HOW DOES OPINIO JURIS MANIFEST ITSELF IN INTERNATIONAL LAW? AND HOW DOES IT SIGNIFY ITSELF IN THIS CONTEXT?

Shahrad

ABSTRACT

This article examines *opinio juris* and the paradox surrounding it, which is a widely debated subject within the scholarly community. *Opinio juris* is a complex subject in international law. The differing approaches of the international courts towards this subjective element have further added to its complexity, rather than making it more intuitive. The nature of the evolution of international law through customary law has shown the level of attention that states must devote to their own conduct and to the interpretation of law, which is where *opinio juris* first comes to our attention. This article analyses how *opinio juris* fulfils an important, functional, necessary and helpful role in the formation and acceptance of customary international law and, more importantly, the void that would be created in its absence within customary international law. In other words, in the absence of *opinio juris*, the formation of customary international law could be considered as incomplete and lacking the requisite legal merit. *Opinio juris* provides a safeguard ensuring that the acts of states based on their beliefs complies with their obligations. A case study will be provided to develop this analysis and to provide an insight into the concept of self-defence in international law. This will also provide a better understanding of a particular situation in an international law context involving the existence, feasibility and applicability of *opinio juris*. The case study will provide background and insight into the evaluation of action or conduct taken by states, based on their legal beliefs.

INTRODUCTION

The doctrine of *opinio juris* and the paradox surrounding it is a widely debated subject within the scholarly community. One school of thought has challenged both the need for it at all

1 PhD holder in International Law, Aberystwyth University, Wales
and, indeed, its usefulness. These scholars ask whether it can be proved objectively that a state practice is based on the state’s subjective belief that it has a legal obligation to follow a particular practice. Others have attacked opinio juris on the grounds that the concept is circular: a state demonstrates that it is acting legally when it can show that it is acting in accordance with what it believes the law requires. Alternatively, as D’Amato has put it: ‘How can custom create law if its psychological component requires action in conscious accordance with law preexisting the action?’ This article aims to assess this paradox in order to evaluate the need for and the usefulness of opinio juris.

State practice and opinio juris sive necessitatis (commonly referred to as opinio juris) are the two elements that comprise customary international law. According to the ICJ Statute, customary international law as a source of international law is ‘international custom, as evidence of a general practice accepted as law’. The key phrases here are ‘evidence’, ‘custom’ and ‘general practice’. The very nature of the evolution of international law through customary law has shown the level of attention that states must devote to their own conduct and to the interpretation of law, which is where opinio juris first comes to our attention.

Opinio juris has traditionally been considered to be the secondary element required for the creation of customary international law, with state practice being the first. These elements were best articulated by the ICJ in the North Sea Continental Shelf cases. The ICJ referred to these elements in the creation of customary international law, stating that, first of all: ‘not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory for the state’.  

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3 Hans Kelsen, ‘Théorie du droit international coutumier’ (1939) 1 Revue internationale de la théorie du droit 253, 264–6; Paul Guggenheim, Traité de droit international public (Librairie de l’Université, Georg & Cie, 1953) 46–8; Michael Akehurst, ‘Custom as a Source of International Law’ (1977) 47 British Yearbook of International Law 32–3. Akehurst regarded the scholars’ view as a ‘radical approach’; however, it is important to note that these scholars subsequently amended their reasoning.

4 Thirlway, above n 1, 103.

5 D’Amato, above n 1, 66.


7 Statute of the International Court of Justice art 38(1)(b).

8 North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), above n 5, para 77.
by the existence of a rule of law requiring it’. Secondly, the ICJ stated that these acts must be accompanied by: ‘the need for such a belief, i.e., the existence of a subjective element, [which] is implicit in the very notion of the *opinio juris* ...’.\(^9\) In essence, the presence of *opinio juris* in customary international law is a significant indication that all states are encouraged and expected to pursue conduct that carries legally binding obligations, based upon the previous conduct of states. The existence of *opinio juris* means that the conduct of a states must align with its legal obligations and, therefore, that all states are obliged as well as encouraged to adopt practices that are governed by internationally accepted rules and norms.

In order to refine and develop this analysis, it is necessary first of all to consider the concept of self-defence in the context of international law. The cases discussed in section 3 below provide background and insight into the evaluation of action or conduct taken by states, based on their legal beliefs. Moreover, examination of these cases will provide a better understanding of a particular situation in an international law context involving the existence, feasibility and applicability of *opinio juris*. A state must take responsibility if it decides not to follow current customary international law rules regarding policy and the use of force,\(^10\) as well as Article 2(4) of the *Charter of the United Nations*,\(^11\) and such a decision can be justified if it is based upon a belief that an act of retaliation is the only correct legal course of action available to the state in question.

In addressing this central question it is necessary, first, to ask how *opinio juris* can be proved and whether this proof is necessary. Secondly, how important and helpful is *opinio juris*? In order to advance this discussion, *opinio juris* will first be assessed, before moving on to consider its rationale.

**OPINIO JURIS**

*Opinio juris* is opinion that holds an act to be a binding legal obligation,\(^12\) and one which emanates from the previous conduct of a state. Thus it is inherently connected with state practice and cannot ever be wholly separated from state practice. Because states follow

\(^10\) *Nicaragua (Nicaragua v United States of America) [1986] ICJ Rep para 184.*
specific paths or act in a way that they believe is legally binding upon them, *opinio juris* indicates a belief that states must behave in a manner in which they are legally bound to take, or abstain from, a particular act.\(^{13}\)

*Opinio juris* helps to create and maintain a form of balance between the legal rights and duties of states, whilst simultaneously minimising any unfair advantage that might thereby be obtained by them. This balance is achieved by encouraging states to comply with their legal obligations and duties, whilst continuing to protect such states against conduct that might lead to unfair benefit on the part of states that are in breach of their obligations.

Elias argues that *opinio juris* is a form of ‘consent’, in the sense that when a state initiates an action, by permitting or agreeing with that action the reaction of other states creates a customary rule through *opinio juris*.\(^{14}\) It should be noted here that the ‘consent’ of all or even majority of states cannot be achieved without compromise, which is likely to be the result of an analysis of the advantages and disadvantages of any proposal, or as a mutual concession of advantages. Watts argues that a custom is created through ‘consistent state practice exercised out of a sense of legal obligation’, and that consistent practice and the sense of legal obligation are based on the prior practices of one or more states.\(^{15}\)

In this way, therefore, custom is created through reciprocal conduct when the belief that a legal obligation exists (*opinio juris*) is grounded on prior conduct that has established a norm.\(^{16}\) Barker and Osiel go further by suggesting that *opinio juris* can also be deduced from the silence adopted by states.\(^{17}\) Osiel, in support of his argument, uses the example of when most states and the organisation Human Rights Watch declined (or decided not) to condemn the targeted killings of Al-Qaeda leaders and members in Yemen in 2002.\(^{18}\) The lack of international criticism of the US missile strike could be viewed as tacit acceptance that the American retaliatory action was customary and legal.

\(^{13}\) Thirlway, above n 1, 103.
\(^{16}\) Ibid 378–81.
\(^{17}\) J Craig Barker, ‘Mechanisms to Create and Support Conventions, Treaties and Other Responses’ (UNESCO Encyclopaedia of Life-Support Systems, 2002); Osiel, above n 1, 55.
\(^{18}\) Osiel, above n 1, 55.
In fact, the scholars’ arguments suggest that the ‘consent’ of states is likely to be highly affected or influenced by reciprocity, particularly in assessing their own interests. Accordingly, the process of the creation of customary international law provides a platform for the limitation of a state’s pursuit of its own interest, because other states’ consent, implied or express, for the acceptability of the conduct becomes an essential element. Consent, in this context, takes the form of a state’s belief that the norm at issue governs the behaviour of that state, which equates to *opinio juris*. This limitation is based on the principle of reciprocity; a state will not consent if it believes that a potential rule is contrary to its reciprocal rights and interests. Furthermore, states tend to act cautiously if they consider that following a path of conduct might place them at a disadvantage pursuant to the reaction of other states.

Once a tenet or rule has been established, then the doctrine of *opinio juris* affects the legality of future similar conduct. Thus, new customary rules are driven from uniform, consistent and general practice accompanied by *opinio juris*. It is important, therefore, to address the provenance of a state’s belief concerning the legality of a particular action and, consequently, how *opinio juris* could ever be established? Is it necessary to ascertain how the belief of legal obligation (*opinio juris*) is to be identified or proven? Who has the burden of the proof: the courts or the states? How do states decide that a practice conforms with customary international law rules? Furthermore, how can states believe in the legality of the actions of others if their own actions could form the commencement of a new customary international law rule?

**HOW CAN OPINIO JURIS BE PROVED AND IS THIS PROOF NECESSARY?**

*Opinio juris* can be identified from the outlook and response of a state to a given situation, as is evident from the ICJ’s approach in the *Anglo–Norwegian Fisheries* case,\(^\text{19}\) where the Court addressed the idea of state practice in relation to the government’s attitude towards *opinio juris*.\(^\text{20}\) In order to gain a better understanding of the functioning of *opinio juris* in reality, an examination of international courts’ treatment of the issue in such high-profile cases as the *Nicaragua* case, the *Lotus* case, the *Anglo–Norwegian Fisheries* case, the *Asylum* case, the

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\(^{19}\) *Anglo–Norwegian Fisheries* (United Kingdom v Norway) [1951] ICJ Rep.

\(^{20}\) Ibid 131–42.
Right of Passage over Indian Territory and the Case concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta) is required.

In some instances, the courts have demanded proof of opinio juris, whilst in others they have, in effect, taken judicial note of the existence of opinio juris. This inconsistent approach has resulted in confusion over whether the parties must plead and prove the existence of opinio juris, or whether opinio juris becomes an issue only if the court opts to make it one. Notwithstanding the burden of proof, it is important to understand that proof of the existence of opinio juris is a reflection of a state’s behaviour and its actions, based upon the belief that its conduct is governed by mirroring previous international conduct, as well as evidence of its ‘consent’ to such conduct.

The loudest argument against opinio juris is in the difficulty – impossibility, some would say – of proving that a state believed it had a legal obligation to act as it did. In attempting to prove opinio juris, and thereby effectively proving how states’ conduct conformed to previous practice, two factors need to be addressed: first, dealing with the issue that states are not like human beings and are incapable of sharing ‘states of mind’ or beliefs and, secondly, exploring the application of opinio juris by the ICJ. The first issue encompasses the challenge that, because opinio juris require a ‘state of mind’, this notion may seem difficult to apply to a state that clearly does not possess a human body. Nevertheless, it should be noted that, whilst states are not people, they are ‘persons’ in the sense of having legal personality under international law. Hence, states are presumed to have a ‘will’, which encompasses the ability to have ‘states of mind’ and ‘beliefs’.

In reality, state officials charged with running a state’s social, political, legal and economic affairs do have ‘states of mind’ and ‘beliefs’, and in this capacity they do take decisions and act on behalf of the state. As stated by Cheng, choosing to deny the acceptance of ‘beliefs’ and ‘states of mind’ would be to enter into a philosophical chestnut in relation to

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21 Thirlway, above n 1, 103–4.
22 Ibid 103.
23 Ibid.
25 Ibid.
ascertaining factors such as the ‘intentions of parties’ relating to national law, since there is an element of presumption when applying such notions. To hide behind the fact that states are not human beings is too simplistic, since every act of a state is an act determined by its human representatives, who unquestionably have wills, motives, beliefs and states of mind. Corporations provide an analogy; they are not human but they are held accountable for the official acts, statements and beliefs of their directors and executive officers.

Moving onto the second factor relating to the application of *opinio juris*, the *Nicaragua case* provides an example of one of the ways in which the ICJ ascertains the existence of *opinio juris*.\(^{26}\) In this case, the court emphasised the need to ‘satisfy itself that the existence of the rule in the *opinio juris* of states is confirmed by practice’, owing to the fact that in customary international law ‘the shared view of the Parties as to the content of what they regard as the rule is not enough’.\(^{27}\) Thus, the attitudes and voting behaviour of states participating at the UN General Assembly (GA) played an important role in leading the Court to assess the existence of *opinio juris*.\(^{28}\)

There is a level of flexibility in the formation of customary international law; absolute agreement of every participating state is not a prerequisite in forming customary international law. Therefore, whilst the majority vote in the GA cannot be taken as evidence of *opinio juris* for all states, the ICJ determined that an individual state’s vote could be viewed as evidence of *opinio juris*.\(^{29}\) In the *Lotus* case, the Court concurred with France’s assertion that customary international law included a rule that removed any jurisdiction by Turkey over the French ship *Lotus*, on the ground that there was no supporting evidence available to the

\(^{26}\) *Nicaragua* (*Nicaragua v United States of America*), above n 9, paras 184, 188.

\(^{27}\) Ibid.

\(^{28}\) Ibid. The Court paid particular attention to the voting in GA Res 2625(XXV). However, Virally, as quoted by Butler, has argued against the evidence of *opinio juris* in the voting behaviours of states in the GA, by suggesting that votes of states in this system only go towards recommendations and are non-binding on the international community. See Grigorii Ivanovich Tunkin, ‘The Role of Resolutions of International Organisations in Creating Norms of International Law’ in William E Butler (ed.), *International Law and the International System* (Martinus Nijhoff Publishers, 1987) 13–4, where it is stated that: ‘While the Assembly is empowered to make only non-binding recommendations to States on international issues within its competence, it has, nonetheless, initiated actions – political, economic, humanitarian, social and legal – which have affected the lives of millions of people throughout the world’ <http://www.un.org/en/ga/about/background.shtml>. However, there are opposing views relating to the binding nature of General Assembly decisions suggesting that General Assembly resolutions have decision/recommendation effects and are thus binding on the international community; Marko Divac Öberg, ‘The Legal Effects of Resolutions of the Security Council and General Assembly in the Jurisprudence of the ICJ’ (2006) 16(5) *The European Journal of International Law* 879–906.

\(^{29}\) Elias, above n 13, 520.
Court, which demonstrated the belief of such jurisdiction by other states, as France contended, to the effect that a mere connection did not of itself create jurisdiction.\(^\text{30}\)

Alternatively, in the *Asylum* case, the ICJ asked the parties that intended to rely on *opinio juris* to prove its existence.\(^\text{31}\) Even though the Court dismissed the existence of a custom in this case, the ICJ reaffirmed the acceptability of a local customary norm by highlighting international custom as ‘evidence of a general practice accepted as law’,\(^\text{32}\) which has played a vital role in assessing a practice as customary international law. The *North Sea Continental Shelf* cases provide another example in which customary norms were not accepted by the Court,\(^\text{33}\) despite the opposing view expressed by Lachs J, stating that ‘the general practice of States should be recognised as prima facie evidence that it is accepted as law’.\(^\text{34}\)

In the majority of cases, however, the ICJ has maintained the position that *opinio juris* exists when the practice at issue is uniform and general. Alternatively, the ICJ has refrained from making any reference to *opinio juris*, as in the *Corfu Channel* case, where the Court simply stated that the conduct of states is ‘generally recognized and in accordance with international custom’.\(^\text{35}\)

This analysis demonstrates theoretical and practical approaches to *opinio juris* and how it can be proved. Each case provides a unique perspective on the view of the belief as to why a state’s conduct was deemed to be based on previous conduct or a demonstration of that state’s ‘consent’ to the conduct, whether rational or otherwise.

Although the cases brought before the courts show different approaches towards establishing *opinio juris* when accepting customary international law, as stressed by Mendelson,\(^\text{36}\) this should not be taken as a devaluation of the importance of *opinio juris*. Indeed, it should not

\(^{30}\) *Lotus (France v Turkey)* [1927] PCIJ Rep Series A No 10 paras 22–3.

\(^{31}\) *Asylum (Colombia v Peru)* [1950] ICJ Rep paras 276–8, which related to a dispute involving Colombia giving political asylum to the Peruvian opposition leader.


\(^{33}\) *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, above n 5, paras 77–81.

\(^{34}\) *Ibid* (Dissenting Opinion of Lachs J) paras 231–2.

\(^{35}\) *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep para 28.

\(^{36}\) Mendelson, above n 1, 285–9.
be presumed that a lack of emphasis on proof of *opinio juris* means that *opinio juris* is to be disregarded.

**HOW IMPORTANT AND HELPFUL IS *OPINIO JURIS***?

In any discussion concerning *opinio juris*, an important question to ask concerns the behaviour of a state in circumstances where customary international law may be created as a consequence of that state’s own conduct. Similarly, how is it possible for a state to be certain that it is acting legally if *opinio juris* indicates the belief that a state should act in a manner in which it clearly believes is in accordance with its legal obligations?\(^{37}\) This has led to a paradox surrounding *opinio juris*, whereby the doctrine has been considered to be unnecessary, unhelpful and ultimately void. One school of thought expressed by commentators including Kelsen, Guggenheim and D’Amato holds that the apparently scant attention paid by the ICJ to the issue of proof of *opinio juris* demonstrates that the doctrine is unwieldy, unhelpful and, indeed, superfluous; according to their reasoning, this is why the courts have granted so little credence to the doctrine of *opinio juris*.\(^{38}\)

There are, however, many supporting examples. In the *Nicaragua* case, the ICJ stated that it was obliged to consider whether a customary rule existed in the *opinio juris* of a particular states, as well as satisfying itself that such a rule was confirmed by subsequent practice in that state.\(^{39}\) In addition, the *North Sea Continental Shelf* cases demonstrate another important practical example of *opinio juris* pursuant to the ICJs statement that settled practice must be clearly established and that it must also be shown that this was the consequence of a belief that the relevant practice was governed and made obligatory by the existence of a rule of law.\(^{40}\)

The Court regarded this ‘subjective element’ as central to the concept *opinio juris*,\(^{41}\) and many commentators agree that *opinio juris* provides legitimacy to international rules. Osiel

\(^{37}\) Thirlway, above n 1, 103.

\(^{38}\) Kelsen, above n 2, 253, 264–6; Guggenheim, above n 2, 46–8; D’Amato, above n 1, 52; and Akehurst, above n 2, 32–3.

\(^{39}\) *Nicaragua (Nicaragua v United States of America)*, above n 9.

\(^{40}\) *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, above n 5, para 77.

\(^{41}\) Ibid.
has stated that: ‘state practice must be accompanied by widespread opinio juris - the consistent legal opinion of relevant states - endorsing such practices as lawful’.

In order to break away from the paradox surrounding opinio juris, it is important to examine not only the actions of a state but also the reasons for those actions, so as to be able to understand the ‘psychological’ element in the formulation of customary international law. Akehurst suggests that opinio juris is the ‘psychological’ element of the ‘conviction felt by states’ that a particular act is required under international law, and this view is shared by Cheng.

This concept implies that international law rules are based on outlining the duties of a state, but that the framework and nature of international law is aimed towards promoting the permissive rather than the directive rules that enable states to act in a specific manner. In addition, the evaluation of the need for the ‘psychological’ element (referred to as opinio juris) further helps to clarify how state practice alone is not enough, thereby stressing the importance of the role of opinio juris. The conduct of state officials gives rise to the ‘psychological’ element or the ‘state of mind’ involved in this state decision-making.

It should also be borne in mind that the primary focus of international law is on the behaviour of states towards each other; as such, the actions and reactions of states are of equal value when assessing the ‘psychological’ element. Brownlie contradicts the claims made by some that the ‘psychological element’ surrounding opinio juris is an unimportant factor for the creation of new customary international law. He convincingly argued that opinio juris was the ‘necessary ingredient’ in the formulation of customary international law. He stated that: ‘the sense of 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’; however, he also noted that: ‘The essential problem is surely one of proof and especially the incidence of the burden of proof’. Brownlie’s view is similar to that of Akehurst, who

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42 Osiel, above n 1, 55.
43 Peter Malanczuk, Akehurst’s Modern Introduction to International Law (Routledge, 7th rev ed, 1997) 44.
44 Cheng, above n 23.
45 Malanczuk, above n 42.
46 Ian Brownlie, Principles of Public International Law (Oxford University Press, 2008) 8.
47 Ibid.
48 Ibid.
believes that the obligatory character of an act can be assessed in proportion to the level of protest or condemnation of other states whose rights may have been affected by the act in question.\textsuperscript{49}

Elias reaches a similar conclusion, whereby he holds that a positive reaction of one state to the action of another state demonstrates ‘consent’ to that conduct. Hence, in his view, \textit{opinio juris} exists in connection with the new practice and, as such, \textit{opinio juris} is ‘indistinguishable’ from the concepts of ‘will’ and ‘consent’.\textsuperscript{50} Mullerson shares Akehurst’s view, by building on Virally’s suggestion that ‘custom derives its authority directly from “will” of states: it is, in fact, tacit agreement’.\textsuperscript{51} Brownlie’s view of this is that silence or a lack of action against a state practice implies that this too is demonstrative of agreement.\textsuperscript{52} Osiel builds on these arguments by emphasising a strong bond of reciprocity in state practice.\textsuperscript{53}

A common factor in the opinions of these scholars is the importance and the need for \textit{opinio juris} in defining customary international law, as well as demonstrating the similarities between \textit{opinio juris} per se, together with the ‘consent’ and the ‘will’ of those states concerned. It is important to note that \textit{opinio juris} is conditioned by the ‘will’ of a state and that, absent some form of ‘consent’, the formation of customary international law rules would not be achievable. This creates and maintains an ongoing balance between the rights and duties of states towards each other, ensuring that states can protest against the actions taken by other states that may jeopardise their rights, and thereby challenge the status of such acts as complying with the rules of customary international law.

Akehurst’s differentiation is especially valid where he draws a distinction between obligatory rules (where proof is gained from the duty imposed on a state by the views held by other states) and permissive rules (where no such proof is required).\textsuperscript{54} The \textit{Lotus} case provides a useful practical approach to elucidate the distinction between permissive rules and obligatory rules, in which the PCIJ ruled in favour of Turkey’s decision to prosecute the master of the

\begin{footnotesize}
\begin{enumerate}
\item Akehurst, above n 2.
\item Elias, above n 13.
\item Brownlie, above n 45.
\item Osiel, above n 1, 55.
\item Malanczuk, above n 42.
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French vessel and to hold him responsible for the collision with the Turkish vessel. Despite France’s claim that there was an obligatory rule preventing Turkey from bringing such a prosecution, the latter successfully argued that even if most states in Turkey’s position had not exercised their jurisdiction, there was no reason to believe that this was the result of a legal obligation.  

Traditional discussion of \textit{opinio juris} is linked less to law-making features but rather to drawing a distinction between legally binding (obligatory) rules and norms that are derived from inter-state courtesies, generally referred to as ‘comity’. The process relating to comity, which was practised by states in their dealings with one another, but without being legally binding upon them, was developed since it was considered that practice alone does not make law. The ICJ affirmed this view in the \textit{North Sea Continental Shelf} cases, stating that: ‘The frequency, or … habitual character of the acts is not in itself enough’.  

The importance of \textit{opinio juris} for the belief that the conduct results from a defined legal obligation thus renders it a necessary element of comity. A widely used example is the custom of using white paper for diplomatic correspondence. However, despite this common practice, there is no legal obligation on states to use white paper nor is such a custom legally binding on them. Brownlie refers to the Oppenheim definition, which describes comity as ‘the rules of politeness, convenience and goodwill observed by states in their mutual intercourse without being legally bound by them’. As articulated by Starke, deviation from the rules of comity may result in reciprocity from other states but is unlikely to result in legal repercussions. This suggests that reciprocity in the form of comity between states is not limited to mandatory conduct under customary international law.

\begin{thebibliography}{99}
\bibitem{Lotus} Lotus (France v Turkey), above n 29.
\bibitem{NorthSea} North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), above n 5.
\bibitem{Danilenko} Gennadiĭ Mikhaĭlovich Danilenko, \textit{Law-Making in the International Community} (Martinus Nijhoff Publishers, 1993) 120; Byers, above n 1, 149.
\bibitem{Brownlie} Brownlie, above n 45, 29.
\bibitem{Starke} Joseph Gabriel Starke, \textit{Introduction to International Law} (Butterworths, 1989) 20–1.
\bibitem{Garner} Garner, above n 11, 284: ‘Comity takes different meanings in legal sense. In this context it is defined as: a practice among political entities (as nations, states, or courts of different jurisdictions), involving mutual recognition of legislative, executive, and judicial acts; case in the US Court states that comity “is neither a matter of absolute obligation … nor of mere courtesy and goodwill … But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws’. \textit{Hilton v Guyor} 159 US 113, 163–64, 16 S Ct 139, 143 (1895).
\end{thebibliography}
As mentioned above, the mere existence of *opinio juris* is a strong incentive for states to comply and follow a course of conduct that they are legally obliged to pursue and to encourage them to abide by the rules of international law. State practice alone would not generate sufficient encouragement for a state to comply with rules of international law but this encouragement is clearly necessary, given the unique nature of international law and, in particular, the flexible and non-central rule-making processes inherent within customary international law. The delicate balance of a state’s rights and duties could be placed at risk should every state be permitted to act as it chose, governed only by state practice (so long as this is consistent and uniform), even though such conduct might not comply with any legal obligation.

Those who argue that *opinio juris* is an unnecessary factor in the formation of customary international law generally assert that the PCIJ and the ICJ have not consistently stated that *opinio juris* is required. Dissenting opinion made by Judge Sørensen in the *North Sea Continental Shelf* cases indicates that ‘the practice of states … may be taken as sufficient evidence of the existence of any necessary *opinio juris’.*61 On the other hand, it is also argued that the Courts have not sought its abandonment. Indeed, any claim for abandonment of *opinio juris* is contradictory to current practice.62 Indeed, evidence to the contrary is visible in the ICJ’s decision in the *Nicaragua* case, where the Court set out to ‘satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice’.63 Far from seeking its abandonment, the ICJ in this case required its ongoing practice.

A similar argument is presented by Elias, referring to the ICJ’s judgments, claiming that the traditional view of *opinio juris* as a separation of obligatory rules and comity is not an entirely valid one and that *opinio juris* ‘has a part to play in law-creation’.64 Taking the previous discussion into consideration, the pertinent observation is that state practice alone is insufficient to establish new rules of customary international law and, if *opinio juris* is considered to be irrelevant, then the role played by *opinio juris* should be replaced.65 As

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61 *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Dissenting Opinion of Sørensen J), above n 5 para 247.
63 *Nicaragua (Nicaragua v United States of America)*, above n 9.
64 Elias, above n 13, 506.
65 *Ibid* 507, 514.
examined above, the issue here with *opinio juris* is that a state’s act is already part of the existing rule before it can constitute a new rule under customary international law. A number of alternative suggestions to this view of *opinio juris* have been put forward, the most plausible of which is that *opinio juris* bisects the formation of customary law.\(^{66}\) Elias considers that the involvement of *opinio juris* in the creation of customary international law should be ‘postponed’ to a later stage than is traditionally the case, insofar as at some point during the creation of new customary law other states must ‘accept, acquiesce in or recognise’ the new practice as legal.\(^{67}\)

In short, therefore, *opinio juris* is almost the same as the concept of the ‘consent’ of states relating to the creation of customary international law. The requirement of the element of ‘consent’ or its existence in the formation of customary international law is not new or exclusive. The principle of consent also helps to resolve the apparent paradox surrounding *opinio juris* in connection with the ‘psychological’ element of customary international law discussed earlier in this article.

In light of the arguments for and against *opinio juris*, including arguments for its abandonment, it is clear that without *opinio juris* the formation of customary international law would be incomplete. Adequate safeguards must be put in place to ensure that all legal obligations are complied with on a continuing basis. These safeguards are fundamental in order to maintain and encourage states to comply with the rules of international law, as well as for the continued balance of the rights and duties of those states.

However, the suggested alternatives potentially to replace *opinio juris* are clearly unsatisfactory in terms of the belief linking *opinio juris* itself to ‘consent’. The element of ‘consent’ plays a fundamental role in the formation of international law and one that cannot be achieved without compromise. Although acceptance of an act as being part of customary law is largely based on its legal merit, its role in creating and maintaining a balance of interests, rights and duties is also significant. Thus, it can be concluded that *opinio juris* does indeed fulfil an important, necessary and helpful role in the formation and acceptance of customary international law, and one that cannot readily be disregarded.

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\(^{66}\) *Ibid* 508.

\(^{67}\) *Ibid.*
CASE STUDY: SELF-DEFENCE AND OPINIO JURIS

Self-defence is an area of international law that provides a helpful background in evaluating a state action or the conduct of a state based upon the belief of that state as regards its legal obligations. As stated above, states must make their own decisions whether or not to adhere to current rules of customary international law,68 including those made under the Charter of the United Nations.69 However, there are many aspects within international law that must be taken into account in deciding whether an action taken by a ‘victim’ state could be considered to be a legal form of self-defence. This section will now explore the legality of self-defence in the context of opinio juris.

International law’s non-centralised enforcement measures aim to encourage states to co-exist by resolving conflicts without resorting to violence or the escalation of disputes. One of the aims of international law is to promote non-aggressive actions in response to breach of agreements and obligations, and there is a specific stipulation in the Charter of the United Nations that prohibits states from using or threatening to use force against another state.70 One exception to this, however, lies in a state’s ‘inherent right of individual or collective self-defence if an armed attack occurs …’, as permitted by the Charter of the United Nations.71

The Persian Gulf War of 1990 is a relatively modern example that shows the application of this right,72 where self-defence in its collective form was employed when Kuwait’s sovereignty was violated, followed by the deployment of coalition forces.73

The right to sovereignty belongs to each and every state. It is protected by international law, which clearly stipulates that the United Nations should not intervene in internal or national matters.74 States benefit from protection against aggressors through their ‘inherent right’ to self-defence, whilst aggressors lose their claim to sovereignty rights in cases where they react

68 Nicaragua (Nicaragua v United States of America), above n 9, para 184.
70 Ibid.
71 Ibid art 51.
73 Ibid.
74 Charter of the United Nations art 2(7) refers to non-intervention into a state’s internal affairs but art 51 stipulates the ‘inherent right’ of states to self-defence.
violently, even if in self-defence. However, in the context of international law, there is a degree of ambiguity concerning the order of priority with regard to issues of self-defence in specific instances.

In certain circumstances self-defence can help to maintain peace and cooperation, as well as ensuring that existing agreements and treaties are adhered to thereafter. However, if a state is attacked then its rights are under threat and an imbalance of equality between the rights of the states concerned is thus created. The ‘inherent right’ to self-defence is a major right that allows the restoration of the equality of rights; indeed, it is a particularly important right that can be utilised to minimise unfair advantages sought or gained by the aggressor.

Nonetheless, the ‘victim’ state must comply with stringent restrictive measures applicable with regard to self-defence set out in the relevant international law treaties. Bearing in mind that the Charter of the United Nations prohibits the use of force by states under any circumstances, the question that arises is when states can safely resort to armed force in the name of self-defence? In this case, a state resorting to the use of force is required to notify the United Nations Security Council (UNSC) that it has been the victim of an armed attack.75 However, there is some doubt as to the definition of an armed attack, as well as the level of force that can be used when acting in self-defence. This is where the obligation on states to interpret treaties in ‘good faith’, and to avoid possible abuses, is essential when interpreting Article 51 of the Charter of the United Nations.76

A state’s right to sovereignty concerns not only its legitimate territorial right but also its rightful autonomy to feel protected from external interference into its internal affairs in addition to its territories and borders.77 Upon taking action in order to attack another state, a state can at that moment be considered as having ceded its sovereign right to absolute protection from other states, as the injured state is authorised under international law to act in self-defence.

Although Article 51 of the Charter of the United Nations clearly affirms the inherent right to

75 Ibid art 51.
self-defence when an armed attack has occurred, the legality of self-defence is not limited to reciprocal self-defence following an armed attack, and in some cases is broadened in scope to include anticipatory, pre-emptive, interceptive, preventative or collective self-defence. It will come as no surprise to hear that the parameters for the legality of such actions is the subject of much scholarly debate. Each of these forms of self-defence will now be discussed in more detail in this section.

The *Nicaragua* case offers a good case study for the interplay and relationship between treaty law and customary international law in relation to the way in which a practice based upon the legal belief of a rule (*opinio juris*) can help to gather different sources and rules of law under one umbrella. The decision in this case helped to clarify some of the uncertainty that existed around the use of force and the right to self-defence by identifying and defining the limitations of an armed attack, as well as the rights existing in customary and treaty law to self-defence. In the *Nicaragua* case, the ICJ emphasised that the use of force is prohibited in customary international law, given the *opinio juris* relating to the existence of the principle of non-intervention in connection with the prohibition on the use of force. The Court sought out the subjective element of states (*opinio juris*) in practice in order to evaluate their belief of the legal rules binding their conduct, by relying on the UN resolutions as a source of *opinio juris*.

As discussed above, the Court considered the *opinio juris* of states in some detail, by evaluating the ‘attitude of the parties and attitude of states towards certain’ GA resolutions and, in particular, Resolution 2625 (XXV) entitled *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations*. The Court gave weight to the acceptance of the parties and the international community of the rules set out in this resolution as acceptance in general of

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79 *Nicaragua (Nicaragua v United States of America)*, above n 9, paras 176, 187–201.

80 *Ibid* paras 185–200, 205, 209.


82 *Ibid* paras 183–211.
the validity of these rules and obligations. Therefore, states are required to cooperate in accordance with this resolution.

However, the ICJ’s ruling maintained that the general rule of the prohibition on the use of force is subject to certain exceptions such as the right granted by the Charter of the United Nations for self-defence. Thus, according to Article 51 of the Charter of the United Nations, when an armed attack takes place, under the right to self-defence an injured state has the right to retaliate but must report to the UNSC immediately. The ICJ also found similar grounds in customary international law for allowing armed attacks without censure in cases of individual or collective self-defence.

In addition, in the Nicaragua case the ICJ deemed it necessary to identify the conditions to be fulfilled prior to the deployment of force in self-defence, citing first that a state deploying force is a ‘victim of an armed attack’ and, secondly, that the ‘criteria of necessity and proportionality’ must be met in any military reaction. The conditions of proportionality and necessity in the legitimate right to self-defence had already been established as prerequisites under rules of existing customary international law.

This view was shared by the International Law Commission (ILC), which considered that restraint must be applied in international armed conflicts as well as in the fulfilment of ‘the requirements of the proportionality and of necessity inherent in the notion of self-defence’. This requirement is to ensure that the rights of states are not impacted through arbitrary reliance on self-defence where the balance between action taken on the part of one state and the reaction on the part of the other state are excessive, disproportionate and/or unnecessary. The ILC reiterated the right to self-defence in an armed attack as an exception to Article 2(4)

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83 Ibid para 188.
85 Nicaragua (Nicaragua v United States of America), above n 9, para 200.
87 Ibid para 195.
88 Ibid paras 176, 194.
of the *Charter of the United Nations*, concluding that self-defence is not wrongful so long as it is conducted within the limitations provided by international law. Thus, the legality of self-defence is reliant on the existence of a proportionate response to the initial act and certain key answers need to be obtained in order to assess the proportionality, namely whether the initial act was lawful and whether the response is proportionate to the initial act.

Collective self-defence has been discussed above in relation to the Persian Gulf War. The legality of this type of self-defence raises rather less of a debate, given that it is directly referred to in Article 51 of the *Charter of the United Nations*; however, in practical terms it is not certain whether actions could be interpreted as collective self-defence. The right of collective self-defence comes into effect where at least one state is ‘entitled to take action by way of individual self-defence’. In additional, the ICJ in the *Nicaragua* case provided further clarity by indicating that two conditions must be fulfilled in order to satisfy the legality of collective self-defence: first, the victim state must declare itself as a victim and immediately request assistance and, secondly, the attack provoking self-defence must be an armed attack.

**PROPORTIONALITY AND NECESSITY IN THE CONTEXT OF SELF-DEFENCE**

When assessing the roles of proportionality and necessity in self-defence, it is useful to understand what these elements mean in this context. Whilst necessity refers to the need for the use and level of force in response to an armed attack, proportionality is concerned with the degree of response in self-defence, specifically with regard to the threat being posed by the armed attack. Thus, proportionality cannot be limited to the proportionate level of use of force that was applied in the initial armed attack since this might not permit recovery of the sovereign and territorial rights of the victim state in question. Greenwood provides a good example, where part of a victim state’s territory might easily and without major force be

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91 Ibid para 1.
92 Ibid para 6.
95 *Nicaragua (Nicaragua v United States of America)*, above n 9, paras 184, 188.
seized by an enemy but its recovery might require a much greater use of force by the victim state in order to recover its territory and to ‘reverse the effects of the armed attack’.96

A distinction must be made between the notion of proportionality when assessing the need and the form of response prior to the response to an attack (jus ad bellum) as opposed to the notion of proportionality once an armed attack has already occurred (jus in bello). It might be argued that the element of necessity plays a greater role in self-defence as it is used to assess the need to respond by the use of force; however, the element of proportionality is also important when assessing the form and extent of the response. The laws of war set out the parameters as to the conduct of a war and the proportionate measures to be taken. The proportionality of force, prohibition of specific weapons and protection of people or targets stipulated in the Laws of War remain in force and apply to all parties equally; hence, the party acting in self-defence is not exempt from these rules. On the other hand, it is less clear what level of proportionality in response must be applied when assessing how to engage in self-defence, irrespective of the form of self-defence in question.

When assessing proportionality in self-defence, the main questions that arise are: What is the right level of proportionality in response to an armed attack? What level of force must be used? Can additional steps, in addition to a responsive attack, be taken to prevent future attacks from the same aggressor? Clearly, the effectiveness and legitimacy of proportionality is justifiable in the legitimate ends being sought, as well as in the relative force and measure of the response to the initial attack.

Kretzmer engages in an interesting debate regarding proportionality in relation to self-defence by highlighting that the first issue to assess is to ‘define’ the legitimate ends when engaging in use of force relating to self-defence and, secondly, that it is essential to assess whether the level of force used in self-defence was necessary to meet the legitimate ends.97 Therefore, the ends being sought in self-defence are important factors in the assessment of the proportionality in the use of force. The conditions of proportionality cannot be considered as fulfilled if the result, following the use of force, is disproportionate when compared to the initial suffering of the victim state. An example of this would be where the victim state has

96 Greenwood, above n 93.
lost part of its territory but, after acting in self-defence, it recaptures its own land and also occupies part of the aggressor’s territory.

Clearly, the use of relative and equal force as a direct response to an attack can leave little to challenge in terms of proportionality. However, the testing and measurement of proportionality in the use of force when motives are more closely linked to reducing the strength of an aggressor, or when the attack has ceased, or is anticipatory, can be much more difficult to assess. Essentially, proportionality and necessity play a vital role in assessing the legality of pre-emptive, interceptive or anticipatory self-defence. However, the challenge is to apply proportionality to the level of force being used since there is no direct relative measurement of the appropriate force given prior to an attack taking place.\footnote{Ibid 247–50.}

The element of intent or aim in the use of force in self-defence is also an extremely important factor, owing to the fact that there is direct link between the appropriate level of force used and testing for proportionate use of force. The legitimacy of the aim is likely to indicate directly the lawful necessity and proportionality of the force used. The intentions, reasons, necessity, proportionality and the timing of the use of force need to be taken into account, i.e. whether the attack has been initiated prior to the response, armed self-defence takes place during an attack or soon afterwards, or in effect as a preventative measure in case of an attack that is not anticipated in the immediate future.

Greenwood argues convincingly in favour of the importance of establishing the timing of the original attack in which self-defence action is taken. He considers that the timing of an attack could be deemed to start with the intended attack by the aggressor, challenging – by way of example – the correct timing of the attack by the Japanese on Pearl Harbour to the time when either the Japanese fleet left the shores of Japan or when the aircraft actually launched the attack.\footnote{Greenwood, above n 93.} It should be noted that this is but one example that could be used to evaluate the timing of an attack, rather than taking the reasons for the attack into consideration. It is not correct to apply a one-rule-fits-all judgment on the legal status of the many different forms of self-defence, because all of these factors together play a vital role in assessing and evaluating the testing necessary in order to assess the legality and legitimacy of the use of force in self-
defence, particularly prior to being subjected to an attack.

The recent example of the Western approach towards uranium enrichment in the Islamic Republic of Iran suggests that an armed attack against Iran might have been an option. This stems from the view that if Iran were to achieve nuclear power this could be a threat to international peace and, as such, could give rise to anticipatory or pre-emptive self-defence. The legal justification of such an attack, if it were to take place, would need careful examination in light of the fact that the intention of the West was to prevent Iran from becoming a nuclear threat, followed by a careful assessment of the situation in respect of Iran’s potential ability to produce a nuclear weapon.

Was this threat imminent? Could other forms of non-violent measures be taken before resorting to the use of force? What was the mode and type of attack likely to be? Would the West apply a bigger force than necessary to deter Iran from becoming a nuclear threat or to defuse the tension? It could be argued that the West took the necessary non-violent action in order to deter Iran from becoming a nuclear threat and was considering the option of an armed attack very carefully.

The absence of any of these factors would have a strong bearing on the legal status of any action taken in self-defence. Despite this statement, the attack on Afghanistan following the attacks of 11 September 2001 is a less controversial example, even though neither Afghan forces nor Afghan civilians were involved in the US 9/11 attacks. However, the attack on Afghanistan was declared to be legal by the US, owing to the fact that those responsible for the US attacks were assumed to have received training or to be operating from Afghanistan, thereby involving the international responsibility of the state.100 This was further supported by the fact that the US has regarded pre-emptive self-defence as justifiable and legal. A controversial example of acts committed under the guise of pre-emptive self-defence was Israel’s action in 1967 on its Arab neighbours.101

101 Kurtulus, above n 99, 220.
FINAL REMARKS

*Opinio juris* is a complex subject in international law. Not only is it a complicated legal concept; it also delves into the psychological and subjective element of the belief of the state. This element can be difficult to identify and evaluate or, indeed, to ascertain the reason why such beliefs may lead a state towards a specific course of conduct that it deems legal. Furthermore, the differing approaches of the courts’ towards this subjective element have further added to its complexity, rather than making it more intuitive.

In addressing the central question, this article has analysed how *opinio juris* can be proven by assessing the practices applied by states through the use of the different means available, such as diplomatic correspondences or behaviours and attitudes to resolutions. Whether this proof is necessary is less obvious but it is this author’s belief that the course adopted by the ICJ in seeking to ‘satisfy itself that the existence of the rule in the *opinio juris* of states’ in the *Nicaragua* case is a more valid option.

This article has also shown the usefulness and necessity of *opinio juris* and, more importantly, the void that would be created in its absence. The doctrine of *opinio juris* provides a safeguard ensuring that the acts of states based on their beliefs complies with their legal obligations. The unique nature of international law, where states function as law-makers, law-breakers and law enforcers, is reliant on such fundamental tools to maintain and encourage a state’s compliance with the rules of international law so as to maintain the balance between the rights and duties of states. Furthermore, there is a strong link between *opinio juris* and the so-called ‘consent’ of states, which plays a significant role given the consensual nature of international law.

It is the conclusion of this article that *opinio juris* fulfils an important, functional, necessary and helpful role in the formation and acceptance of customary international law, which cannot easily be disregarded. More importantly, in the absence of *opinio juris*, the formation of customary international law could be considered as incomplete and lacking the requisite legal merit.

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102 *Nicaragua (Nicaragua v United States of America)*, above n 9, para 184.