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

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1. EMMERICH DE VATTEL, LES DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET SOUVERAINS § 18, 7 (Charles Fenwick trans., 1916).

2. U.N. Charter, art. 2(1) (visited Sept. 10, 2000) <http://www.un.org/aboutun/charter/index.html>.

3. Protection of equality in U.S. law is found in the fifth and fourteenth amendments of the Constitution, which served as a foundation for twentieth century civil rights legislation. *See* MARY ANN HARRELL, EQUAL JUSTICE UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE (4th ed. 1982). Analysis of equal rights in various countries can be found in scholarship on comparative constitutional law. *See, e.g.,* CONSTITUTIONAL PROTECTION OF EQUALITY (T. Koopmans ed., 1975); VICKI JACKSON, COMPARATIVE CONSTITUTIONAL LAW (1999); MICHAEL VON LOTHAR, DER ALLGEMEINE GLEICHHEITSSATZ ALS METHODENNORM KOMPARATIVER SYSTEME: METHODENRECHTLICHE ANALYSE UND FORTENTWICKLUNG DER THEORIE DER "BEWEGLICHEN SYSTEME" (1997); MARCEL PRELOT, INSTITUTIONS POLITIQUES ET DROIT CONSTITUTIONNEL (Jean Boulouis ed., 11th ed. 1990).

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.[4] Sovereign equality also provides states with equal votes in many international organizations[5] and ensures them the equal benefit of essential privileges such as diplomatic immunity for their representatives abroad.[6]

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.[7] 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.[8] 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

4. Article 6 of the 1969 Vienna Convention on the Law of Treaties establishes that "[e]very State possesses the capacity to conclude treaties," and Article 26 codifies the principle of *pacta sunt servanda*: states parties are bound to perform their treaty obligations in good faith. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679.

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.").

6. *See* Vienna Convention on Diplomatic Relations, April 18, 1961, art. 29-31, 23 U.S.T. 3227, 500 U.N.T.S. 95; *see also* EILEEN DENZA, DIPLOMATIC LAW (1998).

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

8. *See* 1944 Articles of Agreement of the International Bank for Reconstruction and Development (World Bank), art. 5(3)(a), 2 U.N.T.S. 39, 134, 606 U.N.T.S. 266 (visited Sept. 10, 2000) <http://www.worldbank.org/html/extdr/backgrd/ibrd/arttoc.htm>; 1944 Articles of Agreement of the International Monetary Fund, art. 12(5)(a) and (b), 726 U.N.T.S. 266 (visited Sept. 10, 2000) <http://www.imf.org/external/pubs/ft/aa/index.htm>.

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-

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9. *See generally* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 305-17 (2d ed. 1997); TERENCE P. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), at 2241 (Trade-Related Aspects of Intellectual Property Rights) and 2335 (Services) (1993).

10. *See* Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 523-524 (1991).

11. *See* Judith Miller, *Mideast Tensions: Kuwaiti Envoy Says Baker Vowed 'No Concessions' to Iraqis*, N.Y. TIMES, Dec. 5, 1990, at A22.

12. *See* Lotus Case (France v. Turkey) 1927 P.C.I.J. (ser. A) No. 9, at 18, 28; Asylum Case (Colombia v. Peru) 1950 I.C.J. 265, at 276-7; Right of Passage Case (Portugal v. India) 1960 I.C.J. 6, at 42-43; North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands) 1969 I.C.J. 3, at 44, ¶ 77.

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-

havior count as state practice,[14] how many states need to participate in the practice,[15] and over how long a period of time?[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.[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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tomary rules. *See* Peter Haggenacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la cour internationale,* 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5 (1986).

14. *See* ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); Michael Akehurst, *Custom as a Source of International Law,* 47 BRIT. Y.B. INT'L L. 1, 1-3 (1974-75); ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 124 (1987) (discussing the debate between Michael Akehurst and Anthony D'Amato over which kinds of behavior count as state practice).

15. *See* North Sea Continental Shelf Cases 1969 (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands) I.C.J. 3, at 42, ¶ 73.

16. *See* South West Africa Cases (Second Phase) (Ethiopia v. South Africa / Liberia v. South Africa), 1966 I.C.J. 6, at 250, 291 (dissenting opinion of Judge Tanaka); North Sea Continental Shelf Cases 1969 (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands) I.C.J. 3, at 43, ¶ 74; MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1997); Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?,* 5 INDIAN J. INT'L L. 23 (1965).

17. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 147 (Percy Corbett trans., 1957).

ences.[18]

There has long been a rich literature on customary international law,[19] which has realized a marked increase in recent years as interdisciplinary approaches between international law and international relations develop,[20] and as scholars within some countries—particularly

18. *See* Michael Reisman, *The Cult of Custom in the Late 20th Century,* 17 CAL. W. INT'L L.J. 133 (1987). Other scholars who have considered briefly the role of power in the formation of customary international law include Oscar Schachter, *New Custom: Power, Opinio Juris and Contrary Practice, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 531 (Jerzy Makarczyk ed., 1996); SERGE SUR, RELATIONS INTERNATIONALES 246-9 (1995).

19. Some of the more significant contributions include: Michael Akehurst, *Custom as a Source of International Law,* 47 BRIT. Y.B. INT'L L. 1 (1974-75); Percy Corbett, *The Consent of States and the Sources of the Law of Nations,* 6 BRIT. Y.B. INT'L L. 20 (1925); ANTHONY D'AMATO, THE CONCEPT OF CUSTOM (1971); René-Jean Dupuy, *Coutume sage et coutume sauvage, in* MÉLANGES OFFERTS À CHARLES ROUSSEAU 75 (1974); Paul Guggenheim, *Les deux éléments de la coutume en droit international, in* 1 LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC: ÉTUDES EN L'HONNEUR DE GEORGES SCELLE 275 (1950); Peter Haggenacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la cour internationale*, 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R.G.D.I.P.] 5 (1986); Hans Kelsen, *Théorie du droit international coutumier*, REVUE INTERNATIONALE DE LA THÉORIE DU DROIT [R.I.T.D.] (new series) 253 (1939); Lazare Kopelmanas, *Custom as a Means of the Creation of International Law,* 18 BRIT. Y.B. INT'L L. 127 (1937); Joseph Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662 (1953); Vaughan Lowe, *Do General Rules of International Law Exist?* 9 REV. INT'L STUD. 207 (1983); Iain MacGibbon, *Customary International Law and Acquiescence,* 33 BRIT. Y.B. INT'L L. 115 (1957); Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea,* 49 AM. J. INT'L L. 356 (1955); Venkata Raman, *Towards a General Theory of International Customary Law, in* TOWARDS WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDOUGAL 365 (Michael Reisman & Burns Weston eds., 1976); Oscar Schachter, *Entangled Treaty and Custom, in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 717 (Yoram Dinstein ed., 1989); SERGE SUR, LA COUTUME INTERNATIONAL (1990); HUGH THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION (1972); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (2d ed. 1993); NANCY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW (1994); Rein Müllerson, *The Interplay of Objective and Subjective Elements in Customary International Law, in* INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 161 (Karel Wellens ed., 1998). *See also* Rudolf Bernhardt, *Customary International Law, in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 898 (Rudolf Bernhardt ed., 1992).

20. On bridges between international law and international relations, see generally Judith Goldstein et al., *Legalization and World Politics*, 54 INT'L ORG. 385 (2000); THE ROLE OF LAW IN INTERNATIONAL POLITICS (Michael Byers ed., 2000); Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, *International Law and International Relations Theory: Toward a New Generation of Interdisciplinary Scholarship,* 92 AM. J. INT'L L. 367 (1998). On interdisciplinary approaches to customary international law, see FRIEDRICH KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 84-93 (1989); SERGE SUR, LA COUTUME INTERNATIONAL (1990); Harold Hongju Koh, *Contemporary Conceptions of Customary International Law: Remarks,* 92 AM. SOC. OF INT'L L. PROC. 37 (1998); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES (1999); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law,* 66 U. CHI. L. REV. 1113 (1999); Stephen

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 consent[22] 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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Toope, *Emerging Patterns of Governance and International Law, in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 91, (Michael Byers ed., 2000); Gerry Simpson, *The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power,* 11 EUR. J. INT'L L. 439 (2000).

21. *See*, *e.g.,* Philip Trimble, *A Revisionist View of Customary International Law,* 33 UCLA L. REV. 665 (1986); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law,* 111 HARV. L. REV. 2260 (1998); and the response from Harold Hongju Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824 (1998).

22. *See*, *e.g.,* Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT'L & COMP. L.Q. 501 (1995); I.M. Lobo de Souza, *The Role of State Consent in the Customary Process,* 44 INT'L & COMP. L.Q. 521 (1995); Maurice Mendelson, *The Subjective Element in Customary International Law,* 66 BRIT. Y.B. of INT'L L. 177 (1995).

23. *See* ANTHONY D'AMATO, THE CONCEPT OF CUSTOM 74-75 (1971).

24. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 238-45 (1980); James Crawford & Thomas Viles, *International Law on a Given Day, in* VÖLKERRECHT ZWISCHEN NORMATIVEM ANSPRUCH UND POLITISCHER REALITÄT: FESTSCHRIFT FÜR KARL ZEMANEK 45 (1994).

25. *See* Peter Benson, *François Gény's Doctrine of Customary Law,* 20 CAN. Y.B. of INT'L L. 267, 276-7 (1982) (discussing FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 367-71 (2nd. 1919)).

> 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.[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."[27]

Drawing upon the work of regime theorists and institutionalists, I argued that some aspects of the international legal system—such as *opinio juris*—have an entrenched specificity that makes them at least somewhat resistant to short-term fluctuations of interest and power.[28] Brigitte Stern's article, reproduced in translation below, presents a less optimistic view. Stern argues that *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 *opinio juris*, Stern's analysis

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26. MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 212 (1999).

27. For constructivist perspectives, see, for example, JOHN RUGGIE, CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION (1998); ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999); Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy,* 92 AM. J. INT'L L. 414 (1998); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law,* 19 MICH. J. INT'L L. 345 (1998). For traditional realist perspectives, see, for example, EDWARD CARR, THE TWENTY YEARS' CRISIS (2nd ed. 1946); HANS MORGENTHAU, POLITICS AMONG NATIONS (2d ed. 1954); GEORGE F. KENNAN, AMERICAN DIPLOMACY (1984); KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

28. On regime theory and institutionalism, see ROBERT KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER (1989); Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* STEPHEN KRASNER, INTERNATIONAL REGIMES 1 (1983); ORAN YOUNG, INTERNATIONAL COOPERATION (1989).

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.