THE NATURE OF THE SUBJECTIVE ELEMENT IN CUSTOMARY INTERNATIONAL LAW

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Doctrine generally holds that customary international law results from (a) the uniform and consistent conduct of States, undertaken with (b) the conscious conviction on the part of States that they are acting in conformity with law, or that they were required so to act by law. The purpose of this article is to examine the nature of this “conviction”, or “psychological element”, or opinio juris sive necessitatis, as it is sometimes called, with a view to comparing its role in the customary law process with that played by the consent of States. It has been said that:

as regards the nature of the psychological element, doctrines are in conflict—the positivists reduce opinio juris to an act of will of numerous States to be bound by a tacit agreement (the voluntarist conception). The objectivists state that the opinio constitutes the obligatory recognition of a pre-existing right (the intellectualist conception).

In other words, while the “voluntarist” (or consensualist) conception equates opinio juris and the will of States, the “intellectualist” conception views the two notions as being distinct. It is this “conflict” that is the subject of this article. MacGibbon noted in 1957 that the majority of writers on this subject have “broached the problem without pursuing its implications”. It will be argued that this psychological element is no different from the consent of States, or more precisely, consensual acceptance, in one form or another, of the legal character of a given course of conduct, and that this conclusion provides a better understanding of the operation of customary international law.

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2. Cf. Judge Azevedo’s statement in the Asylum case I.C.J. Rep. 1950, 266, 336 that: “The opponents of the voluntary theory even go so far as to say that it is impossible to seek a psychological element which remains necessarily intangible.”


4. This paper will not deal with the question whether a State needs to have consented to a rule of customary international law to be bound by it. The point under investigation has nothing to do with the question whether a State needs to have consented to a rule of custom-

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Discussion of the role of *opinio juris* can for our purposes be centred around two questions. The first relates to the role of *opinio juris* in the law-creating process (i.e. whether it is declaratory or constitutive of the law). The second relates to its role in qualifying State practice, in the sense of distinguishing between acts which are legally relevant and those which are not; it is essential to distinguish between practice which is considered to be *legal*, on the one hand, and practice based on courtesy, morality or fairness, and the recognition by States of the legal quality of practice (i.e. *opinio juris*) is considered to be the touchstone of this distinction.5

It should be apparent that this second question is inextricably linked to the first, if the issue is recognised as being one of cognition. In other words, the question “How is a rule of customary law created?” (the first question) and the question “Is this rule one of customary law or of morality/courtesy etc?” (the second question) become indistinguishable if we ask “How do we identify a rule of customary law?” Nevertheless, this discussion will be facilitated if the two questions are treated separately.

I. THE FORMATION OF CUSTOMARY LAW

In this section the role played by *opinio juris* in the customary law-making process will be compared with the role played by consent. The issue has been described as a debate between the constitutive and declaratory theories of customary international law. *Opinio juris* is declaratory if it serves only to demonstrate the existence of customary law which arises independently thereof (the “intellectualist” conception).6 It is constitutive if it is taken to be the source of the law, i.e. if the law is created (whether exclusively or in conjunction with other elements, such as State practice) by the *opinio juris* of States (the “voluntarist” conception).7

A. The Problem

Discussions of *opinio juris* virtually always make reference to the logical difficulty posed by the declaratory view in general: “How can custom create law if its psychological component requires action in conscious accordance with law pre-existing the action?”8 It is widely acknowledged that the

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5. See e.g. Brownlie, *Principles of Public International Law* (4th edn, 1990), p.7. The point on which doctrine is divided in this respect is whether *opinio juris* is capable of performing this task of differentiation satisfactorily, not whether, in principle, the task needs to be performed. See Thirlway, “The Law and Procedure of the International Court of Justice: Part Two” (1990) 61 B.Y.B.I.L. 1, 43–44.

6. See supra n.1.

7. Ibid.

declaratory conception of opinio juris is simply unable to account for the creation of new rules of customary law, requiring as it does that something must already be legal before it can become law. One way round this problem has been to suggest that during the period of formation of the “new” rule, the States acting in accordance with it were mistaken, and they erroneously believed that their actions were required by law when in fact they were not.9 But it is difficult to accept that ill-founded beliefs are the source of customary law.10 The declaratory theory, therefore, seems inadequate.11

B. The Suggested Solutions

This inadequacy has evoked a number of responses. One suggested solution is to abandon altogether or minimise the need for proof of a psychological element.12 But opinio juris cannot be abandoned in this way. As Brownlie has written, “it is in fact a necessary ingredient. The sense of


10. See Suy, Les Actes Juridiques Unilateraux en Droit International Public (1962), pp.223 et seq. and Kelsen, ibid. D’Amato, op. cit. supra n.8, at p.66, stresses the difficulty in imagining that “all States participating in custom-formation were erroneously advised by their counsel as to the requirements of prior international law”.

11. Another related problem with the declaratory theory is that it necessarily implies that custom cannot be a source of law; opinio juris is simply evidence of law which is created by another source. This is similar to the criticisms directed at the wording of Art.38(1)(b) of the ICJ Statute, which speaks of “International custom, as evidence of a general practice accepted as law”. As Anzilotti wrote, the reverse is the truth, “it is precisely the generally accepted practice which constitutes customary law” (Corso di Diritto Internazionale, Vol.I (3rd edn, 1928), p.99). Similarly, the criticisms of Hudson’s proposals in the International Law Commission seem to confirm this view. He had argued that the practice should be in accordance with prevailing international law, but the other members disagreed on the basis that the character of custom as a formal source of law would be denied: see (1950) 1 Y.B.I.L.C. 1, 4–7. The wording of Art.38(1)(b), unless it is the result of a mistake or negligence on the part of the drafters, smacks of the work of the historical school of legal theory, who found the true source of law in the spirit of the people (Volksgeist). The utility of this theory in the context of the customary international law-making process has been questioned; see e.g. D’Amato, idem, pp.47–48, and Walden, “The Subjective Element in the Formation of Customary International Law” (1977) 12 Israel L.R. 345, 359–362.

legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of States recognizes a distinction between obligation and usage. The essential problem is surely one of proof, and especially the incidence of the burden of proof." To jettison opinio juris would involve throwing the baby out with the bath water; some similar criterion for distinguishing between law and non-law would still be needed.

It could still be argued, however, that instead of abandoning opinio juris outright, its role could or should be circumscribed. The problem with the declaratory view is that it cannot account for the creation of new law; but some have argued that it was never intended to serve that function, but was meant only to serve the function of distinguishing between the legal and the non-legal. If this view is correct, it would mean that the criticisms of the declaratory view are misguided. D’Amato, for example, traces the origins of the modern conception of opinio juris to Gény, who employed the term opinio necessitatis to describe the psychological element which was needed to distinguish (domestic) legal custom from other usages which “claim in vain the character of a source of positive private law”. D’Amato argued that while Gény’s analysis greatly influenced contemporary writers on international law, most of them forgot or overlooked his (Gény’s) reason for introducing the concept, namely to separate the legal from the non-legal. Similarly, Walden, in distinguishing between consent-based theories of custom and theories of custom based on opinio juris, was of the opinion that while the former category was concerned with explaining the creation of customary law, the latter was “postulated in order to explain the difference between custom on the one hand and comity, usage etc., on the other”. If these views are correct, opinio juris cannot validly be criticised for not fulfilling a role which it was never intended to fulfil, i.e. accounting for law-creation.

But there are difficulties with this view. First, even if opinio juris serves only to distinguish law from non-law, so that some other notion would be expected to account for law-creation, this latter function could never be served precisely because opinio juris precludes it. Nothing can be a source of new customary law if opinio juris requires that any action must be in accordance with the existing law. So while the declaratory conception of opinio juris cannot itself explain law-creation, it prevents any other concept from serving that function. This view of opinio juris is therefore unacceptable, as it is impossible to divorce it from the problem of law-creation.

13. See Brownlie, loc. cit. supra n.5. See also Akehurst, “Custom as a Source of International Law” (1974–5) 47 B.Y.B.L.L. 1, 32–34 and 36–37, stressing that the concept is too well established to be abandoned so easily.
15. See D’Amato, op. cit. supra n.8, at pp.48–49 (cf. Guggenheim, op. cit. supra n.12).
16. See Walden, op. cit. supra n.11.
Second, the bases upon which this restricted role is attributed to *opinio juris* are arbitrary. As D’Amato admits, Suarez, writing as far back as 1612, had spoken of the need to distinguish between *civil* and *irrelevant* customs.\(^{17}\) There is also a lack of uniformity on the part of modern writers as to the first use of the concept.\(^{18}\) Furthermore, the modern conception of *opinio juris* is generally traced back to the historical school of legal theory, exemplified by Puchta and Savigny.\(^{19}\) The role attributed to *opinio juris* in the writings of these jurists did not relate solely to the distinction between the legal and the non-legal, but to the true source of law, *Volksgeist*, or the spirit of the people of a nation. The historical school grew up largely as a response to the rationalist standards prevalent in the eighteenth century. Law was perceived as being neither the result of arbitrary acts of the legislator nor a product of natural law theory. While Puchta denied the existence of international law because of the absence of a people whose spirit it expressed, Savigny recognised a community of race and religion, at least in Europe, which he found to be the basis of international law.\(^{20}\) But apart from the fact that these writers did not deal exclusively with the question of distinguishing between law and non-law (even Gény, as relied on by D’Amato, was concerned with seeking out those usages which had the character of a *source* of law\(^{21}\)), the point is that, even if they had, it would simply mean that they had failed to provide an adequate explanation of the process of legislation;\(^{22}\) and it is precisely that process that concerns us here. For the same reason, it is difficult to accept Walden’s suggestion that *opinio juris* was not intended to deal with the question of law-creation (although he did refer to this assertion as a shortcoming of the theories of custom based on *opinio juris*).\(^{23}\) The point is that one cannot build a theory on the back of the distinction between the task of law-creation and the


20. See Kosters, *ibid*.

21. *Op. cit. supra* n.8, at pp.48–49. He could, however, have been using the word “source” to refer to where the law can be found, as distinct from the *process* through which law is created.

22. See the criticisms of the historical school on this point in the works cited *supra* n.19.

23. *Op. cit. supra* n.11. Similarly, Quadri ((1964) 13-III R.C.A.D.I. 327) argued that the subjective element is not the cause but the effect of the existence of the rule, and therefore serves as evidence thereof. But (a) this is not supported by the Court’s practice (as discussed
The task of separating law from non-law, a distinction which, as we have seen, can be maintained, if at all, only for ease of discussion.

Third, even if the arguments of D’Amato and Walden are correct, subsequent doctrine has treated the concept differently. On the one hand, the International Court has treated the concept in an ambivalent way, at best. In the Lotus case, the court spoke of “being conscious of having a duty”, and in the North Sea Continental Shelf cases it spoke of “a belief that the practice is rendered obligatory by the existence of a rule of law requiring it”. These would suggest that opinio juris serves only to distinguish between a practice required by law and a practice required by other considerations. But even in the North Sea Continental Shelf cases the Court said that “the need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis”. What the Court said was that the function of distinguishing between law and non-law was implicit in the concept, not that it was coterminous with it; in other words, it is quite possible that it is only one, and not the only, aspect of opinio juris. As the Court explained in the Military and Paramilitary Activities in and against Nicaragua case, “as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the opinio juris sive necessitatis.” The reference is to the formation of a new rule of custom. In addition, at other times, the Court has spoken of a requirement of “acceptance” as law, of the “view” of States that a practice is binding, and of the “attitude” of States regarding a practice. These terms would seem to suggest that opinio juris is not intended simply to distinguish between legal and non-legal practice, as it is possible that it is this “acceptance”, “view” or “attitude” that makes practice legal, which would in turn suggest that opinio juris has a part to play in law-creation. In sum, a theory of opinio juris that fails to take account of the way it is presently perceived is flawed.

in the next paragraph in the text); (b) even if the rule exists, does it have legal character without the subjective element?

26. Ibid (emphasis added).
28. See e.g. the Asylum case, supra n.2, at p.277; the Nottebohm case, I.C.J. Rep. 1955, 22; the Nicaragua case, idem, pp.99–100, para.188, respectively.
29. Similarly, many writers have treated opinio juris as having a law-creating function. Stein wrote that “opinio juris is no longer seen as a consciousness that matures slowly over time... but instead a conviction that instantaneously attaches to a rule believed to be socially necessary or desirable” (“The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law” (1985) 26 Harv. J.L.L. 457, 465). See also Cheng, “Custom: The Future of General State Practice in a Divided World”, in MacDonald and Johnston, op. cit. supra n.4, p.513 at pp.531–532; Dupuy, “Coutume sage et coutume sauvage”, in La communauté internationale: Mélanges offerts à Charles Rousseau (1973),
Some modification of the traditional view is therefore necessary, because the concept cannot be dismissed in its entirety. As stated above, the problem arises from the conception of *opinio juris* which makes it necessary to have recourse to an erroneous belief or conviction that something is already law before it can become law. Several alternatives have been proposed in the literature, but two seem to be most acceptable. The first argues that the belief or conviction does not have to be well founded, honest or genuine, as long as it is expressed to be a belief. Now such a


30. Those theories which seek to abandon or minimise the need for *opinio juris* have already been considered (see *supra* nn.12–29 and accompanying text); for further criticism see Akehurst, *idem*, pp.32–34. Another group of theories refers to a naturalistic idea of “social necessity”; see e.g. de Visscher (1925) 1 R.C.A.D.I. 235, 349–353; Kopelmanas, *op. cit. supra* n.12, at p.148; Kelsen, *General Theory of Law and State* (1944), p.114, and *Principles of International Law* (1952), p.307; Sørensen, *Les Sources du droit international* (1946), pp.106–107; Verdross, *Völkerrecht* (1964), p.138; Thirlway, *International Customary Law and Codification* (1972), pp.53–56; Charpentier, *L’Élaboration du droit international public* (Société français pour le droit international, 1974), p.115. See also the various writings and judicial pronouncements of Judge Alvarez, e.g. I.C.J. Rep. 1951, 148–149, and Bos, *A Methodology of International Law* (1983), p.223, suggests that *opinio juris* (and not voluntas, which he considers to be insignificant in the law-making process), is the “belief that a certain practice should or may be followed by *rights* because it satisfies a conception of legal propriety held by the States concerned”. The problem with these theories is that one State’s idea of social necessity or legal propriety may not correspond to that of others, and in any event it is left up to the States themselves to decide what amounts to social necessity or legal propriety, which, for practical purposes, amounts to an espousal of constitutive doctrine. Furthermore, in as much as these theories take us back to the idea of belief, they are unsatisfactory because they bear all the difficulties inherent in the declaratory theory. See Akehurst, *idem*, p.37 and D’Amato, *op. cit. supra* n.8, at pp.71–72.

31. See Akehurst, *idem*, pp.36–37; Tunkin, *op. cit. supra* n.29, at pp.123–133, esp. p.133; Cheng, *op. cit. supra* n.29, at pp.530–533; Stern, *op. cit. supra* n.18, at p.487. Suy, *Les Actes Unilateraux en Droit International Public* (1962), p.234, actually treats *opinio juris* as “acceptance”, thereby equating it with consent. Thirlway, *idem*, pp.54–56, seems to come close to accepting this view when he states that “what counts is the view held by a State of its own conduct in relation to the law . . . if a State considers, *righty or wrongly*, that its recognition would be socially desirable . . . then this is sufficient” (emphasis added). He also writes that “Only if the view that the custom should be law has the effect of making it law (provided it is coupled with sufficiently general usage), can subsequent practice be coupled up with the correct view that custom is the law” (*ibid*). This actually supports the constitutive theory; while it is true that he stresses the social desirability of the rule, it is ultimately up to the States to decide whether the rule is socially desirable or not. See, similarly, Stein, *loc. cit. supra* n.29, and Scelle, *Droit International Public* (1944), p.398. Even D’Amato, who rejects *opinio juris* in its entirety, however, suggests an alternative which comes very close to the constitutive theory. In putting forward his “realistic” theory of custom, he states that “international law is entirely phenomenological; it does not exist apart from the way the representatives of states perceive it”. The alternative qualitative element he proposes is promulgative “articulation”, “a requirement that an objective claim of international legality be articulated in advance of, or concurrently with, the act which will constitute the qualitative elements of custom”. This, he maintains, is reflected in Art.38 of the ICJ Statute, defining custom as evidence of a practice “accepted” as law. He then states that “This voluntaristic aspect of international law is precisely what makes it acceptable to nation-state decision makers”: *idem*, pp.74–75. It is, however, difficult to determine exactly how “voluntaristic” his theory is, because, in spite of the above, he rejects the definitions of *opinio juris* as consent (*idem*, pp.68–70).
statement made by a State or a group of States can never be "true", because new law is necessarily different from old law. Therefore the State or States in question are really putting forward a new rule of law.\(^\text{32}\) The second alternative is the group of theories which hold that opinio juris operates at a later point in the life of a practice. This involves postponing the role of opinio juris (to a later stage in the formative process of a customary rule), so that States initiating a practice are not required to have opinio juris as traditionally conceived, while other States must at some point accept, acquiesce in or recognise (i.e. develop opinio juris regarding) the legality of the new practice.\(^\text{33}\)

C. A Comparison of These Workable Theories of Opinio Juris and Consent

Taking these two groups of theories of opinio juris in turn, we may compare the descriptions therein with the idea of consent.

\(^{32}\) As Walden, who equates opinio juris with Hart’s notion of the “internal aspect” of rules, puts it, “For customary law to be generated, conduct must be treated as a standard of behaviour: this may take the form, either of complying with an existing standard, or of creating a new one” (emphasis added): see his “Opinio Juris: A Jurisprudential Analysis” (1978) 13 Israel L.R. 86, 98. Even though, as seen earlier, he denied in an earlier work (op. cit. supra n.11) that opinio juris was intended to have a law-creating function, his reformulation of the concept ascribes that role to it, and he thereby espouses the constitutive view. See also Rama Mao (1979) 19 Indian J.I.L. 519, who in arguing that Akehurst’s view is artificial, states: “Why should one take the statement of a State which it knows is a false one in law, to be a necessary element? … It is submitted that the formation of customary law may well be explained by stating that an assertion of a right gets the sanction of customary law … provided it is acquiesced in or agreed to … and that no other mental element is needed except an assertion of a right” (emphasis added). But this is exactly what Akehurst said.

\(^{33}\) See e.g. MacGibbon, op. cit. supra n.3, at pp.130–131; Meijers, “How is International Law Made?—The Stages of Growth of International Law and the Use of its Customary Rules” (1978) 9 Neths. Y.B.I.L. 3; van Hoof, Rethinking the Sources of International Law (1983), pp.91–93 (who would include Thirlway’s theory in this category on account of the fact that he does away with the traditional requirement of simultaneousness of usus and opinio); Mendelson, International Law Association (Report of the 33rd Conference (Warsaw) 1988), Annex 1, First Report of the Rapporteur, pp.938–939 (distinguishing between opinio necessitatris, which is what the States initiating the practice have in the first place, and opinio juris, which is what develops in relation to the practice in question; Villiger, Customary International Law and Treaties (1985), pp.29–30.

The difference between this group of theories and that which holds that opinio juris has no role to play in the law-creating process is that the former takes note of the evolutionary character of customary law. They would argue that at a later stage in the life of a rule, opinio juris can be both constitutive and declaratory, but opinio juris does play some part in the process through which a customary rule is created, because, as seen above, the alternative is that no new practice can be legal because the pre-existing opinio juris precludes that possibility. So even at the later stages, for a State to say that it believes its new practice to be law it would still have the problem of explaining away the old opinio juris. It is by claiming or acting as if there is a new opinio juris that the newer practice acquires a legal character, and it is in this sense that these theories are not declaratory.
1. The theory that belief does not have to be genuine

Here, opinio juris, in order to account for law-creation, becomes the same as claims made by States, which means that it is being equated with the will of States. Thus viewed, there does not appear to be any meaningful distinction between the two ideas.

2. The "postponement" theories

Consent is a choice (on the part of the consenting party) that signifies agreement, compliance, concurrence or permission regarding a given state of affairs.34 Opinio juris on this view is identical to consent. Some States initiate a practice, but we do not look to them for opinio juris; rather, we look to the reactions of other States to the new position. If these other States consent to (i.e. agree, acquiesce in, comply with, concur with or permit) this new practice, then there is opinio juris in relation to this new practice.35

The role ascribed to opinio juris is thus indistinguishable from that played by the notions of will and consent.

D. Some Possible Objections

1. Opinio juris can differ from consent

It might be objected that the foregoing analysis overlooks the point that there can still be a difference between opinio juris and consent, as both subjective elements can exist on the part of the same party. In other words, a State might will or consent to X, but believe/recognise that it is bound by Y. To put the same objection differently, opinio juris is what counts; mere consent/will cannot oust the binding opinio juris.

But this objection deals with a situation where the State in question would be attempting to revoke its established obligations. But to say that

34. The Oxford English Dictionary (2nd edn, 1989), pp.760-761 defines consent as follows: “1. Voluntary agreement to, or acquiescence in what another proposes or desires; compliance, concurrence, permission . . . 2. Agreement by a number of persons as to a course of action; concert . . . 3. Agreement or unity of opinion, consensus, unanimity.”

35. It could be that the effect of the acceptance of those States which follow the lead of the initiating State(s) is not purely constitutive; for example, they may already recognise the legality of the pre-existing practice, so that their subsequent ratification becomes merely declaratory. They may think the practice is already law. But if recognition is required, is it not their (and other States') original recognition which would confer a general normativity on the practice of the initiating States in the first place? Even if it is maintained that, at the later stages, the opinio juris of States is both constitutive and declaratory, the constitutive element is still there. In a case where a truly general opinio juris exists, it may be difficult for a State or some States to sustain a different opinio juris; but this does not suggest a difference between opinio juris and consent, but only a difference between general and particular, between norm and dissenter.
consent is indistinguishable from *opinio juris* is not to say that established obligations can be revoked at will. The objection does not relate to the relationship between *opinio juris* and consent, but only to the relationship between a prior will/consent/*opinio juris* on the one hand and a subsequent will/consent/*opinio juris* on the other. In other words, we could describe the situation as follows: the State had willed/consented to/*opinio juris* in relation to X, and it now wills/consents to/*has opinio juris* in relation to Y. The legal consequences of this change of heart (if such a phrase may be used) can be discussed without reference to any distinction between consent and *opinio juris*. The only possible difficulty here would be the reference to a State which seeks to initiate a new legal position as having consented to or having *opinio juris* in relation to a state of affairs which does not yet exist in law. But that difficulty exists whether we use the term *opinio juris* or consent. Just as one may not be able meaningfully to consent to what one alone wills, one may not be able to speak of *opinio juris* in relation to a rule that does not yet exist.

Similarly, if we consider the position of the generality of States, it would make little difference whether we spoke of there being a practice supported by their *opinio juris* or whether we spoke of a rule to which the generality of States had consented. Article 38(1)(b) of the Statute of the International Court of Justice, as will be recalled, speaks of a general practice which is “accepted” as law. “Acceptance” comfortably straddles the notions of consent and *opinio juris*. In the later stages in the life of a rule of law, the acceptance of a given practice as law by a great majority of States may cause a State which has not accepted that practice to consider itself bound by it; but that situation could be as well described in terms of there being a binding *opinio juris* as it could be in terms of there being a binding rule based on the fact of general consent.

D’Amato raises an objection to the equation of consent with *opinio juris* which is not dissimilar to the kind of objection just discussed. He distinguishes between consent and *opinio juris* thus: “State A may ‘consent’ because it is a small power and State B is a major power, but such consent will not be at all the equivalent of a conviction that B is entitled to act as it is doing.” But this (a) confuses motives/political reasons for acting or consenting with the consent itself, and ignores the consideration that law is a consequence of practical politics, even in domestic systems, and (b) ignores the consideration that the requisite consent in this context must be consent to a/the legal position, not just consent to a one-off agreement for the sake of convenience or consent for any other reason. This last point is confirmed by the Aminoil case, where the tribunal held that consent given in a particular setting was not evidence of *opinio juris, generalis*

or *individualis*. There is a difference between consent *simpliciter* on the one hand and consent to the legal character of a given course of conduct on the other. 38

2. The terminology precludes a non-declaratory conception

It could also be argued, in response to the foregoing, that the terms used to describe *opinio juris* preclude adoption of a non-declaratory conception of the subjective element. Terms like “recognition”, 39 “conviction”, 40 “sense of legal duty” 41 or “consciousness” 42 seem to imply a declaratory view of *opinio juris*.

But this argument would be questionable. Let us consider first the term “recognition”. It is true that “recognition”, in the ordinary use of the term, does not necessarily imply “consensual acceptance” 43 to recognise the fact that the sun rises every day in no way implies that one consents to the rising of the sun. The argument could indeed be made that as a matter of logic, recognition antecedes (consensual) acceptance, so that the two notions are distinct. But this accurate observation is inapplicable in the context of customary international law. First, the practice of the International Court, as has been shown, has been to use various terms interchangeably to describe the subjective element. The Court simply did not have this distinction in mind. 44 Second, and much more important, if the distinction is drawn between recognition and consensual acceptance it would mean that all that is needed is knowledge of the existence of a rule. But knowledge *per se* is devoid of normative consequences so far as the creation of rules of customary law is concerned. It surely cannot be the case that because a State or some States know of the existence of a rule it is

38. D’Amato may be referring to the consideration that the weaker State’s consent may not be genuine. But as Arangio-Ruiz has put it in Cassese and Weiler (Eds), *Change and Stability in International Law-Making* (1985), chap.3 (“Voluntarism and Majority Rule”), there is no real doctrine on “flaws in consent” at least so far as customary law is concerned; doctrine on vitiating factors (such as duress) has been developed in the realm of treaty law and not in relation to custom. Pellet also adds that “if rules of law could coincide in a perfect way with the interests of all existing States there would be no more need for law” (“The Normative Dilemma: Will and Consent in International Law-Making” (1991) 12 Australian Y.B.I.L. 23, 44). However, he adds that there must be a threshold of admissible coercion, and his conclusion, based on a very brief (but accurate, it is submitted) review, is that “non-military coercion invalidates the rule if and only if it is obvious and out of proportion to the usual practices which cannot be avoided in an international society strongly marked by an imbalance of power”.

39. See e.g. I.C.J. Rep. 1969, 25, para.27 and 43, para.74; 173 and 181 (*per Judge Tanaka*): 232 (*per Judge Lachs*).

40. *Idem*, p.231 (*per Judge Lachs*).

41. *Idem*, p.44, para.77.

42. *Idem*, pp.130 (*per Judge Ammoun*) and 231 (*per Judge Lachs*).


44. See *supra* nn.24–28 and accompanying text.
binding on them. Is it the case that because legal subject X recognises that two or more other legal subjects are bound by a rule (the problem is thrown into relief if the rule in question is a treaty or contractual rule) that rule is binding on subject X?

So “recognition” for our purposes means recognition that a given practice is binding on the recognising party, and not merely recognition that the practice exists or is binding on other States. Now, if opinio juris is necessary, and it is defined as recognition of something as being legal, it follows that if something has not been recognised as being legal it is not legal. But States can choose either to recognise or not to recognise it as being legal. As Fitzmaurice has put it, “to recognise a rule as binding is surely to consent to it at that point. Equally, to consent to a rule, is to recognise it as binding.” The same point may be made in relation to any term used to describe opinio juris. If opinio juris is needed before something becomes legal, it must have a non-declaratory meaning. Otherwise, opinio juris is not necessary in determining the legal character of a practice, for the practice alone is law if there is no need for opinio juris.

As for the particular terms “conviction”, “sense of legal duty” and “consciousness”, apart from the point just made, they beg the question concerning the reason for the “feeling” they describe. In other words, what gives rise to the conviction, sense of legal duty or consciousness of duty? These terms seem to revive the declaratory theory which, as we saw, leaves the function of law-creation to some other notion (while at the same time preventing that same notion from fulfilling the function). Could it not be that a conviction, sense of duty or consciousness arises after a given situation is consented to? If the process of law-creation implied in the foregoing discussion is correct, that would seem to be the case. There is also the consideration that other terms, such as “attitude”, “view”, “opinion” and “acceptance” (which, at the very least, are ambiguous in that they could refer either to consent/will or belief; a State could have an

45. There is no duty to recognise a practice as being legal (pace Thirlway, op. cit. supra n.5, at p.54, where the contrary is suggested). Even where the rule is so well established that any dissent therefrom is considered ineffective as a matter of law, it seems inappropriate to treat the ineffectiveness of dissent in such a case as a duty to recognise or as a duty to have opinio juris. It would simply be a duty imposed by the rule in question. Reference to a duty to recognise the existence of a duty would be inelegant and otiose. Even if it were appropriate to speak of such a duty, one could describe it as a duty to consent to the legal position in question.


47. See e.g. I.C.J. Rep. 1986, 99–100, para. 188.

48. See e.g. I.C.J. Rep. 1955, 22.

49. See e.g. I.C.J. Rep. 1969, 235 (per Judge Lachs).

50. See e.g. idem, p.25, para.27; p.43, para.73; pp.230 and 231 (per Judge Lachs). See also the Asylum case, supra n.2, at p.277.
attitude, view or opinion, or accept something which differs from the position of others,) have also been used to describe *opinio juris*. Furthermore, in many of these cases the Court does not even use the term *opinio juris* at all.\(^{5}\) So, while all the terms used to describe *opinio juris* do not exclude some natural consensual meaning, it has already been demonstrated that the declaratory view is too problematic to be sustained. We are thus left with their consensual/constitutive meaning, as that is the only one that can account for law-creation.

If, therefore, *opinio juris* is to permit the creation of new rules of customary law, it is indistinguishable from will/consent. This is particularly true if we accept Walden’s identification of some possible meanings of consent in the customary law process, which he describes as follows: “(1) The contractual sense: an intention to create obligations on a basis of reciprocity; (2) The intention to create obligations generally …; (3) Willingness to be bound by rules already created; (4) Acquiescence in claims put forward by others.”\(^{52}\)

At the very least, the role played by *opinio juris* can be described as the role played by consent. But we may go even further and agree with MacGibbon that in the case of the formation of a customary law right, “the relevance of the doctrine of acquiescence is increased while that of *opinio juris* is diminished”, since it would be difficult to believe that a practice “motivated by reasons of convenience or self-interest would have been initiated or evolved under the conviction on the part of the States participating that such a practice was in conformity with law, far less that it was enjoined by law”.\(^{53}\) And even with regard to customary law obligations “there seems to be little need for the concept of an *opinio juris* as it is generally interpreted”;\(^{54}\) it may be useful only in the case of the party seeking to establish an obligation on the part of another State, as it would be persuasive to show that that State’s compliance “was and is rooted in consciousness of an obligation to comply”. But even in this case, *opinio juris* does not explain the source of the obligation in question. The notions of claim, acquiescence, acceptance and consent, on the other hand, always play a central role in this process. There would seem to be good grounds not for rejecting *opinio juris* outright, but for realising that, in its simplest and most workable aspect, it is a manifestation of the system of consensual law-making that is customary international law.

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\(^{51}\) See e.g. the *Asylum* case, *ibid*, the *Anglo-Norwegian Fisheries* case, I.C.J. Rep. 1951, 116, and the *Notebohm* case, supra n.28, at p.4.

\(^{52}\) *Op. cit. supra* n.32.


\(^{54}\) *Idem*, p.129. The “general interpretation” to which he refers is the reference to *opinio juris* as being belief that particular conduct is followed out of a sense of legal obligation.
II. THE DISTINCTION BETWEEN LAW AND NON-LAW

AKEHURST has written that:55

If States habitually act in a particular way . . . is this because international law requires them so to act, or because international law merely permits them so to act? The frequency or consistency of the practice provides no answer to this question; opinio juris alone can provide the answer. Moreover, opinio juris is also needed in order to distinguish legal obligations from non-legal obligations, such as obligations derived from considerations of morality, courtesy or comity.

Even those who are sceptical about the traditional justification of opinio juris do not contest the fact that this function should be served in some way.56 What they question is whether opinio juris (or indeed any other notion) can fulfil this function adequately.57 Traditional theories of opinio juris are problematic because it is often difficult to find clear indications that States consider a given rule or practice to be obligatory. The problem is largely one of proof. If opinio juris is described as belief or conviction, the problems involved in finding out its content are patent.58

The problem seems to be tied up with the idea of belief. But if we accept the modifications to the traditional theories of opinio juris described above, the position could be improved. Again the treatment of the matter by Akehurst is pertinent:59

56. See e.g. Lauterpacht, loc. cit. supra n.12; D'Amato, op. cit. supra n.8, at pp.85–87 and 66–68; Haggenmacher, loc. cit. supra n.12; Judges Lachs and Sørensen, I.C.J. Rep. 1969, 231 and 246–247 respectively.
57. But see Thirlway, op. cit. supra n.5, at pp.44–45, who states that "It may be doubted whether there is in any real risk of confusion between established, but non-binding, protocollary practices, and rules of customary international law." To this, one might respond as follows: what about the equidistance principle in the North Sea Continental Shelf cases, I.C.J. Rep. 1969, 4, 43, para.74, and 44, para.77, where the court held, inter alia, that the practice in question did not amount to customary law because opinio juris had not been proved?
58. See Brownlie, loc. cit. supra n.5 and Akehurst, op. cit. supra n.13, at p.34, n.4. See also D’Amato, op. cit. supra n.8, at pp.33–41, for a discussion of the difficulties in finding out the beliefs of States.
59. Akehurst, idem, p.37. A good illustration of this proposition is the practice of Japan in the context of the law of the sea before 1977, in the face of increasingly extensive claims made by many States to jurisdiction over the waters adjacent to their coast. Japan claimed a three-mile limit to the territorial sea on the basis that “the great majority” of States followed that rule. But the simple and well-known fact is that the majority of States did no such thing. This claim was altered only in 1977, shortly after, even according to a table compiled by the Japanese Ministry of Foreign Affairs, only 22 out of a total of 124 States included in the survey still claimed the three-mile rule, while 59 claimed a 12-mile limit: see (1977) 21 Japanese Ann.Int.L. 51. Brownlie, writing in 1966 (Principles of Public International Law, 1st edn, p.178, n.1), concluded on the basis of claims made at the 2nd UN Conference on the Law of the Sea (UN Doc.A/CONF. 19/8, p.157), official declarations, legislation and actual practice of States, that 23 States claimed three miles, 29 claimed 12 miles, four claimed four miles and 17 claimed six. Other claims varied from five to 130 miles. By 1973 the position was that 23 States claimed three miles while 53 claimed 12 (Principles of Public International Law, 2nd
The traditional view implies, even if it does not state expressly, that *opinio juris* consists of the genuine beliefs of States. It is submitted, however, that a statement by a State about the content of customary law should be taken as *opinio juris* even if the State does not believe in the truth of the statement. It will often be impossible to prove that a State did not believe that its statement was true; however, even if such proof is forthcoming, it does not detract from the value of the statement.

On this view, a State making such a statement is to all intents and purposes willing/consenting to the legal position contained in its assertion. It is true that such statements are not always forthcoming; but the essence of this lies not so much in the proposition that statements are helpful in themselves as in the fact that many of the problems caused by the need to try to ascertain the genuine beliefs of States would be avoided.60

The way in which the consensual explanation of *opinio juris* could improve upon belief can be demonstrated in the following way. When a State makes a novel claim or acts in a novel way it is much easier to take the State’s claim at face value, and assess the possible legal consequences thereof, than it is to ask whether that State really did believe in the legality of what it claims or what it purports to do. For example, if States A to M deliberately exploit the resources of the exclusive economic zones of States N to Z, it would be easier to say that States A to M have willed/consented to a different regime or have an *opinio juris* different from the old one than it would be to prove that the States in question believed their actions to be in accordance with an existing rule of law. And, as we have seen, belief makes it difficult to explain changes in a customary law regime. Consent/will seems easier to prove than belief.

Alternatively, even if this argument (that consent is easier to prove than belief) is unconvincing, the position would be that *opinio juris* and consent are not different in this respect, in that the same difficulties of proof will exist in either case. On such a view, no problems would be caused by speaking of consent to the legality of a practice as distinct from belief in the legality of that practice.61 A question asked rhetorically by Koskenniemi sums up the point that both belief and will/consent suffer from the same defects: “How can we speak of ‘will’ or ‘belief’ or make a meaningful

60. See D’Amato, *op. cit. supra* n.8, at pp.135 et seq.

61. E.g. it will make no difference if one accepts the view that only a majority of States, including perhaps those whose interests are specially affected by the subject matter of a given rule, need to have *opinio juris*; the same criticism is often levelled at the sometimes alleged requirement of universal consent.
distinction between the two in respect of such corporate entities as States?"62 It is true that consent may not be synonymous with belief; what one believes to be the case may not be what one wills/consents to. But once we move away from the declaratory theory (which requires us to make reference to belief) the distinction between will/consent and belief vanishes. All that the non-declaratory conception of opinio juris does, in taking us away from enquiring into the reasons why a State acts in a particular way, is to highlight the fact that belief does not have to be genuine; what matters is the fact that it is expressed as a belief.63

The foregoing would suggest that there is nothing to be lost, but perhaps something to be gained, by treating opinio juris as consent.

III. OPINIO JURIS: SOME REMAINING ISSUES

Finally, we may consider some recent opinions on pronouncements of the International Court which suggest a difference between consent and opinio juris.

In the Nicaragua case the Court stated that:64

there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States . . . [In accordance with Article 38] the Court may not disregard the essential role played by general practice . . . Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice.

62. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989), pp.374–375. This passage is accepted only in so far as it stresses the similarity between will and belief. The part of it that seems to imply that States can neither will nor believe because they are not natural persons is not accepted here (for such arguments see Slama (1990) 16 Oklahoma City U.L. R. 652–653 and footnotes, and Tesón, “International Obligation and the Theory of Hypothetical Consent” (1990) 15 Yale J.I.L. 84, 99 et seq.). States do sign treaties, just as companies sign contracts in domestic law, and these are based on consent; surely the important issue is to determine whose consent can bind the State? It is the external manifestations of “State psychology” that are relevant.

63. E.g. one may consider the Truman Proclamation of 28 Sept. 1945 (see (1946) 40 A.J.I.L. Supp. 45), which claimed that international law gave a coastal State exclusive rights over its continental shelf. In Akehurst’s words, it made “no difference whether the United States genuinely believed that international law gave such rights to the coastal State or not; the important thing is that the United States said that international law gave such rights to the coastal State”: op. cit. supra n.13, at p.37 (emphasis added).

It would seem that the Court was talking about *opinio juris* (the terms used are “recognition” and “shared view”) and not consent, 65 the *opinio juris* of States in general, and not the consent of the parties to the case, was what mattered. The distinction drawn between treaty and custom in the latter part of the passage quoted above would tend to support this, since it could be said that, unlike the position in customary law, “to conclude a treaty is to consent to the application of . . . [the rule contained therein] to oneself” 66. It thus seems that while consent may be relevant in the case of treaties it is not so with customary law, that *opinio juris* is what counts in customary law, and that *opinio juris* is therefore different from consent.

But it is not clear why the position should be different depending on whether the rule is contained in a treaty or whether it is a customary rule. Surely the fact that a rule is incorporated in a multilateral treaty does not mean that whatever interpretation is given to the rule by any one or two parties to the treaty must necessarily be the right one in law. The text of the treaty is the law; what one or two of the parties deem it to mean may not always coincide with, for example, the plain meaning of the text or the intention of the drafters, or the meaning attributable to the rule by the other parties. 67 Similarly, in customary law, the view of particular parties as to the content of the general law is not necessarily accurate, particularly where, as far as the Court was concerned, the law was already clearly established. 68 In other words, the shared view of the parties as to the content of a rule, *whether treaty or custom*, is not necessarily enough. If we cannot sustain a distinction between the two kinds of law (i.e. treaty and custom) in the way the Court suggests, the conclusion must be that the distinction drawn by Thirlway in reliance on the passage under consideration, between consent (relevant in the case of treaty but not custom) and *opinio juris* (relevant in the case of custom but not treaty), becomes difficult to maintain.

In any event, the passage in question does not support a difference between consent and *opinio juris*. The position could simply be described

65. See Thirlway, *op. cit. supra* n.5, at p.51, who draws this conclusion.
68. As far as the Court was concerned, this rule existed already, and was clearly established before the present dispute arose. That this was the case is confirmed by the Court’s statement, *supra* n.64, at p.98, para.186, made in the same context and concerning the tenacity of an established rule of customary law: “instances of State conduct inconsistent with that rule should generally be treated as breaches of that rule, not as indications of recognition of a new rule. If a State acts in a way prima facie inconsistent with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself . . . the significance of that attitude is to confirm rather than weaken the rule.” The point is that the Court was not dealing with the way in which the customary law rule was created. Rather, the Court was concerned with ascertaining the continued existence of the settled rule. Established obligations cannot be revoked willy-nilly; if a rule is binding, what the parties consider the rule to mean may not be conclusive.
by saying that, with regard to customary law, the shared views/consent/opinio juris of the parties to the case before it was not enough to determine their rights and obligations, and that it was the shared views/consent/opinio juris of the generality of States that really mattered. But while this relates to the relationship between the general and the individual, and/or to the relationship between established rules and newly claimed rules, it does not relate to the relationship between consent and opinio juris.

This is confirmed by the statement, made later on in the case, that:69

apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element"—the expression used by the Court in its 1969 Judgment in the North Sea Continental Shelf cases (I.C.J. Reports 1969, p.44)—that the Court has to appraise the relevant practice.

The fact that the "subjective element" is "express recognition" (which, as we have seen, makes sense in the context of customary law only in its consensual aspect) underlines the possibility that the Court did not intend to stress any difference between opinio juris and consent.

In the North Sea Continental Shelf cases70 the question was whether the equidistance—special circumstances rule laid down in the Geneva Convention of 1958 was binding on the Federal Republic of Germany as a matter of customary law. Judge Lachs, in his dissenting opinion, found that the Federal Republic was bound, as it had manifested opinio juris as to the applicability of the rule in its Proclamation of 1964 which referred to "the development of general international law, as expressed in recent State practice and the Geneva Convention on the Continental Shelf", so that "if it may be claimed that the opinio juris of certain other States is in doubt or not fully proven, this is certainly not the case of the Federal Republic".71 This would suggest that opinio juris, like consent, can exist on the part of individual States. Thirlway, however, questions this understanding of the concept. As he has written, "Could Germany become bound, otherwise than by acquiescence or estoppel, by a purported rule which had not yet attained full customary law status?"72 The implication is that, where general customary law is concerned, reference is not to be made to the opinio juris of individual States, if such a notion exists, but to

69. See idem, para.185 (emphasis added).
the views of several States, from which the opinio juris is to be inferred. In other words, opinio juris, properly understood, means opinio generalis juris generalis. Judge Lachs, he argued, appears to have been mistaken.

But, as we have seen, there are some theories of opinio juris which hold that the concept is not used simply to confirm the recognition of existing obligations but is also, in one form or another, concerned with the creation of new law. If these theories are right (and they must be if opinio juris is to be a workable concept), it would mean that opinio juris can operate prospectively, which would itself mean that there is no difficulty in speaking of a State having opinio juris only for itself. That State could be contributing, at the very least, to the development of the general customary law. After all, opinio generalis juris generalis must, at least in the earlier stages, have been no more than one or a few States’ opinio individualis juris, which, exactly like individual consent, may or may not have the effect of conferring rights and duties as a matter of customary law. In sum, it would appear that opinio juris can mean (and this is not meant to be an exhaustive list) opinio individualis juris individualis, opinio individualis juris generalis or opinio generalis juris. There is nothing inherent in the concept of opinio juris which would require that it can be spoken of only in relation to the community of States as a whole and not in relation to a section thereof or even every State. It is then easily possible to use the terms “consent” or “opinio juris” without losing anything. As stated by

73. See supra nn.31–35 and accompanying text.
74. There are several dicta in the Nicaragua case which would suggest that opinio juris can be individual or at least confined only to a number of States, even in the context of general customary law. See e.g. the passage quoted supra n.69. At p.100, para.188, the Court stated that “opinio juris may . . . be deduced from . . . the attitude of the parties and the attitude of States towards certain General Assembly resolutions . . . The effect of consent to the text of such resolutions . . . may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions themselves.” In the next para. the Court, referring to the Helsinki Final Act, stated that “Acceptance of a text in these terms confirms the existence of an opinio juris of the participating States.” On the following page (para.191), the Court stated that “the adoption by States of this text [i.e. Res.2625 on Friendly Relations] affords an indication of their opinio juris as to customary law on the question”. See also the joint separate opinion in the Fisheries Jurisdiction cases, I.C.J. Rep. 1974, 46, 48, para.13: “such declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law on fisheries jurisdiction and their opinio juris on a subject regulated by customary law”.
75. See Cheng, op. cit. supra n.29, at pp.535–538.
76. Haggenmacher (who provides, it is submitted, the most thoroughgoing, and highly critical, treatment of the requirement of opinio juris in the Court’s jurisprudence: op. cit. supra n.12, at p.99) concludes from the treatment of the concept in the North Sea Continental Shelf cases that: “l’opinio juris . . . est d’abord et avant toute une conviction générale de la communauté internationale; mais elle est également perceptible dans chaque cas individuel, par le truchement de traités et des lois internes relatives à la délimitation du plateau continental . . . Ces convictions statiques individuelles attesteraient ainsi une conviction collective, qui à son tour expliquerait et guarantirait la cohésion de la pratique des États.”
Jiménez de Aréchaga (concerning General Assembly resolutions), “the submission of proposals and amendments, abstentions or tacit acceptance of a given provision reveal the opinio juris of each government represented”.

IV. CONCLUSIONS

To conclude on the comparison between opinio juris and consent, the foregoing shows that opinio juris is needed, and, if it is to operate satisfactorily, it cannot be distinguished, at the very least functionally, from consent. What is perceived to be a difference between the two ideas is, in the final analysis, a question of argumentative strategy. That is to say, it is more convincing to “objectify” a rule, and thereby attempt to shift a burden of proving otherwise on to the opposing party. As Mendelson has written (albeit in a different context), “if you can present your demand as an existing right, it is the other government who would ostensibly be disturbing the status quo by denying it, and not you by making the demand”. States will always try to find as much support for their position as possible, and where better than in the practice of other States? The less peculiar and individual that position is, the more acceptable it is likely to be. It is better to say “Everybody else agrees that x is the case”, than it is to say “I think x, so there.” The fact that the support for such arguments is often couched in terms of opinio juris should not blind us to the fact that what is being referred to is the consent/will of the State making the claim and/or the consent of the generality of States.

77. See Cassese and Weiler, op. cit. supra n.38, at p.2 (emphasis added).