



# The four lives of customary international law

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## **The Four Lives of Customary International Law**

*Jean d'Aspremont\**

*The Hague, Peace Palace, Thursday 1<sup>st</sup> July 1920, 9.30am.*

Baron Descamps, a Belgian senator and former minister, takes the floor as chairman of the Advisory Committee of Jurists established by the Council of the League of Nations a few months earlier.<sup>1</sup> He is about to introduce his project on rules to be applied by the future Permanent Court of International Justice.<sup>2</sup> At this moment, Baron Descamps cannot anticipate that his definition of custom will become the reference formula (hereafter the ‘Descamps formula’) for the great variety of successive approaches to custom in the course of the century and beyond.

*New York, Friday 25<sup>th</sup> May 2018, 1.05pm. 98 years later.*

Sir Michael Wood, Special Rapporteur on the identification of customary law, walks out of the 3412<sup>th</sup> meeting of the International Law Commission held at Headquarters.<sup>3</sup> He is congratulated on the adoption of the 16 Conclusions devoted to this topic.<sup>4</sup> At this moment,

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<sup>1</sup> The Council of the League of Nations established the Advisory Committee of Jurists at the third meeting of the second session on 12th February 1920. See League of Nations, Permanent Court of International Justice, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, p. 5.

<sup>2</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16<sup>th</sup> – July 24<sup>th</sup> 1920, with Annexes, The Hague, Van Langenhuysen Brothers, 1920, p. 306 (see Annex No. 3 to the meeting of 1<sup>st</sup> of July 1920). On the present relevance of the Procès-Verbaux, see Jörg Kammerhofer, Introduction, in: Permanent Court of International Justice, Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee June 16th-July 24th 1920 with Annexes (1920) (Reprint 2006, The Lawbook Exchange) iii-xiv.

<sup>3</sup> Provisional summary record of the 3412th meeting held on 25<sup>th</sup> May 2018, A/CN.4/SR.3412.

<sup>4</sup> See the Draft conclusions on identification of customary international law, with commentaries adopted by the International Law Commission at its seventieth session, in 2018, and submitted to

Sir Michael may not realise that, under the guise of a vindication of the two-element doctrine of customary law (hereafter the ‘dualistic approach’), he has initiated another metamorphosis of the doctrine of customary law, one that resuscitates the Descamps formula and the legal thought of the 1920s.

This article tells the story of the doctrine of customary international law in these 98 years between the moment of the introduction in July 1920 of the draft rules to be applied by the new Permanent Court of International Justice and the International Law Commission’s adoption in May 2018 of its 16 Conclusions on the identification of customary international law. This story of the doctrine of customary international law is not linear. It is tumultuous and pockmarked by a series of metamorphoses. In particular, the tumultuous story told here is articulated around four moments of rupture: 1920, 1927, 1986, and 2018. These four moments corresponds to four key metamorphoses of the doctrine of customary law. Each of these four metamorphoses originates in powerful interventions by some given actors resulting in a redefinition of how arguments about the customary status of a rule ought to be made. It is argued in this article that the doctrine of customary international law, by undergoing these four metamorphoses, has gone through four different stages: the age of innocence (1920 – 1927), the age of dualism (1927-1986), the age of turmoil (1986-2018), and the return to innocence (2018-present). The story offered in this article is a story about the four lives of customary international law.

This story of the four lives of customary international law is produced through a chronological narrativization of these four moments of rupture and organized on the basis of a specific four-tiered periodization. This article proceeds chronologically and sketches out each of these four stages in the history of the doctrine of customary

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the General Assembly as a part of the Commission’s report covering the work of that session (A/73/10), Yearbook of the International Law Commission, 2018, vol. II, Part Two.

international law between July 1920 and May 2018, one after the other. It ends with an epilogue.

Stories are not told for the sake of telling stories. Stories are narrativizing constructions meant to support, confirm, strengthen, accompany, question, disrupt, or rebut a set of discourses or arguments. The story told here is no different. It is at the service of a polemical claim meant to repudiate a common historical narrative found in the legal literature that locates the current two-element doctrine of customary international law in Article 38 of the Statute of the Permanent Court of International Justice, from which the 16 Conclusions on the identification of customary law are supposedly directly extrapolated. Through the story of the four lives of the doctrine of customary law offered here, the argument is made that, patterned after the Descamps formula, Article 38 of the Statute of the Permanent Court of International Justice was originally the receptacle of a monolithic understanding of the ascertainment of customary law. According to this story, it is the International Court of Justice in its *Asylum* judgment which, building on the modest overture of the *Lotus* judgment of the Permanent Court of International Justice, dismantled the monolithic understanding of customary law and replaced it with a dualistic approach to custom-ascertainment that distinguishes the two elements of custom and tests them separately. The dominance of the dualistic approach, as the story goes, became contested in the three decades of turmoil and confusion provoked by the *Nicaragua* decision of the International Court of Justice. As the story goes, this period of confusion only ended with the adoption of the 2018 International Law Commission's Conclusions on the identification of customary law which resuscitated the Descamps formula and its monolithic understanding of custom.

Before sketching out the four lives of the doctrine of customary law, three short caveats are warranted. First, this story about the four lives of custom is not mean to vindicate or rehabilitate any specific approach to the ascertainment of customary law. The following story is agnostic

as to how arguments on customary law should be built and how customary law should be ascertained. This is why no qualitative or value judgment is made on the non-fictional characters and institutions that populate and periodize the following story, let alone on their work or substantive contributions. Second, the elevation of the Permanent Court of International Justice, the International Court of Justice, and the International Law Commission, as well as some strands of international scholarship, as the central actors in this story about the four lives of custom inevitably denotes some important normative biases as to who contributes to the formation of the doctrine of customary international law and determines the way claims about custom ought to be made. Such biases are not further explained or justified but simply acknowledged.<sup>5</sup> Third, although providing a pockmarked and tumultuous story about the doctrine of customary law at odds with the common linear narratives that trace the origin of the current doctrine of customary law to Article 38, this article provides just another linear narrative which does not claim any empirical superiority.<sup>6</sup> The story offered here is only a story among many of the stories that can be told about how international lawyers shape their arguments in relation to customary law.<sup>7</sup>

## **1. The age of innocence (1920 – 1927)**

*Thursday 1<sup>st</sup> July 1920.* It is rainy in The Hague. Having been drenched on their way to the Peace Palace that morning, the members of the Advisory Committee of Jurists lament the fact that the heating system is

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<sup>5</sup> On this common bias of international lawyers, Jean d'Aspremont, "If International Judges Say So, It Must Be True: Empiricism or Fetishism?", *ESIL Reflections*, November 2015, Vol 4, Issue 9.

<sup>6</sup> See also E H H Carr, *What is History?* (2<sup>nd</sup> ed, CUP 1987) 25; Hayden White, 'Historical Discourse and Literary Writing' in Kuisma Korhonen (ed) *Tropes for the Past: Hayden White and the History/Literature Debate* (Rodopi 2006), 30; Hayden White, *Metahistory. The Historical Imagination in the 19<sup>th</sup>-Century Europe* (Johns Hopkins University Press 2014) 7.

<sup>7</sup> Compare with the account provided by Stefan Talmon who similarly rejects any linearity in the modes of custom-ascertainment applied by the International Court of Justice. See Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', *European Journal of International Law* 26 (2015): 417–43. For a contestation of the pockmarked approach of the Court presented by Talmon, see Omri Sender and Michael Wood, *The International Court of Justice and Customary International Law: A Reply to Stefan Talmon*, *EJIL:TALK!*, 30 November 2015, available at <https://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon/#more-13591>.

deactivated in the summer.<sup>8</sup> However, their grumbling is eclipsed by their discussion of the rumours that Germany will declare its neutrality in the war between Poland and the Soviet Union. At 9.30am sharp, Baron Descamps asks that members of the Committee promptly take their seat. He seems anxious about time. He insists that the Committee must hasten its works and that only a quarter of an hour should, from now on, be granted to any member who wishes to express a view on a given question.<sup>9</sup> The meeting continues with a somewhat heated discussion on the question of the jurisdiction of the Court in relation to States which are not signatories of the treaty establishing the Court as well as those which are not members of the League of Nations.<sup>10</sup> Lord Phillimore grows a bit tired of that debate – and of the repeated interventions of Lapradelle who seems a bit restless that morning, perhaps because of the earlier downpour.<sup>11</sup> Lord Phillimore believes there is a consensus on the question of the non-Member States and non-signatory States and proposes to move on to the question of the rules to be applied by the Court.<sup>12</sup> Lord Phillimore has not even finished his intervention when he is interrupted by Baron Descamps who, with a certain glee and excitement, asks for the full attention of the members of the Committee. Baron Descamps indicates that the time has come to discuss the document he circulated earlier regarding the rules to be applied by the Court and the four rules that he has formulated in this respect. Not without some tremor in his voice, he proudly starts to read his proposed provision:<sup>13</sup>

*“The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:*

- 1. conventional international law, whether general or special, being rules expressly adopted by the States;*

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<sup>8</sup> This is fictional. The documents at the disposal of the author do not make it possible to trace the weather in The Hague on the 1<sup>st</sup> of July 1920.

<sup>9</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 231.

<sup>10</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 288 – 293.

<sup>11</sup> The elements on the mindset and emotions of Lord Phillimore and Lapradelle are unverified.

<sup>12</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 293.

<sup>13</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 293. The elements on the mindset and emotions of Baron Descamps are fictional.

2. *international custom, being practice between nations accepted by them as law;*
3. *the rules of international law as recognized by the legal conscience of civilized nations;*
4. *international jurisprudence as a means for the application and development of law*".<sup>14</sup>

As Baron Descamps concludes his presentation, not without displaying a smile of satisfaction, Root takes the floor to stress how important it is to define the rules applied by the Court to induce States to accept the – then envisaged – compulsory jurisdiction of the Court.<sup>15</sup> A discussion on the rules to be applied by the Court ensues. The point is very quickly made that the rules referred to in paragraphs 1 and 2 of Baron Descamps' proposal – thus including that related to custom – are uncontroversial and ought not to be discussed.<sup>16</sup> Attention is quickly drawn exclusively to the much-dreaded hypothesis of a “gap” and the Court declaring itself incompetent through lack of applicable rules (*non liquet*).<sup>17</sup> The Advisory Committee ends its meeting of the 1<sup>st</sup> July 1920. The definition of customary law has not been discussed. Only Lord Phillimore made a reference to “international custom that is a general practice accepted as law by nations” as “the main international law”.<sup>18</sup>

*Friday 2<sup>nd</sup> July 1920.* The weather is dry and summery in the Hague.<sup>19</sup> Upon arrival at the Peace Palace, as they move into their meeting room to take their seat, the members of the Committee cannot help discussing the war between the Soviet Union and Poland and the recent movements of the Red Army. Caught in their discussion, they lose track of time and it takes the insistence of Baron Descamps to have them start

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<sup>14</sup> The proposal of Baron Descamps is reproduced in Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16<sup>th</sup> – July 24<sup>th</sup> 1920, with Annexes, The Hague, Van Langenhuysen Brothers, 1920, Annex No. 3 to the meeting of 1<sup>st</sup> of July 1920, p. 306

<sup>15</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 293.

<sup>16</sup> Loder is the first one to make this point. See Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 294.

<sup>17</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 296.

<sup>18</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 295.

<sup>19</sup> This is fictional. The documents at the disposal of the author do not make it possible to trace the weather in The Hague on the 2<sup>nd</sup> of July 1920.

their meeting.<sup>20</sup> It is 9.35. After reminding the members of their procedural duty to send him any project they would like to propose, Baron Descamps expresses the wish to make some clarifications of his proposal for rules to be applied by the Court that he circulated the day before.<sup>21</sup> In his intervention, there is no elaboration on customary law; only a reference to the duty of the judge to apply customary international law that is understood to be a “rule established by the continual and general usage of nations, which has consequently obtained the force of law” (“une règle établie par la pratique constante, générale, des nations, devenue, à ce titre, une loi pour elles”).<sup>22</sup> Baron Descamps adds that such resort to customary law in international adjudication ought not to be controversial given that custom “results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual intercourse”.<sup>23</sup> The definition of custom proposed by Descamps secures approval and provokes no further discussion.<sup>24</sup>

The foregoing is all that was said about customary international law in the course of the work of the Advisory Committee of Jurists in 1920. After the 2<sup>nd</sup> of July 1920, the constitutive elements of customary international law were never mentioned again in the discussion of the Advisory Committee. Only the wording was the object of a few alterations. The Root-Phillimore plan proposed rewording the definition of custom as “international custom, as evidence of a common practice in the use between nations and accepted by them as law”.<sup>25</sup> Following amendments made by Ricci-Busatti<sup>26</sup> to Descamps’ text, as amended by Root and Phillimore,<sup>27</sup> the wording “international custom

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<sup>20</sup> It is reported that the meeting started at 9.35 on Friday the 2<sup>nd</sup> of July 1920.

<sup>21</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 307.

<sup>22</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 307 and 322.

<sup>23</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 322.

<sup>24</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 293.

<sup>25</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 548.

<sup>26</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 343.

<sup>27</sup> The amended text by Root still read “international custom, being recognized practice between nations accepted by them as law”. See Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 344.



as evidence of common practice among States, accepted by them as law” came to be adopted.<sup>28</sup> Yet, in the ultimate stage of the discussion, the drafting committee removed the reference to ‘States’. The text adopted by the drafting committee thus came to read as: “international custom, as evidence of a general practice, which is accepted as law” (“la coutume internationale, attestation d’une pratique commune, acceptée comme loi”).<sup>29</sup> Notwithstanding some minimal drafting adjustment, it was still very much the Descamps formula submitted on the 1<sup>st</sup> of July 1920.

There were no more changes to the definition of custom although, quite remarkably, the English translation of the authoritative French text prepared by the drafting committee (“la coutume internationale, attestation d’une pratique commune, acceptée comme loi”) referred to either “international custom, *being the recognition of* a general practice, accepted as law”<sup>30</sup> or “international custom, as *evidence of* a general practice, which is accepted as law”.<sup>31</sup> These variations in the English version of the text did not seem to indicate any conscious change as the French text remained unchanged. Interestingly, the same textual instability is found in the documents pertaining to the 10<sup>th</sup> session of the Council of the League during which the draft scheme prepared by the Advisory Committee was discussed.<sup>32</sup>

Be that as it may, the whole draft Statute, including the provision on the rules to be applied by the Court and the definition of customary law “as evidence of common practice among States, accepted by them as law” was submitted the following month to the Council of the League

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<sup>28</sup> Proposal presented by the President and Lord Phillimore, as amended by M. Ricci-Busatti, Annex 3 to the Procès-Verbal of 13<sup>th</sup> meeting), Annex 4, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 351.

<sup>29</sup> Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 561, at 567.

<sup>30</sup> See the text adopted in the first reading in Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 659.

<sup>31</sup> See the draft-scheme submitted to the Council of the League, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 673, at 680 and p. 730.

<sup>32</sup> League of Nations, Permanent Court of International Justice, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant.

of Nations.<sup>33</sup> In the course of its 10<sup>th</sup> session in Brussels, the Council of the League rejected an Argentinean amendment that proposed defining customary international law “as evidence of a practice founded on principles of justice and humanity, and as accepted by law”).<sup>34</sup> The definition of custom was not amended.<sup>35</sup> In November 1920, the project was submitted to the Assembly of the League of Nations which adopted it with further amendments in December 1920.<sup>36</sup> After a minor drafting amendment,<sup>37</sup> the definition of custom now found in Article 38 reads “international custom, as evidence of a general practice accepted as law”.<sup>38</sup> The definition which Baron Descamps introduced on the 1<sup>st</sup> of July 1920 thus made its way to the Statute of the Permanent Court of International Justice and later to that of the International Court of Justice without any substantive alteration.

The little attention which the Advisory Committee of Jurists paid to the question of custom-ascertainment has been noted by commentators.<sup>39</sup>

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<sup>33</sup> League of Nations, Official Journal, September, 1920, p. 318. See also League of Nations, Permanent Court of International Justice, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, p. 19.

<sup>34</sup> See Amendments proposed by the Argentine Delegation to the Draft Scheme of the Advisory Committee of Jurists for the Institution of a Permanent Court of International Justice, as modified by the Council of the League of Nations, p. 68. See also the amendments proposed by the Council to Certain Articles of the Scheme for the Permanent Court of International Justice (10<sup>th</sup> session of the Council), Annex 118, League of Nations, Permanent Court of International Justice, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, p. 44.

<sup>35</sup> See the Draft Scheme for the institution of the Permanent Court of International Justice, mentioned in Article 14 of the Covenant of the League of Nations, presented to the Council of the League by the Advisory Committee of Jurists as amended by virtue of the decisions of the Council, League of Nations, Permanent Court of International Justice, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, p. 54, at 58.

<sup>36</sup> Records of the First Assembly of the League of Nations, Plenary Meetings, p. 500.

<sup>37</sup> See Procès-Verbaux of the Third Committee of the First Assembly Meeting, League of Nations, Permanent Court of International Justice, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, pp. 82-203, esp. 145.

<sup>38</sup> See the Report and Draft Scheme presented to the Assembly by the Third Committee, p. 206, at 211 and 219.

<sup>39</sup> Ole Spiermann, “*Who Attempts too Much Does Nothing Well*: the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice”, 73 *British Yearbook of International Law*, 187-260 esp. 212-218, (2002); M. Fitzmaurice, *The History of Article 38 of the Statute of the International Court of Justice: The Journey From the Past to the Present* in S. Besson and J. d’Aspremont, *Oxford Handbook on the Sources of International Law* (OUP, 2017), pp. 179-202; D. J. Bederman, *Custom as a Source of Law*, 141, (CUP, 2010) See also International Law Commission, *First report on formation and evidence of customary international law* by Sir Michael Wood, A/CN.4/663, 17 May 2013, para. 30 (2013); Jörg Kammerhofer, Introduction, in: *Permanent Court of International Justice, Advisory Committee of Jurists, Procès-verbaux of the proceedings of*

The limited heed paid to custom-ascertainment has sometimes been construed as the sign that the drafter “had no very clear idea as to what constituted international custom”.<sup>40</sup> The lack of engagement with custom-ascertainment has also been seen as indicative of poor drafting<sup>41</sup> or lacking semantic intelligibility.<sup>42</sup> It is argued here that such evaluations of the work of the Advisory Committee of Jurists and of Baron Descamps’ definition are very anachronistic. The reason why the Descamps formula does not do justice to later understandings of customary law, and especially the two-element variant thereof, is simply that Baron Descamps and the members of the Advisory Committee did not think of custom-ascertainment in these terms. Indeed, the dominant understanding of the time was monolithic and did not clearly distinguish between practice and *opinio juris*. This monolithic understanding of custom-ascertainment has been amply documented in the literature.<sup>43</sup> It seems to be confirmed by the few abovementioned references to the modes of custom-ascertainment in the discussion of the Advisory Committee<sup>44</sup> as well as the commentary on the rules to be applied by the Court provided in the final report of the Advisory Committee of Jurists which refers to “international custom in so far as its continuity

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the Committee June 16th-July 24th 1920 with Annexes (1920) (Reprint 2006, The Lawbook Exchange) iii-xiv, at v-vi.

<sup>40</sup> See the statement of Manley O. Hudson, ILC Yearbook, (Vol. I, 1950), 6, para. 45.

<sup>41</sup> See e.g. D. J. Bederman, Custom as a Source of Law, 142-3, (CUP, 2010); see also e.g., J.L. Kunz, “The Nature of Customary International Law”, American Journal of International Law, 47 (1953), 662, 664.

<sup>42</sup> For a recent criticism, see J. Crawford, ‘The Identification and Development of Customary International Law’, Spring Conference of the ILC British Branch – Foundations and Futures of International Law, <https://www.youtube.com/watch?v=0XBc0ZjMVSM>. See also C. Tams, “Meta-Custom and the Court: A Study in Judicial Law-Making”, 14, The Law and Practice of International Courts and Tribunals, 51-79 at 52, (2015).

<sup>43</sup> See P. Hagggenmacher, “La doctrine des deux éléments en droit coutumier dans la pratique de la Cour internationale”, 90 RGDIP, 5-125, at 30-31(1986); C. Tams, “Meta-Custom and the Court: A Study in Judicial Law-Making”, 14 The Law and Practice of International Courts and Tribunals 51-79, at 59-60 (2015); M. Fitzmaurice, The History of Article 38 of the Statute of the International Court of Justice: The Journey From the Past to the Present in S. Besson and J. d’Aspremont, Oxford Handbook on the Sources of International Law (OUP, 2017), pp. 179-202; A. Pellet, *Article 38*, in The Statute of the International Court of Justice (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, 2002) (eds.), 677 at 813.

<sup>44</sup> See the mention of a “rule established by the continual and general usage of nations, which has consequently obtained the force of law” (see Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee p. 307 and 322) or the claim that custom “results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual intercourse” (see Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 322).

proves a common usage”.<sup>45</sup> The Descamps formula and Article 38 simply reflected a monolithic notion of custom whose ascertainment was then deemed an “extremely reliable method”.<sup>46</sup> The problems of drafting or of intelligibility which subsequent generations of international lawyers found in the Descamps formula and the definition found in Article 38 were their own anachronistic projections of an understanding of custom that had yet to emerge in 1920.

## **2. The age of dualism (1927 – 1986)**

While it was deemed reliable by the Advisory Committee of Jurists, it must be acknowledged that the Descamps formula, and its one-element mode of custom-ascertainment, may not have proved that “reliable” for the new Court in need of modes of law-ascertainment that looked mechanical and hence more conducive to the Court’s emerging authority. As early as 1927, the Permanent Court of International Justice came to require a distinct subjective element, namely the “conscious[ness] of having a duty”. The departure from the 1920 Descamps formula lay in the fact that such a subjective element ought not to be inferred from the practice but rather ought to be identified independently. Indeed, addressing France’s third argument about the existence of a rule specially applying to collision cases and according to which criminal proceedings regarding such cases would come exclusively within the jurisdiction of the State whose flag was flown, the Court, in a paragraph that has often been cited and commented upon, affirmed:

*“Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being*

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<sup>45</sup> The French text reads: “la coutume international dont la continuité atteste une pratique commune”), Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 729.

<sup>46</sup> See the Speech of Baron Descamps on the Rule of Law to be applied, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 322.

*obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true*".<sup>47</sup>

Although this affirmation has been commonly read as an authoritative vindication of the two-element doctrine of customary international law,<sup>48</sup> it must be emphasized that the Court was dealing with the difficult question of establishing custom in relation to a duty of abstention, and thus faced the challenge of extracting a customary rule from the absence of action. To distinguish between absence of action that qualifies as practice for the sake of custom and absence of practice that is irrelevant in terms of custom-ascertainment, the Court invented a requirement of "conscious[ness] of having a duty". Only the absence of action that is accompanied by a "conscious[ness] of having a duty" would qualify as practice for the sake of custom-ascertainment. Yet, it is far from evident that the Court meant to generalize that requirement of "conscious[ness] of having a duty" to any custom-ascertainment exercise. It is equally plausible to interpret the above affirmation in the *Lotus* case as reserving the subjective element only for situations where the customary character of a duty of abstention arises. Interpreted in this way, the *Lotus* judgment only amounts to a limited departure from the Descamps formula as it limits the distinction between practice and "the conscious[ness] of having a duty" to the ascertainment of customary duties of abstention.

It is argued here that, more than the judgment in the *Lotus* case, it is the judgment of the International Court of Justice in the *Asylum* case that

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<sup>47</sup> Case of the S.S. "Lotus" (France/Turkey), Judgment, PCIJ Series A, No. 10 (1927), p. 28.

<sup>48</sup> See e.g. M. Fitzmaurice, *The History of Article 38 of the Statute of the International Court of Justice: The Journey From the Past to the Present* in S. Besson and J. d'Aspremont, *Oxford Handbook on the Sources of International Law* (OUP, 2017), pp. 179-202; see also P. Tomka, "Custom and the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 12, No. 2 (2013), p. 195, at 202. I have myself contended that the two-element doctrine originates in the *Lotus* case. See J. d'Aspremont, "The Decay of Modern Customary International Law in Spite of Scholarly Heroism" in Giuliana Ziccardi Capaldo (eds.), *The Global Community Yearbook of International Law and Jurisprudence* (2015), 9-30.

came to break away from the Descamps formula by generalizing the requirement of a subjective element distinct from the practice and tested separately. Indeed, in the *Asylum* case, and in contrast to the *Lotus* case, the requirement of a subjective element no longer is limited to the situation where the customary character of a duty of abstention is at stake. Responding to an argument of the Colombian Government drawing on an alleged regional or local custom peculiar to Latin-American States, the Court made the following statement:

*“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom “as evidence of a general practice accepted as law”.*<sup>49</sup>

With the *Asylum* case, the rupture with the monolithic Descamps formula was complete. Practice and what corresponds to a sense of duty must now be ascertained separately. It is remarkable that, in the *Asylum* case, the Court not only generalized the distinction between practice and a subjective element, but also traced this distinction back to Article 38 and the definition of custom “as evidence of a general practice accepted as law”. In that sense, the *Asylum* case constituted a blunt rewriting of the Descamps formula and of Article 38 in a way that stripped the latter of its 1920 monolithic understanding of custom-ascertainment. The Descamps formula, already severely scaled down by the *Lotus* judgment, was fully repudiated by the *Asylum* judgment.

The rejection of the Descamps formula and the generalization of this position in the *Asylum* judgment were soon confirmed by the Court in the *North Sea Continental Shelf* case, which is often cited in support of the

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<sup>49</sup> *Asylum case (Colombia/Peru)*, Judgment, Judgment of 20 November 1950, I.C.J. Reports 1950, p. 266, 276-277.

two-element doctrine. In this canonical case, the Court famously affirmed:

*“The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio juris; for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty”.*<sup>50</sup>

This famous statement of the Court confirmed the dualistic approach initiated in the *Lotus* case and generalized in the *Asylum* case. It is argued here that the *North Sea Continental Shelf* judgment has become one of the canonical judgments on the matter, not only because it has confirmed the generalization of the subjective element initiated in the *Asylum* case, but also because it has offered a very articulate and unprecedented definition of this subjective element. In fact, shamelessly pushing the anthropomorphic analogy between human beings and states to a degree unheard of,<sup>51</sup> the Court elaborated on what the consciousness of having a duty may be, and indicated that it must correspond to the “feeling” of conforming to what amounts to a legal obligation.<sup>52</sup> The vague

<sup>50</sup> *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 3, 44 (para. 77).

<sup>51</sup> Jean d'Aspremont, *The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law* 4 *Cambridge Journal of International and Comparative Law* (2015) 501, esp. 515-516

<sup>52</sup> As pointed out by Judge Tanaka, this articulate definition of *opinio juris* does not necessarily do away with all the challenges related to *opinio juris*-ascertainment. See Dissenting Opinion of Judge Tanaka, *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, at 175-176 (“[S]o far as the qualitative

reference in the *Lotus* judgment to the consciousness of a duty was thus fully substantiated and the distinction between the two elements of custom firmly established.

Following the judgment in the *North Sea Continental Shelf* case, the rupture with the Descamps formula was certain and its application across the board was confirmed. It is remarkable that the Court, on the occasion of its judgment in the *North Sea Continental Shelf* case, was at pains to trace back the general distinction between the two elements to the *Lotus* case, thereby anchoring the former in the latter. The Court, after distinguishing the two elements, came to add that “[i]n this respect the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case, .... the principle of which is, by analogy, applicable almost word for word, mutatis mutandis, to the present case”.<sup>53</sup> The *Lotus* judgement, despite indications that the subjective element was exclusively reserved for the determination of the customary status of duties of abstention, was made the very precedent for the – now generalized – two-element doctrine of customary international law by the judgment in the *North Sea Continental Shelf* case. Whilst the *Asylum* judgment grounded the two-element doctrine in Article 38, thereby emptying the Descamps formula of its substance, the *North Sea Continental Shelf* case came to ground the two-element doctrine in case-law. Together, these two judgments provided the dualistic approach with rock solid foundations, thereby contributing to the prevention of such a dualistic approach ever being undone. Once endowed with a prestigious pedigree,<sup>54</sup> the now confirmed and

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factor, namely *opinio juris sive necessitatis* is concerned, it is extremely difficult to get evidence of its existence in concrete cases. This factor, relating to internal motivation and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification or other State acts. There is no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement”).

<sup>53</sup> *North Sea Continental Shelf* case, para. 78.

<sup>54</sup> It is interesting that some authors have deemed it necessary to give the two-element variant older roots by tracing it back to Francois Geny, *Méthode d'Interpretation et Sources en Droit Privé Positif* (A. Chevalier-Marescq, 1899) (see e.g. M. Shaw, *International Law*, (7<sup>th</sup> edition, CUP, 2014); Bederman, *Custom as a Source of Law*, 142, (CUP, 2010)) or even Grotius (Joel P. Trachtman, *The Obsolescence of Customary International Law*, Available at SSRN:



generalized two-element doctrine could thrive unchallenged, the Court explicitly indicating a few years later that it had become “axiomatic”.<sup>55</sup> Subject to the *Gulf of Maine* and *Nicaragua* judgments that marked a rupture in the modes of ascertainment of customary law in scholarly debates and which are discussed in the next section, the case-law of the International Court of Justice has continued until today to draw on this axiomatic two-element doctrine that the Court has allegedly inherited from both Article 38 and the *Lotus* judgment.<sup>56</sup>

### 3. The age of turmoil (1986 – 2018)

The dualistic approach to custom-ascertainment that systematically distinguishes between the two elements of custom that was initiated in

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<http://ssrn.com/abstract=2512757>, p. 3) or Suarez (D. J. Bederman, *Custom as a Source of Law*, 139-140, (CUP, 2010) ). Others have even sought traces of the two-element variant in Roman law (R. M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12 *Israeli Law Review*, 344, (1977); Joel P. Trachtman, *The Obsolescence of Customary International Law*, available at SSRN:<http://ssrn.com/abstract=2512757>, p. 3. This view has been rejected by Bederman, *Custom as a Source of Law*, 138-140 & 173, (CUP, 2010)) and English common law (Clive Parry, *The Sources and Evidences of International Law*, 61, (Manchester University Press, 1965)) or the historical school of Savigny (J. Crawford, *The Identification and Development of Customary International Law*, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, <https://www.youtube.com/watch?v=0XBc0ZjMVSM>; C. C. Bradley, *A State Preferences Account of Customary International Law Adjudication* (October 10, 2014) available at SSRN: <http://ssrn.com/abstract=2508298>).

<sup>55</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment 3 June 1985, I.C.J. Reports 1985, p. 29 (para. 27) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”)

<sup>56</sup> See e.g. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, pp. 254–5, para. 70 (“The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”); see also ICJ, *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, I.C.J. Reports 2012, p. 99, 122 (para. 55) (“it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*”); *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, 83, para. 204 (“the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”).

the *Lotus* case and generalized by the judgment in the *Asylum* case dominated international legal practice until the mid-1980s and was widely perpetuated by a very obedient and admiring body of legal scholarship.<sup>57</sup> It is argued here that this dualistic approach to custom-ascertainment came to show some signs of fatigues in the judgment by a Chamber of the Court in the *Gulf of Maine* case. Although the *Gulf of Maine* judgment has commonly been interpreted as continuing the dualistic approach to custom that was initiated in the *Lotus* decision and confirmed in the *Asylum* decision,<sup>58</sup> the *Gulf of Maine* judgment can also be read as the first manifestation of a serious wavering in relation to the well-established dualistic take on custom-ascertainment. In fact, in a much-cited statement, the Chamber of the Court indicated that *opinio juris* could be inferred from practice in the following way:

*“A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the opinio juris of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas”.*<sup>59</sup>

The inferring of *opinio juris* from practice that is suggested by the Chamber of the Court contradicts the elevation of the determination of *opinio juris* as an autonomous and distinct test that had been initiated by the *Lotus* judgment and generalized by the *Asylum* judgment. In the *Gulf of Maine* case, the distinction between practice and *opinio juris* was thus

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<sup>57</sup> See e.g. H. Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Brill, 1972). For a rare exception, see Anthony A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971).

<sup>58</sup> See Draft conclusions on identification of customary international law, with commentaries adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10), *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, p. 137.

<sup>59</sup> *Delimitation of the Marine Boundary in the Gulf of Maine Area (Canada v United States of America)* (Judgment) [1984] ICJ Rep 246, 269, para. 111.

made more porous,<sup>60</sup> coming very close to reviving the Descamps formula and its monolithic understanding of custom-ascertainment.

At the time of the judgment in the *Gulf of Maine* case, the time was not yet ripe to reverse the dominant dualistic approach to custom-ascertainment. The *Gulf of Maine* judgment only proved to be an early fissure in the dualistic approach to custom. It is submitted here that a fundamental rupture would come shortly after with the judgment of the International Court of Justice in the *Nicaragua* case, which opened a new age of turmoil for the doctrine of customary international law. In what proved to be a contentious statement, which later fueled a lot of scholarly debate, the Court declared that:

*“It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”.*<sup>61</sup>

This article is certainly not the place to revisit the approach of the Court to custom-ascertainment that informs the famous abovementioned statement. For the sake of the story told in this article, it suffices to

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<sup>60</sup> J. Crawford similarly contends that the *Gulf of Maine* case constitutes a case where the ICJ conflated the two elements: J. Crawford, The Identification and Development of Customary International Law, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, <https://www.youtube.com/watch?v=0XBc0ZjMVSM>.

<sup>61</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, 98, para. 186.

highlight that the Court, in its *Nicaragua* judgment, while upholding the dualistic take on custom-ascertainment and the distinction between the two elements which must be tested separately, maintained the possibility that custom may be identified on the basis of one element only. In other words, the Court did not revert to the Descamps formula which its judgment in the *Gulf of Maine* case had seemingly returned to but, instead, demoted the two elements to alternative rather than cumulative tests. The *Nicaragua* judgment is thus much more than a simple contortion of the dualistic approach initiated in the *Lotus* case and generalized in the *Asylum* case; rather, it entailed a dramatic metamorphosis of the doctrine of customary international law.

It is interesting to note that, in the *Nicaragua* judgment, the Court was confronted with the customary nature of a duty of abstention in the same way as the Permanent Court of International Justice in the *Lotus* case when it addressed the French argument of a customary obligation not to exercise jurisdiction. Whilst the Permanent Court addressed the challenge of finding relevant practice in relation to a duty of abstention by introducing a requirement of a “conscious[ness] of having a duty” besides practice, the International Court of Justice, caught in the dualistic framework generalized by the *Asylum* judgment, decided to focus exclusively on this “conscious[ness] of having a duty” and ignore the practice.

It is argued here that the discontinuation of the cumulative character of the two elements of custom promoted by the *Nicaragua* judgment, although it could have been simply limited to situations where a duty of abstention is at stake, opened an age of turmoil. In fact, as the dualistic approach was supposedly still the overarching mode of custom-ascertainment, the possibility of focusing on only one of these two elements generated a great deal of instability in custom-ascertainment. Whilst the dualistic approach had thrived uncontested until then, a wide variety of new approaches to custom-ascertainment flourished in the wake of the *Nicaragua* judgment, without any of them getting the upper hand. Even though the case-law of the Court remained, at least on the

surface,<sup>62</sup> loyal to the dualism of the *Lotus* and *Asylum* judgments, legal scholarship became a site of countless endeavours to reorganize the doctrine of customary international law. Put another way, with the *Nicaragua* judgment, the consensus around the dualistic approach to custom unravelled and the admiring scholarship turned itself into a noisy and cacophonous sounding board for a myriad of new approaches to custom-ascertainment. This post-*Nicaragua* turmoil about custom-ascertainment is what I referred to elsewhere as a ‘dance floor’.<sup>63</sup>

A salient aspect of this post-*Nicaragua* turmoil has been the shared diagnosis among legal scholars that the prevailing dualistic approach comes with severe problems, contradictions, and tensions,<sup>64</sup> forcing the Court into inconsistencies<sup>65</sup> and contortions.<sup>66</sup> Drawing on such a

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<sup>62</sup> Commentators have shown that the Court, albeit loyal to the dualistic approach, enjoys significant leeway as to what it elects as a customary rule. See e.g. C. Tams “*Meta-Custom and the Court: A Study in Judicial Law-Making*”, 14 *The Law and Practice of International Courts and Tribunals* (2015), 51-79, at 79; Stefan Talmon, *Determining Customary International Law: The ICJ’s Methodology and the Idyllic World of the ILC*, EJIL:Talk!, 3 December 2015, <https://www.ejiltalk.org/determining-customary-international-law-the-icjs-methodology-and-the-idyllic-world-of-the-ilc/>.

<sup>63</sup> J. d’Aspremont, *Customary International Law as a Dance Floor – Part 1*, available at <http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/> and *Customary International Law as a Dance Floor – Part 2*, available at <http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/>.

<sup>64</sup> Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 *European Journal of International Law* (2004), 523–553; M. Fitzmaurice, *The History of Article 38 of the Statute of the International Court of Justice: The Journey From the Past to the Present* in S. Besson and J. d’Aspremont, *Oxford Handbook on the Sources of International Law* (OUP, 2017), pp. 179-202; Robert Kolb, ‘Selected Problems in the Theory of Customary International Law’, *Netherlands International Law Review* 50 (2003): 119–50; Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’, *European Journal of International Law* 26 (2015): 417–43.

<sup>65</sup> On the huge variations in the case-law of the Court the ICJ, see generally Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’, *European Journal of International Law* 26 (2015): 417–43; A. Pellet, *Article 38, in The Statute of the International Court of Justice*, (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (2002) (eds.) 677 at 826-829; J. Crawford, *The Identification and Development of Customary International Law*, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, <http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001>, p. 8-10; see also International Law Commission, *First report on formation and evidence of customary international law by Sir Michael Wood*, A/CN.4/663, 17 May 2013, para. 62. For a rejection of this position and the argument that a consistent and coherent mode of custom-ascertainment can be found in the Court’s case-law, see Omri Sender and Michael Wood, *The International Court of Justice and Customary International Law: A Reply to Stefan Talmon*, EJIL:Talk!, 30 November 2015, available at <https://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon/#more-13591>.

<sup>66</sup> In the same vein, see C. Bradley, *A State Preferences Account of Customary International Law Adjudication* (October 10, 2014), available at SSRN: <http://ssrn.com/abstract=2508298>; Jonathan I.

diagnosis, many scholars have sought to offer new explanatory and conceptual frameworks to normalize the contradictions, inconsistencies, tensions, and fluctuations of the dualistic approach and thus uphold the latter.<sup>67</sup> For others, this diagnosis has vindicated a reform of customary international law<sup>68</sup> as is illustrated by the popular ideas of a “new

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Charney, *Universal International Law*, 83, 529 at 537, *AJIL* 87 (1993); William Shabas, *Customary Law or ‘Judge Made’ Law: Judicial Creativity at the UN Criminal Tribunals*, 100, in Jose Doria et al (eds) *The Legal Regime of the International Criminal Court* (Martinus Nijhoff, 2009); M. Fitzmaurice, *The History of Article 38 of the Statute of the International Court of Justice: The Journey From the Past to the Present* in S. Besson and J. d’Aspremont, *Oxford Handbook on the Sources of International Law* (OUP, 2017), pp. 179-202.

<sup>67</sup> For instance, much attention has been paid to the chronological paradox that comes with the dualistic approach. G. J. H. Van Hoof, *Rethinking the Sources of International Law*, 99, (Kluwer, 1983) (who seeks to explain the chronological paradox on the basis of an idea “mistake”) or Herman Meijers, *How is International Law Made? The Stages of Growth of International Law and the Use of Its Customary Rules*, 9 *Netherlands Yearbook of International Law*, 1 (1978). It has been argued that none of these explanatory frameworks have proved convincing. See H. Charlesworth, *Customary International Law and the Nicaragua Case*, 11, *Australian Yearbook of International Law*, 9 (1984-87).

<sup>68</sup> See e.g. M. H. Mendelson, *The Formation of Customary International Law*, 272 *Collected Courses*, 155 (1999); International Law Association, *Final Report of the Committee on Formation of Customary (General) International Law* (2000), p. 9-10; D’Amato, *Customary International Law: A Reformulation* 4 *International Legal Theory*, 1, (1998); T. Guzman, *Saving Customary International Law*, 27 *Michigan Journal of International Law*, 115 at 153, (2005); B. Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP, 2010).

custom”<sup>69</sup> or a “sliding scale”.<sup>70</sup> All these new reformist ideas have, in turn, created the need for reconciliatory exercises to soothe, not the contradictions of the dualism of custom-ascertainment, but the contradictions between those reformist constructions.<sup>71</sup>

The foregoing shows that the turmoil prompted by the *Nicaragua* decision has occasioned a very prolific and creative body literature, giving way to all kinds of arguments and scholarly constructions about custom. Scholars, having diagnosed that the rigid dualistic approach to custom-ascertainment generalized by the *Asylum* decision was not functioning properly, felt liberated from a strict two-element doctrine and felt emboldened to offer all kinds of new modes of custom-

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<sup>69</sup> For an illustration, see O. Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 *Recueil des Cours*, 333-342, (1982-V); T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Clarendon, 1989); J. Charney, ‘*Universal International Law*’, 87 *American Journal of International Law*, 529 (1993). See also C. Tomuschat, ‘*Obligations arising for states without or against their will*’, 241 *Collected Courses*, 195-374, p. 269 et seq. (1993-IV) Richard B. Lillich, *The Growing Importance of Customary International Human Rights*, 25 *GA J. International and Comparative Law* 1, 8 (1995/96). The theory of “new custom” has been insightfully analyzed by G. Abi-Saab: see G. Abi-Saab, *Essays in Honor of Roberto Ago*, (A. Giuffrè, 1987), Abi-Saab, ‘*La Coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté*’ 62-65. See the tentative reconciliation between this modern custom and the traditional custom by A. E. Roberts, ‘*Traditional and Modern Approaches to Customary International Law: A Reconciliation*’, 95 *AJIL* 757, (2001); *La Communauté Internationale: Mélanges Offerts a Charles Rousseau* (Pedone, 1974), R.-J. Dupuy, *Coutume sage et coutume sauvage*, p. 75. Such an understanding of customary international law has been subject to very scathing criticisms, mostly because of its inconsistency with practice. See e.g. *International Law: Teaching and Practice* (B.Cheng (ed), Stevens & Sons, 1982), R. Jennings, ‘*The Identification of International Law*’ 3, at 6; *Le Droit International dans un Monde en Mutation: Liber Amicorum en Hommage au Professeur Eduardo Jimenez de Arechaga*, (Fundación de Cultura Universitaria 1994), P.-M. Dupuy, ‘*Théorie des sources et coutume en droit international contemporain*’ 51, at 68; See A. D’Amato, ‘*Trashing Customary International Law*’, 81 *AJIL* 101 (1987); P. P. Kelly, ‘*The Twilight of Customary International Law*’, 40 *VA J. Int’l Law L.* 449 at 451, (2000); *Studi in Onore Di Giuseppe Sperduti*, (Giuffrè ed., 1984), F. Münch, ‘*A propos du droit spontané*’, 149-162; Karl-Heinz Böckstiegel (ed) *Liber Amicorum Honouring Ignaz Seidl-Hohenveldern: Law of Nations, Law of International Organisations, World’s Economic Law* (Carl Heymanns Verlag KG, 1988), D. Vignes, ‘*La Coutume surgie de 1973 à 1982 n’aurait-elle pas écartée la codification comme source principale du droit de la mer?*’, 635-643. See also *Realism in Law-Making, Essays on International Law in Honour of Willem Riphagen*, (A. Bos and H. Siblesz (eds.), Martinus Nijhoff, 1986), G. Ladreit de Lacharrière, ‘*Aspects du relativisme du droit international*’, 89-99; B. Simma and P. Alston, ‘*The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*’, 12 *Australian Yearbook of International Law*, 82 at 89, (1988-1989); R. B. Baker, *Customary International Law in the 21<sup>st</sup> Century: Old Challenges and New Debates*, 21 *European Journal of International Law*, 173-204 (2010).

<sup>70</sup> F. L. Kirgis, *Custom as a Sliding Scale*, 81 *AJIL* 146 (1987)

<sup>71</sup> See A. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 *AJIL* 757 (2001); F. Kirgis, *Custom on a Sliding Scale*, 81 *AJIL* 146 (1987); see also W. Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 *Georgetown Journal of International Law*, 445, (2014).

ascertainment. During the age of turmoil, never has the thinking about custom-ascertainment been so intense, diverse, and original. If one sees value in this prolific and creative scholarship about custom outside the rigid dualistic straightjacket of the *Asylum* case, the age of turmoil triggered by the *Nicaragua* decision could be seen as the golden age of the doctrine of customary law.<sup>72</sup>

#### **4. The return to innocence (2018 – present)**

In this section, it is submitted that the age of turmoil of the doctrine of customary law provoked by the *Nicaragua* judgment is likely to have come to an end by virtue of a new metamorphosis provoked by the 2018 Conclusions of the International Law Commission on the identification of customary international law. The argument is made here that the International Law Commission's formal acceptance that practice and *opinio juris* can be extracted from the very same acts collapses the distinction between the two tests, thereby resuscitating the monolithic understanding of customary law at work in the Descamps formula. This corresponds to the fourth and last metamorphosis of the doctrine of custom in the story told in this article.

Metamorphoses may be protracted and ruptures may not be immediate. This is the case for this fourth metamorphosis whose seeds were already sowed by the prolific and creative literature produced in the post-*Nicaragua* age of turmoil.<sup>73</sup> In other words, the 2018 return to the Descamps formula had long been in the pipeline when it was formalized by the International Law Commission in its Conclusions on the identification of customary international law. In fact, in the wake of

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<sup>72</sup> This is what I have called “scholarly heroism” elsewhere. See J. d’Aspremont, “The Decay of Modern Customary International Law in Spite of Scholarly Heroism” in Giuliana Ziccardi Capaldo (eds.), *The Global Community Yearbook of International Law and Jurisprudence* (OUP, 2015), 9-30.

<sup>73</sup> One could go as far as claiming that the roots of this fourth and last metamorphosis go back to the Dissenting Opinion of Judge Tanaka, *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, at 176 (“the two factors required for the formation of customary law on matters relating to the delimitation of the continental shelf must not be interpreted too rigidly. The appraisal of factors must be relative to the circumstances and therefore elastic; it requires the teleological approach”).



the *Nicaragua* judgment, more and more scholars had come to espouse the idea that, for the sake of custom-ascertainment, written materials as well as verbal acts can be constitutive of both practice and *opinio juris*, thereby allowing the extraction of practice and *opinio juris* from the same acts.<sup>74</sup> There is little doubt that, notwithstanding warnings against such conflation of the two elements,<sup>75</sup> and occasional reminders that verbal acts can only count as practice as far as customs of making such declarations are concerned, and not customs of the conduct described by the verbal acts,<sup>76</sup> the idea that practice and *opinio juris* can be found in the same acts gained acceptance in the post-*Nicaragua* era.

Ushered in by the prolific and creative scholarship generated by the post-*Nicaragua* turmoil, the possibility of finding practice and *opinio juris* in the same acts did not prove controversial when the matter came before the International Law Commission. Indeed, the Special Rapporteur, while showing some awareness for the problem of double-

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<sup>74</sup> See e.g. J. Crawford, *The Identification and Development of Customary International Law*, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, <https://www.youtube.com/watch?v=0XBc0ZjMVSM>. International Law Association, Final Report of the Committee on Formation of Customary (General) International Law (2000), p. 14. See C. Tams, who argues, with respect to contemporary scholarship, that “the actual application of the meta-law of custom has moved away from direct inquiries into State conduct” and that the “link between practice and custom is much, and further, attenuated, to the point where custom ends up being a byproduct of other processes of normative clarification”); see C. Tams “*Meta-Custom and the Court: A Study in Judicial Law-Making*”, 14 *The Law and Practice of International Courts and Tribunals* (2015), 51-79 at 76-77.

<sup>75</sup> This is the objection of the “double-counting”. The expression is probably from Mendelson, 272 *Collected Courses*, p. 206-207 and p. 283-293 (1999); see also D’Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971) p. 88 (“A claim is not an act... claims themselves, although they may articulate a legal norm, cannot constitute the material component of custom”); J. Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 *European Journal of International Law*, 523-553, at 527, (2004); M.E. Villiger, *Customary International Law and Treaties*, 50, (2<sup>nd</sup> ed., Springer, 1997); K. Wolfke, *Custom in Present International Law*, 42, (2<sup>nd</sup> ed., Springer, 1993). According to J. Crawford, criticism of mixing constitutive and declarative was already voiced in relation to the wording of Article 38: J. Crawford, *The Identification and Development of Customary International Law*, Spring Conference of the ILA British Branch – Foundations and Futures of International Law, <http://www.ila-hq.org/download.cfm/docid/BC985B09-ACEA-4356-AD31C90620705001>, at 2.

<sup>76</sup> K. Wolfke, *Custom in Present International Law*, 42, (2<sup>nd</sup> ed., Springer, 1993). See also the remarks of R. Higgins, *Problems and Process: International Law and How we Use it*, 28, (Clarendon, 1995).

counting,<sup>77</sup> had no qualms defending the idea that practice and *opinio juris* could be extracted from the very same acts.<sup>78</sup>

The possibility of finding practice and *opinio juris* in the same acts is articulated by Conclusions 6 and 10. Conclusion 6, entitled ‘Forms of practice’, reads as follows:

1. *Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.*
2. *Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts. [...]*

Conclusion 10, entitled ‘Forms of evidence of acceptance as law (*opinio juris*)’, reads as follows:

1. *Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.*
2. *Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference. [...]*

The possibility of the same acts being conducive to both practice and *opinio juris* is explicitly confirmed by the second paragraphs of each of

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<sup>77</sup> “‘Acceptance as law’ should generally not be evidenced by the very practice alleged to be prescribed by customary international law”: International Law Commission, Second Report on Identification of Customary International Law by the Special Rapporteur Michael Wood, 22 May 2014, A/CN.4/672, para. 74

<sup>78</sup> While unflinchingly adhering to the two-element approach, the second report nurtures some conflation between the two elements. For instance, some acts can indeed be constitutive (and/or declarative) of both practice and *opinio juris* (see report’s draft conclusion 7 and draft conclusion 11). See also the list of acts that can be constitutive of practice in International Law Commission, Second Report on Identification of Customary International Law by the Special Rapporteur Michael Wood, 22 May 2014, A/CN.4/672, para. 41-42 and para 48 (draft conclusion 7) and para. 76-77 and para. 80 (draft conclusion 11). See, however, the more nuanced approach in the Third Report on the identification of customary international law, A/CN.4/682, 27 March 2015, para. 15.

these Conclusions, as they both refer to diplomatic correspondence, conduct in connection with resolutions adopted by international organizations or at an intergovernmental conference, and decisions of national courts as forms of practice and *opinio juris*. This is explicitly confirmed by the commentary on Conclusion 10 that acknowledges that “[t]here is some common ground between the forms of evidence of acceptance as law and the forms of State practice referred to in draft conclusion 6...; in part, this reflects the fact that the two elements may at times be found in the same material (but, even then, their identification requires a separate exercise in each case)”.<sup>79</sup>

The possibility of extracting practice and *opinio juris* from the same act is similarly highlighted by the commentary on Conclusion 3 adopted by the International Law Commission. Whilst Conclusion 3 recalls the dominant dualistic approach to custom whereby each of the two elements ought to be ascertained separately, the commentary on Conclusion 3 indicates that “the same material may be used to ascertain practice and acceptance as law (*opinio juris*)”.<sup>80</sup> In this respect, it must be emphasized how difficult it is to reconcile the claim made in Conclusion 3 that each of the two elements must be verified separately with the explicit possibility that practice and *opinio juris* may be extracted from the same acts. If the two elements of custom are extracted from the same acts, the distinction between their respective ascertainment collapses as it suffices to scrutinize the same material to extract custom.<sup>81</sup> Hence, the finding of practice and *opinio juris* no longer needs to be subject to two distinct tests.

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<sup>79</sup> Draft conclusions on identification of customary international law, with commentaries, A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Part Two, para 2, p. 141.

<sup>80</sup> Draft conclusions on identification of customary international law, with commentaries, A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Part Two., para. 8, p. 129. The Commentary also adds: “Similarly, an official report issued by a State may serve as practice (or contain information as to that State’s practice) as well as attest to the legal views underlying it. The important point remains, however, that the material must be examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law”.

<sup>81</sup> Contra Draft conclusions on identification of customary international law, with commentaries, A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Part Two, para. 8, p. 129.

For these reasons, it is argued here that Conclusions 6 and 10 of the International Law Commission not only contradict Conclusion 3 on the requirement of distinct ascertainment of each element but also bring an end to the dualism that was initiated in the *Lotus* case and generalized in the *Asylum* case: since it suffices to scrutinize the same material to extract custom, such material becomes “evidence of a general practice, which is accepted as law” as this was understood in 1920. Conclusions 6 and 10 thus prompt a very serious rupture with dualism, bringing about a return to the 1920 monolithic understanding of custom-ascertainment where the various elements of custom are not distinguished and tested separately.

A conceptual remark is warranted at this stage. The possibility of extracting practice and *opinio juris* from the same acts builds on the presupposition – already heard in the post-*Nicaragua* turmoil – that the notion of practice is no longer restricted to conduct (action or inaction) strictly speaking, but also includes verbal acts and what State officials say, the latter having the potential to be constitutive of both practice and *opinio juris*.<sup>82</sup> It is interesting that this broad understanding of “practice” for the sake of Conclusion 6 mirrors the understanding of “practice” informing the ILC draft conclusions on *subsequent agreements and subsequent practice in relation to the interpretation of treaties*.<sup>83</sup> In fact, according to the ILC, in the latter project practice ought to be construed as including “not only official acts at the international or at the internal level that serve to apply the treaty...but also, *inter alia*, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise;

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<sup>82</sup> Draft conclusions on identification of customary international law, with commentaries, A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Part Two, para 2, p. 133 (“While some have argued that it is only what States “do” rather than what they “say” that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may also count as practice”).

<sup>83</sup> See Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries (2018), A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Part two.

or the enactment of domestic legislation...”.<sup>84</sup> The ILC similarly indicated that conduct qualifying as subsequent practice includes “not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts...”.<sup>85</sup> The broadening of the notion of practice by Conclusion 6 so as to include verbal acts is thus not an isolated move, but rather echoes a similar understanding of practice for the sake of interpretation. It thus seems that the International Law Commission has aligned the notion of practice for custom-ascertainment and that of practice for interpretive purposes, a move which cannot always be reconciled with the attempts by the Commission to distinguish between sources (law-ascertainment) and interpretation (content-determination).<sup>86</sup>

Be that as it may, the metamorphosis of the doctrine of custom and the return to the Descamps formula, that originates with the possibility of extracting practice and *opinio juris* from the same acts according to Conclusions 6 and 10, is where the story that is told here ends. This fourth and last change constitutes the very last stage of the life of the doctrine of custom that is mentioned here. Ending the story of the four lives of the doctrine of custom with the rupture created by the International Law Commission is what allows it to end with dramatic irony. Indeed, the International Law Commission vindicates an approach to custom whereby *opinio juris* and practice can be extracted from the same acts by reference to Article 38, from which the two-element doctrine supposedly comes.<sup>87</sup> For instance, right at the beginning of its commentaries on the Conclusions on the identification

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<sup>84</sup> Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries (2018), A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Part two, p.32, para. 18.

<sup>85</sup> Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries (2018), A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Part two, p. 50, para. 22.

<sup>86</sup> The distinction between sources (law-ascertainment) and interpretation (content-determination) is expressly acknowledged in Conclusions 2, 12, 13 and 16.

<sup>87</sup> Second report of the Special Rapporteur, Sir Michael Wood (66th session of the ILC (2014)), A/CN.4/672 p. 6. para. 17; see also First report of the Special Rapporteur, Sir Michael Wood (65th session of the ILC (2013)), A/CN.4/663, para. 28-32.

of customary international law, the International Law Commission claims that:

*“Customary international law is unwritten law deriving from practice accepted as law. It remains an important source of public international law. Customary international law is among the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, which refers, in subparagraph (b), to “international custom, as evidence of a general practice accepted as law”. This wording reflects the two constituent elements of customary international law: a general practice and its acceptance as law (the latter often referred to as opinio juris)”*.<sup>88</sup>

The foregoing means that it is in the very name of Article 38 that the same acts can be instrumental in practice and *opinio juris*. In other words, in the commentaries accompanying the International Law Commission’s Conclusions, the extraction of practice and *opinio juris* from the same acts is justified by virtue of the very provision which was originally the receptacle of a monolithic understanding of custom according to the Descamps formula. It is true that the International Law Commission refers to Article 38 by virtue of a linear historical narrative that traces the origin of the two-element doctrine in Article 38, that is, by virtue of a historical narrative that has been seriously challenged in the story told in this article. Yet, finding a justification for Conclusions 6 and 10 in Article 38 is precisely where the fundamental irony of this whole story lies. The definition of Article 38 was shaped by the monolithic thinking about custom of the 1920s and is now invoked to give a pedigree to a new approach of customary law where practice and *opinio juris* are not subject to distinct tests, just like in the 1920s. There can be no better tribute to the Descamps formula and its monolithic understanding of custom-ascertainment than invoking Article 38 to justify a variant of the two-element doctrine of custom whereby the same acts generate both practice and *opinio juris* and for which the two elements are no longer subject to distinct tests.

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<sup>88</sup> Draft conclusions on identification of customary international law, with commentaries, A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Part Two, para. 3, pp. 122-123.

## 5. Epilogue

*The Hague, Saturday 24<sup>th</sup> July 1920, 3.00pm.*

Baron Descamps opens the final session of the Advisory Committee of Jurists. After reading a telegram received from the President of the Council of the League who regretfully could not be present, Baron Descamps delivers a closing speech where he commends the Committee for its hard work to “propose to the nations a general system of international justice”,<sup>89</sup> including its efforts to “lay down the rules of juridical interpretation to be applied by the judges in the examination of cases submitted to them”.<sup>90</sup> The meeting is closed at 3.20pm. As he walks out of the meeting room for the last time, Baron Descamps – probably like many of his fellow members – cannot help contemplating a possible role he could be playing in the Court system which the Committee has decisively contributed to designing during its four weeks of intense work. At this moment, Baron Descamps cannot anticipate that his candidacy for a position as a judge at the Permanent Court of International Justice will prove unsuccessful the year thereafter in the Assembly of the League of Nations.<sup>91</sup>

It has been reported that Baron Descamps’ misfortune at the Assembly of the League of Nations can be traced back, among other things, to some personal enmity as well as the ire he had repeatedly provoked within the Advisory Committee of Jurists a year earlier.<sup>92</sup> It is true that,

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<sup>89</sup> Address of Baron Decamps on 24<sup>th</sup> July 1920, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 753.

<sup>90</sup> Address of Baron Decamps on 24<sup>th</sup> July 1920, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, p. 754.

<sup>91</sup> For an overview of the election of the first judges at the Permanent Court of International Justice, see James Brown Scott, *The Election of Judges for the Permanent Court of International Justice*, 15 *American Journal of International Law* (1921), pp. 556-558. James Brown Scott ends his overview by writing: “The court is an admirable body, representing the different forms of civilization and systems of law, and calculated not only to do justice between nations without fear or favor, but to their satisfaction. One dream of the ages has been realized in our time”.

<sup>92</sup> See Vincent Genin, ‘Le cas des experts belges à la Cour permanente de justice internationale, 1921-1930. Intégrer l’histoire du droit international au champ de l’histoire des relations internationales’, 18 *Les Cahiers Sirice* (2017), p. 61-76, at 65-66.

as one can gather from the *procès-verbaux* of the proceedings of the Advisory Committee of Jurists, Baron Descamps probably did not have an easy and mellow temperament. However, at this stage of the story told in this article, such considerations are irrelevant. So is Baron Descamps' failure to be elected as a judge of the Permanent Court which turned out to be only a limited setback. Indeed, 98 years later, at the 3412<sup>th</sup> meeting of the International Law Commission held at Headquarters, as Sir Michael Wood takes the floor to thank the Commission for the adoption of the text,<sup>93</sup> Baron Descamps' legacy has finally been redeemed. From now on, under the guise of an imaginary genealogy that locates the two-element doctrine of customary law in Article 38,<sup>94</sup> the monolithic understanding of customary law of the Descamps formula can thrive unchecked and shape legal arguments about custom for the century to come. Baron Descamps lives.

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<sup>93</sup> Provisional summary record of the 3412th meeting held on 25<sup>th</sup> May 2018, A/CN.4/SR.3412, p. 9.

<sup>94</sup> The main doctrines of international law are all accompanied by imaginary genealogies that artificially derive them from a formal repository. See generally J. d'Aspremont, *International Law as a Belief System* (CUP, 2017).