INTRODUCTION
POWER, OBLIGATION, AND CUSTOMARY
INTERNATIONAL LAW

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A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.1

When Emmerich de Vattel wrote these words in 1758, he was expressing a basic tenet of eighteenth century international law. Sovereign equality remains a central aspect of the international legal system today, with Article 2(1) of the United Nations Charter stating: “[t]he Organization is based on the principle of the sovereign equality of all its Members.”2

The struggle to achieve and maintain equal rights for all is fundamental to the history of many national legal systems.3 Although some individuals possess infinitely more wealth and influence than others, legal equality matters as it provides the possibility of access to...
legal institutions, including law-making processes. Legal equality is likewise vital to the international legal system composed of approximately 190 nation-states. Referred to as “sovereign equality” in this context, legal equality in international law enables weaker states to enter into treaties with powerful states with the expectation that the treaties will be upheld. Sovereign equality also provides states with equal votes in many international organizations and ensures them the equal benefit of essential privileges such as diplomatic immunity for their representatives abroad.

But just as Bill Gates has more influence than most other Americans on the development and application of U.S. law, there are limits to the concept of sovereign equality in international law. Some of these limits are legally formalized: there are only five permanent, veto-holding members of the U.N. Security Council, for example. Similarly, the votes of certain economically powerful states are accorded greater weight than those of other member states of the World Bank and International Monetary Fund. These formal differences are often the results of disparities in negotiating power among the states that established these organizations. In most treaty negotiations, weak states attach greater value to the stability offered by conventional instruments than powerful states and are therefore often willing to make significant concessions in order to secure a legal regime. And powerful states, with their greater resources and broader range of activities and interests, are better able to link bargaining issues and negotiating arenas strategically so as to offer incentives—and disincentives—across and among a wider range of topics, thereby constraining the options of less powerful states in ways that are subtle yet often extremely effective. In the Uruguay Round negotiations


5. See, e.g., U.N. CHARTER, supra note 2, in art. 2 (1) and art. 18 (1) (“Each member of the General Assembly shall have one vote.”).


7. See, e.g., U.N. CHARTER, supra note 2, art. 27(3).

leading to the creation of the World Trade Organization, for example, the developed world obtained far-reaching concessions on intellectual property and trade in services in return for a binding dispute settlement mechanism and further progress—and the promise of further negotiations—on two other issue areas of profound concern to the developing world: textiles and agriculture.9

Similar strategies are applied by states within international organizations when resolutions and declarations having direct or potential legal effect are negotiated and adopted. The United States, for example, used financial incentives (including the provision of aid, the lifting of trade sanctions, and support both for World Bank loans and for increased aid flows from other states) as well as promises to exclude certain states from international conferences and resume normal diplomatic relations with others, in order to secure greater legitimacy for Operation Desert Storm through the adoption of Security Council Resolution 678 in November 1990.10 A powerful state’s application of economic and political pressure in one situation can also give it a reputation for throwing its weight around—a reputation that may prove beneficial to it in later situations. For example, it is well known that Yemen lost seventy million dollars in annual aid from the United States because of its vote against Resolution 678.11 Accordingly, other developing states will now likely think twice before voting against the United States in the Security Council.

Customary international law is traditionally considered to be comprised of two elements: state practice and opinio juris, with opinio juris being a subjective feeling of legal obligation regarding the practice in question.12 Since subjective feelings are difficult to identify, the analysis of customary rules has almost always focused on state practice.13 The questions asked include the following: what kinds of be-

13. Peter Haggenmacher has convincingly argued that the International Court of Justice does not even attempt to analyze opinio juris when evaluating the existence and content of cus-
behavior count as state practice,\textsuperscript{14} how many states need to participate in the practice,\textsuperscript{15} and over how long a period of time?\textsuperscript{16}

If state practice is treated as the primary element of customary international law, it becomes difficult to regard disparities of wealth and military power as irrelevant in the formation of customary rules. In terms of their ability to engage in practice across a wide range of issues, and thereby to influence the development of customary rules, the tiny island country of Tuvalu (population 10,600) and the United States are patently unequal, even though both formally have the same degree of access to the international legal system.

Charles de Visscher, observing that the “slow growth of international custom has been compared to the gradual formation of a road across vacant land,” wrote in 1953:

Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.\textsuperscript{17}

Michael Reisman is another international lawyer who has recognized that inequality plays an important role in the formation of customary international law. In 1987, he suggested that the United States should shift the focus of its law-making efforts from treaties and international organizations towards customary international law. This reorientation was advocated as the United States, due to its greater wealth and military power, could better influence law-making in an informal environment than in more formalized procedural domains such as the United Nations and multilateral negotiating confer-

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\textsuperscript{14} See Peter Haggenacher, \textit{La doctrine des deux \'{e}l\'ements du droit coutumier dans la pratique de la cour internationale}, 90 REVUE G\'{E}N\'{E}RALE DE DROIT INTERNATIONAL PUBLIC 5 (1986).


\textsuperscript{17} \textit{CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW} 147 (Percy Corbett trans., 1957).
There has long been a rich literature on customary international law, which has realized a marked increase in recent years as interdisciplinary approaches between international law and international relations develop, and as scholars within some countries—particularly

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the United States—become increasingly aware that customary international law may automatically be part of national legal systems.21

With state practice remaining the focus of analysis, however, the second element of customary international law is increasingly ignored. To the degree that *opinio juris* is actually discussed, it is usually confined to the tight constraints of legal theory. Within these artificial limits the focus is on whether *opinio juris* represents a kind of individualized consent22 or whether it precedes or follows the associated state practice, thus constituting an articulation of legal intent,23 expression of law-making desire,24 or mistaken belief.25

The question of whether the limits on sovereign equality that exist with respect to state practice also pertain to *opinio juris* has received virtually no attention. In my own writing, I have suggested—albeit without examining the issue in great detail—that *opinio juris* has traditionally served two closely-related functions:

First, it was used to distinguish legally relevant from legally irrelevant State practice. Secondly, and perhaps less obviously, it was used to control the abuse of power by States within the process of customary international law. In short, the requirement of *opinio juris* meant that only some instances of State practice counted for the purposes of the customary process, since a State had to believe that its behaviour was already required by customary international law. This test controlled the abuse of power, and promoted stability and determinacy, by excluding a great deal of State practice which might otherwise have contributed to the development, maintenance or change of customary rules. It thus fulfilled what would

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appear to be an essential function within any developed society, that of socialising the behaviour of society’s members by imposing the framework of a legal system upon them, of enabling them to think rationally about the future and not to focus on short-term calculations of interest and risk.\textsuperscript{26}

This analysis rests upon an optimistic view of the relationship between power and the second element of customary international law. It reflects the influence of recent theoretical developments—most notably “sociological institutionalism” (now frequently referred to as “constructivism”)—which explore how perspectives and understandings shared among different actors make the world of international law and institutions differ fundamentally from the selfish, mechanistic world described by traditional “realists.”\textsuperscript{27}

Drawing upon the work of regime theorists and institutionalists, I argued that some aspects of the international legal system—such as \textit{opinio juris}—have an entrenched specificity that makes them at least somewhat resistant to short-term fluctuations of interest and power.\textsuperscript{28} Brigitte Stern’s article, reproduced in translation below, presents a less optimistic view. Stern argues that \textit{opinio juris}, though held by all states, is in fact a creation of powerful states that is imposed upon the weak. This argument carries the insights of de Visscher and others to a new level and helps make Stern’s article one of the most important pieces ever written about customary international law. Power is intrinsic to both elements of customary international law, which therefore needs to be analyzed and understood on that basis.

Originally published in 1981, the relevance of Stern’s article now extends even further due to the subsequent literature developed at the intersection between international relations and international law. By explaining how inequality affects \textit{opinio juris}, Stern’s analysis

\textsuperscript{26} Michael Byers, \textit{Custom, Power and the Power of Rules} 212 (1999).


poses something of a challenge to constructivism, institutionalism, and similar theoretical approaches. The article forces us to reconsider the degree to which power is restrained as a result of communities, shared understandings, and international institutions—and thus makes a major contribution towards explaining the full impact of international politics on the structures and content of international law.