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The Custom-Making Moment in Customary International Law

JEAN D'ASPREMONT

1 Introduction

Customary international law (CIL), as it is commonly construed in international legal thought and practice, is grounded in a particular social reality. In fact, the two constitutive elements of CIL, namely practice and *opinio juris*, correspond to two sides of the social reality which CIL is supposed to be grounded in. This is no new state of affairs. Even in the nineteenth century where CIL was thought to be the product of tacit consent, customary international law was construed as the product of social reality.[1] This social grounding of CIL is certainly neither spectacular nor unheard of. That CIL is grounded in a particular social reality

[1] For some illustrations of an understanding of custom built on tacit consent, as well as some remnants thereof, see H Triepel, *Völkerrecht und Landesrecht* (Scientia Verlag 1899); K Strupp, *Elements du droit international public* (Rousseau & Co 1927); T Lawrence, *The Principles of International Law* (7th ed, Heath & Co 1915); J Westlake, *International Law* (The University Press 1904) 14; D Anzilotti, *Scritti di diritto internazionale pubblico* (Cedan Padova 1956–57) 1, 38, 95 ff; GI Tunkin, *Theory of International Law* (Harvard University Press 1974) 124; C Chaumont, 'Cours général de droit international public' (1970) 129 RdC 333, 440; for an attempt to modernise the consensual conception of customary international law, see A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 70–107; A D'Amato, 'Treaties As a Source of General Rules of International Law' (1962) 3 HarvIntlLJ 1. For an overview of nineteenth-century understanding of customary law as tacit consent, see A Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 2019) 61–65. For an illustration of the resilience of the association between custom and consent in international legal thought, see J Tasioulas, 'Custom, *Jus Cogens*, and Human Rights' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 95; N Petersen, 'The Role of Consent and Uncertainty in the Formation of Customary International Law' in BD Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) 111.

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bespeaks a construction that has become rather mundane since the Enlightenment,[2] and according to which norms are no longer supposed to be received by their contemplating[3] addressees but are collectively produced[4] by them as members of a self-conscious social community.[5] Such an understanding of the making of CIL as originating in a process of *self-production*, where the authors and the addressees of the customary norm are conflated,[6] is a manifestation of modern thinking.

Although simple in principle, the grounding of a norm in a social reality is a construction that commonly calls for a number of discursive performances for this grounding to be upheld in the discourse.[7] The present chapter zeroes in on one of these discursive performances that is required for CIL to be grounded in social reality, namely the postulation of a moment in the past where the social reality actually engendered the norm. In fact, the grounding of CIL in a social reality captured through practice and *opinio juris* can only be upheld if there was a moment in the past where the practice and *opinio juris* of states – and possibly of other actors[8] – have coalesced in a way that

[2] The modernism of the way in which CIL is construed in international legal thought and practice does not contradict the fact that the generation of legal normativity through past behaviour has been known to many ancient societies. See DJ Bederman, *Custom as a Source of Law* (Cambridge University Press 2010). See also the remarks of E Kadens, 'Custom's Past', in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 11; H Thirlway, *The Sources of International Law* (2nd ed, Oxford University Press 2019) 60. The doctrine of sources itself was not totally absent from early thinking about international law. Indeed, theories of substantive validity of rules, as those found on scholastic theories, allowed for an autonomous concept of sources. Yet, the dualism – by virtue of which immanent considerations would trump any formal aspects of validity – at the heart of such theories of substantive validity inevitably demoted sources to a very secondary mechanism. See generally A Pagden & J Lawrence (eds), *Vitoria: Political Writings* (Cambridge University Press 1991); A Gentili, *On the Law of War* (JC Rolfe tr, Clarendon Press 1933). On Gentili, see generally B Kingsbury & B Straumann (eds), *The Roman Foundations of the Law of Nations* (Cambridge University Press 2011).

[3] This expression is from Hannah Arendt; H Arendt, *The Human Condition* (2nd ed, University of Chicago Press 1998) 14–21.

[4] On the idea that the question of production of human artefacts and human discourses is very modern, see M de Certeau, *L'écriture de l'histoire* (Gallimard 1975) 27–28.

[5] See the remarks of J Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (F Lawrence tr, Polity Press 1987) 41.

[6] Thirlway (n 2) 61.

[7] I have studied these discursive performances elsewhere. See J d'Aspremont, *The Discourse on Customary International Law* (Oxford University Press 2021).

[8] On the question of the role of other actors in the formation of CIL, see S Droubi & J d'Aspremont (eds), *International Organizations, Non-State Actors, and the Formation of Customary International Law, Melland Schill Perspectives on International Law* (Manchester University Press 2020).

generates customary international law. In other words, for CIL to be grounded in social reality, there must have been a moment in the past where customary international law was actually made.

This chapter argues that, in international legal practice and literature, the actual moment where social reality has engendered a customary norm is never established or traced, but is always presupposed.[9] According to the argument developed here, the moment CIL is made is located neither in time nor in space. Customary international law is always presupposed to have been made through actors' behaviours at some given point in the past and in a given place. Yet, neither the moment nor the place of such behaviours can be found or traced. In other words, there is never any concrete moment where all practices and *opinio juris* coalesce into the formation of a rule and which could ever be 'discovered'. This means that the behaviours actually generating the customary rule at stake are *out of time* and *out of space*. Because the custom-making moment is out of time and out of space, it cannot be located, found, or traced, and it must, as a result, be presumed. This is why current debates on CIL in both practice and literature always unfold as if all actors' behaviours and beliefs had at some point coalesced into a fusional process leading to the creation of customary international law. However no trace of that fusional moment can ever be found, condemning this original fusion of all behaviours and beliefs to be presumed.[10] This presumption of a moment in the past where the social reality creates the norm is called here *the presumption of a custom-making moment*. Most

[9] On the idea of an illusory historicism in customary international law see A Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (MUP 2019) 59–80; A Carty, 'The Need to be Rid of the Idea of General Customary Law' (2018) 112 AJIL Unbound 319, 321:

> CIL is merely the lens whereby lawyers choose to describe that society, which Chimni generously recognizes in citing me. By this I mean that within the field of international legal jurisprudence, international lawyers came to talk of States as having a collective *opinio juris*, but as Guggenheim and Ago have already shown, this is an illusion of historicism. Since the international system is still broadly based upon nation States that are aggressively distrustful of others, there is simply no possibility of any CIL of significance emerging.

[10] See however the understanding of CIL as a rule short of a law-making fact defended by Roberto Ago. See R Ago, 'Positive Law and International Law' (1957) 51 AJIL 691, 723 ('those so-called elements of custom . . . are nothing but the external data by which the existence and efficacy of a customary norm can be recognized'). In the same vein as Ago, see B Stern, 'Custom at the Heart of International Law' (2001) 11 DukeJComp&IntlL 89, 93.

debates on CIL in practice and in the literature are built on such a presumption of a custom-making moment. As was said, this presumption of a custom-making moment is necessary for CIL to present itself as being grounded in a certain social reality.

This chapter is structured as follows. It first sketches out some of the main manifestations of this presumption of a custom-making moment (1). It then sheds light on some of the discursive consequences of presuming a custom-making moment, including those consequences for the interpretation of CIL (2). The chapter ends with a few observations on what the presumption of a custom-making moment entails for foundational debates about CIL as a whole (3).

Before elucidating the manifestations of the presumption of a custom-making moment and its consequences, a preliminary observation is warranted in light of the presumptive character of the custom-making moment. It could be claimed that the presumption of a custom-making moment is, like *opinio juris*,[11] yet another fiction around which CIL is articulated. In that sense, the custom-making moment would be a fiction about the origin of CIL. It is submitted here that claiming that the custom-making moment is a fiction says basically nothing about what such a presumption stands for and actually does. Indeed, it could be said that international law's representations of both the reality and the past are always fictitious constructions.[12] What is more, fictions have always been

[11] This is a charge made by most of those who approach *opinio juris* with suspicion. See for example A D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971) 7, 52, 471; see also Carty (n 9) 59–60; A Carty, *The Philosophy of International Law* (Edinburgh University Press 2007) 26–27; H Kelsen, 'Théorie du Droit International Coutumier' (1939) 1(4) Revue Internationale de Theorie du Droit 253, 263; P Guggenheim, 'Les deux elements de la coutume en droit international' in *La Technique et les Principes du Droit Public: Études en l'Honneur de Georges Scelle*, Vol 1 (LGDJ 1950) 275 ; M Virally, 'The Sources of International Law' in M Sorensen (ed), *Manual of Public International Law* (St Martin's Press 1968) 116, 134–5; M Meguro, 'Customary International Law and Non-State Actors: Between Anthropomorphism and Artificial Unity' in S Droubi & J d'Aspremont (eds), *International Organizations, Non-State Actors, and the Formation of Customary International Law, Melland Schill Perspectives on International Law* (Manchester University Press 2020); S Droubi, '*Opinio Juris*: Between Mental States and Institutional Objects' in S Droubi & J d'Aspremont (eds) *International Organizations, Non-State Actors, and the Formation of Customary International Law, Melland Schill Perspectives on International Law* (Manchester University Press 2020).

[12] On the reality-making performances of international law, see M Hakimi, 'The Work of International Law' (2017) 58 HarvIntlLJ 1; D Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016); M Koskenniemi, 'The Politics of International Law: 20 Years Later' (2009) 20 EJIL 7; I Venzke, *How Interpretation Makes International Law: On Semantic Change and*

a common mode of representing the real.[13] That CIL rests on a fictitious representation of the moment of its making can thus not be demoted to just another fiction of international legal reasoning. It is a powerful discursive performance without which CIL could not do all what it does.

2 The Custom-Making Moment in the International Legal Discourse

The following paragraphs mention a few of the manifestations of the presumption of a custom-making moment in international legal thought and practice. It is, for instance, noteworthy that practice and scholarship continuously set aside the question of the duration of practice, as the determination of a minimum threshold would bring back the question of the custom-making moment.[14] The recurrence of the metaphoric shorthand of 'crystallisation' to describe the formation of customary law in the literature similarly epitomizes the continuous avoidance of finding a custom-making moment and the presumption of the latter.[15] In the same vein, it is striking that courts always locate the practice and *opinio juris* they find *in the present*,[16] thereby constantly avoiding the tracing of a custom-making moment.

Normative Twists (Oxford University Press 2012); S Pahuja, 'Decolonization and the Eventness of International Law' in F Johns, R Joyce & S Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 91. See also the success of the so-called constructivist approaches to world-making, J Brunnée & S Toope, 'Constructivism and International Law' in JL Dunoff & MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 119–45; J Brunnée & S Toope, 'International Law and Constructivism: Elements of an International Theory of International Law' (2000) 39 ColumJTransnat'lL 19; N Onuf, *World of Our Making: Rule and Rules in Social Theory and International Relations* (University of South Carolina Press 1989); N Onuf, 'The Constitution of International Society' (1994) 5 EJIL 1, 6.

[13] On the idea that scientific modes of inquiries have no distinct superiority over literary ones see H White, *Tropics of Discourses: Essays in Cultural Criticism* (Johns Hopkins University Press 1986) 121–22, 142–43; SL Winter, *A Clearing in the Forest: Law, Life and Mind* (University of Chicago Press 2001) 65–66; R Barthes, *L'aventure sémiologique* (Seuil 1985) 14.

[14] See ILC, 'Draft Conclusions on identification of customary international law, with commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in (2018/II – Part Two) YBILC, Conclusion 8.1 (hereinafter *ILC Draft Conclusions*); *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3 [74]; see also Thirlway (n 2) 74.

[15] See for example Thirlway (n 2) 77.

[16] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) (1986) ICJ Rep 14 [184]: 'The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice'. This is also the case of the more rigorous ascertainment of practice and *opinio juris*. See *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) ICJ Rep 99, 127–35 [64–78].

The presumption of a custom-making moment has occasionally been touched on in the literature. For instance, the famous discussion on the chronological paradox of CIL is a question that, although focused only on *opinio juris*, is all about the abovementioned presumption of a custom-making moment.[17] Yet, those debates on the chronological paradox of CIL never explicitly acknowledge the presumption of a custom-making moment. Reference could also be made to scholarly discussions about the relations between a customary international legal rule with a corresponding existing treaty provision.[18] In this situation, the treaty seems to provide some indication of the time and place of the making of CIL.[19] And yet, here too, despite the treaty providing some vague direction in this regard, there is

[17] GJH van Hoof, *Rethinking the Sources of International Law* (Kluwer 1983) 99 (who seeks to explain the chronological paradox on the basis of an idea 'mistake') or H Meijers, 'How is International Law Made? The Stages of Growth of International Law and the Use of Its Customary Rules' (1978) 9 NYIL 1. For some critical observations about how this discussion is being conducted in international legal scholarship, see H Charlesworth, 'Customary International Law and the Nicaragua Case' (1984–87) 11 AustYBIL 9. See also M Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) 130–33; CA Bradley, 'Customary International Law Adjudication as Common Law Adjudication' in CA Bradley (eds), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 34, 41–43; B Lepard, 'Customary International Law as a Dynamic Process' in CA Bradley (eds), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016) 62, 69; J Tasioulas, '*Opinio Juris* and the Genesis of Custom: A Solution to the "Paradox"' (2007) 26 AustYBIL 199; M Meguro, 'Distinguishing the Legal Bindingness and Normative Content of Customary International Law' (2017) 6(11) ESIL Reflections.

[18] See for example the debates on the so-called Baxter paradox. RR Baxter '*Treaties and Custom*' (1970) 129 RdC 36, 64, 73; J Crawford, *Chance, Order, Change: The Course of International Law, General Course of Public International Law* (The Pocket Books of The Hague Academy of International Law, Vol 21, Brill 2014) 128–74; H Thirlway, 'Professor Baxter's Legacy: Still Paradoxical?' (2017) 6(3) ESIL Reflections; M Forteau, 'A New "Baxter Paradox"? Does the Work of the ILC on Matters Already Governed by Multilateral Treaties Necessarily Constitute a Dead End? Some Observations on the ILC Draft Articles on the Expulsion of Aliens' (Forum on the ILC's 'Draft Articles on the Expulsion of Aliens', Harvard, March 2016); AM Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 VandJTransnatlL 1; ILC, 'Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (27 March 2015) UN Doc A/CN.4/682 [41].

[19] *ILC Draft Conclusions* (n 14) Conclusion 11:

> 1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule: (a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law. 2. The fact that

no effort to identify a custom-making moment, the latter remaining presumed.

It is remarkable that the International Law Commission (ILC), in its work on the identification of CIL, consciously decided not to look into the custom-making moment either. Indeed, as it stated in the commentaries to its 2018 conclusions:

> Dealing as they do with the identification of rules of customary international law, the draft conclusions do not address, directly, the processes by which customary international law develops over time. Yet in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions thus inevitably refer in places to the formation of rules of customary international law. They do not, however, deal systematically with how such rules emerge, change, or terminate.[20]

Interestingly, it is this very choice to exclude the question of the formation of customary law from the scope of its work that entailed a change in the way in which the ILC described its own work.[21] It is submitted here that such a choice is not informed by the material impossibility to trace the formation of CIL or the irrelevance of the question for custom-identification, but by the very fact that this presumption is at the heart of the contemporary understanding of CIL. Being presumed, it does not even need to be traced. In the discourse on CIL, the question of establishing or tracing the custom-making moment simply never arises.

3 The Custom-Making Moment and its Doings

It is argued here that the presumption of a custom-making moment is not just a move of convenience to evade difficult methodological and evidentiary obstacles pertaining to the identification of CIL. Such a construction

> a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

[20] *ILC Draft Conclusions* (n 14) 124.

[21] At its 3186th meeting, on 25 July 2013, the commission decided to change the title of the topic from 'Formation and Identification of Customary International Law' to 'Identification of Customary International Law'. For a summary of the debate within the commission, see ILC, 'Report of the International Law Commission 65th Session' (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10, 64, 66.

is being perpetuated for its many discursive virtues. Indeed, as was indicated above, CIL could not be upheld as being grounded in social reality if it could not be presumed as being made at a certain moment in the past. If it were not presumed to be made at a given moment in the past where *opinio juris* and practice coalesce and generate CIL, it would not be possible to hold that CIL originates in some form of social reality.

In enabling the grounding of CIL in social reality, the presumption of a custom-making moment simultaneously allows some other discursive moves which are worthy of mention here. In particular, attention must be turned to the way in which the presumption of a custom-making moment enables a two-dimensional temporality in the discourse on CIL. In fact, it organizes the life of CIL around two distinct moments, namely: (i) the (presumed) moment of making of CIL in the past; and (ii) the application of CIL in the present.[22] If CIL has a past, albeit presumed, it can have a present distinct from that past. The postulation of a custom-making moment in the past thus allows the postulation of other 'moments'. In particular, this two-dimensional temporality enables the idea that CIL is a product made in the past and subjected to interpretation in the present. Because one presupposes a custom-making moment in the past, one can think of CIL as a tangible artefact in the present which

[22] On the idea that international lawyers, in the many activities in which they are engaged, are constantly historicising, even more so since the formalisation of a 'doctrine of sources' in the twentieth century, see R Parfitt, 'The Spectre of Sources' (2014) 25 EJIL 297, 298 ('The classical doctrine of sources, as it emerged in the 19th century, eventually to be codified in Article 38(1) of the ICJ Statute, leaves no doubt as to the historical character of international law's claim to authority and legitimacy – of its claim to be law'). See also A Orford, 'On International Legal Method' (2013) 1 LondRevIntLaw 166, 172 & 175 ('After all, as lawyers, particularly those of us with common law backgrounds, we are trained in the art of making meaning move across time'); A Orford, 'International Law and the Limits of History' in W Werner et al (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2015) 297; T Kleinlein, 'International Legal Thought: Creation of a Tradition and the Potential of Disciplinary Self-Reflection' (2016) 16(1) The Global Community: Yearbook of International Law and Jurisprudence 811–12; M Craven, 'The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law' in L Nuzzo & M Vec, *Constructing International Law: The Birth of a Discipline* (Klostermann 2012) 4; K Purcell, 'Faltering at the Critical Turn to History: "Juridical Thinking" in International Law and Genealogy as History, Critique, and Therapy' (2016) 02/15 JMWP Series, 13–15. It is interesting to note that such a claim has been made in relation to philosophy as well, for instance by Hegel. On this point, see T Rockmore, 'Hegel' in A Tucker (ed), *A Companion to the Philosophy of History and Historiography* (Wiley-Blackwell 2011) 468, 474. See the remarks of M Koskenniemi, 'Epilogue' in W Werner et al (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 406–07.

can therefore be subject to an autonomous and neatly organised interpretive process.[23] This is why those scholars that argue that the interpretation of the content of CIL can be distinguished from the interpretation of its legal existence[24] extensively and systematically build on this two-dimensional temporality.[25] In that sense, the current scholarly attempts to distinguish the interpretation of the making of the CIL rule from the interpretation of its content can be seen as being predicated on this presumption of a custom-making moment.

There is another important consequence of the presumption of a custom-making moment that ought to be mentioned here. That is, the anonymity and impunity in argumentation about CIL that accompany the presumed custom-making moment and its abovementioned two-dimensional temporality. Indeed, since the custom-making moment is outside time and out of space, and simply presumed, those generating the custom-making behaviours cannot be known. The only possible

[23] For the idea that one should not distinguish law-ascertainment and content-determination regarding customary international law, see M Lippold, 'Reflections on Custom Critique and on Functional Equivalents in the Work of Jean d'Aspremont' (2019) 21 IntCLRev 257–82.

[24] On the distinction, see G Postema, 'Conformity, Custom, and Congruence: Rethinking the Efficacy of Law' in MH Kramer, C Grant, B Colburn et al (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford University Press 2008) 45; see also R Dworkin, *Law's Empire* (Harvard University Press 1986) who famously identified several interpretative stages. On the (non-)applicability of such a distinction to CIL, see O Corten, *Méthodologie du droit international public* (Editions de l'Université Libre de Bruxelles 2009) 213–15; J d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished' in A Bianchi, D Peat, & M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 111–29; M Meguro, Distinguishing the Legal Bindingness and Normative Content of Customary International Law (2017) 6(11) ESIL Reflections (2017); Lippold (n 23) 257–82.

[25] See P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 Int CL Rev 126; see also the TRICI Law project: www.TRICI-Law.com. It is interesting to note that the ILC has acknowledged to distinguish between identification and determination of content. See ILC Draft Conclusions (n 14) 124:

> The terms 'identify' and 'determine' are used interchangeably in the draft conclusions and commentaries. The reference to determining the 'existence and content' of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise content is disputed. This may be the case, for example, where the question arises as to whether a particular formulation (usually set out in texts such as treaties or resolutions) does in fact correspond precisely to an existing rule of customary international law, or whether there are exceptions to a recognized rule of customary international law.

pedigree of customary international law comes to be reduced to 'all states at some point in the past'. Being presumed, the custom-making process is actually anonymised. This anonymity is explicitly confirmed by the ILC:

> The necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract. It is clear, however, that universal participation is not required: it is not necessary to show that all States have participated in the practice in question. The participating States should include those that had an opportunity or possibility of applying the alleged rule.[26]

The above statement shows that it is not necessary for the sake of custom-ascertainment to even seek to identify who did (or said) what. The ILC is thus saying that the custom-making moment, because it is presumed, ought not to be traced, named and individualised. Being presumed, the making of CIL can stay anonymous.

The anonymity that accompanies the presumption of the custom-making moment is not benign. In fact, as a result of this anonymity, no one can ever be made responsible for the rule of CIL concerned and what is claimed under its name. In other words, as any customary rule enjoys a life of its own out of time and out of space, what is said under the discourse on CIL cannot be blamed for both the good and the suffering caused in the name of CIL. All those invoking CIL can accordingly present themselves as candid followers and observers who just walk behind CIL, be it for the good or the suffering made in the name of CIL.[27]

4 Concluding Remarks: The End of Foundationalism?

Customary international law epitomizes the idea of grounding. Indeed, by virtue of CIL, the rules to which a customary status is recognised are supposedly grounded in a past social reality. And yet, as has been argued in this chapter, such grounding can never be traced but can solely be presupposed.

It is submitted at this concluding stage that the question of whether this presumptive grounding of CIL is a satisfactory state of the discourse is irrelevant. It is particularly argued here that foundational debates about whether a customary international law rests on valid or invalid,

[26] *ILC Draft Conclusions* (n 14) 136.

[27] I have made a similar argument regarding the identification and interpretation of treaties. See J d'Aspremont, 'Current Theorizations about the Treaty in International Law' in D Hollis (ed), *The Oxford Guide to Treaties* (2nd ed, Oxford University Press 2020) 46.

consistent or inconsistent, legal or illegal, grounded or arbitrary, true or untrue, factual or imaginative foundations are bound to be sterile since the foundations of CIL are condemned to be presumptive.[28] As was shown by this chapter, venturing into foundational debates about the validity, truth, legality, consistency and factuality of the foundations of CIL is to condemn oneself to an inevitable defeat.

Yet, it must be emphasised that the limitations of foundational debates about CIL do not entail that one should verse into relativism, nihilism or even discourse vandalism. Although twenty-first-century post-truth delinquents feel they have made a groundbreaking discovery about the origin-less-ness of discourses, it has long been shown that modern discourses cannot meet their own standards in terms of origins and grounding.[29] The same holds for international law, and even more so for CIL.[30] That does not mean, however, that CIL, or all the discourses that cannot meet their own standards of origin and grounding, ought to be derided, disregarded or vandalised.[31] On the contrary, a discourse should be appreciated for how it does what it does, and especially for its origin-less and untraced performances. In that sense, it is once one is liberated from foundational debates about CIL that one can measure and appreciate both the discursive splendour and the efficacy of the latter.

[28] See J Derrida, 'Force de Loi: Le "Fondement Mystique de l'Autorité"' (1990) 11 CardozoLRev 920, 942; see also J Derrida, *L'écriture et la différence* (Editions du Seuil 1967) 410–11; J Derrida, *De la Grammatologie* (Editions de Minuit 1967) 53, 87.

[29] On the idea that modern discourses are always doomed from the start when it comes to their ultimate foundations and justification, see P Sloterdijk, *Critique of Cynical Reason* (University of Minnesota Press 1987); B Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns* (C Porter tr, Harvard University Press 2013) 152; on the idea that the debate about modern discourses are always driven by foundational contradictions given that they claim some universality while seeking to ground themselves historically, see P Ricoeur, *La mémoire, l'histoire, l'oubli* (Seuil, 2000) 386–87, 399.

[30] On the correlative refuge in mechanisms like self-referentiality, see J d'Aspremont, *International Law as a Belief System* (Cambridge University Press 2017).

[31] R Unger, *The Critical Legal Studies Movement: Another Time. A Greater Task* (Verso 2015) 20 ('Deprived of light, [the ironical and strategic lawyer] easily becomes the victim of his own ironic distancing from the discourse that he deploys instrumentally. By this posture, he denies himself the benefit of a passage from faith to disillusionment to new faith. He finds himself imprisoned in half-belief'). On the idea that any alternative to the system will look like the system, see JF Lyotard, *La Condition Postmoderne* (Editions de Minuit 1979) 70.