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The Decay of Modern Customary International Law in spite of Scholarly Heroism

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Keywords:

Custom, international law, customary international law, sources, practice, behavior, normativity, sliding scale, Article 38, secondary rules, Bentham, modern custom, substantive custom, systemic custom

Abstract:

This article sheds light on those conceptual artifices that made international custom – and behaviorally generated normativity – possible in international law and shows how international lawyers' repeated fixes and sophistications have come to precipitate the decay of the modern way of organizing the behavioral generation of legal normativity in international law. After a few introductory considerations on the notion of custom and behaviorally generated normativity from a jurisprudential perspective, this article describes how the two-element doctrine of custom – that is what is called here 'modern custom' – was built by international courts and subsequently presented by international lawyers as being derived from Article 38 of the Permanent Court of International Justice. On that occasion, this study demonstrates that the traditional derivation of the two-element doctrine of customary law from the Statute of the Court rests on a false genealogy. This article goes on to show how this modern two-element doctrine proved deficient from the start, generating huge argumentative problems. Such problems – and the general inoperability of the two-element doctrine – did not, however, undermine

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the popularity of custom among international lawyers thanks to a wide array of virtues traditionally associated with customary international law. These virtues explain the impressive resolve and determination of international lawyers to vindicate or patch up the modern two-element doctrine of customary international law. Yet, as the last part of this article argues, the rescue of customary international law by international lawyers may prove counter-productive as it currently is accelerating the decay of the modern two-element doctrine of customary international law. The article ends with a few observations on the life and death of doctrines.

Custom allows behavioral generation of legal normativity. Custom is indeed the umbrella under which most legal systems recognize and organize the possibility that behavior generates normativity. This article zeroes in on international law and discusses how custom was made the kingpin of the behavioral generation of legal normativity therein. In this respect, it is well-known that, in international law, custom has been systematized through a two-tier process which is the so-called 'two-element doctrine' of customary international law and which distinguishes between practice and *opinio juris*.[1] This two-element doctrine of customary international law is what is called here the modern variant of custom. [2]As is well-known, modern custom has been elevated to one of the fundamental modes of identification of international legal rules as well as a central mode of law-making by virtue of a narrative that derives this two-element doctrine, not from the practice of international courts and tribunals, but from the Statute of the Permanent Court of International Justice. This narrative has allowed the modern two-element doctrine of custom to reign throughout the 20th century and continue to thrive in the 21st century. It is noteworthy that, albeit uncontested in its principle, the modern two-element doctrine of customary international law has proved unwieldy for practitioners and difficult to conceptualize for scholars. This explains why international lawyers have constantly been striving to justify and improve the unwieldy doctrine of customary international law. Yet, their heroic rescue efforts to salvage the modern two-element doctrine of customary international law may have not sufficed to prevent its meltdown, the irony being that the heroism of international lawyers may currently be precipitating the decay of behaviorally generated normativity in international law. How international law will, after the decay of custom, organize the behavioral generation of legal normativity to which international lawyers seem so wedded remains to be seen. This article seeks to shed some light on those conceptual artifices that made modern custom – and behaviorally generated normativity – possible in the first place and how international lawyers' repeated fixes and sophistications have come to precipitate the decay of modern custom as a way of organizing the behavioral generation of legal normativity in international law.

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[1] See P. Haggenmacher, *"La doctrine des deux éléments en droit coutumier dans la pratique de la Cour international"*, 90 RGDIP, 5-125, (1986).

[2] On the idea of 'modern' doctrines, see MARTTI KOSKENNIEMI, *From Apology to Utopia* (CUP, 2005), 2-5.

After a few introductory considerations on the notion of custom and behaviorally generated normativity from a jurisprudential perspective (1), this article describes how the modern two-element custom was built by international courts and subsequently presented by international lawyers as being derived from Article 38 of the Permanent Court of International Justice (2). On that occasion, this article demonstrates that the traditional derivation of the two-element doctrine of customary law from the Statute of the Court rests on a false genealogy. This article goes on to show how this two-element doctrine proved deficient from the start, generating huge argumentative problems (3). Yet, as this article subsequently discusses, such problems – and the general inoperability of the two-element doctrine – did not undermine the popularity of custom thanks to all the formidable virtues of the doctrine of customary international law (4). These virtues explain the impressive resolve and determination deployed by international lawyers to explain or patch up the flaws and inoperability of the two-element doctrine of customary international law (5). Yet, as the last part of this article argues, the rescue of customary international law by international lawyers may be proving counter-productive as it accelerates the decay of the two-element doctrine of customary international law (6). The article ends with a few concluding observations on the decay of doctrines (7).

1. A multi-faceted construction for behaviorally generated normativity

Custom is known to most legal systems. It boils down to an unwritten process whereby normativity is behaviorally generated short of any written instrument, thereby justifying that custom is elevated, in most legal systems, to a source of law. In that sense, custom simultaneously refers, in most legal systems, to a behavioral law-making process and a source of unwritten law, behavior potentially comprising of actual conducts and beliefs. This is no different in international law.

Being construed as both a behavioral law-making process and a source of unwritten law, custom has unsurprisingly generated cacophonic debates. Such ambiguity is exacerbated by the fact that custom, whether as a behavioral law-making process or a source of unwritten law, can be of several kinds. In this respect, a distinction is often made between substantive custom and systemic custom, that is, as Bentham famously put it, between customs of legal subjects (what he called customs *in pays*) and

customs of legal officials (what he called customs *in foro*).[3] It has sometimes been argued that the distinction between customs of legal subjects and customs of legal officials collapses in international law because legal subjects and legal officials cannot always be differentiated.[4] This objection is not self-evident. It still seems possible to distinguish the two in relation to international law, for international law is applied by a great variety of law-appliers who cannot necessarily be reduced to those to whom international legal rules are addressed. More specifically, those law-appliers, as I have argued elsewhere,[5] ought not to be understood as legal officials in the same sense as they are construed in general jurisprudence and legal theory.

This distinction between customs of legal subjects (substantive customs) and customs of legal officials (systemic custom) is germane not because of its jurisprudential value but more simply because of its descriptive virtues. Indeed, this dichotomy allows us to capture an important point of departure between debates on custom in international legal literature and corresponding debates in legal theory and jurisprudence. In this respect, it is noteworthy that legal theory and jurisprudence have been interested in both custom of legal officials and customs of legal subjects.[6] International legal literature contrasts with legal theory and jurisprudence in this regard as, in the former, customary law has been almost exclusively discussed in

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[3] JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT, Ed. Burns and Hart, 182-184 and 216-218 (1977) , It should be noted however that Jeremy Bentham generally used the phrase "Customary Law" to refer to common law in general, a notion he regarded with contempt. See Fr. Schauer, *"The Jurisprudence of Custom",* 48 TEXAS INTERNATIONAL LAW JOURNAL (2013); J. GARDNER, LAW AS A LEAP OF FAITH, 65-74 (2012)

[4] J. GARDNER, LAW AS A LEAP OF FAITH, 66, (2012)

[5] J. D'ASPREMONT , FORMALISM AND THE SOURCES, esp. Chapter 8, (2011)

[6] See e.g. THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL AND MORAL PHILOSOPHY, (Matthew H. Kramer, Claire Grant, Ben Colburn and Antony Hatzistavrou, 2008), G. Postema, *Comformity, Custom, and Congruence: Rethinking the Efficacy of Law*, 1-22 G. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION, 273-5, (1986) J. GARDNER, LAW AS A LEAP OF FAITH, 65-74 (2012) ; Fr. Schauer, *"The Jurisprudence of Custom",* 48 TEXAS INTERNATIONAL LAW JOURNAL (2013). For Hart, the rule of recognition is an example of law in foro, albeit possibly of a different type. See HART, THE CONCEPT OF LAW, esp. Chapter 5.3, (2nd edition, 1994)

relation to the primary obligations of legal subjects (substantive). It is true that, it has occasionally been contented that customary law also provides a foundation for the sources of international law whose rules on the identification of primary obligations should be held customary. However such discussions on systemic custom in international legal literature have remained very limited. The majority of international debates on customary international law, in contrast to legal theory and jurisprudence, ignore systemic custom and, rather, focus on substantive custom. In that sense, custom in international legal scholarship and practice primarily pertain to the making and the identification of primary customary rules that constrain states (and possibly other actors) in the adoption of certain behaviors. Systemic custom is a notion which has very little ramification – and meaning – in contemporary international legal argumentation. It is because international legal argumentation on custom has been almost exclusively concerned with substantive custom that this article turns a blind eye to systemic custom and zeroes in on substantive custom in contemporary international legal discourse.

This does not mean however that the discussion about custom in international legal thought and practice is one-dimensional. The substantive custom which international lawyers focus on is usually either a law-making process or a source (or both at the same time), the former being a describing tool about the accretion whereby customary rules emerge, the latter being a pre-determined set of law-ascertainment criteria whereby norms can be recognized as rules of international law. These two facets of custom also resonate in international legal scholarship.[7] The change of title of the work of the International Law Commission on custom – and more specifically the change from "Formation and evidence of customary international law" to "Identification of customary international law" – epitomizes these two facets of custom in international legal discourses.[8] This multi-facetedness

[7] This is especially the case in the French-speaking scholarship. See See P. Haggenmacher, *"La doctrine des deux éléments en droit coutumier dans la pratique de la Cour international",* 90 RGDIP, 5-125 at 9-10, (1986) . See also S. SUR, LES DYNAMIQUES DU DROIT INTERNATIONAL, 77-78, (2012)

[8] At its 3186th meeting, on 25 July 2013, the Commission decided to change the title of the topic to "Identification of customary international law", A/CN.4/SR.3186 (2013). See also ILC Report, A/68/10, , chp.VII, paras. 76-77, (2013).

is certainly not idiosyncratic. Sources are themselves a multi-functional and multi-faceted notion.[9]

It must be noted that the ambiguity of scholarly discussions about custom is further exacerbated by an ambivalence inherent in any behavioral generation of normativity. When legal systems allow rules to originate in the behavior and beliefs of those actors they are meant to constrain and obligate – like it is the case with the two-element doctrine of customary international law, they put in place a self-generative and bottom-up process of generation of normativity. In such a case, it becomes impossible to precisely distinguish between the description of the formation of customary norms as legal rules and the interpretation of the content of such rules.[10] Indeed, behaviors and beliefs of actors create the rules as much as they determine their content. This is the reason why it is not possible to distinguish between law-ascertainment and content-determination in legal argumentation pertaining to customary international law. Any fact contribution relevant for custom-ascertainment simultaneously is relevant for the determination of the content of custom.[11]

The above ambiguities inherent in behaviorally generated normativity inevitably hold for the understanding of custom embraced by international lawyers to which this article is devoted. These ambiguities, as the following sections will demonstrate, have not precluded the developments of very idealized and sophisticated constructions as well as constant attempts to refine the doctrine of customary international law.

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[9] This multifacetedness is at the heart of the study of sources offered by S. BESSON & J. D'ASPREMONT, OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW, (eds) (2017, forthcoming)

[10] THE LEGACY OF H.L.A.HART: LEGAL, POLITICAL AND MORAL PHILOSOPHY, (Matthew H. Kramer, Claire Grant, Ben Colburn and Antony Hatzistavrou, 2008), G. Postema, *Comformity, Custom, and Congruence: Rethinking the Efficacy of Law*, 3.

[11] For further discussion of this question, see J. D'ASPREMONT, FORMALISM AND THE SOURCES, (2011)

2. Modern custom and the false genealogy between the two-element doctrine and Article 38

Any mainstream textbook of international law or any pleadings on the state of customary international law before a domestic or international court indicates that the determination of the existence of a rule of customary international law and that of its content are articulated around the establishment of two distinct facts, i.e. practice and *opinio juris* (acceptance as law). This is the so-called two-element doctrine of customary international law[12] which came to dominate contemporary legal argumentation about customary international law in the 20th century.[13] This is what is called here modern custom.

This section makes the argument that the modern version of customary international law has been built on a false genealogical link with Article 38 of the Statute of the Permanent Court of International Justice. Indeed, this legal instrument is continuously invoked as the authoritative text where the doctrine of customary international law is supposed to be nested.[14] It is argued here that, although the two elements were not absent from international legal thought in the 19th century and early 20th

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[12] The first authoritative manifestation of such doctrine in international case-law dates back to the famous judgment in the Lotus, PCIJ, Serie A, no.10, p. 28. For some early contestations of this two-element doctrine, see H. Kelsen, *Théorie du Droit International Coutumier* 1 REVUE INTERNATIONALE DE THEORIE DU DROIT 263 (1939)

[13] On the rise of the two-element doctrine, see also P. Haggenmacher, *La doctrine des deux éléments en droit coutumier dans la pratique de la Cour internationale*, 90 RGDIP, 5-125 (1986)

[14] See e.g. D. J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 135, 137 & 166 (2010) (at p. 137 he write that custom "involves a searching analysis of what has been taken as a canonical set of elements for the proof of any customary international law norm: ICJ Statute Article 38's requirements of a "general practice" of states, which is "accepted as law"") In the same vein, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), A. Pellet, *Article 38*, 677 at 813. For some examples, M. H. Mendelson, '*The Formation of Customary International Law'*, 272 COLLECTED COURSES, 159-410 AT 187; (1998)ollected Courses (1998), 159-410, at 187; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6, (2003) ; A. CASSESSE, INTERNATIONAL LAW, 156, (2005)

century,[15] this genealogical narrative whereby international lawyers root their two-element doctrine is contestable.[16] Indeed, even a scant review of the *travaux préparatoires* of the drafting of this provision suffices to demonstrate that, in 1920, there was little discussion on the very notion of customary international law in the debates in the Advisory Committee of Jurists, and, subsequently, in the Council or Assembly of the League.[17] Most discussions related to the sources of international law revolved around the need for a provision on the sources[18], the necessity to address *non-liquet*, and general principles.[19] The drafting history of Article 38 even shows that the drafters did not discuss what was meant by customary international law and certainly not the need to distinguish between practice and *opinio juris*.[20] They simply "had no very clear idea as to what constituted international custom"[21] and "did not have in mind a splitting-

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[15] Alphonse Rivier has been given the paternity of the first use of the modern concept of opinion juris as an essential element of custom. See A RIVIER, PRINCIPLES DU DROIT DES GENS, 35, (1896) For a recognition of such paternity, A. CARTY, PHILOSOPHY OF INTERNATIONAL LAW, 50, (2007)

[16] In the same vein, C. Tams, *"Meta-Custom and the Court: A Study in Judicial Law-Making"*, 14 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 51-79 at 54-57 (2015)

[17] Ole Spiermann, *"'Who Attempts too Much Does Nothing Well': the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice"*, 73 BRITISH YEARBOOK OF INTERNATIONAL LAW, 187-260 esp. 212-218, (2002) In the same vein, see D. J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, 141, (2010) See also International Law Commission, First report on formation and evidence of customary international law by Sir Michael Wood, A/CN.4/663, 17 May 2013, para. 30 (2013).

[18] Procès-verbaux, p. 286 ff and 293ff.

[19] Procès-verbaux, p. 311-312; 331-338.

[20] In the same vein, See P. Haggenmacher, *"La doctrine des deux éléments en droit coutumier dans la pratique de la Cour international"*, 90 RGDIP, 5-125, at 30-31(1986) ; C. Tams, *"Meta-Custom and the Court: A Study in Judicial Law-Making"*, 14 The Law and Practice of International Courts and Tribunals 51-79, at 59, (2015) ; THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), A. Pellet, *Article 38*, 677 at 813.

[21] ILC Yearbook 1950, vol. I, p. 6, para. 45, (1950).

up of the definition of custom into two distinct elements".[22] In that sense, the *travaux préparatoires* of Article 38 are, as far as the two-element variant of the doctrine of customary international law is concerned, rather inconsequential.[23] This is certainly not surprising as the purpose of including a provision on the applicable law by the international court was not to define each source mentioned therein but rather to provide the new Court with some guidance.[24] The argument that the two-element variant of the doctrine of custom can be derived from Article 38 can give rise to an even greater number of questions when looked at from a purely textual perspective. It is hardly contested that the text of Article 38[25], provided it can be construed in an intelligible way,[26] does not lend any support to the dominant two-element doctrine of custom embraced by

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[22] THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), A. Pellet, *Article 38*, 677 at 813.

[23] This was confirmed by the report of Hammarskjöld (Report of 2 July 1920), Hammarskjöldska Arkivet, p. 480 (cite by Ole Spielmann, "'*Who Attempts too Much Does Nothing Well': the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice"*, 73 BRITISH YEARBOOK OF INTERNATIONAL LAW, 187-260 at 216-17 (2002)).

[24] L. Ferrari, *Méthodes de Recherche de la Coutume Internationale dans la Pratique des Etats*, 192 COLLECTED COURSES, 243, (1965), . O. Spiermann*"'Who Attempts too Much Does Nothing Well': the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice",* 73 BRITISH YEARBOOK OF INTERNATIONAL LAW, 187-260 at 212-218, (2002) ; THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), A. Pellet, *Article 38*, 677 at 813.

[25] The original Root-Philimoore formulation read "international custom, as evidence of a common practice in use between nations and accepted by them as law" before being slightly amended and read "international custom, as evidence of a general practice accepted as law". See Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists , 306, Annex No. 3, (1920).

[26] For a recent criticism, see J. Crawford, 'The Identification and Development of Customary International Law', Spring Conference of the ILA British Branch – Foundations and Futures of International Law, http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001, at 2. See also C. Tams, *"Meta-Custom and the Court: A Study in Judicial Law-Making",* 14, THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 51-79 at 52, (2015).

international lawyers.[27] Interestingly, international lawyers usually explain the discrepancy between their genealogical claim and the text of Article 38 by virtue of an argument of poor drafting,[28] assuming that such an explanation allows them to continue to assert that Article 38 provides for the foundations of their two-element doctrine of customary international law.[29]

It would be of no avail to further discuss the lack of congruence between the text of Article 38 and its foundational role for the modern two-element doctrine. After all, both the meaning of texts and genealogies are social constructions. More interesting for the sake of this article is the fact that whilst international lawyers almost unanimously find in Article 38 the foundation of their two-element custom, they are all divided as to the lineage of this two-element approach prior to Article 38. In fact, some international lawyers attribute this construction to François Geny despite the fact that he was dealing with domestic private law.[30] Others see its roots in Roman law[31] or in English common law.[32] Grotius is also sometimes considered as one of the fathers of the modern version of

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[27] THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), A. Pellet, *Article 38*, 677 at 813. C. Bradley, A State Preferences Account of Customary International Law Adjudication (October 10, 2014). Available at SSRN: http://ssrn.com/abstract=2508298; J.L. Kunz, *The Nature of Customary International Law*, 47 AJIL, 662 at 664 (1953), .

[28] See e.g. D. J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, 142-3, (2010)

[29] THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), A. Pellet, *Article 38*, 677 at 813.

[30] M. SHAW, INTERNATIONAL LAW, (7TH edition, 2014) ; BEDERMAN, CUSTOM AS A SOURCE OF LAW, 142, (2010) ; The text of François Geny that is traditionally referred to is FRANCOIS GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF, (1899)

[31] R. M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12 ISRAELI LAW REVIEW, 344, (1977); Joel P. Trachtman, The Obsolescence of Customary International Law, available at SSRN:http://ssrn.com/abstract=2512757, p. 3. This view has been rejected by BEDERMAN, CUSTOM AS A SOURCE OF LAW, 138-140 & 173, (2010).

[32] CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW, 61, (1965).

custom.[33] The same holds for Suarez.[34] Some scholars claim that it was the historical school of Savigny that informed the notion of customary law which made its way into 20th century international legal thought.[35] It is also sometimes contended that the two-element variant of the doctrine of customary international law is a creation of the Permanent Court of International Justice and of its successor.[36]

This article is certainly not the place to seek to resolve such conflicts of paternity. Yet, the cacophony regarding the pre-Article 38 origin of the two element doctrine of customary law is worthy of mention because it can help justify why international lawyers have been unflinchingly clinging to their genealogical claim that Article 38, despite compelling indications to the contrary, provides the foundations for their two-element doctrine of customary international law. In this context, it should not be surprising that the two-element conception of custom still prevails today.[37] It is also against this backdrop that one should understand the

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[33] Joel P. Trachtman, The Obsolescence of Customary International Law, Available at SSRN:http://ssrn.com/abstract=2512757, p. 3.

[34] D. J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, 139-140, (2010) He argues that the significant transformation of the doctrine of custom occurred in the late Middle Ages, as is illustrated by the writing of Surarez, Tractatus de legibus ac deo legislatore (1612).

[35] J. Crawford, The Identification and Development of Customary International Law, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001, at 7; C. C. Bradley, A State Preferences Account of Customary International Law Adjudication (October 10, 2014). Available at SSRN: http://ssrn.com/abstract=2508298, A State Preferences Account of Customary International Law Adjudication (October 10, 2014). Available at SSRN: http://ssrn.com/abstract=2508298.

[36] C. Tams, *"Meta-Custom and the Court: A Study in Judicial Law-Making"*, 14 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 51-79 at 58-62, (2015) (Tams argues that it is the judgment in the Lotus case that dissagregated the doctrine of custom into two component parts).

[37] See the literature cited by International Law Commission, First report on formation and evidence of customary international law by Sir Michael Wood, A/CN.4/663, 17 May 2013, para. 94-101 and the Second Report at para. 26, (2013) ; International Law Commission, Second Report on Identification of Customary International Law by the Special Rapporteur Michael Wood, 22 May 2014, A/CN.4/672, para. 3, (2014).

International Law Commission's claim that the two-element doctrine is uncontested[38] and ought to be preserved.[39] Both as the description of a process of law-making and as a source determining the pedigree of certain rules of international law, the two-element doctrine of custom continues to enjoy an immense popularity among international lawyers. This is so, even if, as was argued in this section, this two-element doctrine is nowhere to be found in Article 38 and in the *travaux préparatoires* of the Advisory Committee of Jurists. This resounding success does not mean, however, that the doctrine has been spared by criticisms and has been easily wielded by international lawyers. The paradox which the following sections will demonstrate is, however, that all the deficiencies which the two-element doctrine has suffered in theory and practice have not sufficed to tarnish its success.

3. The argumentative deficiencies of the modes of legal reasoning prescribed by customary international law

Legal theorists have long looked with disdain at the modern two-element custom of international lawyers.[40] It is not entirely certain that all their criticisms are warranted since, as was already partly discussed above, they have approached custom from the perspective of radically different paradigms. To their credit, international lawyers themselves have also been able to take a hard look at their – nonetheless cherished – two-element doctrine of customary law. Indeed, account of the deficiencies and contradictions of the doctrine of customary international law

[38] The claim of a fragmentation of the doctrine of customary law has been rejected by the International Law Commission which has continued to see unity in the practice: First Report of the International Law Commission, A/CN.4/663, para. 19: unity – no fragmentation. See also International Law Commission, Second Report on Identification of Customary International Law by the Special Rapporteur Michael Wood, 22 May 2014, A/CN.4/672, , para. 28, (2014). Only a difference in interpretation & application (para. 28, second report)

[39] Third report on the identification of customary international law, A/CN.4/682, 27 March 2015, para. 15, (2015).

[40] For a criticism from general legal theory perspective, see e.g. A. Somek, *Defective Law*, No. 10-33, UNIVERISTY OF IOWA LEGAL STUDIES RESEARCH PAPER (2010).

abound.[41] It would be of no avail to extensively account for them here. Yet, recalling some of the most compelling inner flaws of the two-element doctrine of custom helps to realize the compelling appeal of this doctrine among judges and scholars who have not been deterred by its malfunctioning character. Indeed, the story of custom in international legal thought and practice is the story of a group of professionals having come to terms with the congenital malfunctioning of one of their central argumentative constructions and having to learn to live with it.

The major deficiencies of the two-element custom of international lawyers can be summarized as follows. At a micro-level, each of the two elements of the doctrine has been deemed problematic. It is probably the subject element (*opinio juris*) which is the champion of all criticisms. Scholars have bemoaned its intangibility, the impossibility to apprehend

[41] J. Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 523-553, (2004), ; J. P. Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNAL OF INTERNATIONAL LAW, 449 (2000); C. Bradley, A State Preferences Account of Customary International Law Adjudication (October 10, 2014). Available at SSRN: http://ssrn.com/abstract=2508298; Lazlo Blutman, *Conceptual and Methodological Deficiencies : Some Ways that Theories on Customary International Law Fail*, 25 EJIL, 529-552, (2014), . See the famous contradiction highlighted by Sørensen, '*Principes de droit international public'*, 101 COLLECTED COURSES, 1-254 at 50,(1960-III), ("Si l'on définit l'élément subjectif de telle sorte que l'agent de l'Etat doit avoir la conviction de se conformer ou d'obéir à ce qui est déjà le droit, on présuppose l'existence antérieure des règles juridiques, et la coutume, par conséquent, ne peut pas être le processus par lequel le droit est créé. Si d'autre part, on rejette la conception d'un droit préexistant, tout en exigeant que la pratique, dès le début, soit basée sur la convinction d'une obligation ou d'une autorisation d'agir, on exige en effet, comme base de la coutume, que l'agent se trouve en erreur"). In the same sense, see D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW, 7, (1971). On this paradox, see the comments of R. Kolb, '*Selected Problems in the Theory of Customary International Law'*, 50 NETHERLANDS INTERNATIONAL LAW REVIEW, 119 at 137 et seq, (2003) ; M. BYERS, CUSTOM AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW, 129-146, (1999); M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, 388-473 (1989); J. Klabbers, *The Curious Condition of Custom*, 8 INTERNATIONAL LEGAL THEORY,, 29, (2002) .

it[42]or its redundancy. [43] The anthropomorphic dimension of the subjective element of the doctrine of customary law has also been severely criticized. [44] Practice has not been spared either, especially when it comes to its cognition in relation to prohibitive obligations which calls for abstention of a certain behavior.[45] The arbitrariness inherent in the determination of those actors whose practice and *opinio juris* are deemed (more) relevant has similarly been controversial.[46] The articulation of the

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[42] P. Kelly, "*The Twilight of Customary International Law*", 40 VIRGINIA JOURNAL INT'L L. 449, at 475, (2000). See also the discussion in International Law Commission, Second Report on Identification of Customary International Law by the Special Rapporteur Michael Wood, 22 May 2014, A/CN.4/672, para. 66. See contra CHARLES DE VISSCHER, THEORIES ET REALITES EN DROIT INTERNATIONAL PUBLIC, 172, (4th ed., 1970) : on a tendance à exagérer les difficultés de la preuve de l'opinio juris.

[43] P. Guggenheim, *Les deux éléments de la coutume internationale, in Etudes en l'honneur de Georges Scelle*, vol. I, LGDJ, 275, (1950)..

[44] For some severe criticisms of anthromorphism in the doctrine of customary law, see D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW, 7, 471, (1971) See also the critical remarks of A. CARTY, PHILOSOPHY OF INTERNATIONAL LAW, 26, (2007). See also Kelsen, *Théorie du Droit International Coutumier*, 1, REVUE INTERNATIONALE DE THEORIE DU DROIT, 253 at 263 (1939) (this is a position he later moved away from); LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC : ETUDES EN L'HONNEUR DE GEORGES SCELLE, (1950), P. Guggenheim, "*Les deux elements de la coutume en droit international"* , vol 1, p. 275. I have discussed the anthropomorphic character of opinio juris and the problems associated with anthropomorphist thinking in international law elsewhere. See J. d'Aspremont, "*The Doctrine of Fundamental Rights of States*
and the Functions of Anthropomorphic Thinking in International Law", CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, (2015).

[45] S. Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion*, 26, EUROPEAN JOURNAL OF INTERNATIONAL LAW, (2015) (forthcoming)

[46] On the notion of "specially affected states" see North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 3, at pp. 43-44, paras. 74, 77. See also ILC, Second report of the Special Rapporteur, Sir Michael Wood (66th session of the ILC (2014), A/CN.4/672, para. 54.

two elements from a *ratione temporis* standpoint – the so-called chronological paradox – has also been faulted. [47]

At a more macro and structural level, some severe criticisms have been vented about the elevation of custom to a source as it allegedly fails to provide a reliable yardstick to distinguish between law and non-law.[48] By the same token, it has been contended that rules created by virtue of customary international law are bound to be dangerously indeterminate, at least as long as they have not been certified by a law-applying authority.[49] In that sense, custom has been deemed a "fairly unreliable guide of legal obligation".[50] Accepting to make such a deficient construction a proper source of international law has even been seen as accommodating a transmutation of the legality of international law.[51]

It is not only the elevation of custom to a source that has attracted opprobrium. The doctrine has also been criticized from the vantage point of legal reasoning. For instance, it has been claimed that customary

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[47] M. BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW, 130-133, (1999) C. Bradley, A State Preferences Account of Customary International Law Adjudication (October 10, 2014). Available at SSRN: http://ssrn.com/abstract=2508298.

[48] LE DROIT INTERNATIONAL DANS UN MONDE EN MUTATION : LIBER AMICORUM EN HOMMAGE AU PROFESSEUR EDUARDO JIMENEZ DE ARECHAGA (Fundación de Cultura Universitaria, 1994), P.-M. Dupuy, *"Théorie des sources et coutume en droit international contemporain"*, 51 at 61. See also the very radical criticism by P. Kelly, *"The Twilight of Customary International Law"*, 40 VIRGINIA JOURNAL INT'L LAW .,. 449 (2000); See S. Zamora, *"Is There Customary International Economic Law?"*, 32 GERMAN YEARBOOK OF INTERNATIONAL LAW , 9 at 38, (1989).

[49] This indeterminacy and the correlative leeway of judges have led some scholars to call for an abandonment of custom as a source of international law. See N. C. H. Dunbar, "*The Myth of Customary International Law*", 8 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW,1, (1983) . See also the remarks of D. CARREAU, DROIT INTERNATIONAL, 263, (8th ed., 2004); For a criticism of this position, see contra J. Tasioulas, "*Opinio Juris and the Genesis of Custom: A Solution to the 'Paradox*", 26 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW, 199, (2007).

[50] A. Somek, *Defective Law*, No. 10-33, UNIVERSITY OF IOWA LEGAL STUDIES RESEARCH PAPER, 4, (2010),.

[51] A. Somek, *Defective Law,* No. 10-33, UNIVERSITY OF IOWA LEGAL STUDIES RESEARCH PAPER, 5, (2010).

international law rests on a constant oscillation between descending concreteness (*apologism*) and ascending justice (*utopianism*).[52] In the same vein, it has been stigmatized for its false inductivism.[53] This has led scholars to belittle custom, both as a process and a source, as being incoherent[54] or just unprincipled.[55]

Other criticisms have related to the impossibility to reconcile custom with the simultaneous existence of a universal convention. [56] Some of the subsequent sophistications of the doctrine – which will be examined in section 5 – have not been spared by criticisms. For instance, the notion of persistent objector has been brought into disrepute, not only for being the generalization of whim of a particular judge but also for reintroducing voluntarism in a doctrine that was not meant to be of a voluntaristic

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[52] This has been insightfully demonstrated by M. Koskenniemi: M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT, 388-473 esp. 437-438, (2005), (arguing that the doctrine of custom is indeterminate because of its circular character which stems from it assumption of behaviour as evidence of *opinio juris* and the latter as evidence of the custom-making behavior).

[53] See J. d'Aspremont, Customary International Law as a Dance Floor – Part 1, available at http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/ and Customary International Law as a Dance Floor – Part 2, available at http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/. See also W. Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*. 45 GEORGETOWN JOURNAL OF INTERNATIONAL LAW,, 445, (2014),.

[54] J. P. Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNALOF INTERNATIONAL LAW, , 449 at 499 (2000),

[55] J. P. Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNALOF INTERNATIONAL LAW, 449 at 499 (2000),

[56] R. R. Baxter "*Treaties and Custom*", 129 COLLECTED COURSES, 36 at 64 and 73, (1970),.

nature.[57] For the rest, the norms ascertained as rules of customary law by virtue of the two-element doctrine as well as the process of formation of such rules have been condemned for being undemocratic,[58] illegitimate[59], non-transparent[60], or inefficient.[61]

It will not come as a surprise that the application of the two-element doctrine *in concreto*, has proved extremely vexatious for practitioners. In practice, the doctrine simply does not work. Indeed, international lawyers are often overwhelmed by the instability of their modern doctrine – and of the sophistications which they have added overtime. Judges and law-applying authorities in particular have been forced into inelegant

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[57] P. Dumberry, "*Incoherent and Ineffective: The Concept of Persistent Objector Revisited*", 59 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 779-802, (2010); LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DEVELOPPEMENT : MELANGES MICHEL VIRALLY, (1991), P.-M. Dupuy, "*A propos de l'opposabilité de la coutume générale: enquête brève sur l''objecteur persistant*'", pp. 257-279; J. P. Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNALOF INTERNATIONAL LAW, 449 at 508, (2000), .

[58] J. O. McGinnis and Ilya Somin, *Should International Law Be Part of Our Law*, 59 STANFORD LAW REVIEW,,, 1175 (2007); D. J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, 165,, (2010); J. P. Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNALOF INTERNATIONAL LAW, 457, 449 (2000), . This has led some scholars to content that custom should not have the status of federal common law in the United States. See W. M. Reisman, *The Cult of Custom in the Late 20th Century*, 17 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL,, 133 (1987); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARVARD LAW REVIEW, 815-76 at 870-73, (1997),.

[59] J. P. Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNALOF INTERNATIONAL LAW, 449 at 453, (2000), 453; D. J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, (2010), 164.

[60] D. J. BEDERMAN, CUSTOM AS A SOURCE OF LAW , , 164, (2010)

[61] W. M. Reisman, *The Cult of Custom in the Late 20th Century*, 17 C CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL,, 133 (1987); Joel P. Trachtman, The Obsolescence of Customary International Law, Available at SSRN:http://ssrn.com/abstract=2512757; Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM & MARY LAW REVIEW,, 859, 889-94 (2006).

contortions.[62] A quick look at the case-law of the International Court of Justice suffices to grasp the variety of convolutions into which the Court is forced . The most famous one is probably the fluctuating weight given to each of the two elements.[63] When the Court is unable to meaningfully establish custom, it embraces a very minimalistic and economical reasoning.[64] Scholarly studies of the fluctuations in the Court's understanding of custom and in its application thereof abound.[65] The unwieldiness of the two-element doctrine has also led other tribunals to make such dramatic convolutions that they have conveyed the impression

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[62] In the same vein, C. Bradley, A State Preferences Account of Customary International Law Adjudication (October 10, 2014). Available at SSRN: http://ssrn.com/abstract=2508298, Jonathan I. Charney, *Universal International Law*, 83, 529 at 537, AJIL (1993); THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT (Jose Doria et al., 2009),William Shabas, *Customary Law or 'Judge Made' Law: Judicial Creativity at the UN Criminal Tribunals*, 100.

[63] Most textbooks will discuss the contrasts between the two following decisions: ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Rep. (1986) para. 188 et seq. and *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Reports 1969, para. 42 et seq.

[64] See e.g. in the Gulf of Maine case, the Chamber was satisfied with inferring the opinio juris from a 'sufficiently extensive and convincing practice' (Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment, ICJ Reports 1984, p. 299, para. 111. See also Nicaragua v. Colombia, Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 Novembre 2012, para. 37. Contra: Juridictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment 3 February 2012, para. 55.

[65] On the huge variations in the case-law of the Court the ICJ, see gen. S. Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion,*26, EUROPEAN JOURNAL OF INTERNATIONAL LAW, (2015) (forthcoming); THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), A. Pellet, *Article 38*, 677 at 826-829. ; See also J. Crawford, The Identification and Development of Customary International Law, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001, p. 8-10; see also International Law Commission, First report on formation and evidence of customary international law by Sir Michael Wood, A/CN.4/663, 17 May 2013, para. 62.

they were emancipating themselves from the two-element custom in favor of an alternative construction.[66]

Another illustration of the extent to which international lawyers are overwhelmed by their construction is their tendency to attribute customary status to architectural, institutional and technical norms. The feeling that international lawyers are overloaded by their own doctrinal constructions is even more conspicuous in the light of their inclination to hastily throw themselves in the arms of custom in relation to norms or standards of behavior whose normative content – i.e. norm-creating character – is insufficient or indiscernible,[67] a requirement which international lawyers systematically fail to apply.[68]

The list of conceptual flaws detected in the two-element doctrine or the convolutions witnessed in the legal reasoning that accompanies its deployment in contemporary practice can be continued *ad nauseum*. As was said earlier, both such defects and convolutions have been extensively discussed in the literature. For the sake of this article, it is more interesting

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[66] DROIT INTERNATIONAL HUMANITAIRE : UN REGIME SPECIAL DE DROIT INTERNATIONAL ? (R. van Steenberghe, 2013), J. d'Aspremont, *An Autonomous Regime of Identification of Customary International Humanitarian Law: Do Not Say What You Do or Do Not Do What You Say?* (March 8, 2013), 72-101.. Available at SSRN: http://ssrn.com/abstract=2230345.

[67] For an illustration in the field of customary international law, see SOURCES OF INTERNATIONAL INVESTMENT LAW, (E. de Brabandere and T. Gazzini (eds), 2012), J. d'Aspremont, '*International Customary Investment Law: Story of a Paradox'*, 5-47.

[68] This was rightly pointed out by the ICJ in the case on the *North Sea Continental Shelve*. Indeed, on that occasion, the Court assessed the customary character of the equidistance principle enshrined in Article 6 of the 1958 Convention on the Continental Shelf and asserted that the norm at stake had first to be of a "fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law". The Court drew on the idea that any conventional rule must contain a directive for it be able to one day crystallize into a customary international rule. Taking mainly into account the profound indeterminacy of the concept of 'special circumstances' which determines the qualification to the equidistance principle, the Court deemed that the principle of equidistance enshrined in the 1958 Convention was not normative. Because the principle of equidistance did not provide for a given behavior to be adopted by the parties, the Court concluded that it could not crystallize or generate a rule of customary international law. See [1969] ICJ Rep. 1, at para. 72.

to note that such shortcomings – which international lawyers are very much aware of – have not brought about a repudiation of custom. Only rarely has it been completely cast off.[69] Rather, international lawyers, mindful of the congenital deficiencies of their two-element doctrine, have been emboldened into explaining and salvaging the two-element doctrine. Indeed, as is discussed in section 5, explaining the contradictions of the doctrine or its fluctuations in the practice as well as recasting custom in a way that can accommodate such contradictions and fluctuations have become a calling for most international lawyers. This calling is fueled by the formidable pull exercised by custom to which the attention must now turn.

4. The popularity of customary international law

Modern customary international law, despite all the frustration it creates for the rigorous mind, is adored by international lawyers. This section sketches out some of the greatest pulls of modern custom for international lawyers, thereby seeking to elucidate the centrality of this doctrine in international legal argumentation. In particular, it discusses four driving forces behind the centrality of customary international law.

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[69] See e.g. J. P. Kelly, *The Twilight of Customary International Law,* 40 VIRGINIA JOURNAL OF INTERNATIONAL LAW,Virginia Journal of International Law 449 at 452, (2000), : "CIL should be eliminated as a source of international legal norms and replaced by consensual processes". Bradley, Curtis A. and Gulati, G. Mitu, *Withdrawing from International Custom*, Vol. 120, YALE LAW JOURNAL,, , p. 202, (2010); See also the radical formalization put forward by D'Amato through the concept of *articulation* which ought to replace the two-element doctrine by an objective validator that will usually take the form of a written statement. While D'Amato's approach undoubtedly offers a useful model to formalize custom-ascertainment, it has failed to generate consensus. See e.g. the criticisms of that understanding in H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION, 51-54, (1972); some measured support for D'Amato's theories is provided by N. Onuf, LAW-MAKING IN THE GLOBAL COMMUNITY (N.Onuf, 1982), N. Onuf, '*Global Law-Making and Legal Thought'*, 1 at 18 ; For older skeptical account of opinio juris, see H. Kelsen, *Théorie du Droit International Coutumier* 1 REVUE INTERNATIONALE DE THEORIE DU DROIT,, 253 at 263 (1939) (this is a position he later moved away from); LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC: ETUDES EN L'HONNEUR DE GEORGES SCELLE, (1950), P. Guggenheim, "*Les deux elements de la coutume en droit international*", 275.

First, customary international law performs a safeguarding function for international law as a whole. Indeed, thanks to its generation of normativity through the behavior of States, custom always guarantees *a minimal content to international law*. For state behavior and beliefs always coalesce, according to customary law, into rules – provided they correspond to some standard of behavior, custom ensures that there will always be rules in international law. Custom allows international lawyers to alleviate their fears that international law is one day stripped of all its content. By ensuring a minimum content of international law, it seemingly makes the latter eternal.

Second, custom seems to allow the continuous updating of international law and its congruence with the rapidly changing dynamics of the international society. In that sense, custom seems to keep international law up-to-date and seems to guarantee *the minimal relevance of international law*. Whilst treaty can grow obsolete, custom will always be ever-evolving and allow international law to be responsive to the fluid social contexts as well as to the fluctuations of actors' interests and behaviors.[70]

Third, for a large number of international lawyers, custom seems to be the nest for the foundational and constitutional principles of international law as a whole, thereby allowing them to give self-referential foundations to international law. In that sense, custom is where the foundations of international law can be found.[71] This is well illustrated, for instance, by scholarly debates on international responsibility.[72]

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[70] On this point, see J. D'ASPREMONT, FORMALISM AND THE SOURCES, 164, (2011).

[71] See e.g. D. J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, 136-7, (2010). "Finally, and (perhaps) most influentially, customary international law norms dictate the construction and application of "meta-norms" of public international law. These include what H.L.A. Hart would call secondary rules of recognition for other international law sources, as with principles of treaty formation, interpretation, and termination. Likewise, the substance of international law of state responsibility and the procedures under which states make claim for redress of international wrongs are dictated by custom"

[72] On the use of custom to give authority to non-legislative instruments, see Fernando Lusa Bordin, *'Reflections on Customary International Law : The Authority of Codification Conventions and ILC Draft Articles in International Law'*, 63 ICLQ 535-567, (2014), .

Fourth, mostly thanks to its resorts to non-formal modes of legal reasoning,[73] customary international law provides international lawyers with a formidable argumentative tool by virtue of which they universalize almost any legal claim.[74] What could originally look like a rigid pattern of argumentative structures has proved to be a rather convenient set of modes of legal reasoning[75]. It is true that this holds for most sources of international law.[76] Yet, more than all the others, the two-element doctrine of customary law has left a huge argumentative space for anyone invoking custom,[77] becoming "the generic category for practically all binding non-treaty standards."[78] That international lawyers have been

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[73] On the non-formal character of customary international law, see J. D'ASPREMONT, FORMALISM AND THE SOURCES, esp. Chapter 7, (2011). . On the idea that lack of formalism in the doctrine of customary international law is unproblematic, see D.J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, 165, (2010).

[74] See Ph. Allott, "*State responsibility and the unmaking of international law*" 29 HARVARD INTERNATIONAL LAW JOURNAL, , 1-26 at 24 (1988) (he argues that customary international law has been a system of universalizing in the Rawlsian mode - universalized self-interest).

[75] Elsewhere I have spoken of custom as a large dance floor where (almost) every step and movement is allowed or, at least, tolerated. See J. d'Aspremont, Customary International Law as a Dance Floor – Part 1, available at http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/ and Customary International Law as a Dance Floor – Part 2, available at http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/. E. Jimenez de Arecheaga has refered to the "formidable jelly-fish of customary international law". See E. Jimenez de Arecheaga, *International Law in the Past Third of a Century*, 159 COLLECTED COURSES, at 9, (1978), .

[76] On the idea that the indeterminacy of the source of law can possibly be contained by social practice, see J. D'ASPREMONT, FORMALISM AND THE SOURCES, esp. Chapter 8, (2011).

[77] International Law Commission, First report on formation and evidence of customary international law by Sir Michael Wood, A/CN.4/663, 17 May 2013, para. 2.

[78] SOURCES OF INTERNATIONAL LAW, (Martti Koskenniemi (ed.), 2000), Martti Koskenniemi, *"Introduction",* xxi.

prompt to make use of that space is very conspicuous in certain areas like international human rights law.[79]

It is important to note that this fourth pull of custom holds for all professionals of international law. It is for instance immensely valued for its flexibility by judges. As far as judges are concerned, the advantage of custom lies in its conferral on the exercise of discretion by judges with some constraining rationality by providing a pedigree to the rules applied by judges. In doing so, it contributes to the emergence of a sense of greater adjudicative neutrality in international legal argumentation and international legal adjudication and simultaneously assuages the obsession of international lawyers – especially those educated in the European continental tradition – with apprehending and constraining the leeway of arbitrators. Such a sentiment of immanent rationality is fundamentally conducive to the legitimacy of international tribunals as well as that of their decisions. It simultaneously conveys a sentiment of predictability in adjudication, thereby further comforting international actors and enhancing their faith in the regulatory system provided by international law.

The argumentative space of custom is also cherished by legal advisers of states and other actors. For them, customary international law can be the trump card for situations where non-compliance has become the only option. In cases where a State deems it in its interest to flout a rule rather than to abide by it, it can make use of the hazy contours of customary law to convince other actors that its behavior did not contradict any positive rule of international law. [80] In that sense, customary international law reduces the cost of non-compliance, as it gives States the possibility to contest or challenge the existence of any legal constraint *in casu* and thus play down the non-compliant character of its behavior.

Unsurprisingly, activists and legal scholars have similarly found in the doctrine of customary international law a convenient argumentative

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[79] D.J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, 136, (2010). : "Much of the post-World War II project of ensuring that states protect the human rights and dignities of their citizen, and that countries observe restraint in the treatment of noncombatants in wartime, has been elucidated through customary international law"

[80] In the same vein, see G. M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY, 16-17, (1993). See also J. Hathaway, "*American Defender of Democratic Legitimacy*" 11 *EJIL*, 121 at 128-9,(2000).

instrument. As far as they are concerned, custom proves an expedient tool to vindicate the progressive development of international law and its expansion in areas which are perceived insufficiently regulated by law. For activists and scholars customary international law has much more in common with the idea of softness of law than with the other traditional sources of international law.[81] If a rule cannot be found in a treaty or ascertained by virtue of conventional law-identification mechanisms, customary international law will offer the best alternative pedigree – and thus foundation – for such rule. In that sense, custom is often the generic platform for argumentation on non-conventional law.[82]

5. A professional calling: explaining and improving custom

Nowhere is the popularity of the modern doctrine of customary international law more conspicuous than in relation to the constant need felt by international lawyers to offer a fix to the argumentative deficiencies that have been spelled out in section 3. Indeed, one can hardly fail to notice that the literature on customary international law is awash with scholarly endeavors to either explain the above mentioned deficiencies or streamline it in a way that could accommodate all such contradictions and fluctuations reported in the previous section. Both these explanatory and reformist projects must be briefly sketched out here.

Explanatory works on custom are aplenty. They all seek to play down the above mentioned contradictions and fluctuations. The most famous ones attempt to resolve the chronological paradox[83]. Many of the others focus on the fluctuations observed in the practice and reducing them to conflicts

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[81] For some parallels between customary international law and soft law, see J. d'Aspremont, "*The Politics of International Law*" 3 GOETTINGEN JOURNAL OF INTERNATIONAL LAW, 503-550, (2011) .

[82] M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, 392, (1989)

[83] G. J. H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW, 99, (1983)., (who seeks to explain the chronological paradox on the basis of an idea "mistake") or Herman Meijers, *How is International Law Made? The Stages of Growth of International Law and the Use of Its Customary Rules*, 9 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW,, 1 (1978). It has been argued that none of these explanatory frameworks have proved convincing. See H. Charlesworth, *Customary International Law and the Nicaragua Case*, 11, AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW, 9 (1984-87).

of methods.[84] To explain the fluidity of legal argumentation about customary law, some have gone as far as contending that custom as a rule boils down to a hypothesis being constantly tested by international law-applying authorities.[85] Others have tried to explain inconsistencies of customary international law by virtue of a confrontational account of customary international law whereby customary international law is assaulted to a process of stratification of the will of the majority of states[86] or a site of struggle for law in which countries are actively

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[84]S. Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion,* 26 EUROPEAN JOURNAL OF INTERNATIONAL LAW, , (2015) (forthcoming); CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD (forthcoming), Monica Hakimi: *Custom's Method and Process, Lessons from Humanitarian Law*, ; J. Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems,* 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 523-553, (2004), . W. Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*. 45 GEORGETOWN JOURNAL OF INTERNATIONAL LAW, 445, (2014), .

It is noteworthy that the International Law Commission also seems to assume that problems with customary law are methodological problems. See International Law Commission, Second Report on Identification of Customary International Law by the Special Rapporteur Michael Wood, 22 May 2014, A/CN.4/672, para. 15 (draft conclusion 1)

[85] S. SUR, LES DYNAMIQUES DU DROIT INTERNATIONAL, 79-80 &90 (2012). "Le processus coutumier occupe un présent indéfini, puisqu'il est constamment à l'œuvre. Quant à la règle, elle ne se dévoile qu'à l'occasion de manifestations ponctuelles, puisqu'elle n'a qu'une existence hypothétique en dehors de ses applications concrètes, qu'elle est supposée plus que posée. Elle occupe donc simultanément tous les moments du temps juridique. Elle rend compte du passé, elle justifie le présent, elle vise à ordonner l'avenir. Dans une tension permanente avec le droit écrit, la coutume traduit le phénomène juridique international dans sa plénitude, exprime toute sa compléxité et actualise la plupart de ses virtualités."

[86] See also GIULIANA ZICCARDI CAPALDO, THE PILLARS OF GLOBAL LAW, 34-35, (2008).. In her view, custom is "the expression of the will of the 'large majority of states' meaning a majority where all essential components and political groupings of the international society at any given time are represented"."It is the product…of stratification, over time, of the will of this majority of states, as made manifest by repeated and uniform behaviours rooted in the social fabric"

competing in a marketplace of rules and where they are engaged in a "signaling" process.[87].

Reformist enterprises are equally numerous. [88] They all aimed at preserving the two-element doctrine but vindicate some internal adjustment thereof. A common reformist posture of the kind has been to invite a greater emphasis on practice[89] or, conversely on *opinio juris*[90], the

[87] See D. J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, 150, 164 & 181 (2010). According to this account, a country might, by both its words and deeds, attempt to build support for a new custom while other nations might actively resist the creation of a new norm (p. 150). Customary international law-making must accordingly be construed as a "robust and thick flow of signaling data of "bids" and "blocks" to customary law" (p. 164).

[88] J. D'ASPREMONT, FORMALISM AND THE SOURCES, esp. Chapter 7, (2011). .

[89] M. H. Mendelson, *The Formation of Customary International Law*, 272 COLLECTED COURSES, , 155 (1999); International Law Association, Final Report of the Committee on Formation of Customary (General) International Law (2000), p. 9-10; D'Amato, *Customary International Law: A Refomulation* 4 INTERNATIONAL LEGAL THEORY, 1, (1998) ; H. Kelsen, *Théorie du Droit International Coutumier* 1 REVUE INTERNATIONALE DE THEORIE DU DROIT, 253 at 263, (1939) (this is a position he later moved away from); LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC: ETUDES EN L'HONNEUR DE GEORGES SCELLE, (1950), P. Guggenheim, "Les deux éléments de la coutume en droit international", 275.

[90] INTERNATIONAL LAW: TEACHING AND PRACTICE (B.CHENG, 1982) B. Cheng, *"Epilogue*", 223. ; T. Guzman, *Saving Customary International Law*, 27 MICHIGAN JOURNAL OF INTERNATIONAL LAW, 115 at 153, (2005) ; B. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS, (2010).

latter has sometimes been called "modern custom". [91] In the same vein,

[91] For an illustration, see O. Schachter, *International Law in Theory and Practice: General Course in Public International Law,* 178 RECUEIL DES COURS,, 333-342, (1982-V), ; T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, (1989); J. Charney, '*Universal International Law'*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW, 529 (1993). See also C. Tomuschat, '*Obligations arising for states without or against their will'*, 241 COLLECTED COURSES, 195-374, p. 269 et seq. (1993-IV). The theory of "new custom" has been insightfully analyzed by G. Abi-Saab. Richard B. Lillich, *The Growing Importance of Customary International Human Rights*, 25 GA J. 1, INTERNATIONAL AND COMPARATIVE LAW, , , 8 (1995/96); See G. Abi-Saab, ESSAYS IN HONOR OF ROBERTO AGO, (1987), Abi-Saab,'*La Coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté*' 62-65 ; See the tentative reconciliation between this modern custom and the traditional custom by A. E. Roberts, '*Traditional and Modern Approaches to Customary International Law: A Reconciliation'*, 95 AJIL 757, (2001), ; LA COMMUNITE INTERNATIONALE: MELANGES OFFERTS A CHARLES ROUSSEAU (1974), R.-J. Dupuy, C*outume sage et coutume sauvage*, p. 75; Such an understanding of customary international law has been subject to very scathing criticisms, mostly because of its inconsistency with practice. See e.g. INTERNATIONAL LAW: TEACHING AND PRACTICE (B.CHENG, 1982), R. Jennings, '*The Identification of International Law'* 3, at 6; LE DROIT INTERNATIONAL DANS UN MONDE EN MUTATION: LIBER AMICORUM EN HOMMAGE AU PROFESSEUR EDUARDO JIMENEZ DE ARECHAGA, (Fundación de Cultura Universitaria 1994), P.-M. Dupuy, '*Théorie des sources et coutume en droit international contemporain*' 51, at 68; See A. D'Amato, '*Trashing Customary International Law'*, 81 AJIL 101 (1987); P. P. Kelly, '*The Twilight of Customary International Law*', 40 VA J. INT'L LAW L. 449 at 451, (2000), ; STUDI IN ONORE DI GIUSEPPE SPERDUTI, (Giuffre ed., 1984), F. Münch, '*A propos du droit spontané*', 149-162; LIBER AMICORUM HONOURING IGNAZ SEIDL-HOHENVELDERM LAW OF NATIONS LAW OF INTERNATIONAL ORGANISATIONS WORLD'S ECONOMIC LAW (Carl Heymanns Verlag KG, 1988), D. Vignes, "*La Coutume surgie de 1973 à 1982 n'aurait-elle pas écartée la codification comme source principale du droit de la mer*?", 635-643., . See also REALISM IN LAW-MAKING, ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN, (A. Bos and H. Siblesz (eds.), 1986), G. Ladreit de Lacharrière, "*Aspects du relativisme du droit international*", 89-99; B. Simma and P. Alston, '*The Sources of Human Rights Law: Custom, Jus Cogens and General Principles'*, 12 AUSTRALAIN YEARBOOK OF INTERNATIONAL LAW, 82 at 89, (1988-1989) ; R. B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW, , 173-204(2010), .

others have imagined a "sliding scale"[92] whereby the doctrine is made dynamic and the emphasis oscillates between the two elements. Obviously, all these reformist constructions diverge from one another and put forward opposite views on custom.[93] In that sense, the reformist thirst of international lawyers has generated a huge cacophony. This cacophony is what led some scholars to later seek to iron out, not the contradictions of custom themselves, but the contradictions between those reformist theories of custom.[94]

Other reformist adjustments of the two-element doctrine have been contemplated. For instance, scholars have sought to give a different spin to the two-element doctrine by re-articulating it around "fundamental change…enabling international law to form much more rapidly and with less State practice than is normally thought to be possible"[95], "some kind of collective mental state, existing in the attitudes and dispositions of members of the relevant community"[96], the preferences of the relevant community of states.[97]

Proceduralization of custom has also been put forward with the hope of reforming the two-element custom and saving it. Such procedural reforms

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[92] F. L. Kirgis, *Custom as a Sliding Scale*, 81 AJIL 146 (1987)

[93] Some have spoken of the "disintegration" of the doctrine because of the lack of any common understanding of how to determine customary norms. See J. P. Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNAL OF INTERNATIONAL LAW, 449 at 516, (2000), .

[94] For a presentation of modern custom, see A. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001); F. Kirgis, *Custom on a Slidging Scale*, 81 AJIL 146 (1987); see also W. Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*. 45 GEORGETOWN JOURNAL OF INTERNATIONAL LAW, 445, (2014), .

[95] M. P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 305, at 306, (2014) .

[96] Lazlo Blutman, *Conceptual and Methodological Deficiencies : Some Ways that Theories on Customary International Law Fai*l, 25 EJIL 529, 552 at 551, (2014),.

[97] C. Bradley, A State Preferences Account of Customary International Law Adjudication (October 10, 2014). Available at SSRN: http://ssrn.com/abstract=2508298.

of custom have mostly approached custom from the perspective of custom as a process. Mention must be made here of the multitude of scholarly and judicial constructions which have also sought to proceduralize the otherwise very erratic and unpredictable custom-making process by virtue of ancillary doctrines like "persistent objector".[98] What has been designated as "new custom" or "modern

[98] This construction was originally designed by scholars and then endorsed by international courts. See G. Fitzmaurice, '*The General Principles of International Law Considered from the Standpoint of the Rules of Law*', 92 COLLECTED COURSES,, 1-227 at pp. 49-50 (1957 II). ICJ, *Fisheries case* (UK v. Norway), 18 December 1951, 1951 ICJ Rep 116, 131; ICJ, *Asylum case*, Colombia v. Peru, 20 Nov 1950, 266, 277-78. It has also been endorsed by regional bodies. See e.g. Inter-American Commission of Human Rights, *James Terry Roach and Jay Pinkerton v. United States*, No. 9647, resolution 387, 22 September 1987, Inter-Am. Ct H.R. Annual Report, 1986-7, OAS Doc. No. OEA/Ser.1/V.II.71, Doc. 9, Rev. 1, para. 52. On the idea that the theory of persistent objector betrays an attempt to proceduralize formalize customary process, see LE DROIT INTERNATIONAL DANS UN MONDE EN MUTATION: LIBER AMICORUM EN HOMMAGE AU PROFESSEUR EDUARDO JIMENEZ DE ARECHAGA (Fundación de Cultura Universitaria, 1994), P.-M. Dupuy, '*Théorie des sources et coutume en droit international contemporain'* 51, p. 61 et seq.

custom"[99] can also be seen as epitomizing a proceduralization of the making of custom within the framework of universal intergovernmental

[99] For an illustration, see O. Schachter, *International Law in Theory and Practice: General Course in Public International Law,* 178 Recueil des Cours, 333-342, (1982-V), ; T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, (1989); J. Charney, '*Universal International Law'*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 529 (1993). See also C. Tomuschat, '*Obligations arising for states without or against their will'*, 241 COLLECTED COURSES, 195-374, p. 269 et seq. (1993-IV). The theory of "new custom" has been insightfully analyzed by G. Abi-Saab. See G. Abi-Saab, ESSAYS IN HONOR OF ROBERTO AGO, (1987), Abi-Saab '*La Coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté*', 62-65 ; See the tentative reconciliation between this modern custom and the traditional custom by A. E. Roberts, '*Traditional and Modern Approaches to Customary International Law: A Reconciliation*', 95 AJIL 757, 2001,; LA COMMUNITE INTERNATIONALE: MELANGES OFFERTS A CHARLES ROUSSEAU, (1974), R.-J. Dupuy, *Coutume sage et coutume sauvage*, , p. 75; Such an understanding of customary international law has been subject to very scathing criticisms, mostly because of its inconsistency with practice. See e.g. INTERNATIONAL LAW: TEACHING AND PRACTICE (B.CHENG, 1982), R. Jennings, '*The Identification of International Law'*, 3, at 6. LE DROIT INTERNATIONAL DANS UN MONDE EN MUTATION: LIBER AMICORUM EN HOMMAGE AU PROFESSEUR EDUARDO JIMENEZ DE ARECHAGA (Fundación de Cultura Universitaria, 1994, P.-M. Dupuy, '*Théorie des sources et coutume en droit international contemporain*' 51, at 68; See A. D'Amato, *'Trashing Customary International Law'*, 81 AJIL 101 (1987); P. P. Kelly, '*The Twilight of Customary International Law'*, 40 VA J. INT'L L. 449 at 451 (2000); STUDI IN ONORE DI GIUSEPPE SPREDUTI, (Giuffre ed., 1984), F. Münch, '*A propos du droit spontané'*, 149-162; LIBER AMICORUM HONOURING IGNAZ SEIDL-HOHENVELDERM LAW OF NATIONS LAW OF INTERNATIONAL ORGANISATIONS WORLD'S ECONOMIC LAW (Carl Heymanns Verlag KG, 1988), D. Vignes, *"La Coutume surgie de 1973 à 1982 n'aurait-elle pas écartée la codification comme source principale du droit de la mer?",* 635-643. See also G. Ladreit de Lacharrière, REALISM IN LAW-MAKING, ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN, (A. Bos and H. Siblesz (eds.), 1986), "*Aspects du relativisme du droit international*", 89-99; B. Simma and P. Alston, '*The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*', 12 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW, 82 at 89 (1988-1989) ; R. B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 173-204, (2010), .

bodies[100]. Other reformist works have approached custom as a source and endeavored to turn it into a formal "programme for evidence"[101] – which probably corresponds more closely with the literal wording of Article 38 of the Statute of the International Court of Justice which was discussed above.[102]

Moralization of custom is the last type of refinement of custom which ought to be mentioned here. Indeed, some scholars have endeavored to reform custom through a sophisticated revival of the law-ascertainment and content-determining role of morals. Even if modern sources of international law had been constructed as a rampart against the use of

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[100] See gen. S. Schwebel, '*The Effects of Resolutions of the UN General Assembly on Customary International Law*', ASIL Proceedings, at 301, 1979; M. Bos, '*The Recognized Manifestations of International Law, A New Theory of the sources',* 20 GERMAN YEARBOOK OF INTERNATIONAL LAW,, 9, (1977) . ESSAYS IN HONOR OF ROBERTO AGO, (1987), K. Skubiszewski, *Resolutions of the UN General Assembly and Evidence of Custom*, 503-513.

[101] M. BOS, A METHODOLOGY OF INTERNATIONAL LAW, 224, (1984); See the discussion by J.-A. Barberis, LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DEVELOPPEMENT : MELANGES MICHEL VIRALLY, (1991), '*La Coutume est-elle une source de droit international?*' 43-52 at 44 et 50-51. LE DROIT INTERNATIONAL DANS UN MONDE EN MUTATION : LIBER AMICORUM EN HOMMAGE AU PROFESSEUR EDUARDO JIMENEZ DE ARECHAGA (Fundación de Cultura Universitaria, 1994), P.-M. Dupuy, '*Théorie des sources et coutume en droit international contemporain*' 51, at 54 ; See also BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 8, (6th ed., 2003), (for whom, after all, it only is a question of proof). See also MELANGES REUTER : LE DROIT INTERNATIONAL : UNITE ET DIVERSITE, (Daniel Bardonnet (ed.),1981), B. Stern, '*La Coutume au Coeur du droit international, quelques réflexions*', 479-499, at 483; B. Cheng also construes usage as only evidential. See B. Cheng, INTERNATIONAL LAW: TEACHING AND PRACTICE (B.CHENG, 1982), B. Cheng, '*On the Nature and Sources of International Law* 203, at 223. See also A. Pellet, '*Cours Général: Le droit international entre souveraineté et communauté internationale – La formation du droit international'*,VOL. II, ANUARIO BRASILEIRO DE DIREITO INTERNACIONAL,, 12-75 at 63 et seq, (2007).

[102] In the same vein see, S. Sur, "*La Coutume internationale*", FASCICULE 13, JURIS CLASSEUR, 15,, 1989. See also THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), A. Pellet, *Article 38*, 677 at 749. .

morals in international legal argumentations,[103] the moderate use of morality has sometimes been construed as step towards a refinement of the modern doctrine of custom.[104]

It is in the light of this professional calling for explaining and saving modern custom that the inclusion of custom on the agenda of the International Law Commission must be understood. The International Law Commission work on custom should be seen as yet another attempt to explain and save custom. This new endeavor is however premised on the idea that the huge variety of scholarly works meant to either explain or save custom have failed to fulfill their ambition, having probably made its application even more unstable and problematic. In that sense, conferring such a rescue mission to the International Law Commission presupposed that public codification[105] has a higher chance of success than the prolific scholarship outlined in this section.[106] Whether the International Law Commission will succeed in explaining and saving custom where scholarship has seemingly failed is not a question that ought to (or can) be answered here. This section only aimed to show the extent to which scholars – and occasionally judges – have devoted heroic efforts to explain all the contradictions and fluctuations of custom and to

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[103] It should be recalled that a proposition of Argentina to include a reference to principles of humanity and justice in the formulation of custom was rejected during the discussions about Article 38 of the PCIJ Statute in the League of Nations. League of Nations, Document concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court (1921), p. 50. See the comments of A. Pellet, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), A. Pellet, *Article 38*, 677 at 742.

[104] BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS (2010); CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD, (Curtis A. Bradley ed, 2015,FORTHCOMING), J. Tasioulas, *Jus Cogens, and Human Rights* (March 20, 2015). Available at SSRN:http://ssrn.com/abstract=2581763.

[105] On the retreat of private initiatives in the codification of customary international law, see gen. N. Onuf, LAW-MAKING IN THE GLOBAL COMMUNITY, (N.Onuf, 1982), N. Onuf, '*Global Law-Making and Legal Thought'*, 1, at 22.

[106] See the 2011 recommendation of the Working-Group on the long-term programme of work of the International Law Commission on inclusion of the identification of custom in the ILC's programme of work, A/66/10, Annex A.

reform it in a way that would play them down. It is submitted here that one must be a very fervent worshipper of the doctrine of custom to heroically give oneself away for the sake of such a gravely deficient doctrine. This is however not a question that ought to be reflected upon here.

6. The contemporary decay of modern custom in spite of heroism

The previous section has described the resolve and determination put by international lawyers in the rescue of the modern variant of custom. It has been explained that their rescue operations can take the form of either explanatory constructions or refinements. The present section argues that a great deal of the rescue efforts accounted above are not only futile but also counter-productive as they jeopardize the two-element doctrine as a whole. In other words, the chivalrous endeavors of international lawyers to explain and save the two-element doctrine are not only proving pointless but are also causing the meltdown of the very doctrine they are supposed to save. As shown in this section, international lawyers, in continuously rescuing modern custom or in explaining the variations of its application in theory and practice have come to embrace "argumentative shortcuts"[107] that strip the modern two-element variant of the doctrine of custom of its nucleus: the distinction between practice and *opinio juris*.

This move away from the two-element version of the doctrine of customary international law originally started with a seemingly harmless move: finding practice. Both judges and international legal scholars quickly found out that practice was not easier to find than *opinio juris*. As the Nicaragua decision famously taught them,[108] how can one possibly ascertain the unascertainable, that is an intangible practice of abstention? Since the great majority of rules of international law are of a prohibitive character, the establishment of customary international law very often

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[107] The expression iS from Christian Tams. See C. Tams, "*Meta-Custom and the Court: A Study in Judicial Law-Making*", 14 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 51-79, at 66, (2015).

[108] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.

requires a speculative venture into nothingness. Confronted with this overdue realization that practice – especially with respect to prohibitive rules – was not more easily captured inductively than *opinio juris*, international lawyers have been forced to resort to all sorts of new nets and traps to hunt and capture practice where there was none.

The stratagems and ploys which are being used to "discover" practice are numerous and well-known. Two of them are mentioned here, the second one deserving most of the attention. One of the ruses deployed by international lawyers to discover practice has involved a move away from the self-generating character of customary international law. According to that stratagem, customary rules are no longer emerging by virtue of the behavior and beliefs of those actors to whom those rules are meant to apply. This means, for instance, that the practice of international organizations or that of non-state actors is said to be instrumental in the crystallization of purely inter-state rules. In that sense, third-party practice becomes a source of practice for the sake of customary international law. This is so even if the practice of that third party is purely virtual. Indeed, it is sometimes argued that, even if international organizations have no territory, they generate practice relevant for the establishment of inter-state obligations pertaining to how a territory is used. In the same vein, non-state actors who are not engaged as belligerent in armed conflicts are sometimes said to generate practice for customary rules prescribing how States should behave as belligerent on the battle field.[109]

The abovementioned stratagem, albeit surely in the light of the traditional self-generative character of custom, is however benign. It alters but does not jeopardize the core structure of the doctrine of custom. More devastating is probably the mainstream tendency to turn declarative processes whereby custom is identified into constitutive ones. This is the common contention according to which what is said about a given behavior is constitutive of that behaviour. By this account, written

[109] For a discussion of this question, see DROIT INTERNATIONAL HUMANITAIRE: UN REGIME SPECIAL DE DROIT INTERNATIONAL ? (R. van Steenberghe, 2013), J. d'Aspremont, *An Autonomous Regime of Identification of Customary International Humanitarian Law: Do Not Say What You Do or Do Not Do What You Say?* (March 8, 2013). 72-101. Available at SSRN: http://ssrn.com/abstract=2230345.

materials can be constitutive of attitude[110] while verbal acts can simultaneously be constitutive of practice.[111] Accordingly, the declarative and the constitutive ought not to be distinguished anymore and the possible evidence of a behavior thus becomes the behavior itself. A variant of this stratagem derives behavioral practice from interpretive practice. According to this variant, what is said about an existing rule feeds into the behavioral practice supporting the customary rule. This means, for instance, that qualifications made by certain international actors of given situations (e.g. the Security Council acting in the framework of Chapter VII) generate behavioral practice for the sake of the customary law applicable to that situation.

It is true that warnings against such destructive conflation are not unheard of as concerns have long been vented about the so-called "double-counting"[112]. Yet such reprimands – and the reminders that verbal acts can only count as practice as far as customs of making such declarations are concerned and not customs of the conduct described in the content of the verbal acts[113] – have not sufficed to rein in the embrace

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[110] J. Crawford, The Identification and Development of Customary International Law, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001, at 3. See contra R. HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 28, (1995).

[111] International Law Association, Final Report of the Committee on Formation of Customary (General) International Law (2000), p. 14

[112] The expression is probably from Mendelson,, 272 COLLECTED COURSES, , p. 206-207 and p. 283-293, (1999),; see also D'Amato, *The Concept of Custom in International Law,* p. 88 ("A claim is not act… claims themselves, although they may articulate a legal norm, cannot constitute the material component of custom"); J. Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW, , 523-553, at 527, (2004); M.E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES, , 50, (2nd ed., 1997) ; K. WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW, 42, (2nd ed., 1993). According to J. Crawford, Criticisms of mixing constitutive and declarative was already voiced in relation to the wording of Article 38. J. Crawford, The Identification and Development of Customary International Law, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001, at 2.

[113] K. WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW, 42, (2nd ed. 1993)

of such a construction. This understanding of custom whereby the constitutive and the declarative collapse in one argumentative maelstrom is rife in the literature.[114] It has even been endorsed by the International Law Association and, notwithstanding some awareness for the problem,[115]

[114] This understanding dominates all field of international law. For an account see J. d'Aspremont, Customary International Law as a Dance Floor – Part 1, available at http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/ and Customary International Law as a Dance Floor – Part 2, available at http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/; for a similar account with respect to international investment law, see SOURCES OF INTERNATIONAL INVESTMENT LAW, (E. de Brabandere and T. Gazzini (eds), 2012), J. d'Aspremont, '*International Customary Investment Law: Story of a Paradox'*, 5-47. .

[115] "'Acceptance as law' should generally not be evidenced by the very practice alleged to be prescribed by customary international law". International Law Commission, Second Report on Identification of Customary International Law by the Special Rapporteur Michael Wood, 22 May 2014, A/CN.4/672, para. 74

the International Law Commission.[116] It is also found in the practice of international courts and tribunals.[117]

It is argued here that, in their hunt for practice, international lawyers have thus espoused lethal all-embracing construction whereby practice and *opinio juris*, behavioral practice and interpretative practice, and declarative and constitutive processes as two elements of the same dialectical process, if not two faces of the same coin. This conflation between the declarative, the constitutive and the interpretative can only be fatal for the two-element doctrine of customary law in international legal theory and practice. By allowing the constitutive, the declarative and the interpretative to overlap and by accepting that the practice be constitutive of the *opinio juris* and the *opinio juris* be constitutive of practice, international lawyers are simply tearing down the two-element construction which they had been so painstakingly and patiently tried to

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[116] Drawing on the claim that such a distinction is artificial, International Law Commission decided to avoid distinction between constitutive acts and evidence of constitutive acts (International Law Commission, Second Report on Identification of Customary International Law by the Special Rapporteur Michael Wood, 22 May 2014, A/CN.4/672, para. 38. Although the second report of the Special Rapporteur takes pains to distinguish between the establishment of customary law and the evidence of the two elements (see the report's draft conclusion 4 and draft conclusion 10), the two processes remain conflated in some provisions (see the 2d report's draft conclusion 2). While unflinchingly adhering to the two-element approach, the second report occasionally nurtures some conflation between the two elements. For instance, some acts can indeed be constitutive (and/or declarative) of both practice and *opinio juris* (see report's draft conclusion 7 and draft conclusion 11). See also the list of acts that can be constitutive of practice in International Law Commission, Second Report on Identification of Customary International Law by the Special Rapporteur Michael Wood, 22 May 2014, A/CN.4/672, , para. 41-42 and para 48 (draft conclusion 7) and para. 76-77 and para. 80 (draft conclusion 11). See however the more nuanced approach in the Third report on the identification of customary international law, A/CN.4/682, 27 March 2015, para. 15.

[117]For J. Crawford, the Gulf of Maine case constitutes a case where the ICJ conflated the two elements. J. Crawford, The Identification and Development of Customary International Law, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001, p. 8. See ICJ, Gulf of Maine, XXXX; For an example of association of declaration of States with State practice in the practice of investment tribunals, see *Glamis Gold Ltd v. United States*, Award, 8 June 2009, UNCITRAL, para. 602

build and improve.[118] As a result of this meltdown of the two elements, all the sophistication, creativity, scholarly craftsmanship – not to mention the heroism – demonstrated by international lawyers in the course of the last century and sketched out in this article now appear, sadly or not, self-defeating.

7. Concluding remarks

The foregoing has shown that international legal thought and practice on customary international law have all the trappings of a degenerative enterprise.[119] That does not mean, however, that the modern version of the doctrine of customary international law is necessarily bound to disappear anytime soon.[120] Bolstered by the drivers of the success of custom which have been depicted in section 4 above, international lawyers will probably continue to perpetuate the rescue efforts that have been outlined in section 5, thereby exacerbating the decline of the two-element variant of the doctrine of customary international law but preserving it as a central mode of law-identification and law-making.

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[118] See C. Tams makes a similar – albeit slightly different – argument. He argues that "the actual application of the meta-law of custom has moved away from direct inquiries into State conduct" and that the "link between practice and custom is much, and further, attenuated, to the point where custom ends up being a bypoduct of other processes of normative clarification"). See C. Tams "*Meta-Custom and the Court: A Study in Judicial Law-Making*", 14 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 51-79 at 76-77.

[119] P. SCHLAG, LAYING DOWN THE LAW, 143, (1996),: "if a line of intellectual inquiry poses a threat to "law" or to its fundamental normative commitments, then the line of inquiry is susceptible to being called "nihilistic"… The upshot is that if one is engaged in legal thought, one is obliged to re-present the practice of "law'", however degraded its actual condition may be, as nonetheless essentially justified, coherent, rational, and good. Not only is this orientation profoundly anti-intellectual, but, indeed, it is the mark of a degenerative enterprise – one that prefers its pleasing baubles of moralistic self-congratulations to any serious reckoning with its own identity and actions".

[120] It should be noted that some have spoken of the "disintegration" of the doctrine because of the lack of any common understanding of how to determine customary norms. See J. P. Kelly, *The Twilight of Customary International Law*, 40 VIRGINIA JOURNAL OF INTERNATIONAL LAW, 449 at 516, (2000).

That the modern version of customary international law someday disappears as a source of international law someday should certainly not be bemoaned. There is no reason, other than fetishism, why the way in which the behavioral generation of legal normativity is currently systematized in international law should be dogmatically defended. What is more, behaviorally generated normativity will certainly be preserved in international law, among others, because it ensures a minimum content of international law, thereby providing a guarantee against the demotion of the latter to pure theology. It is obviously of no avail to seek to determine how the behavioral generation of normativity will be organized by international lawyers after the decay of custom. What matters here is simply to highlight that concepts and patterns of argumentative structures have all a life of their own. They emerge and find a place in legal argumentation someday, thrive for decades or centuries in practice and legal thought, before being ditched and replaced by other constructions. This may simply be the fate of legal doctrines. Modern custom does not seem to be an exception to that.