12 Law in Mind: Towards an Explanatory Framework for Customary International Law

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12.1 Introduction

The doctrine on customary international law is seriously paralyzed by conceptual problems. What exactly is *opinio juris*? What is the nature of 'general (state) practice'? What to do with the obscure text of Article 38(1)(b) in the Statute of the International Court of Justice? How to solve the so-called chronological paradox (Section 5)?[1] Traditional dualist theories struggling with grave conceptual difficulties have so far failed to provide a consistent and coherent account for customary international law.[2] We need fresh perspectives. I think that, instead of expending energy on weary dualist explanations, we should focus on a non-objectivist (possibly subjectivist) monist theory – the only one that can offer such perspectives. In what follows I outline the foundations of such a theory. However, a common methodological mistake should be avoided from the outset.

A general discussion on customary international law may be approached from three primary perspectives characterized by three questions: (i) What is a customary norm? (ii) How are customary norms formed? (iii) And how are customary norms identified or how do they show themselves? Confounding these three perspectives causes troubles and complications in understanding how customary international law works. It should be borne in mind that customary rules are, first and foremost, (legal) rules. Therefore, a proper starting point appears to be to seek answers to the two fundamental questions of *what a customary norm is* and *what it means for a customary norm to exist*. The structure of every theory of customary international law greatly depends on the answers one gives to these

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1 For a comprehensive list of problems, *see* B.D. Lepard, *Customary International Law: A New Theory with Practical Applications*, CUP, Cambridge 2010, pp. 30-43, under the label 'practical enigmas'.

2 In contemporary international law, almost all theorists share the *dualist (two-component or bipartite) conception* according to which the nature of customary international law depends on two irreducible components (elements), one objective or material (general practice) and one subjective or psychological (*opinio juris* or consent/acceptance); while *monist theories* identify only one such (subjective or objective) factor (e.g. a subjectivist-monist view excludes state practice as an element of customary rule).

two underlying questions. However, most theorists keep these questions in the background, focusing rather on specific problems of customary norms. In the absence of an account or, at least, a hypothesis on the nature of legal norms or legal normativity of which customary norms are part, explanations will lose their conceptual framework and coherence.

Thus, *a proper account of customary international law should start with a theory, proposition or hypothesis about what a (customary) norm is*. The claim that only a non-objectivist, monist theory is able to explain customary international law sufficiently makes it necessary to choose a default state of mind by which customary norms can be identified. I shall assume that a form of belief is the state of mind by which a customary norm can be properly described.[3] I shall put this forward as a hypothesis or assumption constituting the cornerstone of an instrumental, explanatory framework for interpreting and analysing some of the problems of customary norms. This simplification is necessary, because such an analysis has wide horizon. It has to start from the pure nature of the customary rule itself and should reach the level where meaningful explanations can be proposed to such questions as the chronological paradox, or the nature of general practice, etc.[4] This belief-based approach should be valued by its ability to explain difficulties surrounding CIL, and not by its own terms and ontological values.

With regard to the foregoing comments and propositions, this article will address *a basic assumption and four general claims*. I shall assume that customary norms, like other legal rules, are *beliefs* (specifically, collective beliefs). Then, I shall ground four general claims on this assumption. They are as follows. (i) Customary norms exist by *justified attribution*, that is, by virtue of the fact that they, as collective beliefs, are justifiably attributed to the international community. (ii) The formation of customary norms, like the formation of beliefs in general, is an opaque, extra-legal process which resists any plausible description. (iii) Article 38(1)(b) of the Statute of the International Court of Justice (the Court) is an *evidentiary rule*, which neither defines customary international law, nor determines its elements or formation; it provides for general criteria by which one can identify or justify customary norms in the justificatory process. (iv) The formation or determination of particular customary norms is surrounded by a serious epistemic

3 This hypothesis suggests a kind of *subjectivist-monist stance*. Historically, the most famous subjectivist-monist theory of customary law may be attributed to the German Romantic school of jurisprudence (*Gluck, Savigny*, and *Puchta*). It was especially *Puchta* who consistently excluded usage from the elements of customary law and located it exclusively in the people's spirit or conviction, C. Rousseau, *Droit international public*, Tome I, Sirey, Paris 1970, p. 324; P. Guggenheim, *Traité de Droit international public avec mention de la pratique internationale et suisse*, Georg I. Tome and Geneve Cie, 1967, pp. 102-103. In Section 2, it will turn out that, as my approach is based on a specific form of beliefs, namely collective normative beliefs, the 'subjectivist' label is not adequate. Collective beliefs are not psychological phenomena, but primarily social in nature; such an approach therefore suggests intersubjectivism, that is an *intersubjectivist-monist position*.

4 This simplification, I think, relieves me from providing a wider introduction and helps to maintain the balance between the groundwork and its application.

deficit, which is overcome in practice by a specific technique, also used by the Court, which I call the *summative approach*.

At the outset, some important clarifications have to be made about the basic assumption, *i.e.* that customary international norms exist as collective beliefs.

12.2 Customary Norms as Collective Beliefs: Clarifications

The proposition that customary international law exists in the form of collective beliefs is only assumed. I have no intention here of arguing for this proposition in detail because that would drive us into the middle of complex philosophical controversies. Instead, I shall treat this as postulated scheme for analysing and explaining some of the theoretical and practical difficulties surrounding customary international law. However, this assumption needs some clarifications, which will be made in this Section.

12.2.1 Introducing Belief as Core Concept

In a non-objectivist (or narrowly, subjectivist) approach, one needs to choose a default state of mind in which customary international law appears. I shall argue that belief is the state of mind by which a customary norm can be properly described as a social phenomenon.[5] For the view that a customary norm should be taken as being a form of belief,[6] and not other forms of mental states, I offer the following five preliminary arguments.

(1) First, an adequate non-objectivist, monist approach requires as a reference point a state of mind that must possess some necessary features to be able to play the role of the bearer of norms. (i) This mental state should be about something; that is, it should have some mental content (propositional content), which will encompass a proposition (*P*), to which the subject has a certain attitude. (ii) This default state of mind (attitude) should be cognitive in nature and directly related to the existence of the proposition. (iii) It should imply a certain level of commitment to the existence of the proposition; that is, it is insufficient for the subject only to surmise or conjecture that *P*. (iv) It should have endurance

5 For the purposes of this approach, I shall take *belief as a cognitive attitude that expresses a certain level of confidence in the truth of some content that encompasses a (legal) rule*. Recently, two vigorous, subjectivist-monist theories have emerged that treat beliefs as exclusive bearers of customary norms (Lepard and Guzman), *see* Lepard, 2010 and A.T. Guzman, 'Saving Customary International Law', 27 *Michigan Journal of International Law* (2005), p. 115. In spite of the common underlying principle, my account differs substantially from theirs.

6 What should be stressed is the need for a clear formulation of the thesis. It is not that 'CIL is formed by state beliefs', Guzman, 2005, p. 157, or that belief is 'at the origin of the emergence of such a [customary] norm', B. Stern, 'Custom at the Heart of International Law', 11 *Duke Journal of Comparative and International Law* (2001), p. 97. A customary norm itself *is* a (collective) belief with particular normative content.

because customary rules exist continuously over a long period of time. (v) The default mental state should have not only active, but also sufficiently passive phases. To suppose a permanent active mental state for the perpetuation of a norm would be wildly unrealistic. Belief as cognitive attitude meets these five requirements.[7]

(2) Second, in sociology and social psychology, the notion of '*consensus*' is often used to denote (mutual or shared) beliefs analysed within the framework of a group or community.[8] In view of the classical conception of customary law (*tacitus consensus populi*),[9] consensus may signify the prevailing 'collective belief' in a group, community, or society. Consequently, customary law would exist in the form of (collective) belief within the relevant community.

(3) Third, in the *Nicaragua* judgment the Court speaks about 'the existence of the rule in the *opinio juris* of States.'[10] In various theories of customary international law, *opinio juris* has been identified as belief by many theorists, and even by the *North Sea Continental Shelf* decision.[11] This enables us to make use of the habitual notion of *opinio juris* in an explanatory, monist model.[12] Here, *opinio juris* would not be only one constituent element

7 Other prototypical types of cognitive attitudes like knowing, or even being convinced, would imply too high an epistemic demand. A norm may serve as a reason to act or to refrain from acting even in the case of weaker epistemic commitment. This is not to say that other belief-like cognitive attitudes of higher epistemic commitment such as being convinced of or knowing something could not be the bearers of norms. Belief is only the default attitude that reflects the minimum and necessary level of epistemic commitment which makes it possible for a norm to appear as mental phenomenon. In this context, conviction or knowledge are seen as qualified forms of belief: *knowledge as true and justified belief*; conviction as a belief well-supported by evidence and characterized by high epistemic commitment.

8 E.g. K. Bach, 'Analytic Social Philosophy – Basic Concepts', 5 *Journal for the Theory of Social Behaviour* (1975), pp. 190-195 and R. Tuomela, *The Philosophy of Social Practices*, CUP, Cambridge, 2004, p. 34.

9 '*Tacitus consensus populi*' is *Ulpian*'s expression (Ulpiani, Fragm. § 4) referring to *mores*. ('*Mores sunt tacitus consensus populi longa consuetudine inveteratus*.') For its application to law, *see* e.g. *Salvius Iulianus* (Digest I, 3, 32, 1) or more famously *Hermogenianus* (Digest I, 3, 35).

10 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at pp. 97-98.

11 *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands and Denmark)*, Judgment of 20 February 1969, 1969 ICJ Rep. 3, at p. 44, Para. 77; *Statement of Principles Applicable to the Formation of General Customary International Law*. Committee on Formation of Customary (General) International Law, Final Report. Sixty-Ninth Conference (London, 2000); (available at www.ila-hq.org/en/committees/index.cfm/cid/30, accessed 11 September 2012; hereinafter 'ILA Report'), p. 32; M. Mendelson, 'The Formation of Customary International Law', 272 *Recueil des Cours* (RdC) (1998), p. 246; A.A. Cancado Trindade, 'International Law for Humankind: Towards a New Jus Gentium', 316 RdC (2005), p. 151.

12 Placing *opinio juris* as belief in the centre of the concept of customary international law, *Guzman* developed an elegant form of rational choice theory based on reputational sanctions. For such sanctions, what matters is the states' perspectives or expectations towards another state violating or challenging a rule, which is believed to exist by other states reacting to the violator's behaviour, Guzman, 2005, pp. 115-176. Though beliefs relating to legal rules naturally stand in the centre of his conception, this important aspect of the theory is somewhat undeveloped.

of customary law; customary law would rather exist in the form of *opinio juris* (as belief, or possibly as a collective belief).[13]

(4) Fourth, there are theories that connect norms to beliefs or some form of beliefs. In terms of beliefs do these theories explain either social norms in general (e.g. *Elster, Bicchieri*)[14] or legal norms (e.g. *Pattaro*)[15] or specifically customary international rules (e.g. *Lepard, Guzman*).[16]

(5) Fifth, belief is a central attitude which refers to a person's typical and common cognitive relation to the world. A person holds countless beliefs about the world (about objects, states of affairs, etc.) supported by more or less evidence, but without knowing definitely that their propositional contents are true or not. Therefore, belief is in the centre of research in the philosophy of mind and cognitive psychology.

12.2.2 Collective versus Individual Beliefs

Though the arguments in the previous subsection concern beliefs in general, according to my assumption customary norms exist in the form of collective normative beliefs, and not as simple (ie. individual and factual) beliefs. Individual factual beliefs are psychological facts (and natural facts), while collective beliefs are primarily social facts, though they are rooted in the particular, individual beliefs of the members of a group or community.[17] Such approaches that ground norms in beliefs as psychological facts (i.e. pure subjectivist theories), have relatively weak explanatory power in the field of law as law is product of social interactions. It is highly doubtful that legal norms could be meaningfully reduced to individual beliefs. At this level of investigation, reductionism and general psychologism should be avoided.[18]

Though the issue of how particular beliefs combine into collective belief will be dealt with in Section 3, it is clear that collective beliefs (and legal norms) as social facts are rela-

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13 For this subjectivist-monist view, *see Lepard*'s excellent work, Lepard, 2010, especially pp. 8 and 97-98. However, for *Lepard*, *opinio juris* is not a belief in the existence of a customary rule, but a belief in the desirability of a customary rule. This position is vulnerable to some strong objections because states can hardly create customary rules by wishing them into existence, *see* Guzman, 2005, p. 140. For other doubts concerning such desire-based beliefs, *see* A. Kernohan, 'Desiring What Is Desirable', 41 *The Journal of Value Inquiry* (2007), pp. 281-282 and S. Guttenplan (Ed.), *A Companion to the Philosophy of Mind*, Blackwell, Oxford, 1996, pp. 244-246.

14 J. Elster, *The Cement of Society: A Survey of Social Order*, CUP, Cambridge, 1995, especially pp. 97-107, C. Bicchieri, *The Grammar of Society: The Nature and Dynamics of Social Norms*, CUP, Cambridge, 2006, especially pp. 3 and 8-28.

15 E. Pattaro, *The Law and the Right*, Springer, Dordrecht, 2005, especially pp. 97-114.

16 Guzman, 2005 and Lepard, 2010.

17 G. Sartor, *Legal Reasoning*, Springer, Dordrecht, 2005, p. 293.

18 Some of the beliefs carrying norms are normative in nature. I do not deal here with the difficult question of how a particular belief can have normative (legal) content to become normative belief. I simply take it for granted that there are beliefs, which have normative content, *see* e.g. Sartor, 2005, p. 292.

tively independent of an individual mind, but they cannot be abstracted from human mind in general. The thesis that norms are collective (normative) beliefs expresses that they are neither subjective nor objective. An approach, which ground norms in collective beliefs as social facts, is not subjectivist in traditional sense, but *intersubjectivist*.[19] Nonetheless, it must be remembered that a collective belief, in some ways, is finally rooted in individual beliefs and shares some of their characteristics.

I am of the opinion that such a monist, belief-based, intersubjective theory of customary law is best suited to describing how customary rules (and other legal rules) work within domestic law,[20] where they can easily be traced back to attitudes of natural persons or their groups. However, in international law, the principal actors in law-making are abstract entities, to which beliefs can only be attributed in a metaphorical sense. No approach, other than this metaphorical methodology, seems to be applicable sensibly. In an ontological sense, a state's position relative to an international issue governed by customary rules ultimately depends on complex institutional processes specific to a state and, within these processes, on the beliefs of natural persons representing the state, making decisions in forming this position, and applying this position in practice. However, an investigation of this interesting aspect would be a distraction from the essential question of how customary international law functions at the level of the international community.[21] The metaphorical approach shortcuts problems in the formation of states' opinion and practice by ascribing beliefs to the states themselves.[22]

12.2.3 *The Endurance Problem, or Where Does a Customary Rule Go if Everybody Is Asleep?*

If belief is the default state of mind in which a customary norm exists, the *problem of endurance* emerges. (Dualist theories that treat *opinio juris* as belief also confront this dif-

19 This might as well be considered a subjectivist position, if we take the intersubjectivist strand as a subclass of subjectivism, which subsumption, however, might be doubtful. Therefore, I shall only apply the 'intersubjective' adjective to my approach.

20 The classic conception of customary law (*tacitus consensus populi*) can be considered as being subjectivist-monist, because *usus* (usage) was not strictly required for the pure existence of customary norms. *Usus* only proved their existence. This interpretation is confirmed by, for example, the medieval Hungarian conception of customary law: '*non tamen actus, sed tacitus consensus populi inducit consuetudinem*' [not action but the tacit agreement of the people gives rise to custom], *Tripartitum* (1517), Prologus, Titulus 10, § 7 reprinted in *Corpus Juris Hungarici* Franklin, Budapest, 1897, p. 36. This reference does not mean that I would accept or follow the classic 'tacit agreement' theory of customary international law, Rousseau, 1970, pp. 311-312, Guggenheim 1967, pp. 94-95, M. Seara Vazquez, *Derecho Internacional Público*, Porrúa, México, 1979, p. 72. I am merely emphasizing its intersubjective nature and the particular evidentiary role that usage plays.

21 D. Lefkowitz, '(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach', 21 *Canadian Journal of Law and Jurisprudence*, 2008, p. 130.

22 If states can have will, intent, or *opinio juris*, they can also hold beliefs metaphorically. Moreover, metaphors have unequalled value in understanding and describing complex phenomena.

ficulty). In ordinary usage, customary rules are assumed to have continuous existence after having come into being. How can a belief with propositional content like 'torture is prohibited' endure if international actors do not always reflect on the idea that torture is prohibited? What keeps a customary norm as an intersubjective phenomenon alive during those periods of time when no one gives it a thought? (Where does a customary rule upheld by beliefs go if everybody is asleep?) To answer these questions, we have to descend *ad interim* from the level of state beliefs conceived metaphorically to the level of natural persons' beliefs.

As I noted above, belief as default attitude meets the endurance requirement because beliefs do not only take an active form when they actually occur (temporarily moving to the forefront of conscious, mental events), but also a passive or dispositional form. The *occurrence of a belief* indicates that relevant mental events are actually taking place in the mind. Occurrent beliefs happen to the subject who is experiencing and/or undergoing and/or doing something relative to its propositional content. An occurrent belief that *P* which is limited in temporal terms may have external manifestations: e.g. the subject's stating or declaring verbally that *P*, reasoning in a legal document on the premise that *P*, acting or abstaining from acting for the reason that *P*, etc.[23] Beliefs do not cease when the subject ceases to entertain the idea which constitutes the content of the proposition. As *Hacker* puts it: 'Indeed, one may believe that *P* for many years, without the thought that *P* even crossing one's mind.'[24] Thus, *one can hold beliefs dispositionally*, but dispositional beliefs are not occurrences. In this context, disposition is generally meant as an inclination or tendency to act, react, or undergo something in a particular way on particular occasions. To hold a dispositional, non-occurrent belief that *P*, to put it simply, is a tendency or proneness to hold this belief that *P* occurring in response to particular circumstances and possibly, but not necessarily, accompanied by external manifestations.[25] If one holds a dispositional belief that torture is prohibited, one will also have it continuously, even in one's sleep, embedded in a general dispositional profile of the mind with other connecting beliefs, emotions, mental representations, etc. On particular occasions, certain facts, situations, impacts, or other circumstances may call forth or trigger the belief that torture is prohibited and make it occur.[26]

23 R. Audi, 'Perception and Consciousness', in I. Niiniluoto et al. (Eds.), *Handbook of Epistemology*, Springer, Dordrecht, 2004, p. 88.

24 P.M.S. Hacker, 'Of the Ontology of Belief', in M. Siebel and M. Textor (Eds.), *Semantik und Ontologie*, Ontos Verlag, Frankfurt, 2004, p. 194.

25 For this argument, *see* Hacker, 2004, p. 218, or P.M.S. Hacker, 'Passing by the Naturalistic Turn: On Quine's Cul-de-Sac', 81 *Philosophy* (2006), p. 248; *see also* Audi, 2004, p. 88.

26 J. Vonk and T.K. Shackelford (Eds.), *The Oxford Handbook of Comparative Evolutionary Psychology*, OUP, Oxford, 2012, pp. 50-51; Audi, 2004, p. 88; E. Schwitzgebel, 'In-Between Believing', 51 *Philosophical Quarterly* (2001), pp. 76-82.

Although a state only holds a belief metaphorically, these insights may be utilized in our investigations. In the context of the metaphor of 'state beliefs', they may explain the stability and endurance of this metaphorical belief and the state's disposition to act or react in a particular way under certain circumstances.[27]

12.2.4 Beliefs at Different Levels

The description of belief I have provided above concerns first-order beliefs. First-order beliefs must be distinguished from second- and third-order beliefs. This well-known and common distinction is necessary to elucidate the question of how customary international law can exist in the form of *opinio juris*.

First-order belief expresses a certain confidence that something is legally prohibited, prescribed, or permitted in the relevant community (*internal epistemic commitment* to the existence of a norm). Naturally, first-order beliefs do not stand alone and in isolation. International relations are interactive situations where the states' and other agents' decisions and acts are influenced or even determined by what they expect from other states and actors. It is important what an actor believes about another actor's beliefs, intentions, plans, strategies, etc. Second-order beliefs are thus essential to describing international interactions. We are interested here in those second-order beliefs which are about others' first-order beliefs relative to the existence of an international legal rule.[28]

Second-order beliefs are directed to others' first-order beliefs with the normative content that encompasses the legal rule at issue, and not directly to the normative content itself. For an actor as subject (S), second-order beliefs convey others' epistemic commitment to the existence of the legal rule (*external epistemic commitment*, for short). It only implies external commitment because if S_1 believes that S_2 believes that torture is prohibited, it does not mean that S_1 itself believes that torture is prohibited – although S_2's belief may be a reason for S_1 to believe that torture is prohibited. Therefore, it must be stressed that higher-order beliefs themselves are not normative beliefs. Their propositional content simply concerns the existence of other actors' or agents' beliefs, convictions, etc.

Furthermore, second-order beliefs relating to others' first-order beliefs about an international norm can also be the object of other beliefs (*third-order beliefs*). Although third-order beliefs as beliefs about other actors' second-order beliefs are difficult to discern and identify in practice, they are still important in conveying others' expectations toward an actor regarding the existence of the legal rule. With third-order beliefs, one can grasp

27 Accordingly, *opinio juris* as belief cannot simply be 'consciousness of a legal duty' (that is, occurrent belief), e.g. M. Sorensen (Ed.), *Manual of Public International Law,* MacMillan, New York, 1968, p. 134.

28 In criticizing subjectivist approaches and quoting Virally, Mendelson is right that we never *know* what states believe, Mendelson 1998, p. 269. However, we may have sound *beliefs* about what others believe, and these second-order beliefs have great significance in international practice.

and depict *mutuality and similarity of attitudes* from the perspective of one actor and one particular belief.

In sum, *internal epistemic commitment*, the *detection of others' commitments* and the *mutuality of these commitments* are incarnated in first-order and higher orders of beliefs from the perspective of one actor and one particular belief, and all these beliefs may play a part in the formation and maintenance of a customary rule.[29]

12.2.5 What Counts? False Beliefs and Higher-Order Beliefs

If we conceive of customary international law as a set of norms existing in the form of a web of beliefs within the international community, it is evident that first-order beliefs must count in this web of beliefs. My additional claim is that it is not only first-order beliefs, but also higher-order beliefs and false beliefs that will contribute to the existence of customary norms. The concept of belief *per definitionem* reflects epistemic uncertainty, and beliefs can be and often are false. In the case of higher-order beliefs, this uncertainty may be greater because they concern another actor's or a community's attitude (belief) and the justification of such a belief is more difficult than that of a proposition rooted directly in the objective reality (e.g. 'all the ravens are black').

For my claim that *false beliefs may also contribute to the formation and maintenance of a customary rule*, I offer three arguments. (i) Even false beliefs can generate true beliefs of a higher order. Though S_2's belief that torture is prohibited may be false, S_1's belief that S_2 believes that torture is prohibited can be true. (ii) Even false beliefs can provide apparent reasons to act for the holder of the belief, and reasons to believe or act for another member of the community, and, similarly, false beliefs, may confirm similar first-order beliefs held by other members of the community. (iii) Even false beliefs may change into true beliefs if their normative content gradually becomes a proposition commonly held by other actors. A normative belief may be *a self-fulfilling belief* as its truth value depends on what other subjects think (know, believe, or opine) with regard to the matter its content implies. False beliefs may create the basis for their own justification by generating beliefs with similar content. A false belief that torture is prohibited in a community may turn into a true belief after a certain period of time if a sufficiently large number, or possibly all, of the community's members believe that torture is prohibited.

As to higher-order beliefs, they also contribute to the formation and maintenance of the web of beliefs in which a customary rule (CR) may exist.[30] Here, S_1 is not supposed to

29 The acting state's belief also matters, but for a contrary view, *see* Guzman, 2005, p. 146.

30 It is even said that group beliefs (like customary international law) may be exclusively made up of higher-order beliefs in the following way: S1 believes that the community believes that CR if he believes that the majority of the community members believes that the community believes that CR. As the definition does not refer to first-order beliefs, individual first-order beliefs that CR might as well as be false beliefs. A. Orléan,

believe that CR, but believes that S_2 believes that CR or believes that S_3 or the international community believes that CR. The detection of others' commitment to a customary rule may justify an attitude on the part of S_1 which expresses lesser epistemic commitment than does a belief (e.g. S_1 surmises or conjectures that CR); or believing that S_2 believes that CR may serve S_1 in international cooperation as a reason to act in accordance with the content of the rule believed by S_2 even if S_1 himself does not believe that CR. In turn, S_1's surmise (possibly appearing in S_1's statements) or behaviour may be used as a justification (although, in itself, a relatively weak and partial one) for others to believe that CR.

12.3 Perspective of the International Community: Customary International Law as a Set of Collective Beliefs

12.3.1 Collective Belief as Combination of Individual Beliefs

The international community as an abstract entity is supposed to be able to hold beliefs concerning customary rules.[31] That raises the fundamental question of how a collective belief can be justifiably attributed to the community.[32] The justification of such belief attribution has something to do with individual beliefs. Though collective belief seems to be clearly parasitic on the concept of interaction between the individual beliefs held by the members of the community, it is not clear in what way it is.

There are some theories that attempt to explain the relationship between individual beliefs and collective (group) beliefs.[33] The problem which we confront is that none of

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'What Is Collective Belief?', in P. Bourgine and J-P. Nadal (Eds.), *Cognitive Economics: An Interdisciplinary Approach*, Springer, Dordrecht, 2004, p. 200.

31 E.g. Judge Nyholm's dissenting opinion in the *Lotus* judgment ('*la conscience juridique collective*'), *SS Lotus case (France v. Turkey)*, PCIJ (Ser. A) No. 10, 3, at 60; *see also* S. Vazquez, 1979, pp. 70 and 72; Cancado Trindade, 2005, p. 175.

32 Many expressions with various definitions are on the market: shared belief, mutual belief, collective belief, common belief, group belief, etc., Tuomela, 2004, pp. 33-35. I will spare the reader the sophisticated and controversial distinctions and use the term collective belief, or more specifically, the international community's belief.

33 At the one end of the scale are those theories which link group belief to the aggregate of similar individual beliefs: e.g. the *unanimity view* (the group believes that *P* if and only if all of the group members believe that *P*); the *majoritarian view* (the group believes that *P* if and only if the majority or most of the group members believe that *P*); *representationist view* (the group believes that *P* if and only if a number of group members adequately representing the group believe that *P*). At the other end, some approaches reject that group belief is only a combination of the group members' beliefs and could be reduced to individual beliefs: e.g. *Gilbert*'s influential acceptance-based theory (a group belief is a jointly accepted view of the group and independent of the beliefs the group members hold), M. Gilbert, *On Social Facts*, Princeton University Press, Princeton, 1989, pp. 306-309. For an overview of these theories, *see* R. Hakli, 'Group Beliefs and the Distinction between Belief and Acceptance', 7 *Cognitive Systems Research* (2006), pp. 286-287. Similar problems arise in connection

these approaches is suitable to adequately describe and explain international practice in relation to customary international law. This is due to the fact that the practice of the states and ICJ does not display a definite pattern in the matter of how different, individual manifestations of states' beliefs (state acts, abstentions, and statements) should be evaluated to adequately prove a community belief. The generality condition of the practice in Article 38(1)(b) of the Statute may suggest a *majoritarian view*,[34] the doctrine of specifically affected states refers to a version of a *representationist view*,[35] the Court's investigating the acceptance of the custom at issue by the states' parties to the case may indicate the *unanimity view* or a *sort of 'consensual theory'*,[36] and the ICJ's reference to the states' joint action (e.g. a UN resolution) as a deciding factor in justifying community belief without exploring and assessing the manifestations of individual state beliefs suggests a *non-reductionist theory of collective beliefs* (that is, the collective belief cannot be reduced to a certain combination of individual state beliefs).[37] Thus, I must suppose that no plausible, abstract formula can be discerned by which we could define a general standard for how individual beliefs relate to collective beliefs in international practice with respect to customary norms.

12.3.2 *Collective Beliefs and Customary Norms: 'Existence' by Justified Attribution*

Although an established and accepted method of how to derive collective belief from individual beliefs would have provided a solid theoretical background for evaluating the characteristics of the process in which collective beliefs are attributed to the international community, without such background, what remains is to identify these general characteristics, which are as follows. (i) Collective beliefs (and customary norms) are mental constructs; they do not exist in the same sense as parts of the objective world exist (such as a table or an individual belief). Collective beliefs are only attributed to a group or community, and this attribution must have grounds – and that requires justification. *Collective beliefs (customary norms) 'exist' by justified attribution*. It is therefore more precise to speak about belief attribution than to simply refer to the existence of a collective belief.[38] (ii) An attribution of belief that contains CR can often be described as second-order belief where the

with the generality of consent, *see* I.M. Lobo de Souza, 'The Role of State Consent in the Customary Process', 44 *ICLQ* (1995), p. 539.

34 Although the relationship between individual state conduct and (general) practice as collective phenomenon reflects the same difficulties as does the interconnection between individual and collective belief.

35 *See North Sea Continental Shelf*, *supra,* at p. 43, Paras. 73-74, and P. Manin, *Droit international public*, Masson, Paris, 1979, p. 28.

36 O.A. Elias and C.L. Lim, *The Paradox of Consensualism in International Law*, Brill, Leiden, 1998, p. 84.

37 *Nicaragua* case, *supra*, at pp. 99-100, Para. 188.

38 As collective beliefs are social facts, which exist by justified attribution, the approach I offer can hardly be regarded as an offshoot of philosophical or legal psychologism.

observer or a state believes that the community believes that CR. (iii) An attribution of collective belief may take the form of some linguistic act (declaration, resolution, comment, judgment, etc.). (iv) It is in the international legal discourse where a belief attribution may become justified. The act of belief attribution must therefore be made public in some form in order to have an effect on other agents and have a chance of becoming justified.[39] (v) In practice, the justification for attributing beliefs concerning CR to the international community may take two typical, complementary forms. An attribution of a belief can be justified by other, already justified beliefs (with such normative content as rules, principles, and rationality standards) to which the belief to be justified is inferentially or derivatively related (*systemic justification*). The justification may also be grounded on the evidence in which the collective belief manifests itself (*evidence-based justification*). (vi) Beliefs, even individual (personal) beliefs, cannot be observed by another agent. One can only conclude their existence through their external manifestations, which prove their existence or constitute the basis for justification. We have *three types of evidence* (and their combinations) by which a belief can be justified: (i) (physical) actions, (ii) failures to act, (iii) and linguistic manifestations (*statements*, for short).

For us, the crucial question is how one knows that collective beliefs with propositional content made up of customary rules are justifiably attributed to the community? I will choose and briefly outline a pragmatic approach placed in the context of international legal discourse. The conclusion will, in some respect, be rather meagre: a community belief is justified by virtue of being held for adequate reasons, implying appropriate reference to the manifestations of the community members' beliefs and being successfully defended in the process of justification by interested agents.[40] However, it will provide a flexible framework for further investigation.

As I mentioned above, for a community-wide justification, the attribution of belief has to appear publicly and should be open to objections by other agents with conflicting interests. We have two typical, functional perspectives where the processes of justification may differ significantly: that of *an observer* (e.g. international courts, bodies of experts, such as the International Law Commission, NGOs, and theorists) and *an actor* (e.g. states).[41] Belief attributions may take the form of assertions made publicly by an observer or actor in judgments, resolutions, declarations, opinions, academic literature, etc. On the other hand, from the actor's perspective, belief attribution may also lay a foundation for an actor to act, abstain, or make a claim within the community. The various forms and occurrences

39 ILA report 2000, p. 14.

40 For this approach, *see* A. Leite, 'On Justifying and Being Justified', 14 *Philosophical Issues* (2004), p. 238.

41 For this distinction, *see* Mendelson, 1998, pp. 176-178. I do not wish to engage in the discussion of whether international (intergovernmental) organizations are themselves actors or only *fora* for the joint actions of state actors; I shall therefore only treat the states as international actors, whose beliefs contribute to the formation of collective belief bearing customary norms.

of belief attributions conjoin in international legal discourse, generate or confirm higher-order beliefs, and reinforce each other against objections or counterclaims made by other observers and actors that hold opposite beliefs or opinions or that have conflicting interests.

Justification depends on the ability of the interested agents (observers and actors) in the community to respond to these objections by providing adequate reasons and proof to support the belief. *Practically, a belief attribution is justified if no reasonable objection is left without an adequate answer.* The justification will be decided in international legal discourse according to the rules, processes, and institutions that govern the process of justification in the international legal community. The standard of reasonableness of objections and adequacy of answers is always defined under the rules and practices applied in the community.[42] In the case of beliefs attributed to a community, the state of being justified (positive justificatory status) cannot be abstracted from the process of justification. A collective belief is not justified if the interested agents are not able to justify it.[43] If justification depends on the justificatory process in which it takes place, then some particular features of the justification of customary norms as collective beliefs in international legal discourse must be set forth.

12.3.3 *Some Features of Evidence-Based Justification of Customary Norms in International Legal Discourse*

The justification of customary norms as collective beliefs follows the '*claim – reasonable objection – adequate answer*' pattern.[44] In international practice, evidence-based justification prevails over systemic justification due to the fact that Article 38(1)(b) expressly refers to the practice of international actors, which is a clear evidentiary basis for the attribution of customary norms to the international community.[45] This was confirmed in the *Gulf of Maine* judgment: customary rules 'can be tested by induction based on the analysis of

42 In a similar vein, *Lowe* describes the justificatory process relating to *opinio juris* as collective characterization of state acts by means of presumptions and rebuttals, A. V. Lowe, *International Law*, OUP, Oxford, 2007, p. 51.

43 For a more detailed account of this approach, *see* Leite, 2004, pp. 238-247, and R. Hakli, 'On Dialectical Justification of Group Beliefs', in H.B. Schmid et al. (Eds.), *Collective Epistemology,* Ontos Verlag, Frankfurt, 2011, especially pp. 149-150.

44 For the claim/response theory of the formation of customary international law, *see* Mendelson, 1998, p. 282.

45 That is not to say that systemic justification is excluded from the justification process. The requirement that in the justification process other international legal rules (as justified beliefs) should be given due regard is an aspect of systemic justification. Those who urge that moral principles shall be a determining element in the course of justification intend to place greater emphasis on systemic justification, *see* e.g. Lepard, 2010, pp. 77-95, *South West Africa Cases (Ethiopia and Liberia v. South Africa)*, Second Phase, Judgment of July 1966, 1966 ICJ Rep. 6, at p. 24, Paras. 49-50.

sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.'[46]

As belief is attitude, a mental phenomenon, it cannot be directly observed and manifests itself to another actor or observer by what the subject (as holder of the belief) says and does or does not do.[47] In the case of collective beliefs, what members of the community say and do or do not do individually or jointly may provide justification of different strength for attributing beliefs to the community.[48] It is in this context that I offer some remarks on the particular problem of evidence-based justification of collective beliefs bearing customary norms.

(1) A twilight period in the formation of customary norms.[49]

As long as the process of justification endures, a twilight interval is enclosed by the formation of customary norms.[50] In this period, an overall uncertainty prevails as to the existence, content, and nature of the evolving norm. This period might be said (a) to start when a reasonable claim that implies the alleged customary norm first appears in and becomes part of international legal discourse, a claim to which other interested international agents may reply (*see* e.g. the Truman Proclamation, as one of the few, relatively clear examples), and (b) to conclude when the norm as collective belief can be viewed as being justified.

(2) Three types of evidence and their interpretation.

The three general types of external manifestations of belief may refer to the existence of belief, and, therefore, in the abstract, they all have evidentiary value that proves that the belief exists. It is indifferent whether a belief is properly justified by physical behaviour or failures to act or statements made by community members or the various combinations thereof. Anything counts which can reasonably serve as evidence of the belief attribution.[51] The point is whether the methods by which one can treat a belief as justified is acceptable in the community or not. There can be social conventions, processes, or even legal rules

46 Delimitation of the Maritime Boundary in the Gulf of Maine Area *(Canada/United States of America)*, Judgment of 12 October 1984, 1984 ICJ Rep. 246, at p. 299, Para. 111.

47 On the problems of how to ascertain the content of beliefs, *see* I. Brownlie, *Principles of Public International Law*, Clarendon Press, Oxford, 2003, p. 7; M. Akehurst, 'Custom as a Source of International Law', 47 *BYBIL* 1975, p. 29; A.A. D'Amato, *The Concept of Custom in International Law*, Cornell University Press, Ithaca, 1971, pp. 33-41.

48 For the relation of state practice to justification, *see Nicaragua* case, *supra*, at p. 109, Para. 207.

49 I borrow this adjective from *Justice Cardozo* who spoke of the 'twilight existence' of international law (*New Jersey v. Delaware* 291 U.S. 361, 383 (1934)); *see also* J.P. Kelly, 'The Twilight of Customary International Law', 40 *Vanderbilt Journal of International Law* (2000), p. 535. *Villiger* observes that emerging customary norms are *tertium genus* between *lex lata* and *lex ferenda*, M.E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, Kluwer, The Hague, 1997, p. 54.

50 J. d'Aspremont, *Formalism and the Sources of International Law*, OUP, Oxford, 2011, p. 164.

51 ILA report 2000, p. 14.

which restrict the choice of method by which a normative belief can be attributed to the subject. In international law, such a restrictive, evidentiary rule is Article 38(1)(b) of the Statute, especially the requirement of general practice being an evidentiary standard, but that will be a matter for discussion in the next section.

Physical behaviour (state practice) and statements are only possible signs, and, most often, partial and incomplete signs, of a belief relative to a customary rule. It is almost always questionable on what grounds one can recognize a non-binding decision taken by an international body, a state's failure to act, or a statement as evidence of belief relative to a customary rule.[52] These pieces of evidence are scarcely ever conclusive in and of themselves. Their interpretation is thus necessarily contextual, summative, and subject to other controlling principles.

(3) Contextuality, summativity, coherence, and rationality.

A piece of evidence may gain further strength from its context, from other proof, by the fact that it can be classified as one of a series of items of proof that justify a belief relative to a customary rule (contextuality).[53] Observers (e.g. courts) will then assess a range of available evidence, that is the aggregate of proof that fits into the pattern (summativity). It is not only proof that should produce a pattern to justify a belief attributed to the international community, but the belief which they justify should also fit into a pattern of existing beliefs that represent other legal rules and principles (*coherence*) and should be consistent with rationality (*rationabilitas*).[54] The standards of coherence and rationality, which are means of systemic justification, may control belief attribution based mainly on evidence in international practice.

(4) Reactivity, intensity, and the growing quantity of evidence.

The structure and features of international interactions have undergone a thorough change in recent decades, which has resulted in an ever larger number of statements, declarations, resolutions, and acts made jointly or severally by international agents (states and intergov-

52 Even statements pose a great many difficulties because the statements typically made by states are political in nature, context-dependent, and implicit of possible legal effects. For a typology of statements, *see* Y. Dinstein, 'Customary International Law and Treaties', 322 *RdC* 2006, pp. 279-281.

53 An act or omission of a state may make new sense if evaluated within a pattern of similar acts, omissions, or supporting statements that reflect them. Art. 38(1)(b) of the Statute eventually prescribes such patterns of behaviour to be able to prove a belief relative to a customary rule (general practice of states).

54 This requirement of belief attribution seems somewhat theoretical and evident in international legal practice, but in the traditional theories of municipal customary law *rationabilitas* has been a strict requirement restricting the content of the customary rule, *cf.* '*Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem.*' Codex Iust. VIII, 52, 2. quoted by B. Grosschmid, *Magánjogi előadások* [Lectures in Private Law], Athenaeum, Budapest, 1905, p. 463; *see also* E.C. Stowell, *International Law. A Restatement of Principles in Conformity with Actual Practice*, Holt, New York, 1931, pp. 28-29.

ernmental organizations). International interaction within the international community is increasingly reactive in nature: international actors reflect on others' statements or conduct, whereby the number of linguistic reactions (statements and declarations) has increased at the expense of the amount of physical conduct as components of state practice.[55] It is not only context-sensitive statements that are proliferated, but also free-floating, abstract statements made by states, which directly assert the existence of legal or other rules within the international community,[56] possibly reflecting second-order beliefs relative to the content of international law, which includes customary rules.[57]

Dualists are puzzled by these developments as they perceive, for example, that these modern tendencies trash the foundations of custom by inverting the traditional priority of state practice over *opinio juris*.[58] However, all this is irrelevant because the foundation of customary international law has remained the same, that is collective beliefs that prevail in the community. No piece of evidence has priority over other proof. What counts is how, as truth-indicative grounds, it justifies the ascription of a belief to the community and fits into the pattern of other justifiers or defeaters. Although evidentiary rules like Article 38(1)(b) in some way restrict the method of justification, they are subject to interpretation and easy to overcome if an observer otherwise believes that the available statements as justifiers in fact justify a collective belief.[59]

(5) A customary norm becoming justified: the role of the International Court of Justice.

The conventions in relation to the justificatory processes prevailing in a community determine who decides whether a customary norm is justifiably attributed to the international community. In the present state of international cooperation, no absolute authority exists in this respect. However, it is clear that the Court, whose decisions are evidence of international law, has the greatest, relative authority in spite of the fact that the precedent system is ruled out by Article 59 of the Statute.[60] Besides its authority, this impact of the

55 E.g. as to the *Jurisdictional Immunities* case, the judgment provides evidence that the International Law Commission's report of 1980 evidences that the existing general state practice bears out the customary rule of State immunity; Jurisdictional Immunities of the State *(Germany v. Italy; Greece intervening)*, Judgment of 3 February 2012 (available at www.icj-cij.org/docket/files/143/16883.pdf, accessed 10 December 2012) at p. 24, Para. 56.

56 G.J.H. van Hoof, *Rethinking the Sources of International Law*, Kluwer, The Hague, 1983, p. 217.

57 This change in practice is due to various, well-known factors, *see* van Hoof, 1983, pp. 14, 65-71, or Villiger, 1997, p. 51.

58 A.A. D'Amato, 'Trashing Customary International Law', 81 *AJIL* (1987), p. 101.

59 *Cf.* A. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2001), p. 763 (modern custom seems to be based on normative statements of *lex ferenda* disguised as *lex lata* expressed in mandatory terms).

60 It follows from the nature of customary norms that first of all 'the imprimatur of a court attests its jural quality', *New Jersey v. Delaware* 291 U.S. 361, 383 (1934).

Court's statements is also due to their generality. Though formally only having an *inter partes* effect, in a material sense these statements, prevailing over other justifiers or defeaters, may relate to the whole community because the Court declares what the law is on an issue and this makes it easier for a corresponding first-order or second-order belief to be attributed to the whole community.[61] States may later make references to these statements and use them as reasons to make claims that correspond to the content of this norm, thereby producing additional pieces of evidence to justify the rule.[62]

The Court's pronouncement that a particular customary rule exists does not necessarily conclude the justificatory process.[63] The Court's statements themselves are part of the justificatory process and it is crucial how interested agents respond to the statements that appear in Court decisions. Innumerable, approving references confirm the judicial justification, and, without reasonable objections to the Court's statements, the norm can be viewed as justifiably attributed to the community. On the other hand, as customary rules come into being by justified attribution and the Court plays a considerable part in determining when a collective belief that bears a customary norm is justified, the Court also contributes to the establishment of the norm, that is to international law-making.[64]

12.3.4 An Outlook: opinio juris *as Belief and International Treaties*

If customary norms exist in the form of collective beliefs (*opinio juris*), then what can be said about other international legal norms, such as treaty norms? Though I have no intention of engaging in a general ontology of legal norms, from the intersubjectivist-monist approach outlined here it follows that treaty norms also exist as collective normative

61 In the *Lotus* case, the statement made by the Permanent Court of International Justice that jurisdiction in collision cases does not belong exclusively to flag states (strong, rebutting defeater) has overridden the discernible pattern of previous state practice which had reflected certain, specifically affected states' attitudes that flag states have exclusive criminal jurisdiction in such cases (e.g. the *Franconia* or *Ortigia* decisions as justifiers), *Lotus*, *supra*, at pp. 28-30, but *see especially* Judge Altamira (diss. op.) pp. 100-101. Therefore, following the judgment, it has not seemed justifiable to attribute such collective belief to the international community, and thus the states have been forced to incorporate into treaty law the rule rejected by the PCIJ as a customary rule. (International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, Brussels, 10 May 1952, 439 UNTS 217).

62 However, the standards which govern the justification of customary norms in the Court's decisions are not clear. For the different types of justification, *see* A. Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence', 60 *ICLQ* (2011), pp. 689-703.

63 *Cf. Mendelson*'s point that the formation and application of customary norms are not two distinct stages, Mendelson 1998, pp. 175-176.

64 *Cf. Alf Ross*' thesis that a judge does not simply apply an existing rule, but creates and justifies the particular rule which plays a role in a case A. Ross, *A textbook of international law*, Longmans, London 1947, pp. 80-82; *see also* d'Aspremont, 2011, p. 165.

beliefs, which also require justification. This model might shed a somewhat different light on the relationship between customary norms and treaties.[65]

(1) A treaty may represent both evidence and source of customary international norms. The Court clearly indicates this in the *Libya/Malta Continental Shelf* decision.[66] If we concede that treaties can contribute to the birth of new customary norms,[67] the crucial question is how this can happen. How can a treaty generate beliefs (a) on the part of parties, on the one hand, that a rule in this treaty coincides with a general legal rule that is also binding on non-parties as a customary rule and (b) on the part of non-parties, on the other hand, that the community shares a collective belief that bears a legal rule coinciding with a treaty norm to which they are not parties? One can describe the process of how the Hague Conventions of 1907 have become the crystallizing point of relevant customary rules of land warfare, but the particular process would be difficult to generalize and apply to other cases, for example, to how the agreements of 1815 providing for Switzerland's neutral status contributed to the birth of a customary norm with the same content.[68] Being a form of belief formation, this is a non-transparent process, which is not observable as such. In describing or analysing this process, an observer assesses proof of belief formation and attributes beliefs to states (parties and non-parties), a group of states, or the community itself. Thus everything turns on the summative assessment and standards of justification and evidence.[69] Therefore, it is understandable that scholarly endeavours are focused on offering a system of such justificatory standards.[70]

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65 In general, *see* Dinstein, 2006, pp. 346-426 and ILA report 2000, pp. 42-54.

66 '[M]ultilateral conventions may have an important role to play in *recording and defining rules deriving from custom*, or indeed *developing them*' (emphasis added), *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 3 June 1985, 1985 ICJ Rep. pp. 13, at 29-30, Para. 27, *see also* Manin, 1979, p. 28 and Lepard 2010, pp. 30-31. However, it is not evident which case regards particular treaties. At the time of their coming into force, did the provisions of the 1907 Hague (IV) Convention in relation to land warfare represent proof of pre-existing customary norms or did they merely constitute grounds for subsequent state practice serving as proof of *posterior* customary norms, or both? *Yearbook of the International Law Commission* Vol. II (1966), pp. 230-231; Rousseau 1970, p. 334. Similarly, did the relevant provisions of the UNCLOS Treaty that provided for the possibility of an exclusive economic zone of 200 miles codify existing customary norms or create new rules? Manin, 1979, p. 29. Reuter rightly observes that a treaty codifying some part of customary international law practically always adds new rules to the pre-existing and codified customary rules, P. Reuter, *Droit international public*, Presses Univ. de France, Paris, 1976, p. 98.

67 Art. 38 of the 1969 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 UNTS 331, or *North Sea Continental Shelf, supra,* at p. 41, Para. 71.

68 *Cf. Yearbook of the International Law Commission* Vol. II (1966), pp. 230-231.

69 It seems that treaties provide three general types of evidence which might be used under certain circumstances for justifying beliefs that carry customary international law: (i) the states' actions by which they contribute to the creation and conclusion of a treaty (negotiations, conferences, signature, ratification, etc.); (ii) the existence of the treaty itself; and (iii) state practice in implementing the treaty provisions, Dinstein 2006, pp. 346-382; R. Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes, General Course on Public International Law', 230 *RdC* (1991), pp. 56-61.

70 E.g. how much evidentiary weight should be accorded to the signature and ratification of treaties, to the number of state parties, to the possibility of reservations, to regional or bilateral treaties, to the diverging

(2) On the other hand, the traditional, restrictive treatment of *opinio juris* is closely related to the problems of how to describe the relationship between customary international law and treaties. For example, *Guzman* takes the view that 'treaties are relevant to the formation of CIL only to the extent they represent evidence of *opinio juris*.'[71] The difficulty with such statements that reflect a traditional view on *opinio juris* is that treaties also always generate beliefs that bear legal rules because the main function of international treaties (or specifically their texts) is to establish and maintain beliefs in which treaty norms exist. What is the difference between normative (legal) beliefs generated by general state practice (traditionally coined as *opinio juris*) and those established by a treaty (text)?[72] Treaty norms also exist in the form of beliefs, which are also *opinio juris* regarding their nature, and the text of the treaty will be the principal evidence for justifying such beliefs.[73] The existence of a valid treaty text, which is a definite and objective trace of the states' previous legal commitment, makes justification much easier than general state practice does in the case of customary norms.[74] (Of course, this is not to deny the multiple problems of treaty interpretation.)

Accordingly, *opinio juris* is not a subclass of normative (legal) beliefs; it generally signifies the general class of the normative (legal) beliefs and is not confined to the area of customary law.[75] Legal norms with the same content carried by *opinio juris* (normative legal beliefs) related either to a local or general customary norm or to a provision of a multilateral treaty or a state act qualified as undertaking a unilateral legal obligation do not differ in their nature, only in their effects and justification.[76] The restrictive conception of *opinio juris* in the traditional talk on customary international law may also stand in the way of understanding the correlation between treaties and customary norms, namely, the role of treaties in justifying customary norms and the role of customary norms in interpreting treaty texts.

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application of treaty norms, or to how to evaluate the reservations made by some state parties, etc., d'Aspremont 2011, pp. 152-153; Lepard, 2010, pp. 30-32, 192-205. These efforts have so far failed in reaching a consensus.

71 Guzman, 2005, p. 163; Akehurst, 1975, pp. 43-44.

72 Naturally, both are accompanied by other beliefs relating, for example, to evidentiary rules by which a customary norm is to be recognized or to the rule of *pacta sunt servanda* or other rules specifying the effects of these rules. As Villiger points out, it does not matter whether a legal rule appears in a treaty rule or a customary norm because the effectiveness of its binding force is the same, Villiger, 1997, pp. 58-59.

73 Elias and Lim following the *Nicaragua* judgment place *opinio juris* against *opinio obligationis conventionalis*, Elias and Lim, 1998, p. 6, although the latter is a form of *opinio juris*, which only refers to the specific justificatory basis for the normative belief.

74 For the view that treaty is merely evidence, *see* Stowell, 1931, p. 31.

75 The restrictive view of *opinio juris*, treating it as being peculiar to customary law, is practically unanimous in the academic literature and also in the Court's practice, e.g. *North Sea Continental Shelf*, *supra,* at p. 41, Para 71, *Nicaragua* case, *supra*, at p. 98, Para. 184.

76 Naturally, a state being party to a treaty that reflects customary norms will presumably use as a justificatory basis the more or less definite treaty provisions instead of the indefinite state practice (custom); for this presumption, *see North Sea Continental Shelf*, *supra,* at pp. 44-45, Para. 78.

12.4 Article 38(1)(b) of the Statute as Evidentiary Rule

From the claims that customary international law is a set of collective beliefs that prevail in the international community and that customary norms exist by justified attribution, it follows that Article 38(1)(b) of the Statute does not define the constituent elements or sources of customary norms; it rather sets forth standards of how to justify a collective belief bearing a customary rule in an important forum of international legal discourse.[77] As this justification is to be based expressly on evidence (state practice), this provision of the Statute is primarily an evidentiary rule. In arguing for this claim, a closer look at the conceptual characteristics of the prescribed requirements (general practice and acceptance) is in order. In the next subsections, this inquiry will be framed within three supporting propositions: (i) acceptance cannot be a necessary, constituent element of customary international law; (ii) general practice is a mental construct, a means of justifying a customary norm; and (iii) international law does not govern the formation of customary norms because it, by and large, is an extra-legal process.

12.4.1 What Has Acceptance (Consent) Got to Do with Customary International Law?

As customary norms exist in the form of collective beliefs justifiably attributed to the community, acceptance (consent) will have something to do with customary law if it is somehow connected with beliefs.[78] With regard to customary law, two forms of such connection can be distinguished. One of them concerns *specific acceptance*, which shows itself in distinct (individual or joint) acts of particular states (official statements, declarations, etc.) while the other relates to an indefinite, *general form of acceptance* attributed to the whole international community.[79]

(1) *Specific acceptance*. Specific acceptance differs significantly from belief. It is a brief, volitional mental act indicating relatively weak epistemic commitment toward its propositional content while belief is a durable, mostly passive, cognitive attitude.[80] However, they may have strong interconnections. Actually, if acceptance has normative propositional content (e.g. a rule), its close relationship to belief or beliefs is necessary. Why? Let us

77 It is not a new idea that Art. 38(1)(b) only sets forth evidentiary rules, *see* d'Aspremont, 2011, p. 153.

78 I use acceptance and consent in the same sense, for an insistence on the wording of the Statute, *see* D.J. Bederman, *Custom as a Source of Law*, CUP, Cambridge, 2010, p. 143; Elias and Lim, 1998, p. 11.

79 As the text of the Statute leaves the agent of acceptance unmentioned, at least these two forms of acceptance can be discerned from practice, van Hoof, 1983, p. 95. This problem simultaneously exists in relation to *opinio juris*, ILA report, 2000, p. 8; Dinstein, 2006, p. 207; J.A. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL', 16 *EJIL* (2005), p. 220.

80 For some of the fundamental differences, *see* P. Engel: 'Introduction', in P. Engel (Ed.), *Believing and Accepting*, Springer, Dordrecht, 2000, pp. 3-12.

assume that the subject accepts a rule as legally binding. Acceptance, which is directed to this propositional content, is *an active, conscious, pragmatic, volitional, context-dependent mental act limited in temporal terms*. Here, a basic question emerges. In what form will the effects of this acceptance survive those unconscious phases when the subject does not think of this acceptance and its content? The difficulty lies in the fact that acceptance as an active, volitional mental act has no passive form. Moreover, acceptance is a single-shot, non-recurring act. The subject is not required to reiterate the act of acceptance in order to have its effects set in. Strictly speaking, one cannot accept the same content with the same effects more than once. Additional acts of 'acceptance' will not actually be acts of acceptance if the effects of the first and original act subsist; they are rather acts of confirmation, which may only have practical significance. Therefore, what does acceptance (or its content) change into after it has been realised?[81]

Here, belief enters into the ontological picture of law. Having accepted a rule as legally binding (legal rule – LR), one brings about a belief (or conviction or knowledge) that LR. This belief may take occurrent and non-occurrent (dispositional) forms. A proper act of acceptance alters the dispositional profile of the mind in the sense that it will encompass a proneness or tendency to have the belief that LR occurring in particular circumstances. Having been completed, the proper effect of the acceptance directed to a normative content of LR will be the establishment of normative belief and its effects will further on exist as occurrent and dispositional belief that LR. This is the basic connection between legal acts of acceptance and beliefs that carry legal normative content, which applies to legal norms in general, not only to customary rules.[82] A distinct act of acceptance, accompanied by other beliefs, may generate first-order beliefs that constitute the mental form in which the effects of acceptance subsist.

Under these considerations, two basic roles of specific acceptance can generally be made out in terms of customary international law. With other beliefs, it may give rise to first-order beliefs that CR and higher-order beliefs, which may contribute to the formation of collective belief that CR within the community.[83] It may also be a manifestation of

81 This temporally limited nature of acceptance as active mental act may have driven many authors to use the concept of *opinio juris* in describing customary international law in addition to or instead of the concept of acceptance, e.g. Brownlie, 2003, p. 8; R. Jennings and A. Watts (Eds.), *Oppenheim's International Law Vol. 1. Peace*, Longman, Harlow, 1993, p. 27; J. Touscoz, *Droit international*, Presses Universitaires de France, Paris, 1993, p. 226; Reuter, 1976, p. 93; Bederman, 2010, p. 142; Rousseau, 1970, p. 315; Elias and Lim, 1998, pp. 4-24; Lowe, 2007, p. 38.

82 The scope, forms, and effects of (linguistic) acts of acceptance (consent) may significantly diverge, but determines the manner of how it can bring about first-order or higher-order beliefs in the international community; *see* Nuclear Tests *(Australia v. France)*, Judgment of 20 December 1974, 1974 ICJ Rep. 253, at pp. 267-268, Paras. 43, 46.

83 I am at a loss to understand why Guzman denies this relation between consent (acceptance) and formation of customary norms as beliefs (*opinio juris*), Guzman, 2005, pp. 147-148. He fails to offer an account for why an act of acceptance would not be able to generate first-order or higher-order beliefs relating to a cus-

existing normative belief held by the actor. In this latter case, a distinct act of acceptance will only provide evidence for justifiably attributing belief that CR either to the community (collective belief) or to the particular actor that accepts (individual belief).[84] Therefore, *acceptance is not a component of customary rules, but it may either generate or provide proof of the beliefs which bear customary rules* (constitutive or declaratory acts of acceptance). All this only applies to distinct, individual, or joint acts of acceptance (specific acceptance).[85] However, acceptance is an ambiguous term and also denotes an indefinite, general (collective) acceptance in practice.

(2) *General acceptance*. Acceptance, if used as general, collective acceptance, has a very different conceptual character from that of specific acceptance.[86] Like general practice, it is also a mental construct, a summative concept by which one can make a subsequent overall assessment of, and qualify, a selected series of joint or individual state actions or statements as accepting a regularity or norm as law. Thereby, the concept of general acceptance is fortunately suitable to obscure or even conceal whether the particular acts of acceptance on which its justification is grounded are constitutive or declaratory in nature. In construing states' conduct in a particular case as general acceptance, an observer simultaneously deduces evidence for justifying a collective belief that bears a customary norm.

Furthermore, the summative nature of the concept of general acceptance is strengthened by the wide sense in which this indefinite term is often used. The traditional talk on customary international law is susceptible to the assumption that if a customary norm prevails in the international community, that is, if international actors hold a collective belief concerning a customary norm, then they have accepted it. However, the formation of

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tomary norm in the members of the community and, therefore, also bring about expectations and incentives to comply with this norm.

84 If the act of acceptance is the first public reaction or response made by an international actor to the possibility of a legal rule, it will be impossible to determine in practice whether the act of acceptance generates first-order belief or is simply a manifestation of a pre-existing belief. The theoretical answer, unfit for use in practice, is highly abstract: it will bring about first-order belief only if acceptance as a volitional mental act alters the dispositional profile of the mind.

85 The Court applies the test of specific acceptance in relation to the states which are parties to the case, e.g. *Nicaragua* case, *supra*, at pp. 97-98, Paras. 203, 207, 208; *Gulf of Maine* case, *supra*, at pp. 294-300, Paras. 94, 97-112; *see* Elias and Lim, 1998, p. 84.

86 In the *Lotus* judgment, the PCIJ famously took the side of general acceptance in speaking about 'usages generally accepted as expressing principles of law' *Lotus*, *supra*, at p. 18; for the Court's similar approach, *see* Fisheries Jurisdiction *(United Kingdom v. Iceland),* Merits, Judgment of 25 July 1974, 1974 ICJ Rep. 3, at p. 23, Para. 52; *see also* A. Aust, *Modern Treaty Law and Practice*, CUP, Cambridge, 2007, p. 108; L.B. Sohn, 'Generally Accepted International Rules', 61 *Washington Law Review* (1986), p. 1073; Villiger 1997, p. 49; Lobo de Souza, 1995, pp. 536-539. However, here, the relationship between individual acceptance and collective acceptance raises many problems which are similar to those of the relationship between individual and collective belief.

beliefs is not conditioned upon any act of acceptance.[87] In practice, this widened meaning of general acceptance summarily boils down to the simple proposition borne of a posterior evaluation of international practice that the community holds a belief concerning a customary norm, and, this being the case, the general form of acceptance conceptually merges with *opinio juris*.[88] (This broad understanding of general acceptance might explain why many commentators easily identify the textual requirement of acceptance with the extra-textual requirement of *opinio juris*.) In this broad sense, general acceptance is basically declaratory in nature, signifying that a collective, normative belief is attributed to the community and serves as a conceptual means for justifying such belief attribution.

(3) In sum, the distinct acts of specific acceptance may generate beliefs that bear customary norms or confirm their existence. On the other hand, if Article 38(1)(b) of the Statute provides for general acceptance, then in its broad sense it will simply indicate in common usage that the community holds a normative belief (*opinio juris*); it is therefore only declaratory in character. In this usage, acceptance taken in general will be an indefinite and summative standard for subsequently justifying collective belief that bears a customary norm.

12.4.2 General Practice: A Concept with Strange Characteristics

In the case of written law (like treaty law), the agreement of international actors embodied in a legal text brings about legal rules in the sense that the legal instrument will be strong evidence for the existence of the abstract, legally binding rule and an extremely strong

87 It is a false premise that an act of acceptance relative to the content of belief always stands at the beginning of belief formation and that without such an acceptance no belief can be formed. For such a common and mistaken view, *see Stern*'s thesis that 'there are always wills of states to be found at the origin of customary rules', Stern, 2001, p. 108. This is not so. Beliefs cannot in every case be traced back to definite acts of acceptance. One may take cognizance of a fact or state of affairs without definitely accepting it. (While I believe that there is a repulsive, anti-gravitational energy in space called dark energy, which explains the accelerating expansion of the universe, I do not know when and how this belief of mine was formed and I do not remember any definite act of acceptance by which I appropriated this fact. Beliefs are often formed by and in unconscious mental processes.) In contrast to acceptance, beliefs are not under our reflective control, and one may hold a great many beliefs, whose content one has not accepted. Accordingly, *Rosalyn Higgins* is right in claiming that a customary rule is involuntarily undertaken, Higgins, 1991, p. 63. Acceptance may be one of the indirect sources of customary norms when beliefs that bear customary norms are generated, but such beliefs may also come into being without any definite acts of acceptance. For a similar view, *see* Jennings and Watts, 1993, p. 29.

88 For a good illustration of how the inflated meaning of acceptance absorbs *opinio juris*, *see* Elias and Lim, 1998, p. 14. (also with reference to *opinio juris* as having 'natural consensual meaning' at p. 18) and Villiger, 1997, p. 49. *Cf.* Gilbert's definition of collective belief as a jointly accepted view in a society, Gilbert, 1989. Taking the previous example, though my belief in the repulsive, anti-gravitational, universal energy has not been constituted by a definite act of acceptance, now that I definitely hold this belief, it might be said that I have 'accepted' this state of affairs (in the broad sense of the term acceptance). However, any act of 'acceptance' of mine will only be a manifestation of an existing belief, that is a declaratory act.

justifier for the attribution of collective belief that corresponds to the normative content of the legal rule and conjoins with other beliefs which relate to the legal status of such legal instruments as international treaties. Here, the formal agreement clearly establishes the legal rule carried by collective belief, and the formation of treaty norms, by and large, is governed by international law. This is not the case with customary international law, where general practice plays a role which is very different from that of written, formal agreements. 'General practice' has strange conceptual characteristics, a fact which merits some thoughts.

General practice is an abstract idea. It denotes particular relations, in terms of a predefined pattern, within a set of particular state actions (particular state practice) being related to an issue in international interactions. Its generality suggests that the number or weight of state actions following this pattern (e.g. rule R) significantly exceeds the number or weight of state actions which are inconsistent with rule R. After all, general (state) practice under Article 38(1)(b) may be taken *to refer to the overwhelming preponderance of state actions that share the property of being a manifestation of or coinciding with the regularity of rule R over those state actions which are inconsistent with R.* In contrast to the common view prevailing in the literature, general practice is not material or objective in nature. General practice is not a given in international interactions; it is a mental construct implying selection, abstraction, comparison, weighing, and evaluation. In evaluating the state practice at issue, it will be the agent itself (e.g. an international court) that subsequently constructs the relevant general practice that serves as a means in the justificatory process.

By claiming the generality of state practice (and the rule discerned from it), one will correspondingly attribute a (collective) belief that R to the international community because the generality of the practice may serve as both basis and evidence for such an attribution. Constructing general practice relating to R represents an important part of the process of belief attribution, where relevant particular state behaviours will be evidence for the existence of the rule R and attribution of individual beliefs that R while the generality of practice lays a foundation for, or even amounts to, the ascription of collective belief that R to the community. In the context of Article 38(1)(b), constructing the *relevant* general practice relating to R is tantamount to constructing evidence for the collective belief that R.

It cannot be determined whether the relevant general practice as *ex post facto* evidence of a customary norm is the cause (source) or the result of this rule. The formation of a customary rule and the relevant general practice cannot be placed in chronological order as general practice is subsequently and retrospectively constructed from selected state actions that have happened for a certain period of time. However, it is not known or defined at what point of this period bridging over the first and last facts included in general practice the customary rule is actually created, so it is not known which of these actions has contributed to generating the relevant collective belief and corresponding customary rule and which of them has only confirmed its existence.

It is only a particular (individual or joint) state action as proof of general practice to which a chronological, and thus either formative or confirmatory, aspect can be meaningfully related. However, even in this case, the result is doubtful. An actor may act for very different reasons, which are sometimes difficult for other actors or observers to identify, and the effects of such an act can vary. Theoretically, one might assume that a particular state action completes the formation of a customary rule,[89] but this 'last straw model' does not particularly work in theory and is even less successful in practice.

12.4.3 On the 'Chronology' of the Customary Process

An action will become an element of general practice by subsequent and retrospective interpretation and evaluation because general practice is not an objectively given form of facts or state of affairs. This being the case, for a customary rule to be created, an action assumed to be the last in the formative process is not enough, but it is necessary that other players on the international scene evaluate this action as an element of general practice (and possibly a manifestation of *opinio juris*). *There is no general practice until international agents (actors and observers) have constructed it.* All this means that a state action should have effects in the community in order to qualify as a factor in the formation of a customary rule. What are these effects? The most important one is that the action regarded by other agents as part of general practice should bring about relevant normative first-order and higher-order beliefs relative to the existence of the customary rule in the community (otherwise, one could not assume that the action completes the process of formation of a customary rule).

If an action becomes a relevant factor in the process of formation of a customary rule by its effects, then the customary rule comes into existence the moment these effects set in (and not when the action is taken). However, the point in time when this happens is impossible to define. These effects are scattered in time, may diverge among the various members of the community, and should reach a critical weight to be able to complete the formation of customary rule. (This will be another question of subsequent evaluation.) Furthermore, the formation of a particular actor's (S_2's) belief as an effect of the action taken by S_1 and the external manifestation of S_2's belief, by which someone else (S_3) could conclude the existence of S_2's belief, differ in time. It will even be impossible to tell the time when the effect of an action sets in with a particular actor (S_2) because others (e.g. S_3) can only subsequently infer S_2's belief from its manifestations. Thus, the last straw model does not work, not even in theory.

89 G. von Glahn, *Law Among Nations*, MacMillan, New York, 1981, p. 21.

What follows from all these considerations? The formation of customary rules is that of beliefs, and, like belief formation, is always a vague, unascertainable, subjective, complex, and very often unconscious process, not governed by any discernible rule.[90] As one can conclude the formation of a belief from its *subsequent* manifestations and as these manifestations are to be evaluated in terms of its further, *subsequent* effects of inducing additional beliefs in the community, a customary rule is always a product of *ex post facto*, retrospective reactions or evaluations in the international legal discourse, which themselves also become a part of the justificatory process and an object of further, *subsequent* reactions and evaluations.

In the justificatory process, the two key terms of Article 38(1)(b), acceptance and general practice gain new meaning as conceptual instruments of overall and subsequent evaluation. They simply convey that the attribution to the community of belief that bears a customary rule is justified, and do not control, detail, and describe, but cover up and conceal the process of formation of a customary rule. *The formation of customary international law and relevant beliefs is an extra-legal process; it has no definite or intelligible commencement, determinable end, discernible stages, chronological order, or standard, permanent elements.*[91] One simply does not know how particular customary rules form.[92] Neither Article 38(1)(b), nor other rules (customary rules) regulate the formation of customary international law[93]; they only provide criteria for its recognition or discernment, or to put it another way, Article 38(1)(b) determines the evidentiary basis for attributing to the community normative beliefs that bear customary rules. This conclusion is supported by the Court's recent

90 Mahiou simply speaks about the 'mystery of the formation of customary international law', A. Mahiou, 'Le droit international ou la dialectique de la rigueur et de la flexibilité', 337 *RdC* 2008, p. 321. Stern's review of the voluntarist, objectivist, and normativist strands relating to the question of how and why *opinio juris* is established with respect to a particular norm illustrates the complete perplexity that prevails in scholarly writings, Stern, 2001, pp. 95-108.

91 This explains the lack of common understanding in relation to how customary international law is formed, Kelly, 2000, p. 450. *Cf.* the theory on the spontaneous formation of customary international law; for a summary, *see* Cancado Trindade, 2005, pp. 173-174; M. Kamto, 'La volonté de l'Etat en droit international', 310 *RdC* (2004), pp. 267-268; P-M. Dupuy, 'L'unité de l'ordre juridique international', 297 *RdC* (2000), pp. 158-161.

92 *See* Reuter, 1976, p. 95. *Cf.* 'les vapeurs insaisissables d'un processus de fait'; Dupuy, 2000, p. 164. *See also* d'Aspremont, 2011, pp. 166-168.

93 The thesis that neither international law in general, nor Art. 38(1)(b) of the Statute governs the formation of customary international law may seem, at first blush, to be rather odd. In the *Nicaragua* judgment, the Court appears to refer to the conditions set forth by Art. 38(1)(b) as those of formation of customary norms, *Nicaragua* case, *supra*, at pp. 108-109, Para. 207. Many authors also insist that legal rules govern the formation of customary international law and that these legal rules are themselves customary norms, e.g. Elias and Lim, 1998, p. 7; R.M. Walden, 'Customary International Law: A Jurisprudential Analysis', 13 *Israeli Law Review* (1978), p. 91.