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PROVING CUSTOMARY NORMS: ONTOLOGY AND EVIDENCE IN INTERNATIONAL LAW

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ABSTRACT: This article addresses the epistemological and conceptual challenges involved in proving customary norms in international law. It argues that confusion surrounding *usus* and *opinio juris* stems from a failure to distinguish between the ontology of customary norms and the determination of their existence. Drawing on legal epistemology, social norm theory, and analytical legal philosophy, the article conceptualizes customary norms as products of socially constituted structures grounded in shared normative expectations. Proving *opinio juris* does not require showing that States regard their conduct as legally mandatory, but rather that second-order normative expectations are manifested through patterns of practice. The article defends a dual inferential model — inductive reasoning to establish *usus*, complemented by abductive reasoning to infer *opinio juris*— and proposes a narrative coherence test as a qualitative supplement to the preponderance standard.

KEYWORDS: customary international law, *opinio juris*, legal epistemology, social norms, standards of proof.

SUMARIO: 1. INTRODUCTION.— 2. EPISTEMOLOGICAL AND ONTOLOGICAL FOUNDATIONS.— 3. THE STRUCTURE OF CUSTOMARY NORMS: 3.1. The Conventional-

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ist Framework of Expectations; 3.2. Normative Expectations; 3.3. Normative Attitudes Without Moral Endorsement.— 4. Customary *law*. A theoretical subject.— 5. CONCEPTUAL CLARIFICATION FOR INTERNATIONAL LAW DOCTRINE: 5.1. The Relevance of the *Opinio Juris;* 5.2. The Issue of Inadequate Justifications.— 6. THE EVIDENTIARY METHOD AND APPLICATION: 6.1. Inferring Mental States from Repeated Actions; 6.2. Narrative Interpretative and Approach; 6.3. Towards a Standard of Proof.— 7. CONCLUSION.— BIBLIOGRAPHY

1. INTRODUCTION

Custom, as a source of law, is an intriguing subject for legal theory and doctrine because it forces us to reconsider how we approach legal issues by posing a distinctive epistemic problem. In contrast to statutory sources, the main difference is that, in the face of a controversy, one must first prove that a customary legal norm governs the case; a norm that does not originate in an identifiable authoritative act of positing. That is, while with statutory law the epistemic task of proving is confined to the *quaestio facti* (the determination of the factual matters in controversy), customary law extends the evidentiary inquiry to the *quaestio juris* (the concerns involved in determining the applicable law).

The epistemic burden of establishing the *quaestio juris* underscores the practical necessity for legal theory to help determine whether these norms are part of the law. Unlike statutes, customary norms do not originate from an authoritative act of enactment. For legal positivism, which defines law in terms of social facts, this raises the question: what social facts constitute customary norms, and how can legal institutions identify them? Legal doctrine has developed the «two-element formula» as an answer: for there to be a customary legal norm, one requires both general practice (*usus*) and acceptance as law (*opinio juris*). This provides guidance but leaves unresolved issues, particularly regarding adjudication. First, there is the ontological question about the nature of customary norms: How are we understand the elements of the formula? The structure of proof depends on the structure of what is to be proven. Once we have an answer, we can consider which epistemological method is adequate for proving the existence of customary norms and what makes them part of the law.

The fact that custom is a significant source of international law makes it a compelling case for study, since identifying customary legal norms remains consistently difficult and highlights the conceptual and epistemological challenges that legal theory should address. The latter reflects in the fact that the International Court of Justice and other tribunals apply the two-element formula inconsistently, sometimes emphasizing State practice, sometimes *opinio juris*, without a clear notion of how these elements interact or what evidence suffices to establish either. Scholarship in international law has addressed these difficulties primarily through internal doctrinal refinements, such as distinguishing «traditional» from «modern» custom, proposing «sliding-scale» approaches in which strong evidence of one element compensates for weak evidence of the other, and debating whether *opinio juris* requires belief that

conduct is legally obligatory or merely normatively expected. However, these debates are conceptually obscure and could benefit from incorporating insights from legal theory and conceptual analysis[1].

This article contends that the confusion in methodology regarding customary international law stems from insufficient attention to the connection between ontology and epistemology. Scholars and courts conflate questions about what constitutes a customary norm with questions about how to prove its existence. This reasoning fuses the evidentiary outcome with a conclusion about the ontological requirements for the existence of norms. Courts' methodological choices — what evidence they emphasize — do not necessarily reveal what norms *are*. The result is conceptual inconsistency: courts apply the «two-element formula» erratically, and, consequently, the doctrine offers erratic ontological accounts that paper over rather than resolve the underlying confusion. Drawing on work in social ontology, norm theory, and legal epistemology, I develop a framework that reconceptualizes the relationship between *usus* and *opinio juris* and proposes narrative reconstruction as the appropriate method for proving customary norms. Customary norms are conceptual objects: they exist in virtue of participants' normative expectations. This ontological clarification has epistemological implications. Proving customary norms cannot be a matter of simple empirical observation or inductive generalization from instances of State practice. Rather, it also requires abductive inference. That is, reasoning from recurrent observable phenomena to the best explanation available for the peculiar manifestation of certain reactions (normative expectations) within that structure of concurrent State practices[2].

The article presents three contributions. First, it provides a conceptually rigorous account of the relationship between *usus* and *opinio juris*. I argue that these are not variables requiring separate proof but rather parts of a single inferential procedure: practice serves as evidence from which normative expectations can be inferred. This can be regarded as a solution for the so-called «chronological paradox» (how can

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[1] Situated within international legal doctrine, D'Amato observes that although some international law scholars address legal theory, their engagement frequently lacks sufficient depth. D'Amato, 1971.

[2] 2 Charles S. Peirce explained that abductive reasoning involves a form of pragmatic reasoning that infers causes from effects. In its more contemporary form, it is also called *inference to the best explanation,* and, as Lipton proposes, it can be seen as a form of reasoning in which the phenomenon to be explained provides essential input for believing that a certain explanation is correct (Lipton, 2000). In our case, the very form of States' conduct supports the idea that normative expectations best explain the phenomenon. It includes normative cues, like justifying actions and reactions to deviations from routines. Hence, it is valid to wonder why States justify how they act, why they react to others' divergent actions? We seek the underlying cause as the best explanation possible. Observing these reactions reflects reciprocal expectations about appropriate actions and about what must be done; we can infer that a normative framework — specifically, a customary norm among these States — is at play. It is also worth noting, as Jones does, that abductive inference is commonly employed, particularly in the social sciences, to interpret the existence of social beliefs (such as norms) and to assume certain rationality among agents (Jones, 2011, pp. 1701-1702).

practice manifest *opinio juris* if it is necessary for practice to count as legally relevant?) and explains why doctrinal distinctions between «traditional» and «modern» custom, or proposals for «sliding-scale» methodologies, rest on conceptual confusion. Second, the framework clarifies what courts should be looking for when they seek *opinio juris*: not beliefs that conduct is already law, but normative expectations. Third, I propose a methodological approach to proving customary norms: narrative reconstruction, which infers normative expectations by coherently integrating diverse evidence, including State practice, official statements, patterns of approval and criticism, and responses to perceived violations.

The article proceeds as follows. Part II establishes the epistemological foundations, explaining why proving social norms requires special attention to their ontological status, dependent on participants' normative attitudes. Part III draws on social norm theory to clarify the structure of customary norms, distinguishing normative expectations from mere empirical regularities. Part IV addresses the relationship between social norms and legal norms, explaining how custom becomes law without requiring a separate «act of positing.» Parts V and VI apply these theoretical insights to resolve persistent confusions in international law doctrine and develop concrete guidance for evidentiary reasoning in courts. Part VII concludes by reflecting on implications for legal practice and legal theory.

2. EPISTEMOLOGICAL AND ONTOLOGICAL FOUNDATIONS

Knowledge requires more than true belief; it requires justified belief grounded in intersubjective reasons[3]. The reasons justifying our claims must be accessible to any rational agent and subject to critical evaluation through shared criteria of validity. If making a claim entails commitment to its truth, then having a firm internal conviction does not constitute a valid epistemological reason for qualifying such a belief as knowledge. Intersubjective criteria assess the truth-validity of any claim. Claims about customary norms must be measured against external reality, presupposing a correspondence theory of truth (Goldman, 1999, pp. 59-65; Ferrer Beltrán, 2005, pp.73-75; Haack, 2014, p. 302). Yet we often cannot observe social phenomena directly, and evidence-based reasoning is inherently probabilistic. No set of evidence, however rich and reliable, allows us to reach certainty about a phenomenon's occurrence. Therefore, proving a customary norm exists means showing it probably exists given the available evidence (Ferrer Beltrán, 2007, pp. 92-93).

The epistemological challenge is compounded by the ontology of customary norms. Unlike material objects or directly observable events, such as brute facts,

[3] I will employ the «true justified belief» model of knowledge as a working assumption. I am aware that, since Gettier, this model has been shown to be imperfect, and that philosophers such as Williamson have argued against it, it remains the standard philosophical blueprint for epistemological analysis (Williamson, 2002).

customary norms are not mind-independent facts. They are conceptual objects[4]. If they exist, they do so in virtue of participants' normative attitudes within a recurrent practice — specifically, expectations about how participants ought to behave. This ontological feature, from an epistemological perspective, poses a methodological requirement to determine the presence of a shared mental state (normative expectations), not merely behavioral regularities. Hence, one must infer its existence from evidence of participants' attitudes as manifested in their conduct (Mattei-Gentili, 2026, pp. 53-54). The absence of epistemically valid methods for making such inferences increases the risk of erroneous determinations — mistaking mere regularities for norms or failing to recognize existing norms[5].

As Susan Haack observes, institutions exist in virtue of what people collectively do and believe. They are socially dependent, yet real enough to ground objective statements about them (2014, pp. 309-310). Norms, as social institutions, share this ontological status: they are neither purely subjective (dependent on any individual's beliefs) nor mind-independent (existing regardless of participants' attitudes). Rather, they exist when and because participants share certain expectations. Understanding this ontological structure is essential for determining which evidence can justify claims about the existence of customary norms. Conceptual analysis clarifies what social facts constitute them — the conditions under which such norms exist[6]. Legal theory then addresses the conditions under which social norms become law. These inquiries are necessary for a complete account of customary law because they address different questions: ontology (what are norms?), epistemology (how do we know them?), and legal theory (when are they law?).

3. THE STRUCTURE OF CUSTOMARY NORMS

Common legal doctrine tends to rely primarily on written sources when addressing legal issues. Traditionally, analytical legal theory has assumed a similar scope, treating legal norms as part of a prescriptive discourse (Celano, 2010: 174). From this perspective, international law's reliance on custom seems odd, even raising doubts about whether it is law at all (Hart, 1994, p. 227).

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[4] The existence of conceptual objects implies the existence of intentional facts, which are non-material facts as they depend on mental states, more precisely, our mental capacity for representing (García-Carpintero, 1996, pp. 57-58).

[5] This distinguishes social norms, grounded in habitual behavior, from Lewisian conventions based purely on coordination incentives. While conventions may arise from strategic interaction without normative attitudes, social norms require participants to hold normative expectations —beliefs about what ought to be done, not merely what others are likely to do. *See* Bicchieri, 2006, pp. 11-28.

[6] As González Lagier explains, the truth of many of our statements depends on the conceptual network we employ for understanding the world. That is, truth does not rely solely on how reality is, but also on shared schemes for understanding it (2022, pp. 37-38).

Scarce attention to custom as a theoretical problem and overreliance on written sources have led not only to a limited understanding of international law but also to conceptually unsound explanations of customary legal norms, which fail to distinguish between ontological questions (what makes a norm exist) and epistemological ones (how we know it exists), and hence necessarily look to account for customary legal norms as if they were the product of prescriptive discourse[7]. This would be unsatisfactory for norms of customary sources, such as social norms, and it is unsatisfactory to claim that legal norms are ontologically distinct from norms elsewhere. The difference between a legal norm and other kinds of norms in the social world is not ontological; instead, it depends on the conditions employed to assign them to one system or another (Mattei-Gentili, 2024, p. 131).

To prove the existence of a customary norm, we must look beyond the law's doctrine to understand what it requires. To grasp the conceptual implications of norms derived from customary sources, it is first convenient to elucidate how statutory norms are produced and identified. The latter are deliberately enacted by a recognized authority and recorded in writing, whether as legislation, case collections, or precedential rulings. Contemporary legal theory is inclined to agree that, in the face of a controversy, a judge must exercise interpretation to identify the norm from the dispositions in the written legal sources. Thus, it is said, interpretation is to identify or assign a meaning to a text[8]. Conversely, customary norms are deontic meanings interpreted from recurrent and concurrent sets of social facts of a kind among members of a group. Hence, their identification involves two interpretative steps: one to

[7] For instance, Guastini has stated that customary norms do not exist unless they are formulated in a language (2018). Similar ideas are held by international law scholars, such as Markus Beham, in his «Schrödinger's custom theory.» He considers that custom (i.e., a customary norm) «[…] forms only in present, once it is invoked and an observer is introduced,» where for *observer* we must understand a court (Beham, 2022, p. 91). This is a misconception of Schrödinger's experiment and its lesson about the relationship between facts, objects, and knowledge. Schrödinger aimed to challenge the Copenhagen Interpretation, which holds that quantum systems have no definite reality until they are measured, contradicting the idea that facts have inherent properties. Schrödinger emphasized the nonsensicality of this view, noting that logically, the cat is either alive or dead, and uncertainty doesn't negate logic. We must distinguish between logical conclusions and our lack of knowledge until the box is opened. The same applies to customary norms.

[8] Within legal theory, there is a tradition of debate on whether interpretation is a creative or a cognitive activity. Among realist-influenced scholars, interpretation is seen as unavoidably creative. I do not fully endorse a cognitive approach, but radical legal realism is untenable. If interpretation always involves creativity, then legislation and language, as rule-based practices, become nonsense (*see* Navarro, 2005, pp. 121-122). Following Hart's lessons, there are cases in which the identification of norms is so straightforward, given conventional language usage and the conceptual framework we share, that interpretation involves a cognitive activity, or at least a highly cognitive one. These would be clear cases. However, in other cases, identifying a norm isn't obvious, and discretion is needed to resolve the question (Hart, 1994, pp. 128-129). Hart reminds us that discretion isn't the same as arbitrariness. When interpreting texts or facts, the interpreter's choice among multiple meanings is constrained by factors such as language, conceptual tools, and system rules (Hart, 2013).

determine that a chain of actions over time is customary[9], and another to infer that those customary actions involve a (social) norm.

Consequently, as deontological meanings, norms are markers about what is mandatory, prohibited, or permitted in a particular context[10]. The notion that norms are meanings is more straightforward to grasp when an authority employs language to communicate its intentions regarding what its addressees must do. But this scheme is not adequate for customary norms. Certainly, we can produce norms through agreements, which is assumed by the *pacta sunt servanda* principle. However, contracts are also the product of deliberate negotiation between parties, reflecting their intent to comply with the stipulated rules. This contrasts with the notion of custom, particularly social custom, which implies a recurrent behavior that is spontaneous (not deliberate) and that does not depend on linguistic means to exist[11]. Custom, and whatever custom brings about, exists because of recurrent practice, not because of language. Hence, we need an explanation of how recurrent behaviors can produce meanings, and how those meanings can become normative, *i.e.*, norms.

3.1. The Conventionalist Framework of Expectations

Spontaneous conventions[12] are how we produce social meanings in the absence of negotiated deliberation; through recurrent behaviors, they function as tacit agreements. In this sense, it said, language is a paradigm of a conventional product. David Lewis showed that we can achieve conventional outcomes without explicit agreements when repeatedly facing situations that require coordination to solve problems. We reach these solutions by examining each other's past behavior and inferring that, in similar situations, everyone will probably act as they have before. Others who wish to coordinate with us will also look at our past behavior in similar situations, inferring that we will likely behave as we have in the past.

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[9] Vernengo stresses that customary facts are not material facts and, strictly speaking, are not mere empirical facts, but metaphysical abstract predicates. Therefore, identifying a particular action with the custom it displays involves an interpretative action (1976, p. 446). Also, Canale, 2008, p. 114.

[10] The idea that norms are meanings is a staple thesis in analytical legal theory for written sources, which tends to stress that legal norms are the meanings associated with, or interpreted from, a legal provision. In the case of customary norms, norms are meanings associated with certain social practices (Guastini, 2011, pp. 8-11). The idea that norms are meanings, language-independent (not language-indifferent), has been termed the *hyletic conception of norms* and explained by Alchourrón & Bulygin (1981, pp. 96-97). For an analysis of how the hyletic conception's ontological coordinates apply to customary legal norms, *see* Mattei-Gentili, 2020a. For a thorough exposition of the thesis that norms are meanings and what it involves for legal theory, *see* Mattei-Gentili, 2024.

[11] However, communicative resources, in a broad sense, are a requisite to produce them.

[12] I want to stress that spontaneity exemplifies conventions, especially as products of habitual social behavior, but we can also create conventional products through planning, negotiating, and expressive compromise (Celano, 2010: 212).

Lewis was aware that reaching these solutions is not easy; after all, we are inferring and adapting our behavior as we expect others to behave, so there will be a trial-and-error process. But once we reach a solution, once our behaviors converge to coordinate us onto a common path of action that solves the problem we face, we will praise that solution; it will be a common, *salient* option, and we will probably repeat it in future situations when we face similar problems. When the kind of situation and the solution become habitual, we will have formed expectations about each other's behavior: the expectation that the other will act in a certain way, so I must act in a specific manner in response, and vice versa. This means that our preference for behaving in accordance with the solution is partly conditional on others' adherence to it. The solution is common knowledge now, and we praise it for allowing us to coordinate. In this sense, the convention that is the solution acquires a normative impress; we represent it as what we ought to do in a given situation. In this sense, Lewis considered conventions to be species of norms: «Any convention is, by definition, a norm which there is some presumption that one ought to conform to.» (Lewis, 2002, p. 99).

Lewis' scheme of conventions as norms —as tacit rules[13] — is plausible for explaining a range of habitual social behaviors, but, for this reason, it seems at odds with the notion of *norm* we commonly conceive and that we are trying to figure out. In this explanation, conventions like fads are indistinguishable from more robust conventional social norms, such as promises. Lewis vaguely recalls that normativity is socially enforced by signs such as unfavorable responses from others, since failing to conform to a social norm involves going against the settled expectations of others, who can plausibly infer that one knowingly acted contrary to the convention[14].

Conventions are contingent; we could have chosen a different solution that also solved our coordination problem. That does not mean we are indifferent to them. Indeed, part of the reason we follow conventions is that others do too, which helps us coordinate in strategic social actions. However, this is not necessarily the only reason we adhere to these conventions. Agents tend to follow conventions as social rules and enforce them through adverse responses because they believe that some of these social rules reflect values beyond mere coordination (Chwe, 2001, chap 1).

Cristina Bicchieri has enhanced the framework towards an explanation of social norms[15], making the punctual distinction between conventional products like mere

[13] They do not need to be uttered to exist (Lewis, 2002, pp. 105-106).

[14] Brandom also assumes that normativity is the byproduct of the interplay among participants in a practice in which agents constantly make their moves and assess each other's actions, thereby emitting responses as signs of those assessments. He calls those responses «sanctions,» but we need not necessarily equate them with physical punishment or harm. Sanctions are merely the actions agents take to alter the normative status and attitudes toward actions (Brandom, 1994, p. 42).

[15] Bicchieri is not the only philosopher proposing an account of social norms. Diverse thinkers have engaged with the subject, but mainly as a byproduct in the scope of explaining wider phenomena like, for instance, the possibility of meaning (Gibbard, Blackburn, Brandom), the production of social reality (Searle), how rules operate and give sense to a social reality (Wittgenstein), the production

customs, what she calls «descriptive norms», and «social norms», and observes that the latter do not arise precisely from a coordination game, but from a mixed-motive game where once a solution is reached, turns into a coordination game (Bicchieri, 2006, p. 38)[16]. Also, social norms are equivalent to our understanding of customary norms (Postema, 2007, p. 286)[17]. They carry the deontic properties of obligation, prohibition, and permission, involve recurrent, convergent behaviors over time, and have unclear emergence times. If conventions imply an empirical expectation that, in certain situations, specific types of actions or outcomes[18] are held and will most probably be held, social norms arise when the element of normative expectations comes into play.

3.2. Normative Expectations

As Celano stresses, for a customary norm to exist, behavior must not only be repeated and considered binding, but also consistently observed, as it is regarded as such by the population (2010: 178). The idea is that observance of behavior is reinforced by the sense of duty in force because one believes that one ought to do so, primarily because others believe that one must do so, and so on. That is, there is a sense of expectation about each other's behavior that is not merely empirical.

Normative expectations evolve from empirical ones, introducing the *ought-factor*. That is, they not only predict that specific outcomes produced in the past will happen again, but also that they *ought* to occur. That means, when a certain social behavior stands for a social norm, we are not only aware of the informational insight about

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of institutions (Weber, Searle, Tuomela, Hart, Weinberger, Marmor, Guala), to explain conventions (Lewis, Gilbert), to explain how diverse schemes of strategic interaction can produce rules (Ullmann-Margalit), to explore the possibilities of a deontic logic (von Wright), etc. There are meaningful insights from these approaches, and whenever useful, I will refer to them as Bicchieri has also done. However, the main aim of Bicchieri's account is social norms; thus, it provides a robust but straightforward insight that can be useful for explaining the sort of questions we face in understanding customary norms. An alternative to Bicchieri's account is the theory advanced by Brennan, Eriksson, Goodin, and Southwood. However, I find it unconvincing for several reasons: it dismisses a conventionalist framework without properly engaging with Lewis' account — reducing preferences in social contexts to mere personal desires; it misconstrues the ontological status of norms, treating them as vehicles of social meaning rather than meanings in themselves; and it ultimately offers a circular definition of norms as «accepted rules or normative principles.» (Brennan, Eriksson, Goodin & Southwood, 2013, p. 2).

[16] In game theory, a mixed-motive game involves parties with both cooperative and competitive goals. When repeated, and parties see cooperation as more beneficial than selfishness, the game becomes cooperative, favoring coordination over other actions. This creates an environment conducive to the formation of conventions and, more specifically, social norms.

[17] This is in line with the common understanding of international law scholarship of Customary International Law as grounded in a particular social reality (d'Aspremont, 2022, pp. 29-30).

[18] Not only can public actions produce social outcomes like conventions and social norms. Some private actions produce publicly notorious outcomes, hence making propitious to produce social expectations.

past behaviors, but we also believe that we *ought* to act by those past behaviors, and, somehow, we are aware and believe that others believe we *ought* to abide by those past behaviors.

Empirical expectations and normative expectations involve different cognitive attitudes. The former are first-order beliefs about what others will do: «I expect most people will perform action X in situation S.» The latter involves second-order beliefs about what others think people *ought* to do. More precisely, a normative expectation has two components: (a) a *normative belief*—«I believe others think people should perform X in S»—and (b) a *normative expectation proper*—«I believe others expect *me* to believe people should perform X in S.» This recursive structure creates conditional normative preferences: individuals prefer to conform to a social norm *on condition that* they believe others share both the normative belief and the expectation that others hold that belief.

This second-order structure explains a range of puzzling features of social norms. First, it explains why social norms can exist even when participants privately disagree with them — what matters is not individual endorsement but shared expectations about what the group normatively expects. Second, it explains norm enforcement: criticism of norm violations appeals not to the critic's personal preferences but to what «we» (the group) expect of each other. Third, and crucially for customary law, it is a response to the apparent circularity in *opinio juris* understood as a mental constitutive element of a customary norm. The belief that «there is an obligation to perform X» need not precede practice for practice to manifest a normative mental state that could be called «*opinio juris*.» Rather, what is required is the normative expectation structure: States engage in practice X while believing that other States expect them to follow X and expect them to hold that expectation. This is not a belief that X is *already* law, but a network of conditional normative expectations that *constitutes* the social norm.

For evidentiary purposes, this conceptual clarification is critical. Courts seeking to prove *opinio juris* need not identify States' beliefs that conduct is legally obligatory (which would be circular) [19]. Rather, they must identify evidence of normative expectations: manifestations that States believe others normatively expect certain conduct and that others are expected to share that expectation. Such evidence includes not only explicit statements invoking obligation, but also patterns of criticism (indicating normative expectations), justifications for conduct (appealing to what «the

[19] For instance, this is a conceptual mistake in Conclusion 9 of the United Nations' International Law Commission's *Draft conclusions on the identification of customary international law*, which emphasized that practice must be undertaken with a sense of legal obligation when determining the *opinio juris* existence. Part of the problem with inquiry into the existence of customary legal norms is that, when discussing the *opinio juris* element, jurists focus on finding the basis of legal membership rather than on identifying a necessary condition for the existence of such norms. One inquiry is proper to legal theory, while the other is conceptual-ontological. (Celano, 2010: 179-180).

community of States» expects)[20], and responses to perceived violations (expressing disapproval rather than merely strategic responses to unwelcome behavior). The distinction between empirical and normative expectations thus provides a framework for determining what evidence is relevant to proving customary norms. Also, from the standpoint of a factfinder, the reasoning process is dual, giving rise to inductive reasoning to acknowledge empirical expectations and to abductive reasoning to acknowledge normative expectations. Hence, recurrent and convergent States' practices permit inductive inference of a common custom (*usus*). But States criticize deviations, manifest discord to uncanny behaviors, justify their conduct by appealing to what is expected by the community — they don't simply act, but also react to others' actions. These reactions are striking and call for explanation. Therefore, among the diverse available hypotheses (such as protecting self-interests or political prudence), the hypothesis that States manifest these reactions because of a framework of normative expectations (*opinio juris*) provides a more comprehensive and coherent explanation of these phenomena. Accordingly, the existence of a customary norm is *abductively inferred* as the best explanation of the observed manifestations of normative expectations.

Now, there is no indisputable feature that explains why a particular pattern of behavior acquires normative expectations and becomes a social norm (Bicchieri, 2006, pp. 41-44). A pattern that in society *A* is a descriptive norm in another society *B* can be a social norm. And what once was merely a descriptive norm in society *A* can become a social norm in T1, then return to a descriptive norm in T2[21]. The reasons some convergent practices produce social norms are infinite, and to understand why a social pattern of behavior becomes a social norm, one should engage in an ethnographic inquiry into the factors that forge a society's idiosyncrasy. From the conceptual enterprise of what could be deemed as an exercise of armchair descriptive sociology[22], one can only stress features of conditional social expectations and social preferences to identify normative expectations that give rise to social norms[23].

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[20] As Bulygin has emphasized, norms cannot only be employed for sanctioning or criticizing deviation, but also for justifying our actions (2005, p. 32). Similarly, Postema's discursive account emphasizes the relevance of reason-giving among participants in a reciprocal normative practice, among which justification is fundamental (2012, pp. 732-734).

[21] This phenomenon has been acknowledged in international law by Kunz, noticing that what once was a norm of *courtoisie internationale* can become a norm of customary general international law by the later addition of an *opinio juris* to the practice of States (1953, p. 667).

[22] The idea that explaining social institutions and products involves a kind of speculative sociological exercise is held among diverse philosophers (Hart, 1994, p. v; Ullmann-Margalit, 1977, p. vii).

[23] As Bicchieri has emphasized: «The triad of empirical and normative expectations and conditional preferences is what, in my view, *defines* social norms.» (2014, p. 226).

3.3. Normative Attitudes Without Moral Endorsement

Conventional products, like social norms, imply some form of assessment of most of the population. However, it should not be interpreted as a strict moral judgment, which leads to a moral norm. One does not follow moral norms simply because others do. Conventional products obey adaptive behavior. In conditions of uncertainty, we tend to imitate others, others we deem successful or, at least, deem that they know what they are doing, what is «correct» in such a situation (Bicchieri, 2017, p. 23). This means that when a convention is in place, our actions are interdependent, that is, they involve a social conditional preference, *i.e.,* we do it partly because others do it too. If others started changing their behavior, one would do the same, not only because it would be evidence that social assessments have changed, but also because one desires to coordinate one's actions with one's peers. Therefore, if we value conventions — and as such, social norms — in a relevant sense, it is because they allow us to coordinate with others in social enterprises. Indeed, for social norms to emerge, what the group assumes lies behind the convention's coordinative solution must be positively valued. But this is a delicate matter; some coordinative functions that conventions and social norms preserve are notorious, and it's easy to understand why people value the norm and therefore punish defectors. Traffic rules are clear examples, but one can think of others, such as tradesmen's conventions or even the paradigmatic relevance of the institution of the promise. But the value behind other social norms is not that obvious.

Many people may believe that a certain norm is less effective at achieving social goals than another conceivable one. It is possible that most individuals despise the current norm but are afraid to express it in the face of potential sanctions — they believe others morally endorse the norm, so they remain silent[24]. Therefore, the social norm remains in place because, although people regard it as objectionable or ineffective, they also consider it valid and enforce it on others. This structure is compatible with what, in legal theory, Hart described as the internal point of view: adopting a normative stance toward a pattern of behavior (Hart, 1994, p. 90. As Shapiro suggests, it should not be regarded as an insider's point of view — the stance of someone in the community whose only interest in the rules is to avoid sanctions — but as a normative attitude towards the pattern of behavior that instantiates the rules. And somehow, this normative attitude involves a critical-reflexive attitude on the part of the agents, enabling them to recognize and accept such patterns as valid rules of society (Shapiro, 2006, pp. 1159-1165).

[24] This is what Bicchieri calls *pluralistic ignorance* (2017, p. 42). Also, Sunstein, 2019, pp. 5-6.

4. CUSTOMARY ***LAW***. A THEORETICAL SUBJECT

Legal theory has an epistemological scope, aiming to stipulate the truth conditions for statements about legal duties and rights and to provide criteria for identifying the legal norms that support those duties and rights (Moreso, Navarro & Redondo, 2002, p. 7). Therefore, I adopt a positivist outlook, aligned with the social philosophy that conceives of norms as products of social practices (social facts), emphasizing the importance of a value-free description of law[25].

As emphasized, there is no ontological feature of legal norms that distinguishes them from norms in other realms of social life. Therefore, there is no intrinsic feature in customary legal norms that distinguishes them from other customary norms (*i.e.,* social norms). What, then, makes a norm pertain to the domain of law? First, Kelsen suggested that there are no isolated legal norms. Whenever there is a legal norm, there is at least another norm related to it, underscoring the relevance of the notion of system for understanding law. In a further step, Hart established that what makes a norm *legal* is its membership in a system, *i.e.*, a legal system. Thus, law is a system composed of two types of norms: primary and secondary. Primary norms are basic rules of conduct, while secondary norms concern the operation and structure of the legal system, providing mechanisms for producing, adopting, changing, and enforcing legal norms. Consequently, a norm is part of the legal system if it has been created or recognized by a secondary norm; it can be a rule of change, a rule of adjudication, or a rule of recognition.

Hence, *prima facie*, a customary norm can become part of a legal system if it has been adopted or recognized by a previously existing legal norm. The rules of recognition can recognize several customary norms as part of the law; the rules of change can adopt customary norms, and the mechanisms of legal adjudication can also incorporate them (Mattei-Gentili, 2026, pp. 67-68).

In legal systems, which mostly rely on statutory law, a legal provision can recognize certain customary norms as part of national law. For instance, Article 2, A. I., of the Mexican Constitution guarantees and recognizes the customary normative systems of indigenous peoples as valid law under which they have the right to organize their communal life. Therefore, it is plausible to assume that statutory law already confers *legal* character on those customary norms. The issue is more complicated in systems that do not depend on statutory law or where statutory law does not clearly specify which customs are sources of law[26]. This is the case with international law.

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[25] It is also worth noting that international law scholars like Sender and Wood recognize that the approach of customary law is grounded on facts and not on preconceptions about what law ought to be (2004, p. 79). Hence, the approach can be seen as a test of positive law.

[26] For instance, the Nigerian Constitution implicitly acknowledges custom as a source of law, even establishing Customary Courts of Appeal for each State that needs them. However, there is no legal

To determine whether a customary norm belongs to the system of international law, custom itself is the main available source.

Within Hart's theory of legal systems, the rule of recognition is itself a customary norm; more specifically, it is the outcome of the practice of legal officials in identifying ultimate valid law. If this were accurate, the foundation of any legal system would be customary law, meaning international law would be based on the same principles as national legal systems, including those that primarily depend on legislation. That would mean customary legal norms underpin further legal norms of change and adjudication. However, this offers little insight into the dynamics of customary norms within legal systems. For such matters, Bentham suggested distinguishing between customary norms *in foro* and customary norms *in pays* (Bentham, 2010, pp. 234-235). The former are the outcome of legal officials' practice, while the latter are the outcome of citizens' practice. Since a customary norm *in foro* (the rule of recognition) is the ultimate basis for the validity of any legal norm, the validity of further customary norms as legal norms depends on the former[27]. Hence, the absence of a formal instance of recognition of customary norms *in pays* as members of the law, the only instance left for such recognition is judicial practice and its customary norms *in foro* (Mattei-Gentili, 2026, pp. 91-93) Let us explore what this demands for the epistemic purposes of this essay.

First, it is important to stress that, in the face of controversy, proof of customary law *in foro* is excluded since its validity is assumed to be granted. For international law, this means that only customary norms *in pays* — norms form the customary practice of States — are subject to the evidentiary legal procedure. However, the fact that judicial practice and judicial decisions ultimately determine what is recognized as customary law *in pays* leaves room for epistemic error. It leaves open the possibility of producing «customary» legal norms that are not the product of States' practice. Consequently, it is conceivable to have genuine customary legal norms *in pays* when judicial practice succeeds epistemically in identifying actual customary norms among the practice of the State members of the international community, and spurious customary legal norms *in pays* when judicial practice epistemically errs by determining as valid an alleged customary norm that is not supported by the actual practice of members of the international community. Both would be international legal norms that derive their legal validity from the international rule of recognition, but only the former genuinely reflects the actual customary practice of States. The latter are judicially created norms.

Among international law scholars, it is common to conceive of customary international law as disguised judge-made law (*see* Talmon, 2015). The assertion is too

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provision in the constitutional text specifying which customary norms should be considered part of Nigerian law, as opposed to those that are not.

[27] Recognition of the custom of the courts as a source of law is as old as, at least, the Roman Empire. As Bederman notices, in § 1.3.58 of the *Digest*, Callistratus exposes that «in cases of ambiguity arising from statute law, statutory force ought to be ascribed to custom or to the authority of an unbroken line of similar judicial decisions.» (Bederman, 2010, p. 19).

categorical, but courts can err in identifying customary norms. This possibility allows for creative decisions that may create general legal norms if judges uphold them as legally valid[28]. However, the theoretical lesson relevant for evidentiary purposes lies in what makes a customary norm *in pays* a customary *legal* norm.

Much of the evidentiary challenge lies in identifying the subjective and psychological elements underlying the recurring practice. And while it is true that a psychological element is unavoidable for producing customary norms, the peculiarity of that psychological component is not what makes a customary norm *in pays* a legal norm — the same is not necessarily true for customary norms *in foro*. One could argue that, if the rule of recognition of international law accepts customary norms from States' practice as part of the system, they are, by default, considered customary legal norms *in pays*. What makes customary norms *in pays* a part of the law is their compliance with the criteria of membership to a legal system. One of these criteria is recognition by international courts. That recognition, to be epistemologically justified, requires that courts examine the normative social beliefs that accompany the concurrent States' practice, but they are not conceptually required to also find that States believe that such practice involves *a legal* obligation. The court's duty consists of acknowledging the conceptual elements comprising customary norms and applying the rules of epistemic reasoning to prove their existence.

5. CONCEPTUAL CLARIFICATION FOR INTERNATIONAL LAW DOCTRINE

Some of the problems international courts face in determining the existence of customary norms are not strictly epistemically, but stem from conceptual confusion regarding legal doctrine. One involves the two-element formula, particularly understanding the *opinio juris* element. The other concerns the practice's self-understanding of its outcomes in determining the existence of the components of customary norms.

There are several discussions and little agreement on how to characterize the elements of the two-element formula traditionally recognized in legal doctrine. Nonetheless, the formula remains regarded as the best blueprint for proving the existence

[28] Hans Kelsen regarded judicial rulings as individualized legal norms. Eugenio Bulygin notes that if that were the case, each time a judge makes a ruling, the legal system, as a normative system, changes, posing difficulties for the idea of law's continuity. Hence, he suggests legal norms are only those criteria that have been generally upheld (Bulygin, 1991, p. 262). This means that a new interpretation of a legal disposition does not add a new norm to the system; for that to happen, the interpretation must become generally employed by other judges — there must be a customary practice among judges of recognizing it as valid law. I consider this a hint at the rule of recognition and customary norms *in foro*. However, in international law, there are few courts, and cases are significantly scarcer. Each international resolution tends to attract significant attention and is often presumed to entail the immediate production of a general international legal norm. *See* Tams, 2015.

of customary legal norms, and international law is no exception[29]. Since international courts will likely continue to employ the formula, it is appropriate to resort to rational reconstruction to clarify its components and the process of identification.

5.1. The Relevance of the *Opinio Juris*

There are two main lines of debate and proposals surrounding the two-element conception of customary legal norms. One involves removing the *opinio juris* as a constitutive element and, therefore, focusing exclusively on the less controversial component of the *usus*. The other comprises recognizing that some customary legal norms are composed exclusively of *usus*, while others are composed solely of *opinio juris*. However, these lines of argumentation cannot withstand conceptual analysis and scrutiny.

As Chiassoni emphasizes, although there are diverse arguments against *opinio juris*, the logical and epistemological arguments are decisive (2008, pp. 73-74). The former criticizes a vicious regress: *opinio juris* is a prerequisite for the creation of a customary norm, but at the time, the existence of *opinio juris* as a conviction to submit to a legal obligation implies an already constituted legal norm (Bobbio, 2010, p. 57)[30]. The solutions, as Bobbio suggests, are: considering the *opinio juris* as based on an error and, hence, customary law is grounded on a mistake[31], or admitting there is already a constituted norm before the manifestation of the conviction, but, consequently, reducing to irrelevance not only the *opinio juris* as constitutive component (Bobbio, 2010, p. 58), but also the *usus*, since the norm would already be formed, and practice merely involves a source of cognition of law, not of production (Chiassoni, 2008, p. 74). Conclusively, Bobbio considers that the only satisfactory solution is to get rid of the *opinio juris*. The epistemological argument holds that *opinio juris* must be eliminated from the characterization of customary legal norms, since mental states are not susceptible of being known, if at all, only conjecturally through external behavioral clues (Chiassoni, 2008, p. 75).

Elsewhere, I have explained why I am dissatisfied with accounts that dismiss mental features as key parts of customary norms (Mattei-Gentili, 2020b, pp. 91-

[29] Article 38. 1. b, of the Statute of the International Court of Justice even stresses that applying custom as a source of law involves «[…] evidence of a general practice accepted as law.» This could suggest that custom is not a source of law but merely proof of pre-existing (natural) law, thus distinguishing validity as membership from validity as applicability [*see* Bulygin 1991: 266 - 267]. The phrasing is best understood as a historical relic (the original wording is from 1920). Under a positivist framework, however, customary legal norms are valid because they meet the system's membership criteria. The text could thus be understood otherwise as considering customary international norms not as members of the international legal system, but merely as applicable legal norms, and general practice as the only evidence of their existence. However, the ICJ applies custom as law, not as mere evidence.

[30] Kelsen presents another version of the error theory (Kelsen, 1949, p. 114).

[31] Anyone convinced to comply with a legal obligation is mistaken. As Bederman notes, this line of critique of the *opinio juris* is as old as the Romans (2010, p. 20).

93). Also, I see no problem with customary norms being based on a logical mistake of judgment, which does not make them less customary nor less normative[32]. More importantly, as we have seen, social philosophers do not avoid discussing mental states in their explanations, but also highlight the importance of expectations and inferences about others' mental states in understanding social norms[33]. If this is so, it is because removing the mental features that accompany our practices would exclude conventions and social norms altogether. Conventions and norms are not material facts; they do not exist without a mental act by their creators. Now, it is true that we can never be certain about others' mental states; inferring a subject's mental state from behavioral cues is complex, error-prone, and susceptible to misinterpretation[34]. This means that inference to others' mental states is fallible and operates under irreducible epistemic uncertainty, but that does not mean we cannot achieve justified knowledge of them. Fallibility is a feature of all empirical knowledge, not a mark of mere conjecture. What matters is whether inferences are grounded in reliable indicators and subject to intersubjective scrutiny[35]. Not only are we prone to infer others' intentions in our everyday interactions with high success rates, but legal practice is no stranger to the evidentiary task of determining the existence of mental states, with *mens rea* serving as a paradigm in criminal law.

What we need is an explanation of what those mental states — which can be called *opinio juris* — encompass, given what we know about social norms. In this sense, the first issue to tackle is semantic. Bobbio suggests that, while there is no doubt that *opinio juris* indicates a mental state, it is not clear which sort. Doctrinal developments have suggested that it is sometimes understood as a conscience or conviction, less commonly as a belief or a feeling, and exceptionally as an intention or will. When adding «*sive necessitatis*» to the expression, it is unclear if the actions must be carried out of conviction of acting out of necessity, or properly out of legal necessity, or even as a conviction to avoid sanction (Bobbio, 2010, pp. 56-57). Finally, the term suggests that the practitioners' mental state makes any norm *law*, that is, part of the legal system.

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[32] If we assume Hume's law as adequate, all our normative conceptual apparatuses are based on the logical mistake of deriving normative judgments from factual judgments. That does not make things like language or promises, for instance, less real or less useful. As Bicchieri has pointed out, «[…] personal as well as historical evidence tells us that we are readily victims of this "naturalistic fallacy".» (Bicchieri, 2006, p. 43).

[33] In a similar vein, dismissing the error theory critique, Canale stresses that any belief capable of motivating the qualified repetition of a behavior satisfies the requirement of the *opinio juris*. Therefore, error theory turns into a mere *a posteriori* psychological conjecture (Canale, 2008, p. 120).

[34] This is about the *problem of other minds*. I see others' actions, which suggest they have certain mental states, but I can never be sure of their actual mental states or motivations.

[35] González Lagier's *principle of minimum rationality* (PRM) is a suitable epistemic tool for grounding inferences and enabling intersubjective scrutiny. It states that when an agent acts intentionally, she performs the action she believes best achieves her end. This principle helps assess intentions by reconstructing the agent's practical reasoning within the relevant context. González Lagier, 2005, pp. 207-216.

The task of identifying customary norms is bound to be speculative to some extent, and demanding that everyone involved share the same precise mental content means we will find nothing. It is conceptually and epistemologically too burdensome. We don't need to all have the exact same idea in mind to share conceptual items such as norms. About a social norm, some may have the conviction that the norm is needed, some others may despise the norm but believe it is valid and obey it nevertheless, some may consider the norm as necessary for a social aim but some other may not have ever thought much its utility; moreover, that same population may even disagree about the proper linguistic formulation of the norm (Bentham, 2010, p. 161; Gardner, 2012, p. 67). Much of this involves controversy, but that does not mean that a customary norm is not in force (Mattei-Gentili, 2026, pp. 244-245). Norms are not language-dependent, and social norms can serve diverse functions, but that is not necessarily the reason they exist. So, discussions about their formulation might merely involve linguistic disputes, and debates about their social purposes merely involve projections about diverse political and moral appreciations. Despite the lack of agreement on either question, the community continues to exhibit the same pattern of behavior and manifests the same normative attitudes towards that practice; that is, they share the social norm.

Patterns of behavior identifiable through a concurring social practice held over time, and normative attitudes attached to that conditioned practice, not only constitute social norms but also serve as clues for social scientists as evidence of existing social norms. Conditional preferences and normative attitudes are indicators of normative expectations shared within the population, and these expectations can plausibly be characterized doctrinally as *opinio juris* (Celano, 2010: 222). Nevertheless, as clarified, the normative expectations do not necessarily entail believing they are legal duties.

5.2. The Issue of Inadequate Justifications

Courts are not ethnographers nor social philosophers. While part of the international community, they are not involved in creating customary norms *in pays*. That explains some of the issues they face, but it does not mean they are impeded from acknowledging the existence of customary norms *in pays*. Some of the gaffes are not strictly epistemological, but argumentative. That is, it is not uncanny that international courts are untidy in justifying their decisions when determining the existence of customary norms. In other words, courts do not make a neat exposition of their reasoning in assessing evidence and determining the existence of customary norms. For instance, it has been alleged that the International Court of Justice (hereinafter, the ICJ) has determined the existence of a customary norm but failed to acknowledge consistent State practice in cases such as *Nicaragua v. United States*. It has also established the existence of a customary norm without resorting to *opinio juris* in *The Nottebohm Case* (Kirgis, 1987, pp. 147-149). This has led to confusion among some

scholars. In the conceptual field, Roberts has concluded that there are two kinds of customary international norms: traditional ones, which are determined by induction from the accreditation of consistent State practice, and modern ones, which are determined deductively from verification of an *opinio juris* among States (Roberts, 2001, pp. 757-758). In the methodological field, Kirgis has proposed the sliding-scale model, under which, depending on circumstances, the courts can determine the existence either from evidence of *opinio juris* or from evidence of consistent State practice.

Customary norms, as social norms, are ontologically consistent: all of them are composed of a convergent and repeated practice and a shared mental state from their beholders[36]. Instead, Robert's account suggests that it is courts that create the norms of customary international law, justifying their actions based on either *usus* or *opinio juris*. For its part, Kirgis does not notice that courts' methods or justifying arguments may be deficient. Instead, he justifies the courts' practice as adequate because of the values or the goods at stake. That is, methodologically, a court may not do all that is needed to prove the existence of a customary norm and, erroneously, determine its existence based on evidence of only one component. Or it may be that a court did find evidence of both components (and, hence, found a customary norm), but in the argumentation that justifies its decision, the court fails to refer to one of the elements.

Genuine customary norms *in pays* are not judge-created. That international courts in the past tended to accentuate evidence on State practice to prove the existence of customary norms does not mean that traditional customary norms are the result of consistent practice followed by the States ignoring *opinio juris*, while modern customary norms are identified mainly by State statements that emphasize the existence of an *opinio juris,* neglecting States' practice. The change in the approach to evidence regarding the elements does not change the nature of customary norms (Mattei-Gentili, 2026, pp. 106-107). If a court fails to find one element but still determines the existence of a customary norm, it is an erroneous ruling. Should a court ascertain the presence of both constitutive elements but fail to articulate its reasoning for each explicitly, the decision's justification is deficient.

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[36] In international law, Kelsen notes, States' behavior reflects that of the individuals representing them (Kelsen, 1949, pp. 191-192, 364). This insight is essentially adequate, but it must be complemented: the alleged «mental state» of a State is best understood as a shorthand for the resulting pattern of actions of the individuals who have represented it over time. These actions are guided by internal institutional rules that shape the representative role —for instance, the Chancellor, the head of State, etc. Some States are consistently more proactive than others, and this is observable across successive representatives. Strictly speaking, however, nonphysical agents like States do not possess mental states. When referring to a State's mental state, we refer to its representatives' mental states, which are influenced by institutional rules. Individual agents retain their own motivations and responsibility for their actions, including violations of international law that are inconsistent with the pattern of action of the State they represent. On epistemic matters regarding State representatives and their actions. Collins & Lawford-Smith, 2016, pp. 151-152, 159-159.

6. THE EVIDENTIARY METHOD AND APPLICATION

Proving customary international norms faces fewer formal constraints than evidentiary procedures in national legal systems. Hence, there are fewer epistemic obstacles. In this regard, the United Nations International Law Commission has left the burden of proof open. While in national legal systems, parties bear the burden of proving the existence of customary norms[37], in international law, the *jura novit curia* principle places this responsibility on courts, though parties may also provide evidence (Sender & Wood, 2024, p. 98). Nonetheless, this procedural difference does not alter the fundamental epistemological task. In any case, courts must evaluate evidence to determine whether a customary norm exists, whether the evidence comes from the parties or the court's own inquiry.

The primary doctrinal constraint international courts face is that usus and *opinio juris* must be separately proved, though how this is to be done remains unclear. In what follows, I propose an appropriate interpretation of this. Next, I examine the epistemic challenges courts face and propose an interpretative approach to resolve them. Lastly, I briefly address a largely ignored issue: the lack of evidentiary standards.

6.1. Inferring Mental States from Repeated Actions

Sender and Wood note that the existence of *opinio juris* cannot simply be deduced from the existence of an usus; acting in a particular manner does not prove anything of a legal nature[38], and, because acceptance as law must be sought with regard not only to those taking part in the relevant practice, but also in those in a condition to react to it (Sender & Wood, 2024, pp. 89-90). This idea has been reinforced by the International Law Commission of the United Nations, which, in paragraph 2 of Conclusion 3 of the *Draft conclusions on the identification of customary international law* of 2018, states: «Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.»

As explained, when dealing with customs *in pays*, acting in a particular manner can be an input for inferring the existence of normative expectations, constituting evidence for the existence of a customary norm. Consequently, external actions are the only means available for inferring mental states such as normative expectations. The proof of an *opinio juris* cannot be separated from evidence of the *usus*. The condition of separately assessing each element requires the court to provide specific reasons for each constituent, not different evidentiary materials, ensuring a separate argumentative justification.

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[37] For instance, article 3.1 of the Spanish Civil Code requires parties to provide evidence of the existence of a legal custom to enforce it.

[38] This has been stressed by the ICJ in the *North Sea Continental Shelf* case.

The emphasis in this necessity is comprehensible since the ICJ has not always been meticulous in manifesting either the existence of an *opinio* or an *usus* in the determination of customary norms, raising doubts either if it was merely a defective labor, if the court found the uncanny case of customary norms composed by only one element, or if it acted arbitrarily and determined there was a customary norm where there was none. Although there are no exceptional cases of customary norms composed of a single element, it is still possible that some decisions are either wrong or arbitrary; however, some cases of determining customary norms involve enthymematic arguments in which not all premises are explicitly stated, raising questions about the logical validity of the conclusions.

Occasionally, the ICJ assumes the existence of *opinio juris* among participants when proving a persistent, convergent practice as *usus*, without mentioning it in its resolution. More controversially, commentators have lamented that the ICJ has sometimes only referred to the constatation of an *opinio juris* by the parties without reference to a *usus* (*see* D'Amato, 1987). Can a court legitimately — on epistemologically sound grounds — verify that someone has a mental state without reference to any external action? Since telepathic powers are excluded, the answer is negative. We can infer others' mental states only from what they do, including what they say. Declarations are material external actions. This seems to escape commentators who exclude declarations as instances of *usus*. However, as speech acts, declarations can and do create and perpetuate genuine customary norms[39].

The inquiry for the *opinio juris* requires an interpretive approach that does not ignore that State practice (*usus*) is situated in a contextual matrix of intersubjective expectations, through which its normative significance is constituted and maintained[40]. It must also be flexible and allow diverse concrete actions to be included within the abstract type of action demanded by the norm[41]. That includes actions

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[39] In this sense, Brandom proposes that normative language is employed to make explicit support for a *pattern* of material practical interferences. Those practical inferences can range from mere conventions to customary norms that, up to that point, had been implicit in a group's convergent practice (Brandom, 2000, pp. 89-90). This is also somehow presupposed by Searle's regulative rules, which govern preexisting activity and which we come to know through *speech acts* (Searle, 1969, pp. 33-34,). Postema also emphasizes that action and word work together in the formation of customary norms (Postema, 2007, p. 29). In this regard, it is worth noting that some International Law scholars have argued in favor of considering declarations as components of State practice (Akehurst, 1975, p. 53).

[40] Perhaps this is what d'Aspremont intends when advocating that while identification of customary norms is an *in abstracto* question, evidence and ascertainment of the norm is an *in concreto* process (d'Aspremont, 2011, p. 151).

[41] For instance, if the norm requires communicating intentions to another party, this can be done through diverse concrete actions, such as formal diplomatic letters, press conferences, or even legislative actions. In this line, the need for flexibility in interpreting evidence to ascertain facts is noted in the second commentary to the third conclusion of the *Draft,* and in its fifth conclusion, which states that legislative actions and judicial rulings are State actions to be considered when assessing conformity with a customary norm. As Bicchieri underlines, many norms admit variations in behavior, and the range of variation can be substantial (2017, p. 36). Hence, Conclusion 7 of the Draft states that variations in a

such as what parties declare, manifesting acceptance of a norm (as a critical reflexive attitude) that converges with the common actions and expectations of other parties in the contextual practice; that is, the practice of declarations displays the *opinio*. This means that declarations supplement the other actions that constitute the practice of States in supporting a customary norm like the one of non-intervention [42].

In a case like *Nicaragua v. United States*, declarations were actions in which the United States, along with other nations, converged on consolidating empirical expectations (*usus*) with normative expectations (*opinio juris*) in a matrix of conditional preferences. Thus, although the United States breached the non-intervention norm on diverse occasions, that did not mean it did not recognize the norm, nor that it did not participate in its creation and maintenance. The United States normally does not intervene in other nations' affairs [43]; moreover, it has recognized this norm in various declarations and has repudiated such intervention when other nations intervene in others' affairs. From the perspective of social norms, an individual can transgress a norm on diverse occasions, a norm they nonetheless acknowledge as valid, ordinarily comply with, and even actively enforce upon others. Focusing exclusively on actions of non-abidance would imply that no party would ever participate in the creation and maintenance of the norm, nor accept it. Therefore, courts must distinguish between acts of transgression, as in the United States in the *Nicaragua v. United States* case, and non-participation or even repudiation of the norm-practice, as in Germany in the *North Sea Continental Shelf* case [44].

Attaining the context contemplates being aware that the practice that raises the norm involves not one but diverse parties, and that there are other norms, a system of norms, that compose international customary law, that also give sense to the normative practice of the examined alleged customary norm. This is particularly relevant when assessing the existence of customary permissive norms. This is illustrated in the *Right of Passage over Indian Territory* case, where the ICJ determined that Portugal had a pacific right of passage over the Indian territory for private persons, functionaries, and merchandise to access the Portuguese enclaves. This meant Portuguese persons did not have to apply for a permit from the Indian authorities. India claimed Portugal had

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State's practice must not be immediately considered to constitute a new custom; this must be assessed in light of the circumstances.

[42] Conclusion 10 of the Draft emphasizes this for the proof of *opinio juris*.

[43] The phrase is controversial since the United States has interfered in other nations' affairs multiple times. Therefore, contextualization is needed. What I mean is that, although the United States has unjustifiably interfered in the affairs of other nations on repeated occasions, it does not do so with most nations and does not do so consistently. Moreover, on most occasions, it has done so by trying to hide its actions, which, as will be argued, is a clue to the State's recognition of the existence and validity of the customary norm. That is, at least until 1986, the United States was no persistent objector to the non-intervention customary norm.

[44] In this case, Denmark and the Netherlands were pushing towards the creation of a customary practice to claim a customary norm. However, from the beginning, Germany not only abstained from participating in the practice but also rejected it.

no right and had been tolerant, a concession revocable at any time. The ICJ reasoned that a practice lasting over a hundred years suggested more than a concession; it was plausible to infer a permissive bilateral customary norm, as nations usually request permission to pass through foreign territories. That is, the permissive norm for Portugal was inferred not just from India's never objecting for over a century, but also from the fact that, in the common customary norms of the international community, there is a mandatory norm requiring permission to access other nations' territory[45].

6.2. Narrative Interpretative and Approach

Courts face challenges in determining whether customary norms exist when interpreting evidence. Not being exhaustive, I find the following. First, the epistemic distance involved in being a third-party alien to the practices that create and support the customary norm. Second, the fact that customary norms conceptually entail coordination and, *prima facie*, common self-interest for acting, hence raising the question: Why would anyone act against their own self-interest? Third, how to understand *sanctions* that aid in inferring the existence of a customary norm, if international law excludes unilateral sanctions?

The above questions concern the problematic issue of judicial discretion. But discretion is not arbitrariness. Epistemologists acknowledge that discretion is unavoidable when assessing evidence and *making decisions*, but this does not imply an epistemologically unjustified choice. Hence, the issue is: What can courts do to justify, on epistemic grounds, their rulings about the existence of customary norms?

A party's conduct has diverged from her usual behavior and community expectations. The key question is whether this deviation represents a mere departure from a custom or a violation of a norm. Brandom considers that norms are in the eye of the beholder, one embedded in the practice. Therefore, addressing a group's customary norms requires considering what it means to acknowledge them in practice (Brandom, 1994, p. 25). Once more, norms are distinguished from mere practices from the internal point of view[46]. This is a significant obstacle for courts as they are not firsthand actors in customary norms *in pays*[47]. Difficulties increase when considering

[45] Although Portugal argued that its right of passage also included armed troops and military equipment, the Court ruled that the right was limited to civilians, officials, and merchandise. Additionally, as Johnson points out, the Court once again failed to explicitly refer to evidence of an *opinio juris* (Johnson, 2021, p. 1184).

[46] Hart's internal point of view can be expanded using Brandom's explanation that norms can be conceived as a type of practical commitment shared within a group. Therefore, norms help explain why someone acts a certain way and make it understandable to others in the group. (Brandom, 2000, p. 93).

[47] I stress this because, in a sense, they are part of the international community, and their resolutions also shape the behavior of States, including behavior that can lead to the formation of customary norms. As Bentham notes, judges' actions can influence the population's behavior and produce social norms (Bentham, 1977).

that, conceptually, customary norms are the outcome of a coordination solution that serves the best interests of the parties. But actions of defection from the coordination solution are usually argued by the parties as supporting their actual self-interest, hence, trying to defeat the claim that such a pattern of conduct represents a genuine customary norm. The account of social norms perceives sanctions as cues for identifying expectations. However, defining sanctions in international law is problematic, though threats and coercive force are *prima facie* excluded[48].

Since customary norms evolve gradually through social practices and adapt to changing contexts, narratives help third parties understand the origins of a custom, how expectations are formed, and how they evolve, shaping normative expectations. A good narrator is sensible in plausibly recreating the characters' points of view to convey their personalities, goals, ways of thinking, and so on, to the audience. For a narrator, accurately recreating a character's perspective requires exploring the context of the States at a given historical moment, the values they uphold, and the assumptions they hold about each other. Through well-crafted narratives, we can gain insights into situations that would otherwise remain hidden.

Twining and Taruffo have championed the relevance of narratives or storytelling for evidential procedures, particularly as a tool of rational argumentation that allows structuring the materials provided for a case to make sense of them in a legally meaningful way (Twining, 2006, chap. 9). Narratives are also relevant for structuring a court's reasoning when assessing parties' actions and expectations in determining whether a customary practice exists, which involves a norm, and whether there was a defection by one of the parties. This comprises discerning and structuring the information collected to picture the context in which the customary practice developed, the peculiarities of that practice that may have led to expectations for the creation of a norm, and the attitudes displayed toward the practice. If, as Taruffo notes, good judicial narratives allow distinguishing facts from law (Taruffo, 2008, p. 194), in the case of customary norms, they serve to differentiate incidental actions from those tangled in the chain of concurrent actions that produce a custom and to individuate the peculiar attitudes that manifest normative attitudes and expectations[49].

Reconstructing the narrative of the practice does not mean producing a precise, descriptive history in which one can clearly distinguish when a convention arises between the parties and evolves into a proper social or customary norm[50]. Recon-

[48] With the exceptions listed in article 2.4 of the Charter of the United Nations and diverse Resolutions.

[49] As Sender and Wood expose, commentaries on conclusion 3 of the *Drafts* emphasize that courts must be careful in considering the context of States' actions, which includes those declarations proffered causally, in the heat of the moment, should not have the same weight as carefully considered declarations. Also, declarations by junior officials should carry less weight than those of senior officials (Sender & Wood, 2024, p. 85).

[50] Some scholars are preoccupied with the importance of distinguishing between the stage of norm formation and the stage of preservation, as if it were possible to identify the exact moment

structing the narrative, even the narrative of the practice of a social norm, involves something less ambitious.

The evidence collected by the courts and presented by the parties is hardly sufficient to reconstruct a precise and complete history of the practice[51]. Moreover, evidence doesn't speak for itself; it requires interpretation to understand metaphysical concepts such as customs, norms, and expectations. Therefore, a historical reconstruction is almost inevitably an interpretation of the facts, and if the authors of such a reconstruction are unaware of this, the result risks being highly biased. Instead, courts must construct hypotheses about the existence (or nonexistence) of a customary norm, assess and articulate the evidence, and try to assume the perspective of a member of the group in the ongoing history in which the practice occurs. This may be the closest to adopting the internal point of view and to a strategy that can help reduce the knowledge gap in social norms between a member of the group and an external observer. This perspective may permit picturing an act of self-interest coordination among group members and an act of egotistic self-interest that disregards others' interests and expectations[52]. That is, in the usual account of social norms,

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when a customary norm emerges from a mere custom (Akehurst, 1975, pp. 4-5; Bobbio, 2010, pp. 60-61; Chiassoni, 2008, pp. 78-79). The distinction between the formation and the conservation or consolidation of a customary norm has also been a central argument in diverse paradigmatic cases, such as the *Lotus Case*, the *North Sea Continental Shelf Case*, the *Nuclear Tests Jurisdiction Case*, and the case of *Germany v. Italy about Jurisdictional Immunities*, among others. It has been stressed by Conclusion 1 of the *Draf* (although acknowledging its difficulties). However, insistence is unhelpful because, as Ullmann-Margalit emphasizes, norms don't arise at a specific time nor from a manageable number of acts. Instead, a better strategy is to verify whether the conditions for a norm's existence have been met (Ullmann-Margalit, 1977, p. 8). She takes this insight from Raz's indications about the existence of isolated norms. Joseph Raz (1990).

[51] This is not a form of holism that ranks evidential reliability below narrative coherence. Narratives serve as heuristic tools, not replacements for detailed evidential analysis. This does not mean endorsing a holistic approach to evidence over an atomistic one. I see them as complementary (*see* Accatino, 2014, pp. 45-52). The atomistic approach assesses the reliability of each piece of evidence, while the holistic approach evaluates a set of evidence related to a hypothesis (Ferrer Beltrán, 2007, pp. 45-46). The strength of a proof set depends on the reliability of its parts. Therefore, a narrative must be sound and grounded in reliable evidence to best support a hypothesis.

[52] The question of what motivates actors to follow social norms is rarely debated and often unclear, leading to cryptic accounts of why some agents break norms underdeveloped. The traditional economist's view, based on *homo œconomicus*, suggests that actors follow norms because the benefits of compliance outweigh those of defection, implying that defectors are mistaken or foolish. Behavioral economists note this view is short-sighted, as balancing costs isn't always the main motivator and is affected by cognitive biases. Furthermore, it tends to assume a decision-theoretic model of an isolated decision-maker. [Ullmann-Margalit, 1977, p. 7]. Instead, conventionalist accounts assume decision makers work within a strategic social-interaction framework, and avoiding the coordination solution can sometimes offer greater personal benefit. Consequently, Bicchieri claims social norms conflict with selfish motives and emerge from situations with conflicting interests and coordination incentives. Hence, she emphasizes that norms develop when a mixed-motivation game evolves into a coordination game in which actors prioritize coordination, recognizing that coordination is more rewarding in the long term because selfishness carries higher risks. Therefore, actors' interests should not be treated in a Manichean way. Actors do cherish coordination solutions and, most of the time, observe and enforce

the coordination solution that involves the customary norm has the agents tie their conception of self-interest not only to success but also to success within the group.

Observers of the norm not only internalize the norm as a valid norm of the group and follow it habitually and even somehow automatically[53], but they also regard following norms as a requisite to coordinate with others and be socially accepted, or at least not repudiated. Defectors usually continue to desire being accepted and repudiate sanctions; the difference from observers is that defectors have desires they cannot achieve by coordinating with others because, it tends to be the case, their desires imply losses for others. Hence, what characterizes the actions of non-cynical defectors[54] is that they make efforts to hide their actions, and thus, also benefit from others' perceptions of their cooperation. On the other hand, observers would be able to explain how the defector's actions fail to meet their expectations (descriptive and normative) and how that, in some way, implies losses on their behalf. Losses commonly involve the non-satisfaction of an economically quantifiable expectation, but this may not be obvious at first sight. Sometimes the losses are characterized as dignitary torts, as the law's doctrine calls them, such as damage to reputation, invasion of privacy, or breach of confidence. Considering customary norms involve interdependent actions that anchor conditional preferences, the losses can also be understood in terms of the efforts made by one of the parties, driven by justified expectations that the other party will and should act in a corresponding manner.

The best epistemologically justified hypothesis, the one that permits abductive inference of the probable existence of customary norms as the best explanation, will be the one comprising more reliable and diverse information supporting the existence of a recurrent, convergent practice, while also consistently justifying the existence of shared expectations, both descriptive and normative. It must allow for constructing a narrative that plausibly explains the factors that led to the formation of a norm within a group through repeated convergent practice, including the expectations created by the practice and the attitudes the parties demonstrate toward it[55].

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social norms. But that does not mean they have abandoned their egoistic selves. If actors foresee a short-term gain from breaking a norm and believe they can get away with it, they will be tempted, and some will do it.

[53] Internalization of social or customary norms is a key in their continuity and in their seemingly natural functioning. That is, some norms, like the rules of grammar, are followed unconsciously, meaning that agents do not stop to evaluate the rule's validity each time they apply it. This idea underpins Wittgenstein's rule-following thesis. Additionally, as Guala emphasizes, the internalization of social norms through habit has been an important concept in social philosophy, and it partly involves agents' compromise with the norms (2016, p. 79). In this line, in a laboratory experiment, Guala concluded that when people produce a story of strategic joint interactions, this involuntarily produces a sort of internalized pressure for them, compelling them to abide by the equilibrium solutions reached and followed in the past (conventional social norm), even in the absence of external sanctions or possible negative consequences (Guala, 2013).

[54] A cynical defector is someone who openly breaks the norm and does little to hide it.

[55] The literature on social norms lacks specific methods for identifying actions that break norms and the reactions they elicit. Bicchieri proposes asking participants how they expect others to react to

Particularly for proving normative expectations, the main clues are displays of disapproval by other members of the group toward behavior of the sort committed by the alleged transgressor, and exhibitions of conduct whose particular manner of execution reasonably permits the inference of normative attitudes on the part of the actors involved in the practice. Undoubtedly, other hints can reinforce the latter: although not a requirement of normativity, longevity and consistency tend to be presumptive indicators that a pattern of recurrent behavior comprises more than mere courtesy or fads in the participants' thoughts. This can be relevant for distinguishing between cases involving a customary norm and those involving mere alleged *comitas gentium,* as argued in cases like *Portugal v. India*, the *Asylum case*, and other maritime law disputes. Also, as indicated, transgressors of norms tend to make efforts to hide their actions[56]. Likewise, it is not at all uncommon for some participants to emphasize that their actions are in accordance with a customary norm, and for other participants to heighten approval of those actions. This can also serve as evidence of the practice's normativity.

Consequently, a compelling reconstructive account of customary international norms requires an expansive understanding of sanctions[57] as indicators of normativity, a necessity reinforced by international law's ban on overt aggression and supported by philosophical analysis (e.g., Bicchieri, Brandom), demonstrating that even subtle manifestations of discontent or estrangement can serve as sanctioning cues for underlying normative practices.

6.3. Towards a Standard of Proof

The framework developed in the preceding sections clarifies what courts must prove — the existence of normative expectations constituted by state practice — and how to reason about such proof — through narrative reconstruction that integrates diverse evidence. Yet a crucial question remains: how much evidence suffices to justify a determination that a customary norm exists? The question is political rather than epistemological — though involving epistemic considerations[58]. Without a standard to prove a customary norm's existence, courts rely on subjective judgments of evidence rather than objective criteria.

Standards of proof are rules that specify the threshold of corroboration required for a justified conclusion. Social norm theory and epistemology provide conceptual

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a hypothetical defection, as this better reflects social norms than asking whether they would condemn the action, which reflects personal values (2017, p. 72).

[56] Sometimes, this involves not so much concealing the breach as disguising it as compliance with the norm. This may involve merely resorting to rhetorical devices, but more sophisticatedly, doing something that formally or superficially appears to observe the norm while doing the opposite.

[57] Contrary to the expansive understanding of sanctions advocated, for instance, Kelsen reduced sanctions in international law to threats and acts of war from one State to another. Kelsen, 1956: 14, 22.

[58] Ferrer Beltrán, 2021, p. 24.

guidance on what counts as evidence and how to reason from it, but they do not specify decision thresholds. Inference to the best explanation, the reasoning method underlying narrative reconstruction, does not itself constitute a standard of proof. One narrative may be better than available alternatives yet still rest on sparse or low-quality evidence, yielding insufficient justification for a sound conclusion. International law faces this problem: the ICJ has not articulated explicit evidentiary standards, and the doctrine's emphasis on vague criteria such as «consistency of practice» offers little guidance. The inconsistency in the Court's reasoning across cases compounds the difficulty of extracting implicit standards from practice[59].

The need for articulated standards is particularly acute in customary international law. In national legal systems, well-established standards such as «preponderance of evidence» or «beyond a reasonable doubt», although vague, at least inform the decision-maker about the responsibility for what is at stake and acknowledge that there is a risk of error being distributed among the parties. The proof of customary international norms treats matters «pragmatically,» so to speak.

Although the two-element formula is often taken as a standard, this is not actually the case. As seen, it is more of a doctrinal and epistemic blueprint to guide their inquiries and interpretations. However, courts can be reckless in their treatment of this blueprint, neglecting one element altogether or giving it little weight compared to the others. Moreover, each element could be evaluated by its own standard. The *usus* can be quantified and evaluated against factors such as time and uniformity. The *opinio juris* demands greater conceptual and interpretive effort. Hence, the ICJ tends to establish, case by case, the threshold that evidence of a customary norm must meet, according to the stakes at issue. For instance, in the *North Sea Continental Shelf* case, the ICJ was rigorous in its examination of *usus*, holding that evidence of a customary norm must display extensive and virtually uniform State practice, accompanied by *opinio juris* of the parties. Meanwhile, in *Nicaragua v. United States*, while not articulating a standard, emphasis was placed on *opinio juris*, particularly on State declarations, while quietly acknowledging that *usus* was neither extensive nor virtually uniform.

As attested, the stakes vary dramatically: proving a customary norm governing diplomatic immunity differs from proving one regulating the use of force. The consequences of error — falsely «finding» a non-existent norm or failing to recognize an existing one — are not symmetric across domains. A standard appropriate for low-stakes ceremonial practices may be insufficient for norms whose violation could trigger armed conflict. And while the flexibility of assuming diverse thresholds can be regarded as pragmatically convenient, not knowing beforehand the sort of standard the ICJ will assume is contrary to the predictability of its rulings and to the notion of legal certainty (2021, p. 28).

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[59] On standards of proof in general and their importance (*see* Ferrer Beltrán, 2021; Laudan, 2006). On the specific problem in international law (*see* Del Mar, 2012).

While a comprehensive treatment of evidentiary standards for customary international law exceeds this article's scope, the framework developed here offers a promising direction. The baseline standard is preponderance of the evidence: a customary norm should be deemed proven when, holistically assessed, the evidence makes its existence more probable than not[60]. However, this must be supplemented with qualitative criteria derived from the narrative reconstruction method. Specifically, the evidence must support a coherent narrative that explains both the convergence in State practice and the normative expectations underlying it. This narrative coherence test requires: (1) that the evidence includes a qualitative sample of a cross-section of States' practice by geography, legal systems, and level of development[61], and (2) must give particular weight to States whose interest or legal positions are most directly implicated by the norm (as the doctrine from the *North Sea Continental Shelf* has established), (3) that the narrative account for both conforming conduct and apparent deviations (explaining the latter as either violations subject to criticism or instances where the norm does not apply); and (4) that the evidence include manifestations of normative expectations — criticism, justification, enforcement responses — not merely behavioral regularity. This standard is more demanding than a simple count of practice instances, yet more determinate than vague appeals to «consistency.»

This proposal is preliminary and requires further development. First, the framework does not address how standards should vary with the stakes involved — whether norms governing the use of force require a higher threshold than those governing diplomatic protocol. While differentiated standards exist in other legal areas, setting thresholds for categories of customary international law requires normative analysis of error costs, not merely epistemological considerations. Second, the narrative coherence test, though more determinate than current doctrine, is still interpretive and won't resolve all disputes about the existence of a norm. Its value lies in offering courts a methodologically sound framework for reasoning, not in mechanically ensuring

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[60] For present purposes, «preponderance of the evidence» means the existence of a customary norm is more probable than not (>0.5), considering only the two hypotheses advanced by the parties. *Inference to the best explanation* thus serves as a method for comparing these competing claims, not as a freestanding standard of proof.

[61] Conclusion 8 of the *Draft* demands that, for determining the existence of a customary norm, the practice must be general, in the sense of being sufficiently widespread, representative, and consistent. Goldsmith and Posner notice that the determination that 190 or so States engage broadly in a particular customary practice that supports a customary norm is practically impossible. As Sender and Wood emphasize, the requirement of generality must not be understood as a requirement of universality (2014, pp. 139-140). Hence, in practice, the determination of customary international law tends to be based on selective survey practice, which undeniably privileges the interests of major international powers (Goldsmith & Power, 2005, p. 24). The bias towards powerful States is reproachable in the practice of actual International Courts, but that does not mean that this representative sample cannot be done, considering random States to attest that a practice is widely held if the case is to attest the existence of a universal customary norm, like, for instance, the norm about the inviolability of diplomatic agents or the immunity *rationae personae*. The scope of the sample can be restricted when it is argued to be a regional or bilateral custom.

certainty, but at least in showing, in a more transparent way, the factual and causal reasoning courts use in determining the existence of a valid customary norm. These questions indicate that the standards of proof for customary international law remain an important area for future research, one in which epistemology, legal theory, and policy analysis must be integrated.

7. CONCLUSION

This article has argued that persistent confusion in customary international law reflects inadequate attention to the relationship between ontology and epistemology — conflating what constitutes customary norms with how to prove them. Customary norms are formed through shared empirical and normative expectations. Proving them requires abductive inference: reasoning from observable phenomena to the best explanation of the normative expectations that structure them.

The article has made three main contributions. First, it has reconceptualized the relationship between *usus* and *opinio juris* to show that these are not independent variables requiring separate proof, but components ascertained from the same procedure: practice provides evidence from which normative expectations are inferred. This resolves the chronological paradox of custom formation. Second, it clarifies what courts must identify when seeking *opinio juris*: not beliefs that conduct is already *law* (which would be circular), but normative expectations. Third, it has proposed narrative reconstruction as an appropriate method, coherently integrating State practice, statements, and response patterns to infer expectations.

The article has also outlined a preliminary approach to evidentiary standards. While comprehensive development requires further work, the framework developed suggests that the appropriate standard should combine a preponderance of the evidence and narrative coherence. Evidence must support a consistent explanation of both behavioral convergence and normative expectations across representative States. However, it must be emphasized that development of differentiated standards for diverse domains of customary international law — reflecting varying stakes and acceptable error costs — remains an important direction for future research.

While developed through analysis of customary international law, this framework has broader implications for legal theory. The challenge of proving norms that emerge from practice rather than authoritative enactment arises in any legal system, including common law, commercial practices (*lex mercatoria*), and indigenous legal orders, among others. Conceptual and methodological tools developed here apply wherever law depends on identifying shared normative expectations embedded in social practice.

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