COMPARATIVE LEGAL METHODOLOGY AND ITS RELATION TO THE IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

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ABSTRACT

The lack of clarity about the content and application of the relevant rules and principles relating to the identification of customary international law, as Professor Matthew Craven posits, stem from a failure to appreciate fully the conceptual problems that underlie the construction of doctrine in international law. Indeed, these difficulties broadly stem from the lack of any agreed theoretical structure through which knowledge could be understood and utilised. The solution, it is argued, boils down to methodology. This article argues that comparative legal methodology should be applied as an epistemology of legal reasoning to give the study of customary international law a framework through which its content and application could be better articulated, structured, appraised, and assessed.

I INTRODUCTION

The lack of clarity about the content and application of the relevant rules and principles relating to the identification of customary international law, in Professor Matthew Craven's view,[2] stem from a 'failure to appreciate fully the conceptual issues that underlie the construction of doctrine [of law] in international law'.[3] Professor Craven further posits that the root of these issues is confusion arising from 'the lack of any agreed theoretical structure' as regards the analysis and understanding of the 'creation, assumption [and] imposition of legal obligation in international law'.[4] Indeed,

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[2] Matthew Craven, 'The Problem of State Succession and the Identity of States Under International Law' (1998) 9 *European Journal of International Law* 142, 142.

[3] Ibid 142–3.

[4] Ibid 142–3.

as an illustrative example, the late Philip C Jessup in his book *Transnational Law*, some forty years earlier, opined that these difficulties 'stem from the lack of agreement on the terminology [and vocabulary[5]] for the subject matter under examination'.[6] The term 'international law' — as a purported placeholder term for the broad province of 'transnational law', 'the law of nations', or '*droit des gens*' — is inexact and misleading since it obscures the true nature of the subject matter.[7] 'International law', in the words of Jessup, is a study of not only the relations of one state to another or among states (international law) but a study of 'all law which regulates actions or events that transcend national frontiers' (trans-national law).[8]

As will be demonstrated, the true nature of international law is obscured by confusion.[9] This confusion makes it difficult to ascertain the character, nature, scope and content of international law. But far from setting down a fixed predetermined idea of what is 'international law', this article argues that *some* methodology or epistemology should be adopted in the identification of customary international law. In line with Professor Geoffrey Samuel's view, it is argued that a comparative legal epistemology (or social science methodology[10]) should be applied to the study of customary international law to give it a framework through which its content and application could be better analysed and understood.[11] This article briefly analyses Professor Samuel's comparative methodology,[12] and argues that his methodological approach to comparative law, as an epistemology of legal reasoning, facilitates better articulation, appraisal and assessment

[5] Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 *Asian Journal of International Law* 61, 68.

[6] Philip C Jessup, *Transnational Law* (Yale University Press, 1956) 1–3, citing Georges Scelle, *Precis de droit des gens* (Recueil Sirey, 1932) pt 1, vii.

[7] Jessup (n 6) 1–3; cf David Kennedy, 'International Legal Education' (1985) 26 *Harvard International Law Journal* 361, 373–6; cf Hart (n 174) 215.

[8] Jessup (n 6); Roger Cotterell, 'What is Transnational Law' (2012) 37 *Law and Social Enquiry* 500. The 'transnational' view of 'international law' is particularly important, especially in an era where it has been emphasised that the future of international law is domestic, based on cooperation and integration. Out of an enormous literature, see especially Giacco (n 86) 27; Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47 *Harvard International Law Journal* 1103; Andre Noellkaemper and Janne Nijman (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007) 13; Eibe Riedel, 'Standards and Sources: Farewell to the Exclusivity of Sourced Triad in International Law' (1991) 2 *European Journal of International Law* 58, 58–9. Cf *Gaetano Morelli Lectures* (Lectures, Sapienza University of Rome, 29 May 2014 – 13 October 2018).

[9] Out of an enormous literature, see Koskenniemi (n 5) 68; Craven (n 2) 142.

[10] Cf Geoffrey Samuel, 'Can Social Science Theory Aid the Comparative Lawyer in Understanding Legal Knowledge' (2019) 14(2) *Journal of Comparative Law* 311.

[11] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, 2014) 2, citing Olivier Corten, *Methodologie du droit international public* (Editions de l'Universite de Bruxelles, 2009) 12. See also *Gaetano Morelli Lectures – 5th Edition (2018)* – 'Methodologies of International Law' (Lectures, Sapienza University of Rome, 11–13 October 2018); *Gaetano Morelli Lectures – 4th Edition (2017)* – 'Rethinking the Doctrine of Customary International Law' (Lectures, Sapienza University of Rome, 26–27 May 2017).

[12] Geoffrey Samuel, 'Taking Methods Seriously (Part One)' (2007) 2(1) *Journal of Comparative Law* 94; Geoffrey Samuel, 'Taking Methods Seriously (Part Two)' (2007) 2(2) *Journal of Comparative Law* 210. See also Geoffrey Samuel, 'Is Law Really a Social Science' (2008) 67(2) *Cambridge Law Journal* 288; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, 2014). Professor Samuel's book *An Introduction to Comparative Law Theory and Method* presents the arguments and proofs in 'Taking Methods Seriously (Part One)' and 'Taking Methods Seriously (Part Two)' in a well-structured manner that is easy to follow.

of doctrine in international law.

Part II looks at some problems relating to the identification of customary international law. Part III, with reference to Part II, analyses the role of comparative legal methodology in relation to international law. It also argues that Professor Samuel's methodological approach to comparative law, as an epistemology of legal reasoning, facilitates better articulation, appraisal, and assessment of doctrine in international law.

II PROBLEMS WITH THE IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

The difficulty with establishing the *existence* of customary international law arises, in part, because of the abundance of ways in which customary international law can be supported and founded.[13] In the language of Sir Henry Maine, there exist a 'substantive aggregate' of sources from which materials can be used to support or evidence the existence or development of custom.[14] This is because customary international law can be inferred, deduced, induced, or intuitively asserted from sources that evidence the internal motivation of states,[15] such that it can be said that the 'generality of subjects of international law accept [an asserted] rule as law'.[16] These sources generally include treaties and ratifications of treaties,[17] decisions of national courts, national legislation, municipal law,[18] administrative statements and decisions of governments,[19] opinions of national legal advisers, claims, declarations *in abstracto*,[20] diplomatic correspondences, practice of international organisations,[21] etc.[22]

However, despite the abundance of sources from which state's internal motivations can be evidenced, the problem lies in the analysis and appraisal of these sources, as well as the criterion on which customary international law is found. First, finding material that *actually* and *conclusively* evidences a state's internal motivations is an uphill task. As Judge Sørensen noted in the *North Sea Continental Shelf Cases*:[23]

> [T]his is a problem of legal doctrine which may cause great difficulties in

[13] Koskenniemi, *From Apology to Utopia* (n 26) 385; this is a problem of law's intelligibility.

[14] Maine (n 79) 11.

[15] Koskenniemi, *From Apology to Utopia* (n 26) 363. Cf actions undertaken because of coercion, goodwill, or bargaining: *Colombian-Peru Asylum Case (Judgment)* [1950] ICJ Rep 266, 277, 286; *Dispute Between the Government of Kuwait and the American Independent Oil Co* (1982) 21 ILM 976 (Award). Cf 'rule of force' in Keeton (n 180) 45–6.

[16] Koskenniemi, *From Apology to Utopia* (n 26) 384, citing Georg Schwarzenberger; *Statute of the International Court of Justice* art 38(1)(b).

[17] *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ Rep 4, 22–3; *SS Wimbledon* [1923] PCIJ Rep, Ser A, No 1, 25; *Territorial Jurisdiction of the International Commission of the River Oder* [1929] PCIJ Rep, Ser A, No 23, 27; *Panevezys-Saldutiskis Railway* [1939] PCIJ Rep, Ser A/B, No 76, 51–2 (Dissenting Opinion of Judge Erich); Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons, 1958) 377–8.

[18] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ Rep, Ser A, No 7, 17

[19] Ibid.

[20] Michael Akehurst, 'Custom as a Source of International Law' (1975) 47 *British Yearbook of International Law* 1, 53.

[21] See, eg, *Chagos Archipelago Advisory Opinion* (n 115) [150].

[22] (1950) II *Yearbook of the International Law Commission* 368 *et seq*.

[23] *North Sea Continental Shelf Cases* (n 91) 246 (Dissenting Op of Judge Sorensen).

> international adjudication. In view of the manner in which international relations are conducted, there may be numerous cases in which it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action and policy of other governments.[24]

Second, these sources have dual — sometimes competing — functions in the identification and classification of customary international law.[25] They can be declaratory of existing customary international law or constitutive of the sources or the elements of developing new customary international law.[26] As Judge Alvarez noted in the *Reparations* case,[27] 'it is quite impossible to say where the development of law ends and where its creation begins'.[28] Third, there is difficulty in discerning whether there is sufficient support for an asserted rule of customary international law. As will be demonstrated below, the point at which the combination of state practice and *opinio juris* become customary international law is, at best, unclear.

These difficulties, stemming from problems of substance and methodology,[29] are apparent in the jurisprudence of the World Court. In relation to the identification of customary international law generally, and from general assembly resolutions specifically, this can be illustrated with reference to:

a) different valid thresholds (strict versus flexible) and analytical approaches (induction versus deduction) adopted by the World Court in establishing customary international law (analysed in Parts II.B.1 & II.B.2 of this article);

b) the rise of intuitive 'assertion' as an approach taken by the World Court in identifying customary international law (analysed in Part II.B.3 of this article).

A *The Concept of Customary International Law*

At a conceptual level, 'customary' international law may be articulated with reference to a modified articulation of Professor Pocock's description of English Customary Law:[30]

> When a reasonable act once done is found to be good and beneficiall [sic]

[24] Ibid.

[25] These can be characterised as competing or complementary, depending on the context. Cf Li Chen, 'Tracing Chinese Scholar Chen Tiqiang's Pursuit of International Law Education and His Major Contribution to the Doctrine of Recognition' (2020) 10 *Asian Journal of International Law* 68, 76. This dual function dichotomy is addressed in greater detail by Alvarez-Jimenez: Alberto Alvarez-Jimenez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000-2009' (2011) 60 *International & Comparative Law Quarterly* 681.

[26] *Nicaragua* (n 115) 254-5 [70]; See also, Antonio Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International & Comparative Law Review* 133, 135-6; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Lakimiesliiton Kustannus, 1989) 5.

[27] *Reparations for Injuries Suffered in the Service of the United Nations* (1949) ICJ Rep 174, 190 (Sep Op Judge Alvarez).

[28] Ibid.

[29] Eg, Craven (n 2) 142; See also, David Kennedy, 'The Sources of International Law' (1987) 2 *American University Journal of International Law and Policy* 1.

[30] J G A Pocock, *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century* (W W Norton & Co, rev ed, 1967).

> to [states], and agreeable to their nature and disposition, then do they use it [in the belief that it expresses the law] and practice it again and again, and so by often iteration and multiplication of the act it becometh a *Custome*; and being continued without interruption time out of mind [in the belief that it expresses the law], it obtaineth the force of a *Law*.[31]

As apparent from the above quote, customary international law realistically speaking, is based upon the common consciousness of plural states.[32] As Savigny posits:

> [T]his existence is an invisible thing; by what means can we recognize it? We do so when it reveals itself in an external act when it steps forth in usage, manners, custom; in the uniformity of a continuing and therefore lasting manner of action we recognize the belief of [states] as its common root and one diametrically opposite to bare chance.[33]

Customary International Law consists of two components. These are an objective and a subjective element: 'actual practice and *opinio juris* of states' respectively.[34] Customary international law 'consist of rules of law derived from the *consistent* conduct of states (state practice) acting out of the belief that the law required them to act that way (*opinio juris sive necessitatis*)'.[35]

At the practical level, there are divergent approaches taken by the World Court in realising the conceptual articulation of customary international law. These divergent approaches stem from divergent understandings of the formation of doctrine in international law. But why, then, does this pose a problem? Granted that the jurisprudence of the World Court has no formal equivalent binding effect in the vein of *stare decisis*,[36] the unsettled state of affairs in this province of international law may pose practical difficulties. As Judge Tanaka posited in *Barcelona Traction*: previous decisions of the World Court must be considered as having a 'tremendous influence upon the subsequent

[31] Ibid 33 (emphasis added); In other words, this refers to 'legal custom' or 'custom *stricto sensu*: See P J Fitzgerald, *Salmond on Jurisprudence* (Sweet & Maxwell, 12th ed, 1966) ('Salmond') 192-3; cf Stone Sweet (n 115): 'dyads' and 'triadic dispute resolver'; Note that duration appears not as critical provided that the elements of consistency and generality are satisfied: *North Sea Continental Shelf Cases* (n 92) [74]: 'passage of only a short period of time is not necessarily … a bar to the formation of a new rule of customary international law …'.

[32] Savigny, *System of the Modern Roman Law* (n 42) 28; cf Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Arno Press, 1975) 443-5, 449-51, 470-1.

[33] Savigny (n 42) 28.

[34] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13, 29-30 [27]: The World Court noted that these elements as 'materials of customary international law' were 'axiomatic'; *Colombian-Peru Asylum Case (Judgment)* [1950] ICJ Rep 266, 277, 286.

[35] Shabtai Rosenne, *Practice and Methods of International Law* (Oceana Publications, 1985) 55; *Asylum Case* (n 34) 277.

[36] *Statute of the International Court of Justice* art 59; cf *Beamish v Beamish* (1861) 9 HLC 274, 380 (Lord Halsbury).

course of the Court's jurisprudence'.[37] This is because decisions of the World Court are subsidiary sources of international law[38] and have an informal binding nature: 'binding' in the sense that its judgments are taken to be the 'correct expression' of law; 'correct' in the sense that their reasons aid in ascertaining the correct state of the law.[39] According to Professor Schwarzenberger, past decisions of the World Court have informal precedential value because they contain intrinsic arguments which strengthen the conclusion of their reasons.[40] The divergent approaches taken by the World Court in identifying customary international law reflects confusion about the formation of doctrine within it. There is difficulty is ascertaining the 'real' state of international law.

B *Different Conceptions of Custom and Different Thresholds for Establishing Customary International Law*

The World Court has taken several different approaches to establishing customary international law. It has adopted several different articulations of the thresholds at which *sufficient* actual practice and *opinio juris* of states may be described as providing enough support to conclude the existence of customary international law. This is partly due to the different conceptual understandings of customary international law, as well as different views about the ways in which its existence may be concluded from sources that evidence states' internal motivations (ie, deduction, induction, and intuitive assertion).[41] This conundrum can also be seen in the World Court's approach to UN General Assembly resolutions.

1 *Custom as Strictly Declaratory of International Law: Traditional Strict Induction*

As Savigny posits, the traditional view of customary international law is that it is

[37] *Barcelona Traction, Light and Power Company Limited (Preliminary Objections) (Judgment)* [1964] ICJ Rep 6, 67 (Sep Op of Judge Tanaka); Separate and Dissenting opinions of the World Court are analogous to doctrinal views than to Court decisions. They belong to the teachings of the most highly qualified publicists of different nations mentioned in Art 38(1)(d): Alain Pellet, 'Decisions of the ICJ as Sources of International Law' (2018) 2 *Gaetano Morelli Lecture Series* 7, 21-2; cf *Application for Review of Judgment No 333 of the UN Administrative Tribunal (Advisory Opinion)* [1987] ICJ Rep 18, 45 [49]: 'In order to interpret or elucidate a judgement it is both permissible and advisable to take into account any dissenting or other opinions appended to the judgement. Declarations or opinions drafted by members of a tribunal at the time of a decision, and appended thereto, may contribute to the clarification of the decision'.

[38] *Statute of the International Court of Justice* art 38(1)(d).

[39] Hersch Lauterpacht, 'Westlake and Present Day International Law' (1925) 15 *Economica* 307, 315; *Diplomatic Protection (2760th Meeting)*, UN Doc. A/CN.4/529, sect.A, A/CN.4/530 and Add.1, A/CN.4/L.631 (2003) *Yearbook of the International Law Commission* 59; *Succession of States in Respect of Treaties*, UN Doc. A/CN.4/SR.1288 (1974) I *Yearbook of the International Law Commission* 212, 214 [29]; Tom Bingham, 'Preface' in Shaheed Fatima, *Using International Law in Domestic Courts* (Bloomsbury, 2005) xi; Antonio Tzanakopoulos and Christian Tams, 'Introduction: Domestic Courts as Agents of Developments of International Law' (2013) 26(3) *Leiden Journal of International Law* 531, 533; This view has support in domestic contexts, eg, Peter L Waller, 'Transfer of Land – Mental Incapacity of Transferor – Voidability, But no Avoidance, of Instrument of Transfers' (1957) 12 *Res Judicatae* 101, 102.

[40] Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60(4) *Harvard Law Review* 539, 555.

[41] Cf Giacco (n 86). See Anastasios Gourgourinis 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22(4) *European Journal of International Law* 993, 993-1003.

'the badge, but not the origin, of positive [international] law'.[42] Custom was merely declaratory of the sources of law but was not constitutive of law itself (ie, the finding of Custom was not a law-creating fact).[43] The terms 'customary international law' and 'custom' refer to the unwritten state of international law. When analysed 'bottom-up',[44] they are evidenced by a *sufficient* combination of state practice and accompanying *opinio necessitatis*. [45] In this sense, for a court to find the existence of customary international law, there must be a high degree of state practice and *opinio juris* to justify that conclusion. As a corollary, the approach to establishing customary international law must be one of enquiry, such that the case for the establishment of custom is built up and made out. On this view, customary international law could be seen as a source of international law but not because of the recognition given to it by an adjudicatory body.[46] The recognition of its binding nature by adjudicatory bodies was merely a consequence of customary international law being a reflection of the unwritten state of extant international law.

In its 1969 *North Sea Continental Shelf Cases* judgment, the World Court adopted this approach. The World Court took a strict, inductive, logical approach in fulfilling this traditional conception of customary international law.[47] In doing so, the plurality prescribed a high benchmark, such that one could say there was clear support for the existence of a purported rule of customary international law. The World Court set down this high threshold criteria of 'extensive and virtually uniform' state practice,[48] accompanied by general belief (*opinio juris*) amongst states that 'the practice [adopted was] regarded … as mandatory and not because they thought it convenient'.[49] In this way, customary international law was formed closely 'on the back' of state practice and accompanying *opinio juris*.[50] Therefore, customary international law recognised by the World Court was declaratory: merely a reflection or description of the unwritten law that

[42] Quoted by Hans Kelsen (n 57) 227, referring to Friedrich Karl von Savigny, *System des Heutigen Romischen Rechts* (1840) 35: 'Gewohnheit [ist] das Kennzeichen des positiven Rechts, nicht dessen Entstehungsgrund'; cf judicial decisions: Kelsen (n 57) 237-8; see also, Friedrich Carl von Savigny, *System of the Modern Roman Law*, tr William Holloway (Hyperion Press, 1978) 28-9.

[43] Kelsen (n 57) 227.

[44] Gourgourinis (n 41) 1003.

[45] *Contra* law-creating fact: Kelsen (n 56) 227-8.

[46] 'According to a positivistic theory of law, the source of law can only be law': Kelsen (n 57) 233.

[47] Alvarez-Jimenez (n 25) 686, 697; Talmon (n 148) 420; see also *Arrest Warrant* (n 97) [58]; The latest example of the application of this strict approach was in the 2008 judgment in the *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* [2008] ICJ Rep 12. For summary of the *Pedra Branca* case, see CG Lathrop, 'Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)' (2008) 102 *American Journal of International Law* 828. On recent developments on that case since 2008, see eg, Jing Zhi Wong, 'Malaysia's Application for Revision of the *Pedra Branca* Judgment: Case Note on the Question of Admissibility' (2017) 2 *Perth International Law Journal* 62; Sienho Yee, 'S. Jayakumar and Tommy Koh, *Pedra Branca: The Road to the World Court*' (2017) 16(3) *Chinese Journal of International Law* 617.

[48] *North Sea Continental Shelf Cases* (n 92) [74].

[49] Alvarez-Jimenez (n 24) 687, referring to *North Sea Continental Shelf Cases* (n 92). In relation to establishing regional or local custom, the test is similarly – 'constant and uniform usage': *Colombian-Peruvian Asylum Case (Judgment)* [1950] ICJ Rep 266, 276-7; Custom may also exist exclusively between two states, or on a specific subject matter, ie: a territorial regime of free passage: *Case Concerning Right of Passage over Indian Territory (Merits) (Judgment)* [1960] ICJ Rep 6, 39-40; cf *Aaland Islands* (1920) 3 *League of Nations Official Journal Special Supplement* 3.

[50] Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2015) 60(1) *International and Comparative Law Quarterly* 57, 70.

existed amongst nations. This approach is consistent with the view that the true source of international law was the unwritten state of extant international law, evidenced by state practice and *opinio juris*.

2 *Custom as Constitutive of International Law: Modern Flexible Deduction*

By contrast, in its 1986 *Nicaragua* decision, the World Court took a modern, deductive,[51] and less strict approach to the establishment of rules of customary international law.[52] By introducing deductive legal reasoning into the analysis — and, with that, the *fictio* of crystallisation of customary international law[53] — the court increased the tolerances in which customary international law could be inferred and justified from various sources.[54]

Under this approach, the test was altered in two significant aspects. First, complete uniformity of state practice was no longer necessary.[55] For the World Court to deduce or find the existence or crystallization of customary international law, the requirement was that state practice were 'in general, consistent with such a rule'.[56] In this respect, the World Court, consistent with the writings of Hans Kelsen some fifteen years earlier,[57] held that 'instances of State conduct inconsistent with a given rule should generally … be treated as breaches of that rule, not as indications of the recognition of a new rule'.[58] Second, the World Court held that *opinio juris* may not only be inferred from states' beliefs that they are complying with a mandatory precept,[59] but also from State's voting conduct in declarations and resolutions of the General Assembly.[60]

In this sense, by inverting the process of creation, the *Nicaragua* decision loosened

[51] See verbatim text in *Nicaragua* (n 115) [186]; Talmon (n 147) 423-4 posits three methods of deduction, normative, functional, and analogical deduction.

[52] Alvarez-Jimenez (n 25) 687-8; See also, Martti Koskenniemi, *The Politics of International Law* (Hart, 2011) viii, 9.

[53] *Nicaragua* (n 115) [186], [207]; cf Michael Inwood's commentary on c. cxv of Hegel's *Introductory Lectures on Aesthetics*. Hegel (n 222) 195: '… [I]n Hegel's view, crystallization, …, is relatively independent of gravitational force'. In this vein, the phenomenon of crystallization does not necessarily describe, as a matter of fact, sufficiently extant underlying state practice and *opinio juris*.

[54] Talmon (n 148) 420, referring to Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons, 1964) 646; See also, Richard A Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford University Press, 1961) 12 *et* seq, 16, 37: this allows 'a conclusion [that] is justified [through] the process of justification'; Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart Publishing, 2020) pt 1, ch 1.

[55] *Nicaragua* (n 115) [186].

[56] Ibid.

[57] Hans Kelsen, *Pure Theory of Law* (University of California Press, 1970) 88, 212-3: occasional transgression of a rule does not water down its validity, provided that the norm contained by that rule is reasserted by the international legal community from time to time.

[58] Ibid; See also, Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95)4) *American Journal of International Law* 757, 785; *Nicaragua* (n 115) [186], [207].

[59] Alvarez-Jimenez (n 25) 687-8; cf Paul Kahn, *Origins of Order: Project and System in the American Legal Imagination* (Yale University Press, 2019) 170.

[60] *Nicaragua* (n 115) [188]: 'This *opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.

the requirements for a finding of the existence of customary international law[61] and privileged legal normativity over description.[62] It was no longer necessary to build up a case to such a high degree, as under the traditional conception, in order for the World Court to conclude that custom existed and was factually justified. It was also no longer necessary to source the law in actual state practice. By adopting this approach, the World Court adopted the view that customary international law ('custom') was also constitutive, not merely declaratory, of the state of international law.[63] To use the language of Hans Kelsen, custom, in this view, was considered to '[also] be a law-creating fact'.[64]

Because customary international law was could be both declaratory and constitutive of law[65] — ie, both a factual conclusion that there was *sufficient* combination of state practice and accompanying *opinio necessitates*; and a fact that created law — differences in conclusions or finding as to the existence of customary international law could arise.[66] Here, the competing difference between the traditional (inductive) and modern (deductive) conception of custom was that of the qualitative and quantitative thresholds of factual support at which the conclusion or finding of custom could be arrived at. Indeed, the World Court does not have to conclude using the traditional conception that, *as a matter of fact*, the purported rule of custom exists. It may, under the modern conception, opt to *find* or *decide* that international law shall contain such a rule.[67] Under the latter approach, where the finding is not a conclusion that is open under the former approach, it necessarily follows that the World Court is filling in the gaps. Customary international law established this way obtains infallibility, not entirely because of it being an accurate description of the state of existing unwritten law amongst nations; rather, it is because of it being a combination of both that and the authoritative nature of the World Court.[68]

It follows that *Nicaragua* recognised the normative and functional value of *opinio juris* in the creation of customary international law and the gap-filling of lacunae in international law. *Nicaragua* also recognised the value that global governance and UN

[61] Alvarez-Jimenez (n 25) 688, referring to O Schachter, 'New Custom: Power, Opinio Juris and Contrary Practice' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubieszewski* (Kluwer Law International, 1996) 531, 532.

[62] Roberts (n 58) 762, referring to Martti Koskenniemi, *From Apology to Utopia* (n 26) 41.

[63] See Kelsen (n 57) 227.

[64] Kelsen (n 57) 227.

[65] See, on a related note, eg, Antonio Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International & Comparative Law Review* 133, 138-40; Helmut Aust, Alejandro Rodiles and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 *Leiden Journal of International Law* 75, 75; Antonio Tzanakopoulos and Christian Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26(3) *Leiden Journal of International Law* 531, 534; Richard Falk, *The Status of Law in International Society* (Princeton University Press, 1970) 433.

[66] Akin to a sense of 'alterity' cf singularity in the law, as formulated by Pierre Legrand. See Lyombe Eko, *American Exceptionalism, the French Exception, and Digital and Media Law* (Rowman & Littlefield,) 14-15; Pierre Legrand, 'On the Singularity of Law' (2006) 47(2) *Harvard International Law Journal* 517, 527; Pierre Legrand, 'Comparative Law' in David Clark (ed), *Encyclopedia of Law and Society* (SAGE, 2007) 220, 220-3.

[67] Salmond (n 31) 30.

[68] Salmond (n 31) 185; See also, Richard Sparks, *Study Guide to Jurisprudence* (Sweet & Maxwell, 1967) 34: 'the "infallibility" referred to by Salmond's editor is a consequence of the authoritative status of the tribunal, *not* a characteristic of the type of reasoning involved'.

General Assembly resolutions have in norm-making[69] and as a proxy of states' internal motivations. It allowed for an inference (deduction) of the existence of customary international law to be made from *opinio juris* confirmed by *some* state practice and not merely from uniform state practice supported by uniform *opinio juris*.[70] It also allowed for the establishment of customary international law while 'eschewing examination of primary materials establishing state practice and *opinio juris*'.[71] In this way, new rules — based on some normative functional and analogical precept of what the state of international law should be — could be inferred from axiomatic principles of international law.[72]

3 *Custom as a Tool of Assertion*: *The World Court's Concept of Custom*

The identification of customary international law is further complicated by the sociological view that customary international law is, 'in essence … nothing but tacit agreement, as opposed to express agreement, which takes treaty form'.[73] Agreement as to the law on a subject matter is found based on an abstraction of the evidence of individual states' practice and accompanying *opinio juris* taken together.[74]

In a positivistic sense, it is judicial recognition from the World Court that makes 'tacit agreement' attract the force of a law and accrue the capacity of fulfillment or enforceability in a court of law.[75] It may be that the World Court is concluding (under the traditional conception) or making a finding (under the modern conception) that such a rule exists; the better view is that the World Court is deciding that international law shall contain such a rule.[76] In relation to the existence of customary international law established by the World Court, its infallibility is not entirely due to it being an accurate description of the state of existing unwritten law amongst nations, but rather, it is due to the authoritative nature of the World Court.[77] It is the application of legal reasoning to social facts that makes customary international law.

The identification of customary international law from material that evidences states' internal motivations is not as straightforward. The apparent dichotomy (or trichotomy) in the approaches used to establish customary international law and the dichotomous (or trichotomous) conceptions of customary international law are prime examples of this difficulty.[78] To use the language of Sir Henry Maine, it is 'the unsatisfactory

[69] *North Sea Continental Shelf Cases* (n 92) [72].
[70] Alvarez-Jimenez (n 25) 688.
[71] Ibid, referring to Theodore Meron, 'Revival of Customary Humanitarian Law' (2005) *99 American Journal of International Law* 817, 819.
[72] Talmon (n 148) 423.
[73] A Berriedale Keith, *Wheaton's Elements of International Law* (Stevens & Sons, 6th English Edition, 1929) vol i, 11-2; cf Kelsen (n 57) 229.
[74] Kelsen (n 57) 228-9.
[75] Hermann Kantorowicz, *The Definition of Law* (Cambridge University Press, 1958) 79; Kelsen recognizes that judicial decisions and administrative acts can create legal norms: Kelsen (n 57) 227 *et seq*.
[76] Salmond (n 31) 30.
[77] Salmond (n 31) 185; See also, Richard Sparks, *Study Guide to Jurisprudence* (Sweet & Maxwell, 1967) 34: 'the "infallibility" referred to by Salmond's editor is a consequence of the authoritative status of the tribunal, *not* a characteristic of the type of reasoning involved'.
[78] See Part II.B.1-2 above.

condition [of] the science of [international law] jurisprudence'[79] that has caused these complications. Judge Tanaka, perplexed by this complexity, opined in his Dissenting Opinion in the *North Sea Continental Shelf Cases*:[80]

> [I]t is extremely difficult to get evidence of [the] existence [of *opinio juris*] 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.[81]

As the criterion for the formation of customary international law, Judge Tanaka maintained neither the plurality's rigid sociological view of uniform state practice and *opinio juris* nor the strict dichotomy between induction and deduction (whilst arguably supporting the deductive approach). Rather, His Excellency stressed that the approach to establishing customary international law is, in reality, a normative, consequence-based, teleological approach,[82] despite it being described at the conceptual level as a mere description of the unwritten law that existed amongst nations. Indeed, as Talmon posited some forty-five years later in an analysis of the World Court's jurisprudence, the approach of the World Court in the *North Sea Continental Shelf Cases* and *Nicaragua*, which were labelled as inductive and deductive respectively,[83] is imprecise[84] and gives an incomplete or distorted picture.[85] The true method behind what can be described as induction or deduction employed by the World Court is rather that of 'assertion',[86] based on what it perceived as 'necessity felt in the international community'.[87] Indeed, as both Koskenniemi and Ammann succinctly posit: 'law is not a social science. It is a normative practice'.[88] Judges reason through the perceived needs of the case, rather than to attain a uniform standard.[89] On this, there is a greater degree of assertion in the deductive approach.

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[79] Henry Maine, *Ancient Law: Its Connection with The Early History of Society and Its Relation to Modern Ideas* (John Murray, 1909) 3.

[80] *North Sea Continental Shelf Cases (Judgment)* [1969] ICJ Rep 3, 176 (Dissenting Opinion of Judge Tanaka).

[81] Ibid.

[82] *North Sea Continental Shelf Cases* (n 92) 176; This would explain the shift of the World Court's jurisprudence from an inductive approach in the North Sea Continental Shelf Cases to a deductive approach in Nicaragua. This is wide enough to explain the shift to 'assertion'.

[83] Alvarez-Jimenez (n 25) 686-8.

[84] Talmon (n 148) 417.

[85] For a more in-depth discussion, see Talmon (n 148) 434 *et seq*.

[86] Talmon (n 148); See also, Kelsen (n 57) 80; cf Letizia Lo Giacco, 'Swinging Between Finding and Justification: Judicial Citation and International Law-Making' (2017) 6(1) *Cambridge International Law Journal* 27, 27.

[87] *North Sea Continental Shelf Cases* (n 92) 176 (Dissenting Opinion of Judge Tanaka).

[88] Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26 *International Relations* 3, 19; Odile Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (2018) 28 *Swiss Review of International and European Law* 489, 492.

[89] Pierre Legrand, 'How to Compare Now' (1996) 16 *Legal Studies* 232, 234-5, 237-40.

There can be no doubt that, in realising international law is practically consequence-based and teleological, the World Court's method of assertion could explain its preference for a relatively more flexible deductive approach in cases decided after the *North Sea Continental Shelf Cases*.[90] In the traditional inductive approach, assertion is applied insofar as it was necessary to declare the existence of extant unwritten international law. The move from this descriptively accurate inductive approach, which places an emphasis on uniform state practice, to a relatively more normative and teleological approach, which places an emphasis on *opinio juris*, perhaps recognises the evolving and non-static nature of international law.[91] In this context, the modern deductive approach uses a higher degree of assertion to bridge gaps. The normative, consequence-based teleological approach of the World Court, therefore, appears apt in filling lacunae in international law,[92] particularly when there is a paucity in state practice. The appeal to a method of assertion could also aptly explain the World Court's trend of resorting to the deductive approach in cases after *Nicaragua*[93] — such as the cases concerning the *Gulf of Maine*,[94] *Jurisdictional Immunities*,[95] *Black Sea*,[96] and *Arrest Warrant*[97] — and generally in those like the *Reparations* case, where the World Court was 'faced with a new situation'.[98]

However, the World Court's appeal for a method of assertion goes much further than to imbue the recognition of customary international law with normative, teleological, or moral content. In this context, customary international law asserted to exist by the World Court does not attract its force because it is a description of the unwritten law of nations:

[90] See, eg, as justification for this analysis: Richard Wasserstrom, *The Judicial Decision* (Stanford University Press, 1961) 21-2.

[91] Eg, Okon Udokang, 'The Role of New States in International Law' (1971) 15(2) *Archiv des Volkerrechts* 145, 145; cf Michael Inwood's commentary on c. lxxvii of Hegel's *Introductory Lectures on Aesthetics*: Hegel (n 222) 145-6; cf Paul Kahn, *Making the Case: The Art of the Judicial Opinion* (Yale University Press, 2016) 84-7.

[92] There are two opposing views as regards the World Court filling gaps in international law, though there appears to be more judicial support in the affirmative. Authorities for the World Court filling the gaps in international law include: *Desgranges v International Labour Organization* (1957) 20 ILR 523, 530: 'One of the fundamental tenets of all legal systems is that no court may refrain from giving judgment on the grounds that the law is silent or obscure'; *Mavrommatis Concessions Case* [1924] PCIJ Ser A, No. 2, 16; *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, [83], [88]-[91]; Authorities against this view include: *SS Lotus* [1927] PCIJ Ser A, No. 10, 18, 21, 31: what is not prohibited is permitted. See also, Amos Enabulele, 'The Avoidance of *non liquet* by the International Court of Justice, the Completeness of the Sources of International Law in Article 38(1) of the Statute of the Court and the rile of Judicial Decisions in Article 38(1)(d)' (2012) 38(4) *Commonwealth Law Bulletin* 617, 641; An Hertogen, 'Letting *Lotus* Bloom' (2016) 26(4) *European Journal of International Law* 901.

[93] See generally, Talmon (n 148) 423-7; Though note that the World Court applied the strict inductive approach one again in the 2008 judgment of *Pedra Branca/Pulau Batu Puteh*; See also, *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13, 33 [34].

[94] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246, 300 [114]. In this case, practical methods for the delimitation of maritime boundary was inferred from *lex specialis* international law rules.

[95] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Rep 99, 123 [57]: the Court derived 'the rule of state immunity … from the principle of sovereign equality of states'.

[96] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 62, 96 [99]: new rules were inferred from customary law principles such as the 'land dominates the sea'.

[97] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3, [58] *et seq*; Talmon (n 148) 425 (n 53).

[98] *Reparations Case* (n 27) 182, 190 (Judge Alvarez); 218 (Dissenting Op of Judge Krylov).

there is a paucity of justification from uniform state practice.[99] Rather, it acquires its force as law solely from the authority of the World Court.[100] In the language of Stefan Talmon, the World Court is allowed to 'simply assert the law as it sees fit'.[101]

Two main issues arise with the World Court's adoption of assertion and deduction as approaches to establishing customary international law.[102] First, as a matter of methodology, they are unsatisfactory for determining the rules of customary international law. They allow for inaccurate 'findings' of international law where, descriptively speaking, such findings cannot be supported by sufficient existing state practice. In other words, such 'findings' are not descriptions that originate in a recognised source of law. Rather, they are new legal fictions, created under the pretext of 'finding' existing customary international law. Methodologically, it is unsatisfactory and fallacious to have two supposedly valid but inconsistent concepts of customary international law — one at the traditional but conceptual level, and the other at the modern but practical level, where the latter does not appear to reconcile with the former.

Second, as a matter of substance, approaches which utilise a high degree of assertion may potentially delegitimise international law. The appeal to approaches that emphasise the importance of *opinio juris* over state practice (ie deduction) is problematic. As Professor Roberts posits:

> [*O*]*pinio juris* is inherently ambiguous in nature because statements can represent *lex lata* (what the law is, a descriptive characteristic) or *lex ferenda* (what the law is, a normative characteristic). The Court has held that only statements of *lex lata* can contribute to the formation of custom.[103] … Ideally, one should be able to distinguish between *lex lata* (fit) and *lex ferenda* (substance).[104]

The appeal to a normative,[105] teleological, consequence-based approach (ie assertion) is equally problematic. As Professor O'Connell posits (in a passage cited by Judge Tanaka in the *North Sea Continental Shelf Cases*):

> He [who] looks to positiv[ist] (purely formalistic) practice without possessing the criteria for evaluating it, [is] … powerless to explain the mystical process of *lex ferenda*, which he is compelled to distinguish sharply, and improperly, from *lex lata* …[106]

[99] Talmon (n 148) 434.
[100] Salmond (n 31) 185; See also, Sparks (n 68) 34.
[101] Talmon (n 148) 434.
[102] Roberts (n 58) 763; See also, Loretta Chan, 'The Dominance of the International Court of Justice in the Creation of Customary International Law' (2016) 6 *Southampton Student Law Review* 44; Brad Bowden, 'How to Kick Postmodernism' (2018) 70(4) *IPA Review* 16, 20-2.
[103] Ibid (footnotes omitted), referring to *North Sea Continental Shelf Cases* (n 92) 38.
[104] Roberts (n 58) 775.
[105] Cf concept of 'qiya' in domestic Islamic jurisprudence: Joshua Neoh, 'The Legitimacy of the Common Law in post-Colonial Malaysia' [2010] *LAWASIA Journal* 59, 81.
[106] *North Sea Continental Shelf Cases* (n 92) 178-9 (Dissenting Opinion of Judge Tanaka), referring to D P O'Connell, *International Law* (Stevens & Sons, 1965) vol 1, 20-21.

These problems, which go to the heart of constructing international law doctrine,[107] perpetuates a situation where *lex ferenda* is cloaked and passed off as *lex lata*.[108] The highly political nature of states' conduct and internal motivations are, in this sense, obscured by the World Court's approach,[109] favouring an open texture of law informed by what the World Court perceives to be 'necessity felt in the international community',[110] as well as normatively or teleologically 'fit'.[111] In this context, it can be fairly said that the World Court is opportunistically 'creating' laws and rights which, under the traditional inductive approach, were not supported.[112] Under these approaches, activist benches can expand international law beyond it being a descriptive 'law amongst nations', potentially delegitimising it. As a subsidiary source for ascertaining or identifying the content of law, it is unsatisfactory for the World Court to simply assert the law without first establishing the constitutive elements of it. As Professor Onuf aptly noted:[113]

> The traditional commonsense meaning of *custom* has increasingly been stretched and distorted, first by the idea of its rapid, almost instantaneous creation and now by the idea of its creation through intentioned behavior.[114]

These problems reflect a confused understanding of the concept of customary international law and can be illustrated with reference to the World Court's recent practice of establishing customary international law from General Assembly resolutions, as well as the literature about these practices.

C *Problems in Establishing Custom from General Assembly Resolutions*

In relation to recent developments, there is increasing recognition, by both academics and the World Court, that the adoption of a General Assembly resolution

[107] Nicholas Onuf, '*International Legal Structure*. By David Kennedy. Baden-Baden: Nomos Verlagsgesellschaft, 1987. Pp 294. DM 69' (1989) 83(3) *American Journal of International Law* 630; cf David Kennedy, 'Primitive Legal Scholarship' (1986) 27(1) *Harvard International Law Journal* 1; cf James Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-house of Language' (1985) 26 *Harvard International Law Journal* 327.

[108] Roberts (n 58) 763; some support from a legal philosophy context can be seen in Peter Cane, 'Consequences in Judicial Reasoning' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (Oxford University Press, 2000) 41; cf W Michael Reisman, *Jurisprudence: Understanding and Shaping Law* (New Haven Press, 1987) 17.

[109] Cf Bertrand De Jouvenel, *Power: The Natural History of its Growth* (Hutchinson & Co, 1947) 109; Tommy Thomas, *Abuse of Power: Selected Works on the Law and Constitution* (SIRD, 2016) 246-7, 276-83; It is perhaps the language of global governance that makes obscuring the intensely political nature of international law desirable.

[110] *North Sea Continental Shelf Cases* (n 92) 176 (Dissenting Opinion of Judge Tanaka).

[111] Talmon (n 148) 434.

[112] Kelsen opines that only the traditional conception of customary international law, ie: the declaratory view, 'can claim validity because, and so far as, it is the reproduction of pre-existing law'. This conclusion, as Kelsen posits, is consistent with the theory expressed by the German Historical School that law is neither created by legislation nor by custom but only by Popular Spirit (*Volkgeist*), and French Sociological Theory with the difference that law is created, not by *Volkgeist* specifically, but *solidarite sociale* more broadly: Kelsen (n 57) 227; Chan (n 102) 68-70.

[113] Onuf (n 125) 48.

[114] Ibid; See also, Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press, 2012) 52-5, cf 55.

may be evidence of both elements of customary international law:[115] state practice[116] and *opinio juris*.[117] With this, there may be a tendency to infer or deduce that, because resolutions adopted by international organisations represent 'rule[s] believed to be

[115] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32(2) *Comparative Political Studies* 147, 156-7 *et seq*; Bin Cheng, 'Custom: The Future of General State Practice in a Divided World' in Macdonald and Johnston (eds), *The Structure and Process of International Law* (Martinus Nijhoff, 1983) 513, 520; The World Court has affirmed that UN General Assembly resolutions may be evidence of existing customary international law: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* ('***Armed Activities***') [2005] ICJ Rep 168, 226 [162]: "[the provisions contained within the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* adopted by GA Res 2625 (XXV) are] declaratory of customary international law"; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ('***Nuclear Weapons***') [1996] ICJ Rep 226, 254-5 [70]: "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"; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (Judgment)* ('***Nicaragua***') [1986] ICJ Rep 14, 107 [204]: "[the adoption of a resolution of an international organization] testifies to the existence, and acceptance… of a customary principle [of international law] which has universal application"; This is also supported by the decisions of international arbitral panels, eg, *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* (1978) 53 ILR 389; 17 ILM 1, 27 (arbitral award of Professor Dupuy); cf *British Petroleum v Libyan Arab Republic (Award)(Merits)* (1973) (Judge Lagergren); See also, Stephen Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 *Proceedings of the Annual General Meeting (American Society of International Law)* 301, 303-5; Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Clarendon Press, 1994) 24-28; In relation to treaties and multilateral conventions being declaratory of custom: Eg, *Case Concerning the Gabcikovo-Nagymaros Project* [1997] ICJ Rep 7, [46]-[47], [101]-[104], [123]; *Namibia Advisory Opinion* (n 116) 47; crystallizing effect: *North Sea Continental Shelf Cases* (n 92) 39; norm-generating effect: *North Sea Continental Shelf Cases* (n 92) 41.

[116] Schwebel (n 115) 305, referring to the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* ('***Namibia Advisory Opinion***') [1971] ICJ Rep 16, 31 and the *Western Saharan Advisory Opinion* [1975] ICJ Rep 12, 31-3; This is further supported by the 2019 Advisory Opinion of the World Court in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* ('***Chagos Archipelago Advisory Opinion***') [2019] ICJ General List No. 169, [150]-[152], [155], following and applying the dictum in *Nuclear Weapons* (n 115) 254-5 [70].

[117] *Nicaragua* (n 114) 99-100 [188], [189], 101 [191], where the Court held that the votes of UN GA resolutions can be evidence of *opinio juris*, in that '*opinio juris* may … be deduced from, inter alia, the attitude of the parties and the attitude of states towards certain General Assembly resolutions' (at [188]). The Court noted that, in relation to Art 2(4) of the UN Charter, 'the effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.' (at [188]) Corollary, the 'adoption by States of this text [of the resolution] affords an indication of their *opinio juris* as to customary international law on the question' (at [191]). This was further affirmed in the *Nuclear Weapons Advisory Opinion* (n 115) 254-5 [70], and in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ General List No. 169, [150]-[152].

socially necessary or desirable',[118] 'instant custom'[119] may generally arise from them.

Caution, however, must be had in determining whether such a resolution does indeed establish the existence of the constitutive elements of extant customary international law. As His Excellency James Crawford noted:[120] '[I]n each case [of determination] there is a process of articulation, appraisal and assessment'.[121] A corollary of this is that not all adoptions of resolutions evidence or constitute the elements of customary international law.

What may be determinative in this assessment is, first, the character and meaning of the particular wording used in a given resolution (going to *opinio juris*)[122] and, second, the legal significance of the adoption of the resolution (going both to *opinio juris* and state practice).

As for the first criteria, the International Court of Justice articulated it clearly in the *Nuclear Weapons Advisory Opinion*,[123] holding that 'it is necessary to look at [the resolution's] content and the conditions of its adoption; it is necessary to see whether an *opinio juris* exists as to its *normative character*'.[124] Operationally, this means 'verifying the presence of two structural characteristics that all general norm-creating resolutions must possess'.[125] These are the generality of language and a declaratory format.[126] For example, it is essential to examine whether the content is a result of actions done in the

[118] Ted L Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26(2) *Harvard International Law Journal* 457, 465; See also, Koskenniemi, *From Apology to Utopia* (n 26) 373.

[119] Bin Cheng, who has been cited by the World Court on at least 15 occasions, posit a theory of 'instant customary law': Cheng (n 115) 520; Bin Cheng, 'United Nations Resolutions on Outer Space: 'instant' Customary International Law?' (1965) 5 *Indian Journal of International Law* 23, 26, 35-9; Benjamin Langille, 'It's "Instant Custom": How the Bush Doctrine Became Law after the Terrorist Attacks of September 11, 2001' (2003) 26(1) *British Columbia International and Comparative Law Review* 145. While this theory has, in principle, some support from the jurisprudence of the World Court, eg, *Nicaragua* (n 115) [184], [188]-[193], [203]-[211], [264], 184 [7] (Judge Ago), it is not without controversy. See H C M Charlesworth, 'Customary International Law and the Nicaragua Case' (1984) 11 *Australian Yearbook of International Law* 1, 11, 21-6; See also, Abi-Saab, *Analytical Study on the Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order* (1984) UN Doc. A/39/504/Add.1, 36-7.

[120] Current Judge of the International Court of Justice.

[121] James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil de Cours* 90, 112; *Nicaragua* (n 115) 99-100 [188]: An undertaking that must be "carried out with all due caution"; see also. Martti Koskenniemi, 'The Normative Force of Habit; International Custom and Social Theory' (1990) 1 *Finnish Yearbook of International Law* 77, 149; cf Myres McDougal and W. Michael Reisman, *International Law in Contemporary Perspective: The Public Order of the World Community* (Foundation Press, 1981) 1193-4; See also, Chan (n 102) 62 *et seq*.

[122] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2013) 194-5; See also, Richard Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60 *American Journal of International Law* 782, 785-6.

[123] *Nuclear Weapons* (n 115) 254-5 [70].

[124] *Nuclear Weapons* (n 115) 254-5 [70]; This criteria is perhaps in recognition of the teleological and normative nature of customary international law.

[125] Nicholas Onuf, *International Legal Theory: Essays and Engagements 1966-2006* (Routledge-Cavendish, 2008) 44.

[126] Ibid.

belief that that was the expression of law, or if it was done under duress.[127] As the World Court observed in *North Sea Continental Shelf Cases*: 'There are many international acts, eg, 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'. But even this examination alone is not adequate. As Professor Roberts noted: it is difficult to distinguish between an accurate description of existing customary international law and progressive development by simply examining the language of declarations and resolutions.[128]

As for the second criteria, Sir Michael Wood, in his *Third Report on Identification of Customary International Law* as Special Rapporteur for that topic, opined that circumstances surrounding the adoption of the resolution in question are relevant.[129] As for *opinio juris*, these circumstances — including the method in which the resolution was adopted (by vote or by consensus), voting figures, and reasons furnished by states for their position — goes to the degree of support,[130] as well as the enquiry of whether there is *sufficient* support, for the purposes of meeting the thresholds for the positive identification of customary international law.[131] Even where the normative character has been ascertained, careful consideration must still be had as to whether the resolution can be used as a proxy for inferring the existence of underlying state practice and *opinio juris*.[132] As for state practice in decolonisation, where there was sufficient other support in states' actual conduct,[133] General Assembly resolutions 'represent[ed] a defining moment in the consolidation of State practice on decolonisation'.[134] This was enunciated in the *Chagos Archipelago Advisory Opinion* on GA Res 1514 (XV). Implicit in this was the recognition that, where there is actual practice of states, General Assembly

[127] Koskenniemi, *From Apology to Utopia* (n 26) 371 (n 117); In *Dispute Between the Government of Kuwait and the American Independent Oil Co.* (1982) 21 ILM 976 (Award), the ad-hoc tribunal noted that several agreements cited by Kuwait in support of their case of an existence of customary *lex petrolea* did not express any *opinio juris*, because they were the result of bargaining and not 'inspired by legal motivations': *Colombian-Peru Asylum Case (Judgment)* [1950] ICJ Rep 266, 277, 286; *Contra* 'rule of force' in Keeton (n 180) 45-6.

[128] Roberts (n 58) 763.

[129] Michael Wood, *Third Report on the Identification of Customary International Law* (2015) UN Doc. A/CN.4/682, 31-40.

[130] Ibid, [49]; See also *Nuclear Weapons* (n 115) 255 [71].

[131] *North Sea Continental Shelf Cases* (n 92); *Nicaragua* (n 115); See above Part II.A. These thresholds are categorical – 'strict inductive' and 'flexible deductive', in the sense that no set cut-off number has been posited. Guidance may be sourced in the writings of eminent publicists. Falk posits that the resolutions must be 'adopted overwhelmingly, or at least by a two-thirds majority of all major powers and groups represented. This need not be the systematic and enduring practice required for the formation of customary law. Rather, the combination of frequent, favorable citation in forums such as the General Assembly and infrequent contrary practice would probably suffice': Onuf (n 125) 44, referring to Richard Falk, 'On the Quasi-Legislative Competence of the General Assembly' (n 122) 787-90, 784-5; cf Anthony D'Amato, 'On Consensus' (1970) 8 *Canadian Yearbook of International Law* 104; On a related note, the World Court in the *Reparations case* (n 27) 185, that the consent of fifty out of fifty-eight states could make international legal rules affecting all states: 'the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claim'.

[132] See, eg, in relation to cultural or customary practices in general as 'law', Michael Karayanni, 'Adjudicating Culture' (2009) 47(2) *Osgoode Hall Law Journal* 371, 384.

[133] *Chagos Archipelago Advisory Opinion* (n 116) [150].

[134] Ibid.

resolutions (and all those of a plenary body) are 'representative' or 'proxies' of state practice. As Judge Schwebel opined some forty years earlier on decolonisation and the same GA resolution, albeit extra-curially:[135]

> General Assembly's declaration may, depending on its terms and content, be taken as a valid element and articulation of state practice *provided that it finds sufficient other support in the actual conduct of states*. This interpretation appears to be consistent with the advisory opinions of the International Court of Justice which afford weight in the development of international law to General Assembly declarations respecting non-self-governing territories (GA Res 1514 (XV) and 2625 (XXV)).

As a corollary of this, the assessment can be reduced to a two-fold enquiry. First, whether the resolution is of a normative character: whether it illuminates the intent of Member States as to the legal significance or binding-ness of a resolution,[136] or of its recommendatory nature.[137] Second, the degree of actual support from states, in outward and internal manifestations of consciousness, for the norms contained within the resolutions.[138]

This additional step in the analysis is crucial, especially when these resolutions are proxies of evidence for state practice and accompanying *opinio necessitatis*. GA resolutions reduce individual states' manifestations of agreement and disagreement to a number, which may be obscuring the analysis. Relying on sources that originate from the proceedings of global institutions and plenary bodies may, no doubt, have its benefits: it accelerates the formation of customary international law and, as a result of global participation in norm-making, takes into account the views of an increasing number of countries.[139] However, as noted in Part B above, deference to these resolutions for evidence of state practice and *opinio juris* obscures the true state of international law and may delegitimise it. Deferring the quest of identifying customary international law solely to the authority of UN General Assembly resolutions is akin to deferring solely to the authority of an adjudicatory body in finding customary international law. At extremes, it allows the creation of law out of thin air. This does not, as a matter of fact, fulfil the conceptual understanding of customary international law. To preserve this understanding, a traditional inductive approach — a scientific, sociological, and descriptive approach — informed by comparative legal methodology is required.

III COMPARATIVE LEGAL METHODOLOGY

A *The Need for an Inductive Approach and Comparative Methodology*

As apparent from the preceding parts, there is confusion as to how customary

[135] Schwebel (n 115) 305 (emphasis in italics added).

[136] Crawford, *Brownlie's Principles of Public International Law* (n 122) 194-5.

[137] Higgins (n 115) 28; Focarelli (n 114) 55.

[138] Michael Wood, *Third Report on the Identification of Customary International Law* (2015) UN Doc. A/CN.4/682, [49]; cf Rossana Deplano, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law' (2017) 14 *International Organizations Law Review* 227; Sufyan Droubi, 'Institutionalisation of Emerging Norms of Customary International Law Through Resolutions and Operational Activities of the Political and Subsidiary Organs of the United Nations' (2017) 14(2) *International Organizations Law Review* 254.

[139] Roberts (n 58) 768.

international law is formed and how, as a matter of practice, the concept of customary international law can be fulfilled. As is apparent from the preceding section (Part II.C), the literature, critically reflecting on the identification of customary international law from UN General Assembly resolutions, seems to suggest that a method of deduction or assertion is not satisfactory in justifying the finding of customary international law. As a corollary, there is the need for a shift towards a relatively more sociological, descriptive method in the construction of doctrine in international law. This is especially important in a time of globalisation, where the creation, practice, and development of international law occurs primarily under the auspices of global and multilateral institutions. Their championing peace, cooperation, and harmony may obscure the reality of international law as being highly contested and unsettled.

According to Professor Koskenniemi,[140] to develop greater understanding of the actual sources and 'contested nature' of international law,[141] the literature must, 'instead of becoming … more technical vocabulary of global governance amongst others, … become a platform on which … existing global decision-making [is made transparent] and … accountability of the professional classes to the communities affected by their (contentious) choices [is enhanced]'.[142] In other words, when the emphasis is clearly put on the legal and political sources of an asserted state of international law, rather than the illusory authority of some apparently transcendent will,[143] the legitimacy of that state of international law can be apparent from the experimental action of states and their consciousness.[144] In this context, '[*n*]*omos* and *exousia*, [customary international] law and power [clearly] expose each other'.[145] The state and condition of existing international law, thence, can be more accurately (and immanently) articulated.

An appeal to the sociological and descriptive method would enable analyses of international law to be terser, pithier, and, most importantly, accurate. It allows for a closer examination of the nature of the relationship among sources of international law. As Professor Schwarzeberger notes:

> An international lawyer who applies the inductive (sociological, descriptive and enquiry-based) method in full awareness of the hierarchies of sources, law-determining agencies, and elements of such agencies will always have at his disposal reliable measuring rods for determining the significance of instances taken from state practice, of individual decisions of international and national

[140] Professor Koskenniemi finalized the 2006 UN International Law Commission's report on the *Fragmentation of International Law* (2006) UN Doc. A/CN.4/L.702.

[141] Koskenniemi, 'What Use for Sovereignty Today?' (n 5) 68.

[142] Ibid; see also, Boyle (n 107) 330 *et seq*.

[143] Carlo Grassi, 'Jean-Luc Nancy or Justice as Ontology of the 'With'' in Jean-Luc Nancy, *Dies Irae*, ed Angela Condello, Carlo Grassi and Andreas Philippopoulos-Mihalopoulos, tr Cadenza Academic Translations and Angela Condello (University of Westminster Press, 2019) 1, 9; cf 'structural bias', Martti Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian 'Tradition'' (2019) 30(1) *European Journal of International Law* 17, 18, 27.

[144] Ibid.

[145] Ibid; cf Kirsten Schmalenbach, 'A Game of Powers' (2017) 14(2) *International Organizations Law Review* 221; George Sheets, 'Conceptualizing International Law in Thucydides' (1994) 115(1) *American Journal of Philology* 51, 58.

courts, and of the writings of the most highly qualified publicists.[146]

Quite apparent from this excerpt is that appraisals of a comparative nature are intrinsic to an international lawyer's task, who must appraise and analyse the hierarchies of the sources of international law. Comparative methodology, in this context, may be useful to an international lawyer by providing him or her with the tools or 'measuring rods' for 'estimating, criticising, [critiquing], … classifying'[147] and appraising the sources of state practice and *opinio juris* between different states.[148] Comparative legal methodology would allow for a more descriptively accurate identification of customary international law as the law amongst nations.[149] In the view of Professor Sarfatti:

> [T]he science of comparative law … [allows one] to penetrate the historical origin of the [sources of law] under examination, … to study its evolution and to draw from it the fundamental principles, always keeping in view the reciprocal analogies and differences.[150]

In the context of analyses of international law, comparative law methodology allows one to appreciate the differences and nuances in its sources and, consequently, analyses. To do so, however, 'it is necessary to know the juridical atmosphere in which to consider the state of the law at a given moment on a special problem'.[151] In a similar vein, Professor Samuel posits that it is necessary for an author to be aware of not just his or her orientation (subject matter) but equally of his or her theoretical and methodological frameworks.[152] Thus, an international lawyer undertaking comparative appraisals of state practice and *opinio juris* across jurisdictions must thus have 'a profound knowledge of the literature on general theory of comparative law so as to be able to inform the readers of his or her final thesis on what methodology, orientation,

[146] Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 *Harvard Law Review* 539, 568; Gourgourisnis (n 40) 1003; Chong (n 195) 11; cf, in a functional context, Professor Ehrlich's position that '[i]n order to understand the actual state of the law we must institute an investigation as to the contribution that is being made by [international] society itself as well by [existing international law], and also as to the actual influence of [existing international law] upon social law': Ehrlich (n 32) 504-5.

[147] Mario Sarfatti, 'Comparative Law and Its Relation to International Law' (1936) 22 *Transactions of the Grotius Society* 83, 90; See also, Mario Prost, 'Sources and the Hierarchy of International Law: Source Preferences and Scales of Values' in Samantha Besson and Jean d'Aspremont, *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017) 640, 655-8; Harlan Grant Cohen, 'Finding International Law: Rethinking the Doctrine of Sources' (2007) 93 *Iowa Law Review* 65.

[148] Sarfatti (n 147) 90-1; See also, Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) *European Journal of International Law* 417, 417; cf Kirchner, 'Thoughts about a Methodology of Customary International Law' (1992) 43 *Austrian Journal of Public and International Law* 215, 215; cf Adolf Schule, 'Methoden der Volkerrechtswissenschaft' (1959) 3 *Berichte der Deutschen Gesellschaft fur Volkerrecht* 1, 1.

[149] This is perhaps what Professor Samuels was alluding to when he posited that 'to teach the methodology of international law is not to teach international law itself': Samuel, *An Introduction to Comparative Law Theory and Method* (n 11) 2; See also David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 *Wisconsin International Law Journal* 1, 10 *et seq*; As Professor Ehrlich aptly observes, '… of course our knowledge in this sphere will always remain full of gaps, and unsatisfactory, and doubtless it is much easier and much more pleasant to study a few codes together with illustrative material and explanatory notes than to ascertain the actual state of the law. But it certainly is not the function of science to seek easy and pleasant tasks but great and productive ones. We know in part, and the science of law is no exception to this; the more truly scientific it will become, the more perfect it will be.': Ehrlich (n 32) 505.

[150] Sarfatti (n 147) 95.

[151] Ibid.

[152] Samuel (n 11) 27.

and epistemological foundation he or she has adopted'.[153] Failure to appreciate the importance of analytical skills, in Professor Samuel's opinion, 'often result[s] in just another descriptive and intellectually uninformative piece of work';[154] it can 'be fatal to a serious research project [and] result in work that is pretentious and ridiculous and (or) full of errors'.[155]

It follows that there is a need for a methodological approach.[156]

B *The Need for Methodology: Comparative Methodology as Social Science Methodology*

In a domestic system, methodology is dictated by an epistemological approach premised upon 'authority'[157] (eg formalism and positivism).[158] In line with the doctrine of *stare decisis*, it is often satisfactory to state the law as municipal courts state it. In the international legal sphere, such approaches are not satisfactory.[159] What there needs to be is an epistemological approach (methodology) premised upon 'enquiry', or social science, and a method based on this epistemological approach.

In Professor Samuel's view, 'the comparative lawyer cannot do without knowledge of social science methodology … there is no science without method[ology], for every scientist needs to be able to distinguish analysis from synthesis'.[160] Once an understanding of this methodology is achieved, one can decide on a method of analysis. As Professor Samuel posits: 'What links [analysis and synthesis] is the scheme of intelligibility (*methods of comparative analysis*) whose purpose is to relate the experience of the real world to an abstract scheme of elements and relations'.[161] In Professor Samuel's view, there would be no axioms or scientific laws, and no substantive knowledge, without this two-way process.[162] The scheme (or *method of comparative analysis*) employed, in turn, gives meaning to the facts.[163]

Professor Samuel's methodology is, however, not immune from criticism. Applying social science methodology to analyses of the sources of law, which has its roots in domestic legal systems, appears to attract the 'amateurism' that Professor Riles observes.[164] Professor Riles posits that comparative legal methodology is

[153] Ibid 43-4.

[154] Ibid 44; Clarity and adequacy of analysis and reasoning, are central to the judicial functions of many democracies around the world. Clear and well-crafted writing can be of great assistance. See, eg, *Thorne v Kennedy* [2017] HCA 49, [61]; *Wainohu v New South Wales* (2011) 243 CLR 181, [54] (French CJ & Kiefel J); see also, *Re Lord Goldsmith Peter Henry PC QC* [2013] SGHC 181; *Practice Note* [1983] 1 WLR 1055; *Practice Note* [1991] 3 All ER 609.

[155] Samuel (n 11) 35;

[156] Samuel (n 11) 22-3; See also, Geoffrey Samuel, 'Can Social Science Theory Aid the Comparative Lawyer in Understanding Legal Knowledge? (2019) 14(2) *Journal of Comparative Law* 311.

[157] Samuel, 'Taking Methods Seriously (Part One)' (n 12) 94, 98-9.

[158] Annelise Riles, 'Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism' in Annelise Riles (ed), *Rethinking The Masters of Comparative Law* (Hart Publishing, 2001) 94, 125-6.

[159] For justification, see Part II.

[160] Ibid 98-9.

[161] Samuel (n 11) 21.

[162] Samuel, 'Taking Methods Seriously (Part One)' (n 12) 99.

[163] Samuel (n 11) 21.

[164] I owe this thought to Matthew Thompson.

amateurish for its failure to analyse scientifically.[165] Indeed, law is a sociological, man-made construct[166] that aligns itself along society's perceived needs,[167] not logic or natural science.[168] Law is often taken for an axiom and has the propensity to be circular and fallacious.[169] However, the pitfalls of comparative law methodology that Professor Riles posits should not arise when it is applied in analyses of international law. Comparative legal methodology, as a theory of method of appraising the sources of law and their content, assists in making this analysis clearer.[170] This is because, by applying comparative legal methodology, the analysis is not strictly confined to formalist epistemological approaches premised upon 'authority'.[171] Greater tolerance is allowed for scientific and enquiry-based approaches.[172] By adopting comparative legal methodology in their international law analysis, an international lawyer is able to analyse[173] and, with that, operate in three different dimensions. Firstly, they are able to operate within the 'authority' dimension of analysis and appreciate the 'internal' view of the sources of international law (ie domestic legal systems).[174] Secondly, they are able to operate in another legal system and appreciate their 'internal' view as an outsider or foreigner.[175] Thirdly, they will be able to function outside the 'authority' tradition, making use of the full range of reasoning methods, schemes of intelligibility, paradigms, and epistemological approaches employed across the social sciences.[176]

[165] Riles (n 158) 125-6.

[166] Pierre Legrand, 'Negative Comparative Law' (2015) 10(2) *Journal of Comparative Law* 405, 406.

[167] Esin Orucu,'Developing Comparative Law' in Esin Orucu and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing, 2007) 43, 58; See also, Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, tr Walter Moll (Harvard University Press, 1939) xv; cf Martti Koskenniemi, 'Law of Nations and the "Conflict of The Faculties"' (2018) 8 *History of the Present* 4.

[168] Samuel, 'Taking Methods Seriously (Part One)' (n 12) 99-100; Samuel (n 11) 21; Referring to Riles, Professor Samuel acknowledges that his 'method' is open to the criticism that 'formalism that defines all legal knowledge … looks amateuristic within the context of comparative law'. Indeed, Professor Samuel accepts that the formalistic idea of 'comparative-law-as-method' is untenable. The dichotomy between scientific enquiry and method is 'epistemologically dangerous'. However, Professor Riles' view, if and when it is directed to Professor Samuel's 'method', is misconceived. This is because Professor Samuel's 'method' is to be understood in a more profound sense as being of a methodology – epistemology of methods that champions the formulation of problem-specific *intermediary jurisprudence* – rather than a fixed method that could attract that 'amateurism'. In any case, Professor Samuel's methodology is consistent with Professor Kelsen's notion of law as a normative science: Kelsen (n 57) 75-81.

[169] Samuel, 'Taking Methods Seriously (Part One)' (n 12) 118. Eg: in a domestic system laws are premised on authority, yet 'their authority is rooted in the evidence arising out of the methods of enquiry'.

[170] Cf Georg Schwarzenberger, 'On Teaching International Law' (1951) 4 *International & Comparative Law Quarterly* 299, 304-5: Sociology of International Law; see also, Philip Allott, 'Language, Method and the Nature of International Law' (1971) XLV *British Yearbook of International Law* 79; See footnote 149 above, where Professor Ehrlich posits, 'the more truly scientific [the analyses] will become, the more perfect it will be'.

[171] Samuel, 'Taking Methods Seriously (Part Two)' (n 12) 236.

[172] Samuel, 'Taking Methods Seriously (Part One)' (n 12) 94, 98-9.

[173] Riles (n 158) 125-6.

[174] Samuel, 'Taking Methods Seriously (Part Two)' (n 12) 236; See also, HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994); Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 7th ed, 2015) 41-5.

[175] Samuel, 'Taking Methods Seriously (Part Two)' (n 12) 236.

[176] Ibid.

Applying comparative legal methods and methodology to international law[177] allows an international lawyer to operate outside the authority paradigm (ie, operate in the enquiry paradigm), and the comparison aspect of his task escapes amateurism.[178] Importantly, this approach places emphasis on examining the sources of law, and it is consistent with the (preferred) inductive approach to international law.

Professor Samuel's sociological-jurisprudential approach, when applied to international law, resonates with Judge Tanaka's plea in the *North Sea Continental Shelf Cases*. His Excellency emphasised that the appraisal of factors and sources evidencing or declaring custom must be 'relative to the circumstances' and preferably of a sociological approach.[179]

C *Employing Professor Samuel's Comparative Legal Methodology*

1 *Navigating Professor Samuel's Methodology*

Recognition of a standard or true method of comparative legal analysis has always been a bone of contention. Several eminent jurists champion a formal technique or *method of comparative analysis* as *the* technique or method to comparative legal analysis. These include functionalism (the functional method),[180] neo-functionalism,[181] legal culture,[182] legal diffusion,[183] structuralism (the structural method),[184] the hermeneutical

[177] For a formal treatment of the distinction between method and methodology, see Reza Banakar and Max Travers, 'Method versus Methodology' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart, 2005) 27-31.

[178] Samuel, 'Taking Methods Seriously (Part Two)' (n 12) 236.

[179] *North Sea Continental Shelf Cases* (n 92) 176 (Dissenting Opinion of Judge Tanaka).

[180] Eg, Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Oxford University Press, 3rd ed, 1998); Gunter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harvard Journal of International Law* 411, 436; See Samuel (n 11) ch 4; Van Hoecke (n 200); In relation to international law, see eg, discussion in George W Keeton, 'International Law and the Future (A Plea for a Functional Approach)' (1941) 27 *Transactions of the Grotius Society* 31, 44-58; Nicholas Onuf, 'Do Rules Say What They Do – from Ordinary Language to International Law' (1985) 26 *Harvard International Law Journal* 385, 410.

[181] Also known as contextualism. It is claimed that neo-functionalism is a contextual understanding of functionalism and has its roots in literature about the regional integration of laws. Van Hoecke calls this the 'law-in-context method' or 'historical' method. See Van Hoecke (n 200); See also, Ernest Haas, 'Regional Integration: The Joys and Anguish of Pre-Theorising' (1970) 24 *International Organizations* 691; Ernest Haas, 'Turbulent Fields and the Theory of Regional Integration' (1976) 30 *International Organizations 173;* Christopher Whytock, 'Legal Origins, Functionalism, and the Future of Comparative Law' [2009] (6) *Brigham Young University Law Review* 1879; For criticisms of functionalism, see Joseph Frankel, *Contemporary International Theory* (Oxford University Press, 1973) 48-61; Milja Kurki, *Causation in International Relations: Reclaiming Causal Analysis* (Cambridge University Press, 2008) 30-9; Jaakko Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2009) 67(3) *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht* 419; Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32 *Brooks Journal of International Law* 405; Keeton (n 180).

[182] Eg, David Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Australian Journal of Legal Philosophy* 1; See also, Mario Sarfatti, 'Comparative Law and Its Relation to International Law' (1936) 22 *Transactions of the Grotius Society* 83, 86 [3].

[183] Eg, William Twining, 'Diffusion of Law: A Global Perspective' (2006) 1(2) *Journal of Comparative Law* 237

[184] Eg, Samuel (n 11) 81, ch 6; Van Hoecke (n 200); On Historical methods, see, eg, Ehrlich (n 32) 472 *et seq*; Martti Koskenniemi, 'What is Critical Research in International Law? Celebrating Structuralism' (2016) 29(3) *Leiden Journal of International Law* 727.

method,[185] legal transplants,[186] and abstract relativism.[187] Professor Samuel's 'method' to doing comparative law is, however, not strictly a formal technique or method *of* comparative legal analysis, but it is a theory *about* comparative legal analysis. In this context, Professor Samuel refers to 'method(s)' in a more profound sense.[188]

In Professor Samuel's view, *the* 'method' to doing comparative analysis is a method of research.[189] As Professor Samuel posits, comparative law method, as a research method, should be viewed as an *epistemology*:[190] a methodology (or scientific study) of the different *methods of comparative analysis*. It describes 'route[s] to follow', or 'methodological roadmap[s]', to navigate the different *methods of comparative analysis* in order to achieve a result for a particular research goal.[191] As Professor Samuel posits: '[J]ust as one uses different maps in different situations, … the comparatist should employ different methodologies to reveal different kinds of knowledge'.[192]

As a corollary of this, by selecting, combining, and applying different formal techniques or *methods of comparative analysis[193] to a comparative appraisal in order*

[185] Eg, Pierre Legrand, *Le Droit Compare* (Presses Universitaires de France, 3rd ed, 2009) 50-73; Samuel (n 11) ch 6.

[186] Eg, Alan Watson, 'Comparative Law and Legal Change' (1978) 37(2) *Cambridge Law Journal* 313; Esin Orucu, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205.

[187] A concept fabricated to allow comparison. It is a conceptual or structural framework or prototype created, through which qualitative and normative analyses can be brought. Abstract relativism may employ the use of a *tertium comparationis*: TP van Reenen, 'Major Theoretical Problems of Modern Comparative Methodology (1): The Nature and Role of the *tertium comparationis*' (1995) 28 *Comparative International Law Journal of South Africa* 175, 198-9; TP van Reenen , 'Major theoretical problems of modern comparative legal methodology (2); the comparability of positive legal phenomena' (1995) 28(3) *Comparative International Law Journal of South Africa* 407, 408, 420-1; John Reitz, 'How to Do Comparative Law' (1998) 46(4) *American Journal of Comparative Law* 617, 623; Brand (n 181); See also, Eibe Riedel, 'Standards and Sources: Farewell to the Exclusivity of the Sources Triad in International Law?' (1991) 2 *European Journal of International Law* 58, 77-8. Riedel posits that the Topics school of thought allows 'mediation between fixed [conceptual] definitions and real-life facts by means of standards, themselves rooted in normal prototype conduct. Topics shares this method of comparison with general hermeneutics as a precondition for the legal process of subsuming norms and facts. Standards may thus serve as a *tertium comparationis*'; Abstract relativism may also be thought of as a 'second-order language' of pluralist understanding that describes the concepts that constitute the different legal systems compared. See Van Hoecke (n 200) 27-8; Qualitative standards such as 'coherence' and 'consistency' may be used to compare the effectiveness of laws between two jurisdictions: Andrew Fell, 'The Concept of Coherence in Private Law' (2018) 41(3) *Melbourne University Law Review* 1.

[188] Samuel (n 11) 20; Corollary, Professor Samuel's method does not attract the amateurism Professor Riles posits.

[189] Ibid i; See also, Charles J Ten Brink, 'A Jurisprudential Approach to Teaching Legal Research' (2004-2005) 39 *New England Law Review* 307, 309-11; P Ziegler, 'A General Theory of Law As a Paradigm for Legal Research' (1988) 51 *Modern Law Review* 569; Terry Hutchinson, 'Taking Up the Discourse: Theory or Praxis' (1995) 11 *Queensland University of Technology Law Journal* 33, 38 *et seq*.

[190] Geoffrey Samuel, 'Comparative Law and Jurisprudence' (1998) 47(4) *International and Comparative Law Quarterly* 817, 827.

[191] Samuel (n 11) i, v, 173-9.

[192] Samuel, 'Taking Methods Seriously (Part Two)' (n 12) 236.

[193] See footnotes 180 to 187 above.

to achieve a set research goal,[194] *Professor Samuel's 'method' of doing comparative analysis is a 'method' of developing one's own intermediary jurisprudence*.[195] Taking methods seriously is, therefore, paramount. However, it is not the *method of comparative analysis* per se that the focus should be on. Rather, to make good choices about the method or combination of methods they will employ to get to their goal, the international lawyer undertaking comparative appraisals must understand what his or her needs and wants are. Put in layman terms, the comparatist must know how to utilise the *methods of comparative analysis* well. That is because, without knowing how to use and adapt *methods of comparative analysis* for the comparatists' purposes, the comparatist risks creating work that 'is pretentious and ridiculous and (or) full of errors'[196] or, in Professor Craven's view, 'confused and resistant to simple exposition'.[197]

Consistent with Orucu,[198] Glanert,[199] and Van Hoecke,[200] Professor Samuel does not disclaim the proposition that *the* comparative method is not *one single* method of comparative analysis; rather, he claims that it is *methods* of comparative analysis,[201] or a combination of those *methods*.[202] In fact, he posits that there is 'no singular way of modelling society' and the rules, standards, principles, and habits that society lives by.[203] There is, instead, interdisciplinarity.[204] Quoting Legrand,[205] Professor Samuel insists that 'law does not exist in a vacuum'.[206] 'It is a social phenomenon … because it operates within society'.[207] He argues that there are different *reasoning methods*,[208] *schemes of intelligibility* or *grilles de lectures* (Professor Samuel uses this term to refer to 'methods of comparative analysis'), and *paradigm orientations* (different and particular tracts of views, as well as levels of observation) that can be used to model society.[209] As Professor Samuel aptly observes: '[I]t is the choice of a combination [of *methods*, *schemes* and *paradigms*] which constitute a school [of thought] in any given discipline or between disciplines'.[210] Implicit in Professor Samuel's 'method' to doing comparative law is

[194] For an example of the application of an intermediary jurisprudence, see Wygene Chong, 'Harmonisation in Comparative Law: Lessons in Diplomatic Immunities' (2017) 2 *Perth International Law Journal* 1, 3; See also, Julian Wyatt, *Intertemporal Linguistics in International Law* (Hart, 2019); For well-articulated methodology, see eg, Joshua Neoh, 'Jurisprudence of Love in Paul's Letter to the Romans' (2016) 34(1) *Law in Context: Law and Love* 7, 10-11.

[195] A fiction, concept or 'epistemological attitude' providing a knowledge framework for rethinking a topic. See, eg, James Penner, '*Rethinking Legal Reasoning.* By Geoffrey Samuel. [Cheltenham: Edward Elgar, 2018. 466 pp. Hardback £95. ISBN 978-17-84712-60-0.]' (2019) 78(2) *Cambridge Law Journal* 450, 450.

[196] Samuel (n 11) 35.

[197] Craven (n 2) 143.

[198] See Peter de Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, 3rd ed, 2007) 241; Orucu, 'Methodology of Comparative Law' (n 211).

[199] Sliding Scale of methods; Simone Glanert, 'Method?' in Giuseppe Monateri (ed), *Methods of Comparative Law* (Edward Elgar Publishing, 2012) 61.

[200] Toolbox of methods; Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 *Law and Method* 1; Samuel (n 11) 19.

[201] Samuel (n 11) 2.

[202] Ibid.

[203] Samuel, 'Taking Methods Seriously (Part One)' (n 12) 99.

[204] Samuel (n 11) 23-4.

[205] Pierre Legrand, 'How to Compare Now' (1996) 16 *Legal Studies* 232, 238.

[206] Samuel (n 11) 23.

[207] Ibid.

[208] Not to be confused with '*methods of comparative analysis*'.

[209] Samuel, 'Taking Methods Seriously (Part One)' (n 12) 99; Samuel (n 11) 7, 153;

[210] Samuel, 'Taking Methods Seriously (Part One)' (n 12) 99.

the recognition that there can be multivalent truths, levels of abstraction, classification, languages of comparison and measurement, problems of translation, and cross-cultural terminology.[211] Like Glanert's and Van Hoecke's method, Professor Samuel's method to doing comparative analyses has the potential to mitigate criticisms of *methods of comparative analyses*, such as ethnocentric assumptions or predispositions.[212]

2 *Taking Methods Seriously in International Law*

In Professor Samuel's view, *the* correct comparative law method is a method of research: a methodology of methods. For Professor Samuel, methodology refers to 'roadmaps' for navigating and choosing between the different *reasoning methods*, *schemes* (*methods of comparative analysis*), and *paradigms* that are reasonably appropriate and adapted to serve as an *intermediary jurisprudence* for a particular comparative research task. As Professor Samuel appositely asserts, the focus is on the process of utilising the well-established[213] *methods of comparative analysis* to develop an *intermediary jurisprudence* adequately appropriate for a research task. This is a very important process. In relation to its application to international law, comparative methodology stimulates thought about how analyses in international law should be approached.

Method and methodology must be distinguished from the substance of a discipline.[214] As Professor Samuel posits: '[T]o teach the methodology of international law is not to teach [the content of] international law itself'.[215] It is to teach the skills that inform the construction of international law doctrine. It does not come as a surprise that the title of Professor Samuel's papers on comparative law methodology, 'Taking Methods Seriously', is reminiscent of the title of the late Professor Ronald Dworkin's book, *Taking Rights Seriously*.[216] Professor Dworkin's 'rights thesis' was not *on* the substance or specifics of rights, but it was *about* the framework of rights and rights in society more generally. To understand Professor Dworkin's substantive thesis, that 'rights are more

[211] Eg, Esin Orucu, 'Methodology of Comparative Law' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing, 2006) 442, 447-51.

[212] Ethnocentrism is a common problem in anthropology - 'the researcher uses his or her own bias while problematizing, concluding, reasoning or systemizing the study of another culture'; see Vernon Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2004) 4(2) *Global Jurist Frontiers* 1, 9 (n 24); Samuel (n 11) 6.

[213] Professor Samuel gives a summary of these in his book and in 'Taking Methods Seriously (Part Two)'. See Samuel (n 11) ch 4-7; Samuel, 'Taking Methods Seriously (Part Two)' (n 11); See also Van Hoecke (n 200), who summarizes some important comparative methods of comparative analysis.

[214] Samuel (n 11) 2.

[215] Ibid; See also, Bin Cheng, 'Custom: The Future of General State Practice in a Divided World' in R St J Macdonald and Douglas Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff, 1983) 513, 513-50.

[216] Professor Samuel engaged extensively with Professor Dworkin's work in his book *Epistemology and Method in Law* (Ashgate, 2003), criticizing Professor Dworkin for claiming epistemological exclusivity for his hermeneutical account of law and ignoring that law should be understood as a function of society, and that it is necessary to look outside of comparative law literature and to look at social science. See also, Maksymilian Leskiewicz, 'Epistemology and Method in Law, Geoffrey Samuel' (2005) 24(1) *University of Queensland Law Journal* 225; Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977); Samuel (n 11) 22-3; See also, Raef Zreik, 'Ronald Dworkin and Duncan Kennedy: Two Views of Interpretation' (2019) 32(1) *Canadian Journal of Law & Jurisprudence* 195, 195 (n 2).

fundamental than rules',[217] we must first have a proper (Dworkinian) understanding of the framework or nature of law and legal practice in which rights operate.

In relation to international law, the application of comparative legal methodology to it provokes thought about the construction of doctrine in a particular area of law — eg the *grundnorms*, character, nature, structure, framework, historical developments, evolution, theory, etc of that area of law — and allows the international lawyer to make informed decisions about the method he or she should formulate to conduct his or her research. It enables the international lawyer to ask the right, or suitably right, questions.[218] In this thought process, comparative methodology will inform the international lawyer about the 'tools' in his or her subject matter critical for his or her research task. It will inform the international lawyer about the need to have the proper understanding and be aware of the theory of international law that informs the substance and construction of doctrine in it (ie the 'hierarchies of sources, law-determining agencies, and elements of such agencies'[219] in international law). In turn, this informs the international lawyer about formulating the right *intermediary jurisprudence*, using a *method of comparative analysis* or a combination of those methods.[220] When this is done, the international lawyer will be able to employ 'reliable measuring rods for determining the significance of instances taken from state practice, of individual decisions of international and national courts, and of the writings of the most highly qualified publicists'.[221]

Succinctly put, it is the choice of approaches to critique that defines the rigor of analysis. In the process of formulating an *intermediary jurisprudence*, the international lawyer is compelled to formulate a scientific[222] understanding of his subject matter and understand how doctrine in that area of law is formed. In turn, this leads to a method of analysis that is informed by that understanding of doctrine creation less likely to be 'marred by blind spots when we completely surrender to a particular method'.[223] In the Foucauldian definition of critique, the process of formulating an *intermediary jurisprudence* is a useful exercise in 'pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices we accept rest'.[224] It is also useful in enabling the international lawyer to convey that understanding in his or her writing. Such an approach is consistent with the views of Professor Craven, who posits that similar exercises would resolve problems surrounding 'largely confused' areas of international law, such as the law of state succession to treaties.[225] Granted that even if the application of such methodology would result in an outcome that does not fulfil the sociological or inductive approach in international

[217] Dworkin (n 216).
[218] Or, to formulate the right research questions; Samuel (n 11) ch 2.
[219] Schwarzenberger, 'The Inductive Approach to International Law' (n 40) 568.
[220] Brink (n 189).
[221] Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 *Harvard Law Review* 8
[222] Scientific in the legal sense, eg, Hermann Kantorowicz, 'Legal Science – A Summary of its Methodology' (1928) 28(6) *Columbia Law Review* 679; cf Georg Hegel, *Introductory Lectures on Aesthetics*, ed Michael Inwood, tr Bernard Bosanquet, (Penguin Books, 2004) 17 *et seq*.
[223] Jerusha Asin, ''South Africa is not an accused': State (non) co-operation with the ICC and the case of the arrest warrants for President Omar Al-Bashir' (2017) 3 *Strathmore Law Journal* 157, 158-9.
[224] Michel Foucalt, 'Practicing Criticism' in L Kritzman (ed), *Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984* (Routledge, 1990) 154-5.
[225] Craven (n 2).

law,[226] the benefit of adopting *some* structured and methodological approach allows the reader to better discern the methodical approaches utilised by the author. In turn, this leads to a better understanding of the content of law preferred by the author and, with that, greater transparency and understanding of the state of affairs in international law.[227] This enables the development of a enquiry-based sociological or inductive approach in the identification of customary international law.

IV CONCLUSION

Given the highly contested nature of international law, it is inevitable that international lawyers — and, indeed, the World Court — would take vastly different methods in identifying the content of 'customary international law' (inductive, deductive, assertion, etc). However, the understanding of how doctrine in international law is formed should not be obscured by what individual international lawyers, or the World Court, desire to be custom. As can be seen from the preceding parts, the problems of identifying customary international law is marred by problems with the articulation of what the practical approach to fulfilling the conceptual understanding of custom should be. The World Court adopts, as the literature suggests, three approaches: induction, deduction, and intuitive assertion. These represent three different articulations of what is perceived to fulfil the conceptual understanding of customary international law. As Professor Kennedy aptly posits:

> People inhabit the interactive, articulative or performative aspect of global power with varying degrees of clarity about where they are and how things works. Strongly held myths about how the society operates can feel like incontrovertible facts. We might think we live in a 'nation,' held together by a 'constitution', setting the mandate, institutional form and jurisdictional reach of public authority; legitimate when representative, in the public interest but not when harnessed to private interest. At some point, the 'constitution', like the 'international legal order' or 'international community' or 'global market' becomes a cargo cult. People accept it as real, a thing with needs, necessities, limits — *the point is only to articulate what they are*.[228]

It is argued that, in identifying the content of customary international law, a shift towards a scientific, sociological, and descriptive approach of analysis is highly

[226] As Judge Tanaka in his Dissenting Opinion in the *North Sea Continental Shelf Cases* (n 92) 178 held: 'The attitude which one takes vis-à-vis customary international law has been influenced by one's view on international law or legal philosophy in general. Those who belong to the school of positivism and voluntarism wish to seek the explanation of the binding power of international law in the sovereign will of States, and consequently, their attitude in recognizing the evidence of customary law is rigid and formalistic. On the other hand, those who advocate the objective existence of law apart from the will of States, are inclined to take a more liberal and elastic attitude in recognizing the formation of a customary law attributing more importance to the evaluation of the content of law than to the process of its formation'.

[227] Such an approach is consistent with the 'requirement of publicity' in Lon Fuller's 8 desiderata of law. While this comment posits that this 'would' occur, it is unlikely global institutions would adopt such a methodology; See also, Martti Koskenniemi, 'What Use for Sovereignty Today?' (n 5) 68.

[228] David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press, rev ed with Afterword, 2018) 286-98 (emphasis in italics added), especially 289; cf Wittgenstein, whom Fuller quotes as saying "The limits of my language are the limits of my world": Lon Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 186.

desirable. It is shown that comparative legal methodology, being a theory of method of appraising the sources of law and their content, does this and is highly appropriate for this task. Adopting comparative legal methodology in international law analyses, in turn, allows the international lawyer to formulate an *intermediary jurisprudence* that is jurisprudentially sound in both the 'authority' and 'enquiry' paradigms. This allows for more accurate and clearer analyses of the sources of international law. Comparative legal methodology, as an epistemology of legal reasoning, facilitates better articulation, appraisal, and assessment of doctrine in international law, fulfilling the conceptual understanding of customary international law. Even if such methodology is not adhered to, thinking about one's methodology for examining the evidence of custom can facilitate clearer and more accurate identification and articulation of customary international law.[229]

[229] In Wittgenstein's words: 'The ideal, as we think of it, is unshakable. You can never get outside it; you must always turn back. There is no outside; outside you cannot breathe. – Where does this idea come from? It is like a pair of glasses on our nose through which we see whatever we look at. It never occurs to us to take them off. … We predicate of the thing what lies in the method of representing it. Impressed by the possibility of a comparison, we think we are perceiving a state of affairs of the highest generality.': Ludwig Wittgenstein, *Philosophical Investigations*, tr G E M Anscombe (Basil Blackwell & Mott, 2nd ed, 1958) 45-6; See also, Del Mar (n 54).