached to it, to highlight one of its core features: the rigorous insistence on the principle that states are bound by rule of international law only by their own consent. States, on this thesis, possess a fundamental right to grant or withhold their consent to rules of law at their discretion. This makes the voluntarist approach the direct heir to the contractual view of the nature of customary law, as outlined above. It holds customary international law to be, in essence, a tacit agreement between states. The content of that tacit agreement is to be discerned inductively by observation of state practice. In addition, the important further element of legal obligation is conferred by the presence of opinio juris.

Opinio juris, according to this school of thought, therefore corresponds to the private-law principle of intention to create a legal obligation. It is to be seen as, in effect, an intention on the part of states participating in a practice, to impress upon that practice the additional “seal” of legal obligation. As a matter of state sovereignty, states are free either to
grant or withhold that seal. This is, of course, merely another way of stating the fundamental proposition that rules of law become binding upon states only by their consent.

It is especially important to appreciate that the presence or absence of opinio juris, according to this perspective, is a matter to be separately determined by each state individually, acting independently of all others. This voluntarist school of thought may therefore be said to be strongly “individualistic” in character, in the sense that each state makes up its own mind entirely on its own as to whether to accept an obligation as customary law – just as each state decides, entirely on its own, whether or not to accede to a treaty.

The importance of this school’s stress on the strict independence of state practice and opinio juris cannot be overestimated, for it marks the single most important difference between this school of thought and the other two. It will be recalled that, for the historical school, practice and opinio juris, far from being wholly independent, are seen as simply two different aspects of a single law-making process, with opinio juris as the cause and practice the effect. It is far otherwise with this second school, which sees no conceptual bar to one element being present without the other. This is easily seen in the case of practice without opinio juris. It is called comity. Scarcely less difficult to conceive is the opposite situation, in which opinio juris is present but practice absent. The field of international human rights law might be thought to be dispiritingly rich in illustrations of this.

The principal point, though, is that this school of thought, more than either of the other two, insists on the actual (even if implicit) presence of opinio juris before there can be a rule of customary law. Moreover, the presence of that utterly indispensable component cannot, in principle, be inferred from evidence of state practice alone. It must be – somehow or other – separately established. Those of an irreverent turn of mind might term this the “pixie dust” approach to customary law. A pattern of state practice is in the dull category of mere usage until and unless it is, so to speak, brought to juridical life by a sprinkling of the magic dust of opinio juris. Those of sterner stuff might call it the “Frankenstein” approach. Just as the monster is mere clay until the spark of life is added, so state practice is mere usage until given the juridical “spark” of opinio juris. More scientific types could call it a “vitalist” theory of customary law, with opinio juris as the non-material, “animating” element that turns a mere agglomeration of practices into a living juridical organism.

In this view of opinio juris, we see the classic positivist mentality operating at full throttle. A particularly clear sign of the positivist mind at work is the stress on the fundamental rights of states, as well as on the firm insistence that states operate wholly independently of one another. That is to say, the presence or absence of opinio juris is
determined by each state, for itself, purely at its own discretion, independently of what course any other state might take. A given practice, therefore, might be legally obligatory for one state but not for another – if the one state has given the requisite “consent” in the form of opinio juris where the other has not.

A final observation is in order. That is, that opinio juris, on this view, has a strongly psychological flavour to it. (Hence the alternate label provided.) It concerns what is in the “mind” of a given state, concerning a given practice. It might be objected that states do not have minds in the way that humans do. But that is a point which positivists of an especially rigorous stripe will dispute. One of the features of much of Nineteenth-Century positivist writing was a firm belief in the real personality of states – and that could easily be extended to include a collective will or mind. There is no need to regard this as a mystical or superstitious idea. It posits nothing more (or less!) radical than the supposition that states have an objectively determinable set of interests, and that it is the duty of the flesh-and-blood statesmen who hold office at any given time to have a clear idea of what that interest is, and then either to grant or withhold consent to emerging rules of law accordingly. The realist school of international relations is founded on basically this idea, and no one accuses its adherents of mysticism or superstition. (They are accused of sundry other things instead.)

*The solidarist or collectivist viewpoint*

The third view of opinio juris has important disagreements with both of the first two. It rejects the voluntarist (or positivist) stress on the fundamental rights of individual states and the need for individual consent by each state to a rule of law. It adopts instead a more collectivist or communitarian view of international law in general (hence the suggested label). The essence of the solidarist outlook may be summed up very briefly. It is the emphasis on interdependence of states, instead of independence, as the fundamental feature of international society. That is to say, it a school of thought – or rather a congeries of schools of thought – which sees the states of the world, as constituting an international society in a meaningful sense of that word, rather than being a mere aggregate of self-sufficient, isolated, self-centred entities.

On the subject of opinio juris specifically, the solidarist position may be summed up readily. The opinio juris element of customary law refers to the acceptance of a practice as
law by the international community at large, rather than to acceptance by each state individually. To borrow Rousseau’s famous expression, opinio juris is best seen, on this view, as an expression of the “general will” of the international community as a whole. Among international lawyers, we may cite Clyde Eagleton as a proponent of this thesis. (International Government, at 45-48) At the present time, the most conspicuous incarnation of the solidarist outlook is constitutionalism.

It will immediately be apparent that this view of opinio juris is a direct expression of the legislative view of the nature of customary law, as outlined above. This view was a minority one after the Seventeenth Century, but it did command a certain degree of support. Westlake, for example, inclined towards it, when, in discussing customary rules, he insisted explicitly that “it is not necessary to show that the state question has assented to the rule” – though he cautiously added that “it is a strong argument if you can do so.” (1 International Law, at 16-17) The immediate and obvious conclusion that follows from the legislative view of customary law, as noted above, is that customary law is formed on some kind of majority-rule basis.

One of the strengths of the solidarist position is that it is able to posit a commendably objective means for determining the existence of the global general will: the presence (or absence) of a sanction against those who depart from the practice in question. If a sanction is imposed, then that is a sure sign of a true customary-law rule. If a sanction is not imposed, then the practice is merely one of comity.

It should be appreciated that the solidarists need not insist, as the voluntarists do, on the strict independence of state practice and opinio juris from one another. The solidarists, instead, tend to regard opinio juris as forming in the wake of state practice and as a consequence of it. This is a most important point. It means that, once the requisite pattern of state practice is determined to be present – something that (at least in principle) can be objectively determined on the basis of external evidence – then opinio juris can be, ipso facto, at least in the process of formation. The only question, then, is whether that formation of world opinion has advanced sufficiently far to allow opinio juris to be pronounced to be present. In other words, the solidarist approach goes very far towards holding that opinio juris can be presumed to be present on the basis of state practice. Presumably, the position is that, if the practice is sufficiently widespread – and it definitely need not be universal – then opinio juris can be inferred.

The relation of the solidarist view to that of the historical school is instructive. Solidarists agree with the historical school in seeing opinio juris in terms of the collective
mentality of the society at large. The two part company, however, on the important question of the direction of the arrow of causation. Where the historical school tends to be mentalistic in positing inner consciousness as the source or fount of external actions, this third group is more materialistic. It sees changes in the external world as primary or fundamental, with consciousness following in the wake. The historical school, in other words, sees opinio juris as the cause and state practice as the effect. The solidarists are the opposite, seeing state practice as the cause and opinio juris as the effect.

These two schools are in agreement, though – and strongly at odds with the voluntarists – in positing a close tie (i.e., a cause-and-effect link) between state practice and opinio juris. This close link has a highly important consequence: it allows the presence of opinio juris to be inferred from evidence of state practice. Such an inference is not possible for the voluntarists, because of their strong insistence (noted above) on strict independence of opinio juris from practice.

It might be said that the solidarist way of looking at things goes a long way towards dispensing with opinio juris altogether. That is a fair comment, and some lawyers have been willing to take the matter to that logical conclusion. Outstanding in this respect are those arch-logicists, the lawyers of the Vienna Circle. Paul Guggenheim, for example, who was strongly influenced by the Vienna Circle, was explicit in rejecting outright the requirement of opinio juris as an element of custom. (1 Traité, at 46-48)

It is easily seen that this majoritarian position on customary law could cause some disquiet among international lawyers – and, perforce, among governments too. As a consequence, a device has been crafted to make the doctrine more palatable. This is the persistent-objector principle – although it might be more accurate to characterise it as the persistent-objector proviso. This is, in essence, a grant of an “opt-out” right to states which do not wish to be bound by an emerging rule of customary law. The opt-out comes with two important conditions attached: first, that it must be exercised explicitly (and perhaps even repeatedly “refreshed” by repetition); and second, that it is exercisable only as the rule is in the process of emerging. Once the rule is settled, all states that did not explicitly object are presumptively bound.

In concrete terms, the persistent-objector question is perhaps the single issue that best highlights the dispute between the voluntarists and the solidarists. If the contractual view of customary law (i.e., the voluntarist position) is adopted, then there is no need for any special and distinct proviso on persistent objection. The reason is obvious. On this view of customary law, all states are inherently free to withhold consent to any emerging rule, simply
as an exercise of their inherent sovereign rights. So no separate rule on objection is called for. It is quite otherwise, however, with the legislative view of customary law. Here, a special proviso is needed because, without it, an objecting will find itself bound by a customary rule, against its will, if the majority so decrees. A special persistent-objector proviso, in other words, makes no sense except on the understanding – if only implicitly – that the legislative view of customary law is the correct one.

Concluding Thoughts

The World Court has yet to commit itself on the key question of the nature of customary law. And it has been delphic on the more specific question of opinio juris. In the Lotus Case, it spoke in psychological terms, holding that states must be “conscious of having a duty” in order for a rule of customary law to be present. Similarly, in the North Sea Continental Shelf Cases, the Court referred to opinio juris as “a subjective element” in the composition of customary law. More specifically, it is described as “a belief,” which appears to have a psychological flavour. Further in this apparently psychological vein, the Court held that states “must . . . feel that they are conforming to what amounts to a legal obligation.” (para. 77) The Court does not explicitly say, however, whether this subjective element or belief refers to the positions of each state individually, on its own, or to the subjective stance of the community as a whole. In later cases, the Court has held back from this overtly psychological phraseology.

As to which view of customary law is the correct one – and consequently which view of opinio juris to adopt -- we continue to await definitive word from the World Court. In the shorter term, perhaps a definitive conclusion will emerge from this present conference.

References

Bynkershoek, Cornelius, *Questions of Public Law* (Trans. by Tenney Frank; Clarendon Press, 1930 [1737])


Guggenheim, Paul, *1 Traité de droit international public* (Georg, 1953)

Holland, Thomas Erskine, *Studies in International Law* (Clarendon Press, 1898)


Porter, Jean, “Custom, Ordinance and Natural Right in Gratian’s Decretum,” in *The Nature of Customary Law*, at 79-100


Westlake, John, *1 International Law* (2d ed.; Cambridge University Press, 1910)

Wheaton, Henry, *Elements of International Law* (Carey, Lea and Blanchard, 1836)


Woolsey, Theodore D., *Introduction to the Study of International Law* (5th ed.; Charles Scribner’s Sons, 1879)