1. Custom as a Law-Creating Process

(a) Introduction

In a previous paper it was argued that neither the tacit consent theory nor the opinio juris theory were by themselves capable of explaining the nature of customary international law, although each of them does indeed stress an important aspect—the tacit consent theory that custom is a law-making process, and the opinio juris theory that there must be some difference between customary law and practices which do not express, or do not give rise to law. What has to be done is to reformulate these approaches in such a way as to preserve the insights of each, while avoiding their errors.

A good starting point is the older tacit consent theories of the Civilians and Canonists, which were described in the previous paper. Their approach has the following characteristics:

i) By "consent" they mean, not contractual consent, but simply the intention to create law; therefore—

ii) they are able to admit that custom can bind individuals that have no part in its creation, even without their consent;

iii) they consider that the rules of customary law are binding absolutely, and not merely on a reciprocal basis; and

iv) finally, these jurists show an awareness of the fact that the conditions which regulate the formation of customary law are themselves rules of law, rather than necessary truths that can be deduced from the nature of custom.

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2 See, e.g., the theory of Suarez, ibid., at 345–6.

3 The word "consent" is in fact used with several meanings which should not be confused. (1) The contractual sense: an intention to create obligations binding on a basis of reciprocity. (2) The intention to create obligations generally (this usage is perhaps something of a solecism). (3) Willingness to be bound by rules already created. (4) Acquiescence in claims put forward by others.
This is not the case with many current accounts of customary law. For example, the tacit consent school does not claim merely that one way for customary rules to be generated is as a result of their acceptance by States on a reciprocal basis nor does the *opinio juris* school claim merely that another way for them to be generated is by States carrying out a course of conduct in the belief that it is binding. Such an approach would carry the implication that the conditions for the creation of customary law were merely contingent rules, and therefore subject to alteration. Instead, the claim is made that in the nature of things, customary law *can* only be created in one or other way.

It is this assumption that must be challenged. Instead, it is suggested that in most legal systems, including International Law, there are two different kinds of rules involved in the formation of custom; secondary rules specifying the conditions under which customary law can be created; and primary rules created under the conditions specified by the secondary rules.\(^4\) The secondary rules may themselves either be customary or have some other origin. This means that customary law can change in two different ways. Either the primary rules created by the exercise of the powers conferred by the secondary rules can be abrogated or varied by the further exercise of the same powers, or the secondary rules themselves may be changed.

In order to bring out the implications of this approach more clearly it will be useful to contrast it with another model of custom, that developed by Hart in “The Concept of Law”.

*(b) Hart’s Model of Custom: The Formation of Custom as Involving Primary Rules Only*

Hart’s model of custom is most clearly described in the passage in which he develops his model of the legal structure of a primitive society, which is without “a legislature, courts, or officials of any kind”.\(^5\) He describes such a social structure as being one of “primary rules of obligation”; i.e., one in which the only rules that exist are those that impose duties to act or to refrain from acting. The question what are the rules which exist in such a society is a purely factual one; a given rule exists if:

i) most people generally behave in a certain manner;

ii) deviations from such behaviour are regarded as lapses or faults and open to criticism, and threatened deviations meet with pressure for conformity;

\(^4\) The distinction between primary and secondary rules is that drawn by Hart in *The Concept of Law* (Oxford, 1961). D’Amato, in *Concept of Custom in International Law* (Ithaca, N.Y., Cornell U.P., 1971) refers to custom as a secondary rule (at 41–44). This is misleading. Custom itself is not a secondary rule, but there are secondary rules involved in the formation of custom.

\(^5\) Hart, *op. cit.*, at 89ff.
iii) deviation from the conduct is generally accepted as a good reason for making such criticism, even by those against whom the criticism is directed; and

iv) there exists an “internal attitude”\(^6\) towards such behaviour on the part of individual members of the society.\(^7\)

Evidently, in such a society (if indeed there exists any society to which this model applies) the only rules that exist are customary rules, which come into being, not by any formal process of law-making, but simply by virtue of their being complied with as a matter of fact. Hart then points out that societies with advanced legal systems differ from such primitive societies in as much as they contain secondary rules, in addition to primary rules of obligation. These are: —

i) **A rule of recognition**, specifying some “feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts”\(^8\). He adds that the feature in question may be (inter alia) “the fact of their having been enacted by a specific body,\(^9\) or their long customary practice, or their relation to judicial decisions”.\(^10\)

ii) **Rules of change**, i.e., rules conferring law-making powers on specified individuals or groups of individuals, in accordance with the procedures laid down in those rules.

iii) **Rules of adjudication**, “empowering individuals to make authoritative determinations of the question whether on a particular occasion, a primary rule has been broken”.\(^11\)

(c) **The Formation of Custom as Involving both Primary and Secondary Rules**

The most important question for our purposes, but one which Hart does not discuss, is, what is the nature of customary law in a society which contains secondary rules as well as primary rules? In the case of a society which contains only primary rules of obligation, customs come into existence, but there are no rules specifying when a custom exists and when it does not. A custom exists simply if it has been accepted. Borderline questions, such as whether the custom is binding on those members of the society who reject it, cannot be authoritatively solved, in the absence of judicial institu-

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6 The concept of an “internal attitude” is discussed infra part 5.
7 These four conditions are a brief summary of Hart's account of the conditions for the existence of a social primary rule (op. cit., at 54–55).
8 Hart, op. cit., at 92.
9 This phrase suggests recognition by Hart of the fact that in developed legal systems the formation of custom involves secondary as well as primary rules; but he does not develop this point.
10 Hart, op. cit., at 92.
11 Ibid., at 94.
tions. One can only say that from the point of view of the majority who do accept the custom it is binding on all members, and if they can enforce them by the application of such decentralised sanctions as are at their command, they will. But once secondary rules are added, the situation changes.

Let us consider first the effect of introducing rules of adjudication. Once a court is empowered to make authoritative decisions about whether a primary rule has been broken, it will have to decide, first of all, whether the alleged primary rule does exist. To answer this it will have to apply rules specifying what kind of conduct, carried out by whom, and over what period, can give rise to such a rule. Secondly it will have to decide to what individuals the rule applies. To answer this, rules as to the territorial and personal ambit of the rule will have to be developed. Thus the introduction of rules of adjudication, and the consequent application of the customary rules to the resolving of disputes, immediately involves the introduction of secondary rules regulating the recognition and scope of application of the customary rules. The rules of recognition may have a retroactive effect, and provide that conduct carried out in the past shall be taken to have given rise to binding rules of law.

Of course, in the extreme case of a society in which there is never any doubt as to what the customary rules are, the existence of courts will have no impact on the primary rules already existing. Max Gluckman describes such a society as follows:

The Lozi are a comparatively homogeneous people, and the judges are drawn from and related by kinship throughout the populace, which is not cut by class divisions. Hence judges do not call for evidence on what Lozi custom is. At least I never heard of this, and when I suggested it as a possible nexo they laughed at me.12

One possible effect of the introduction of secondary rules by a court is to limit the scope of existing custom. In other words, its effect may be that out of the mass of custom existing in a given society, only a small amount is admitted to the status of customary law. The common law rules about the formation of custom are an example of this. The requirements that the custom must be practised within a recognised locality, that it must have existed since time immemorial, that it must be reasonable, etc., all have the effect of restricting the extent to which customary practices are treated as rules of law.

We have now to consider which of these two models of custom applies more closely to international law—that of custom as a system of primary rules only, or that of custom as involving both primary and secondary rules. Hart adumbrates the possibility that it consists of primary rules only, and that it is to that extent analogous to primitive law. In support of this pos-

12 Max Gluckman, The Judicial Process among the Barotse of Northern Rhodesia (1955) 238ff.
sibility he queries the view that international law must necessarily contain a rule of recognition, as follows:

We shall question the assumption that [international law] must contain such an element. Here the first and perhaps the last question to ask is: why should we make this a priori assumption (for that is what it is) and so prejudge the actual character of the rules of international law. For it is surely conceivable (and perhaps has often been the case) that a society may live by rules imposing obligations on its members as "binding" even though they are regarded simply as a set of separate rules, not unified by or deriving their validity from any more basic rule. It is plain that the mere existence of rules does not involve the existence of such a basic rule. In most modern societies there are rules of etiquette, and though we do not think of them as imposing obligations, we may well talk of such rules as existing, yet we would not look for, nor could we find, a basic rule of etiquette from which the validity of the separate rules was derivable. Such rules do not form a system but a mere set. . . . Where we have such a situation, we cannot ask: from what ultimate provision of the system do the separate rules derive their validity or "binding force"? For there is no such provision and need be none. It is, therefore, a mistake to suppose that a basic rule or rules of recognition is a generally necessary condition of the existence of rules of obligation or "binding" rules.  

The force of this argument is, in our view, weakened by the following considerations:

In the first place, although Hart states that international law does not necessarily contain a rule of recognition, he adduces no positive arguments to show that it does not contain one. In the second place, even if it does not contain such a rule, it does not follow that it is merely a set of primary rules; it may nevertheless contain rules of change and adjudication. Hart himself points out that there is at least one such rule in international law, namely that which empowers States to create binding obligations by concluding Treaties. So there is no intrinsic reason why customary international law should not be of the type here suggested, rather than a mere set of primary rules. There are two reasons for saying that it is of this type. Firstly doubts frequently arise about the content, scope, and existence of customary rules, which have to be resolved by the application of legal rather than factual criteria, and such criteria must take the form of secondary rules specifying under what circumstance customary rules come into being. And secondly, if customary rules are sometimes binding on States that have taken no part in their creation, this must be by virtue of a secondary rule to that effect.

If we distinguish the two types of customary law by calling the type described by Hart, the criteria for the existence of which are purely factual, fact-created custom, and the second type, the criteria for the existence of

which are legal, law-created custom, then our position can be summed up briefly by saying that international customary law is, in general, law-created and not fact-created. This does, not, however, rule out the existence of fact-created custom in international law. For many of the secondary rules regulating the creation of customary rules in international law will have that status, that is, they will owe their existence merely to the fact that they have been accepted by States in practice; and even those which owe their origin, not to the practice of States, but to decisions of the International Court, are of this kind in the last analysis, since such power as the Court possesses to develop valid law itself rests on the willingness of States to recognise it.

It follows that Hart’s account of the nature of fact-created custom will have to be supplemented by giving an account of the conditions under which a customary secondary rule can be said to exist analogous to that of the existence of a customary primary rule. The former will in fact be identical with the latter, with the following variation.

In condition i), instead of “most people generally behave in a certain manner” this will now be “on the performance by a specified person or body of a specified act which stipulates a certain course of conduct, most people generally behave in the manner so stipulated”. Conditions ii) to iv) will remain the same. As an illustration, one may imagine a primitive society in which customary legislative powers are conferred on a Council of Elders. Of the truth-conditions for the existence of such powers, condition i) will be, that on the issuing of prescriptions in the recognised manner by the Council of Elders most people generally comply with such prescriptions. Here, the issuing of prescriptions in the recognised manner is “the performance of a specified act which stipulates a certain course of conduct”. The Council of Elders is the “specified person or body”; and the fact that there is general compliance with such prescriptions is an instance of “most people generally behaving in the manner so indicated”.

The general compliance with the course of conduct indicated only gives rise to a customary secondary rule if the reason for that compliance is that the course of conduct in question has been indicated in the appropriate manner by the appropriate person or body. If, for example, the members of our imaginary primitive society in fact generally act as the Council of Elders prescribes, but do so not because the Council has so prescribed, but, for example, because the Council only prescribes standards of behaviour to which the society in any case habitually conforms, then this fact would not be sufficient to confer law-making powers on the Council. But if the compliance is due to the Council’s prescriptions, then such powers will have been conferred.

Furthermore, if the customary power exists, then every primary rule created by its exercise is valid and therefore binding, including those that

14 See text, supra at p. 88.
are in practice not complied with. To say that “most people generally behave in the manner so indicated”, is not the same as to say that “most people always behave in the manner so indicated”.

And finally, we must distinguish between customary secondary rules that give rise to the creation of non-customary primary rules, and those that give rise to the creation of customary primary rules. Our imaginary primitive society is an example of the former situation: international law, we have argued, is an example of the latter. In the latter case the “specified act which stipulates a certain course of conduct” will sometimes be, not a set of words describing such conduct, but a pattern of behaviour exemplifying it. For one of the things that distinguish custom from other modes of law-making is the predominant part played by conduct, rather than language, in its creation.

(d) Custom and Other Law-Creating Processes

Our analysis so far has led us to the conclusion that, contrary to the tenets of the opinio juris school, custom is a method of law-making, and that like other methods of law-making, it involves the existence of secondary as well as of primary rules. We have not, however, shown either what differentiates custom from other kinds of law, or how, in the case of international law, it differs from such non-legal phenomena as usage, comity, or morality.

In answer to the first question Kelsen said:

1. Legislation is conscious and deliberate law-making—men who legislate know that they are making law and intend by their activity to make law; custom is unintentional and unconscious law-making. In establishing a custom, men do not necessarily know that they create by their conduct a rule of law, nor do they necessarily intend to create law. The rule of law is the effect and not the purpose of their activity.

2. Legislation is law-making by a special organ instituted to this end, according to the principle of division of labour, this organ being different from and more or less independent of the individuals themselves who are subject to the law created by their conduct. The individuals creating the law and the individuals subject to the law are at least partly identical. Custom is decentralised—legislation a centralised—creation of law”.

But this account is not entirely satisfactory because custom in international law is not necessarily, (though it may sometimes be) “unintentional and unconscious law-making”. Frequently, as McDougal and MacGibbon have

17 MacGibbon, “Customary International Law and Acquiescence” (1957) B.Y.I.L.
pointed out, it grows as a result of claims which are intentionally made by one State, and knowingly acquiesced in by others. Furthermore, as has already been pointed out, actual conduct, as opposed to verbal formulations, plays a greater role in customary than in other forms of law-making.

2. *Opinio Juris and the Internal Aspect of Rules*

(a) *The Internal Aspect of Rules*

The second question which needs to be considered is, what differentiates customary law from usage, comity, and international morality?\(^18\) The distinction between these is usually drawn by reference to the element of *opinio juris*. But, as we have seen, this concept, in its usual formulation, is unsatisfactory, because it denies the law-making role of custom. The concept must therefore be reformulated in such a manner as to avoid this conclusion. This can be done by reference to Hart's theory of the 'internal aspect' of rules. We have already briefly referred to this, in our summary of the truth-conditions given by Hart for the existence of social rules.\(^19\) The fourth of these, it will be remembered, was that "there exists an 'internal attitude' towards such behaviour on the part of the individual members of society".

At this stage it will be useful to cite at length what Hart writes about the "internal aspect".

The first point he makes is that there is a difference between habitual behaviour and rule-guided behaviour. He writes:

The account which we are at first perhaps naturally tempted to give of a mandatory rule has soon to be abandoned. It is, to say that a rule exists means only that a group of people or most of them behave "as a rule" i.e., generally, in a specified similar way in certain kinds of circumstances. So, to say that in England there is a rule that a man must not wear a hat in church or that one must stand up when 'God save the Queen' is played means, on this account of the matter, only that most people generally do these things. Plainly this is not enough, even though it conveys part of what is meant. Mere convergence in behaviour between members of a social group may exist (all may regularly drink tea at breakfast or go weekly to the cinema) and yet there may be no rule requiring it. The difference between the two social situations of mere convergent behaviour and the existence of a social rule shows itself linguistically. In describing the latter we may, though we need not, make use of certain words which would be misleading if we meant only to assert the former. These are the words 'must', 'should', and 'ought to', which in spite of differences share certain common functions in indicating the presence of a rule requiring certain

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19 See *supra* at n. 6.
conduct. There is in England no rule, nor is it true, that everyone must or ought to or should, go to the cinema each week: it is only true that there is regular resort to the cinema each week. But there is a rule that a man must bare his head in church.\footnote{Hart, \textit{Concept of Law}, 9–10. It is interesting to note that a very similar distinction to that made by Hart between habitual and rule-guided behaviour was made by Suarez in his distinction between “custom of law” and “custom of fact”. Suarez, \textit{De Legibus ac Deo Legislatore} (Classics of International Law trans.) 444–445: “...we must distinguish two elements in custom. The one is frequency of actions, as such, which we may call formal custom. This, as we have said, is a matter of fact, as usage is. The other is an after-effect of the repeated acts. This after-effect may be physical, as habit, which is not infrequently called custom but somewhat improperly by jurists, since it has reference to custom as fact. We shall, therefore, include it under the first head. A second after-effect may be one of the moral order, after the manner of a power or law binding to such action, or nullifying another obligation. This may be called consuetudinary law or a legal rule introduced by custom.”}

Having made this point, he then explains the difference between habitual and rule-guided behaviour in terms of the ‘internal point of view’ or the ‘internal aspect of rules’.

The third feature distinguishing social rules from habits is implicit in what has already been said, but it is one so important and so frequently disregarded or misrepresented in jurisprudence that we shall elaborate it here. It is a feature that throughout this book we shall call the \textit{internal aspect} of rules. When a habit is general in a social group, this generality is merely a fact about the observable behaviour of most of the group. In order that there should be such a habit no members of the group need in any way think of the general behaviour or even know that the behaviour in question is general, still less need they strive to teach or intend to maintain it. It is enough that each for his part behaves in the way that others also in fact do. By contrast, if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an “internal” aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record. This internal aspect of rules may be simply illustrated from the rules of any game. Chess players do not merely have similar habits of moving the queen in the same way which an external observer, who knows nothing about their attitudes to the moves which they make, could record. In addition, they have a reflective critical attitude to this pattern of behaviour. They regard it as a standard for all who play the game. Each not only moves the queen in a certain way himself but “has views” about the propriety of all moving the queen in that way. These views are manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threaten-
ed, and in the acknowledgement of the legitimacy of such criticism and demands when received from others. For the expression of such criticisms, demands and acknowledgements, a wide range of "normative" language is used. "I (You) ought not to have moved the queen like that", "I (You) must do that", "That is right", "That is wrong".

The internal aspect of rules is often misrepresented as a mere matter of "feelings" in contrast to externally observable physical behaviour. No doubt, where rules are generally accepted by a social group and generally supported by social criticism and pressure for conformity, individuals may often have psychological experiences analogous to these of restriction or compulsion. When they say they "feel bound" to behave in certain ways they may indeed refer to these experiences. But such feelings are neither necessary nor sufficient for the existence of "binding" rules. There is no contradiction in saying that people accept certain rules that experience no such feeling of compulsion. What is necessary is that there should be a critical reflective attitude for certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticisms and demands are justified, all of which find their characteristic expression in the normative terminology of "ought", "must", and "should", and "right" and "wrong".21

Hart's thesis, then, is as follows: Firstly, there is a difference between a social rule and a social habit. Second, the difference lies in the fact that in the former case there is an 'internal attitude' towards the conduct in question on the part of most members of society. Third, the internal attitude is not a matter of unobservable inner feelings, but of observable linguistic usages, which actually have been, or are likely to be used; it exists when people show, or in appropriate circumstances would show, by their use of normative terminology, that the conduct in question is being treated as a standard of behaviour.

(b) Customary International Law and the Internal Aspect

It is apparent that the concept of the internal point of view is adequate for the purpose of distinguishing between custom and usage, since this distinction is very close to that between habitual and rule-guided behaviour. The essence of usage lies precisely in the fact that it is not normative, and not used as a standard of behaviour and criticism. However, what we have said so far is not enough to enable us to distinguish between law, comity, and morality, all of which, unlike usage, are normative and not merely habitual phenomena. In order to do this we must examine the concept of the internal aspect of rules more closely. Even on the level of mere primary rules, it is possible to distinguish between different normative orders. Hart

21 Hart, Concept of Law 55–56.
himself has drawn attention to the difference between rules of etiquette and rules of social morality. Now although there is a common normative language appropriate to all normative orders, there are also specialised vocabularies appropriate to each different normative order. "He ought not to have done that" may be said as well of the man who interrupts another, as of the man who murders another. But only the first action can appropriately be called "rude", and only the second, "wicked". This fact is relevant to the distinction between international law, comity, and morality. In the case of an actual or threatened breach of the rules belonging to any of these orders, other States could react by saying, "that is wrong". But the use of "that is illegal", "immoral", or "a breach of comity", would indicate to which normative order the State so speaking regarded the rule in question as belonging. This would not, of course, be conclusive. It is not the normative language used by one State alone, but that used by the generality of States, that determines to which normative order a rule belongs.

All this applies, as we have said, to normative orders consisting of primary rules only, (i.e. what we have previously called 'fact-created custom'). In the case of legal systems, the situation is more complicated. What is characteristic of law is that its primary rules are in general created by the exercise of powers conferred by secondary rules. In most cases, in order to decide whether a rule belongs to a legal system, what is relevant is not the language in which critical reactions are expressed when the rule is broken, but whether the rule has been created by the exercise of powers conferred by the appropriate secondary rule.

Customary international law, however, poses a special problem. We must, reverting to our previous analysis, distinguish between three kinds of customary rule: fact-created primary rules, law-created primary rules and fact-created secondary rules.

We have previously argued that customary international law includes fact-created secondary rules, and law-created primary rules; we have discussed the possibility that it may also contain fact-created primary rules. We must now consider how far the concept of the "internal point of view" is relevant to each of these three types of customary rule.

The case of fact-created primary rules is the simplest, and requires no special discussion, since this is the precise case to which Hart's analysis applies. The case of fact-created secondary rules is a little more complicated, but the nature of the internal point of view relevant to these rules is implicit in the analysis which has already been given of the truth-conditions for the existence of such rules. It will be remembered that the first of these conditions was that "on the performance by a specified person or body of a specified act which stipulates a certain course of conduct, most people generally behave in the manner so indicated"; and to this was added the proviso that the reason for this behaviour must be that the course of conduct in question was stipulated in the appropriate manner by the appropriate person or body.
The internal point of view will therefore consist in treating as a standard of behaviour and criticism all primary rules created in the appropriate fashion. An important example of this type of customary rule in international law is the secondary rule that provides that States have the power to create obligations binding on themselves by making Treaties. (The formulation "pacta sunt servanda" is misleading, because it suggests that the power to make treaties rests on a primary rule, whereas in fact it can only be based on a secondary rule.) On our analysis, the relevant internal point of view is one directed not towards this secondary rule, but towards the primary rules created by its exercise, i.e., towards the treaty provisions themselves. Thus, a full analysis of the truth-conditions for the existence of the secondary rule that obligations can be created by making Treaties is as follows:

States, when they enter into a Treaty, generally act in the manner stipulated by the Treaty.

They do so because the conduct in question is so stipulated.

Deviations from such conduct are regarded as lapses or faults and open to criticism, and threatened deviations meet with pressure for conformity.

Deviation from such conduct is generally accepted as a good reason for making such criticism, even by those against whom the criticism is directed.

There exists an internal point of view towards the provisions of the Treaty themselves, on the part of the States party to the Treaty.

We must now turn to the case of law-created primary rules. Here, as we have seen, it is the secondary rule itself which stipulates how and under what conditions a rule of customary law comes into being, and it is therefore to the secondary rule that we must turn, in order to ascertain the role played by the internal point of view in generating the rules of customary law. This can be expressed by the formula that practice treated by States as a legal standard of behaviour will generate customary law. This must be explained more fully. It means that the conduct of the subjects of a legal system is only recognised as generating customary law, if, in addition to the other conditions that have to be fulfilled, the practice is treated as a standard of legal behaviour by those who pursue it. This seems paradoxical, since it seems to mean that a practice can only become law if (among other conditions) those who follow it already, (and at first wrongly) believe it to be law. But what is involved may be, not a belief that the practice is already legally binding, but a claim that it ought to be legally binding. In other words, those who follow the practice, and treat it as a legal standard of behaviour, may be doing so with deliberate legislative intention. For example, those States which, after the Second World War, asserted their legal right to the exclusive exploitation of the resources of the Continental Shelf, had the clear intention of creating new law, and did so by treating such behaviour on the part of themselves and others as being already lawful.22

22 A similar point has been made by H.W.A. Thirlway, *International Customary*
(c) Opinio Juris and the Internal Aspect

The conclusion to be drawn is that Hart's theory of the internal aspect of rules, although developed with quite other problems in mind, contains all that is of value in the doctrine of opinio juris, while avoiding the connection with the declaratory theory of custom which vitiates it. For customary law to be generated, conduct must be treated as a standard of behaviour; this may take the form, either of complying with an existing standard, or of creating a new one. It may be that a given rule has been in existence for so long that States have forgotten when or by what process it was brought into being; or it may be that what was originally a matter of mere usage or comity has gradually come to be seen as a matter of law, without it being possible to say when precisely the transition took place, or it is even conceivable that the situation described by Kunz could occur, and a new customary rule come into being as a result of an erroneous belief that it already exists. Furthermore, once the customary rule has come into being, the opinio juris will take the form traditionally attributed to it, of the belief that the conduct in question is binding. What starts as an intention to create law, ultimately becomes a belief that the law in question exists. None of this matters, so long as the practice in question is in fact treated by States as a standard of conduct. Thus this analysis has a flexibility which the usual doctrine of opinio juris lacks.

It must be stressed that although opinio juris is normally manifested by the use of normative language, it is not identical with it. A State might

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\textit{Law and Codification} 55: "If a State considers—rightly or wrongly—either that an existing rule of law requires it to act in a certain way, or that a particular course of action is of such a kind that its recognition as in accordance with law, \textit{de lege ferenda}, would be socially desirable, then this is sufficient (if the view is or becomes general) to distinguish the emerging legal rule from the usage, or potential usage, of courtesy or convenience."

23 Cf. Fischer Williams' well known remark in \textit{Some Aspects of International Law} (1939) 44: "The Rubicon which divides custom from law is crossed silently, unconsciously, and without proclamation."


25 This transition is recognised by Suarez, who, as we have seen, devotes most of his analysis of custom to the process of its formation, but, in one passage, when speaking of custom as already formed, writes: "if the custom is of long standing and has to do with matters onerous and difficult, and if, finally, the custom is observed by the major part of the people—since the people do not commonly agree in the performance of acts of this sort save when they feel an obligation to do so—we have sound evidence that the people are led (to act as they do) from a sense of obligation that is already established or is being established by it." The analogy with the traditional account of opinio juris is plain, but Suarez does not make the mistake of expecting this attitude to be present when custom is in the process of formation.
adopt a certain course of conduct in the belief that it was obligatory, but without publicly articulating the rule in question; the first occasion that it might have to formulate the rule might be in response to its breach by another State. But this does not mean that one would not be justified in attributing *opinio juris* to that State, even before it had had the opportunity of formulating the rule. The same applies, of course, to the *opinio juris* which takes the form of a claim of right, of permissibility, of the exerciseability of a power, and so on. This point may be summed up by saying that in our view to attribute *opinio juris* to a State is to attribute to it a *disposition*; it is to say that under certain circumstances a State will (or is at any rate likely) to evince a normative attitude towards its own conduct or the conduct of other States, and that this will involve the explicit or implicit formulation of rules of law as a standard against which the conduct in question is judged. But, as we have said, although *opinio juris* is *evinced* by the use of normative language, it is not identical with it, and may be held by a State, even if that State has never expressed it in words.

For this reason, our account of *opinio juris* differs from that of D'Amato, since he identifies *opinio juris* with the words in which it is formulated. "The simplest objective view of *opinio juris*", he writes, "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 (sic) of custom".26

The difficulty in D'Amato's identification of *opinio juris* with articulation is that, as he himself writes: "States often do not give official explanations of their conduct, nor should we expect them to do so"27 and this means that, if his theory were correct, we should often have to deny the existence of *opinio juris* in cases where we would not otherwise be inclined to do so. It should also be born in mind that States, like private individuals, are likely to guard themselves against formal admissions of obligation to carry out the acts which they do in fact perform.

D'Amato, trying to overcome this difficulty by suggesting that the articulation need not be by the State itself, writes:

There is no need for the acting State itself, through its officials, to have articulated the legal rule.... A writer on international law, a court, or an international organisation may very well provide the qualitative component of custom. But it must be promulgated in a place where nation-State officials or their counsel would have reason to consult. The leading journals in international law, the leading textbooks, reports of legal decisions affecting international law, resolutions of international organisations—all these are likely sources for the articulation of rules. Diplomatic correspondence is similarly a good source; if one State

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26 D'Amato, *The Concept of Custom in International Law* 74.
27 Ibid., at 85.
protests the actions of another, the acting State is clearly apprised of
the fact that its actions may have legal consequences. At the present
stage of the development of international law, the greatest number of
articulated rules may be found in treaties, draft conventions of the
International Law Commission, and resolutions of the General Assembly
of the United Nations. These sources serve to call to the immediate
attention of States the rules that are in the process of change, of
"progressive development" or in the process of creation (for example,
rules relating to outer space).28

The implication of this passage, as is apparent from the subsequent deve-
lopment of D'Amato's argument, is that if a State has "notice" of some
such articulation of a proposed rule of law, and subsequently acts in con-
formity with that rule, then the rule will be taken to be an expression of
that State's opinio juris, since it "should have been aware that its actions
were constitutive of custom". But this is not a convincing argument. From
the mere fact that a proposed rule of law has been promulgated, even by
the General Assembly or by the International Law Commission, and that a
State has, in fact, in its conduct, conformed with the provisions of that
rule, it does not follow that the rule embodies that State's opinio juris. For
this, some evidence would have to be provided either that that State had
adopted the course of conduct in question as a result of the influence of the
rule so promulgated or that it accepted the rule independently of its pro-
mulgation by the body in question. In the case of resolutions of the General
Assembly, for example, the fact that a State had voted for the resolution and
subsequently acted in conformity with it would be good (though not con-
clusive) evidence that the resolution expressed that State's opinio juris. But
this would not be the case if the State had abstained, or voted against the
resolution.

In short, the opinio juris of a State can sometimes be identified with what
it has said, or would, under certain circumstances, probably say. But it can-
ot be identified with what some other body has said, without further evi-
dence that it does in fact endorse this formulation.

It should be added that there is one kind of opinio juris that nearly always
accompanies State conduct, even though it is seldom articulated, namely,
the belief that the conduct is permissible in international law. This is not
negligible, since it is often important to establish what kinds of conduct are
not prohibited in international law, and evidence that a State persistently
follows a certain line of conduct proves that that State, at any rate, considers
that the course of conduct is, or ought to be permitted.

28 Ibid., at 85–86.
MacGibbon's Theory of Opinio Juris

MacGibbon's account of opinio juris will now be contrasted with that which we have given. According to MacGibbon, there are three stages in the process of formation of customary international law. In the first stage, a claim is made by one State against another State or States. In the second, the other States manifest their attitude towards the claim; if they acquiesce in it, this may result in the formation of customary law. The third arises where the recognition of the claim involves some positive action on the part of the State recognising it. Here, and here alone, according to MacGibbon, is there scope for opinio juris. For if a State performs that action, this must be because it considers that it is under an obligation to do so, or in other words, because of the existence of opinio juris with regard to that action.

Now this is undoubtedly a correct description of one form of opinio juris; what is unacceptable is the suggestion that it is the only kind. But this is what MacGibbon says, since he denies that any element of opinio juris is involved in the making of the initial claim. To quote his words: "...the reasons prompting a State or States to pursue a particular course of conduct may vary from convenience to self-interest. It is only with difficulty that it can be conceived that a practice motivated by reasons of convenience or self-interest would have been initiated or evolved under the conviction on the part of the States participating that such a practice was in conformity with law, far less that it was enjoined by law, although such considerations may well apply to the formation of a customary obligation. To hold otherwise would be to suppose that the assertion of a claim, far from being made as of right, or in a state of indifference as to whether or not it was in conformity with law, was made as a matter of duty".

To the extent that MacGibbon's argument rests on the identification of opinio juris with the belief that conduct is already binding, there is no need to add to what has already been said. But his argument contains a further assumption which requires consideration, namely that the opinio juris related only to rules which create obligations, and not to rules which create rights. This is too narrow a conception, and if true, would render it impossible to distinguish between claims made as a matter of right (whether de lege lata or de lege ferenda) and claims which are a mere exercise of power. An example of the latter would be the case in which State A demands or seizes part of the territory of State B, without asserting that it has any right to the territory. Its action is simply an exercise in brute force; but if, on the other hand, it alleges a right to seize that territory, then this must be by virtue of some actual or proposed rule of law, which would entitle other States to act in the same way. At the same time, it would involve the recognition of

29 MacGibbon, "Customary International Law and Acquiescence" (1957) B.Y.I.L.
30 Ibid., at 127.
correlative rules of law obliging other States not to interfere with the right so asserted. To say, therefore, that a claim of right has been made, is to say that an internal attitude, or *opinio juris*, exists treating the alleged rules creating that right and its corresponding duties as standards of legal behaviour.\(^\text{31}\)

Furthermore, the fact that a claim has been made for "reasons of convenience or self-interest" does not prevent its being at the same time a claim of right, and therefore accompanied by an *opinio juris*. It was for such reasons that President Truman issued his proclamation concerning the Continental Shelf, and yet the proclamation clearly implied a right on the part of other States to issue a similar proclamation.

The same argument applies to the process of acquiescence which MacGibbon regards as an essential factor in the formation of customary law. An act of acquiescence which consists merely in a weak State's bowing to the inevitable in the face of aggressive behaviour on the part of a more powerful one will not give rise to a rule of customary law. But if the act of acquiescence involves the recognition that the claim is justified, either in existing law or *de lege ferenda*, then this means that the rules justifying the claim and giving rise to the obligation to accede to it are seen as legal standards, and in that case the act of acquiescence will necessarily be accompanied by *opinio juris*.

**Summary and Conclusions**

1. Contrary to the model developed by Hart, a theory of custom in international law is developed based on the assumption that secondary as well as primary rules are involved in its formation.

2. A theory of the nature of *opinio juris* is developed which interprets it in terms of the concept of the "internal point of view".

3. It is argued that this theory of custom resolves the difficulties posed both by the tacit consent theory, and by the classical *opinio juris* theory.

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31 Insofar as a customary rule exists or has existed recognising subjugation as a title, this would be an example of a secondary customary rule conferring a power to create rights by conduct unaccompanied by any *opinio juris*. The present discussion would therefore not apply to it.