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Custom and the Regulation of 'the Sources of International Law'

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> It is the practice of states which demonstrates which sources are acknowledged as giving rise to rules having the force of law . . . Article 38 of the Statute of the International Court of Justice . . . [which] cannot itself be creative of the legal validity of the sources set out in it . . . is, however, . . . authoritative generally because it *reflects state practice*.[1]
>
> Article 38(1) of the Statute of the International Court of Justice . . . *is regarded as customary international law*.[2]

1 The *Regulation* of Sources of Law

The *law* on the sources of law in international law, if any, appears to be largely neglected by scholarship. So seems to be state practice of *regulation* of the sources of law in international law, even where questions about any legal consequences of such practice are not raised. That these two aspects of lawmaking remain understudied, is, in a way, unsurprising: scholarship has remained divided about the very concept of 'the sources of international law', as evidenced by vexed controversies about their nature.

Article 38(1) of the International Court of Justice (ICJ) Statute[3] almost invariably features in all of these controversies. More importantly, albeit rarely acknowledged in contemporary scholarship, ICJ Statute Article 38(1) is invoked in state practice regarding the sources of law in international law.

[1] RY Jennings & A Watts (eds), *Oppenheim's International Law – Vol 1: Peace* (9th ed, Longmans 1992) 24 [9] (emphasis added).

[2] *Prosecutor v Vlastimir Đorđević* (Appeals Chamber Judgement) IT-05–87/1-A (27 January 2014) [33] fn 117 (emphasis added).

[3] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993.

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Two positions about such state practice can be found among scholars and international courts and tribunals. Some accept that regulation patterns are inferable from such state practice, but stop short of drawing any legal consequences from those patterns. Others go further and argue that such patterns in state practice do have legal consequences, amounting to law in the form of rules, particularly general rules of customary international law (CIL). In this vein, ICJ Statute Article 38(1) is said to reflect such CIL general rules. The former position, which the first epigraph epitomises, has become the standard one. The latter position, of which the second epigraph is illustrative, enjoys support among some leading, mostly early, commentators[4] and, at least, one international court.[5]

'The sources of international law', often used in the plural as a set phrase, is a concept which has constantly evaded precise definition. The multiplicity of meanings attributed to it, as Sur has noted, has resulted in contestations of its pertinence.[6] Kelsen, for instance, observed that it designates not only 'modes' of lawmaking and 'reasons' for the validity of law, but also its 'ultimate fundament'.[7] According to Truyol y Serra, the linkage of these two aspects of lawmaking accounts for various controversies.[8] As Dupuy correctly notes, it ought to be, and has in a way increasingly been, accepted that a source of law is distinct from the law's ultimate basis.[9]

[4] See for instance H Lauterpacht, 'Règles Générales du Droit de la Paix' (1937) 62 RdC 95; A Verdross, 'Les Principes Généraux du Droit dans la Jurisprudence Internationale' (1935) 52 RdC 191.

[5] Namely, the International Criminal Tribunal for the former Yugoslavia's Appeals Chamber's views in *Prosecutor v Đorđević* (n 2).

[6] S Sur, 'La Créativité du Droit International Cours Général de Droit International Public' (2013) 363 RdC 9, 76 ('[t]he critique of the pertinence of the notion of "sources" rests on the multiplicity of its meanings which renders it equivocal and misleading' ('*[l]a critique de la pertinence de la notion de "sources" repose sur la multiplicité de ses sens qui la rend équivoque et trompeuse*')).

[7] H Kelsen, 'Théorie du Droit International Public' (1953) 84 RdC 1, 119.

[8] A Truyol y Serra, 'Théorie du Droit International Public: Cours Général' (1981) 173 RdC 9, 231 ('the theory of the sources of public international law keeps a close connection with the problem of the fundament of its validity, which explains the divergences which appear there' ('*la théorie des sources du droit international public garde un rapport étroit avec le problème du fondement de sa validité, ce qui explique les divergences qui s'y font jour*')).

[9] PM Dupuy, 'L'Unité de l'Ordre Juridique International: Cours Général de Droit International Public' (2002) 297 RdC 1, 188 ('[e]veryone seems to agree . . . in theory, to distinguish the source of law from that of its foundation . . . a problem . . . at the edge of legal science' ('*[t]out le monde paraît d'accord . . . en théorie, pour distinguer la source du droit de celle de son fondement . . . un problème . . . aux confins de la science juridique*')); see also GJH van Hoof, *Rethinking the Sources of International Law* (Kluwer 1983) 71 (casting aside 'the source in the first sense', namely 'the basis of the binding force of international law').

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Notwithstanding the consensus reached among scholars about the distinction between the basis of a legal order and lawmaking within that legal order, various disputes about the nature of the sources of international law stemming from the concept's polysemy remain unresolved. As Ago noted, other differences over their nature result from persistent reliance on certain assumptions,[10] and, as Truyol y Serra observed, variations as to those assumptions result in the intractability of related controversies.[11] Some of those assumptions, in turn, may involve a conflation of levels of analysis, an implication to which writers of various schools of thought have drawn attention.[12] Tunkin, for instance, regarded international law as a 'multi-level system'.[13] Abi-Saab and Wood, for their part, rightly warn against such a conflation.[14]

The idea of regulation, as it pertains to the sources of international law, is widely discussed. More broadly, general jurisprudence has also contributed to the understanding of 'regulation' in ways which are apposite to this chapter. Without prejudice to a fuller discussion of its general jurisprudential meaning, which falls outside the scope of this chapter, 'regulation' is used here to designate the making of rules, whether they have attained or not a legal status, or if so, whether they directly govern conduct or not. First, by encompassing rules which arguably cannot, or, if so, have not yet, attained a legal status, regulation gives expression to the common ground among the aforementioned schools of thought, accepting there is state practice on sources of law. Second, the idea of regulation, as opposed to 'norm' in its theoretical sense, is key: while a norm is a rule aiming to guide conduct, other rules may lack such a normative character, and yet still constitute a form of regulation, alongside normative

[10] R Ago, 'Science Juridique et Droit International' (1956) 90 RdC 851, 916 (calling for an analysis of the terms of those problems).

[11] Truyol y Serra (n 8) 231 (noting controversies are 'conditioned by the starting positions of the respective authors' ('*conditionnées par les positions de départ des auteurs respectifs*')).

[12] O de Schutter, 'Les Mots de Droit: Une Grammatologie Critique du Droit International Public' (1990) 6 RQDI 120, 124 (speaking of 'three levels of analysis').

[13] GI Tunkin, 'Politics, Law and Force in the Interstate System' (1989) 219 RdC 227, 259 ('the international community' as 'a subsystem of . . . the interstate system' which 'is a multi-level system (different levels of actors and different levels of norms)').

[14] G Abi-Saab, 'Cours Général de Droit International Public' (1987) 207 RdC 9, 34 ('it is important to be aware of the level of analysis at which one is situated' ('*il est important d'être conscient du niveau d'analyse auquel on se situe*')); MC Wood, 'Legal Advisers' [2017] MPEPIL [36] (referring to 'the delicate relationship between law and policy in international relations' as an aspect of the work of 'those who advise on matters of public international law'.)

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regulation.[15] While a distinction between normative and non-normative regulation may ostensibly overlap with Hart's distinction between primary and secondary rules, a reference to regulation seeks to place emphasis on the *legality* of non-normative legal regulation, as well as on its place within a legal system as *internal* to it. In this vein, it is worth recalling that Hart regarded secondary rules on law ascertainment as non-legal and, ultimately, external to the legal system. Third, the elements of any custom giving rise to such CIL general rules may be better understood. Once the assumption that every custom need derive from the same kind of general practice as that leading to the formation of primary, normative, CIL rules is set aside, any custom giving rise to non-normative rules of CIL, including those on sources of law, can be the object of the same legal scrutiny to which any other custom can be typically subjected. Most notably, any enquiries into such non-normative CIL would not be discarded by any misconception confining CIL to rules of CIL derived from practice consisting in 'physical', as opposed to 'verbal', acts.

The view that there is a phenomenon of regulation of sources of law in international law, and that such regulation is carried out by a 'system of sources' contained within the legal order of international law as a whole, finds some support in international law scholarship. Virally, for instance, considered that legal orders are generally 'self-regulated', including as to their own sources of law. Virally's view that international law, as any legal order, self-regulated its own sources of law was without prejudice to admitting that such autonomy was relative, the legal order of international law being conditioned by the various circumstances within which it operates.[16] Virally's caveat is not contradictory, since it involves a level of analysis other than that of the rules performing self-regulation of the system's sources of law, namely that of the various wider processes within whose framework the legal system operates.

[15] See, generally, J Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd ed, Oxford University Press 1980) 144, 182 (defining law as 'a special social method of regulating human behaviour by guiding it', but noting that 'every legal system . . . contains laws . . . which are not norms').

[16] M Virally, 'Panorama du Droit International Contemporain: Cours Général de Droit International Public' (1983) 183 RdC 9, 167 ('the legal order is a self-regulated system. . . however,. . . it is also conditioned by the particularities, institutional, sociological. . . which explain the specific characteristics of the system of sources of the international legal order' ('*l'ordre juridique est un système autorégulé . . . cependant, . . . il est aussi conditionné par les particularités, institutionnelles, sociologiques . . . qui expliquent les caractères spécifiques du système des sources de l'ordre juridique international*')).

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2 Custom as *Source* of Rules Arising out of General Practice on Sources of Law

This section examines the place of custom in the regulation of the sources of international law, with a particular focus on custom's role as source of the law on sources of law, if any, in international law.

The suitability of custom as a source of universal rules has been widely accepted in the literature. An analysis of custom's suitability as a source of universal rules usually involves a comparative analysis, vis-à-vis other sources of law.[17] Such comparative analyses have tended to point out its inherent qualities. For instance, Marek argued that custom's inherent qualities rendered it 'superior' to any treaty as a source of universal rules.[18] Marek characterised this superiority as being a form of 'inherent superiority' or 'superiority of quality', and not a matter of hierarchy among sources of law.[19]

As it relates to general rules regarding the sources of law, on the other hand, the suitability of custom is widely contested. Those who contest the suitability of custom for these particular purposes often deny the possibility of regulation of sources of law by any rule created by one of the regulated sources of law. Jennings and Watts' view, partly quoted in the first epigraph to this chapter, furnishes a typical statement of this denial: 'Article 38 of the Statute of the International Court of Justice . . . cannot itself be creative of the legal validity of the sources set out in it, since it belongs to one of those sources itself.'[20] While Jennings and Watts' denial concerns ICJ Statute Article 38 *qua* treaty only, the view is usually predicated of any other claimed source-based rules on sources, including custom-based ones. This is exemplified by Dinstein's view, for whom reliance on CIL rules on 'how and when custom is brought into being'

[17] Some of those who accept the possibility of legal rules on lawmaking hold the view that such rules may take the form of either CIL or general principles of law. See, for instance, N Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge 2014) 16 ('there are principles of law that ought to be followed in the finding or making of the law – applicable in the customary process as well – which may have crystallised as customary rules in their own right or may exist as general principles of law').

[18] K Marek, 'Le Probleme des Sources du Droit International dans l'Arrêt sur le Plateau Continental de La Mer du Nord' (1970) 6 RBDI 45, 75.

[19] ibid. On the character of hierarchical properties as normative and not formal, see, among others, A Pellet, 'Article 38' in A Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (2nd ed, Oxford University Press 2012) 846 [284].

[20] Jennings & Watts (n 1) 24 [9].

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inherently involves 'a *petitio principii*'.[21] These instances of reluctance to ascribe legality to the regulation of sources of law, which could be collectively called, using Dinstein's term, *petitio principii* objections, are, again, without prejudice to the concomitant acknowledgement of the existence and importance of relevant patterns of regulation of sources of law in general practice.[22]

Leaving aside the *petitio principii* objections, the only major objection to the idea of regulation of sources of law and its character as law, in the form of general rules of CIL, might arise from various forms of scepticism as to the idea of regulation or, where accepted, its legality.[23] This scepticism is not easily amenable to analysis, since it appears to be latent in the respective bodies of scholarship, never being made explicit by virtue of the very view that it would be pointless to engage in any further arguments against the idea of regulation or its legality, if any. The assumed futility of regulation of sources of law or its legality may explain the lack of arguments in the event of a dismissal of a *petitio principii* objection on the part of scholarship underpinned by this assumption: in a way, this assumption implies that the vacuum which would be left if the respective *petitio principii* objection were disproved is one which scholarship based on this presumption has chosen to leave unaddressed. This assumption may underlie the view, expressed by the United Nations' International Law Commission (ILC) Special Rapporteur on CIL identification, Sir Michael Wood, that '[i]t is perhaps unnecessary, at least at this stage, to enter upon the question of the nature of the rules governing the formation and identification of rules of customary international law, for example, whether such rules are themselves part of customary international law'.[24] In support of this proposition, Special Rapporteur Wood quotes Sinclair's view on 'the debate on the nature of some rules of treaty law, particularly *pacta sunt servanda*', to the effect that such an enquiry involved 'doctrinal arguments', ultimately leading the enquirer to 'metaphysical regions'.[25]

[21] Y Dinstein, 'The Interaction between Customary International Law and Treaties' (2007) 322 RdC 295 [67]; which contrasts with the view of L Henkin, 'General Course on Public International Law' (1989) 213 RdC 9.

[22] For a more detailed discussion of various strands of *petitio principii* objections, see DG Mejía-Lemos, 'On Self-Reflectivity, Performativity and Conditions for Existence of Sources of Law in International Law' (2014) 57 GYIL 289.

[23] ibid.

[24] ILC, 'First Report on Formation and Evidence of Customary International Law by Michael Wood, Special Rapporteur' (17 May 2013) UN Doc A/CN.4/663 [38].

[25] ibid [38] fn 85 (quoting I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press 1984) 2–3).

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The remainder of this section proposes to set aside, for the sake of argument, the above *petitio principii* objections, and to focus, instead, on examining patterns of regulation of sources of law as they arise in general practice in which ICJ Statute Article 38(1) is used *outside* ICJ proceedings.[26]

There are two bodies of materials in which ICJ Statute Article 38(1) is used outside ICJ proceedings: decisions of international courts and tribunals and state practice itself. Bearing in mind the difference between these bodies of materials is very significant (a question to which Section 3 returns), and although this section is mainly concerned with selected state practice, it is worth recalling that the place of ICJ Statute Article 38(1) in decisions of international courts and tribunals is widely acknowledged.[27] For instance, Crawford observes that '[ICJ Statute] Article 38(1) has been taken as the standard statement of the so-called "sources" of international law for all international courts and tribunals'.[28] Charney, in a study concerning the proliferation of international courts and tribunals, reached a similar conclusion.[29] He inferred that uniformity among international courts and tribunals regarding the sources of law shows that the proliferation of international courts and tribunals has not eroded 'the international law doctrine of sources'.[30] The aforementioned reliance on ICJ Statute Article 38(1) by contemporary international courts and tribunals gives continuation to the analogous practice of arbitral tribunals constituted prior to the adoption of the ICJ Statute. Those tribunals invoked Article 38 of the Statute of the Permanent Court of International Justice (PCIJ).[31] As Mendelson observes, PCIJ Statute Article 38 had been 'treated as an authoritative list by

[26] MW Janis, 'The Ambiguity of Equity in International Law' (1983) 9 BrookJInt'lL 7, 10 ('article 38 has taken on an importance as a description of the "sources" of international law even outside the confines of the World Court'); JE Noyes, 'The International Tribunal for the Law of the Sea' (1999) 32 CornellInt'lLJ 109, 124 n 79; JA Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 MichJIntlL 215, 220 fn 18.

[27] See, recently, among others, N Grossman, 'Legitimacy and International Adjudicative Bodies' (2009) 41 Geo WashIntlLRev 107, 148 fn 182.

[28] J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 RdC 325, 392.

[29] JI Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 RdC 101, 235.

[30] ibid 236.

[31] See also Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 8 October 1921) 6 LNTS 389. Where practice predating the conclusion of the ICJ Statute is involved, Article 38 of the Permanent Court of International Justice (PCIJ) Statute is used for the same purposes.

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various arbitral tribunals'.[32] Earlier scholars had also recognised the significance of PCIJ Statute Article 38.[33]

The place of ICJ Statute Article 38(1) in general practice is paramount and more significant than credited in contemporary scholarship. This general practice, whereby states have characterised sources of law through express invocation of, or through statements largely consistent with those contained in, ICJ Statute Article 38(1), is twofold, taking the form of conduct of state organs for international relations, as well as decisions by state judicial organs.

The first category of relevant general practice consists in inter-state arbitration agreements, multilateral treaties beyond matters of dispute settlement, and statements in international organisations, including the United Nations (UN).

A paramount instance of this category is the very adoption of the ICJ Statute. Indeed, it is widely considered that the identity in content between Articles 38 of the PCIJ and ICJ Statutes, except for the opening sentence introduced in the latter, confirms the continuity of the rules stated in both provisions. Furthermore, for several scholars, this continuity evidences that what matters most about the statements contained in Article 38, common to the PCIJ and ICJ Statutes, is not their character as rules *qua* treaty, but their broader place beyond the confines of dispute settlement by the PCIJ and the ICJ, respectively.[34] That this wider significance was attributed to ICJ Statute Article 38 is further confirmed by the fact that proposals to modify its content, in order to account for other categories of acts with purported general lawmaking effects, were unanimously rejected in debates leading to the adoption of the UN Charter,[35] whose preamble expressly states the importance of the 'sources of international law'.[36]

[32] MH Mendelson, 'The Formation of Customary International Law' (1998) 272 RdC 155, 176–7 fn 21.

[33] See, in particular, the arbitral decisions and related arbitration agreements discussed by Verdross (n 4).

[34] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius 1987) 2 (referring to 'alteration' of 'numbering' and 'addition of a few words').

[35] During the UNCIO Conference in San Francisco, in which the UN Charter was drafted, the Philippines' proposal to attribute legislative powers to the UNGA was unanimously rejected. J Castañeda, 'Valeur Juridique des Résolutions des Nations Unies' (1970) 129 RdC 205, 212; G Arangio-Ruíz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations' (1972) 137 RdC 419, 447 ('Committee 2 of Commission II (10th meeting) had rejected by 26 votes to 1 the proposal of the Philippines that the Assembly be vested with legislative authority to enact rules of international law').

[36] S Chesterman, 'Reforming the United Nations: Legitimacy, Effectiveness and Power after Iraq' (2006) 10 SYBIL 59, 66.

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The reference to ICJ Statute Article 38 in other major multilateral treaties lends additional support to its wider role in the regulation of sources of law. For instance, the reference to ICJ Statute Article 38 in Articles 74(1) and 83(1) of the UN Convention on the Law of the Sea[37] is considered as a general ground for denying the character of equitable principles as legally binding.[38] Other major multilateral treaties, in which no reference to ICJ Statute Article 38(1) is made, are widely regarded as having been negotiated on the understanding that ICJ Statute Article 38(1) underpinned the terms used, as exemplified by Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[39]

Various states have made multiple statements to the effect that ICJ Statute Article 38(1) sets out the sources of 'positive' international law exhaustively and satisfactorily.[40] Even more pertinently, in some

[37] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397.

[38] A Strati, 'Greece and the Law of the Sea: A Greek Perspective' in A Chircop, A Gerolymatos & JO Iatrides (eds), *The Aegean Sea after the Cold War* (Macmillan 2000) 96 ('reference to Article 38 of the ICJ Statute indicates that an *ex aequo et bono* adjudication of the dispute is excluded' as well as 'an eventual application of equitable principles based on purely subjective appreciations and not on a rule of law').

[39] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159; AR Parra, 'The Convention and Centre for Settlement of Investment Disputes' (2014) 374 RdC 313, 380

> [t]he Report of the Executive Directors of the World Bank on the Convention explains that the term 'international law' in the second sentence of Article 42 (1) should be understood in the sense given to it by Article 38 (1) of the Statute of the International Court of Justice', since 'Article 38 (1) of the Statute ... represents an authoritative statement of the sources of international law.

[40] UNGA, 'Review of the Role of the International Court of Justice: Report of the Secretary-General' (15 September 1971) UN Doc A/8382, 24 [61] ('[r]egarding the law applied by the Court, it is the understanding of the Argentine Government that the Court applies *positive* international law as specified in Article 38 of its Statute') (emphasis added); UNGA, 'Review of the Role of the International Court of Justice *(concluded)*' (5 November 1974) UN Doc A/C.6/SR.1492, 166 (containing Brazil's statement that '[t]he sources of international law *were those* listed in Article 38 of the Statute of the International Court of Justice, *and those alone*') (emphasis added); UNGA, 'Review of the Role of the International Court of Justice *(concluded)*' 168 (containing Japan's statement that '[t]he sources of law enumerated in Article 38 of the Statute of the Court were *exhaustive*') (emphasis added); UNGA, 'Review of the Role of the International Court of Justice: Report of the Secretary-General' 24 [63] ('[o]n the question of the law which the Court should apply, the Mexican Ministry of Foreign Affairs on the whole considers Article 38 of the Statute of the Court *satisfactory as it now stands*; it is the ultimate definition of the sources of international law in their most widely recognized gradation') (emphasis added).

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instances, states may indicate that ICJ Statute Article 38(1) provides a 'legal basis' for statements about sources of international law. In doing so, states rely on ICJ Statute Article 38(1) as a 'legal basis' for the sources of law, whether seen as a category in whole[41] or with regard to individual sources. Furthermore, states rely on ICJ Statute Article 38(1) in order to deny that a subsidiary source is a proper source of law,[42] or to substantiate their affirmation that individual recognised sources are indeed sources of law proper.[43]

The second category of relevant general practice comprises two forms of state practice, namely decisions of domestic courts and other forms of practice in connection with domestic judicial proceedings. The former subcategory includes decisions constitutive of state practice, capable of giving rise to custom within the meaning of subparagraph (b) of ICJ Statute Article 38(1), by contrast to their other potential role, as a subsidiary means, under subparagraph (d) thereof. The latter subcategory encompasses pleadings by foreign states opposing the execution of arbitral awards before domestic courts of the place where execution is sought.

The authoritativeness of ICJ Statute Article 38(1) is widely affirmed by domestic courts and tribunals in the first subcategory of practice surveyed. For instance, the United States District Court for the Southern District of New York, in *Presbyterian Church of Sudan* v. *Talisman Energy, Inc*, observed that '[t]he Second Circuit has cited Article 38(1)

[41] UNGA, 'Report of the International Court of Justice – 42nd Plenary Meeting' (1 November 2007) UN Doc A/62/PV.42, 16–17 (containing Nicaragua's reference to ICJ Statute Article 38(1) as the legal basis for statements on the sources of international law).

[42] UNGA, 'Report of the International Court of Justice – 39th Plenary Meeting' (27 October 2005) UN Doc A/60/PV.39 (Malaysia stated that: 'Judicial decisions as such are not a source of law, but the dicta by the Court are unanimously considered as the best formulation of the content of international law in force').

[43] ILC, 'Survey on Liability Regimes Relevant to the Topic International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law: Study Prepared by the Secretariat' (23 June 1995) UN Doc A/CN.4/471, 35 [91] fn 119 (referring to Canada's claim against 'claim against the former USSR for damage caused by the crash of the Soviet satellite Cosmos 954 on Canadian territory in January 1978' reproducing Canada's statement to the effect that the principle of 'absolute liability' was a general principle of law within the meaning of Article 38(1)(c), ICJ Statute, and expressly referring to the provision); UN Committee on the Elimination of Racial Discrimination, 'Addendum to the Twelfth Periodic Reports of States Parties Due in 2006: Mozambique' (10 April 2007) UN Doc CERD/C/MOZ/12, (21) [82] (containing Mozambique's reference to ICJ Statute Article 38(1) as the basis for the proposition that custom is a source of international law).

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as an authoritative reflection of the sources of international law'.[44] This decision is notable for referring to the character of ICJ Statute Article 38 as a 'reflection' of, as opposed to a provision directly governing, sources of law. Other courts have emphasised the character of ICJ Statute Article 38 as a formulation enjoying authority beyond ICJ proceedings. For example, in *Handelskwekerij GJ Bier BV & Stichting Reinwater* v. *Mines de Potasse d'Alsace SA*, the Amsterdam District Court quoted ICJ Statute Article 38 and held that it 'must be taken as an authoritative formulation of the sources of international law, inside or *outside* the International Court of Justice'.[45]

Some domestic courts go on to indicate that reliance on ICJ Statute Article 38 is necessary, and not merely called for given its authoritativeness. The Argentine Supreme Court of Justice in both *Simon and others* and *Arancibia Clavel*, quoting ICJ Statute Article 38, observed that '[i]t is necessary to determine what are the sources of international law . . . what is provided for by the Statute of the International Court of Justice has to be taken into account'.[46] This stance was confirmed by the Argentine government in a statement at the UN, concerning the place of ICJ Statute Article 38 in its internal judicial practice.[47] Similarly, the Supreme Court of Chile, in *Lauritzen and others* v. *Government of Chile*, invoked ICJ Statute Article 38 in support of its statement that 'customs and treaties figure among the traditional sources, to which may be added principles'.[48] In other cases, such an invocation is stronger, being qualified to the effect that observance of ICJ Statute Article 38 is not only

[44] *Presbyterian Church of Sudan v Talisman Energy, Inc*, 244 F.Supp.2d 289 (SDNY 2003) 289, 304 (citing *Filartiga v Pena–Irala*, 630 F.2d 876 (2d Cir 1980) 881 n8).

[45] *Handelskwekerij GJ Bier BV & Stichting Reinwater v Mines de Potasse d'Alsace SA Handelskwekerij Firma Gebr Strik BV & Handelskwekerij Jac Valstar BV v Mines de Potasse d'Alsace SA* (8 January 1979) District Court of Rotterdam, [1979] ECC 206 [16] (emphasis added).

[46] *Julio Simón et al v Public Prosecutor* (14 June 2005) Supreme Court of Justice of the Argentine Nation, Case No 17.768, 103–4; *Chile v Arancibia Clavel* (24 August 2004) Supreme Court of Justice of the Argentine Nation, Case No 259 [50–51].

[47] UN Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Initial Reports of States Parties Due in 2004: Argentina' (13 November 2007) UN Doc CRC/C/OPAC/ARG/1, 5 [14] (containing Argentina's statement that under 'articles 116 and 117 of the Constitution, the Supreme Court has found that international custom and the general principles of law – the sources of international law in accordance with article 38 of the Statute of the International Court of Justice – are directly incorporated in the legal system').

[48] *Lauritzen et al v Government of Chile* (19 December 1955) Supreme Court of Chile, 52(9–10) RD 444.

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necessary, in a conceptual sense, but also legally required. For instance, the Indonesian Constitutional Court, in *Law 27 of 2004 on the Truth and Reconciliation Commission*, considered whether a given alleged general principle of law had been 'created in accordance with the provisions of the Statute of the International Court of Justice regarding the sources of international law'.[49] For similar purposes, Argentina invoked ICJ Statute Article 38(1)(b) before the Court of Cassation of Belgium in *Argentine Republic* v. *NMC Capital*, as a rule of law allegedly breached, in support of one of the grounds for her request for cassation.[50]

Before concluding this succinct survey of state practice, it is worth revisiting Jennings and Watts' discussion of the wider value of ICJ Statute Article 38(1). They reiterate their view that, since '[ICJ Statute] Article 38 . . . cannot be regarded as a necessarily exhaustive statement of the sources of international law for all time . . . [t]hose sources are what the practice of states shows them to be'.[51] And yet, a key aspect of their analysis of the continuing wider relevance of ICJ Statute Article 38(1) lies in '[t]he fact that the International Court of justice, in its numerous judgments and opinions relating to international organisations, has always been able . . . to dispose of the questions arising for decision'.[52] While Jennings and Watts justifiably refer to the practice of the ICJ, since they were concerned with the sufficiency of relying on ICJ Statute Article 38(1) in ICJ proceedings, their reference is notable because it is representative of the tendency to exclusively focus on decisions of international courts and tribunals in spite of general statements to the effect that the primary object of enquiry should be state practice itself. As discussed in Section 3, Jennings and Watts are not alone in their tendency, as the work of earlier scholars who did not raise any *petitio principii* objection to the possibility of CIL on sources of law shows. Indeed, Section 3 shows that practice-based accounts, whether source-based or not, have heretofore tended to overlook state practice itself, given their assumptions regarding state practice, particularly as to decisions of domestic courts.

The character of decisions of domestic courts as general practice has raised various questions, which call for some elucidation of their precise

[49] *Law 27 of 2004 on the Truth and Reconciliation Commission* (2 August 2006) Constitutional Court of the Republic of Indonesia, Perkara No 006/PUU-IV/2006, 5 [131].

[50] *République d'Argentine v NMC Capital LTD* (22 November 2012) Court of Cassation of Belgium, C.11.0688.F.

[51] Jennings & Watts (n 1) 45 [16].

[52] ibid 46 [16].

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nature,[53] before turning to the question of the existence of a CIL on sources of law based on states' general practice primarily in the form of decisions domestic courts. It is common to treat selected judicial decisions as 'subsidiary means' under ICJ Statute Article 38(1)(d).[54] This tends to be the case despite their multiple roles.[55] One of those roles is as a form of general practice under ICJ Statute Article 38(1)(b).[56] Lauterpacht had reached the same conclusion regarding PCIJ Statute Article 38.[57] Several scholars likewise accept that these two roles may be concurrently performed.[58]

Leaving aside the dual role a domestic court decision may play under subparagraphs (b) and (d) of ICJ Statute Article 38(1), and focusing on the former role, there is some debate as to whether the two elements of custom within the meaning of subparagraph (b) are present. Whether a decision of a domestic court constitutes practice is a question which partially overlaps with debates over whether practice need consist in physical, as opposed to verbal, acts. Those debates have lost currency, since it has become increasingly uncontroversial to regard verbal acts, including in the form of written statements, as a form of state practice. Indeed, both the ICJ,[59] the

[53] T Giegerich, 'The Case-Law of the European Court of Human Rights on the Immunity of States' in A Peters et al (eds), *Immunities in the Age of Global Constitutionalism* (Brill/Nijhoff 2015) 68 (critiquing their 'ambiguous role' in the 'doctrine of sources').

[54] A Kaczorowska-Ireland, *Public International Law* (5th ed, Routledge 2015) 53 (noting ICJ Statute Article 38(1)(d) 'is not confined to international decisions'). Some wrongly refer to ICJ Statute Article 38(1)(c). See, for example, S Beaulac, 'National Application of International Law: The Statutory Interpretation Perspective' (2003) 41 Can YBIL 225, 239 fn 81 (noting that under ICJ Statute Article 38(1)(c) 'judicial decisions, including those of domestic courts, are a subsidiary source').

[55] See for example M Frankowska, 'The Vienna Convention on the Law of Treaties before United States Courts' (1988) 28 Va J Int'l L 281, 381 (deeming ICJ Statute Article 38 as 'the proper framework' to assess domestic courts' 'functions' but referring to 'article 38(d)' only).

[56] *Jurisdictional Immunities of the State (Germany/Italy, Greece intervening)* (Judgment) [2012] ICJ Rep 131, 132 [72] (relying on '[s]tate practice in the form of the judgments of national courts').

[57] H Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 BYBIL 65, 86 (indicating that PCIJ Statute Article 38(2) was where domestic courts decisions found their 'true *sedes materiae* . . . in their cumulative effect as international custom').

[58] Mendelson (n 32) 200 ('[d]ecisions of national courts thus perform a dual function'); Arajärvi (n 17) 31 (suggesting that this is the case 'even if overlapping with' each other's function).

[59] *Jurisdictional Immunities of the State* (n 56) 141 [72].

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ILC,[60] and some states commenting on the ILC's recent work on CIL identification,[61] have acknowledged that decisions of domestic courts can constitute general practice for the purposes of custom formation and CIL identification. An alternative rationale for the reluctance to accept state practice in the form of domestic courts decisions might lie in the assumption that CIL only encompasses normative regulation. Such an assumption would confine CIL to primary rules, to the exclusion of non-normative regulation, of which secondary rules, including rules on sources of law, are a notable instance. This assumption would translate into a view demanding that all CIL rules derive from the kind of general practice which underlies CIL primary rules, often derived from practice in the form of physical acts. As discussed in Section 1, this assumption results from a misconception requiring all forms of regulation to be normative. The character of decisions of national courts as a form of acceptance as law, or *opinio juris*, on the other hand, has raised less controversy.[62] Some accept their role, but qualify which decisions are more suitable to constitute *opinio juris*.[63]

The question of whether and how the two constitutive elements of custom may be satisfied by a set of statements, including those in domestic court decisions, warrants some further examination. Some scholars have accepted the concurrent character of decisions of national courts as practice and acceptance as law.[64] While the concurrent character of internal judicial

[60] ILC, 'Identification of Customary International Law, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee' (30 May 2016) UN Doc A/CN.4/L.872, 3 ('[f]orms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: . . . decisions of national courts').

[61] South Korea points to the 'natural [fact] that the form of state practice . . . and the evidence of acceptance as law . . . overlap to a considerable degree, since it most cases acceptance as law should be identified through state behavior or relevant documentation'. Republic of Korea, 'Comments and Observations on the ILC Topic "Identification of Customary International Law"' (*ILC*, 22 December 2017) 2 [3] <https://bit.ly/3r9bZzp> accessed 1 March 2021. Switzerland, for their part, commenting on draft conclusion 11 under the heading 'double-counting', goes on to state that 'the possibility of double counting is accepted by the Swiss authorities, but is not necessarily used' ('*la possibilité du double-comptage est admise par les autorités suisses, mais n'est pas nécessairement utilisée*'). Swiss Confederation, 'La pratique suisse relative à la détermination du droit international coutumier' (*ILC*, 2017) 53 <https://bit.ly/3oVWp7G> accessed 1 March 2021 (internal references omitted).

[62] ibid.

[63] Kaczorowska-Ireland (n 54) 53 (a domestic court decision 'in particular of a highest court of a particular State expresses the *opinio juris* of that State').

[64] R O'Keefe, *International Criminal Law* (Oxford University Press 2015) 110 ('decisions of municipal domestic courts on points of international law . . . constitute . . . state practice and accompanying *opinio juris* on the part of the forum state').

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decisions may be contested given its potential for so-called 'double-counting',[65] a set of separate verbal acts cannot be lightly disregarded as establishing both elements of custom. For instance, Argentina's position is apposite, as an example of how a variety of separate statements, including domestic court decisions, may constitute general practice in support of a position and acceptance as law of that position. Indeed, while Argentina's judicial organs engage in actual instances of practice, such as the invocation of ICJ Statute Article 38(1) in decisions of the Argentine Supreme Court, among others, other organs separately issue statements clearly indicating that state's *opinio juris* to the same effect, such as Argentina's unequivocal statements at the UNGA concerning the legal value of ICJ Statute Article 38(1).

3 Customary International Law as *Law* on Sources of Law in International Law: Custom *in Foro* or *in Pays*?

This section examines selected claims of existence of law on sources of law, with a particular focus on major models of CIL rules on sources of law, in international law.

The claim that ICJ Statute Article 38 contains statements regarding CIL rules on sources of law has taken various forms. Some advance the claim unqualifiedly. For instance, Ohlin has recently stated that ICJ Statute Article 38 '*embodies* a customary norm' regarding the sources of international law.[66] He goes on to argue that ICJ Statute Article 38 is such a 'direct statement about the sources of law' that it 'might be the closest thing one could find in any legal system –domestic or international – to a pure rule of recognition'.[67]

Some add that ICJ Article 38, while not directly embodying CIL rules on sources of law, is reflective or declaratory of such CIL rules.[68] While both claims point in the right direction, the view that ICJ Statute Article 38 is reflective, rather than directly constitutive, of CIL is more accurate. Hence, ICJ Statute Article 38 does not in itself 'embody' CIL. As Sur

[65] See Mendelson and Schwebel's critique of the ICJ decision in *Nicaragua*, discussed in M Mendelson, 'The Subjective Element in Customary International Law' (1996) 66 BYBIL 177, 206 fn 196.

[66] JD Ohlin, *The Assault on International Law* (Oxford University Press 2015) 23 (emphasis added).

[67] ibid (adding, for instance, that such a statement cannot be found 'in the US legal system').

[68] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1994) 22.

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explains metaphorically, CIL, albeit 'invisible', is reflected in 'mirrors', and yet 'these mirrors are not the rule' of CIL.[69]

The claim that ICJ Statute Article 38(1) has a declaratory or reflective character with respect to sources of law is formulated variously.[70] Some refer to a 'doctrine', but not to rules as such. For example, Dolzer refers to 'the traditionally accepted doctrine of sources, as reflected in the [PCIJ and ICJ] Statutes . . . (Article 38)'.[71] Some do refer to rules as being reflected, but do not indicate their legal character. For instance, Tomuschat simply refers to '[t]he rules on law-making, as they are reflected in Article 38(1) of the ICJ Statute'.[72] Other scholars refer to the existence of law and its being declared by ICJ Statute Article 38, without indicating the source of the law declared.[73]

Those who claim that ICJ Statute Article 38 is reflective or declaratory of CIL on the sources of international law may qualify those CIL rules as being of general character. This is illustrated by Abi-Saab, who, noting that ICJ Statute Article 38(1) is commonly perceived to be declaratory of 'general international law' on sources, adds that such general international law corresponds to Hart's 'secondary rules of change'.[74] Some of those who deem ICJ Statute Article 38 as declaratory sometimes hold this claim in relation to propositions regarding specific sub-systems of international law.[75]

The attribution of the character as declaratory or reflective of CIL to ICJ Statute Article 38 is not entirely novel, since this was equally

[69] Sur (n 6) 149.

[70] Debates over ICJ Statute Article 38's character as declaratory of CIL on sources of law are not to be confused with the debate over the character of custom as non-constitutive, but merely 'declaratory', of a form of pre-existing law. For a discussion of the latter debate, which ultimately concerns whether custom is a proper source of law, see P Guggenheim, 'Les Principes de Droit International Public' (1952) 80 RdC 2, 70; Kelsen (n 7) 124. The two debates should be distinguished even if the latter debate arguably had an impact on the drafting of PCIJ Statute Article 38, as Kelsen pointed out.

[71] R Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 AJIL 553, 556.

[72] C Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241 RdC 195, 240.

[73] DC Vanek, 'Is International Law Part of the Law of Canada?' (1950) 8 UTLJ 251, 254 ('although the provisions of that Article relate to a particular court, they are merely declaratory of existing law').

[74] Abi-Saab (n 14) 191.

[75] G Acquaviva & A Whiting, *International Criminal Law: Cases and Commentary* (Oxford University Press 2011) 21 (characterising as 'declaratory of customary international law' Article 38(1)(d) in connection with the proposition that there is no *stare decisis* in international criminal law).

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predicated of PCIJ Statute Article 38. Verdross cited approvingly a 1928 arbitral award holding that, in the event of 'silence of the *compromis* on the sources of law, every international arbitral tribunal must apply the rules of the law of nations, taking into account the definition contained in Article 38 of the [PCIJ] Statute'. Verdross implied that custom served as legal basis for findings like this one. In fact, he inferred from the 'long history' of arbitral tribunals' invocation of general principles of law (a source of law already included in PCIJ Statute Article 38) without 'special authorisation', that 'the application of such principles has been sanctioned by international custom'.[76] It is notable that Verdross, unlike Jennings and Watts, did not see any inconsistency in relying on a source of law, such as custom, as basis for the legal character of another source of law, such as general principles of law. Lauterpacht also deemed PCIJ Statute Article 38 as declaratory of 'custom expressed by a long series of conventions and arbitral awards'.[77] Lauterpacht added, with particular reference to PCIJ Statute Article 38(3) (which would become ICJ Statute Article 38(1)(c)), that it was 'purely declaratory' since, prior to the PCIJ Statute, both 'arbitral practice and arbitration agreements' recognised general principles of law.[78]

Various leading authors have more recently noted that declaratory character is attributed to ICJ Statute Article 38. With respect to ICJ Statute Article 38(1)(c), Jennings and Watts, despite their *petitio principii* objection, reported on the 'fact' that 'a number of international tribunals, although not bound by the Statute, have treated that paragraph of Article 38 as declaratory of existing law'.[79] Monaco pointed to the role of PCIJ Statute Article 38 in giving concrete expression to a 'preexisting practice'.[80] Sur, likewise, attributes declaratory character to PCIJ Statute Article 38.[81] Pellet, in his 2012 survey of uses of ICJ Article 38, discusses various international instruments, and implies that some refer indirectly to ICJ Statute Article 38.[82]

[76] Verdross (n 4) 199.
[77] Lauterpacht (n 4) 164 fn 2.
[78] ibid 163–4.
[79] Jennings & Watts (n 1) 39 [12].
[80] R Monaco, 'Cours Général de Droit International Public' (1968) 125 RdC 93, 188 fn 1.
[81] Sur (n 6) 142.
[82] Pellet (n 19) 745 [50] fn 77 (discussing, among others, arbitration agreements which refer to Article 33 of the Optional Rules for Arbitrating Disputes between Two States of the Permanent Court of Arbitration).

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Some have gone further, holding that ICJ Statute Article 38 codifies the 'sources' of international law,[83] or, more precisely, the CIL rules governing the 'sources' in international law.[84] Supporters of the view that ICJ Statute Article 38 is codificatory include earlier scholars, such as Lauterpacht.[85] Along similar lines, Conforti referred to the role of PCIJ Statute Article 38 as a codification of the 'practice followed by international tribunals'.[86] Lepard, for his part, not only claims that ICJ Statute Article 38 is codificatory, but also attributes to it authoritativeness as a statement of CIL rules on sources of international law directly.[87] Lepard's statement is notable, since most contemporary writers who regard ICJ Statute Article 38 as authoritative fail to indicate whether it is so *qua* treaty or *qua* statement of a separate rule, including any CIL rule.

The foregoing discussion has shown that, in essence, there are two models of CIL on sources of law in scholarship. Before delving into these two models, a discussion of some conceptual underpinnings is warranted. In particular, Bentham's distinction between custom *in foro* and custom *in pays* sheds light on the nature of these two models.[88]

[83] See R Alfert, 'Hostes Humani Generis: An Expanded Notion of US Counterterrorist Legislation' (1992) 6 EmoryInt'lLRev 171, 198 fn 128 (quoting ICJ Statute Article 38 and stating that 'Section 102 of the Restatement (Third) . . . also codifies existing sources of international law').

[84] The attribution of codificatory character to ICJ Statute Article 38 is discussed by several authors, including those who approve of this view. See Abi-Saab (n 14) 191; Sur (n 6) 75 ('Article 38 itself is indeed generally regarded as codifying a customary rule' ('*[l]'article 38 lui-même est en effet généralement considéré comme codifiant une règle coutumière*')); Virally (n 16) 167 ('[t]he codification of the system of sources of international law is generally considered as effected by Article 38 of the Statute of the International Court of Justice . . . [t]his Article lists three series of sources' ('*[l]a codification du système des sources du droit international est généralement considérée comme effectuée par l'article 38 du Statut de la Cour internationale de Justice . . . [c]et article énumère trois séries de sources*')).

[85] See Lauterpacht's statement in his capacity as Special Rapporteur of the ILC, cited in M Lachs, 'Teachings and Teaching of International Law' (1976) 151 RdC 161, 177 fn 3.

[86] B Conforti, 'Cours Général de Droit International Public' (1988) 212 RdC 9, 77.

[87] BD Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (Penn Press 2003) 100 ('[t]hese rules regarding the "sources" of international law . . . are now codified in Article 38 of the Statute of the International Court of Justice . . . often regarded as an authoritative statement of the customary rules regarding the sources of international law').

[88] J Bentham, *A Comment on the Commentaries* (JH Burns & HLA Hart eds, Oxford University Press 1977) 182–4, cited by G Lamond, 'Legal Sources, the Rule of Recognition, and Customary Law' (2014) 59 American Journal of Jurisprudence 25, 43.

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This distinction has been recently revisited by Lamond, as part of his critique of Hart's conception of the rule of recognition. Lamond argues that Hart's characterisation of the rule of recognition as a form of 'collective social practice of officials'[89] fails to account for its additional, and more important, character as 'a form of customary law'.[90] Significantly, Lamond advocates the importance of characterising rules on sources of law as customary, not merely as practice-based. While Lamond does not put forward a source-based model of customary rules of recognition, his analysis of the character of the rule of recognition as a form of law standing on an equal footing with other forms of law within a legal system is pertinent.[91]

The following discussion focuses on Lamond's conception of customary rules of recognition, its transferability to an analysis of international lawmaking, and the various aspects of his portrayal of that kind of customary law as internal, systemic and foundational.

The internal character of the rule of recognition is an important aspect, and its denial, particularly where justified by the comparison between games and law, warrants further examination. Lamond contests the relevance of this comparison, which holds that, since players of games are not required to determine the rules of the game as part of the game, those second-order rules are not part of the rules of the game. Instead, Lamond argues, the assumption that game-playing necessarily excludes the creation of rules of game-playing does not hold true with respect to legal systems, which are precisely concerned with a wide range of regulation, 'including crucially the activities of law-identification and law-creation themselves'.[92] Lamond's critique of the widespread reliance on the 'rules of the game' comparison to justify a segregation of the rule of recognition from other rules of law is apposite, in the sense that it reminds that a separation in all respects of secondary rules from primary rules, including as to their making and identification, is mistaken. This, as discussed in Section 1, would be as unjustified as assuming that all regulation need be normative in nature. Indeed, leaving aside functional differentiations, secondary and primary rules may partake in the same properties, as rules of the same legal system, including their source-based creation and identification. This is all the more relevant in international law, given its so-called

[89] ibid 26.
[90] ibid (emphasis omitted).
[91] ibid 31.
[92] ibid 38.

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horizontality whereby, among others, even *jus cogens* rules need not 'displace [the] application' of certain non-peremptory rules.[93]

The systemic character Lamond attributes to custom, is also of relevance to international lawmaking. Lamond's systemic account of acceptance aptly introduces the idea of levels of analysis. Indeed, while acceptance may occur at the separate levels of an individual rule and that of the legal system, acceptance ultimately performs the same function, including at the second-order level where a rule of recognition operates.[94] A similar approach is defended by Mendelson in his analysis of the place of consent in the formation of custom. In particular, Mendelson aptly critiques voluntarist theories for importing consent '[a]t the most general, systemic level' into the 'identification-of-sources level'.[95]

The source-based character of a customary rule of recognition is an area where Lamond's model may be of limited relevance, and, in a way, partake in the shortcomings of Hart's conception of the rule of recognition, for the purposes of international lawmaking. For Lamond, the rule of recognition's foundational character does not detract from its place as internal to the legal system. Indeed, he argues, 'the fact that the rule of recognition is the ultimate basis for source-based standards in the system, and does not owe its status to satisfying the criteria in some further standard, does not show that it is not internal to the system of laws'.[96] He appears to accept the idea that the non-application of the standard demanded by the rule of recognition for the creation of custom to the very creation or identification of the rule of recognition is not at odds with the character of the rule of recognition as a customary rule which is internal to the legal system. This seems to be justified by Lamond's apparent view that source-based and non-source-based law are equal parts of a legal system. This view is evidenced by his conception of custom *in foro*. He defines custom *in pays* as 'the custom of non-officials recognized by the law . . . not . . . the custom of the officials themselves'. By contrast, he defines custom *in foro* as 'customary law' which 'rests on being applied in the practice of the courts'. In particular, he lays out four features of custom *in foro*: 'customary legal standards . . . are: (a) authoritative for the courts; (b) not validated by another legal standard; (c) depend for their existence on being applied in the practice

[93] *Jurisdictional Immunities of the State* (n 56) 141 [95].
[94] Lamond (n 88) 39.
[95] Mendelson (n 32) 261–3.
[96] Lamond (n 88) 39.

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of the courts; and (d) belong to a system of laws'.[97] Nevertheless, establishing a source of law for rules governing sources of law is key to properly determine how such rules may be created, changed or terminated. Lamond himself seems to hint at the importance of characterising a rule as customary, including the rule of recognition, since such an understanding determines '[a]t a practical level, . . . how we think they can or cannot be altered'.[98] Yet, it is unclear why understanding the rule of recognition as a form of customary law, without treating it as a form of source-based law, derived from a custom, suffices to determine how that customary law can be changed, let alone how it is created or terminated. As the present author has shown elsewhere with regard to strands of constitutional theories of international lawmaking, theories which do not identify a source of law for rules regulating sources of law are bound to fail in their attempts to properly account for changes of those rules.[99]

It is fitting to now discuss a caveat to the distinction between custom *in foro* and custom *in pays*. Lamond states that '[c]ustomary international law is most similar to the custom of non-officials recognized by the law (custom '*in pays*'), not to the custom of the officials themselves'.[100] This caveat is partly accurate. On one hand, it may misrepresent the dual character of states as both law-addressees (and, in that sense, non-officials) and lawmakers (and, thus, officials, to the extent that they have lawmaking power), a duality encapsulated in Scelle's concept of '*dédoublement fonctionnel*'.[101] On the other hand, Lamond's caveat correctly reminds that custom is a source through which the general practice of subjects of law becomes law (custom *in pays*), independently of the practice international courts and tribunals develop as they settle disputes (akin to a custom *in foro*). Indeed, the 'officialdom' of international courts and tribunals, in their capacity as dispute settlers, is typically limited to the confines of the jurisdiction to which the subjects of law submitting their disputes have consented.

Despite being evidently inconsistent with the tenet of the primacy of state practice, as primary subjects of international law, the large majority of existing theories of CIL on the sources of law are largely modelled after a form of custom *in foro*. As such, those theories seek to establish the existence, scope and content of rules on sources of law without due

[97] ibid.
[98] ibid 27.
[99] Mejía-Lemos (n 22).
[100] Lamond (n 88) 43.
[101] G Scelle, 'Règles Générales du Droit de la Paix' (1933) RdC 1, 358.

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consideration of any relevant general practice of states. Instead, custom is frequently ascertained primarily by reference to decisions of international courts and tribunals. Exceptionally, selected decisions of domestic courts may be examined, provided that they can be regarded as more authoritative than regular national judicial decisions and placed on the same plane as international decisions. This is the model followed by various leading writers supportive of CIL accounts of regulation of sources. In fact, Lauterpacht and Verdross reached their conclusion as to the declaratory status of PCIJ Statute Article 38 solely on the basis of its use by international tribunals other than the PCIJ, without placing the various arbitration agreements underling those treaty-based arbitrations at the centre of their respective claims of existence of CIL then declared by PCIJ Statute Article 38. This model is replicated in more recent accounts which accept the idea of CIL rules on sources of law, as exemplified by Tams' analysis of 'meta-rules' on sources of law, which focuses mainly on ICJ decisions.[102]

By contrast, a model of CIL whereby custom is created through (and ascertained by reference to) state practice proper, is what the notion of custom *in pays* calls for. By means of such general practice, states make determinations as to sources of law in various contexts, whether they engage in lawmaking or in law-identification in connection with dispute settlement proceedings, on the basis of rules which they accept as law. This kind of custom is a model of CIL which is advocated by some scholars, albeit the degrees to which they substantiate their claims varies. Major examples of claims of CIL on sources of law which intend to rely on state practice, but do not fully substantiate those claims by reference to actual instances of state practice, can be found in the work of Henkin. He argued that customary law was a default category including diverse bodies of law which would not necessarily meet the requirements for the existence of custom proper. Nevertheless, and interestingly for the purposes of the present chapter, Henkin claimed that there exists custom regulating the sources of law, and considered that it constituted a form of custom proper, one based on actual general state practice and accepted as law.[103]

[102] CJ Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 LPICT 51.

[103] Henkin (n 21) 54 (arguing that '[t]he norm governing the making of customary law – the requirement of consistent general practice plus *opinio juris* – is . . . developed by custom, by general, repeated practice and acceptance').

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4 Conclusions

This chapter has explored various aspects of the idea that there may exist a law on the sources of law, as opposed to a mere theory or doctrine thereof, in the form of CIL. In doing so, the chapter has provided an overview of the existing theories, both in general jurisprudence and international law scholarship, and assessed their limitations and merits.

Section 1, by way of background, has indicated that, in spite of sharing important common ground, as with many other vexed issues in the theory of the sources of international law, there is a controversy as to the idea of regulation of sources of law and the legality of rules on sources of law, if any, among major schools of thought. At the core of debates concerning this idea, it was submitted, is the fact that regulation tends to be conflated with normativity, unjustifiably denying the legality of non-normative regulation.

Section 2, in particular, has shown that the standard position, albeit professing to be practice-based, rejects a source-based account of regulation of sources of law, on grounds of a *petitio principii* objection. It has proposed to set aside, for the sake of argument, any *petitio principii* objection(s), and suggested that the standard account, seemingly assuming the futility of the idea of regulation of sources, has neglected the task of addressing alternative arguments against a source-based account of the regulation of sources of law. In addition, it has examined the idea of custom's inherent features, which make it especially suitable to create general rules of universal scope. Furthermore, it has provided an overview of state practice invoking ICJ Statute Article 38(1) in contexts other than proceedings before the ICJ. It has further shown that there is evidence that this general practice is accepted as law. In addition, it has argued in favour of reaffirming the centrality of state practice itself, including in the form of decisions of domestic courts, as opposed to the typical exclusive reliance on decisions of international courts and tribunals with respect to the regulation of sources of law.

Section 3 has provided an overview of some accounts of CIL on sources of law and has proposed to conceptualise these accounts in terms of two models, along the lines of Bentham's distinction between custom *in foro* and *in pays*, as revisited in recent general jurisprudence literature. In this vein, it has discussed in detail Lamond's recent critique of the rule of recognition which, relying on the distinction between custom *in foro* and custom *in pays*, argues in favour of treating the rule of recognition as a rule of customary law having the same properties as any legal rule of the

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legal system. Section 3 has argued that, to the extent that this critique is apposite to international law, the insights it contains shed light on the nature of a CIL regulating the sources of law in international law.

To conclude, the chapter suggests that the persistence of custom *in foro* as a model for CIL regulation of the sources of law, a matter calling for further research, may detract from the potential for establishing the existence of a CIL regulating the sources of international law on the solid grounds of proper state general practice and acceptance as law thereof.

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