SYMPOSIUM: REFLECTIONS ON CUSTOMARY INTERNATIONAL LAW AND THE INTERNATIONAL LAW COMMISSION'S PROJECT (CONTINUED):

CUSTOMARY INTERNATIONAL LAW: A MORAL JUDGMENT-BASED ACCOUNT

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In this contribution to AJIL Unbound, I outline a moral judgment-based account (MJA) of customary international law. On the MJA, moral judgment plays a dual role in the formation of customary international law. First, MJA is part of a disjunctive analysis of *opinio juris*, which involves a moral judgment about what the law ought to be or what it justifiably is. Second, the interpretive process of adducing a customary norm from state practice and *opinio juris* characteristically requires some moral judgment on the part of the interpreter. Along the way, I draw attention to two points at which the MJA departs significantly from the analysis presented in the International Law Commission (ILC)'s Second Report by Special Rapporteur Sir Michael Wood, on the identification of customary international law.[1] First, by more sharply separating state practice from *opinio juris,* MJA avoids systematically double-counting the same facts as both *opinio juris* and state practice. Second, MJA offers an effective response to the so-called "paradox of custom", according to which a customary norm can only come into existence if a sufficient number of states mistakenly believe (or pretend to believe) that it already exists.

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There is a perfectly intelligible sense in which all law, including customary international law, derives from practice. It is the product of what states and other agents actually do or refrain from doing, where this importantly includes the performance of speech-acts that give expression to their objectives and beliefs. To this extent, *opinio juris*, as a factor in the genesis of customary international law, should not be contrasted with "practice", as if it denominated some occult phenomenon unfolding behind the scenes of ordinary human activity. This is not just for the quite general metaphysical reason that, as Wittgenstein put it, "an inward process stands in need of an outward criterion". It follows more directly from the public and intentional—the *positive* or *posited*—character of legislative activity. Law is paradigmatically created through publicly accessible acts that are undertaken precisely *as* law-creating. Hence, all law is practice-based in this wide sense.

Nonetheless, in seeking to understand the orthodox view of customary international law reflected in Article 38 (1) of the Statue of the International Court of Justice (ICJ)—according to which two elements, general state practice and *opinio juris*, bear on its formation—we can regard both ingredients as forms of practice, or two

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[1] Int'l Law Comm'n, Second report on identification of customary international law, by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/672 (2014) [hereinafter ILC 2nd report].

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aspects under which practice may be interpreted. In determining whether a norm exists as a matter of international custom, we begin by giving its putative content (e.g. about the length of the territorial sea, the requirements of diplomatic protection, and so on). This content will specify some pattern of (state) conduct—act or omission—to which a normative modality (obligatory, impermissible, permissible, etc.) is assigned under certain conditions. In order to determine whether these conditions have been met for a putative legal norm, call it *X*, we must address the following two questions (for the sake of convenience, I focus exclusively on states):

> (1) State practice: Is there evidence that states generally conform their conduct to *X*? For example, if *X* is an obligation-imposing norm, is it the case that states generally do, or refrain from doing, what *X* enjoins them to do, or refrain from doing?
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> (2) *Opinio juris*: Is there evidence that states adopt one or other of the following attitudes to *X*:
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> [OJ1] the creation of an international legal rule according to which the specified pattern of behaviour has the normative significance attached to it by *X* is ethically justified, and such a legal rule should be created by means of a process that involves general state practice consistent with *X* and an ethical endorsement by states of *X*'s establishment as a legal rule, or
>
> [OJ2] *X* is already a norm of customary international law, i.e. it exists as a matter of general state practice and *opinio juris* (i.e. OJ1), and the status of *X* as a legal norm (or compliance with it as such) is ethically justified.

In short, *opinio juris* involves the judgment that a norm is already part of customary international law and that (compliance with) it is ethically justified; or that it should be established as law through the process of general state practice and *opinio juris*; or else some mixture of these two attitudes. These are the judgments that a state makes in forming an *opinio juris*, drawing on whatever it takes to be correct values (a matter regarding which it may, of course, be mistaken). The centrality of fallible moral judgment to *opinio juris* is one main reason why the account of customary international law defended here is best described as a moral judgment-based account (MJA).

Let me elaborate on how the MJA interprets the two ingredients of general state practice and *opinio juris*. To begin with, it involves a narrower interpretation of "state practice" than that which is sometimes deployed. On the view outlined above, state practice consists in the behaviour of states insofar as it is in conformity with the putative norm. A positive showing of state practice depends on evidence of general state conformity with what the supposed norm stipulates as obligatory, impermissible, permissible, etc. Positive state practice, therefore, is redeemable in the hard currency of actual conformity to the norm. Forms of state behaviour that evidence some kind of belief regarding the existence or otherwise of the norm, but which do not relate to conformity with it, do not fall within the category of state practice, e.g. states' votes on resolutions by international organizations. Instead, they will bear of the separate matter of *opinio juris*.

One advantage of this way of distinguishing the two elements of custom is that it marks the distinctive significance of whether states actually generally conform to a supposed norm as opposed to other things they may do in relation to that norm, such as merely expressing their approval of it. This is broadly the significance of putting your money where your mouth is: of actually *conforming* ("state practice") to the (putative) legal norm that you *avow* ("*opinio juris*") to be ethically justified. It therefore avoids the unorthodox claim that state practice can amount to nothing more than evidence of *opinio juris*.[2] Nonetheless, this framing of the distinction allows that state practice, interpreted against a suitable background, can be evidence of *opinio juris*. Another advantage

[2] *See, e.g.*, BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS ch. 8 (2010).

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is that it prevents extensive "double counting", whereby one and the same course of conduct, e.g. diplomatic correspondence, votes on resolutions, etc. is treated as both state practice and *opinio juris*.

It is worth noting that failure to avoid double-counting is a blemish in the ILC's Second Report of Special Rapporteur Sir Michael Wood.[3] On the one hand, the report affirms the necessity for both elements, general practice and *opinio juris* (or, "acceptance as law") in order for a customary international legal norm to emerge (Draft conclusion 3). On the other hand, it gives an account of general practice that seems to subsume, as a component part, *opinio juris*, at least insofar as the manifestations of the former seem to encompass most, if not all, of those of the latter (compare Draft conclusion 7(2) on evidence of state practice[4] with Draft conclusion 11(2) on evidence of *opinio juris*).[5] The double-counting entailed by the second aspect of the Report largely renders nugatory its repeated insistence on the necessity for both state practice and *opinio juris* in the case of each norm of customary international law, e.g. diplomatic correspondence, statements in official publications, and actions in relation to international organizations and conferences get to count as evidence of both.

Turn now to the disjunctive interpretation of *opinio juris*. It does not stretch things unduly to say that this interpretation is already literally foreshadowed by the concept's full Latin tag: *opinio juris sive necessitatis* (an opinion of law or necessity). Firstly, what is at issue is an *opinion* or judgment about what is or ought to be the case, rather than the mere expression of a desire or a preference. Second, the content of that judgment relates *either* to what the law is and whether, as a moral matter, it may be complied with or else what it ought to be (and hence, on either alternative, a moral "necessity"). Let me expand on both points.

What is central to both variants of *opinio juris*, OJ1 and OJ2, is an imputed attitude at the core of which is a *judgment* that a norm is, or would be, *morally justified* as a norm of customary international law. The judgment is one about moral justification because only this species of justification is adequate to the task of upholding the claim to legitimacy inherent in law, i.e. its claim to impose obligations of obedience on its purported subjects. Only a justification grounded in moral standards, as opposed for example to mere considerations of self-interest, can vindicate the claim of the law to be morally binding on its subjects. This understanding of *opinio juris*, as reflecting a moral judgment, should be contrasted with two other understandings, one unduly broad, the other unduly narrow.

The overly broad view, epitomized by Curtis A. Bradley's forthcoming paper,[6] characterizes custom in terms of state preferences. Preferences we may take to be a subject's pro-attitudes towards some particular outcome which typically reflect what the subject takes to be reasons. These reasons may differ greatly in kind, from reasons of self-interest, at one extreme, to moral reasons at the other. But a preference, thus broadly understood, does not necessarily purport to identify a consideration that is even in principle capable of justifying the claim to legitimacy (moral bindingness) inherent in law. Notice, in addition, that we can often intelligibly speak of a discrepancy between what a state would prefer the law to be and what it judges that it should be as a moral matter. Its self-interested preference (e.g. as a powerful, or land-locked, or culturally homogeneous state) may point in one direction, but its expressed assessment of the moral merits regarding the content of international

[3] ILC 2nd report, *supra* note 1.

[4] This includes "the conduct of States 'on the ground', diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties, and acts in connection with resolutions of organs of international organizations and conferences". *Id.* at 21.

[5] This includes "statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of government legal advisers, official publications in fields of international law, treaty practice, and action in connection with resolutions of organs of international organisations and of international conferences". *Id.* at 67.

[6] Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD (Curtis A. Bradley ed., 2016).

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may point in the opposite direction. But it is only the latter that counts as *opinio juris*. All this is compatible with two observations. First, that the moral judgments made by states will often be skewed by considerations of self-interest or mere preference. This is simply a pitfall to which all moral judgment is prey. Second, that even when not so skewed, the relevant moral judgment may be one to the effect that permitting states to pursue their preferences or self-interest in various ways is justifiable. In other words, state preferences do have a potentially substantial role to play in the formation of customary international law, but only as regulated by background moral judgments regarding their suitability to do so. It is these background judgments, not the preferences, that are the core of *opinio juris*.

If the preference-based interpretation of *opinio juris* fails in virtue of being overly broad, another much more familiar interpretation is unduly narrow. The latter usually takes *opinio juris* to be an attitude accompanying state practice, one according to which the state acts out of a "sense of obligation" in engaging in the relevant pattern of conduct. So, for example, in the first ICJ case to invoke *opinio juris*, the notion is inappositely described as a matter of states feeling "legally compelled to [perform the relevant act] by reason of a rule of customary international law obliging them to do so".[7] And most recently, in the Second Report on Identification of Customary International Law, the ILC's Special Rapporteur, Sir Michael Wood glossed *opinio juris* as a matter of general practice being "accepted as law", which in turn was understood to mean that "the practice in question must be accompanied by a sense of legal obligation" (Draft Conclusion 10(1)[8]). This is an apt characterization of *opinio juris* for the specific case in which a state is complying with an already existing international norm that it takes to impose an obligation on itself. But it fails to embrace two other cases. First, if the obligation is understood as an already existing legal obligation, this analysis does not capture *opinio juris* that gives rise to a new norm (i.e. the type covered by OJ1). Second, even in the case of an existing customary norm, it does not cover situations where the norm is thought by the state to confer a *right* or a *liberty* upon it to engage in the specified pattern of conduct. The characterization of *opinio juris* I have given, by contrast, accommodates all of these normative modalities. What it requires is that the relevant norm, whether it is taken by the state to impose a duty or confer a right or a liberty on it, is judged by the state to be morally justified in doing so. It therefore does not clamp *opinio juris* to one specific normative modality, that of obligation, even though many norms of customary international law will of course be obligation-imposing.

An advantage of this disjunctive specification of *opinio juris* is that it defuses the so-called "paradox of custom", according to which the creation of new customary international law is inescapably premised on *error* or *deception* on the part of states. Specifically, it is premised on the mistaken belief, or pretended mistaken belief, that a norm that is not already part of customary international law actually possesses this status. Although some question the practical significance of this paradox, I have argued elsewhere that it tarnishes the legitimacy of customary international law. This is because there is a transparency constraint on any form of law-making to the effect that its successful operation must not necessarily depend on mistaken beliefs (or pretended such beliefs) on the part of the agents that create the law as to what it is they are doing.[9]

On the disjunctive analysis of *opinio juris* we do not need to assume that the generation of a new customary norm requires the existence of widespread error or deception as to the existing state of the law. This is because the relevant kind of *opinio juris* may be of the type OJ1. Once the customary norm has come into existence, however, its continued existence across time can be sustained by *opinio juris* of the second sort, OJ2. But there is no "paradox" involved in a legal norm's *continued* existence depending in part on the fact of its being taken to already exist. Contrast the ILC's Second Report. In interpreting *opinio juris* as "practice accepted as law", the

[7] North Sea Continental Shelf (Ger. v. Den./Ger. v. Neth.), Judgment, 1969 ICJ REP 3, at 44-45, para. 78 (Feb. 20).

[8] ILC 2nd report, *supra* note 1, at 51.

[9] *See* John Tasioulas, Opinio Juris *and the Genesis of Custom: A Solution to the 'Paradox'*, 26 AUSTL. Y.B. INT'L L. 199 (2007).

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report rather optimistically suggests that "[u]se of this term from the Statute [of the ICJ] goes a large way towards overcoming the *opinio juris* paradox".[10] This makes it sound as if the paradox stems from the Latin and will be eradicated by the use of plain English expression. On the contrary, the "practice accepted as law" formulation accentuates that very paradox, making it clear that a practice has to be accepted as already legal in order to *become* legal.

Another, more widely-credited threat to the legitimacy of customary international law is the accusation that it is hopelessly indeterminate; in particular, that there is no determinate account of the role and relations of state practice and *opinio juris* in the generation of customary international law. In previous work that takes as its focus the highly influential conception of customary international law that emerged in ICJ decisions such as the *Nicaragua* and *Nuclear Weapons* cases, I have offered a general interpretative framework for responding to this sceptical challenge.[11] Essential to this framework is the need for the interpreter identifying customary international law to engage in moral reasoning, to determine how a putative norm fares on a dimension of "justification", in addition to a dimension of "fit" with the "raw data", i.e. state practice and *opinio juris*. This is the second important sense in which the MJA is based on moral judgment. I shall not rehearse further details here except to point out that the MJA yields the following three implications, among others:

(1) Although state practice and *opinio juris* are, as a conceptual matter, independent variables in the formation and persistence of customary international law, in the paradigm case general state practice and widespread *opinio juris* are both present. Indeed, especially in the case of OJ2, the existence of *opinio juris* is what in part explains the state practice. Practice, after all, is the natural product of *opinio,* the practical manifestation of the value judgment that the latter embodies.

(2) In appropriate cases, state practice and *opinio juris* can be traded off against each other. In particular, customary norms can come into being despite the absence of much supporting general state practice, or at the extreme, even in the teeth of considerable countervailing practice. This is because a dearth of state practice can sometimes be compensated for by high levels of *opinio juris,* especially if there is a strong moral case for the norm in question. That case must typically be constructed around those values that are especially salient for the legitimacy of international law, such as peaceful coexistence, human rights, environmental protection, etc.

(3) Whereas evidence of *opinio juris* can establish a customary norm in the absence of supporting general state practice, the reverse position very seldom if ever obtains. To the extent that it does so, it will probably consist in cases in which *opinio juris* is primarily inferred from general state practice. It follows that *opinio juris* is always necessary to the formation of customary international law, even if sometimes its existence is inferred primarily from a pattern of general state practice. But inferring *opinio juris* from state practice, given various other background assumptions, is not the same as identifying it with such practice.

These features of the MJA, especially feature (2), generate three additional benefits that are worth highlighting: (a) they allow new, potentially universally-binding law to come into existence (or to do so more rapidly) in areas where it is needed, but where there is much contrary state practice, e.g. human rights norms and the laws of war, or in cases where state practice has not yet had an opportunity to develop, e.g. the law of outer space; (b) they enable the law to be changed through large-scale shifts in *opinio juris*, thereby avoiding the legitimacy-

[10] ILC 2nd report, *supra* note 1, at 50-51.

[11] John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the* Nicaragua *Case*, 16 OXFORD J. LEGAL STUD. 85 (1996) and John Tasioulas, *Customary International Law and the Quest for Global Justice*, *in* THE NATURE OF CUSTOMARY LAW: LEGAL, PHILOSOPHICAL AND HISTORICAL PERSPECTIVES 307 (Amanda Perreau-Saussine & James B. Murphy eds., 2007).

undermining idea that the only way to reform existing customary international law is through a vast programme orchestrating its persistent violation; (c) by construing *opinio juris* as an ingredient independent of state practice, they enable the *opinio juris* of non-state actors, such as organs of the United Nations, international organizations and tribunals, non-governmental organizations, expert academic opinion, etc. to be taken into account where this is appropriate in terms of enhancing the legitimacy of international law.

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