National Court Decisions and *Opinio Juris*

Ingrid Wuerth³

A Conference Paper Prepared for *The Role of Opinio Juris in Customary International Law*

National court decisions were traditionally a controversial source of either State practice or *opinio juris*. Positivist scholars writing a century ago, such as Professor Lassa Oppenheim, argued that international law is fundamentally a “matter between the governments of the states which are members of the family of nations,” and accordingly “not within the competence of municipal courts.”² Uniform practice of courts might provide evidence of the content of international law, but national courts could not determine the law itself.³ In part, this perspective reflected the view that customary international law must rest upon express rather than implied consent of the government – a view “stimulated by an exaggerated regard for sovereignty,” in the critical words of (then) Professor Hersch Lauterpacht writing two decades later.⁴ Putting aside whether the rejection of national court decisions as constitutive of customary international law was ever descriptively accurate,⁵ it is not today. As just one example, the *Jurisdictional Immunities of the State* case, decided by the International Court of Justice in 2011, explicitly provides that national court decisions can constitute both state practice and *opinio juris*.⁶ This view is widely-held.⁷

---

¹ Professor of Law, Director of International Legal Studies, Vanderbilt University School of Law. Ingrid.wuerth@vanderbilt.edu.


³ Oppenheim, *supra* note 2 at 337.


⁵ Id.; see also S.S. “Lotus” (Fr. v Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 23, 26, 28–9 (Sept. 7); but cf. id. at 59-64 (dissenting opinion of Judge Nyholm).


Nevertheless, one theoretical issue that animated Oppenheim’s position remains an open question: the relationship between national courts and their “governments” in the formation of customary international law. Oppenheim – like other positivists who rejected national court decisions the basis of customary international law – had a “rigorously statist” understanding of the family of nations, in which “state” meant the “government” or head of state and minister of foreign affairs, not the parliament or courts.⁸ In the event of conflict, the government’s position controlled as to the content and development of a rule of international law.⁹ Lauterpacht’s classic essay accepted national court decisions as the will of the state and thus as opinio juris¹⁰, but he was less clear about the resolution of conflicts between the executive and courts. He rejected the idea that the executive and courts can force a sovereign state to speak with “two voices” – and argued that they “are the same voice,” noting that in certain matters the executive can make determinations binding on the courts.¹¹ This observation works to minimize the opportunity for conflict between the branches, but does not explain how to resolve what conflict may remain. Elsewhere, Lauterpacht suggested that a lack of uniformity may prevent the formation of custom at all, but he also seems to suggest that the executive branch should be bound by courts’ decisions in their areas of authority, and that courts’ decisions reflect “implied consent” of the state because the government may have recourse to the legislature if it wishes to correct a domestic decision with which it disagrees.¹²

Today, the issue remains unresolved. The plural forms of state practice and opinio juris which are now accepted as forming customary international law, as well as the increasing independence of the judiciary from the executive branch, are both likely to increase the incidence of conflict.¹³ The proffered solutions remain basically the same as those put forth by Oppenheim and Lauterpacht: accord primacy to the executive, as suggested by the International Law Association’s 2000 Statement of Principles Applicable to the Formation of General Customary International Law;¹⁴ or look to the branch that has

---


⁹ Oppenheim, supra note 2 at 339-40.

¹⁰ Lauterpacht, supra note 4 at 84-85.

¹¹ Id. at 84 (quoting in part, McNair, Judicial Recognition of States and Governments, and the Immunity of Public Ships, BRIT. Y.B. INT’L L. 65 (1921-22))

¹² Id. at 82, 84, 90 (the state should not be allowed “to throw overboard a rule which it suffered its courts to pronounce and of which it implicitly approved by not resorting to legislative measures to have the judicial pronouncement set aside”).


¹⁴ International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, p. 18 [hereinafter ILA Statement of Principles]. (“In the ultimate analysis, since it is the executive which has primary responsibility for the conduct of foreign relations, that organ’s formal position ought usually to be accorded more weight than conflicting positions of the legislature or the national courts.”).
control over the question as a matter of domestic law and accord primacy to its view;\textsuperscript{15} or conclude that the internal conflict precludes any State practice or \textit{opinio juris};\textsuperscript{16} or some mixture of the foregoing.

The first goal of this short conference paper is to consider these approaches in terms of the most commonly advanced purposes and functions of \textit{opinio juris}: to demonstrate consent;\textsuperscript{17} to distinguish law from non-law;\textsuperscript{18} to enhance clarity and predictability;\textsuperscript{19} and to articulate important normative values.\textsuperscript{20} It argues against the ILA position of according presumptive priority to the executive position. The second goal is to proffer a brief defense of an alternative resolution to internally inconsistent practice: affording individual states more than one State practice and \textit{opinio juris}. Although the practical effect of such a proposal will be limited because the conflicting practices and \textit{opinio juris} (if both count) will tend to cancel each other out, this may not always be the case. It is hoped that these comments may be helpful to the International Law Commission as it considers the topic “Formation and Evidence of Customary International Law.”\textsuperscript{21}

\section{Executive Priority}

The old view of executive primacy held that only the executive could make or consent to “law between the states” – so it followed that in the event of a conflict, the executive position was

\textsuperscript{15} See Nollkaemper, \textit{supra} note 13 at 271; see also Anthea Roberts, \textit{Comparative International Law? The Role of National Courts in Creating and Enforcing International Law}, 60 \textit{INT’L & COMP. L.Q.} 57 (2011) (“where inconsistencies emerge, the conflicting practice must be weighed, considering factors such as which branch of government has authority over the matter.”).

\textsuperscript{16} See Akehurst, \textit{supra} note 7 at 22; ILA Statement of Principles, \textit{supra} note 14 at 18.


\textsuperscript{18} North Sea Continental Shelf, Advisory Opinion, 1969 I.C.J. 3, 44 (Feb. 20); Akehurst, \textit{supra} note 7 at 23.

\textsuperscript{19} \textit{Cf.} Anthony A. D’Amato, \textit{The Concept of Custom in International Law} 74 (1971) (“The simplest objective view of \textit{opinio juris} is a requirement that an objective claim of international legality be articulated in advance of, or concurrently with, the act which will constitute the quantitative elements of custom’’); Vincy Fon & Francesco Parisi, \textit{International Customary Law and Articulation Theories: An Economic Analysis}, 2 INT’L L. & MGMT. REV. 201 (2007).


"decisive." But today, national court decisions can constitute state practice and *opinio juris*, and thus they can make or consent to customary international law. The traditional reason for executive primacy therefore does not hold, nor does State practice appear to support it.

One oft-cited function of *opinio juris* is to distinguish between law and non-law. But this generates no across-the-board reason to favor the executive branch. Indeed, courts might be better at identifying legal obligations, because their decisions often focus on what the law requires, while “official expressions of views of governments on matters of international law are frequently partisan assertions of claims.” *Opinio juris* may clarify the meaning and significance of state practice, making the law more certain and predictable. The executive branch might perform this function better (putting aside changes in the views of executives over time) but only in areas over which it has authority as a matter of domestic law. An executive statement about the legal circumstances under which force may be used is likely to be a better predictor of a state’s future behavior than a similar statement by a court, for example, but only so long as the executive controls the use of force. In an area of law governed by statute or treaty, by contrast, a court’s analysis of the law may be more predictive if the courts control their interpretation. This is not an argument for executive primacy, it is an argument for determining which state organ controls the practice, an issue discussed below.

Another defense of executive primacy is offered in the very recent Preliminary Report of an International Law Association Study Group on *Principles on the Engagement of Domestic Courts with International Law*:

>[I]t is only when decisions of domestic courts are not rejected by the State’s executive that they constitute State practice or that they can be taken to express the State’s opinio juris, so that they are capable of contributing towards the formation or development of


23 This sentence does not take a position on whether consent is required on behalf of an individual state and/or the international community as a whole. If some form of consent is required, there is no reason that national court decisions and cannot provide it.

24 For example, in the *Jurisdictional Immunities of the State* case, the International Court of Justice did not suggest that conflict between the Greek executive branch and Greek courts ought to be resolved by according primacy to the views of the executive.

25 Lauterpacht, *supra* note 4 at 83. Courts may be biased, they may not be good at interpreting international law, and their decisions may rest on a mixture of international and domestic law that is impossible to disentangle. My point is not courts are better, but instead that it is incorrect to assume that either courts or the executive are better.


customary law. This could be seen as a projection of the domestic constitutional principle of separation of powers at the international level; it guarantees that the (presumably democratically elected) government can overrule democratically unaccountable courts in the process of the formation of international law, and it thereby also limits the impact of domestic courts in the formation of that law.

The first sentence appears to mean that if (and only if) the forum state’s executive branch rejects the national court decision after it is issued, then the decision cannot be considered state practice or opinio juris. It is unclear why a conflict between the executive and courts should be resolved through which branch last considered an issue, unless domestic law allocates authority in that way. If it does, then municipal separation of powers applies – not executive primacy, an issue discussed below. It is also unclear what the author means by “reject.” If State A successfully prosecutes a national of State A for crimes against humanity under international law, and the conviction is later denounced by the President of State A as inconsistent with international law, is this a “rejection” that renders the case irrelevant for international law? Did the decision of the Greek government not to permit the enforcement of the Distomo judgment in Greece constitute a rejection of the national court decision so that the court decision was not “capable” of contributing to customary international law? Although the ILA’s 2000 Statement of Principles also suggests some role for executive primacy, that Report advocates a weighing of different positions (and the possibility of no relevant state practice), rather than a simple binary calculus of whether the executive has “rejected” the position of the courts.

The second quoted sentence from the Preliminary Report is also unconvincing. It apparently reasons that the executive branch must be favored over the courts as a reflection of domestic separation of powers and to ensure democratic accountability. But domestic separation of powers does not always favor the executive. A national court may be interpreting a statute that implements international law, or a treaty, or customary international law, and as a matter of domestic law its decisions may be final and binding on the executive branch. In this situation, to ignore the courts in favor of the executive branch would undermine, not effectuate, domestic separation of powers. The penultimate justification, “democratic accountability” is also deeply problematic. An important function of national courts in the international legal system is to constrain the power of their national legislatures and executives, by enforcing law derived from existing or developing international norms. It makes little sense to disqualify such decisions from the formation of customary international law based on a “democratic accountability” rationale, much less one that does not apply to executive actions from non-democratic nations. The last justification – limiting the impact of courts – merely begs the question of if and when that is desirable and for what purpose.

II. Domestic Separation of Powers

A second and more promising approach to conflicting internal state practice is to determine which organ has final authority over the issues a matter of domestic law, and accord priority to it. In practice, this may frequently lead to favoring the executive, but at other times it may favor courts or


29 See ILA Statement of Principles, supra note 14 at 18.

30 See NOLLKAEMPER, supra note 13 at 16; see, e.g., Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
legislatures. This approach is advantageous from two perspectives. As described above, it enhances predictability and certainty by according the greatest weight to the branch that actually controls the relevant state practice. In the hypothetical posed above, the prosecution in State A could constitute state practice and opinio juris, subsequent statements of the executive notwithstanding. As another example, if courts make immunity determinations independent of the executive, and the statements of the executive conflict with the actions of the court, then according greater weight to the courts’ actions and explanations of what the law requires will likely to lead to greater predictive accuracy. Second, this approach prioritizes the branch that the domestic polity has decided ought to make the normative/policy determination, rather than assuming that one branch has greater expertise or other unproven advantages over the other.

Although this resolution of conflicts is preferable to executive primacy, it is problematic. It may be unclear which branch controls a particular issue as a matter of domestic law. In the United States, whether the executive or the courts making binding determination of foreign official immunity is currently contested. More fundamentally, courts and executive branches may each control different aspects of the same issue. In Greece, for example, it appears that courts decide whether foreign states are immune, while the executive branch has to approve any execution of a resulting judgment against a foreign state. Or executive officials may make statements in international law fora that conflict with decision of national courts. As these examples show, the branches may act differently in their respective sphere of authority, based on different views of what international law requires (immunity for states, or not) – potentially giving rise to conflicting opinio juris.

The foregoing considerations may lead to the conclusion that conflicting internal practice and opinio juris should be weighed in determining customary international law, with particular consideration given to the branch whose determinations are binding as a matter of domestic law, and an eye toward changes and developments over time. Alternatively, a state’s internally conflicting practice and opinio juris might preclude any relevance for customary international law, unless and until uniformity is achieved. This position is suggested by the International Law Association’s Statement of Principles, and is advanced by some commentators. It rests on the assumption that each state may have only one relevant practice for the purposes of customary international law. The assumption is discussed in the next section.

III. How Many State Practice; How Much Opinio Juris?

Today it is well-accepted that state practice can take many forms, as discussed above, including statements and conduct of the executive branch, judicial decisions, and domestic legislation. Some influential commentators nevertheless reason that each state can have only one state practice and one opinio juris that “counts” toward the formation of customary international law. This is understood as an aspect of the consistency requirement – here meaning internal consistency within one state rather than consistency among the practices of many. Only if internal state practice is sufficiently consistent is it

31 This assumes a broad definition of state practice, which includes statements and diplomatic correspondence by the government.


33 Jurisdictional Immunities of the State, supra note 6 at ¶ 30.
“capable of contributing to the development of international law.” On this view, any differences between practices of different state organs must be eliminated before the practice of the state is relevant to international law. Similarly, the International Law Association’s Statement of Principles, in addition to suggesting that executive branch practice should control in the case of conflict, also reasons that in cases of conflict “the internal uniformity or consistency which is needed for a State’s practice to count towards the formation of a customary rule may anyway be prejudiced.”

There is a strong case for abandoning the internal consistency requirement, however, assuming that there is even such a requirement. If customary international law is built on plural forms of state practice and opinio juris, with diminished significance for practice itself, it is appropriate to recognize in the formation of customary international law that states may have more than one practice, and indeed may provide conflicting evidence of opinio juris.

This approach would have several advantages. It brings the formation of customary international law in better alignment with the actual practice of states on the ground. It is factually accurate that states may have more than one practice and evince differing opinio juris. As well, despite the commentary to the contrary, it is not clear that there is currently a one-state one-practice rule. So, for example, very repeated and consistent practice even by one particular state provides stronger evidence of customary international law, and in that sense some states are entitled to greater weight based on their internal practice than a simple one-state one-practice rule would suggest. Finally, it allows the reasoning and distinctions drawn by different domestic actors to be reflected into the content of customary international law.

What impact would such a rule have on the formation of customary international law? With respect to traditional custom, where something like near uniformity is arguably required, this approach would probably tend on the margins to make customary international law more difficult to form. Conflicting internal state practice, rather than not counting at all, could count on both sides of ledger. Letting dissenting practice into the calculation makes a high level of uniformity more difficult to achieve. Consider an example. A rule of immunity is uniformly applied in States A-C, but there is not a great deal of state practice. In State D, there is internally conflicting state practice. If State D does not count at all, the rule of immunity from States A-C applies. If State D’s practice counts both for the rule and against it, the conflicting practice from State D might be enough to undercut the rule entirely, if a high level of uniformity in state practice is required.

IV. National Courts and State Sovereignty

The treatment of internally conflicting state practice and opinio juris is in one sense a small-bore issue amid the broader theoretical debates about consent, the role of non-state actors, and normative

34 Akehurst, supra note 7 at 22.


36 See Roberts, supra note 20.

37 See id. at 26, n. 65 (“A separate but connected point is that, because their extensive interests, major powers often contribute a greater quantity of practice than other States”); Akehurst, supra note 7 at 23.
basis of *opinio juris*. Efforts to redefine sovereignty as involving an inherent responsibility for human dignity is linked to a move away from a “state-centric” international legal order toward an international legal order centered around individuals. The shift is reflected in the process through which international law is made and enforced. Contemporary international law is widely understood as having more “subjects” with legal personality and more relevant actors than the traditional state-centered approach, and as not based merely on the consent of individual states. International norms are thus generated by a broader set of actors, including non-state actors, and they increasingly blur the distinction between law created through the traditional doctrine of sources and non-law.

These broader debates question the relevance of states and the definition of sovereignty, while internally conflicting practice is a question very much within the traditional paradigm – both Lauterpacht in 1928 and Oppenheim in 1908 rested their arguments on the primacy of state consent (explicit or implied). Yet the small-bore problem remains relevant. The state itself remains relevant – perhaps increasingly so as both a matter of practice and theory. On the theory side, there is a noticeable body of recent scholarship emphasizing the normative value of state sovereign, consent, and sovereign equality of states. Questions about how the state constitutes itself internationally are thus of enduring significance. Also, according greater place to the practice and *opinio juris* of state organs could, in a very modest way, empower non-state actors even within a state-centric approach. Internally conflicting state practice gives voice to groups within society whose normative claims may not be accepted by the executive branch, but who nonetheless convince another branch of government – like the legislatures or courts. Convincing another branch of government is not an easy task, however, and when groups are successful in doing so it is often because their position reflects important normative views on contested issues. Giving a foothold to these views in the formation of customary international law might contribute to a kind of bounded pluralism, where states still control the production of binding international norms but somewhat more purchase is given to the division of power within states and the groups they represent.

---


43 See Kingsbury, *supra* note 8 at 436; Brad Roth, *Sovereign Equality and Moral Disagreement* (2011); cf. Bradley & Gulati, *supra* note 4 (arguing that customary international law can be improved according individual states more power to withdraw consent or “opt out” of customary international law).