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Custom and the Regulation of ‘the Sources
of International Law’

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

Diego Mejia Lemos*

'It is the practice of states which demonstrates which sources are acknowledged as giving rise to rules having the force of law. It is useful, however, to consult Article 38 of the Statute of the International Court of Justice [...] Article 38 cannot itself be creative of the legal validity of the sources set out in it, since it belongs to one of those sources itself. 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

I. The Regulation of Sources of Law

The *law* on the sources of international law, if any, appears to be largely neglected by scholarship. So seems to be state practice of *regulation* of the sources of international law, even where questions about any legal consequences of such practice are not addressed. That these two aspects of law-making 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) Statute³ almost invariably features in all of these controversies. ICJ Statute Article 38(1) also appears continuously in state practice regarding the sources of international law outside ICJ proceedings. This continuous use of ICJ Statute Article 38(1) has been largely left unaddressed in (especially contemporary) scholarship. Two positions about such state practice may be found among scholars and (albeit less frequently) international courts and tribunals. On one hand, some accept that regulation patterns are inferable from such state practice, but stop short of drawing any legal consequences from those patterns. On the other hand, some 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, of which the first epigraph is representative, has become the standard one. The latter position, of which the second epigraph is representative, enjoys support among some leading (mostly early) commentators and (at least) one international court.

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¹ Jennings & Watts (1992) 24 para 9.

² *Prosecutor v Vlastimir Đorđević* (Appeals Chamber Judgment) IT-05-87/1-A (27 January 2014), para 33 n 117.

³ Statute of the International Court of Justice, 18th April 1946 (33 UNTS 993, UKTS 67 (1946) Cmd 7015, 3 Bevans 1179, 59 Stat 1055, 145 BSP 832, TS No 993).

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The article provides overviews of selected issues revolving around the idea of regulation of sources of law and of selected state practice on sources of law, which forms the basis of both the standard and the CIL positions. The paper then proceeds, in order to examine the CIL position at greater length, to outline the major existing models of CIL on sources of law in international law. The paper, furthermore, sketches a critique of major CIL models, relying, among others, on the distinction between custom *in foro* and custom *in pays*, as revisited in recent scholarship. This critique, in essence, proposes that models of CIL as custom *in foro*, while apposite as to certain of its premises and elements, is unsuitable as a model of CIL on sources of law in international law proper. Instead, the paper argues, a model which regards that part of CIL as a form of custom *in pays* (albeit one which accounts for state practice *in foro domestico* alongside other relevant practice) may be, subject to some caveats, more suitable.

The remainder of this introductory part introduces the idea of regulation of the sources of international law with some more detail.

'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.⁴ Kelsen, for instance, observed that it designates not only 'modes' of law-making and 'reasons' for law's validity, but also law's 'ultimate fundament'.⁵ According to Truyol y Serra, the linkage of these two aspects of law-making accounts for various controversies.⁶ In this latter regard, as Dupuy correctly noted, it ought to be, and in way has increasingly been, accepted that a source of law is distinct from international law's ultimate fundament.⁷

Despite some consensus about the distinction between the fundament of the legal order and law-making within the legal order, various disputes about the nature of the sources of international law stemming from the concept's polysemy remain unresolved. As Ago pointed out, other differences over their nature result from persistent reliance on certain assumptions,⁸ and, as Truyol y Serra observed, variations as to those assumptions result in the intractability of various controversies.⁹ Some of those assumptions, in turn, may involve a conflation of levels of analysis. Indeed, writers of various schools of thought express their awareness that various levels of analysis may be involved.¹⁰ Tunkin, for instance, regarded international law

⁴ Sur (2013) 76 ('[l]a critique de la pertinence de la notion de «sources» repose sur la multiplicité de ses sens qui la rend équivoque et trompeuse.')

⁵ Kelsen (1953) 119.

⁶ Truyol y Serra (1981) 231 ('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'.)

⁷ Dupuy (2002) 188 ('[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 Hoof (1983) 71 (casting aside 'the source in the first sense', namely 'the basis of the binding force of international law'.)

⁸ Ago (1956) 916 (calling for an analysis of the terms of those problems.)

⁹ Truyol y Serra (1981) 231 (noting that controversies are 'conditionnées par les positions de départ des auteurs respectifs'.)

¹⁰ Schutter (1990) 124 (speaking of 'three levels of analysis').

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as a 'multi-level system'.¹¹ Various scholars, such as Abi-Saab and Wood, rightly warn against such a conflation.¹²

The idea of regulation, as it pertains to the sources of law in international law, is accepted by various writers. In particular, the view that not only is there a phenomenon of regulation of sources of law in international law, but that such regulation is carried out by a 'system of sources' contained within the legal order of international law as a whole, is supported by Virally. Indeed, Virally deemed legal orders generally to be 'self-regulated' in this regard. Virally's support for the 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.¹³ In this vein, the level of analysis is that of the rules performing such self-regulation, and not that of the various circumstances and processes within the framework of which such self-regulation is performed.

II. Custom as Source of Rules arising out of State Practice on Sources of Law

This part examines the place of custom in the regulation of the sources of international law, with a particular focus on custom's role as a 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 acknowledged in the literature. An analysis of custom's suitability as a source of universal rules includes a comparative analysis, vis-à-vis other sources of law.¹⁴ Comparative analyses of custom's suitability tend to point out its inherent qualities. For instance, Marek argued that custom's inherent qualities rendered it 'superior' to a treaty as a source of universal rules.¹⁵ 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.¹⁶

Those who contest the suitability of custom often hold similar views to the ones underlying the standard denial of the possibility of regulation of sources of law by any rule,

¹¹ Tunkin (1989) 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).')

¹² Abi-Saab (1987) 34 ('il est important d'être conscient du niveau d'analyse auquel on se situe.');

Wood (1997) 256 (referring to the 'tension between', but not conflating in his analysis, 'law and policy in connection with the former Yugoslavia.');

Wood (2013b) para 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'.)

¹³ Virally (1983) 167 ('chaque ordre juridique dispose-t-il de son propre système de sources [...] l'ordre juridique est un système autorégulé. Il ne dispose pas, cependant, d'une liberté totale [...] il est aussi conditionné par les particularités, institutionnelles, sociologiques [...] qui expliquent les caractères spécifiques du système des sources de l'ordre juridique international'.)

¹⁴ Some of those who accept the possibility of legal rules on law-making hold the view that such rules may take the form of either CIL or general principles of law. See, for instance, Arajärvi (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.')

¹⁵ Marek (1970) 75 (discussing *North Sea Continental Shelf*.)

¹⁶ Marek (1970) 75. On the character of hierarchical properties as normative and not formal, see, among others, Pellet (2012) 846 para 284; Leal-Arcas, Filis & Abu Gosh (2014) 364 n 128.

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let alone a source-based legal rule. For instance, Dinstein considers that reliance on CIL rules on 'how and when custom is brought into being' inherently involves 'a *petitio principii*'.¹⁷

The possibility that regulation of sources of law may take place by means of a rule created through one of the regulated sources of law is often denied. This denial lies at the core of various positions on the nature of the sources of international law, including the standard position, accepting the existing of patterns of state practice but denying the legality of any rules resulting from such regulatory patterns. This view is also at the core of schools of thought which deny entirely the idea of rules on sources of law, as well as those which accept that such rules may exist, but deny that the rules in question are legal or, if legal, based on one of the sources of law so regulated. The present author has advanced elsewhere a critique of selected schools of thought on grounds of their adoption of a variation of the view that regulation by source-based legal rules of sources of law involves a *petitio principii*.¹⁸

This critique is not restated in this paper, as it cannot be undertaken again within the limited scope of this paper, nor is it required to fulfil its present purposes. It is, perhaps, apposite to point out before proceeding that, 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 the various forms of scepticism as to the idea of regulation or, where accepted, its legal form (whether customary or not) underpinning a major strand of the standard position.¹⁹

This scepticism is not easily amenable to analysis, since it appears to be latent in that body 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. This scepticism, in turn, may involve the view that any regulation of sources of law, or, where a practice-based approach is adopted in which a regulatory pattern is observed in state practice, any legal rule embodying such regulatory patterns, is futile. The assumed futility of regulation of sources of law or its legality may explain the lack of arguments in the alternative to the *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 *petitio principii* objection were disproved is one which scholarship based on this presumption has chosen to leave unaddressed. The assumed futility of such an alternative enquiry may be evidenced by the view, expressed by Special Rapporteur 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

¹⁷ Dinstein (2007) 295 para 67.

¹⁸ Mejía-Lemos (2014).

¹⁹ Mejía-Lemos (2014) (distinguishing two major strands of the *petitio principii* objection, namely logical and constitutional, and noting that the constitutional strand, while accepting the possibility of rules on sources of law, remains subject to the *petitio principii* element concerning the impossibility of a source-based rule, although the impossibility is transferred to the level of constitutional rules posited in the constitutional strand – whether asserted or assumed as a hypothetical *Grundnorm*. The scepticism mentioned above would be predicable of the logical strand.)

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example, whether such rules are themselves part of customary international law'.²⁰ In support of this proposition, 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' consideration of which of necessity leads us into somewhat metaphysical regions'.²¹

Turning to the topic addressed in this part, after the above brief *excursus* concerning a potential objection on grounds of futility resulting from a form of rule scepticism, the remainder of this part proposes to set aside, for the sake of argument, the *petitio principii* objection raised by the various strands of scholarship examined elsewhere, and to focus instead on examining the suitability of custom as a source of law through which regulatory patterns in practice may become part of CIL.

With respect to general rules regulating sources of law in international law, if any, this part submits that custom proves to be the most suitable source of law for such rules. The suitability of custom for these purposes can be more appropriately examined through a succinct discussion of practice in which ICJ Statute Article 38 is used *outside* ICJ proceedings.²²

There are two bodies of practice in which ICJ Statute Article 38 is used outside ICJ proceedings: decisions of international courts and tribunals and state practice itself. Bearing in mind the difference between these two bodies of practice is very significant (a question to which Part III returns, below). It is also important to bear in mind that not only ICJ Statute Article 38 features in both bodies of practice. Where practice predating the conclusion of the ICJ Statute is involved, Article 38 of the Permanent Court of International Justice (PCIJ) Statute²³ is used for the same purposes. An exposition of these two bodies of practice goes beyond the scope of this paper. Nevertheless, some instances and their assessment by leading commentators show the suitability and significance of custom as a source of rules on sources of law in international law.

The place of ICJ Statute Article 38 in decisions of international courts and tribunals is widely acknowledged.²⁴ For instance, Crawford observes that 'Article 38 (1) has been taken as the standard statement of the so-called 'sources' of international law for all international courts and tribunals.'²⁵ Charney, in a study concerning the proliferation of international courts and tribunals, reached a similar conclusion.²⁶ He inferred that uniformity among

²⁰ First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, UN Doc A/CN.4/663 (2013), para 38.

²¹ First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, UN Doc A/CN.4/663 (2013), para 38 n 85 (quoting I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edition, Manchester University Press, 1984) 2-3).

²² Janis (1983) 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'.); Noyes (1999) 124 n 79; Green (2011) 220 n 18. *Contra*, Steinhardt (1991) 551 n 106 ('international law argumentation outside the ICJ is not even analogously closed'.)

²³ Statute of the Permanent Court of International Justice, 16th December 1920 (6 LNTS 389, 114 BFSP 860).

²⁴ See, recently, among others, Grossman (2009) 148 n 182.

²⁵ Crawford (2006) 392.

²⁶ Charney (1998) 235.

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international courts and tribunals regarding sources shows that their proliferation has not eroded 'the international law doctrine of sources'.²⁷

The continuous use of the statements contained in ICJ Statute Article 38 by international courts and tribunals is evidenced specially by arbitral tribunals constituted prior to the ICJ Statute adoption. Those tribunals invoked PCIJ Statute Article 38. As Mendelson observes, PCIJ Statute Article 38 had similarly been 'treated as an authoritative list by various arbitral tribunals'.²⁸ Earlier commentators also recognised PCIJ Statute Article 38's significance, as discussed in Part III, below.

The place of ICJ Statute Article 38 in state practice is paramount and more significant than credited in contemporary scholarship. Likewise, PCIJ Statute Article 38 had an important place in state practice preceding the ICJ Statute's adoption. The practice analysed in relation to this element of the claim comprises conduct of state organs for international relations, in connection with the conclusion of treaties and participation in international cooperation, most notably in international organizations, on the one hand, and the adoption of decisions by state judicial organs, on the other hand.

State practice of organs for international relations outside ICJ proceedings includes various instances of practice in which states have characterized sources of law through express invocation of, or through statements consistent with those contained in, ICJ Statute Article 38(1). Such instances of state practice comprise inter-state arbitration agreements (discussed in Part III, below), multilateral treaties in several fields, beyond matters of dispute settlement, and statements in international organizations, including in the United Nations. While a discussion of these various instances of practice cannot be fully undertaken within the limited confines of this paper, nor is it required for present purposes, it is pertinent to provide an overview of some of the categories of state practice just mentioned.

Turning to multilateral treaties, it may seem trite, but a paramount instance of relevant practice is the very adoption of the ICJ Statute. Indeed, it is widely considered that the fact that Articles 38 of the PCIJ and ICJ Statutes, except for the opening sentence introduced in the latter, are identical in content confirms the continuity of the rules stated in both provisions. Furthermore, for several scholars, this continuity evidences that what matters 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.²⁹ That this wider significance was attributed to ICJ Statute Article 38 at the time of its adoption is further confirmed by the fact that proposals to modify its content, in order to account for other categories of acts with purported law-making effects, were unanimously rejected during the process of adoption of the UN Charter,³⁰ whose

²⁷ Charney (1998) 236.

²⁸ Mendelson (1998) 176 – 177 n 21.

²⁹ Cheng (1987) 2 (referring to 'alteration' of 'numbering' and 'addition of a few words'). Most authors do not even speak of any alteration, and consider both provisions to be 'identical'. See, among others, Erades (1993) 47; Ambos (2014) 248 n 14; Arajärvi (2014) 10.

³⁰ 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. Castañeda (1970) 212; Arangio-Ruiz (1972) 447 ('Committee 2 of Commission II (10th meeting) had rejected by 26 votes to 1 the

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preamble expressly noted the importance of the category of the 'sources of international law'.³¹

The reference to ICJ Article 38 in other major multilateral treaties lends further support to the wider role of regulation of sources of law it has played. 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 Sea³² is considered to be of relevance as a general ground for denying the character as legally binding of equitable principles.³³ Other major multilateral treaties, in which no express reference to ICJ Statute Article 38 is made, are widely regarded as having been negotiated on the understanding that ICJ Statute Article 38 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.³⁴

Various states, representative of several regions and on a variety of occasions, have made statements to the effect that ICJ Statute Article 38(1) sets out the sources of 'positive' international law exhaustively and satisfactorily.³⁵ More pertinently even, in some instances, states indicate that ICJ Statute Article 38 provides a 'legal basis' for statements about sources of international law. In doing so, states note their reliance on ICJ Statute Article 38 as a general 'legal basis', applicable to all sources of law,³⁶ or with regard to particular sources of law. In the latter case, they may indicate their reliance on ICJ Statute Article 38 in order to deny that a subsidiary source is a proper source of law,³⁷ or to substantiate their affirmation that individual recognised sources are indeed sources of law proper.³⁸ Even less explicit

proposal of the Philippines that the Assembly be vested with legislative authority to enact rules of international law.');

³¹ Schermers & Blokker (2003) 768 para 1221 n 261; Scharf (2013) 51.
³¹ Chesterman (2006) 66.

³² 1833 UNTS 397.

³³ Strati (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 'an eventual application of equitable principles based on purely subjective appreciations and not on a rule of law.')

³⁴ 575 UNTS 159. Parra (2014) 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').

³⁵ UN Doc A/8382 (1971) 24 para 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); UN Doc. A/C. 6/SR 1492 (1994) 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); UN Doc. A/C. 6/SR 1492 (1994) 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); UN Doc A/8382 (1971) 24 para 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).

³⁶ UN Doc A/62/PV.42 (2007) 16 – 17 (containing Nicaragua's reference to ICJ Statute Article 38(1) as the legal basis for statements on the sources of international law.)

³⁷ UN Doc A/60/PV.39 (2005) (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'.); Patel (2007) 110.

³⁸ UN Doc A/CN.4/471 (1995) 35 para 91 n 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')

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statements articulate a state's underlying view that there is a law on sources of law. In this vein, the distinction between *lex lata* and *lex ferenda* is employed, as illustrated by statements, expressly qualified as *de lege ferenda*, to the effect that the phrase 'of civilised nations' be excluded from ICJ Statute Article 38(1)(c).³⁹ It follows from this qualification that these states regard ICJ Statute Article 38 as *lex lata*, including those elements thereof which they find undesirable.

State practice of relevance also takes the form of conduct in connection with domestic judicial proceedings in which international law is applied. This body of state practice *in foro domestico*, so to speak, takes mostly the form of decisions of judicial organs and, occasionally, of pleadings by states parties to domestic judicial proceedings. While a full survey of such internal judicial practice exceeds the scope and purposes of this paper, a few instances are apposite for present purposes.

The following cases embody various positions regarding the legal significance of ICJ Statute Article 38. Among others, authoritativeness is commonly attributed to statements in ICJ Statute Article 38, whether with or without qualifications indicating a view as to the legal character and bindingness of the statements regarded as authoritative. For instance, the United States (US) District Court for the Southern District (SD) of New York, in *Presbyterian Church of Sudan v Talisman Energy, Inc*, observed that '[t]he Second Circuit has cited Article 38(1) as an authoritative reflection of the sources of international law'.⁴⁰

Similarly, where ICJ Statute Article 38 is deemed 'authoritative', observations on the scope of its authority may be added. For example, in *Handelskwekerij G.J. Bier BV & Stichting Reinwater v Mines de Potasse d'Alsace SA*, to which *Handelskwekerij Firma Gebr. Strik BV & Handelskwekerij Jac. Valstar BV v. Mines de Potasse d'Alsace SA* was joined, 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'.⁴¹

Proceeding further, a domestic court may indicate that consideration of ICJ Statute Article 38 is necessary. This is illustrated by the approach of various governmental organs of Argentina. The Argentine Supreme Court of Justice in *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 [...] for the knowledge of the sources of this international law, fundamentally, what is provided for by the Statute of the International Court of Justice has to be taken into account'.⁴² This stance was confirmed by the Argentine government in a

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 Doc CERD/C/MOZ/12 (2007) 21 para 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.)

³⁹ Patel (2007) 101 (commenting on a proposal of Guatemala and Mexico to this effect.)

⁴⁰ United States District Court, SD New York, 19 March 2003, 244 FSupp2d 289, 304 (citing '*Filartiga v. Pena-Irala*, 630 F.2d 876, 881 n. 8 (2d Cir.1980).')

⁴¹ Para. 16.

⁴² Supreme Court of Justice of the Nation, decisions of 14 June 2005 and 24 August 2004, respectively, A 533 XXXVIII A 533 XXXVIII, 103 – 104, paras 50 – 51.

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statement at the UN, concerning the place of ICJ Statute Article 38 in its internal judicial practice.⁴³

Similarly, a domestic court may invoke ICJ Statute Article 38 as a basis for a statement on the sources of law of the international law it applies. In some cases, such an invocation is unqualified. For instance, 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'.⁴⁴ In some other cases, such an invocation may be qualified, to the effect that observance of ICJ Statute Article 38 is legally required, as illustrated by the two following instances of practice. The Indonesian Constitutional Court, in *Law 27 of 2004 on Truth and Reconciliation Commission*, considered whether a given alleged general principle had been 'created in accordance with the provisions of the Statute of the International Court of Justice regarding the sources of international law'.⁴⁵ Similarly, although in the capacity of claimant, Argentina invoked ICJ Statute Article 38(1)(b) before the Court of Cassation of Belgium in *Argentine Republic v NMC Capital*.⁴⁶

To the foregoing, further instance of state practice, including practice *in foro domestico*, could be added. However, for present purposes, the above instances of practice suffice to substantiate one of the propositions advanced in this paper: states conduct in connection with the internal judicial application of international law may constitute both practice and *opinio juris* in support of the customary character of the statements contained in ICJ Statute Article 38, as CIL general rules regulating the characterisation of a source as a source of law of international law proper.

While a fuller substantiation of this proposition goes, again, beyond the limited confines of this paper, it suffices for present purposes to point out that this proposition may find common ground among supporters of both the standard view, to the extent that the *petitio principii* objection is set aside, and CIL positions (to which Part III turns, below). Indeed, not only the above practice consists in characterisations of sources of law made on the basis of ICJ Statute Article 38 outside ICJ proceedings (a hallmark of practice creating CIL rules whose content is reflected in treaties), but also those characterisations are made out of the acceptance as law of the statements in ICJ Statute Article 38 (as evidenced by practice in various contexts outside ICJ proceedings in which the wider legal bindingness of the statements of ICJ Statute Article 38 invoked is variously, but very clearly, stated – in some instances by different organs of the same state, as the aforementioned Argentine instances of practices show).

⁴³ UN Doc CRC/C/OPAC/ARG/1 (2007) 5 para 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.')

⁴⁴ 19 December 1955, 23 ILR 708, 710.

⁴⁵ Case No. 2004- 18-0106, Judgment, 13 May 2005.

⁴⁶ Judgement, 22 November 2012, C.11.0688.F/1, 2-3 ('II. Le moyen de cassation. La demanderesse présente un moyen libellé dans les termes suivants : [...] Dispositions légales violées [...] article 38, § 1er, b), du Statut de la Cour internationale de Justice').

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To sum up this succinct discussion of the value of state practice of uses of ICJ Statute Article 38 (and, where relevant, PCIJ Statute Article 38) outside ICJ (or, again, PCIJ) proceedings, and their value with respect not only to the recognised sources of law, but also with regard to the various developments of new normative processes regarded as going beyond those recognised sources, it is worth recalling the assessment provided by Jennings and Watts in the latest edition of *Oppenheim's International Law*, by way of concluding reflection on the sources of international law. The significance of this assessment not only lies in the highly authoritative character of their edition of *Oppenheim's*, but also, among others, in the fact that Jennings and Watts are, as noted from the outset, supporters of the standard view who explicitly accept the *petitio principii* objection, which prevents them, again, from adopting a source-based approach.

In their assessment, Jennings and Watts reiterate their view that 'Article 38 of the Statute of the International Court of Justice cannot be regarded as a necessarily exhaustive statement of the sources of international law for all time.' Furthermore, reiterating their practice-based approach, whereby '[t]hose sources are what the practice of states shows them to be,' they enquire whether 'one may therefore ask whether developments in the international community since Article 38 was first adopted call for any additions to the sources set out in that Article.'⁴⁷ They point out that, among such developments 'perhaps the most significant change in the international community over the last 50 years has been the increased number and the developing role of international organisations.'⁴⁸ They add that '[t]heir impact upon the sources of international law has been considerable.'⁴⁹ Jennings and Watts then go on to conclude that '[t]he activities associated with international organisations can be fitted into the traditional categories for the sources of international law, either as being attributable to treaties (since the constituent instrument of an international organisation is a treaty) or as part of customary international law.'⁵⁰ They rely primarily on '[t]he fact that the International Court of Justice, in its numerous judgments and opinions relating to international organisations, has always been able, without remarking upon the incompleteness of Article 38, to dispose of the questions arising for decision, is a strong argument for suggesting that their activities are for the moment at least still properly regarded as coming within the scope of the traditional sources of international law.'⁵¹

As argued above, and, as stated from the outset and discussed in greater detail in Part III, the 'fact' that state practice (illustrative instances of which have been discussed above) proper equally finds the sources of law recognised in ICJ Statute Article 38 to be necessary and sufficient bases for determinations regarding sources of law, provides similarly, and even more pertinent evidence of the wider significance of ICJ Statute Article 38. The propriety and greater pertinence of the aforementioned state practice, as argued in Part III, lies in its being the basis of custom proper, *in pays* as opposed to *in foro*, where the *forum* whose 'practice' is

⁴⁷ Jennings & Watts (1992) 45 para 16.

⁴⁸ Jennings & Watts (1992) 45 para 16.

⁴⁹ Jennings & Watts (1992) 45 para 16.

⁵⁰ Jennings & Watts (1992) 46 para 16.

⁵¹ Jennings & Watts (1992) 46 para 16.

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relied on is an international court or tribunal and the practice is not state practice proper but rather a set of international decisions, as exemplified by the above assessment of Jennings and Watts, and the views of most authors who, unlike them, are not prevented from taking a source-based approach, and support some form of CIL regulating sources of law (mostly in the form of a custom *in foro*, as discussed in Part III, below).

The character of decisions of domestic courts as state practice has raised various questions, which call for some elucidation of their precise nature,⁵² before turning to the question of CIL on sources of law and the major existing models of such CIL in the literature. It is common to treat judicial decisions generally as 'subsidiary means' under ICJ Statute Article 38(1)(d).⁵³ This tends to be the case despite their multiple roles.⁵⁴ One of those roles is as a form of state practice under ICJ Statute Article 38(1)(b).⁵⁵ Lauterpacht had reached the same conclusion regarding PCIJ Statute Article 38.⁵⁶ The above roles may be concurrently performed.⁵⁷ Decisions of national courts as *opinio juris*, on the other hand, has raised less controversy.⁵⁸ Some qualify which decisions are more suitable to constitute *opinio juris*.⁵⁹ The concurrent character of decisions of national courts as practice and acceptance as law is also pointed out without controversy.⁶⁰ This concurrent character of internal judicial decisions, nevertheless, may be contested given its potential involvement of so-called 'double-counting'.⁶¹

III. CIL as Law on Sources of Law in International Law: Custom *in Foro* or *in Pays*?

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

⁵² Giegerich (2015) 68 (critiquing their 'ambiguous role' in the 'doctrine of sources'.)

⁵³ Kaczorowska (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, *eg*, Beaulac (2003) 239 n 81 (noting that under ICJ Statute Article 38(1)(c) 'judicial decisions, including those of domestic courts, are a subsidiary source'.)

⁵⁴ See, *eg*, Frankowska (1988) 381 (deeming ICJ Statute Article 38 as 'the proper framework' to assess domestic courts' 'functions', but referring to 'article 38(d)' only).

⁵⁵ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Judgment)* [2012] ICJ Rep 131 – 132 para 72 (relying on '[s]tate practice in the form of the judgments of national courts'.)

⁵⁶ Lauterpacht (1929) 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'.)

⁵⁷ Mendelson (1998) 200 ('[d]ecisions of national courts thus perform a dual function'.); Arajärvi (2014) 31 (suggesting that this is the case 'even if overlapping with' each other function).

⁵⁸ International Law Commission, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, UN Doc A/CN.4/L.872 (2016), 3 ('[f]orms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: [...] decisions of national courts'.)

⁵⁹ Kaczorowska (2015) 53 (a domestic court decision 'in particular of a highest court of a particular State expresses the *opinio juris* of that State'.)

⁶⁰ O'Keefe (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'.)

⁶¹ See Mendelson and Schwebel's critique of the ICJ decision in *Nicaragua*.

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The claim that ICJ Statute Article 38 contains statements related to 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.⁶² 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'.⁶³

Some add that ICJ Article 38, while not directly embodying CIL rules on sources of law, is reflective or declaratory of such CIL rules.⁶⁴ 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 explains metaphorically, CIL, albeit 'invisible', is reflected in 'mirrors', and yet 'these mirrors are not the rule' of CIL.⁶⁵

The claim that ICJ Statute Article 38 has a declaratory or reflective character with respect to sources of law is formulated variously.⁶⁶ 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)'.⁶⁷ Some do refer to rules as being reflected, but 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'.⁶⁸ Other refer to the existence of law and its being declared by ICJ Statute Article 38, without pointing out the source of the law declared.⁶⁹

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'.⁷⁰ Some of those who deem ICJ Statute Article 38 as declaratory sometimes hold this claim in relation to propositions on specific areas of international law.⁷¹

⁶² Ohlin (2015) 23 (emphasis added).

⁶³ Ohlin (2015) 23 (adding, for instance, that such a statement cannot be found 'in the U.S. legal system'.)

⁶⁴ Cheng (1994) 22.

⁶⁵ Sur (2013) 149.

⁶⁶ 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 preexisting law. For a discussion of the latter debate, which ultimately concerns whether custom is a proper source of law, see Guggenheim (1952) 70; Kelsen (1953) 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. Kelsen (1953) 124.

⁶⁷ Dolzer (1981) 556.

⁶⁸ Tomuschat (1993) 240.

⁶⁹ Vanek (1950) 254 ('although the provisions of that Article relate to a particular court, they are merely declaratory of existing law.')

⁷⁰ Abi-Saab (1996) 191.

⁷¹ Acquaviva & Whiting (2011) 21 (characterizing 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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The attribution of the character as declaratory or reflective of CIL to ICJ Statute Article 38 is not entirely novel, since this was equally 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'.⁷² Verdross implied the role of custom 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'.⁷³

Lauterpacht also deemed PCIJ Statute Article 38 as declaratory of 'custom expressed by a long series of conventions and arbitral awards'.⁷⁴ 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 principle of law.⁷⁵

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 report 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'.⁷⁶ Monaco noted the role of PCIJ Statute Article 38 in giving concrete expression to a 'preexisting practice'.⁷⁷ Sur, likewise, attributes declaratory character to PCIJ Statute Article 38.⁷⁸ Pellet, in his 2012 survey of uses of ICJ Article 38, discusses various instruments which refer directly or indirectly to ICJ Statute Article 38, and observes, with regard to the latter, that '[s]tates may refer to this provision, and thus indirectly to Art. 38 of the Statute, in arbitration agreements'.⁷⁹

Some have gone further, holding that ICJ Statute Article 38 codifies the 'sources' of international law,⁸⁰ or, more precisely the CIL rules regarding 'sources' in international law.⁸¹ Supporters of the view that ICJ Statute Article 38 is codificatory include Lauterpacht⁸²

⁷² Verdross (1935) 199.

⁷³ Verdross (1935) 199.

⁷⁴ Lauterpacht (1937) 164 n 2.

⁷⁵ Lauterpacht (1937) 163 – 164.

⁷⁶ Jennings & Watts (1992) 39 para 12.

⁷⁷ Monaco (1968) 188 n 1.

⁷⁸ Sur (2013) 142.

⁷⁹ Pellet (2012) 745 para 50 n 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).

⁸⁰ Polebaum (1984) 194; Alfert (1992) 198 n 128 (quoting ICJ Statute Article 38 and stating that 'Section 102 of the Restatement (Third) [...] also codifies existing sources of international law'.)

⁸¹ 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 (1996) 191; Sur (2013) 75 ('[l]'article 38 lui-même est en effet généralement considéré comme codifiant une règle coutumière.');

Virally (1983) 167 ('[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'.).

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and, more recently, Lepard. Lepard 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 directly. Most commentators agree on ICJ Statute Article 38's authoritativeness but fail to establish whether it is so *qua* treaty or *qua* statement of a rule, namely of a CIL rule.⁸³ Along similar lines, Conforti referred to the role of PCIJ Statute Article 38 as a codification of the 'practice followed by international tribunals'.⁸⁴

The foregoing discussion has shown that, in essence, there are two models of CIL on sources of law which have been proposed in scholarship, to which this part returns towards the end.

These two models may be best conceptualised by means of Bentham's distinction between custom *in foro* and custom *in pays*.⁸⁵ This distinction is all the more apposite since it has been recently revisited by Lamond, who reintroduced it in connection with his critique of the notion of secondary rules in Hart.⁸⁶ Although Lamond's work is intended to set out a critique of the Hartian conception of the rule of recognition as it is understood in general jurisprudence, Lamond's critique, it is submitted in this part, holds significant insights into the idea of regulation of sources of law which may be predicated of international law, and which may, furthermore, prove to be even more apposite in this field than in general jurisprudence, given the systemic features of international law as a legal order. A brief presentation of Lamond's critique follows.

Lamond sees in the rule of recognition 'Hart's solution to a general puzzle of legal practice', namely 'the obligation to use the sources of law in a particular legal system.'⁸⁷ Lamond aptly notes that '[a]ll legal systems have sources of law that are fundamental in that they do not rest on any further legal basis.'⁸⁸ Lamond observes that 'Hart's answer to this problem is that once one reaches the fundamental sources of law one must look to the practices of officials [...] [i]t is this social practice that Hart calls the 'rule of recognition.'⁸⁹ Lamond observes that 'legal systems can contain non-source-based laws' and that, 'even if there can be legal systems without any source-based law, that would still leave the problem of understanding the role of sources in those systems with source-based law.'⁹⁰ Lamond adds that 'source-based laws [...] constitute a significant part of the law in most legal systems.'⁹¹ Having noted the significance of 'source-based law', whether a legal system contains as a

⁸² See Lauterpacht's statement in his capacity as Special Rapporteur in ILC (1949) 22 para 33, cited in Lachs (1976) 177 n 3.

⁸³ Lepard (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.')

⁸⁴ Conforti (1988) 77.

⁸⁵ Jeremy Bentham, *A Comment on the Commentaries*, ed. J.H. Burns and H.L.A. Hart (Oxford: Oxford University Press, 1977), 182-4, cited by Lamond (2014) 43.

⁸⁶ Lamond (2014).

⁸⁷ Lamond (2014) 25 (discussing the basis for 'the binding force of precedent'.)

⁸⁸ Lamond (2014) 25.

⁸⁹ Lamond (2014) 25.

⁹⁰ Lamond (2014) 26.

⁹¹ Lamond (2014) 26 (referring to 'such as statutes and precedent'.)

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whole or only in part source-based law, Lamond goes on to argue that 'Hart was mistaken to characterize the rule of recognition as simply an official custom, that is, as simply a collective social practice of officials.'⁹² Lamond argues, instead, that the rule of recognition 'is a social practice, but it is also a form of customary law, and thus just as much a part of the law of a system as any other law.'⁹³ Lamond adds, in this vein, that the rule of recognition 'is law in the same sense that statutes and precedents are law, though it has some distinctive features.'⁹⁴ While Lamond did not at the outset characterise the rule of recognition as a form of source-based law, by equating it with forms of law which he had identified as epitomes of source-based law, it may be inferred that, in his view, the rule of recognition 'is also a form of source-based law. Lamond then queries 'whether this is a distinction without a difference, or at least a distinction with very little difference.'⁹⁵ Lamond argues that 'whether the fundamental sources of law amount to customary law rather than simply official custom matters both in theory and in practice.'⁹⁶ In particular, Lamond contends that '[a]t a practical level, how we understand the sources of law matters for how we think they can or cannot be altered.'⁹⁷ Lamond argues that the rule of recognition's character as 'official custom', which he does not deny but to which he adds that of being a rule of 'customary law', 'merely establish the distinctive nature of ultimate legal sources rather than their inability to constitute ordinary laws.'⁹⁸ Lamond adds, with regard to the rule of recognition's dual customary nature, namely as official and legal, that emphasising its official character to the detriment of acknowledging its legal nature, is 'mistaken in thinking that this makes them law in a fundamentally different sense to laws [...]',⁹⁹ which are, one may put it more generally, 'source-based'.

Lamond fleshes out his general claim after discussing in greater detail Hart's concept of the rule of recognition, Lamond argues that 'although the rule of recognition is a distinctive type of legal standard, it is, nonetheless, best understood as just as much a law of the system as any other law.'¹⁰⁰

Lamond reasons that 'the rules of the system are not accepted because the rule of recognition is accepted', but, '[i]nstead, the rule of recognition is accepted because the system itself is accepted.'¹⁰¹ Lamond terms this alternative understanding of acceptance 'systemic acceptance.'¹⁰² Lamond adds that systemic acceptance is an account of acceptance which is more suited to the law than Hart's: while Hart's concept of acceptance is 'modelled on the structure of personal authority', Lamond argues that systemic acceptance is modelled on 'impersonal authority', and that the latter is a more suitable model of law's authority,

⁹² Lamond (2014) 26.

⁹³ Lamond (2014) 26 (emphasis omitted).

⁹⁴ Lamond (2014) 26.

⁹⁵ Lamond (2014) 26.

⁹⁶ Lamond (2014) 27.

⁹⁷ Lamond (2014) 27.

⁹⁸ Lamond (2014) 27.

⁹⁹ Lamond (2014) 27 (referring to 'laws such as statutes and precedents.')

¹⁰⁰ Lamond (2014) 31.

¹⁰¹ Lamond (2014) 31.

¹⁰² Lamond (2014) 33 (emphasis in the original).

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which, Lamond notes, 'is not a form of personal authority'.¹⁰³ For Lamond, systemic acceptance accounts for a system in which 'accepting legal rules (including the rule of recognition)' is possible 'because of the acceptance of the system as a whole'.¹⁰⁴ Lamond concludes in this regard that '[t]he sources of law in a legal system are accepted for the same reasons as the laws based on those sources-because they are parts of a system of laws that is acceptable.'¹⁰⁵

Furthermore, Lamond argues that '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.'¹⁰⁶ Lamond develops this argument by reference to the widely accepted comparison between games and law. Lamond argues that this comparison is inapposite, since '[t]he rules of a game constitute an extremely restricted activity,' one in which, Lamond correctly points out, players are not required to determine the rules of the game as part of the game. Hence, the separability of game-playing and rules-of-game-playing regulation is not capable of demonstrating that regulating and rules-of-regulating, since the law is precisely concerned with a wide range of regulation, 'including crucially the activities of law-identification and law-creation themselves.'¹⁰⁷ Lamond, contrasting 'ultimate' to 'derivative' standards, argues that the rule of recognition's character as 'ultimate [...] does not establish that the rule of recognition is not just as much part of the law as the laws that it identifies.'¹⁰⁸

Lamond proposes that the rule of recognition, which underpins 'the existence of ultimate legal sources', has a 'distinctive nature' which 'shows them to be part of the customary law of the courts.'¹⁰⁹ Much of the analysis of Lamond concerns Hart's theory, and a fuller discussion of these more specific arguments falls outside the scope of this paper. It is in this vein, that Lamond revisits the distinction between 'custom *in foro*' and 'custom *in pays*'.¹¹⁰ This distinction is of certain relevance to this part of the paper. Lamond defines custom *in pays* as 'the custom of non-officials recognized by the law [...], not to the custom of the officials themselves.'¹¹¹ By contrast, Lamond defines custom *in foro* as 'customary law' which 'rests on being applied in the practice of the courts'.¹¹² In particular, Lamond identifies four features of custom *in foro*, namely that such '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 of the courts; and (d) belong to a system of

¹⁰³ Lamond (2014) 33 (adding that '[i]n the case of law, it is the body of standards that claims our allegiance, rather than the makers of those standards', and that '[i]f we should obey the law, it is not because we have a duty to obey the legislature, but because we have a duty to follow the laws properly made by that legislature.')

¹⁰⁴ Lamond (2014) 33 (as opposed to 'accepting valid legal rules because of the acceptance of the rule of recognition'.)

¹⁰⁵ Lamond (2014) 36.

¹⁰⁶ Lamond (2014) 39.

¹⁰⁷ Lamond (2014) 38.

¹⁰⁸ Lamond (2014) 39.

¹⁰⁹ Lamond (2014) 27.

¹¹⁰ Lamond (2014) 43.

¹¹¹ Lamond (2014) 43.

¹¹² Lamond (2014) 43.

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laws.¹¹³ In response to a potential objection of being circular, Lamond asserts that, while this might be true 'circularity is not a flaw *per se*-there can be virtuous as well as vicious circles.'¹¹⁴

Lamond's critique is amenable to be applied to international law for a variety of reasons. In general, as he points out, while his analysis addresses the binding force of precedents in common law, some of the solutions offered in that context are not adequate, '[n]or is the problem restricted to precedent.'¹¹⁵ In particular, and while Lamond does not address this feature of international law, even assuming uncritically the content of Hart's approach, it would remain unsuited to international law if its assumptions are applied strictly: while Hart's legal system includes officials, international law lacks officials proper, other than states (unless one adopts, among other theories, Schelle's *dédoublement fonctionnel* as an alternative). More importantly, and as the present author has pointed out elsewhere, characterising the rule governing sources of law (whether one chooses a Hartian rule of recognition as a model or not) by reference to its source of law allows for a legally sound answer (as a matter of both theory and practice) to the question of how such a rule may change. This is a conundrum which a strand of scholarship adopting constitutional models of rules regulating sources of law has failed to address satisfactorily, precisely on account of the absence of a source-based approach to law-making.¹¹⁶

Other significant insights lie in Lamond's argument that the aim of focusing on an account of the rule of recognition as a manifestation of officialdom, to the detriment (and almost entire exclusion) of its legality, is a mistaken way of showing the rule of recognition's distinctiveness, by setting it aside from other (legal, source-based) rules of the legal system. In this vein, Lamond's systemic account of acceptance introduces the idea of levels of analysis to argue that, albeit occurring at individual and systemic levels, acceptance is ultimately the same and may operate as a common criterion across the legal system (including at the second-order level where the rule of recognition operates). A similar approach, warning against a conflation of 'levels of analysis', is defended by Mendelson in his analysis of the place of consent in the formation of custom. In particular, Mendelson aptly critiqued voluntarist theories for importing consent "[a]t the most general, systemic level' into the 'identification-of-sources level.'¹¹⁷ Similarly, Lamond's critique of the widespread reliance on the 'rules of the game' comparison to justify the separation 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 the manner of law-making and law-identification is mistaken, since, leaving aside functional differentiation, 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 apposite in international law, given the so-called 'horizontal' of this legal order (in which, for

¹¹³ Lamond (2014) 43.

¹¹⁴ Lamond (2014) 45.

¹¹⁵ Lamond (2014) 25.

¹¹⁶ Mejía-Lemos (2014).

¹¹⁷ Mendelson (1998) 261-263.

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instance, *jus cogens* rules need not 'displace [the] application' of certain non-peremptory rules).¹¹⁸

To sum up, it is fitting to now discuss a *caveat* introduced by Lamond at the outset in his discussion of 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.'¹¹⁹ This *caveat* is partly accurate. In part, it may misrepresent the dual character of states as subject of the law, addressees of it (and, in that sense, non-officials) and law makers (officials, in a way, to the extent that they have law-making power). And yet, it may suffice to aptly remind that custom is a source through which the practice of subject of law becomes law, independently of the practice of (international) courts and tribunals (officials, although in a limited sense, within the confines of the jurisdiction to which the subjects of law submitting their disputes have consented).

Returning to the aforementioned CIL accounts, it is clear that various major CIL claims are modelled after a custom *in foro* in which the rules on sources of law, as they apply within and without international courts, and for law-making and law-ascertaining purposes, are being fully determined without consideration for the practice of states, as subjects of that law.

Custom is frequently ascertained primarily by reference to decisions of international courts and tribunals. In this model, only selected, and mostly fewer, decisions of domestic courts, are 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: indeed, Lauterpacht and Verdross reached their conclusion as to the declaratory status of the PCIJ Statute on the basis of its use by international tribunals other than the PCIJ, whereas related state practice, which Verdross discussed, was not placed at the centre of the respective CIL claim. 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.¹²⁰

There may be various reasons for the persistence of custom *in foro*, so to speak, '*iuris gentium*'. Those reasons may require further enquiry. In any case, to the extent that there is common ground as to the primacy of state practice in the creation and identification of custom, a model of CIL which conceives of the custom on sources of law as a custom '*in pays*', to the extent that it is applicable to the analysis of international law-making, is more suitable to place such CIL general rules, if any, on more solid grounds.

Such 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* helps illustrate. By means of such state practice, states make determinations as to sources of law in various contexts, including where they engage in law-making or in law ascertainment in connection with

¹¹⁸ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, 141 para 95.

¹¹⁹ Lamond (2014) 43.

¹²⁰ Tams (2015).

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dispute settlement procedures, including before domestic courts, using rules which they accept as law (as indicated by views attributing authority to the rules and, more evidently, legal force). This kind of custom is a model of CIL which is observed in some pieces of scholarship, albeit the degrees to which authors engage with any state practice in support of their customary claim varies, to the point that in most instances the customary claim at issue is not more than an assertion (perhaps an articulation of the view that regulation on sources of law exists – or ought to exist – underpinned by the view that custom is the most suitable source of law for such a rule). Major examples of customary claims which intend to rely on state practice but do not fully substantiate it by reference to state practice are provided by the work of Henkin, who conceived of various forms of customary law and regarded custom regulating sources of law as a form of custom proper (one based on actual state practice).¹²¹ Furthermore, the customary claim outline in Part III is intended to fall within this model: it primarily relies on state practice (as displayed in various contexts) and focuses, in particular, on practice whereby states use the statements in ICJ Statute (or PCIJ Statute, where relevant) Article 38 in order to regulate sources of law (whether for law-making or law-ascertaining purposes), showing that state conduct of uses of this provision may constitute both general practice (*usus*) of Article 38 as a general rule accepted as law (*opinio juris*).

IV. Conclusions

Part I, by way of background, has indicated that, in spite of sharing important common ground, there is, as with many other vexed issues in the theory of the sources of international law, a controversy as to the idea of regulation of sources of law and the legality of rules on sources of law, if any.

Part II, in particular, has indicated that the standard account, albeit professing to be practice-based, rules out a rules/source-based account of regulation of sources of law, on grounds of a *petitio principii* objection. Part II, however, proposes to set aside, for arguendo, any *petitio principii* objection(s), and suggests that the standard account, seemingly assuming the futility of the idea of regulation of sources, has neglected the task of addressing alternative arguments against such an idea and the sub-set of theories which support a rules/source-based account of regulation of sources of law. Part II has, hence, focused on the suitability of custom as a source of law. In this vein, Part II has discussed the idea of custom's inherent features which make it specially suitable to create general rules of universal scope. Furthermore, Part II has provided an overview of state practice which, it contends, at least *prima facie* may satisfy the constituent elements of custom. In order to do so, Part II focuses on state practice of uses of ICJ Statute Article 38 outside the ICJ Statute.

¹²¹ Henkin (1989) 54 (noting, with respect to the rules on sources of law, generally, that '[h]ere we have customary law as traditionally defined', and adding that, for instance, '[t]he norm governing the making of customary law — the requirement of consistent general practice plus *opinio juris* — is based on the constitutional conceptions of the State system, but developed by custom, by general, repeated practice and acceptance.').

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Part III 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 the distinction between custom *in foro* and *in pays*. In this vein, it has discussed in detail a recent critique of the rule of recognition which, relying on this distinction, argues for treating the rule of recognition as a rule of customary law having the same properties as any legal rule of the legal order. Part III has argued that, to the extent that this critique is applicable to international law, the insights it contains are apposite to the understanding of CIL, if any, regulating the sources of law in international law. Part III suggest that the persistence of custom *in foro iuris gentium* may detract from the potential for establishing CIL, if any, on the sources of law in international law on the more solid grounds of actual state practice and acceptance as law.

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¹²² The previous footnotes contain, for the most part, references in abridged form. This section sets out in full these abridged references. This section will be deleted at a later stage, when the final version of the footnotes is prepared in compliance with the applicable style.

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