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Jean d'Aspremont

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# Tradition and International Law: Pre-discursivity as a Source?

*Jean d'Aspremont\**

Tradition governs. It governs the world and the minds that populate it. Tradition also represses, oppresses, suppresses. Indeed, it represses ideas, it suppresses freedom, and it oppresses bodies. In the history of mankind, tradition, just like the idea of nature,<sup>1</sup> has always been one of the most efficacious modes of governance, one that is, still today, regularly wielded to repress, oppress, and suppress otherness. It is as if two centuries after the Enlightenment and the repudiation of the contemplative subjection to pre-discursive holy scriptures, tradition had incongruously remained a linchpin of the discursive apparatus that shape contemporary societies and subjectivities. International law is no exception to that. Tradition is constantly at work in international legal thought and practice notwithstanding the attempt of international law to be nothing else than a self-standing discursive practice grounded in the actuality of the world and independent from any pre-discursive past.<sup>2</sup>

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\*Professor of International Law, Sciences Po Law School and University of Manchester.

<sup>1</sup> The invocation of “nature” as the ultimate truth-claiming criteria is a common feature of those discourses about the real. See, generally, Bruno Latour, *Science in Action: How to Follow Scientists and Engineers Through Society* (Harvard University Press, 1987), esp. 228-244.

<sup>2</sup> On the modes of grounding the international legal discourse in the actual world, see Jean d'Aspremont, “A Worldly Law in a Legal World”, in Andrea Bianchi, and Moshe Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford, 2021), 38-82.

This chapter starts by defining tradition, which it construes as the invocation of a pre-discursive past, that is a past that precedes the past of the discourse (1). It then discusses the systematic reliance on the idea of tradition in international law despite international law seeking to profile itself as a modern discourse grounded in the actuality of the world (2). Thereafter, this chapter turns more specifically to how tradition specifically plays out in relation to the sources of international law, and especially to the common opposition between traditional and non-traditional sources of international law (3). The chapter ends with a few concluding remarks (4).

## 1. Tradition as a pre-discursive past

By tradition, this chapter refers to the reliance on a *pre-discursive past*, that is, a past that pre-existed the discourse which allows its invocation. Tradition, for the sake of this chapter, is pre-discursive because it constitutes a past that belongs to a temporality distinct from that of the discourse within which it is invoked. So construed, tradition is a past-before-the-past of the discourse, for it cannot be constituted or apprehended by the discourse itself and lies outside the discourse's temporality. This is why, as it is understood here, tradition always is an eruption, i.e. the eruption of a past-before-the-past in the present time of the discourse.<sup>3</sup> To say it yet in other words, tradition, for the sake of this chapter, is a discursive technology<sup>4</sup> whereby one is able to invoke a norm

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<sup>3</sup> On the idea of a past-before-the-past, see Jacques Derrida, *L'écriture et la différence* (Editions du Seuil, 1967), 409–410; Jacques Derrida, *The Beast and the Sovereign*, vol 1 (University of Chicago Press 2011) 17; Roland Barthes, *Essais critiques IV* (Seuil, 1984), 75 and 139.

<sup>4</sup> A discursive technology refers to a non-material and non-textual device or technique of a cultural, cognitive, or intellectual nature that governs the speaking and the thinking in a given environment and in a given group of interlocutors. It is thus a device that produces specific attitudes, presumptions, needs, and experiences to any user of the discourse. In that sense, see Michel Foucault, *Sécurité, Territoire, Population. Cours au Collège de France. 1977-1978* (Gallimard, 2004), 128-134 and 151-169; Michel Foucault, *Histoire de la Sexualité I. La volonté de savoir* (Gallimard, 1976), 78-91; Michel Foucault, *Dits et écrits II* (Gallimard, 2001), 548-566, 587, 956-958, and 1013. This is different from the understanding of a discursive technology in the contemporary literature where that notion is commonly associated with the deployment of advanced technological tools. See Jay Lemke, "Discursive Technologies and the Social Organization of Meaning", 35 *Folia Linguistica* (2001), 79-96; E. Fisher, (2010). "Contemporary Technology Discourse", in *Media and New Capitalism in the Digital Age*. (Palgrave Macmillan, 2010) 29–41; M.-A. Paveau, « Réalité et discursivité. D'autres dimensions pour la théorie du discours », 34 *Semen* (2012), 95-115; M.-A., Paveau, *Les prédiscours. Sens, mémoire, cognition* (Presses Sorbonne nouvelle, 2006), at 132.

or a specific normative content which has been produced at a time preceding the moment of its invocation and through norm-generating mechanisms alien to that of the discourse in which tradition is mobilized.

The foregoing should suffice to highlight the two distinctive facets of the idea of tradition espoused in this chapter, especially compared to other invocations of the past that one can witness in a discourse. First, tradition, as a pre-discursive past, refers here to a past different from the past of the discourse in which tradition is mobilized, that is from the origin that the discourse would give to itself.<sup>5</sup> Second, tradition refers to a past that is not empty but incarnates some kind of norm. In this regard, tradition refers here to a past norm created through validity-making processes unknown to the discourse in which tradition is invoked. In that sense, the pre-discursivity of tradition, as the latter is understood here, has both a temporal and a normative dimension. Tradition, for the sake of this chapter, is a reference to both a normative past and a past norm. In the rest of this chapter, these two dimensions are presupposed, and mention is only made of tradition as a pre-discursive past.

At this stage, an important observation on such two-fold pre-discursivity of tradition is in order. It must be emphasized that tradition, although referring to a past norm and a normative past that precede the discourse in which tradition is invoked, is not outside any discourse. In fact, there is nothing that is outside discourse, even the pre-discursivity invoked in the discourse of the present.<sup>6</sup> More specifically, there cannot be not such a thing as a non-discursive pre-discursivity. As is construed here, tradition, and thus the pre-discursivity it embodies, is always caught in some discursive practices albeit distinct from the discourse in which tradition is invoked. For that reason, the invocation of tradition in a given discourse can be construed as an event where some discursive practices erupt in a discursive space to which they are foreign. Such eruptions of discursive practices in a discourse alien to them are rather mundane in contemporary discourses. Indeed, discourses commonly overlap, collide, cross-fertilize, converge, or

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<sup>5</sup> On the idea that discourses always invent their own past and origins, see Jean d'Aspremont, "Critical histories of international law and the repression of disciplinary imagination", 7 *London Review of International Law* (2019), 89–115.

<sup>6</sup> Michel Foucault, *L'ordre du discours* (Gallimard, 1971), at 55; Michel Foucault, *Dits et écrits I* (1954-1975) (Gallimard, 2001), at 426 and 443.

speak to one another.<sup>7</sup> Tradition, as allowing the eruption of a pre-discursive past in the discourse of the present is only a manifestation of these many discursive eruptions that one witnesses in contemporary discourses.

Whilst it is not necessary, for the sake of this chapter, to further theorize the notion of tradition and the twofold pre-discursivity to which it is identified, a final definitional observation is warranted. The possibility of invoking tradition, and thus the space left by every discourse for the eruption of a pre-discursivity, varies greatly among discourses. Science and traditional philosophy, for instance, are discourses that do not leave space for a past norm or a normative past that precede them, for the truth they seek to generate are meant to be temporally and epistemologically universal.<sup>8</sup> In fact, they are meant to produce some synchronically universalist knowledge. In contrast, theology and law are discourses where the eruption of pre-discursivity is not only permitted but also facilitated.<sup>9</sup> The same goes for international law. The next section will show, however, that such facilitation of the eruption of a pre-discursive past by international law is not without entailing a very noteworthy tension.

## **2. A discursive tension: international law and the reliance on tradition**

Tradition constitutes an idiom that is omnipresent in international legal thought and practice. For instance, international lawyers repeatedly and regularly refer to: the

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<sup>7</sup> This is one of the main claims of Michel Foucault's *Les mots et les choses* (Gallimard, 1966).

<sup>8</sup> Michel Foucault, *Le Discours Philosophique* (Gallimard/Seuil, 2023), at 78 and 87.

<sup>9</sup> Pierre Legendre, *Sur la question dogmatique en Occident. Aspect théoriques* (Fayard, 1999), at 118; Pierre Legendre, *De la Société comme Texte. Linéaments d'une Anthropologie dogmatique* (Fayard, 2001), 68; Michel de Certeau, *La faiblesse de croire* (Seuil, 1987), at 254.



tradition of international law;<sup>10</sup> traditional approaches to international law;<sup>11</sup> the traditional concept of international law<sup>12</sup> the traditions of the field of international law;<sup>13</sup> the traditional subjects of international law;<sup>14</sup> traditional and non-traditional sources of international law;<sup>15</sup> regional or geographical traditions of international law;<sup>16</sup> the

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<sup>10</sup> M. Koskenniemi, “International Law in Europe: Between Tradition and Renewal”, 16 *European Journal of International Law* (2005) 113-124; David Kennedy, “International Law and the Nineteenth Century: History of an Illusion”, 65 *Nordic Journal of International Law*, 385 (1996); Thomas Kleinlein, “International Legal Thought: Creation of a Tradition and the Potential of Disciplinary Self-Reflection”, in Giuliana Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence 2016* (OUP, 2017), 811–828; Matthew Craven, “The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law” in Luigi Nuzzo and Miloš Vec (eds) *Constructing International Law: The Birth of a Discipline* (Klostermann 2012) 4; Chiara Giorgetti, “Rethinking the Individual in International Law”, 22 *Lewis & Clark Law Review* 1085 (2019). This is also a terminology very present in the international relations and international ethics literature. See e.g. C. Covell, “The Tradition of International Law”, in *Hobbes, Realism and the Tradition of International Law* (Palgrave Macmillan, 2004), 99–145; Murray Forsyth “The Tradition of International Law”, in T. Nardin & D. Mapel (Eds.), *Traditions of International Ethics* (CUP 1992), pp. 23-41.

<sup>11</sup> See Part 2 of J. Dunoff & M. Pollack (Eds.), *International Legal Theory: Foundations and Frontiers* (CUP, 2022), pp. 37-130; Andrea Bianchi, “Different Ways of Thinking about International Law”, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP, 2016), 1-20.

<sup>12</sup> Jean d’Aspremont, Jean, “From a Pluralization of International Norm-making Processes to a Pluralization of the Concept of International Law”, in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (OUP, 2012), 185–199.

<sup>13</sup> See Martti Koskenniemi, “Between Commitment and Cynicism: Outline for a Theory of International Law as Practice” in *The Politics of International Law* (Hart Publishing, 2011), 271, at 272. James Crawford and Martti Koskenniemi, “Introduction”, in J. Crawford and M. Koskenniemi (eds), *Cambridge Companion to International Law* (CUP, 2012), at 14; J. d’Aspremont, *Epistemic Forces in International Law – Foundational Doctrines and Techniques of International Legal Argumentation* (Elgar, 2015), 9-22. See also A. Orford, “The Destiny of International Law” 17 *Leiden Journal of International Law* (2004) 441-476, at 464-475.

<sup>14</sup> Andrea Bianchi, “The Fight for Inclusion: Non-State Actors and International Law”, in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP, 2011), 39–57; Christian Walter, “Subjects of International Law”, *Max Planck Encyclopedia of Public International Law*, available at [www.mpepil.com](http://www.mpepil.com); R. Wolfrum, “Traditional Actors in International Relations”, in *Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law* (Brill | Nijhoff, 2021), at 93-113.

<sup>15</sup> See the contributions to this volume as well as the references provided by the introductory chapter. See also A. Roberts and S. Sivakumaran, “The Theory and Reality of the Sources of International Law”, in M. D. Evans (ed.), *International Law*, 5th Edition (OUP, 2018), p. 90; J. E. Alvarez, *International Organizations as Law-Makers* (OUP, 2006), p. xvi; H. Thirlway, *The Sources of International Law*, 2nd Edition (OUP, 2019), p. 36; S. Besson and J. d’Aspremont, “The Sources of International Law: An Introduction”, in S. Besson and J. d’Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP, 2017), p. 6; G. J. H. van Hoof, *Rethinking the Sources of International Law* (Kluwer Law, 1983), p. 82.

<sup>16</sup> See e.g. P. Hilpold (ed.), *European International Law Traditions* (Springer, 2021); Mark Weston Janis, *The American Tradition of International Law: Great Expectations 1789-1914* (OUP, 2004). D. H. N. Johnson, “The English Tradition in International Law”, 11 *The International and Comparative Law Quarterly* (1962), 416–45; L. Mälksoo, “The Estonian Tradition of International Law”, 20 *Baltic Yearbook of International Law* (2022), 1-6; Lauri Mälksoo, “The History of International Legal Theory

tensions between tradition and renewal in international law;<sup>17</sup> the modern tradition of international law;<sup>18</sup> the Anglo-American tradition of international law;<sup>19</sup> the positivist tradition of international law;<sup>20</sup> the natural law tradition to international law;<sup>21</sup> the cosmopolitan tradition of international law;<sup>22</sup> the black traditions of international law;<sup>23</sup> the Grotian tradition of international law;<sup>24</sup> the Victorian tradition of international law;<sup>25</sup> the Westphalian tradition of international law;<sup>26</sup> the Hartian tradition of international law;<sup>27</sup> the traditional principles of international law;<sup>28</sup> the traditional attributes of state

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in Russia: a Civilizational Dialogue with Europe”, 19 *European Journal of International Law* (2008), 211–232; A. Hamann, “The French Tradition of International Law”, in P. Hilpold (ed.), *European International Law Traditions* (Springer, 2021), 137–189; Edward McWhinney, “The International Court of Justice and the Western Tradition of International Law”, in *The Paul Martin Lectures in International Relations and Law* (Nijhoff, 1987); Lauri Malksoo, “Sources of International Law in the Nineteenth-Century European Tradition: Insights from Practice and Theory”, in Samantha Besson and Jean d’Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (OUP, 2017) 165; Milos Vec, “Sources of International Law in the Nineteenth-Century European Tradition: the Myth of Positivism”, in Samantha Besson and Jean d’Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (OUP, 2017), 121. See also the series dedicated to “The European Tradition in International Law” in the *European Journal of International Law* at <http://www.ejil.org/>.

<sup>17</sup> M. Koskeniemi, “International Law in Europe: Between Tradition and Renewal”, 16 *European Journal of International Law* (2005) 113–124.

<sup>18</sup> Jean d’Aspremont, “Turntablism in the History of International Law”, 22 *Journal of the History of International Law* (2019) 472–496.

<sup>19</sup> David Clinton, “Chapter 7 The Anglo-American Tradition in International Law” in Alan P. Dobson and Steve Marsh *Anglo-American Relations and the Transmission of Ideas: A Shared Political Tradition?* (Berghahn Books, 2022), pp. 215–238.

<sup>20</sup> Devika Hovell, “The Elements of International Legal Positivism”, 75 *Current Legal Problems* (2022), 71–109.

<sup>21</sup> A. Follesdal, “Natural Law: Current Contributions of the Natural Law Tradition to International Law”, in J. Dunoff & M. Pollack (Eds.), *International Legal Theory: Foundations and Frontiers* (CUP, 2022), pp. 39–62; Robert P. George, “Natural Law and International Order”, in *Defense of Natural Law* (OUP, 1999), 228–245.

<sup>22</sup> G. Gordon, G. (2013), “The Innate Cosmopolitan Tradition of International Law”, 2 *Cambridge International Law Journal* (2013), 906–934.

<sup>23</sup> James T. Gathii, Henry J., “Richardson III: The Father of Black Tradition of International Law” 31 *Temple International Law & Comparative Law Journal* (2017) 325

<sup>24</sup> H. Lauterpacht, “The Grotian Tradition in International Law,” 23 *British Yearbook of International Law* (1946) 1; Martti Koskeniemi, “Imagining the Rule of Law: Rereading the Grotian ‘Tradition’”, 30 *European Journal of International Law* (2019) 17–52.

<sup>25</sup> Martti Koskeniemi, “Lauterpacht: The Victorian Tradition in International Law” 8 *European Journal of International Law* (1997), 215–263.

<sup>26</sup> This is a terminology found in the international relations literature. See e.g. P. Miller, (2021), “The Westphalian Tradition” in *Just War and Ordered Liberty* (CUP, 2021), pp. 81–117; Steven Patton, “The Peace of Westphalia and its Effects on International Relations, Diplomacy and Foreign Policy”, 10 *The Histories* (2019) 91.

<sup>27</sup> Beckett, ‘The Hartian Tradition in International Law’ (2008) 1 *The Journal of Jurisprudence* 51.

<sup>28</sup> Donald McRae, “International Economic Law and Public International Law: The Past and The Future”, 17 *Journal of International Economic Law* (2014), 627–638; Curtis A. Bradley, “The ‘Charming Betsy’ Canon and Separation of Powers: Rethinking the Interpretive Role of International



sovereignty;<sup>29</sup> the traditional concept of sovereignty;<sup>30</sup> the traditional concept of sovereign equality;<sup>31</sup> the traditional theory of the sources of international law;<sup>32</sup> the traditional and modern approaches to customary international law;<sup>33</sup> the traditional concept of *opinio juris*;<sup>34</sup> the traditional concept of international legal personality;<sup>35</sup> the traditional concept of self-defense;<sup>36</sup> the traditional rule-based approaches to legal interpretation;<sup>37</sup> the traditional primacy of bilateralism in inter-state relations;<sup>38</sup> etc. Tradition is thus an idiom that one regularly encounters in international legal thought and practice.

In most of the abovementioned invocations of tradition, tradition is a shorthand for bypassing any validity-verifying or evidencing process in the discursive construction that is attempted. In fact, tradition, when mobilized to describe an attribute

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Law”, 86 *Georgetown Law Journal* 479-537 (1998); Daniel D. Bradlow, “Differing Conceptions of Development and the Content of International Development Law” 21 *South African journal on human rights* (2005), 47-85; G. Triggs, “Public International Law: Is It Fit For Purpose?” 7 *Legal Information Management* (2007) 113-123.

<sup>29</sup> Fuad Zarbiyev, “Judicial Activism in International Law. A Conceptual Framework for Analysis”, 3 *Journal of International Dispute Settlement* (2012), 247–278; Michael P. Scharf, “Earned Sovereignty: Juridical Underpinnings”, 31 *Denver Journal of International Law and Policy* (2003) 373; Lars Vinx, “Kelsen's Legal Cosmopolitanism”, in *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (OUP, 2007), 176–207.

<sup>30</sup> B. Kingsbury, “Sovereignty and Inequality”, 9 *European Journal of International Law* (1998), 599-625; Heike Krieger, “Sovereignty – an Empty Vessel?”, 7 July 2020, <https://www.ejiltalk.org/sovereignty-an-empty-vessel/>

<sup>31</sup> Christoph Schreuer, “The Waning of the Sovereign State: Towards a New Paradigm for International-Law?”, 4 *European Journal of International Law* (1993), 447-471.

<sup>32</sup> Jean d’Aspremont, “The Politics of Deformalization in International Law”, 3 *Goettingen Journal of International Law* (2011) 503-550. Jean d’Aspremont, *Formalism and the Sources of International Law* (OUP, 2011), chapter 5.

<sup>33</sup> Anthea Elizabeth Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation.” 95 *American Journal of International Law* (2001): 757–91; W. Worster, “The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches”, 45 *Georgetown Journal of International Law* (2014) 445.

<sup>34</sup> Guzman, Andrew T. “A Compliance-Based Theory of International Law”, 90 *California Law Review* (2002), 1823–87

<sup>35</sup> Christian Walter, “Subjects of International Law”, *Max Planck Encyclopedia of Public International Law*, available at [www.mpepil.com](http://www.mpepil.com)

<sup>36</sup> Alexander Orakhelashvili, “Self-Defence and Collective Security”, in *Collective Security* (OUP, 2011), 277–287; L. Finlay, & C. Payne, “The Attribution Problem and Cyber Armed Attacks”, *AJIL Unbound* (2019), at 202-206.

<sup>37</sup> A. Bianchi, “Textual Interpretation and (International) Law Reading: The Myth of (in) Determinacy and the Genealogy of Meaning”, in P. Bekker (ed) *Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts* (Cambridge University Press, 2010) 35.

<sup>38</sup> G. Nolte, “From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations”, 13 *European Journal of International Law* (2002), 1083-1098.

or feature of international law; certain approaches to international law; a certain concept of international law; certain subjects or sources of international law; modernist, positivist, naturalist, cosmopolitan, black, Grotian, Victorian or Westphalian sensibilities in international law; certain principles of international law; certain attributes of state sovereignty, the concepts of sovereignty and sovereign equality; certain approaches to customary international law; the concepts of *opinio juris*, international legal personality, self-defense; etc. allows such approaches, concepts, sources, principles, and sensibilities to be held as an unvalidated or unevidenced because such validity or evidence was seemingly secured in a past-before-the-immediate-past of the discourse. In other words, most of the uses of tradition witnessed in contemporary international law amount to the invocation of a pre-discursive validation or evidencing that need not to be repeated in the present. In that sense, such common and frequent uses of tradition in international legal discourse can be read as invoking of some kind of pre-discursivity which enables a complete bypass of the processes of validation and evidencing that is normally expected when making any argument within present international legal discourse. The invocation of tradition is, effectively, a convenient legal shortcut.

It is argued here that the omnipresence of the idea of tradition in international law and practice, and thus the constant invocation of a pre-discursive past, as it has been depicted in the preceding paragraphs, can be construed as constituting a discursive tension. After all, international law has always tried to profile itself as a modern discourse about the real<sup>39</sup> that is autonomous and grounded in practice and facts rather than in a past that precedes international law.<sup>40</sup> Indeed, as of the 19<sup>th</sup> century, international law has embraced a self-representation that grounds international law in practice and facts and makes it self-standing.<sup>41</sup> Said differently, international law, since

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<sup>39</sup> The real refers here to the experience of something that resides in reality as opposed to something that resides in something deemed literary, fictitious, narrative, or metaphysical.

<sup>40</sup> See my remarks in Jean d'Aspremont, "International Law and the Rage against Scienticism", 33 *European Journal of International Law* (2022), 679–694.

<sup>41</sup> Later, in the 20<sup>th</sup> century, international law even sought to consolidate its status of discourse about the real by honing its methods in such a way that it functions and is represented as a scientific discipline. Although the self-representation of international law as a scientific discipline has faltered over the last decades, international law has continued, until today, to foreground in its engagement with the real, be it in terms of its origin or of its goals. For some classical exposition of international law as a science,

its inception, has always been thought and practiced as a modern discourse, a discourse that is not inherited from God, morality or nature but a discourse that is constantly made, remade, and unmade through facts and practice that belong to international law's temporality and that are apprehended through international law's intelligibility criteria.<sup>42</sup> In that sense, for the modern mind,<sup>43</sup> like that of the international lawyer, the past is always built-in and thought through the discourse of the present: the past as source of the present is known, traced, and apprehended through the present categories of the discourse.<sup>44</sup> By articulating itself around facts and practice in present international legal discourse, rather than a pre-discursive past or meaning, international law has been able to affirm its modernity and tap into the modern discursive hierarchies according to

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see L. Oppenheim, 'The Science of International Law: Its Task and Method' 2 *American Journal of International Law* (1908) 313; R. Ago, "Science Juridique et Droit International" 90 *Collected Courses* (1956) 851-958; F. Castberg, "La Méthodologie du droit international public", 43 *Collected Courses* (1934) 309-384; A. Somek, 'Legal Science as a Source of Law: A Late Reply by Puchta to Kantorowicz', *University of Iowa Legal Studies Research Paper Series*, Number 13-7. On the consolidation of this self-representation, see the remarks of Anne Orford, "Scientific Reason and the Discipline of International Law", 25 *European Journal of International Law* (2014) 369-385. For a criticism of this self-representation see M. Koskeniemi, "Letter to the Editors of the Symposium" 93 *American Journal of International Law* (1999) 351; J. Crawford, "International Law as Discipline and Profession", *Proceedings of the American Society of International Law* (2012) 1.

<sup>42</sup> On the rejection of the foundational role of pre-discursivity by modernity, see Jürgen Habermas, *The Philosophical Discourse of Modernity. Twelve Lectures* (translated by Frederik Lawrence) (Polity Press, 1987), 7; A. McIntyre, *Whose Justice? Which Rationality?* (Duckworth, 1988), at 7; Hans-Georg Gadamer, *Truth and Method* (Bloomsbury, 2013), at 342 ("What makes modern scholarship scientific is precisely the fact that it objectifies tradition and methodologically eliminates the influence of the interpreter and his time on understanding"). On the critique by romanticism of the modern rejection of the pre-modern past, see Anthony Pagden, *The Enlightenment and Why it Still Matters* (OUP, 2013), 12-13 and 148-140. On the contestation of modernity by romanticism, see the essays in Thomas Pfau and Robert Mitchell (eds), *Romanticism and Modernity* (Routledge, 2015). See also Michael Löwy and Robert Sayre, *Révolte et mélancolie: Le romantisme à contre-courant de la modernité* (Payot and Rivages, 2005). Comp. with the Greek understanding of tradition and pre-discursive past as examined by Paul Veyne, *Les Grecs ont-ils cru à leurs mythes? Essai sur l'imagination constituante* (Seuil, 1983) at 18-22 and 78.

<sup>43</sup> Michel Foucault, *Le Discours Philosophique* (Seuil/Gallimard, 2023), 245; Hayden White, *The Content of the Form. Narrative Discourse and Historical Representation* (John Hopkins University Press, 1987), at 82.

<sup>44</sup> For the inescapability of presentism, see gen Anne Orford, *International Law and the Politics of History* (CUP, 2021). See Jean d'Aspremont, "International Law and the Rage against Scienticism", 33 *European Journal of International Law* (2022), 679-694; Jean d'Aspremont, "Critical histories of international law and the repression of disciplinary imagination", 7 *London Review of International Law* (2019), Pages 89-115; Thomas Kleinlein, "International Legal Thought: Creation of a Tradition and the Potential of Disciplinary Self-Reflection", in Giuliana Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence 2016* (OUP, 2017), 811-828;

which the real trumps the narrative, the factual eclipses the literary, and the physical overwrites the metaphysical.

Affirming its independence from a pre-discursive past and grounding itself into the actuality of the world is no simple state of affairs. It has required international law to draw on a variety of sophisticated discursive constructions. Concepts like State practice<sup>45</sup> or State consent,<sup>46</sup> to name only a few, are among these constructions that allow international law to always find its present meaning, its validity and its justification in present international legal discourse as well as the actuality of the world. The same can be said of the sources of international law, to which the second section of this chapter will return. Indeed, the sources of international law constitute a mechanism to guarantee the autonomy of international law, that is, independence from other discourses, as well as its grounding in worldly facts and events that have taken place in the present of international law.<sup>47</sup> Yet another discursive construction that allows international law to escape any reliance on a pre-discursive past is found in the self-referential moves that populate international legal thought and practice and whereby international law generates its own foundations and ensures that it owes its existence and validity to itself<sup>48</sup> – which is yet another manifestation of international law’s modernism.<sup>49</sup> It is by virtue of all the abovementioned discursive constructions that

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<sup>45</sup> On the idea that State practice is a discursive construction that enables international law to be grounded in the present and actuality of the world, see Jean d’Aspremont, “A Worldly Law in a Legal World”, in Andrea Bianchi, and Moshe Hirsch (eds), *International Law’s Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford, 2021), 38-82.

<sup>46</sup> On the idea of State consent as a discursive construction that enables international law to be given an origin that always comes a posteriori and after what is being consented to, see Jean d’Aspremont “Consenting to International Law in Five Moves”, in Samantha Besson (ed.), *Consenting to International Law* (CUP, 2023).

<sup>47</sup> On the sources of international law as a very modern construction, see Jean d’Aspremont and Samantha Besson, “The Sources of International Law: An Introduction”, in Samantha Besson, and Jean d’Aspremont (eds), *The Oxford Handbook of the Sources of International Law*, OUP, 2017, 1-40. See also J. d’Aspremont, *International Law as a Belief System* (CUP, 2017); Jean d’Aspremont, “The Four Lives of Customary International Law”, 21 *International Community Law Review*, (2019), 229-256.

<sup>48</sup> I have studied some of the self-referential mechanisms of international law elsewhere. See Jean d’Aspremont, *International Law as a Belief System* (CUP, 2017).

<sup>49</sup> On self-referentiality being a central feature of modern thought, see Pierre Bourdieu, *Homo academicus* (Les Editions de Minuit, 1984, re-edited 2012), at 306; Timothy Mitchell, *Questions Of Modernity*, (University of Minnesota Press 2000), 17; Timothy Mitchell, *Colonising Egypt* (Cambridge University Press, 1991), 178-179; Bruno Latour, *An Inquiry into Modes of Existence. An Anthropology of the Moderns* (Translated by Catherine Porter) (Harvard University Press, 2013 and 358-359), 157; Bruno Latour, *La Science en action. Introduction à la sociologie des sciences* (La Découverte, 2005), 244, 326, and 347-348; Gilles Deleuze and Claire Parnet, *Dialogues* (Champs essais, 1996), 27; Michel

international law can present itself as made, remade, unmade and interpreted in the presence of the discourse, uphold its permanent actuality, and affirm its independence from a pre-discursive past.

As a modern discourse that seeks to ground itself in the actuality of the world and affirms its self-sufficiency, international law should accordingly leave no place for a pre-discursive past. The abovementioned recurrent invocations of the idea of tradition in international legal thought and practice can thus be considered rather idiosyncratic, if not incongruent. Indeed, the common invocations of a pre-discursive past in present international legal discourse can be interpreted as echoing a pre-modern discursive state of affairs,<sup>50</sup> and as running against the very modernism around which international law has been built, thought and practiced.

It is true that such tension should not be exaggerated, let alone pathologized. It has been convincingly demonstrated in critical theory that modern discourses like international law often fail to meet their own modernist ambitions.<sup>51</sup> It has also been shown that modern thinking has not been able to keep pre-discursivity completely at bay,<sup>52</sup> especially since any discipline needs some degree of self-historicization through

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Foucault, *Naissance de la clinique* (PUF, 1963), 270; Michel Foucault, *Il faut défendre la société. Cours au Collège de France 1976* (Gallimard, 1997), 19; Theodor Adorno and Max Horkheimer, *Dialectic of Enlightenment* (London, Verso, 1997), 9; Henri Bergson, *La pensée et le mouvant* (Flammarion, 2014), 251; Roland Barthes, *Le bruissement de la langue. Essais critiques IV* (Seuil, 1984), 149; Gaston Bachelard, *Le nouvel esprit scientifique* (PUF, 1934), at 9-18; Gaston Bachelard, *La formation de l'esprit scientifique* (Vrin, 2011), 15; Jacques Derrida, Force de Loi : Le 'Fondement Mystique de l'Autorité', 11 *Cardozo Law Review* (1990) 920-1046. On the self-referentiality of the modern concept of law, see in particular Bruno Latour, *La fabrique du droit. Une ethnographie du Conseil d'Etat* (La Découverte, 2004), at 153, 235, and 278.

<sup>50</sup> On the rejection of the reliance on a pre-discursive past as being a feature of modernity, see Michel Foucault, *Le Discours Philosophique* (Seuil/Gallimard, 2023), 245.

<sup>51</sup> Jean-François Lyotard, *La Condition Postmoderne* (Editions de Minuit, 1979), at 65; Emmanuel Levinas, *De L'existence à l'existant* (Vrin, 2013) (1<sup>ère</sup> édition, 1947), at 52 and 63; Theodor Adorno and Max Horkheimer, *Dialectic of Enlightenment* (London, Verso, 1997), at xiv and xvi. Paul Veyne, *Les Grecs ont-ils cru à leurs mythes? Essai sur l'imagination constituante* (Seuil, 1983), 137; Judith Butler, *Gender Trouble. Feminism and the Subversion of Identify* (Routledge, 2d edition, 1990), 4. It has even been claimed that discourses about the real work as secularized theologies, see Pierre Legendre. *Sur la question dogmatique en Occident. Aspect théoriques* (Fayard, 1999), at 41.

<sup>52</sup> On the impossibility of rejecting tradition, see A. McIntyre, *Whose Justice? Which Rationality?*, (Duckworth, 1988), at 367; Paul Ricoeur, *Temps et récit, Volume 1, L'intrigue et le récit historique* (Seuil, 1983), at 135; J. Derrida, "Force of Law – The 'Mystical Foundation of Authority'" in Gil Anidjar (ed), *Acts of Religion – Jacques Derrida* (Routledge, 2002), 230-298, at 239-240.



the idea of tradition.<sup>53</sup> This is certainly the case for international law. Yet, that modernism has never been able to fully realize itself and has rested on fundamental contradictions does not liquidate the discursive tension that has been discussed in this section. The foregoing simply means that international law, because it has continued to leave space for the mobilization of a pre-discursive past, has not fully engineered the modernism in which it has sought to wrap itself. This is even more tangible in international legal thought and practice pertaining to the sources of international law to which the next section turns.

### 3. The idea of tradition and the sources of international law

As is illustrated by the very theme of the volume in which this chapter is included, the discourse on the sources of international law itself is very much permeated by regular invocations of tradition. It is, as previously mentioned, very common to encounter claims articulating around the distinction between traditional and non-traditional sources of international law,<sup>54</sup> mentions of traditional approaches to customary international law,<sup>55</sup> references to formalist and anti-formalist traditions of the sources of international law,<sup>56</sup> discussions on the limits of the traditional international law fabric,<sup>57</sup> or discussions of the traditional concept of *opinio juris*.<sup>58</sup>

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<sup>53</sup> Thomas, Kleinlein, “International Legal Thought: Creation of a Tradition and the Potential of Disciplinary Self-Reflection”, in Giuliana Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence 2016* (OUP, 2017), 811–828; Jean d’Aspremont, “Critical histories of international law and the repression of disciplinary imagination”, *7 London Review of International Law* (2019), 89–115.

<sup>54</sup> See *supra* fn. 15.

<sup>55</sup> See *supra* fn. 33.

<sup>56</sup> Upendra Baxi, ‘Sources in the Anti-Formalist Tradition: “That Monster Custom, Who Doth All Sense Doth Eat”’, in Samantha Besson and Jean d’Aspremont (eds.), *Oxford Handbook on the Sources of International Law* (OUP, 2017), pp. 225–244, esp. p. 232 ; Monica Garcia Salmones Revira, “Sources in the Anti-Formalist Tradition: A Prelude to Institutional Discourses in International Law” in Samantha Besson and Jean d’Aspremont (eds.), *Oxford Handbook on the Sources of International Law* (OUP, 2017), 203-224.

<sup>57</sup> M. Goldmann, ‘Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority’, *9 German Law Journal* (2008) 11, 1865 and A. von Bogdandy, P. Dann & M. Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, *9 German Law Journal* (2008) 11, 1375.

<sup>58</sup> Guzman, Andrew T. “A Compliance-Based Theory of International Law” *90 California Law Review* (2002), 1823–87.

Obviously, references to tradition in the abovementioned writings about the sources of international law are of a great semantic variety. Tradition often is a shorthand for the use of formal law-ascertainment criterion, for a description of the normative phenomena deemed positivists, for the law-ascertainment criteria prescribed by Article 38 of the Statute of the International Court of Justice, for an approach to the sources of international law that is adverse to relative normativity or soft law, for the allegedly dominant interpretive practice related to the sources of international law, for a more rigid and orthodox use of the sources of international law, etc. It is similarly noteworthy that such references to tradition in debates about the sources of international law have commonly been at the service of arguments that either bemoan and belittle the ‘traditional’<sup>59</sup> or, on the contrary, vindicate and rehabilitate it.<sup>60</sup>

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<sup>59</sup> See e.g. J. Brunnée and S. J. Toope, “International Law and Constructivism, Elements of an International Theory of International Law”, 39 *Columbia Journal of Transnational Law* (2000-2001) 19 p. 65; R. Baxter, “International Law and Her Infinite Variety”, 29 *International and Comparative Law Quarterly* 549 (1980) at 563; O. Schachter, “The Twilight Existence of Non binding International Agreements”, 71 *American Journal of International Law* (1977) 296; A. Boyle, “Some Reflections on the Relationship of Treaties and Soft Law”, 48 *International Law and Comparative Law Quarterly* 901 (1999) at 913; C. Chinkin, “The Challenge of Soft Law: Development and Change in International Law”, 38 *International Law and Comparative Quarterly* 850 (1989) 866. A. Pellet, “Complementarity of International Treaty Law, Customary Law and Non-Contractual Law-Making” in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer, 2005) 409, at 415; M. Goldmann, “Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority”, 9 *German Law Journal* (2008) 1865; A. von Bogdandy, P. Dann and M. Goldmann, “Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities”, 9 *German Law Journal* (2008) 1375; J. Tasioulas, “In Defence of Relative Normativity: Communitarian Values and The Nicaragua Case” 16 *Oxford Journal of Legal Studies* (1996) 85; D. Shelton, “International Law and ‘Relative Normativity’” in Malcolm D. Evans (ed.) *International Law* (Oxford, OUP, 2006) 159-185.

<sup>60</sup> For a recognition of the importance of the formalism commonly associated with those sources deemed traditional, see e.g. Prosper Weil, “Towards Relative Normativity in International Law?” 77 *American Journal of International Law* (1983), pp. 413-442; J. Hathaway, “American Defender of Democratic Legitimacy” 11 *European Journal of International Law* (2000) 121, at 128-129; F. Kratochwil, *Rules Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP Cambridge, 1989), p. 205; G. M. Danilenko, *Law-Making in the International Community*, Dordrecht, Martinus Nijhoff, 1993, at 21; C. Tomuschat, “International law: ensuring the survival of mankind on the eve of a new century: general course on public international law” 281 *Collected Courses* (1999) 9-438, at 26-29; K. Raustiala, “Form and Substance in International Agreements”, 99 *American Journal of International Law* (2005) 581; J. Klabbers, “Constitutionalism and the Making of International Law”, 5 *NoFo* (2008) 84 at p. 85 and at p. 103; G. Abi-Saab, “Cours général de droit international public”, 207 *Collected Courses* (1987-III) 9-463 at p. 35 et seq.; R. Jennings, “The Identification of International Law” in B. Cheng (eds.) *International Law: Teaching and Practice* (Stevens, London, 1982) 3, at p. 3.

Whatever this semantic diversity and the diverging agendas behind it, it is submitted here that the idea of tradition, in all the abovementioned invocations, always stands for a normative past that precedes the present of the claim in which it is mobilized. Indeed, notwithstanding the great semantic pluralism at work in the many references to tradition in the international legal discourse on the sources of international law, tradition always defer meaning to a pre-discursivity of sorts, that is, a past norm or a normative past that ought not to be validated or evidenced for the sake of the claim made in the present, as if it had already been validated or evidenced in the past. The traditional sources, the traditional approaches to sources, the formalist and non-formalist traditions of sources, the traditional fabric of international legal norms, the traditional concepts around which sources are articulated – to name only some of the few occurrences of invocation of tradition in the discourse on the sources of international law – are always held as an actuality with a fixed meaning that ought not to be demonstrated in the present for it has been ascertained in a time that precedes their invocation, as tradition, in the present.

In some earlier scholarship, I must acknowledge that I have myself toyed with the idea of ‘a traditional theory of the sources of international law’, which I related to the dominant discourse on the law-ascertainment mechanisms associated with Article 38 of the Statute of the International Court of Justice.<sup>61</sup> Back then, I even took a dim look at what I called non-traditional law-ascertainment methods. Let me say it bluntly: I now deeply regret such position for at least three reasons. First, I do not think it is possible to speak of a ‘theory of sources’, for theory, and its universalizing and totalizing ambitions, is yet another failed ambition of the modern mind,<sup>62</sup> and at best a programme of perception.<sup>63</sup> Second, I no longer think that the so-called traditional

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<sup>61</sup> Jean d’Aspremont, “The Politics of Deformalization in International Law”, 3 *Goettingen Journal of International Law* (2011), pp. 503-550; Jean d’Aspremont, *Formalism and the Sources of International Law* (OUP, 2011), esp. chapter 5.

<sup>62</sup> See Paul de Man, *The Resistance to Theory* (University of Minnesota Press, 1986), at 19; T. Adorno, *Negative Dialectics* (Continuum, 1981), at 4; Jean-François Lyotard, *La Condition Postmoderne* (Editions de Minuit, 1979), at 25; Roland Barthes, *Le bruissement de la langue. Essais critiques IV* (Seuil, 1984), at 80; Roland Barthes, *Leçon* (Seuil, 1978), at 16; Michel Foucault, *Dits et écrits*, II (Gallimard, 2001), 404.

<sup>63</sup> Pierre Bourdieu, *Ce que parler veut dire. L’économie des échanges linguistiques* (Fayard, 1982), at 150.

sources of international law, especially those associated with Article 38 of the Statute of the International Court of Justice, are more able to convincingly trace the contour of the legally binding universe of international lawyers than the so-called non-traditional sources. Indeed, I believe that the law-ascertainment criteria of both traditional and non-traditional sources are always caught in what I have called elsewhere “an indefinite deferral of meaning”<sup>64</sup> in that they are textual criteria whose meaning is found in other texts which themselves see their meaning pushed back indefinitely to other texts. Third, and this is the argument that I will develop in this section, I do not think that the very idea of tradition and its pointing to some sort of pre-discursivity, whatever it semantically stands for, can be reconciled with the sources of international law and their modern ambition to ground international law in present discourse.

It is argued in this section that the discursive tension identified in the previous section – whereby a modern discourse allows space for the mobilization of pre-discursive past – comes to a head in the international legal thought and practice pertaining to the sources of international law. Indeed, as was alluded to in the previous section, the sources of international law are the linchpin of the constitution of international law as a modern discourse, that is, a discourse that is self-sufficient, autonomous, and grounded in the actuality of the world.<sup>65</sup> More specifically, the sources of international law constitute a device that enables international law to be independent from a pre-discursive past and to constantly present itself as a production of the actual present. In that sense, the sources of international law can be construed as the discursive device that is most instrumental in the rejection of any kind of pre-discursivity and in the creation of international legal discursivity in the present. There is thus a major tension in having the sources of international law, as the modern barrier against all kind of pre-discursivity, hinting at the possibility of mobilizing a pre-discursive past to ascertain international legal rules in the present. From the vantage point of the modernist aspirations of the sources of international law, tradition, i.e. a reference to a pre-

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<sup>64</sup> Jean d’Aspremont, *After Meaning. The Sovereignty of Forms in International Law* (Edward Elgar, 2021). See also Jean d’Aspremont, “Current Theorizations about the Treaty in International Law” in Duncan Hollis (ed.), *The Oxford Guide to Treaties* (OUP, 2<sup>nd</sup> edition, 2020) 46.

<sup>65</sup> See Jean d’Aspremont, “International Law and the Rage against Scienticism”, 33 *European Journal of International Law* (2022), 679–694. See Jean d’Aspremont, *The Discourse on Customary International Law* (OUP, 2021), esp. 1-13.

discursive past, has no place in the most modern of all discursive constructions around which international law is articulated, especially that which is meant to make international law independent from any pre-discursive past.

It is further argued here that the abovementioned tension reaches a pinnacle in the very resort to the distinction between traditional and non-traditional sources of international law, as is the case in the present volume. In fact, there is nothing more incongruous than the idea of the sources of international law being traditional or non-traditional. Actually, more than the idea of *non-traditional* sources, it is that of *traditional* sources that collides with the very modernity which the sources of international law are meant to enable. Indeed, all sources of international law, out of a discursive necessity, are always non-traditional. In other words, there cannot be such a thing as traditional source, for the sources are a mechanism meant to reject pre-discursivity and always the constant identification of rules in the present.

The claim made here about the incongruity of the idea of tradition in the discourse on the sources of international law could be met with two objections which warrant some attention here. One much anticipated objection relates to the role of tradition in the doctrine of customary international law. It is commonly assumed that customary international law constitutes a traditional source of international law, one that is of a pre-discursive nature for it predates modern international law.<sup>66</sup> From this perspective, there would not be anything incongruent in associating tradition and the sources of international law as one of the main sources of international law supposedly predates the consolidation of international law as a modern discourse.

Yet, as I have argued elsewhere, customary international law is *not* the surviving trace of a traditional law-making mechanism that used to be found in so-called ancient societies. In fact, the doctrine of customary international law is everything but ancient. On the contrary, there is hardly any doctrine of international law that contains so many of the features of modern thinking. The most prominent of such modern features is the idea of production which systematically informs the way in which customary

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<sup>66</sup> This is a claim commonly witnessed in the legal literature. See D. J. Bederman, *Custom as a Source* (CUP, 2010). See also the remarks of Emily Kadens, "Custom's Past", in Curtis A. Bradley (eds), *Custom's Future. International Law in a Changing World* (CUP, 2016), 11; Hugh Thirlway, *The Sources of International Law* (2<sup>nd</sup> ed., OUP, 2019), at 60.



international law is thought, theorized, argued, and practiced.<sup>67</sup> Indeed, customary international law commonly refers to a process of production of legal normativity through human institutions or activities, which is the manifestation of a modern pattern of thought.<sup>68</sup> The whole development of the doctrine of customary international law in the 19<sup>th</sup> century<sup>69</sup> and its refinement in the 20<sup>th</sup> century can be construed as the organization and systematization of this idea of production inherited from modernity. And it is no coincidence that the production is commonly envisaged as a process of *self-production*, that is, a process of production where the authors and the addressees of the customary norm are conflated.<sup>70</sup> This echoing of the social contract is another manifestation of customary international law's modernism. In that regard, it is not surprising that this idea of self-production at the heart of customary international law was first theorized through the idea of tacit consent in the 19<sup>th</sup> century.<sup>71</sup> Although the

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<sup>67</sup> On the idea that the question of production of human artefacts and human discourses is very modern, see Michel de Certeau, *L'écriture de l'histoire* (Gallimard, 1975), at 27-28.

<sup>68</sup> On these two aspects of the doctrine of sources in general, see Jean d'Aspremont and Samantha Besson, "Introduction", in Samantha Besson and Jean d'Aspremont (eds.), *Oxford Handbook on the Sources of International Law* (OUP, 2017). See also the remarks of H. Charlesworth, "Law-Making and Sources", in J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law* (CUP, 2012), 187.

<sup>69</sup> See Anthony Carty, *The decay of international law. A reappraisal of the limits of legal imagination in international affairs* (Manchester University Press, 2019), 59-80. See also Milos Vec, "Sources of International Law in the Nineteenth-Century European Tradition: the Myth of Positivism", in Samantha Besson and Jean d'Aspremont (eds.), *Oxford Handbook on the Sources of International Law* (OUP, 2017), 121; Lauri Malksoo, "Sources of International Law in the Nineteenth-Century European Tradition: Insights from Practice and Theory", in Samantha Besson and Jean d'Aspremont (eds.), *Oxford Handbook on the Sources of International Law* (OUP, 2017) 165.

<sup>70</sup> See the remarks of Hugh Thirlway, *The Sources of International Law* (2<sup>nd</sup> ed., OUP, 2019), at 61.

<sup>71</sup> For some illustrations of an understanding of custom built on tacit consent, as well as some remnants thereof, see H Triepel, *Völkerrecht und Landesrecht* (Scientia Verlag, Aalen, 1899); K Strupp, *Elements du droit international public* (Rousseau & Co, 1927); T Lawrence, *The Principles of International Law* (7<sup>th</sup> ed, 1915); John Westlake, *International Law*, (1904), 14; D Anzilotti, *Scritti di diritto internazionale pubblico* (Cedra Padova, 1956-7) 1, 38, 95ff; GI Tunkin, *Theory of International Law* (Harvard University Press, 1974) 124; C Chaumont, 'Cours général de droit international public' 129 *Collected Courses* (1970) 333, 440. For an attempt to modernise the consensual conception of customary international law, see A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008), 70-107; A D'Amato 'Treaties As a Source of General Rules of International Law' 3 *Harvard International Law Journal* (1962) 1. For some classic criticisms of such a convention-based approach to customary law, see H Lauterpacht, "Decisions of Municipal Courts as a Source of International Law" (1929) 10 *British Yearbook of International Law* 65, 83; J Brierly, *The Law of Nations* (5<sup>th</sup> ed, 1955), 52; J Kunz, "The Nature of Customary International Law" 47 *American Journal of International Law* (1953) 662, 664. For an overview of 19<sup>th</sup> century understanding of customary law as tacit consent, see Anthony Carty, *The decay of international law. A reappraisal of the limits of legal imagination in international affairs* (Manchester University Press, 2019), 61-65. For the resilience of the association between custom and consent in international legal thought, see however

refinement of the doctrine of customary international law in the 20<sup>th</sup> century drew the idea of self-production away from tacit consent,<sup>72</sup> the consolidation of the two-element variant of the doctrine of customary international law in the 20<sup>th</sup> century can be construed as a reinvention of the self-production at the heart of customary international law and a preservation of the conflation between authors and addressees of the norm short of consent.<sup>73</sup> This modern idea of self-production informing the understanding of customary international law is supposed to make customary international law work as a mechanical process and allow its normative product to be independent from a pre-discursive past, a position which the International Court of Justice seems to have vindicated in its canonical *North Sea Continental Shelf* case with respect to the concept of *opinio juris*.<sup>74</sup>

Another fundamental manifestation of customary international law's modernism,<sup>75</sup> which disparages claims that customary international law corresponds to a tradition-based mode of law-ascertainment, is found in the constant attempt of

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John Tasioulas, "Custom, Jus Cogens, and Human Rights", in Curtis A. Bradley (eds), *Custom's Future. International Law in a Changing World* (CUP, 2016), 95; Niels Petersen, "The Role of Consent and Uncertainty in the Formation of Customary International Law", in Brian D. Lepard, *Reexamining Customary International Law* (CUP, 2017) 111.

<sup>72</sup> In the same vein, see Hugh Thirlway, *The Sources of International Law* (2<sup>nd</sup> ed., OUP, 2019), 61-62.

<sup>73</sup> Some authors continue to associate the sources of international law with voluntarism. See Venzke, *How Interpretation Makes International Law*, 1-2. The idea that crude voluntarists have never existed and that voluntarism has been a straw man is discussed in R Collins, "Classical Positivism in International Law Revisited" in J Kammerhofer and J d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014), 23-49. For a similar distinction, see S. Besson, *Theorizing the Sources of International Law*, in In Samantha Besson & John Tasioulas (eds.), *The Philosophy of International Law* (OUP, 2010) 163, at 166.

<sup>74</sup> *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 3, 44 (para. 77) ("The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty").

<sup>75</sup> The invocation of "nature" as the ultimate truth-claiming criteria is a common feature of modern technical discourses. See gen. Bruno Latour, *Science in Action: How to Follow Scientists and Engineers Through Society* (Harvard University Press, 1987).

customary international law to enable international law to “speak real”. This means that, thanks to customary international law, international law can be represented and can function as an emanation of the actual world “out there”.<sup>76</sup> The modernism of such a feature of customary international law can be explained as follows. Although not unheard of in pre-classical international legal thought,<sup>77</sup> the necessity for international law to be represented and to function as an emanation of the actual world is a construction that came to be systematized in classical international legal thought – and especially in the work of Vattel and Martens.<sup>78</sup> Back then, the actual world in which international law had to be grounded meant the will of States and it gained further currency in the 19<sup>th</sup> century.<sup>79</sup> Although the 20<sup>th</sup> century reaffirmed the necessity to ground international law in the actual world, the way in which it is understood subsequently underwent significant development and ceased to be simply reduced to the will of State. In fact, 20<sup>th</sup> century international law took issue with the idea that the

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<sup>76</sup> This necessity to speak the real is what Martti Koskenniemi has referred to as the requirement of “concreteness” of international legal argument. See Martti Koskenniemi, *From Apology to Utopia* (CUP, 2005), 17-23.

<sup>77</sup> Indeed, authors from the 17<sup>th</sup> and 18<sup>th</sup> century, while prioritizing moral needs in international legal discourse, recognized that international law could partly be an emanation of the actual world. See S. Pufendorf, *On the Law of Nature and of Nations*, (translated by CH Oldfather and WA Oldfather) (Clarendon Press, Oxford, 1934, originally 1672). See C. Wolff, *Law of Nations Treated According to A Scientific Method* (translated by JH Drake) (Clarendon Press, Oxford, 1934).

<sup>78</sup> The 1758 work of Emmerich de Vattel, while perpetuating some of the assumptions of his predecessors regarding the necessity of natural law, made the need to ground international law in the actual world – which he reduced to the will of the States – the main cause of international law. Even more decisive was Georg Friedrich de Martens’ radical move away from the moral necessities of natural law and the systematization of international law through treaty and custom *fondé sur les traités et l’usage*. With Martens, the need to ground international law in the actual world became the exclusive cause of international law, and thus he steered international law discourse precisely in this direction. See E. de Vattel, *The Law of Nations*, (translated by Frenwick) (Carnegie Institution of Washington, Washington DC 1916). See gen. Georg Friedrich von Martens, *Précis du droit des gens moderne de l’Europe fondé sur les traités et l’usage* (Dieterich, 1789).

<sup>79</sup> See e.g. H. Wheaton, *Elements of International Law* (1836); R. Phillimore, *Commentaries upon International Law*, 4 vols, (AG Benning, London, 1854-1861); T. D. Woolsey, *Introduction to the Study of International Law*, 4<sup>th</sup> ed. (Scribnerm Amstrong & Co, New York, 1877). It should be noted that some of these, whilst making the need to ground international law in the actual world very central, continued to accommodate the idea that international legal discourse must respond to reason or natural law, or sometimes the will of God. It has been claimed that the necessity to ground international law in the actual world that arose in the 19<sup>th</sup> century and was part of an overarching dialectical mode of argumentation that simultaneously required the espousal of some utopian principles. It was also said that, for 19<sup>th</sup> century authors, responding to the actual world was a strategy to avoid being utopian. This is the thesis defended by Martti Koskenniemi in *From Apology to Utopia* (CUP, 2005), 71-157

basis of international law is provided by the will of States.<sup>80</sup> Rather, it reinvented its understanding of the actual world in which international law ought to be grounded, ceased to reduce it to the will of States, and generalized the idea of (State) *practice* which any international legal claim or argument is now expected to respond to or draw on. This modern necessity to ground international law in the actual world – and more specifically in this renewed notion of practice under the umbrella of which the actual world came to be captured – found a very specific expression in the doctrine of customary international law, which similarly underwent a move from the tacit consent of States to practice proper in the 20<sup>th</sup> century.<sup>81</sup> The elevation of practice into a constituent element of customary international law, and thus enabling international law to be grounded in the actual world “out there”, is a vivid reminder of the very modernism that informs customary international law and confirms that this law cannot be simply reduced to a mode of generation of normativity associated with tradition.

Another possible objection against the claim made in this section – that tradition cannot be reconciled with the sources of international law given their modern attempt to anchor international law in the actuality of the world and present discourse while keeping all pre-discursivity at bay – could be inferred from the common historicization in which international lawyers engage whenever they make an international legal argument.<sup>82</sup> In fact, it could be argued that retrieving, reconstructing, and giving

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<sup>80</sup> 20<sup>th</sup> century international lawyers came to develop a sophisticated doctrine of sources meant to mediate between the will of States and the legal forms by which a rule would be recognized as a legal rule. On the rise of the doctrine of sources, see Jean d’Aspremont, *Formalism and the sources of international law* (OUP, 2011), 38-82.

<sup>81</sup> See *supra* note 56.

<sup>82</sup> Anne Orford, ‘On international legal method’ 1 *London Review of International Law* (2013) 166, 172 and 175 (“After all, as lawyers, particularly those of us with common law backgrounds, we are trained in the art of making meaning move across time”); Anne Orford, ‘International Law and the Limits of History’ in W Werner and others (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (CUP 2015) 297; Thomas Kleinlein, ‘International Legal Thought: Creation of a Tradition and the Potential of Disciplinary Self-Reflection’ in Giuliana Ziccardi Capaldo, *The Global Community: Yearbook of International Law and Jurisprudence 2016* (OUP 2016) 811, 812; See also Matthew Craven, ‘The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law’ in Luigi Nuzzo and Miloš Vec, *Constructing International Law: The Birth of a Discipline* (Klostermann 2012) 4. Kate Purcell, ‘Faltering at the Critical Turn to History: ‘Juridical Thinking’ in International Law and Genealogy as History, Critique, and Therapy’ (2016) *Jean Monnet Working Paper Series*, JMWP 02/15, 13-15. It is interesting to note that such claim has been made in relation to philosophy as well, for instance by Hegel. On this point, see T Rockmore, ‘Hegel’ in Aviezer Tucker (ed), *A Companion to the Philosophy of History and Historiography* (Wiley-Blackwell 2011)

meaning to past texts, doctrines, concepts, and practices for the sake of the present constitutes a central component in the making of international legal discourses.<sup>83</sup> Whether in practice or scholarship, scrutinising past texts, doctrines, concepts, and practices and organizing them in a meaningful way<sup>84</sup> has long been a necessary step in the making of legal arguments, certainly since the ‘modernization’ of international law. From this perspective, the sources of international law could be read as the device that systematizes historicization and makes the invocation of past practice or past forms central in the formulation of international legal arguments.<sup>85</sup> According to such objection, the sources of international law necessarily make international lawyers seasoned historians of past practices and past forms, thereby making them masters of traditions.<sup>86</sup>

This second objection against the incongruence between tradition and the sources of international law must similarly be rejected. It is true that international legal discourse, like any discourse, allows one to move back and forth from the present discourse to its immediate past. International law is no exception to that.<sup>87</sup> In fact, it is very common for international lawyers to refer to past judicial decisions, past treaties, past practice constitutive of a customary rule or of a given interpretation, past

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468, 474. See the remarks of M Koskenniemi, ‘Epilogue’ in W Werner and others, *The Law of International Lawyers. Reading Martti Koskenniemi* (CUP 2017) 406-407.

<sup>83</sup> For this reason, it has been argued that the distinction between law and history is a modern invention. See Anne Orford, “The Past as Law of History? The Relevance of Imperialism for Modern International Law” (2012) University of Melbourne Legal Studies Research Paper 600, 8 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2090434](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2090434)> accessed 14 June 2018.

<sup>84</sup> Michael S Roth ‘Foreword: “All You’ve Got is History”’ in Hayden White, *Metahistory. The Historical Imagination in the 19<sup>th</sup>-Century Europe* (JHU Press, 2014) ix.

<sup>85</sup> In the same vein, Rose Parfitt, “The Spectre of Sources” 25 *European Journal of International Law* (2014) 297, 298 (“The classical doctrine of sources, as it emerged in the 19<sup>th</sup> century, eventually to be codified in Article 38(1) of the ICJ Statute, leaves no doubt as to the historical character of international law’s claim to authority and legitimacy – of its claim to be law”).

<sup>86</sup> Such aphorisms are common in international legal literature. It is nowadays common to say, not without a great deal of oversimplification, that all international law are realists (See H Cohen, “Are We (Americans) All International Legal Realists Now?” in Chiara Giorgetti and Guglielmo Verdirame (eds), *Concepts on International Law in Europe and the United States* (CUP, 2021), 33-52) or that they are all formalists (see Jean d’Aspremont, *International Lawyers and Legal Forms: Transatlantic Denials in Chiara Giorgetti & Guglielmo Verdirame (eds), Concepts on International Law in Europe and the United States* (CUP, 2021), 13-32) or that they are all critical (see Jean d’Aspremont, “Martti Koskenniemi, the Mainstream, and Self-Reflectivity” 29 *Leiden Journal of International Law* (2016) 625-639).

<sup>87</sup> Jean d’Aspremont, “Time Travel in the Law of International Responsibility” in S. Besson (Ed.), *Theories of International Responsibility Law* (CUP, 2022), pp. 252-276.



authoritative literature, past ideologies and political projects, etc. Yet, such references to the past do not constitute any kind of tradition as it is understood in this chapter. Indeed, the past that is invoked in these instances is never pre-discursive but belongs to the temporality of present international legal discourse. Such past is always part of present international legal discourse and is constituted through the categories, forms and intelligibility frameworks of that discourse. Said differently, invoking past judicial decisions, past treaties, past practice, past authoritative literature, past ideologies and political projects, etc. always entails the anachronistic and constitutive projection of present categories, forms and intelligibility frameworks of international legal discourse to an immediate past that is bound to be part of the present of that discourse.<sup>88</sup> There simply is no past outside present international legal discourse, and hence the historicization at work in international lawyers' arguments are always a discursive event in the present.<sup>89</sup>

For all these reasons, the idea of tradition sits uncomfortably with the sources of international law. Whether one speaks of the distinction between traditional and non-traditional sources of international law, the traditional approaches to customary international law, the formalist and anti-formalist traditions of the sources of international law, the traditional international law fabric, the traditional concept of *opinio juris*, etc. there cannot be a place for pre-discursivity in any modern construction, like the sources of international law, that seeks to ensure that the discourse is self-sufficient, grounded in the actuality of the world, and independent from any pre-discursive past.

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<sup>88</sup> Anne Orford, *International Law and the Politics of History* (CUP, 2021); Jean d'Aspremont, "International Law and the Rage against Scientism", 33 *European Journal of International Law* (2022), 679–694.

<sup>89</sup> The same goes for the – very compelling – invocation of the dark colonial past and present of international law. See gen. Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005); Makau Mutua, "What is TWAIL?" 94 *American Society of International Law Proceedings* (2000) 31; Antony Anghie, "The Evolution of International Law: colonial and postcolonial realities" 27 *Third World Quarterly* (2006) 740; B S Chimni, "Third World Approaches to International Law: A Manifesto" 8 *International Community Law Review* (2006) 18; Makau Mutua, "Savages, Victims and Saviors: The Metaphor of Human Rights" 42 *Harvard International Law Journal* (2001) 201.

#### **4. Concluding remarks: a discursive debacle?**

This chapter has tried to show the great tension that lies at the heart of a modern discourse, like international law, that seeks to be self-sufficient and grounds itself in the actuality of the world while making space for the possibility of invoking tradition, understood here as a reference to a pre-discursive past. It has been argued in the previous sections that the sources of international law, as a linchpin of international law's autonomy, self-sufficiency and grounding in the real, are not commensurable with any law-ascertainment role bestowed on pre-discursivity. And yet, as was discussed in this chapter, tradition has remained frequently mobilized by international lawyers in international legal thought and practice, including in relation to the sources of international law.

That tradition, and thus the reference of a pre-discursive past, continues to be invoked in international legal thought and practice, is certainly something that ought not to be deplored or lamented. Discursive coherence and the lack of tensions have never been an ideal in itself. A discourse, like international law, is not better, let alone less efficacious, because it is short of tensions or denotes discursive unity. It is not even certain that a discourse can ever ensure that all the devices and technologies around which it is articulated neatly hang together. More importantly, it has long been shown that modern discourses have failed to fully realize their modern ambitions, especially when it comes to self-grounding, autonomy and the demotion of pre-discursivity to the outside of the discourse.<sup>90</sup> In that sense, that international law and the doctrine of the sources of international law regularly make space for pre-discursivity is only a manifestation of modernity's disproportionate and unrealistic ambitions. Said differently, the enduring connection between pre-discursivity and the sources of international law is not the only modern arrangement that has misfired, the modern devices of self-referentiality<sup>91</sup> and of meaning-centrism<sup>92</sup> having similarly foundered.

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<sup>90</sup> See supra note 56.

<sup>91</sup> Jean d'Aspremont, *International Law as a Belief System* (CUP, 2017).

<sup>92</sup> Jean d'Aspremont, *After Meaning. The Sovereignty of Forms in International Law* (Edward Elgar, 2021).

If one ought not to bewail the continuous eruptions of pre-discursivity in international legal thought and practice related to the sources of international law, one may however remain mystified by international lawyers' lack of acknowledgement of the modern impasse they are in. Such shortsightedness is maybe why tradition is bound to continue to govern the world and the modern minds that populate it for a long time.