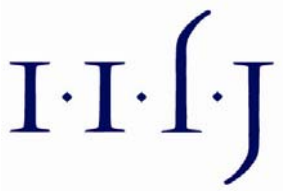

Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2012
Convened by Professors Benedict Kingsbury and Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown, unless otherwise noted

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

January 25 Harlan Grant Cohen, *University of Georgia*
"Finding International Law, Part II: Our Fragmenting Legal Community"

February 1 Anthea Roberts, *London School of Economics / Visiting Professor at Harvard University*
"Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System"

February 8 Odette Lienau, *Cornell University*
"Rethinking Sovereign Debt: The Politics of Reputation in the Twentieth Century"

February 29 Nico Krisch, *Hertie School of Governance (Berlin) / Visiting Professor at Harvard University*
"From Consent to Consultation: International Law in an Age of Global Public Goods"

March 21 Doreen Lustig, *New York University*
"The Business of International Law: International Legal Attitudes Toward the Business Enterprise, 1870-1954"

April 3 Jean d'Aspremont, *University of Amsterdam*
"Formalism and the Sources of International Law" (*excerpts*)

April 4 Martti Koskenniemi, *University of Helsinki / New York University / Visiting Professor at Columbia University*
"International Law and the Emergence of Mercantile Capitalism: Grotius to Smith"

April 17 Horatia Muir Watt, *Sciences Po*
"Global Governance and Private International Law"
[to be held, exceptionally, on a Tuesday at 4pm; location TBA]

April 18 Armin von Bogdandy & Matthias Goldmann, *Max Planck Institut, University of Heidelberg / New York University*
"Sovereign Debt"

1

Introduction

1.1 Setting the stage: the retreat from formal law-ascertainment

Law is a process in that it is both the product and the source of a flux of various dynamics which static formal concepts inevitably fail to capture. Once the object of much controversy, this assertion is nowadays uncontested. Yet, law is not only a process. Law also constitutes a set of *rules* which, at times and for multiple purposes, need to be ascertained. While not excluding the dynamic character of the whole phenomenon of law, this study primarily approaches international law as a set of rules.

The ascertainment of international legal rules had, until recently, remained a central concern of the international legal scholarship which has long elevated the elaboration of criteria for the identification of law—through a theory of the sources—into one of its paramount tasks.[1] However, the quest for a consensus on the criteria necessary for the identification of international legal rules no longer occupies a prominent position on the contemporary agenda of international legal scholars. Indeed, international legal scholars are becoming much less sensitive to the necessity of rigorously distinguishing law from non-law. Normativity has been correlatively construed as a *continuum*[2] and the identification of law has grown into 'a matter of "more or less"'.[3] This growing acceptance of the idea of a penumbra between law and non-law has provoked a move away from questions of law-ascertainment, increasingly perceived as irrelevant. A correlative greater feeling of liberty has followed, paving the way for the use of a wide variety of looser law-identification criteria.

[1] This has been particularly the case in European continental traditions of international law. See e.g. P.-M. Dupuy, 'Cours général de droit international public' (2002) 297 RCADI 9–490, 205) or P. Reuter, 'Principes de droit international public' (1961) 103 RCADI 425–655, 459.

[2] For some famous support to the idea of normative continuum, see R. Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 ICLQ 549, 563; O. Schachter, 'The Twilight Existence of Non-binding International Agreements' (1977) 71 AJIL 296; A. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 ICLQ 901, 913; C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850, 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, Berlin, 2005) 409, 415.

[3] The expression is from M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (CUP, Cambridge, 2005) 393.

The retreat from the question of ascertainment has also been dramatically accentuated by the undeniable finding that much of the international normative activity takes place outside the remit of traditional international law, and that only a limited part of the exercise of public authority at the international level nowadays materializes itself in the creation of norms which can be considered international legal rules according to a classical understanding of international law. Indeed, international norm-making has undergone an intricate and multi-fold pluralization. First, normative authority at the international level is no longer exercised by a closed circle of high-ranking officials acting on behalf of States, but has instead turned into an aggregation of complex procedures involving non-State actors.[4] As a result, public authority is now exercised at the international level in a growing number of informal ways which are estranged from the classical international law-making processes.[5] Second, traditional international law-making processes themselves have endured a process of pluralization, which has manifested itself in a diversification of the types of instruments through which norms are produced at the international level. Eventually, the effects of these pluralized exercises of public authority have gradually ceased to be confined to their sphere of origin, for law has grown more post-national and the international and domestic spheres have become more entangled.[6] This complex pluralization of norm- and law-making processes at the international level has, in turn, fractured the *substance* of the norms produced, including that of international legal rules. In that sense, the pluralization of international norm- and law-making processes has been accompanied by a diversification of international legal norms themselves.

These manifestations of normativity outside the remit of international law are not entirely new but they have grown extremely diverse, fragmented, and of an unprecedented degree. Whether they are perceived as the reflection of a healthy pluralism or a daunting fragmentation,[7] these various forms of pluralization of international

[4] This has sometimes been called 'verticalization'. See J. Klabbers, 'Setting the Scene', 14, in J. Klabbers, A. Peters, and G. Ulfstein (eds), The *Constitutionalization of International Law* (OUP, Oxford, 2009). On the role of non-state actors more specifically, see J. d'Aspremont (ed), *Participants in the International Legal System—Multiple Perspectives on Non-State Actors in International Law* (Routledge, London, 2011).

[5] See M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* (2008) 1865 and A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* (2008) 1375.

[6] N. Krisch, *Beyond Constitutionalism—The Pluralist Structure of Postnational Law* (OUP, Oxford, 2010), 6–11.

[7] On the discourses about the pluralization of the substance of law see M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 MLR 1–30; See also M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, Cambridge, 2005) 392–4. M. Prost,'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation' (2006) 17 FYBIL 131–59 or M. Prost, *The Concept of Unity in Public International Law*, Hart Monographs in Transnational and International Law (Hart, Oxford, 2011) (forthcoming); see also A.-C. Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 LJIL 1–28.

norm- and law-making processes have further cast into doubt the relevance of traditional international law-ascertainment. Indeed, confronted with such a pluralized normative activity at the international level, international lawyers have endured a greater inability to capture these developments through classical concepts, which has further enticed them to take some freedom with law-ascertainment with a view to more easily engaging with the multiplication of these pluralized forms of norm-making.[8] In this context, the idea that formal law-ascertainment has grown inappropriate to capture contemporary international norms has become even more prevalent.[9]

This overall liberalization of the ascertainment of international legal rules has resulted in contemporary scholarly debates in the field of international law turning more cacophonic. Indeed, scholars often talk past each other.[10] The impression is nowadays rife that the international legal scholarship has become a cluster of different scholarly communities, each using different criteria for the ascertainment of international legal rules. For a long time, such a cacophony had been averted by virtue of a systematic use of commonly shared formal law-ascertainment criteria. Despite occasionally resting on artificial constructions,[11] this use of formal criteria for the identification of international legal rules allowed international lawyers to reach a reasonable consensus as to how to distinguish between law and non-law. Generations of international lawyers were trained[12] to identify international legal rules by virtue of the formal source from which they emanate, a blueprint that has

[8] One of the first studies on Transnational Regulatory Networks (TRNs), see Anne-Marie Slaughter, *A New World Order* (Princeton UP, Princeton, 2004); see also the project on Global Administrative Law. See B. Kingsbury, N. Krisch, and R. Steward, 'The Emergence of Global Administrative Law' (2005) 68 LCP 15–61, 29; C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 EJIL 197–214; see also B. Kingsbury, 'The Concept of Law in Global Administrative Law' (2009) 20(1) EJIL 23–57. See also the project of the Max Planck Institute for Comparative Public Law and International Law on the international exercise of public authority. See M. Goldmann, 'Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* 1865 and A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375. Some of the projects are discussed below.

[9] B. Kingsbury and M. Donaldson, 'From Bilateralism to Publicness in International Law', *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP, Oxford, 2011) (forthcoming) 79, 89; N. Krisch, *Beyond Constitutionalism—The Pluralist Structure of Postnational Law* (OUP, Oxford, 2010) 12; J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (CUP, Cambridge, 2010) 46; F. Megret, 'International Law as Law', in J. Crawford and M. Koskenniemi (eds), *Cambridge Companion to International Law* (CUP, Cambridge, 2011) (forthcoming), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672824>, 20.

[10] I already made this point in J. d'Aspremont, 'Softness in International Law: A Rejoinder to Tony D'Amato' (2009) 20 EJIL 911–17.

[11] The most obvious of them—although not always perceivable as such thanks to the formal veils under which it has been shrewdly shrouded—being customary international law. Cfr *infra* 7.1 and 7.2.1.

[12] On the training of international lawyers, see generally the remarks of A. Orford, 'Embodying Internationalism: the Making of International Lawyers' (1998) 19 Aust. YBIL 1. See more generally, M. Foucault, *L'archéologie du savoir* (Paris, Gallimard, 1969).

continuously been perpetuated until recently. The prominence of formal law-ascertainment in the international legal scholarship has, however, come to an end as a result of the abovementioned move away from formal identification of law.[13]

Obviously not all lawyers and scholars have turned a blind eye to law-identification. Yet, among those that still deem it necessary to take pains to identify international legal rules, other blueprints of law-ascertainment have been preferred to the traditional formal yardsticks widely in use until recently. For instance, a growing number of scholars and lawyers, drawing on a disconnect between the international rules identified by formal law-ascertainment mechanisms and commands actually relied upon by actors, have decided to revamp their law-ascertaining criteria by shifting from source-based to effect- (or impact-)based[14] approaches, thereby bypassing completely any formal identification of law. Because they require enhanced legitimacy of law to ensure compliance, these effect- (or impact-)based law-ascertainment blueprints have further lured them away from the question of law-ascertainment. The international legal scholarship has also experienced a revival of process-based conceptions of law-identification which have similarly accentuated the current deformalization of the identification of international legal rules.[15] These

[13] J. Klabbers, 'Constitutionalism and the Making of International Law' (2008) 5 NoFo 84, 89. Such a finding was already made by Virally: M. Virally, 'A Propos de la "Lex Ferenda"', in Daniel Bardonnet (ed), *Mélanges Reuter: le droit international: unité et diversité*, (Paris, Pedone, 1981) 519–33, 521. Albeit for different reasons which are explored later, this finding has also been made by scholars affiliated to deconstructivism and critical legal studies. See e.g. M. Koskenniemi, *From Apology to Utopia* (CUP, NY, 2005), 393.

[14] For a few examples, see J. Alvarez, *International Organizations as Law-makers* (OUP, Oxford, 2005); For J. Brunnée and S.J. Toope, international law ought to be defined by the sense of obligation among its addressees, which indirectly grounds law-ascertainment in the impact of rules on their addressees. See J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (CUP, Cambridge, 2010) 7 ('The distinctiveness of law lies not in form or in enforcement but in the creation and effects of legal obligation'). Their interactional account of international law is further examined below. Cfr *infra* 5.1. A similar use of non-formal law-identification criteria can be found in the studies about non-state actors. See e.g. A. Peters, L. Koechlin, T. Förster, and G. Fenner Zinkernagel, 'Non-state actors as standard setters: framing the issue in an interdisciplinary fashion', in A. Peters, et al. (eds), *Non-State Actors as Standard Setters*, (CUP, Cambridge, 2009) 1–32. These effect-based approaches must be distinguished from the subtle conception defended by F. Kratochwil based on the *principled rule-application* of a norm which refers to the explicitness and contextual variation in the reasoning process and the application of rules in 'like' situations in the future: *Rules Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP, Cambridge, 1989) 206–8. See also F. Kratochwil, 'Legal Theory and International Law', in D. Armstrong (ed), *Routledge Handbook of International Law* (Routledge, London, 2009) 58. Likewise, effects-based conceptions must be distinguished from the conceptions based on expectations and the relative normativity of the Heidelberg project on the international exercise of public authority. See in this respect the very interesting work of M. Goldmann, 'Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* 1865 and A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375. While adhering to a non-formal law-identification criteria, these authors have tried to formalize it. Some of these examples are discussed in chapter 5 below.

[15] See e.g. R. Higgins, *Problems and Process: International Law and How We Use It* (OUP, Oxford, 1995) 8–10. The work of the New Haven Law School is further discussed below at 3.2.3. For another illustration of the contemporary tendency towards process-based law-identification, see P. S. Berman,

various types of deformalization of law-ascertainment in the theory of the sources of international law have, in turn, aggravated the scholarly cacophony generated by the abovementioned move away from questions of law-ascertainment witnessed in the international legal scholarship.

1.2 The argument: rejuvenating formalism in the theory of the sources of international law

It is against the backdrop of this sweeping retreat away from formal international law-ascertainment, that this book not only calls for the preservation of the distinction between law and non-law, but makes a plea for some elementary formalism in the theory of the ascertainment of international legal rules. While *not* being construed as a tool to delineate the whole phenomenon of law—and especially the flux of dynamics at the origin of the creation of legal rules, the content thereof, or the sense of obligation therein[16]—or a theory to describe the operation of international law, formalism is solely championed here for its virtues in terms of distinguishing law from non-law and ascertaining international legal rules.

Nowadays, advocating formalism in the theory of the sources of international law may certainly sound idiosyncratic. The contradictions of formalism have long been unearthed and formalism has unanimously grown to be the culprit of many of the ailments of international law. This book does not seek to obfuscate the undeniable limits of formalism in legal argumentation or to rebut these criticisms. Indeed, the formalism that is discussed here is alien to the classical formalist theory of immanent intelligibility and adjudicative neutrality which have particularly been the target of realist and, later, the powerful postmodern critiques. The book rather makes the case for a preservation of formalism in the theory of the sources of international law for the sake of the ascertainment of international legal rules and the necessity to draw a line between law and non-law.

Preserving the centrality of formalism in the theory of the sources of international law, however, requires more than mere repetition of the old formal templates. The rejuvenation attempted here first necessitates that the illusions of formalism that accompany the ascertainment of customary international law, or that of certain international legal acts, be dispelled. Revealing the mirage of formalism that lies behind some of the existing sources of international law does not amount to a call for an abolition of such modes of creation of international law. It simply aims at raising awareness of the cost and contradictions of the non-formal law-ascertainment that lies behind sources like customary international law. By the same token, revitalizing formalism at the level of the ascertainment of international rules also necessitates that

'A Pluralist Approach to International Law' (2007) 32 Yale J. Int'l L. 301. For a hybrid law-ascertainment approach based on both effect and processes, see H.G. Cohen, 'Finding International Law: Rethinking the Doctrine of Sources' (2007) 93 Iowa L. Rev. 65.

[16] This is further explained in the following chapter. Cfr *infra* 2.1.1.

some paradigms of the postmodern[17] critique of formalism be taken into account. It simultaneously calls upon us to move away from the current intent-based identification of international legal acts found in the mainstream theory of the sources of international law. In sum, the rejuvenation of formalism in the ascertainment of international legal rules undertaken in this book involves both the abandonment of the fallacious formal trappings of some of the existing sources of international law—like customary international law—while requiring that the theoretical foundations of formalism in the ascertainment of international legal acts, like treaties, be revisited.

The foregoing shows that the revitalization of formalism in the theory of the sources of international law attempted in the following chapters cannot be construed as yet another objection against the already much-discussed phenomenon of 'relative normativity'.[18] Indeed, relative normativity, as was constructed by international legal scholars,[19] includes a wide array of different departures from a legal system made of strictly horizontal and bilateral rules: the establishment of hierarchies of norms (*jus cogens*), the generalization of obligations *omnium*, or the universalization of the interest States may have in the application of legal obligation contracted by others (*obligations erga omnes*). It is true that the abovementioned deformalization ongoing in the theory of the sources of international law inextricably reinforces some dimensions of the phenomenon of relative normativity. However, relative normativity being a much wider phenomenon, the present argument does not seek to contain the development of this. Indeed, the rejuvenation of formalism in the ascertainment of international legal rules advocated in this book does not seek to do away with the other manifestations of relative normativity, and in particular the universalization of legal interests in the application of norms (*obligations erga omnes*) or that of hierarchies (*jus cogens*). The rationales of the preservation of formalism in international law-ascertainment spelled out below will further underpin the differences between the argument made here and the traditional objections against relative normativity.[20]

[17] Postmodernism is used here in a generic sense to describe some of the new approaches to international law, including those approaches affiliated with critical legal studies and structuralism. See *infra* 4.1.4 and 4.2.4. The concept thus not refers to the second generation of critical legal scholars as it is sometimes the case in the literature. See D. Kennedy, 'A Rotation in Contemporary Legal Scholarship' (2011) 12 *German Law Journal* 338, especially 356–61. On the concept of postmodernism in general, see D. Patterson, 'Postmodernism', in D. Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, Oxford, 1999) 375, 375.

[18] The most famous broadside against normative relativity has been initiated by Prosper Weil. See P. Weil, 'Towards Relative Normativity in International Law' (1983) 77 AJIL 413 (translated from 'Vers une normativité relative en droit international?' (1982) 86 *Revue générale de droit international public* 5–47). For a criticism of Weil's argument, see U. Fastenrath, 'Relative Normativity in International Law' (1993) 4 EJIL 305–40; J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and The Nicaragua Case' (1996) 16 Oxford J. Leg. Stud. 85; D. Shelton, 'International Law and 'Relative Normativity'' in Malcolm D. Evans (ed) *International Law* (OUP, Oxford, 2006) 159–85; R.A. Falk, 'To What Extent are International Law and International Lawyers Ideologically Neutral? in A. Cassese and J.H.H. Weiler (eds), *Change and Stability in International Law-Making* (De Gruyter, Berlin, 1988) 137. For a counter-reaction to these criticisms, see J. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 EJIL 627–50.

[19] See P. Weil, 'Towards Relative Normativity in International Law' (1983) 77 AJIL 413.

[20] Cfr *infra* 2.2.

The argument made here is structured as follows. After these introductory considerations, I start, in chapter 2, by spelling out how I construe formalism for the sake of the argument made here and mention a few of the rationales of formalism at the level of law-ascertainment. In chapter 3, I briefly outline how formalism outpaced natural law theory and became the dominant model of understanding of law-identification in both general theory of law and in the theory of the sources of international law. Such an overview of the rise of formalism in general legal theory and in the theory of the sources of international law should contribute to the elucidation of some of its political foundations, as well as some of its limits. Chapter 4 then discusses the various criticisms of formalism that have been formulated in the context of general legal theory and depicts how these criticisms subsequently trickled down into the theory of the sources of international law. It is only once the criticisms levelled against formalism have been duly explained that I expound, in chapter 5, on the various manifestations of the deformalization of law-ascertainment in the theory of the sources of international law and their multi-fold agenda. After explaining in chapter 6 what I perceive as the most insightful lessons that can be learned from the critiques of formalism, I engage in chapters 7 and 8 in an attempt to revisit formalism in the theory of the sources of international law and ground it in the social practice of international law-applying authorities. This will require that some of the illusions of formalism that pervade the mainstream theory of the sources of international law are dispelled, and will call for a reconstruction of our concept of law-applying authority whose practice is conducive to the meaning of formal law-ascertainment indicators. Chapter 9 concludes this study with some of the possible insights which can be gained from the theory of international law-ascertainment presented here for the new forms of exercise of public authority outside the traditional channels of international law-making.

1.3 Preliminary caveats about the argument made in this book

Before I begin this inquiry, my ambition for this book must be clearly elucidated. In the following paragraphs, I do not shy away from relying on general legal theory. In particular, the so-called source and social theses devised in general legal theory have been the linchpins of my argument. Yet, this book is not intended to be a contribution to the general theory of law. Even though general legal theorists may identify here some postures which correspond with those pervading the debates in general law theory,[21] the defence of formalism at the level of international law-ascertainment undertaken here is probably too restricted to the sources of international law to be germane to general legal theory. This is why, while making mention of some important debates in general legal theory and in the philosophy of law, the call for the preservation (and rejuvenation) of formalism in international legal scholarship

[21] In particular, the argument made here can be seen as being the reflection of a so-called 'post-realist' posture. See D. Kennedy, 'A Rotation in Contemporary Legal Scholarship' (2011) 12 *German Law Journal* 338, 346–50.

that is made in this book is primarily addressed to international lawyers. Yet, it cannot be ignored that its grappling with some debates which have unfolded in general legal theory or political philosophy may occasionally be of interest beyond international legal circles.

It is to appeal to a wide readership of international lawyers—who arguably often resist any inquiry into the ontology of the ascertainment of international legal rules—that I have tried to formulate my argument in simple terms. Indeed, I strongly believe that obscurity of language is frequently used to camouflage unachieved or half-baked thoughts. By using a simple vocabulary, I hope to clearly lay bare all the underpinnings of the different parts of my argument and the conceptual tools on which it rests with a view to making them accessible and useful to many international lawyers and not only those that are well-versed in theoretical debates about sources. In doing so, I hope to simultaneously facilitate the continuation of the discussion about formalism in the theory of the sources of international law which this book certainly does not seek to exhaust.

It should be similarly emphasized that, although law-ascertainment inevitably bears upon how one construes law as a whole,[22] the theory of ascertainment defended here does not seek to put forward a new general theory of international law. The theory undertaken here is far more modest than that.[23] It zeroes in only on the ontology of law-ascertainment and does not make any hubristic argument about the ontology of international law as a whole. It will, for instance, be shown that a defence of formal law-ascertainment cannot be conflated with a plea for international legal positivism although the latter has usually abided by formal identification of rules.[24]

Even though the argument here is constructed for a wide readership of international lawyers, its significant theoretical dimension and its focus on the deformalization at play in the international legal scholarship may at times seem arcane to those who are actually engaged in the *practice of international law*. To such practitioners, aside from some inevitable ambiguities in interpretation and ostensible conflicts of rules, a few borderline cases where law cannot be distinguished from non-law, or the inevitable tendency of advocates and counsel to use non-formal law-identification criteria to unearth rules supporting their argument, international law may seem to work properly and an invitation for a return to greater formalism be a purely academic whim. It is true that, by contrast to the determination of the content of law, the ascertainment of international legal rules is not a continuous and recurring controversy in practice.[25] In that sense, this work may look overly introspective to practitioners since it discusses international legal scholarship more than international law itself. Yet, I believe that the kinship between the international legal scholarship and international practice—whether by virtue of legal education or professional

[22] For a more radical affirmation of this point, see J. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL' (2005) 16 EJIL 213, especially 217.

[23] This is, in my view, one of the main differences between Hart and Kelsen. See *infra* 3.1.3.

[24] Cfr *infra* 2.1.2.

[25] In the same vein, see M. Prost, *Unitas multiplex—Les unités du droit international et la politique de la fragmentation* (McGill University, Montreal, 2008) 160, available at <http://digitool.library.mcgill.ca/>.

interchanges—is too important for these contemporary debates to be entirely ignored by practitioners. Because of the continuous exchanges between practice and scholarship, the possibility that the current deformalization of law-ascertainment in the theory of the sources of international law will eventually trickle down into the practice of international law cannot be excluded. The greater unease and hesitations of international tribunals that are examined in chapter 7 seem to underpin that probability. Likewise, it should not be ignored that, too often, States themselves either nurture or take advantage of the uncertainty inherent in the use of non-formal law-ascertainment criteria with a view to preserving their freedom of action.[26] This is particularly true as far as customary international law is concerned. Indeed, while the practice of international law-making indicates a great awareness by States of the thin line between law and non-law,[27] States can also seek to benefit from the absence of clear formal custom-identification standards and engage in ascertainment-avoidance strategies. The non-formal character of custom-identification criteria discussed in chapter 7 will illustrate that point. Hence, the argument made here, even though it is not meant to offer any pragmatic theory that could help lawyers solve most practical issues and describe the whole phenomenon of law,[28] can help them decipher contemporary practice as well as provide some modest guidance to those international actors actively engaged in international law-ascertainment.

As the structure of the argument and the nomenclatures on which it builds show, this book is undoubtedly informed by a European continental approach to international law.[29] I certainly do not seek to conceal this epistemic bias. On the contrary, it is important to unveil it at the preliminary stage, for I believe that it is precisely what enables the book to provide a refreshing and innovative take on the sources of international law by, on the one hand, making use of concepts and taxonomies with which the dominant universal legal scholarship is not always familiar and, on the other hand, examining the question of sources of international law from the angle—unexplored in continental traditions of international law—of

[26] In the same vein, see G.M. Danilenko, *Law-Making in the International Community* (Dordrecht, Martinus Nijhoff, 1993) 19. See also M. Reisman, 'Soft Law and Law Jobs' (2011) 2 *Journal of International Dispute Settlement* 25, 26.

[27] See e.g. the conscious choice of a majority of States during the negotiating process about a new framework to tackle global-warming in the second half of 2009, whereby States decided that any agreement they could reach would take the form of a political agreement and not an international legal act. See H. Cooper and B. Knowlton, 'Leaders delay action on climate agreement', International Herald Tribune, 16 November 2009, 1. See the similar opinion expressed by D. Shelton, 'Soft Law' in D. Armstrong (ed), *Handbook of International Law*, (Routledge, London, 2009) 68, 78 or K. Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581, 587. See also A. Aust, who argues that such clear awareness is reflected in the terminology of agreements: A. Aust, *Modern Treaty Law and Practice* (2nd edn, CUP, Cambridge, 2007) 33; C. Lipson, 'Why are some international agreements informal' (1991) 45 *International Organization* 495.

[28] For a similar acknowledgement that formalism, while being necessary, should not be thought as a problem-solving theory, see G.P. Fletcher, 'Law as a Discourse' (1991–1992) 13 Cardozo L. Rev. 1631, 1634. For further insights on the conception of formalism that is espoused here, see *infra* 2.1.

[29] On some of the main differences between the areas of interests of continental, US, and Third World international legal scholarships, see M. Koskenniemi, 'International Legal Theory and Doctrine', *Max Planck Encyclopedia of Public International Law*, available at <http://www.mpepil.com>, para. 28.

formal law-ascertainment. Although I have a distinctive jurisprudential point of view, this feature allows a wide spectrum of international lawyers across all traditions of international law to find in this study useful tools to refresh their understanding of the sources of international law.

Another preliminary caveat must be formulated about the reductionism inherent in the—non-historical—mapping undertaken in some of the following chapters. Needless to say, such mapping will sometimes come at the cost of some inevitable overgeneralization, for scholarly thinking rarely fits into one box or stands at one end of a given spectrum. In other words, a legal scholar's conception of international law rarely has all the trappings of one precise school of thought and often borrows from several traditions. Any description of international legal scholarship based on a taxonomy of schools of thought would inevitably be overgeneralizing.[30] A broad brush and an overall mapping based on trends, movements, and schools are, however, indispensable tools to deconstruct and reconstruct formalism at the level of law-ascertainment in a manner which remains intelligible to a large number of international legal scholars, even those who are not used to the sometimes obscure and intimidating jargon of legal theorists.[31]

Finally, it should be emphasized at this introductory stage that, although the following chapters zero in on the problems of ascertainment of rules originating in traditional international law-making processes, they do not turn a blind eye to the new forms of norm-making at the international level. Although not falling within the scope of the inquiry undertaken here, these new forms of norm-making at the international level ought to be borne in mind, for they shed light on the more limited role nowadays played by traditional international law in global governance. This more limited role of international law and the unprecedented multiplication of modes of norm-making is what has prodded many scholars to turn their attention away from the former in order to research the latter. This is well-illustrated by the research projects on governmental networks, Global Administrative Law (GAL), or the international exercise of public authority.[32] While acknowledging that the use of a non-formal yardstick is indispensable if one wants to capture these new forms of norm-making, the following paragraphs occasionally reflect upon the non-formal criteria used by the authors affiliated to these various research projects to identify the

[30] To borrow a metaphor from D. Kennedy, such mapping is inevitably reminiscent of the all-embracing descriptions of religious groups by secular commentators. See D. Kennedy, 'When Renewal Repeats: Thinking Against the Box' (1999–2000) 32 NYU JILP 335, 374.

[31] It is interesting to note that the criticism of overgeneralization has also been levelled against the international legal scholarship affiliated with critical legal studies and deconstructivism, which has also carried a mapping of the different traditions of international law. See e.g. P.-M. Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to the Universal Values: A Response to Martti Koskenniemi' (2005) 16 EJIL 131–8.

[32] See *supra* note 8. It should be noted, however, that GAL has not entirely excluded traditional law-making processes, as it has, for instance, attempted to include international institutional law. See e.g. B. Kingsbury and L. Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 IOLR (2009) 319–58.

product of these alternative norm-making processes. Yet, the present study does not in any way engage with them nor question their move away from formalism, for it simply does not grapple with the same international norm-production processes.[33] They nonetheless constitute insightful theoretical frameworks which will not be ignored throughout the following chapters.

[33] I have engaged in one dimension of this phenomenon elsewhere, see J. d'Aspremont (ed), *Participants in the International Legal System—Multiple Perspectives on Non-State Actors in International Law* (London, Routledge, 2011).

5

Contemporary Deformalization of Law-Ascertainment in International Law

It seems difficult to dispute that the success of the critiques spelled out in chapter 4 is interwoven with the relative indifference, described in chapter 3, of international legal scholars towards the theoretical foundations of law-ascertainment.[1] Likewise, there are some good reasons to think that the extent to which these critiques have contributed to the contemporary move away from formal law-ascertainment in the theory of the sources of international law—this is what I call the deformalization of law-ascertainment[2]—has been reinforced by the rapid pluralization undergone by contemporary international norm- and law-making processes which has accompanied the unprecedented development of international law and globalization in the 20th and 21st centuries.[3] More specifically, it is not a coincidence that the growing abandonment of formal law-identification criteria in the international legal

[1] On this indifference of international legal scholars towards theory, see generally E. Jouannet, 'Regards sur un siècle de doctrine française du droit international' (2000) AFDI 1–57. See generally, D. Kennedy, 'International Law and Nineteenth Century: History of an Illusion' (1996) 65 Nord. J. Int'l L. 385, 387; D. Kennedy, 'A New Stream of International Legal Scholarship' (1988–1989) 7 Wisconsin Int'l L. J. 1, 6; N. Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 Harvard JIL 81, 84; M. Reisman, 'Lassa Oppenheim's Nine Lives' (1994) 19 Yale J. Int'l L. 255, 271; B. Kingsbury, 'The International Legal Order', NYU Law School Public Law & Legal Theory Research Paper No. 01–04 (2003), IILJ History and Theory of International Law Series, Working Paper No. 2003/1. See. N. Onuf, 'Global Law-Making and Legal Thought', in N. Onuf (ed), *Law-Making in the Global Community*, (Carolina Academic Press, Durham, 1982) 1, 13; See also A. D'Amato, 'The Need for a Theory of International Law', Northwestern University School of Law, Public Law and Legal Theory Research Paper Series (2007); A. D'Amato, 'What "Counts" as Law?' in N.G. Onuf (ed), ibid, 83–107. D'Amato provided his own theory of the autonomy of the international legal system. See A. D'Amato, 'International Law as an Autopoietic System' in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (Springer, Berlin, 2005) 335 (see the criticism of D'Amato's theory by A. Pellet, 'Complementarity of International Treaty Law, Customary Law and Non-Contractual Law-Making' in the same volume, 409–14). See also T. Skouteris, *The Notion of Progress in International Law Discourse* (LEI Universiteit, Leiden, 2008), chapter 3, later published as *The Notion of Progress in International Law Discourse* (T.M.C. Asser, The Hague, 2010). M. Koskenniemi, 'Repetition as Reform' (1998) 9 EJIL 405; J. Klabbers, 'Constitutionalism and the Making of International Law' (2008) 5 NoFo 84, 94.

[2] The meaning of deformalization in this book thus departs from the use of that concept to refer to norm-making by informal non-territorial networks. See M. Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 13. On the concepts of formalism and deformalization, see *supra* 2.1.1.

[3] On the concept of normative order, see generally N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP, Oxford, 2008) 11–20.

scholarship has taken place against the backdrop of the dramatic pluralization of norm-making at the international level, for the latter has conveyed the impression that formal law-ascertainment was no longer attuned to contemporary realities. This phenomenon has already been described above.[4] The following paragraphs only aim at depicting some of the manifestations of the deformalization of law-ascertainment currently witnessed in the international legal scholarship against the backdrop of this contemporary pluralization of international norm- and law-making processes. I start by expounding on some of the most common forms of non-formal law-ascertainment yardsticks which are used by international legal scholars and international lawyers (5.1). I then explain how this has generated a general acceptance of the idea of softness of legal concepts (5.2). I eventually say a few words on the various agendas pursued by each of these different types of deformalization (5.3).

5.1 The various manifestations of deformalization of law-ascertainment in contemporary international legal scholarship

The contemporary rejection of formalism in international law-identification has proved a complex phenomenon and has manifested itself in many ways. A systematic account of all the manifestations of deformalization of international law-ascertainment would certainly exceed the ambit of this book. However, it is necessary to flag its most common expressions in the theory of the sources of international law.

Contemporary persistence of substantive validity

Despite being the object of the compelling objections raised by international legal scholars affiliated with deconstructivism and critical legal studies, uses of substantive validity have continued to infuse the theory of the sources of international law. Very illustrative of that persistence of substantive validity are those scholars who, faced with the impossibility of resorting to formal identification criteria of customary international law, have designed a theory of customary international law informed by moral or ethical criteria.[5] According to this view, customary international rules ought to be ascertained by virtue of some fundamental ethical principles, a theory of custom-ascertainment based on substantive criteria which, albeit admitting the

[4] Cfr *supra* 1.

[5] See J. Tasioulas, 'Customary International Law and the Quest for Global Justice' in A. Perreau-Saussine and J.-B, Murphy (eds), *The Nature of Customary Law* (CUP, Cambridge, 2007) 307; J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 OJLS 85; See also B.D. Lepard, *Customary International Law, A New Theory with Practical Applications* (CUP, Cambridge, 2010) especially 77. This echoes some isolated proposals made at the time of the drafting of art. 38. See e.g. the Argentinian amendment to draft art. 38, according to which customary international law should be construed as 'evidence of a practice founded on principles of humanity and justice, and accepted as law', League of Nations, *Documents Concerning the Action Taken by the Council of the League of Nations under article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court* (1921) 50. For a criticism of this understanding of custom, see J. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisite of Law' (2001) 12 EJIL 627.

possible fluctuating character of these criteria, is reminiscent of theory of substantive validity.[6]

Reference must also be made to some radical contemporary liberal scholars[7] and especially those who have been qualified as 'anti-pluralists'.[8] Indeed, the Kantian foundations of their understanding of international law have led some of them to resuscitate the classical kinship between morality and international law.[9] It is fair to say that, in doing so, these scholars have rejected the source thesis and embraced a law-identification blueprint based on substantive validity.[10]

International case-law is occasionally pervaded by naturalist conceptions of law-ascertainment as well. A good illustration is provided by the conception of customary international law advocated by the International Tribunal for the Former Yugoslavia which, although admittedly its case-law is not fully consistent on this point, has deemed that 'demands of humanity or the dictates of public conscience' could be conducive to the creation of a new rule of customary international law, even when practice is scant or non-existent.[11]

It seems that a conception of law based on substantive validity—and hence on a substance-based conception of law-ascertainment—is not entirely absent from Global Administrative Law (GAL). It is true that GAL is not directly concerned with traditional forms of international law-making.[12] It, however, is not entirely exclusive of it,[13] among other reasons because GAL still partially rests on 'formal sources' which include classical sources of public international law.[14] This is why it is noteworthy that, despite claiming that he espouses a Hartian inclusive legal positivism[15]—that is the idea that the rules of recognition can recognize some substantive principles as legal principles—Benedict Kingsbury, for instance, in its attempt to develop (formal) institutional procedures, principles and remedies, advocates that the

[6] See J. Beckett, ibid, 627, 648

[7] Liberalism in American legal scholarship is often associated with the exodus of the German legal science which enriched the expanding US legal scholarship. In that sense, the Kantian-grounded liberal cosmopolitan views of many of the most important educational institutions of US elites was considerably reinforced by this influx of scholars: S. Oeter, 'The German Influence on Public International Law', in Société française pour le droit international, *Droit International et diversité juridique, Journée franco-allemande* (Pedone, Paris, 2008), 38.

[8] G. Simpson, 'Two Liberalisms' (2001) 12(3) EJIL 537–71.

[9] The most famous example is Tesón, 'The Kantian Theory of International Law' (1992) 92 Colum. L. Rev. 53. See also F. Tesón, *A Philosophy of International Law* (Westview, Boulder, 1998). On Tesón's understanding of international law, see G.J. Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' (1994) 15 Aust. YIBL 103, 116. For a criticism of Tesón from a natural law standpoint, see A. Buchanan, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (OUP, Oxford, 2007) 17–18.

[10] For a criticism, see P. Capps, 'The Kantian Project in Modern International Legal Theory' (2001) 12(5) EJIL 1003.

[11] *Prosecutor v Kupreskic*, Case No. IT-95–16-T, 14 janvier 2000, para. 527.

[12] Cfr *supra* 1.3.

[13] See e.g. B. Kingsbury and L. Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 IOLR 319–58

[14] B. Kingsbury, N. Krisch, and R. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 LCP 16, 29-30.

[15] B. Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 EJIL 23.

principle of publicness[16]—and the substantive tenets behind it—constitutes a necessary element in the concept of law irrespective of the rule of recognition,[17] a position partly reminiscent of Lauterpacht.[18] Whilst not strictly moral in content, the allegedly inherent quality of publicness of law advocated by Kingsbury has a strong normative dimension which inevitably brings about a deformalization of law-ascertainment.[19] Unsurprisingly, Kingsbury overtly acknowledges that his own conception of publicness runs in the opposite direction from Hart which inspires the theory of formal ascertainment defended here.[20]

Brunnée and Toope's transposition of Fuller's theory to international law can also be seen as constituting the expression of a substantive validity theory leading to a deformalization of law-ascertainment.[21] Although, as has been argued above,[22] modern natural law theory in international law has been, like most modern natural law theory, more concerned with the authority of law than the identification of international legal rules, these two authors have made use of Fuller's eight procedural criteria in a way that leads them to elevate the 'fidelity to law' into a law-ascertainment criterion. Indeed, Fuller's eight criteria of legality, in their view, 'are not merely signals, but are conditions for the existence of law'[23] They 'create legal obligation'.[24] Yet, it must be made clear that Fuller's criteria of legality, in the eyes of these authors, are not themselves the direct law-ascertaining criteria. They are solely 'crucial to generating a distinctive legal legitimacy and a sense of commitment . . . among those to whom law is addressed'.[25] In that sense, it is rather the 'fidelity to law'—in other words, the sense of obligation—that is the central indicator by which international legal rules ought to be identified. In that sense, Brunnée and Toope's theory comes down to a blended mix of substantive validity and effect-based conception of international law. The deformalization of law-ascertainment conveyed by their theory is thus as much the result of their resort to substantive validity as to a theory of international law whereby law is restricted to what generates a sense of obligation among the addressees of its rules. This is why it ought also to be mentioned as an illustration of the contemporary effect- (or impact-)based conception of international law-ascertainment.

[16] Ibid. ('Only rules and institutions meeting these publicness requirements immanenent in public law . . . can be regarded as law')

[17] B. Kingsbury, ibid, 23–57, 31

[18] This point is also made by A. Somek, 'The Concept of "Law" in Global Administrative Law' (2009) 20 EJIL 984–95, especially 991. See also the remarks of M-S. Kuo, 'The Concept of "Law" in Global Administrative Law' (2009) 20 EJIL 997–1004.

[19] B. Kingsbury and M. Donaldson, 'From Bilateralism to Publicness in International Law', *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP, Oxford, 2011) (forthcoming) 79, 86.

[20] B. Kingsbury and M. Donaldson, ibid, 79, 89.

[21] See J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (CUP, Cambridge, 2010).

[22] Cfr *supra* 4.1.1.

[23] Ibid, 41.

[24] Ibid, 7

[25] See J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (CUP, Cambridge, 2010) 7.

The few limited expressions of theory of substantive validity reported here undoubtedly contribute to the contemporary deformalization of law-ascertainment, as the ethical or moral law-identification criteria which they resort to do not constitute formal law-identification indicators.

Effect- or impact-based conceptions of international law-ascertainment

The most common non-formal law-ascertainment blueprint is found in *effect- (or impact-)based* conceptions of international law which have been embraced by a growing number of international legal scholars.[26] For these scholars, what matters nowadays is 'whether and how the subjects of norms, rules, and standards come to accept those norms, rules and standards . . . [and] [i]f they treat them as authoritative, then those norms can be treated as . . . law'.[27] In their view, any normative effort to influence international actors' behaviour, at least if it materializes in the adoption of an international instrument, should be considered to be comprised in international law. Such an effect- (or impact-)based conception of international law—which entails a shift from the perspective of the norm-maker to that of the norm-user—has itself taken various forms. For instance, it has led to conceptions whereby compliance is elevated to the law-ascertaining yardstick.[28] It has also materialized in behaviourist approaches to law where what seems to be crucial is only the 'normative ripples' that norms can produce.[29] Whatever its actual manifestation,

[26] For a few examples see, J.E. Alvarez, *International Organizations as Law-makers* (OUP, NY, 2005); J. Brunnée and S.J. Toope, 'International Law and Constructivism, Elements of an International Theory of International Law' (2000–2001) 39 Colum. J. Transnat'l L. 19–74, 65. These effect-based approaches must be distinguished from the subtle conception defended by Kratochwil based on the *principled rule-application* of a norm which refers to the explicitness and contextual variation in the reasoning process and the application of rules in 'like' situations in the future. See F. Kratochwil, *Rules Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP, Cambridge, 1989) 206–8. See also F. Kratochwil, 'Legal Theory and International Law', in D. Armstrong (ed), *Routledge Handbook of International Law* (Routledge, NY, 2009) l, 58.

[27] On that approach, see the remarks of J. Klabbers, 'Law-making and Constitutionalism' in *The Constitutionalization of International Law* (OUP, Oxford, 2009) 98.

[28] See e.g. J. Brunnée and S.J. Toope, 'International Law and Constructivism, Elements of an International Theory of International Law' (2000–2001) 39 Colum. J. Transnat'l L. 19–74, 68: 'We should stop looking for the structural distinctions that identify law, and examine instead the processes that constitute a normative continuum bridging from predictable patterns of practice to legally required behavior'. The same authors argue: 'Once it is recognized that law's existence is best measured by the influence it exerts, and not by formal tests of validity rooted in normative hierarchies, international lawyers can finally eschew the preoccupation with legal pedigree (sources) that has constrained creative thinking within the discipline for generations' (ibid, 65). As has been argued above, their interactional account of international law is nonetheless based on both substantitve validity and the impact of rules on actors. For a more elaborated presentation of their interaction theory, see J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (CUP, Cambridge, 2010).

[29] J.E. Alvarez, *International Organizations as Law-makers* (OUP, NY, 2005). Alvarez argues, 'Although we have turned to such institutions for the making of much of today's international law, the lawyers most familiar with such rules remain in the grip of a positivist preoccupation with an ostensibly sacrosanct doctrine of sources, now codified in article 38 of the Statute of the International Court of Justice, which originated before most modern IOs were established and which, not surprisingly, does not mention them': J.E. Alvarez, *International Organizations as Law-makers* (OUP, NY, 2005) x. He adds, '[W]e continue to pour an increasingly rich normative output into old bottles labeled treaty, custom, or

there is no doubt that effect- (or impact-)based conceptions of law-ascertainment have grown widespread in the contemporary international legal scholarship.

The use of the effect or impact of norms to identify rules is not only witnessed in studies about the traditional forms of international law-making. Mention must again be made here of two well-known research projects which, although not directly centred on international law but on the new forms of contemporary norm-making, show how international norms are being ascertained by virtue of their effect or impact: the Heidelberg research project on the Exercise of Public Authority by International Institutions and—the already discussed—Global Administrative Law project.[30] It is true that, because of the specificities of the normative phenomenon with which these two projects deal, the use of a non-formal yardstick of norm-identification in these cases proves absolutely indispensable. Yet, they provide an insightful illustration of how, outside the classical remit of international law, effect- (or impact-)based conceptions of norm-ascertainment have also been thriving.

Some very subtle and elaborate forms of effect- (or impact-)based norm-ascertainment models informed by the need to continuously ensure the legitimacy of the exercise of public authority at the international level have, for instance, been defended by Armin von Bogdandy, Philipp Dann, and Matthias Goldmann within the framework of the Heidelberg research project on the Exercise of Public Authority by International Institutions. Their model of norm-ascertainment is not strictly based on the impact of the norms that they examine but rather the expected impact that these norms create.[31] Drawing on such an expectations-based conception to capture normative production outside the traditional international law-making blueprint, these scholars have attempted to devise 'general principles of international public authority'[32] with a view to fostering 'both the effectiveness and the legitimacy of international public authority.[33] These endeavours have not gone as far as claiming that any exercise of international public authority should be construed as law. The use of non-formal criteria is designed to capture norms which are precisely

(much more rarely) general principles. Few bother to ask whether these state-centric sources of international law, designed for the use of judges engaged in a particular task, remain a viable or exhaustive description of the types of international obligations that matter to a variety of actors in the age of modern IOs': J.E. Alvarez, ibid, x-xi. He exclusively focuses on the normative impact and 'the ripples' of norms: see J.E. Alvarez, ibid, xiii, 63, 122. A similar account can be found in D.J. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 Va. J. Int'l L. 275, 372; N. White, 'Separate but Connected: Inter-Governmental Organizations and International Law' (2008) 5 IOLR 175–95, especially 181–6.

[30] Cfr *supra* 1.3.

[31] See also M. Goldmann, 'Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* 1865 and A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375.

[32] A. von Bogdandy, et al., ibid, 1375–400. With respect to the development of 'standard instruments', see A. von Bogdandy, 'General Principles of International Public Authority: Sketching a Research field' (2008) 9 *German Law Journal* 1909–1939. See M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* 1865–1908.

[33] M. Goldmann, ibid, 1865–1908, 1867.

not, strictly speaking, international legal rules and which, on the basis of formal criteria, could not be identified. However, their 'legal conceptualization'[34] echoes a deformalization of norm-identification[35] necessary to ensure the legitimacy of the exercise of international public authority.[36] Interestingly, the deformalization of law-identification that inevitably accompanies the conceptualization at the heart of this project is meant to be only temporary, since the ultimate aim of these scholars is to re-formalize the identification of those 'alternative instruments'.[37]

Indeed, it is of the utmost importance to highlight that, despite the deformalization at the heart of the net by virtue of which they capture their object of study, the ambition of these scholars has remained the elaboration of formal 'principles of international public authority'[38] in order to foster 'both the effectiveness and the legitimacy of international public authority'.[39] Their use of non-formal criteria has thus been designed to apprehend normative activities which are not, strictly speaking, international legal rules and which, on the basis of formal criteria, could not be identified. Their ultimate aim has nonetheless remained a 'legal conceptualization' to an extent necessary to ensure the legitimacy of the exercise of international public authority. In that sense, the deformalization of law-identification inherent in their attempt to capture new forms of exercises of public authority has been accompanied by a reformalization of those 'alternative instruments' and, in the same vein as Global Administrative Law, an attempt to devise formal principles of public authority.

While also constituting an expression of substantive validity theory—as has been discussed above,[40] Global Administrative Law (GAL) must be again mentioned here. Indeed, although it is geared towards the development of institutional procedures, principles, and remedies, which encompass formal mechanisms of application of GAL,[41] it captures the normative product of these processes through an effect- (or impact-)based conception of norm-ascertainment. In particular, GAL is premised on the idea that, regarding these alternative modes of norm-making, problems of law-ascertainment cannot be fully resolved.[42] This certainly is not surprising, since the

[34] M. Goldmann, ibid, 1865.

[35] A. von Bogdandy, P. Dann, and M. Goldmann 'Developing the Publicness of International Law' (2008) 9 *German Law Journal* 1375–1400, 1376.

[36] M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* 1867–8.

[37] Ibid.

[38] A. von Bogdandy, P. Dann, and M. Goldmann 'Developing the Publicness of International Law' (2008) 9 *German Law Journal* 1375–1400. With respect to the development of 'standard instruments', see A. von Bogdandy, 'General Principles of International Public Authority: Sketching a Research field' (2008) 9 *German Law Journal* 1909–1939. See M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* 1865–1908.

[39] M. Goldmann, ibid, 1865–1908, 1867.

[40] Cfr *supra* 5.1.

[41] B. Kingsbury, N. Krisch, and R. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 LCP 16, 27.

[42] See B. Kingsbury, et al., ibid, 15–61, 29; C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 EJIL 197-214. According to Kingsbury, GAL rests on an 'extended

norms created through the processes concerned cannot be ascertained through the classical theory of the sources.[43] GAL accordingly resorts to non-formal yardsticks, and in particular effect- (or impact-)based criteria, to identify what it considers a normative product.[44] As was said above, these principles to which these alternative norms are subjected are themselves identified through substance-based criteria, and especially by virtue of the principle of publicness.[45] Although some of its leading figures have curiously professed that GAL bespeaks a Hartian conception of law,[46] GAL can thus be understood as resting on a subtle use of both effect- (or impact-) and substance-based norm-ascertainment indicators.

This being said, it must be recalled that GAL has simultaneously sought the development of formal institutional procedures, principles, and remedies, which encompass formal mechanisms of the application of GAL.[47] The emerging rules it refers to accordingly encapsulate formal procedures and standards for regulatory decision-making outside traditional domestic and international frameworks.[48] In that sense, it promotes a formalization of global processes.[49] Whilst the source of GAL and the practice it seeks to apprehend involve deformalization, its object thus remains the development of formal rules and procedures.

If we leave aside these two specific research projects dedicated to the new pluralized forms of norm-making at the international level, it is noteworthy that, however nuanced and detailed they may be, effect- (or impact-)based models of norm-ascertainment are generally grounded in a two-fold deformalization of law-ascertainment. First, the impact that the rule bears has not been subject to formal identification for it necessitates that one looks at the behaviour of actors—an approach which Judge Ago had famously criticized in his notable Separate Opinion

Hartian conception of law' which elevates publicness to a constitutive element of law. According to that view, publicness is a necessary element in the concept of law under modern democratic conditions. By publicness, Kingsbury means the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concerns to the society as such. See B. Kingsbury, 'The Concept of Law in Global Administrative Law' (2009) 20(1) EJIL 23–57, 31.

[43] B. Kingsbury, ibid, 23–57, 25–26.

[44] 'The legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality and by providing effective review of the rules and decisions these bodies make': B. Kingsbury, ibid, 23–57, 25.

[45] B. Kingsbury, ibid, 23–57, 31.

[46] B. Kingsbury, ibid, 23–57; see also B. Kingsbury, 'Global Administrative Law Dimensions of International Organizations Law', Public Law & Legal Theory Research Paper Series, Working Paper No. 10-04, January 2010, available at <http://www.ssrn.com>.

[47] B. Kingsbury, N. Krisch, and R. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 LCP 16, 27.

[48] S. Chesterman, 'Global Administrative Law', Working Paper for the S.T. Lee Project on Global Governance (2009), New York University Public Law and Legal Theory Working Papers, Paper 152, available at <http://lsr.nellco.org/nyu_plltwp/152>, 4.

[49] In the same vein, see S. Chesterman, ibid, 3-4.

in the *Nicaragua* case at the jurisdictional stage.[50] Second, the actors whose behaviour is impacted have also remained free of any formal definition—which is hardly surprising, for even the State in mainstream theory has proven to be indefinable through formal criteria.[51] All-in-all, effect- (or impact-)based identification of international law has thus been synonymous with non-formal law-ascertainment.

Interestingly, and somewhat paradoxically, all the abovementioned effect- (or impact-)based approaches to law-ascertainment have borne a resemblance to the compliance-based conceptions of international law found in realist theories according to which law only exists to the extent to which it is complied with.[52] It is equally noteworthy that the undeniable success of these effect- (or impact-)based conceptions of law-ascertainment in contemporary legal scholarship has not been without consequence for the general research agenda of international legal scholars, since effect- (or impact-)based conceptions have revived interest in the theory of the fairness of law. Indeed, it is uncontested that the fairness or the justness of a rule encourages compliance by those subjected to it[53]—a contention also at the heart of modern natural law theories examined above[54] For this reason, effect- (or impact-) based accounts have also kindled a need to bolster the legitimacy of international legal rules. The attention accordingly devoted to the question of the legitimacy of international law—which has been directly shored up by the reinforcement of effect- (or impact-)based law-ascertainment theories—has further deflected the attention of international legal scholars away from the problems inherent in the effect- (or impact-)based conceptions of law, especially from the standpoint of law-ascertainment.[55]

The repercussions of effect- (or impact-)based law-ascertainment on the theory of legitimacy is not limited to a reinforced interest in the latter. Effect- (or impact-) based identification of international legal rules has also spawned a shift in the central paradigm in the theory of legitimacy. Indeed, because effect- (or impact-) based law-ascertainment models entail a deformalization of law-ascertainment, formal law-identification can no longer constitute a source of the legitimacy of rules. The legitimacy of international legal rules—which is sought to secure greater compliance—is, in turn, sought in their content. This shift in the central paradigm of legitimacy can, potentially, lead to a return to substance-based identification of

[50] See Separate Opinion of Judge Ago, ICJ Rep. (1984) 527 ('A ce sujet je dois faire . . . une reserve expresse quant à l'admissibilité de l'idée même que l'exigence d'un acte formel d'acceptation puisse être remplacée . . . par une simple conduite de fait . . . ').

[51] Cfr *supra* 2.1.1.

[52] J. Goldsmith and E. Posner, *The Limits of International Law* (OUP, Oxford, 2005). For a criticism of their conception of law, see the very interesting contribution of A. Somek, 'Kelsen lives' (2007) 18 EJIL 409–51. Some aspects of this conception have been discussed above. Cfr *supra* 4.2.2.

[53] See the famous account made by T. Franck, *The Power of Legitimacy Among Nations* (OUP, Oxford 1990) 25.

[54] Cfr *supra* 4.1.1.

[55] Cfr *supra* 2.2.

law.[56] The naturalistic overtones of such an outcome—of which supporters of effect- (or impact-)based law-ascertainment models are not always aware—confirms the significant extent of the deformalization of law-ascertainment that they bring about.

Process-based conceptions of international law-identification and other manifestations of the deformalization of international law-ascertainment

The effect- (or impact-)based conceptions of international law do not constitute the exclusive manifestation of the deformalization of law-ascertainment in contemporary legal scholarship. Indeed, the general scepticism vented against formal law-ascertaining criteria has also led to a revival of *process-based* law-identification. This revival of process-based critique of mainstream conceptions of international law has no doubt re-kindled the deformalization of law-ascertainment advocated by the New Haven School.[57] Such a resuscitation of New Haven has occasionally been expressed in functionalist terms.[58] Whatever its ultimate manifestation, process-based approaches have come with a great deformalization of law-ascertainment, for it has generally proved very difficult to formally ascertain the process by which international legal rules are identified.[59]

There are other, more marginal, expressions of the deformalization of law-ascertainment in the contemporary international legal scholarship.[60] For instance, it has sometimes been argued that the purpose of the rule should be turned into a law-ascertaining criterion.[61] While these—more isolated—approaches cannot be discussed here, they ought at least to be mentioned because they further illustrate the general deformalization of law-ascertainment currently at play in the contemporary international legal scholarship.

[56] For an even more radical position, see M. Virally, 'A Propos de la "Lex Ferenda"', in Daniel Bardonnet (ed), *Mélanges Reuter: le droit international: unité et diversité* (Pedone, Paris, 1981) 521–33, p. 530.

[57] For a classical example of this type of deformalization, see R. Higgins, *Problems and Process: International Law and How We Use It* (OUP, Oxford, 1995) 8–10. For another illustration of the contemporary tendency to identify the law through processes, see P.S. Berman, 'A Pluralist Approach to International Law' (2007) 32 Yale J. Int'l L. 301. For a hybrid law-ascertainment approach based on both effect and processes, see H.G. Cohen, 'Finding International Law: Rethinking the Doctrine of Sources' (2007) 93 Iowa L. Rev. 65. The New Haven approach to law-ascertainment has been examined above. Cfr *supra* 4.2.3.

[58] See D.M. Johnston, 'Functionalism in the Theory of International Law' (1988) 26 Canadian YBIL 3, especially 30–1.

[59] On the difficulty to formally ascertain processes, see G. Abi-Saab, 'Cours général de droit international public' (1987-VIII) 207 RCADI 9–463, 39–49; Brownlie 'International law at the fiftieth anniversary of the United Nations: general course on public international law' (1995) 255 RCADI 9–228, p. 29; G.J.H. Van Hoof, *Rethinking the Sources of International Law* (Kluwer, Deventer, 1983) 283.

[60] For a more precise and systematic taxonomy of these other approaches, see J. Klabbers, 'Law-Making and Constitutionalism' in *The Constitutionalization of International Law* (OUP, Oxford, 2009) 94.

[61] This is what J. Klabbers has described the 'Functionalist turn'. For examples, see J. Klabbers, ibid, 99.

5.2 The softness of international law

Irrespective of how deformalization of law-identification actually manifests itself, the rejection of formal law-ascertainment has generated the acceptance among international legal scholars of the existence of a grey area where it is not possible to distinguish law from non-law. More particularly, international law is increasingly seen as a *continuum* between law and non-law, and formal law-ascertainment as no longer being capable of capturing legal phenomena in the international arena. This has gone hand-in-hand with a conflation between legal acts and 'legal facts' (*faits juridiques*)[62] in the theory of the sources of international law[63] and an espousal of the overall softness of legal concepts.[64] Indeed, the theory of the softness of international law has been gaining currency in international legal scholarship. It has been argued that not only has law become soft, but so have governance,[65] law-making,[66] international organizations,[67] enforcement,[68] and even—from a critical legal perspective—international legal arguments.[69] This general idea of softness—and especially the softness of the instrument (*instrumentum*) in which international legal rules can allegedly be contained[70]—has commonly originated in the abovementioned presupposition that the binary nature of law is ill-suited to accommodate the growing complexity of contemporary international relations, and that international law comprises a very large grey area where there is no need to define law and non-

[62] The term 'legal fact' is probably not the most adequate to translate a concept found in other languages. It however seems better than 'juridical fact'. I have used the former in earlier studies about this distinction. See J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 EJIL 1075–93.

[63] For an early systematization of the distinction between legal acts and legal facts, see D. Anzilotti, *Cours de droit international, premier volume: introduction—theories générales*, translated by G. Gidel (1929). See also Morelli, 'Cours général de droit international public' (1956-I) 89 RCADI 437–604, p. 589. J-P. Jacqué, 'Acte et norme en droit international' (1991-II) 227 RCADI 357–417, p. 372. See also M. Virally, *La pensée juridique* (LDGJ, Paris, 1960) 93; G. Abi-Saab, 'Les sources du droit international. Essai de déconstruction', in *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (Fundación de Cultura Universitaria, Montevideo, 1994) 29–49, p. 40.

[64] I have studied that phenomenon in greater depth elsewhere. See J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 EJIL 1075–93.

[65] K.W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421–56.

[66] P.–M. Dupuy, 'Soft Law and the International Law of the Environment' (1990–1991) 12 Mich. J. Int'l L. 420–35, especially p. 424.

[67] J. Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 Nord. J. Int'l L. 403–21.

[68] O. Yoshida, 'Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions' (1999) 95 Colo. J. Int'l Envtl. L. & Pol'y 95; A.E. Boyle, 'Some reflections on the relationship of treaties and soft law' (1999) 48 ICLQ 901, especially p. 909.

[69] D. Kennedy, 'The Sources of International Law' (1987) 2 Am. U. J. Int'l L. & Pol'y 1, especially 20–1.

[70] On the distinction between *instrumentum* and *negotium*, cfr *infra* 7.2.2.

law.[71] Norms enshrined in soft instruments, e.g. political declarations, codes of conduct, and gentlemen's agreements, are considered as part of this continuum between law and non-law.

In the traditional theory of the sources of international law, norms enshrined in a non-legal instrument (i.e. those norms with soft *instrumentum*) can still produce legal effects. For instance, they can partake in the *internationalization of the subject-matter*,[72] provide guidelines for the interpretation of other legal acts,[73] or pave the way for further subsequent practice that may one day be taken into account for the emergence of a norm of customary international law.[74] Yet, if only the formal pedigree were to be the law-ascertainment criterion, they would simply be legal facts. Nonetheless, the international legal scholarship has manifested a strong tendency to construe these legal facts as law, properly so-called.[75]

I will explain in chapter 7 why classical international law-ascertainment yardsticks prove highly unsatisfactory.[76] However inadequate the mainstream theory of the sources of international law may be to capture the complexities of contemporary norm-making at the international level, the softness inherent in the growingly accepted idea of a grey area and the elevation of the norms enshrined in non-legal instruments—which are at best legal facts—into international legal rules reinforce the current deformalization of the ascertainment of international legal rules

[71] On this point see particularly L. Blutman, 'In the Trap of a Legal Metaphor: International Soft Law' (2010) 59 ICLQ 605, 613–14.

[72] On this question, see J. Verhoeven, 'Non-intervention: affaires intérieures ou "vie privée"?' *Mélanges en hommage à Michel Virally: Le droit international au service de la paix, de la justice et du développement* (Pedone, Paris, 1991) 493–500; R. Kolb, 'Du domaine réservé—Réflexion sur la théorie de la compétence nationale' (2006) 110 *Revue générale de droit international public* 609–10; F.B. Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)' (1987) 58 BYBIL 124.

[73] See A. Aust, 'The Theory and Practice of Informal International Instruments' (1986) ICLQ 35, 787–812; R.-J. Dupuy, 'Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law"' in R. Akkerman et al. (eds), *Declarations of Principles. A Quest for Universal Peace* (Sijthoff, 1977) 247, p. 255. U. Fastenrath, 'Relative Normativity in International Law' (1993) 4 EJIL 305–40. See O. Schachter, 'The Twilight Existence of Non-Binding International Agreements' (1977) 71 AJIL 296.

[74] This is, for instance, the intention of art. 19 of the ILC articles on Diplomatic Protection on the 'recommended practice' by States, *Official Records of the General Assembly*, Sixty-first Session, Supplement No. 10 (A/61/10).

[75] A. Boyle and C. Chinkin, *The Making of International Law* (OUP, Oxford, 2007) 211–29; V. Lowe, *International Law* (OUP, Oxford, 2007) 96–7. A.T. Guzman, 'The Design of International Agreements' (2005) 16 EJIL 579–612. Pellet has hinted at the idea of a 'dégradé normatif': A. Pellet, 'Le "bon droit", et l'ivraie—plaidoyer pour l'ivraie' in *Mélanges offerts à Charles Chaumont, Le droit des peuples à disposer d'eux-mêmes. Méthodes d'analyse du droit international* (Pedone, Paris, 1984) 465–93, especially 488. See also G. Abi-Saab, 'Eloge du 'droit assourdi' in *Nouveaux itinéraires en droit: Hommage à François Rigaux* (Bruylant, Brussels, 1993) 59, 62–3; R.R. Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 ICLQ 549; R. Ida, 'Formation des normes internationales dans un monde en mutation. Critique de la notion de Soft Law', *Mélanges en hommage à Michel Virally: Le droit international au service de la paix, de la justice et du développement* (Pedone, Paris, 1991) 333, p. 336; M. Virally, 'La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique, Rapport provisoire à l'Institut de droit international' (1983) 60 *Annuaire de L'Institut de Droit International* 166, p. 244; O. Elias and C. Lim,'General principles of law', 'soft' law and the identification of international law' (1997) 28 Netherlands YBIL 45.

[76] Cfr *infra* 7.2.

described in the previous section.[77] Softness is thus seen here as constituting an integral part of the contemporary deformalization of international law-ascertainment.[78]

5.3 The diverging agendas behind the deformalization of law-ascertainment

The abovementioned manifestations of the deformalization of law-ascertainment have been informed by very different agendas.[79] Indeed, similar conceptions of law-ascertainment sometimes even serve very opposite agendas. This is well-illustrated by the use of effect- (or impact-)based conceptions by some of the abovementioned scholars[80] and behavioural conceptions defended by (neo-)realists who, although resorting to somewhat comparable conceptions of law-identification, have been pursuing radically different objectives. It certainly is not the aim of the following paragraphs to identify each of the motives that lie behind the various understandings of law-ascertainment which have been mentioned in this chapter. I only sketch out here some of the main objectives that scholars may have been—sometimes unconsciously—pursuing by deformalizing the ascertainment of international legal rules. I subsequently formulate some critical remarks. The presentation of the agenda of deformalization of law-ascertainment attempted in the following paragraph takes an external point of view. It leaves aside the motives animating international actors engaged in international norm-making processes and those behind their choices regarding the nature of the norm which they seek to create.[81]

Programming the future development of international law

The most common driving force behind the deformalization of law-ascertainment is probably what I call the *programmatic* character of the use of non-formal law-

[77] C.M. Chinkin, 'The Challenge to Soft Law, Development and Change in International Law' (1989) 38 ICLQ 850, p. 865.

[78] I have expounded on the idea of softness of international law elsewhere. See J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 EJIL, 1075–93. See also J. d'Aspremont, 'Les dispositions non-normatives des actes juridiques conventionnels' (2003) 36 *Revue Belge de Droit International* 492.

[79] I have mentioned some of these agendas in previous works: J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19(5) EJIL 1075. See also J. d'Aspremont, 'La Doctrine du Droit international et la tentation d'une juridicisation sans limite' (2008) 112 *Revue générale de droit international public* 849–66.

[80] Cfr *supra* 5.1.

[81] On the reasons why international actors prefer soft law to hard law and vice-versa, see generally H. Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 EJIL 499, 501–2; See also the insightful three-tiered analysis of K. Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581, 591–601; D. Carreau, *Droit International* (8th edn, Pedone, Paris, 2004) 205; G. Shaffer and M. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minn. L. Rev. 706, p. 717–21

ascertainment criteria.[82] I hereby refer to the use by international lawyers of non-formal criteria of law-identification with the hope of contributing to the subsequent emergence of new rules in the *lex lata*. Thus I have in mind the identification of rules which, although not strictly speaking legal rules, are seen as constituting an experimental ground for future legal rules whose emergence is deemed desirable.[83] The resort to non-formal law-ascertainment is meant, in this case, to be conducive to the subsequent emergence of new rules. This programmatic attitude is rife in the area of human rights law and environmental law.[84]

Promoting the expansion of international law

Programming the further crystallization of formally ascertainable rules is not the only driving force behind the abovementioned deformalization of law-ascertainment. The latter is also widely informed by the idea that international law is necessarily good and should therefore be expanded. There is indeed a widespread tendency among international lawyers to consider that any international legal rule is better than no rule at all, and that the development of international law should be promoted as such.[85] This faith in the added value of international law in comparison to other social norms is often accompanied by the belief that the cost of non-compliance necessarily outweighs the benefit thereof. Seen in this light, international law is conceived as an essential condition of any systematized form of an international community[86] and any new legal rule is deemed a step towards a greater integration of that community away from the anarchical state of nature.[87] Accordingly, deformalizing international law-ascertainment is seen as instrumental in expanding the realm of the international community with a view to ensuring what is seen as progress.[88]

[82] This argument has also been made by L. Blutman, 'In the Trap of a Legal Metaphor: International Soft Law' (2010) 59 ICLQ 605, 617–18. In the same vein, see M. Reisman, 'Soft Law and Law Jobs' (2011) 2 *Journal of International Dispute Settlement* 25, 25–6.

[83] For an avowed programmatic use of soft law and customary international law, see R.-J. Dupuy, 'Droit déclaratoire et droit programmatoire de la coutume sauvage a la "soft law" ' in *Société française pour le droit international, L'élaboration du droit international public, Colloque de Toulouse* (1974) (Pedone, Paris, 1975) 132–48; see also 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, Berlin, 2005) 409, p. 415; U. Fastenrath, 'Relative Normativity in International Law' (1993) 4 EJIL 305, p. 324; See also F. Sindico, 'Soft Law and the Elusive Quest for Sustainable Global Governance' (2006) 19 LJIL 829, p. 836.

[84] See e.g. A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1988–1989) 12 Aust. YBIL 22, p. 47.

[85] This was insightfully highlighted by J. Klabbers, 'The Undesirability of Soft Law' (1998) 67 Nord. J. Int'l L. 381–91, p. 383.

[86] See e.g. G.G. Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' (1957-II) 92 RCADI 1, 38; G. Abi-Saab, 'Cours général des droit international public' (1987-VIII) 207 RCADI 9–463 p. 45.

[87] On the various dimensions of this enthusiasm for the international, see D. Kennedy, 'A New World Order: Yesterday, Today and Tomorrow' (1994) 4 Transnat'l L. & Contemp. Probs. 329–75, p. 336.; See also S. Marks, *The Riddle of All Constitutions* (OUP, Oxford, 2000) 146.

[88] On the idea of progress see T. Skouteris, *The Notion of Progress in International Law Discourse* (LEI Universiteit, Leiden, 2008), chapter 3, later published as *The Notion of Progress in International Law Discourse* (T.M.C. Asser, The Hague, 2010).

While the idea that international law is necessarily good and should be preferred to non-legal means of regulation can be seriously questioned, it helps explain how the use of non-formal international law-ascertainment has turned into a tool to expand international law. Using non-formal law-identification criteria is yet another strategy which comes to complement the existing interpretative instruments devised by international lawyers to expand international law.[89]

Accountability for the exercise of public authority

As was said above,[90] most of the international normative activity nowadays unfolds outside the traditional framework of international law, and generates norms which do not qualify as international legal rules according to the traditional law-ascertainment criteria of mainstream theory of the sources of international law. Yet, international legal scholars have been prompt to see in these new forms of norm-making at the international level a phenomenon that they ought to come to grips with and could not leave aside. It is particularly by virtue of a preoccupation with the accountability deficit generated by the sweeping impact that such norms could bear on international and national actors, that international legal scholars have increasingly tried to encompass these new phenomena in the remit of international legal studies. Encapsulating these new normative phenomena has required the use of non-formal law-ascertainment. Some of them have even been exclusively focused on this pluralization of norm-making at the international level with a view to designing instruments addressing this accountability deficit. While American liberal scholars and their interest in governmental networks may have been the first to seriously engage in such an endeavour,[91] they were quickly followed by others, as is illustrated by NYU's Global Administrative Law[92] or the Max Planck Institute's study of the International Exercise of International Public Authority'.[93] Whilst, strictly speaking, the latter have not zeroed in on traditional international legal rules,[94] they are symptomatic of the contemporary use of non-formal law-ascertainment criteria as part of an endeavour to address accountability deficit.

[89] On the use of treaty interpretation to expand international law, see L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 EJIL 585–604.

[90] Cfr *supra* 1.1.

[91] See e.g. M. Slaughter, *A New World Order* (Princeton UP, Princeton, 2004). See also A.-M. Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2003) 24 Mich. J. Int'l L. 1041.

[92] See B. Kingsbury, N. Krisch, and R. Steward, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15–61, p. 29; C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 EJIL 197–214; B. Kinsgbury, 'The Concept of Law in Global Administrative Law' (2009) 20(1) EJIL 23–57.

[93] See also M. Goldmann, 'Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* 1865 and A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375.

[94] Cfr *supra* 1.3.

A self-serving quest for new legal materials

Deformalization of law-ascertainment also has some roots in the—conscious or unconscious—quest of international legal scholars to *stretch the frontiers of their own discipline*. In that sense, deformalization of law-identification could be a means to alleviate the unease that has followed the sweeping development of international legal scholarship. Indeed, there is no doubt today that international law has acquired an unprecedented importance in legal discourse and has proven to be a paramount component of legal studies. Hence, universities and research institutes have significantly increased the number of staff charged with teaching and research in the field of international law. At the same time, many people have 'discovered' their calling for international law. International law is now studied to an unprecedented extent. As a result, the international legal scholarship has mushroomed and the number of research projects and publications on international law has soared. There is little doubt that we presently face a proliferation of international legal thinking.[95] Although the foregoing may be seen as an encouraging and cheerful development,[96] it has not come about without problems. Because scholars are so numerous today, it is much harder for each of them to find their niche and distinguish themselves. As a result, there are fewer unexplored fields and less room for the original findings that are sometimes commanded by incongruous institutional constraints when not driven by mere vanity.[97] This makes it much harder to make one's mark today than it was at a time when international legal thinking was still in its infancy. The greater difficulty in finding a niche has pushed scholars into fiercer competition and ignited a feeling of constriction, as if their field of study had grown too narrow to accommodate all of them. This battle within the profession has simultaneously been fostered by a battle among professions and, in particular, the growing interest of non-legal disciplines in subjects classically deemed to be within the exclusive ambit of legal scholarship.[98]

Against that backdrop, many scholars have chosen to advocate an extension of the limits of classical international law by 'legalizing' objects that intrinsically lie outside

[95] This is why I have expounded on in J. d'Aspremont, 'Softness in International Law: A Rejoinder to Tony D'Amato' (2009) 20 EJIL 911–17. See also J. d'Aspremont, 'La doctrine du droit international face à la tentation d'une juridicisation sans limites' (2008) 112 *Revue générale de droit international public* 849–66. See also K. Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581, 582 (he contends that 'pledges are smuggled in into the international lawyer's repertoire by dubbing them soft law').

[96] The variety and richness of scholarly opinions is often seen as one positive consequence of the unforeseen development of legal scholarship. See the remarks of B. Stephens on the occasion of the panel on 'Scholars in the Construction and Critique of International Law' held on the occasion of the 2000 ASIL meeting, (2000) 94 ASIL Proceedings 317, 318.

[97] See *contra* D. Kennedy, 'A New World Order: Yesterday, Today and Tomorrow' (1994) 4 Transnat'l L. & Contemp. Probs. 329–75, 370.

[98] On the battle for controlling the production of discourse, see generally M. Foucault, 'The Order of Discourse' in R. Young (ed), *Untying the Text: a Post-Structuralist Reader* (Routledge, London, 1981) 52.

the limits of international law through the use of non-formal law-ascertainment criteria. The use of non-formal law-ascertainment criteria, in this context, has helped scholars find new extra raw material and opened new avenues for legal research.[99]

Creative argumentation before adjudicative bodies

Finally, mention must be made of the abiding and inextricable inclinations of advocates and counsel in international judicial proceedings to take some liberties with the theory of the sources of international law.[100] To them, formal law-ascertainment frustrates creativity.[101] Deformalizing law-ascertainment conversely provides them with some leeway to stretch the limits of international law and unearth rules that support the position of the actors which they represent.[102] The use of non-formal law-ascertainment criteria thus offers more room for creative argumentation. This tendency—which is somewhat inevitable—does not seem to contradict any standard of conduct elaborated by the profession.[103] It usually manifests itself in cases where applicable rules are scarce.[104] It commonly materializes in the invocation of soft legal rules,[105] or the use of a very liberal ascertainment of custom and general principles of law.[106]

Remarks on the agendas of deformalization

The foregoing shows that deformalization of law-ascertainment stems from a host of different agendas which may, at times, seem contradictory. Subject to the occasional self-serving quest for new materials pursued by some scholars to nourish and expand their own areas of study, it is fair to say that deformalization of international law-ascertainment has usually been undertaken out of a sense of justice or collective interest. I do not intend to appraise each of these agendas. Yet, a word must be said

[99] For an illustration of that phenomenon, see e.g. D. Johnston, 'Theory, Consent and the Law of Treaties' (1988–1989) 12 Aust. YBIL 109.

[100] See generally S. Rosenne 'International Court of Justice: Practice Direction on Agents, Counsel and Advocates', in S. Rosenne (ed), *Essays on International Law and Practice* (Nijhoff, Leiden, 2007) 97–104; J.-P. Cot, 'Appearing "for" or "on behalf of" a State: the Role of Private Counsel before International Tribunals' in N. Ando, et al. (eds), *Liber Amicorum Judge Shigeru Oda,* vol 2 (Kluwer, The Hague, 2002) 835–47; J.P.W. Temminck Tuinstra, *Defence Counsel in International Criminal Law* (T.M.C. Asser, The Hague, 2009); U. Draetta, 'The Role of In-House Counsel in International Arbitration' (2009) 75 *Arbitration* 470–80.

[101] Interestingly, the same argument has been made as far as legal scholars are concerned. See J. Brunnée and S.J. Toope, 'International Law and Constructivism, Elements of an International Theory of International Law' (2000–2001) 39 Colum. J. Transnat'l L. 19–74, 65.

[102] I owe this argument to an interesting discussion with Alan Boyle.

[103] See *The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals* elaborated by the The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, 2010, available at <http://www.ucl.ac.uk/laws/cict/docs/Hague_Sept2010.pdf>; see also Jan Paulsson, 'Standards of conduct for counsel in international arbitration' (1992) 3 Am. Rev. Int'l Arb. 214–22.

[104] For a recent example, see e.g. the Memorial of Argentina of 15 January 2007 in the case *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* 132–42, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=au&case=135&k=88;>.

[105] Cfr *supra* 5.2.

[106] Cfr *infra* 7.1. and 7.2.1.

about the two most common of them, namely the programmatic attitude geared towards the emergence of new rules of international law[107] and the quest for greater accountability through non-formal law-identification.[108]

I cannot help voicing some strong reservations about the idea that the use of non-formal law-ascertainment criteria contributes to the facilitation of the emergence of new and desirable rules of international law. More specifically, I doubt that experimenting with a new rule of international law through the use of non-formal law-ascertainment criteria really helps such a norm to actually become a rule of international law. In my view, it is not true that international law is a behavioural model to which addressees grow accustomed and finally abide by. International legal rules do not exist simply because States and other addressees become habituated to being bound by them and eventually accept it. On the contrary, the use of non-formal criteria to experiment with the expansion of international law in areas where it would not be identified as such on the basis of formal law-ascertainment yardsticks may even prove counter-productive. Indeed, it may fuel strong opposition by the actual international law-makers and law-addressees. Furthermore, the illusory state of international law that is conveyed through the use of non-formal law-ascertainment may obfuscate the need to lobby for the adoption of new rules. In fact, the use of non-formal law-ascertainment criteria may bring about a feeling that the adoption of legal or non-legal regulations is no longer necessary. It can simultaneously dim the awareness of the possibility of resorting to non-legal instruments—which may prove more effective—to achieve the same political end.[109]

While the need to ensure changes to actual international legal rules is not itself condemned here, it must be pointed out that the plea for some elementary formalism in law-identification—which is more systematically spelled out in chapter 7—should not necessarily be perceived as coming at the expense of a critical evaluation of existing rules and the progressive development or change of international law in areas where States are usually loath to being bound by stricter rules. On the contrary, rather than an impediment, formal law-identification—as was already cogently demonstrated by Bentham[110]—is a necessary condition to sustain the possibility of both critical evaluation and thus of the initiation of change to actual international legal rules.

Turning to the separate idea that deformalization of international law-ascertainment can help allay accountability deficits inherent in the exercise of public authority outside the traditional framework of international law, I am of the opinion that this underlying motive of the contemporary deformalization of law-ascertainment is barely more convincing than the idea of programming the progressive development of international law. Indeed, it is to be questioned whether bringing these new forms of the exercise of public authority into the remit of international law clearly helps to

[107] Cfr *supra* 5.3.
[108] Cfr *supra* 5.3.
[109] In the same vein, see W.M. Reisman, 'The Cult of Custom in the Late 20th Century' (1987) 17 Cal. W. Int'l L. J. 133, p. 136.
[110] Cfr *supra* 3.1.2.

foster accountability. Why would accountability be more efficiently achieved if a norm-making process or an exercise of public authority is brought within the remit of international law? In other words, why would international law provide a better framework of accountability, since international law itself already lacks binding and generally available accountability mechanisms? Accountability mechanisms being significantly underdeveloped in international law, one may especially wonder whether bringing this normative activity in the remit of international law really serves its avowed objective. Moreover, it is not certain that the accountability mechanisms that could be found in international law would be the most effective. International actors have consciously and purposely placed such a normative activity outside the traditional framework of international law with a view to eluding the—already underdeveloped—mechanisms of accountability provided by international law. If legal scholars, analysts, or theorists were to succeed in their attempt to bring these forms of the exercise of public authority in the remit of international law, it can be anticipated that international actors would, in turn, again create new normative tools and use other norm-making channels which allow them to evade the accountability.

In sum, it remains to be seen whether any of these—albeit lofty—objectives can be fully achieved by deformalizing international law-ascertainment. It is not only that the use of non-formal law-identification criteria does little to actually change the *lex lata* or foster accountability mechanisms. It is also that it comes with a very high cost in terms of normativity (and authority) of international law, meaningfulness of the international legal scholarship, possibility of a critique of international legal rules, and the rule of law.[111]

[111] This has been discussed above. Cfr *supra* 2.2.

7

The Configuration of Formal Ascertainment of International Law: The Source Thesis

This chapter examines the current law-ascertainment yardsticks in the mainstream theory of the sources of international law with a view to flagging up and addressing some of their flaws. It simultaneously attempts to refresh law-ascertainment criteria in contemporary international law. Such a revitalization is attempted on the basis of the theoretical model mentioned above, according to which rules are ascertained through their pedigree (the source thesis). This chapter first expounds on how the source thesis has materialized in the theory of the sources of international law, showing that, to a large extent, the formal character of law-ascertainment has been fabricated. It then tries to shed some light on possible avenues for a rejuvenation of the source thesis in the theory of sources of international law. In particular, drawing on some practical examples, a plea is made for a move away from the law-ascertaining role of intent.

As has been explained in the previous chapters,[1] the so-called source thesis refers to the idea that law is identified by its pedigree, itself defined in formal terms, and that, as a result, identifying the law boils down to a formal pedigree test.[2] Because the pedigree is defined in formal terms, the source thesis entails formal law-ascertainment. The categorization of the pedigree requires formalization which itself necessitates the use of ordinary language. This is why, as was indicated earlier,[3] formalism at the level of law-ascertainment, and in particular the identification of rules through their pedigree (the source thesis) cannot completely elude indeterminacy. Yet, as will be demonstrated here, it is only possible for a social practice of law-ascertainment by law-applying authorities to provide a relative determinacy to formal categories on which any formal model of law-identification is based if standards of pedigrees of international rules are fashioned in a manner that lends limited room to indeterminacy. It is argued here that the source thesis in the mainstream theory of the sources of international law—as it is embodied in the model provided by article 38 of the Statute of the International Court of Justice (ICJ Statute) and the accompanying

[1] See in particular *supra* 2.1.1.

[2] On the source thesis, see generally. J. Raz, 'Legal Positivism and the Sources of Law', in J. Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon, Oxford, 1983) 37–52.

[3] Cfr *supra* 6.1.

source doctrines inspired by analogies with domestic rules[4]—fails to offer a satisfactory blueprint for law-ascertainment in international law.

Even though the following paragraphs will present a model of formal law-ascertainment that, to a significant extent, departs from the source doctrines which accompany article 38, it must first be acknowledged that providing a model for law-ascertainment has never been the function of article 38. Indeed, article 38 has never been more than a provision that modestly aims to define the law applicable by the International Court of Justice (ICJ).[5] Moreover, article 38 has never purported to provide an exhaustive list of the sources of international law. And that list was not considered very helpful anyway, even by the author of the Statute.[6] In that sense, the frenzy that this provision has always stirred up in international legal scholarship is somewhat ill-grounded. Yet, because it offers a handy toolbox for international lawyers in need of a list of sources of international law endowed with some elementary authority, and because of the sophisticated doctrines of sources that have accompanied it, this provision—although it has not been the only conventional provision to list the sources of international law[7]—has been the lens through which law-identification in international law has been—almost exclusively—construed, and on the basis of which several generations of international lawyers have been trained.

Given that the list of sources contained in article 38 of the ICJ Statute has been misguidedly elevated into the overarching paradigm of all source doctrines in international law, it should not come as a surprise that the formal law-ascertainment model that it is said to offer has been unanimously deemed unsatisfactory.[8] Reviewing all the weaknesses of which that provision has been accused is not indispensable

[4] M. Koskenniemi, 'The Legacy of the Nineteenth Century', D. Armstrong (ed), *Handbook of International Law* (Routledge, London, 2009) 141, 151. See also P.-M. Dupuy, for whom the source thesis is borrowed from domestic legal theories: P.-M. Dupuy, 'Théorie des sources et coutume en droit international contemporain' in *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (Fundación de Cultura Universitaria, Montevideo, 1994) 51, 58.

[5] In the same sense, Condorelli, 'Custom', in M. Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff, The Hague, 1991) 179–211, 184; G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in *Symbolae Verzijl* (Martinus Nijhoff, The Hague, 1958) 173.

[6] See the authors and the documents cited by O. Spiermann, *International legal argument in the Permanent Court of International Justice, The Rise of the International Judiciary* (CUP, Cambridge, 2005) 207.

[7] See art. 7 of the XII Hague Convention Relative to the Creation of an International Prize Court of 28 October 1907 (never ratified): 'If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions in the said treaty. In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity'.

[8] Using art. 38 as it stands has been deemed 'absurd'. See R. Jennings, 'The Identification of International Law' in in B. Cheng (ed), *International Law: Teaching and Practice* (Stevens, London, 1982) 3, 9. See also the criticisms by P. Haggenmacher, 'La doctrine des deux elements du droit coutumier dans la pratique de la Cour internationale' (1986) 90 *Revue générale de droit international public* 5–125, 25–6.

for the sake of the argument made here. Each textbook of international law begins its study of the sources of international law by listing the drawbacks of that provision, the usual targets being its non-exhaustive character[9] or its obsolete—and almost politically incorrect—distinction between civilized States and others.[10] It is argued here that law-ascertainment in international law must be conceived independently from article 38, which was not only conceived to serve another purpose, but also leaves too much room for non-formal law-ascertainment.

Leaving aside article 38 of the ICJ Statute, the following paragraphs address the structural flaws of the current formal law-ascertainment blueprint in international law with a view to offering a model of law-ascertainment in the theory of the sources of international law. This revitalization of formalism starts by shedding some of the mirages of formalism that shroud the traditional theory of the sources and which have allowed legal scholarship to live in an illusion of relative certainty regarding the identification of international legal rules (7.1). It will then be argued that this formal law-ascertainment model goes hand-in-hand with the incorporation of international legal rules in a written instrument. The argument made here particularly takes aim at those conceptualizations of the sources of international law that allow rules to be made through oral agreements or oral promises. After commenting on the sources of international law which do not necessitate a written instrument for identification purposes, attention will turn to the ascertainment of international legal acts, namely treaties, written promises, and acts of international organizations. On that occasion, the limits and drawbacks of the current model used to ascertain international legal acts will be scrutinized with a view to demonstrating that the current theory of the sources of international law, because of the prominent law-ascertaining role of intent, is insufficient to ensure the formal ascertainment of international legal rules (7.2). An attempt will thus be made to spell out a refreshed configuration of international law-ascertainment beyond intent (7.3).

[9] On unilateral acts as sources of rights and obligations, see E. Suy, *Les actes juridiques unilatéraux en droit international public* (LGDJ, Paris, 1962); E. Suy, 'Unilateral Acts of States as a Source of International Law: some New Thoughts and Frustrations' in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon* (Bruylant, Brussels, 2007) 631–42. See also J. d'Aspremont, 'Les travaux de la Commission du droit international relatifs aux actes unilatéraux des Etats' (2005) 109 *Revue générale de droit international public* 163–89. See the contribution of V. Rodríguez Cedeño, et al., 'Unilateral acts of States', in the *Max Planck Encyclopedia of International Law* (OUP, Oxford, 2008). See also C. Goodman, 'Acta Sunt Servanda ? A Regime for Regulating the Unilateral Acts of States at International Law (2006) 25 Aust. YBIL 43.

[10] B. Vitanyi, 'Les positions de la doctrine concernant le sens de la notion de principes généraux de droit reconnus par les nations civilisées' (1982) 86 *Revue générale de droit international public* 54–5; Y. Ben Achour, *Le rôle des civilisations dans le système (droit et relations internationales)* (Bruylant, Brussels, 2003) 129. See also G. Abi-Saab, 'Cours général de droit international public' (1987-VIII) 207 RCADI 9–463, 56. For a suggested renewal of the meaning of the reference to civilized nations, see the remarks of E.-U. Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System' (1999) 31(4) NYU JILP 753–90, 762.

7.1 Dispelling the illusion of formalism accompanying formal evidentiary, law-making and content-determining processes

Despite the fact that formalism has been embraced as a central paradigm of the ascertainment of international legal rules in the mainstream theory of the sources of international law—as has been explained in chapter 3—the theory of the sources provides for the use of non-formal law-ascertainment. Indeed, the mainstream theory of the sources of international law recognizes the existence of rules of international law originating in customary international law, general principles of law, oral agreement, or an oral promise. These sources of international legal rules do not rest on any formal law-ascertainment mechanisms, for these rules are not identified on the basis of formal criteria. Yet, the non-formal character of these law-ascertainment mechanisms has occasionally been dimmed by other forms of formalism which are alien to law-ascertainment. Indeed, as described in chapter 3, international legal scholars, since the advent of formalism, have relentlessly cloaked the making, evidence, and interpretations of the rules of international law with a veil of formalism. This has allowed the international legal scholarship to live with an illusion of formal law-ascertainment, even with respect to those legal rules which are not identified by virtue of formal indicators. There is no doubt that this illusion has been instrumental in the critiques mentioned in chapter 4. It is accordingly necessary to draw a preliminary distinction between the formalization of law-ascertainment and the veil of formalism that shrouds the *making*, the *evidence*, or the *determination of the content* of the rules. The following paragraphs thus distinguish between formal law-ascertainment and formal evidence of law, formal law-making process, and formal determination of the content of the rules. To shed light on such distinctions, it will suffice to mention a few of the classical sources of international law. There is no need to systematically review each of the traditional sources of international law classically recognized as such in the mainstream theory of the sources of international law.

Distinguishing formal law-ascertainment and formal evidence of law: customary international law

As was explained above,[11] ascertainment of law and evidence of law, whilst being two distinct intellectual operations, are inevitably interconnected. Indeed, evidence of law entails that the law-ascertainment criteria of the rule—which are defined *in abstracto*—be verified *in concreto*, that is for the sake of the specific situation in which the existence of a legal rule must be evidenced. Evidence of law accordingly calls upon the authority or the individual applying or invoking the rule to demonstrate the actual existence of indicators which themselves ascertain the existence of the rule. The close kinship between ascertainment of law and evidence of law does not mean, however, that if the ascertainment of a rule is non-formal, its evidence cannot be

[11] Cfr *supra* 2.1.1.

made formal. At least theoretically, one can well prove the existence of a rule through a formal evidentiary process although the rule concerned is ascertained by virtue of non-formal criteria. It is, therefore, not surprising that formal evidentiary processes have been devised to offset the uncertainties associated with the non-formal character of the ascertainment-mechanism of a rule. The way in which customary international law has been conceptualized in the theory of the sources of international law is very illustrative of such an endeavour to compensate non-formal law-ascertainment by a formal evidentiary process.[12] The example of customary international law simultaneously shows how difficult it actually is to effectively counterbalance the non-formal character of law-ascertainment by a formal evidentiary process. While the non-formal nature of custom-ascertainment is analyzed later, together with these rules that are ascertained short of any written instrument,[13] the following paragraphs depict how international legal scholars have striven to formalize the evidence of custom and the extent to which such an endeavour foundered.

International lawyers and scholars have long tried to develop a *formalization of the evidence* of customary international law.[14] Seen in this light, the theory of customary international law can be said to be nothing more than a formal 'programme for evidence'.[15] Such formalization of the evidence of custom elevates the two constitutive elements of custom into two evidentiary indicators which the law-applying authority are called upon to verify *in concreto*. This means that, when applying customary international law, the authority in question must preliminarily prove its existence through a two-step formal process which will be reflected in its decision. Such a formalization of the evidence of custom thus rests on the presupposition of a (general or regime-specific) secondary rule imposing obligations on international law-applying authorities as to how they must prove the existence of customary rules.[16]

This approach has undoubtedly conveyed the hope among international lawyers that the behaviour of law-applying authorities could be predicted despite the highly

[12] For a similar distinction between ascertainment of customary rules and evidence of customary rules, see P. Daillier, M. Forteau, and A. Pellet, *Droit international public* (8th edn, LGDJ, Paris, 2009) 364.

[13] Cfr *infra* 7.2.1.

[14] This also is the opinion of J.-A. Barberis, 'La Coutume est-elle une source de droit international?' in *Mélanges en hommage à Michel Virally: Le droit international au service de la paix, de la justice et du deíveloppement* (Pedone, Paris, 1991) 43–52, 44 and 50–1; P.-M. Dupuy, 'Théorie des sources et coutume en droit international contemporain' in *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (Fundación de Cultura Universitaria, Montevideo, 1994) 51, 54; See also Brownlie, *Principles of Public International Law* (6th edn, OUP, Oxford, 2003) 8 (for whom, after all, it only is a question of proof). See also B. Stern, 'La Coutume au Coeur du droit international, quelques réflexions', in D. Bardonnet (ed), *Mélanges Reuter: le droit international: uniteí et diversiteí* (Pedone, Paris, 1981) 479–99, 483; B. Cheng also construes usage as only evidential. See B. Cheng, 'On the Nature and Sources of International Law', in B. Cheng (ed), *International Law: Teaching and Practice* (Stevens, London, 1982) 203, 223. See also A. Pellet, 'Cours Général: Le droit international entre souveraineté et communauté internationale—La formation du droit international' (2007) 2 *Anuário Brasileiro de Direito Internacional* 12–75, 63.

[15] M. Bos, *A Methodology of International Law* (T.M.C. Asser Instituut, Amsterdam/NY/Oxford, 1984) 224.

[16] In the same vein, see J. Raz, *The Authority of Law* (Clarendon, Oxford, 1983) 96.

indeterminate character of custom-ascertainment. In that sense, the formalization of the evidence of customary international law has sometimes contributed to the emergence of a sense of greater adjudicative neutrality[17] in international legal argumentation and international legal adjudication.[18] Interestingly, such a formalization of the evidentiary process of customary international law can probably be deemed to correspond more closely with the conceptualization of customary international law enshrined in article 38 of the ICJ Statute which provides for a method to evidence the existence of customary international law.[19]

This being said, it would be an exaggeration to claim that this formal evidentiary model of customary international law has proved entirely satisfactory. International legal scholars themselves have been divided as to the parity existing between these two evidentiary elements.[20] Moreover, the evidentiary practice of judicial bodies has provided little consistency,[21] seesawing between the psychological[22] and the material elements.[23] More importantly, the formalism in legal argumentation and legal adjudication brought about by the formalization of the evidence of customary international law has not allayed the indeterminacy of custom-ascertainment itself and the defective normative character of customary rules.[24]

It is argued here that deficiencies of the formal programme for evidence of custom are, to a large extent, to be traced back to the non-formal character of custom-ascertainment which will be examined below.[25] The fruitless attempts to formalize evidence of custom show the need to distinguish between custom-ascertainment and evidence of custom, as the latter does not in itself formalize the former. What a formal evidentiary process formalizes is only the legal reasoning of the law-applying authority called upon to apply a rule of customary international law. The resulting formalism found in the legal reasoning inherent in the formal evidence of custom

[17] Cfr *supra* 2.1.2.

[18] On the different meanings of formalism, see *supra* 2.1.

[19] In the same vein, see S. Sur, 'La Coutume internationale' (1989) 3 *Juris-Classeur de Droit International*, Fascicule 13, 15. See also A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice* (OUP, Oxford, 2002) 677, 749.

[20] Part of the debate between the traditional custom and the new custom can also be interpreted along these lines. See the account by A.E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757.

[21] See the remarks and criticisms of A. D'Amato, 'Trashing Customary International Law', (1987) 81 AJIL 101, 102–3; T. Franck, 'Some observations on the ICJ's Procedural and Substantive Innovations' (1987) 81 AJIL 161–21, 118–19; J. Verhoeven, 'Le droit, le juge et la violence. Les arrêts Nicaragua c. Etats-Unis' (1987) 91 *Revue générale de droit international public* 1159–239, 1209; A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice* (OUP, 2002) 677, 760.

[22] See also *ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Rep. (1986).

[23] ICJ, *North Sea Continental Shelf*, ICJ Rep. 3 (1969) 35, 42–3, paras 53–75.

[24] On the problems of ascertainment and normativity of customary international law, see M. Prost, *Unitas multiplex—Les unités du droit international et la politique de la fragmentation* (McGill University, Montreal, 2008) 154, available at <http://digitool.library.mcgill.ca/>; P. Daillier, M. Forteau, and A. Pellet, *Droit international public* (8th edn, LGDJ, Paris, 2009) 349: T. Guzman, 'Saving Customary International Law' (2005) 27 Mich. J. Int'l L. 115, especially 157–59.

[25] Cfr *infra* 7.2.1.

certainly helps foster the legitimacy of the law-applying authority concerned and that of its decision. However, such a formalism is not immune from the criticisms raised by the modern critiques of formalism described in chapter 4, which have mostly taken aim at the idea of formal legal reasoning.[26]

Distinguishing formal law-ascertainment and formal law-making procedures: agreements in simplified form

As has been explained earlier in this book,[27] formal law-ascertainment means that law is identified by virtue of formal indicators. These criteria can be of various kinds. In the theory of the sources of international law, formal law-ascertainment has manifested itself through either a theory of the sources *stricto sensu*,[28] formal validation,[29] or formal law-creating processes.[30] It must be noted that however it has actually manifested itself in the theory of the sources of international law, formal law-ascertainment has generally been construed as independent from the procedure through which the law is made. Indeed, as a matter of principle, law can be ascertained through formal criteria without having been made subject to a formal procedure. It is true that international treaties often originate in a very formal procedure, the various aspects of which have been the object of a string of rules in the Vienna Convention on the Law of Treaties ('the Vienna Convention'),[31] starting with the production of full powers by the competent authority and ending with registration. However, it is not always the case that treaties are formally made, for a treaty can be adopted through a highly non-formal procedure. The use of non-formal treaty-making could even be said to be on the rise.[32] The best illustration thereof is offered by the accepted practice of agreements in simplified form (*accords en forme simplifiée*). Agreements in simplified form are proper treaties, although they originate in an ad hoc and often non-formal procedure which departs from the

[26] On this conception of formalism, cfr *supra* 2.1.2.

[27] Cfr *supra* 2.1.1.

[28] For Condorelli, the term sources remain appropriate even with respect to customary international law. See Condorelli, 'Custom', in M. Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff, The Hague, 1991) 179–211, 186; see also G. Abi-Saab, 'La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté', in *Essays in honor of Roberto Ago* (Giuffrè, Milan, 1987) 58; C. Rousseau, *Principes généraux du droit international public*, tome 1 (Pedone, Paris, 1944) 108.

[29] See A. D'Amato, 'What 'Counts' as Law?' in N.G. Onuf (ed), *Law-Making in the Global Community* (Carolina Academic Press, Durham, 1982) 83.

[30] See D.P. O'Connell, *International Law*, vol. 1 (2nd edn, Stevens, London, 1970) 7–8; see G. Schwarzenberger, *International Law*, vol. 1 (3rd edn, Stevens, London, 1957) 25–7; Jennings, 'Law-Making and Package Deal', in D. Bardonnet (ed), *Mélanges Reuter: le droit international: unité et diversité* (Pedone, Paris, 1981) 347, 348.

[31] See in particular arts 11–17 and the comments thereto.

[32] C. Lipson, 'Why are some international agreements informal' (1991) 45 *International Organization* 495; M. Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations between States in International Law' (2003) 73 BYBIL 141, 142; G.M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff, Dordrecht, 1993) 55. Such a finding was already made by M. Lachs, 'Some Reflections on Substance and Form of International Law', in W. Friedmann, L. Henkin, and O. Lissitzyn (eds), *Transnational Law in a Changing Society, Essays in Honor of P. Jessup* (Columbia UP, NY, 1972) 99.

traditional and solemn treaty-making procedure, and are usually not subject to registration with the Secretariat of the United Nations.[33] It is precisely the non-formal character of their making, especially at the domestic level, that has resulted in agreements in simplified form being so enticing.[34] Despite the non-formal character of the procedure through which they are made, agreements in simplified form are nevertheless ascertained through the formal law-ascertainment criteria applicable to treaties. The foregoing underpins the utmost relevance of such a distinction between the (non-)formal character of the law-making procedure and the (non-)formal character of the ascertainment of the rule concerned. It is argued here that such a distinction remains particularly necessary as the need for non-formal law-making procedures continues to grow unabated in a globalized world where changes are wide-ranging, more sudden, and less predictable. In this context, it is argued that deformalization of law-making procedures ought not necessary to entail deformalization of law-ascertainment.

Interestingly, the inconsequentiality of the formal character of international law-making procedures for the identification of international legal acts seems to be confirmed by the case-law of the ICJ[35] and is commonly accepted in international legal scholarship.[36] It is true that the case-law of the ICJ has sometimes appeared to lend support to the idea that formal elements of law-making procedures constitute necessary conditions for an act to be a legal act. For instance, the nebulous wording in the ICJ decision in the oft-discussed *Qatar v. Bahrain* case could be interpreted as supporting the idea that signature of the agreement is a law-ascertainment criterion.[37] Likewise, in the decision of the *Nuclear Test* case, some ambiguity shrouds the

[33] On agreements in simplified form, see C. Chayet, 'Les accords en forme simplifiée' (1957) 3 AFDI 205–26; F.S. Hamzeh, 'Treaties in simplified form—modern perspective' (1968–69) 43 BYBIL 179–89; J. Salmon, 'Les Accords non formalizes ou 'solo consensu' (1999) 45 AFDI 1–28, 22; P. Gautier, *Les accords informels et la Convention de Vienne sur le droit des traités entre Etats, Mélanges Jean Salmon: Droit du pouvoir, pouvoir du droit* (Bruylant, Brussels, 2007) 425–54; see also P. Gautier, *Essai sur la définition des traités entre Etats* (Bruylant, Brussels, 1993) 149–309. For an earlier recognition of agreement in simplified form, see the 1935 codification of the law of treaties by the Harvard Research (1935) 29 AJIL Sup. 697–698 (although it excluded simple exchange of notes from its definition of treaty).

[34] A. Aust, 'The theory and practice of informal international instruments' (1986) 35 ICLQ 787, 811. J. Klabbers, *The Concept of Treaty in International Law* (Kluwer, The Hague, 1996) 29; M. Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations Between States in International Law' (2003) 73 BYBIL 141, 142.

[35] ICJ, *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of 19 December 1978, paras 95–107 (emphasis is put on the intent as reflected in the actual terms and the context of the agreement). More recently, see the laconic decision of the Court regarding the nature of the *Maroua Declaration adopted by Cameroon and Nigeria in Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* 10 October 2002, para. 263: 'The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Art. 2, para. l), to which Nigeria has been a party since 1969 and Cameroon since 1991, and which in any case reflects customary international law in this respect'.

[36] See e.g. the remarks of P. Gautier, *Essai sur la définition des traités entre Etats* (Bruylant, Brussels, 1993) 58.

[37] ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 1 July 1994, para. 27: 'The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of

issue of the place of 'publicity' in the ascertainment of legal promises.[38] Within the framework of the work done by the International Law Commission (ILC) on unilateral acts, similar opinions have been heard as to the importance of publicity in the ascertainment of legal promises,[39] although the ILC eventually decided otherwise.[40] Yet, these few—limited—departures from the common rejection of formalism in the law-making procedure as an element of law-ascertainment fell short of reversing it and the mainstream theory of the sources of international law has globally remained averse to the ascertaining role of formal procedures—although it has been recognized that material and procedural indicators could play a supplementary role in this regard.[41] These examples simply bespeak the international lawyers' temptation to take refuge in procedures to elude the difficulties inherent in law-ascertainment.

The abovementioned temptation to elevate formalism of the law-making procedure into a formal law-ascertainment criterion probably stems from their evidentiary weight as to the presence of a will to make law. As was just indicated, there is little doubt that the formal steps of the law-making procedure can constitute useful indicators of such an intent, although their evidentiary importance has been scaled down by the ICJ for international treaties.[42] This is certainly true with respect to the international registration of treaties, which factually provides a presumption of intent.[43] Moreover, it cannot be excluded that, within a specific legal order and

Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement'. This has led some scholars to see that decision as 'a further step along the path of the gradual erosion of specific consent as the basis of the Court's jurisdiction'. See E. Lauterpacht, '"Partial" Judgments and the Inherent Jurisdiction of the International Court of Justice', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP, Cambridge, 1996) 465, 467; in the same vein see M. Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations Between States in International Law' (2003) 73 BYBIL 141, 170.

[38] See ICJ, *Nuclear Tests* case *(Australia v. France)*, 20 December 1974, para. 43: 'An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding'.

[39] Second report of the Special Rapporteur, A/CN.4/500, § 55. On this question, see C. Goodman, 'Acta Sunt Servanda ? A Regime for Regulating the Unilateral Acts of States at International Law (2006) 25 Aust. YBIL 43, especially 58–9

[40] See recommendation n°1 of the ILC working group, ILC Report (2003), A/58/10, §306.

[41] See generally, J. Klabbers, *The Concept of Treaty in International Law* (Kluwer, The Hague, 1996) 68–86. See P. Gautier, *Essai sur la définition des traités entre Etats*, (Bruylant, Brussels, 1993) 78–85. This is further analyzed below; M. Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations Between States in International Law' (2003) 73 BYBIL 141, 149–56. Cfr *infra* 7.2.4.

[42] ICJ, *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of 19 December 1978, para. 95–107 (where the emphasis was put on actual terms and context); In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 1 July 1994, para. 28, the Court interestingly held that 'The Court therefore cannot infer from the fact that Qatar did not apply for registration of the 1990 Minutes until six months alter they were signed that Qatar considered, in December 1990, that those Minutes did not constitute an international agreement'.

[43] H. Lauterpacht proposed to enshrine such presumption in the articles about the law of treaties. See 'First Report' (1953) II *Yearbook of the ILC* 97–8. On the significance of registration, see generally D.N.

among certain States, the legal effects of a treaty are conditioned upon a formal procedural requirement.[44] That does not mean, however, that the (non-)formal character of the law-making procedure must be conflated with the (non-)formal nature of the ascertainment of the rules which are generated therefrom. As was already said, a rule that is identified through formal law-ascertainment criteria can very well originate in a non-formal law-making procedure and, conversely, a rule ascertained through non-formal criteria could have been generated by a very formal procedure.

Distinguishing formal law-ascertainment and formal determination of the content of rules: principles of interpretation of international law

It is argued here that the criteria on the basis of which international legal rules are ascertained are not necessarily the same as those through which the *content* of law is determined. This means that the yardstick to distinguish between law and non-law may differ from that used, once a legal rule, to determine the scope of the legal obligation that the rule in question imposes.[45] This distinction is of fundamental import as is explained in this section.

Because there is no application of law without interpretation,[46] the question of the determination of the content of international legal rules arises each time one is called upon to apply a rule. This means that the question of the interpretation of law is permanent. It imbues any process of legal reasoning. Yet, because of the indeterminacy of language, the interpretation of law is necessarily accompanied by a wide discretionary power of the authority in charge of the application of the rule concerned. It is with a view to reining in and legitimizing the use of the discretionary powers of law-applying authorities and simultaneously limiting the fluctuations of expectations of addressees as to the meaning (and effects) of rules, that interpretation has been subject to formal limits. In international law, this has taken the form of formal rules of interpretation which, as far as international treaties are concerned, are enshrined in articles 31 to 33 of the Vienna Convention, which were themselves

Hutchinson, 'The Significance of the Registration and Non-Registration of an International Agreement in Determining Whether or Not it is a Treaty' (1993) *Current Legal Problems* 257–90.

[44] See art. 18 of the Covenant of the League of Nations: 'Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered'. For one of the very few applications of such sanction, see the decision of the French-Mexican Claims Commission of 19 October 1928 in the case of *Pablo Najera*, RIAA, vol. V, 468–73.

[45] In the same vein, see A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, Oxford, 2008) 285–6; J. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 EJIL 627–50; J. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL' (2005) 16 EJIL 213, 217; O. Corten, *Méthodologie du droit international public* (Editions de l'Université de Bruxelles, Brussels, 2009) 213. See *contra* P. Reuter, 'Traités et transactions. Réflexions sur l'identification de certains engagements conventionnels', in *Essays in honor of Roberto Ago* (Giuffrè, Milan, 1987) 399.

[46] As famously stated by G. Scelle. See G. Scelle, *Précis de droit des gens principes et systématique*, vol. II (Sirey, Paris, 1934) 488. See also G. Schwarzenberger, 'Myths and Realities in Treaty Interpretation' (1968) 9 Va. J. Int'l L. 1, 8.

influenced by some earlier scholarly work.[47] Although it has proved less successful, a similar endeavour has also been undertaken for unilateral acts and promises,[48] which the ICJ did not see as being necessarily governed by the same principles as international treaties.[49]

As far as the interpretation of international treaties is concerned, the adoption of these rules has been deemed a feat.[50] It was intended to replace the sovereignty-protective principles of interpretation devised by international courts in the first half of the 20th century[51] by a toolbox of allegedly neutral principles.[52] Leaving aside the legitimacy that these rules bestow upon the legal reasoning of law-applying authorities, the paradox nonetheless is that, while they constitute some of the rules of the Vienna Convention to which reference is most frequently made,[53] they are actually of limited help, for, in my view, the actual leeway of law-applying authorities remains almost unfettered.[54] The exercise of that discretion has simply been made more

[47] See (1956) 46 *Annuaire de l'Institut de droit international* 364–5. See also <http://www.idi-iil.org/>. A.D. McNair, *The Law of Treaties* (Clarendon, Oxford, 1961) 466; See L. Siorat, *Le Problème des lacunes en droit international. Contribution à l'étude des sources du droit et de la fonction judiciaire* (LGDJ, Paris, 1958) 134. C. Rousseau, *Principes généraux du droit international public*, tome I (Pedone, Paris, 1944) 676. See also P. Verzijl, *Georges Pinson* case (1927–8) AD No. 292, cited by C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 279. On the work of the ILC, see M.S. McDougal, 'The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus' (1967) 61 AJIL 992–1000.

[48] See the *Fourth report on Unilateral Acts of States*, A/CN.4/519, §§101–54 and *Fifth report on Unilateral Acts of States*, A/CN.4/525, add.1, §§120–35. See the comments of J. d'Aspremont, 'Les travaux de la Commission du droit international sur les actes unilatéraux des Etats' (2005) 109 *Revue générale de droit international public* 163–89. See the contribution of V. Rodríguez Cedeño, et al., 'Unililateral acts of States', in the *Max Planck Encyclopedia of International Law* (OUP, Oxford, 2008). See also C. Goodman, 'Acta Sunt Servanda ? A Regime for Regulating the Unilateral Acts of States at International Law (2006) 25 Aust. YBIL 43 or A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, Oxford, 2008) 465–86.

[49] See ICJ, Advisory Opinion on the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, 22 July 2010, available at <http://www.icj-cij.org> para. 94.

[50] P. Reuter, *Introduction au droit des traités* (Armand Colin, Paris, 1972) 103. See P.Daillier and A. Pellet, *Droit international public* (6th edn, LGDJ, Paris, 1999) 262.

[51] PCIJ, *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion, 1925 PCIJ Series B, No. 12, 7, 25.

[52] On the rebuttal of that idea, see L. Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 EJIL 681–700.

[53] See e.g. ICJ, Arbitral Award of 31 July 1989 *(Guinea-Bissau v. Senegal)*, Judgment, ICJ Rep. (1991) 69–70, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, ICJ Rep. (1992) 582–3, para. 373, and 586, para. 380; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Rep. (1994) 21–2, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, ICJ Rep. (1995) 18, para. 33.

[54] See Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in The Interpretation of Treaties' (1949) 26 BYBIL 48–85, 53: 'In a sense, the controversy as to the justification of rules of interpretation partakes of some degree of artificiality as it tends to exaggerate their importance. For as a rule they are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means. It is elegant—and it inspires confidence—to give the guard of an established rule of interpretation to a conclusion reached as to the meaning of a . . . treaty. But it is a fallacy to assume that the existence of these rules is a secure safeguard against arbitrariness or impartiality. The very choice of any single rule or of a combination or cumulation of them is the result of a judgment arrived at, independently

formal with the hope of making the outcome therewith more legitimate. Nothing is more illustrative than the case-law of the international tribunals pertaining to the principle of systemic integration, despite this principle making interpretation less contingent on the intent of the lawmakers and more dependent on existing formal legal instruments.[55] Be that as it may, the existence of the formal principles of interpretation shrouds law-application with a veil of formalism. These rules purport to provide a formal methodology to the interpretation of international legal rules.[56] In that sense, formalism in interpretation is an expression of the theory of adjudicative neutrality and immanent intelligibility of legal arguments,[57] whereby interpretation is meant to provide certainty in the behaviour of law-applying authorities.[58]

Rule-scepticism and legal realism,[59] as well as subsequent approaches to international law associated with deconstructivism and critical legal studies,[60] have already long

of any rules of construction, by reference to considerations of good faith, of justice, and of public policy within the orbit of the express or implied intention of the parties or of the legislature'. See also J.H.H. Weiler, 'The Interpretation of Treaties—A Re-examination Preface' (2010) 21(3) EJIL 507.

[55] See e.g. ICJ, *Oil Platforms*, decision of 6 November 2003, ICJ Rep. (2003) para. 78; See the criticisms of P. d'Argent, 'Du commerce à l'emploi de la force: l'affaire des plates-formes pétrolières (arrêt sur le fond)' (2003) 49 *Annuaire français de droit international* 266, 655–78; See the Opinion of Judge Buergenthal, Judge Higgins, or the Opinion of Judge Kooijmans, ICJ Rep. (2003); See C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279. Compare with the more reasonable use of that principle in the case *Djibouti v. France,* ICJ Rep. (1999) paras 113–14. For other uses of the principles of systemic integration in the international case-law, see *Arbitration regarding the Iron Rhine Railway*, (*Kingdom of Belgium v. Kingdom of the Netherlands)* 24 May 2005, available at <http://www.pca-cpa.org> paras 58 and 79. See the remarks of P. d'Argent, 'De la fragmentation à la cohésion systémique: la sentence arbitrale du 24 mai 2005 relative au Rhin de fer (Ijzeren Rijn)' in *Droit du pouvoir, pouvoir du droit, Liber amicorum Jean Salmon* (Bruylant, Brussels, 2007) 1113–37. See the very restrictive interpretation by the WTO Appellate Body in the *EC-Measures Affecting the Approval and Marketing of Biothech Products* WT/DS291/R; WT/DS292/R; WT/DS293/R, 29 September 2006, para. 7.68: 'Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by others of international law which that State has decided not to accept'. On this point, see the remarks of B. Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265–97, 276–7. On that principle, see also the remarks of J. d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order', in A. Nollkaemper and O.K. Fauchald (eds), *Unity or Fragmentation of International Law: The Role of International and National Tribunals* (Hart, Oxford, 2011) (forthcoming).

[56] See generally S. Sur, *L'interprétation en droit international public* (LGDJ, Paris, 1974). See also J.-M. Sorel, 'Article 31', in P. Klein and O. Corten (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article* (Bruylant, Bruxelles, 2006) 1289–338; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, Oxford, 2008) 301–92; J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge, London, 2010) 92.

[57] On this conception of formalism, cfr *supra* 2.1.2.

[58] See E.J. Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (May 1988) 97(6) Yale L. J. 949–1016; S.V. Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 EJIL 313–25, especially 322.

[59] On the realist criticisms of formalism as a theory of legal reasoning in adjudication, see generally A.J. Sebok, 'Misunderstanding Positivism' (1994–1995) 93 Mich. L. Rev. 2054 especially. 2071. See also *supra* 4.1.2.

[60] See e.g. D. Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 LJIL 84; D. Kennedy, 'When Renewal Repeats: Thinking Against the Box' (1999–2000) 32 NYU JILP 335. M.

demonstrated the illusive character of formalism in law-interpretation[61] and shed some light on the 'abuse of logic',[62] the 'abuse of deduction',[63] and the 'mechanical jurisprudence'[64] inherent in such a formal determination of the content of legal rules. This is why it is so important to stress that the formalism accompanying formal interpretation of international legal rules is fundamentally different from formalism in law-ascertainment. Indeed, formal determination of the content of rules, i.e. formalism in interpretation, should be clearly distinguished from formal law-ascertainment. Subjecting a rule to formal ascertainment does not mean that its content must necessarily be determined through formal interpretative processes. The opposite is also true. The content of rules which are identified through non-formal ascertainment processes can remain subject to formal principles of interpretation. In international law, for instance, it is commonly agreed that the principles of interpretation designed by the Vienna Convention are customary international law[65] and apply to oral agreements, despite the latter being identified through non-formal ascertainment standards.

It is true that if a criterion like the intent of the parties is elevated into a law-ascertainment indicator, and if that intent is to be inferred from the instrument, interpretation of the content of the instrument will be necessary to unearth the intent and thus to assess whether the rule is a legal rule.[66] This, however, is a consequence of the use of intent as a law-identification criterion.[67] As such, law-ascertainment and interpretation of the content of rules are two distinct operations. The distinction is important, for the law-ascertainment criteria of a rule can be free of any formalism while the determination of its content may be subject to formal principles

Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP, Cambridge, 2002) 502. M. Koskenniemi, *From Apology to Utopia* (CUP, Cambridge, 2005) 306. N. Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 Harvard JIL 81; T. Skouteris, 'Fin de Nail: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship' (1997) 10 LJIL 415; T. Skouteris, *The Notion of Progress in International Law Discourse* (LEI Universiteit, Leiden, 2008) chapter 3; For a similar interpretation of formalism from the vantage point of critical legal studies, see I. Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism' (1990) 61 BYBIL 339–62, 345.

[61] Cfr *supra* 7.1.

[62] A.J. Sebok, 'Misunderstanding Positivism' (1994–1995) 93 Mich. L. Rev. 2054, 2093.

[63] D. Kennedy, *The Rise and Fall of Classical Legal Thoughts* (re-edited in 2006, Beard Books, Washington DC) at xviii.

[64] This is the famous expression of Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 Colum. L. Rev. 605.

[65] See generally J.M. Sorel, 'Article 31' in P. Klein and O. Corten (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article* (Bruylant, Bruxelles, 2006) 1289–334; M.E. Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Nijhoff, Dordrecht, 1985) 334–43; see ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* ICJ Rep. (1994) 6; *Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Rep. (1999) 1059; *LaGrand (Germany v. United States of America)* ICJ Rep. (2001) 501, para. 99. See *Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République Française en application du Protocole du 25 septembre 1991 additionnel à la Convention relative à la protection du Rhin contre la pollution par les chlorures du 3 décembre 1976 (The Netherlands v. France)*, Award of 12 March 2004, UNRIAA, vol. XXV, 312, para. 103.

[66] O. Corten, *Méthodologie du droit international public* (Editions de l'Université de Bruxelles, Brussels, 2009) 213–14.

[67] Cfr *infra* 7.2.3.

of interpretation and vice-versa. This is also the reason why formal law-ascertainment—which is exclusively discussed in this book—does not contribute to the delineation of the entire phenomenon of law and falls short of providing indication as to the content of law.[68]

7.2 Ascertainment of international legal rules in traditional source doctrines and case-law

The previous paragraphs have been aimed at laying bare some of the illusions of formal law-ascertainment mistakenly associated with formal evidentiary processes, formal law-making procedures, and formal determination of the content of international legal rules in the mainstream theory of the sources of international law. I am now turning to the current state of formal ascertainment of international legal rules in mainstream theory of the sources. As has been explained above,[69] international legal rules have commonly been ascertained through their sources. Main sources of international law include treaties, unilateral promises, customary law, and general principles of law. It is not the aim of this section to review them all. A distinction will, more simply, be drawn between those rules of international law that are ascertained by virtue of the instrument in which they are enshrined (7.2.2) and those that are not (7.2.1) with a view to demonstrating that formal law-ascertainment has only proved possible as regards the former. Yet, it will be shown that, in traditional sources doctrines, even those rules ascertained by virtue of the instrument in which they are contained still necessitate resorting to non-formal indicators, thereby showing the limits of formal law-ascertainment as is currently fashioned in the mainstream theory of the sources of international law (7.2.3 and 7.2.4).

7.2.1 Rules ascertained short of any written instrument: custom, general principles of law, oral treaties, and oral promises

International law has long recognized the existence of rules that are not enshrined in a written instrument, as is illustrated by the general acceptance that customary international law, general principles of law, or oral agreements and promises can generate rules of international law. These rules usually correspond with the category of rules dubbed by international legal scholars 'non-treaty law'.[70] As a result, the rules originating in these sources are not ascertained on the basis of a written instrument but by virtue of indicators found elsewhere. It will be shown here that

[68] For a more ambitious attempt to describe the 'complete phenomenon of law', see M. Bos, *A Methodology of International Law* (T.M.C. Asser Instituut, Amsterdam/NY/Oxford, 1984) 2.

[69] Cfr *supra* 3.2.2.

[70] See e.g. D. Bodansky, 'Prologue to a Theory of Non-Treaty Norms', in M. Arsanjani, et al. (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill, Leiden, 2011) 119–34; see also H. Hillgenberg, 'A Fresh look at Soft Law' (1999) 10 EJIL 499. See also the distinction by P. Daillier, M. Forteau, and A. Pellet between conventional modes of law-making and non-conventional modes of law-making (the latter including voluntary and spontaneous modes of law-making). See P. Daillier, M. Forteau, and A. Pellet, *Droit international public* (8th edn, LGDJ, Paris, 2009) 365.

8

The Foundations of Formal Ascertainment of International Law: The Social Thesis

The previous chapter has tried to refresh the formal ascertainment of international legal rules and dispel some of the illusions of formalism that permeate mainstream theory of the sources in international law. It has opened some avenues to revitalize the current law-ascertainment criteria in international law by moving away from intent. Yet, the abovementioned model of formal law-ascertainment is not self-sufficient, for it does not provide any indication as to the foundations of such formal law-ascertainment criteria. Indeed, any set of formal yardsticks of law-ascertainment shaped through ordinary language would remain inextricably beset by the indeterminacy of language if it were not grounded in the social practice of those who apply them. This chapter thus turns to the foundations of law-ascertainment in the theory of the sources of international law and, trying to offset the anti-theoretical bent of the international legal scholarship, demonstrates the possibility of constructing a theory of formal law-ascertainment grounded in the social practice of law-applying authorities. In other words, it explains how the source thesis presented in the chapter 7 can itself be rooted in the social practice of law-applying authorities (the social thesis).

As was indicated above,[1] such an understanding of the foundations of formalism corresponds with Hart's and his followers' so-called social thesis. Indeed, according to Hart's theory which was described in chapter 3, the social thesis purports to provide foundations to law-ascertainment criteria—which, in Hart's theory, are embodied by the rule of recognition. This understanding of the foundations of formal law-ascertainment criteria, although devised for domestic legal systems, proves equally insightful for the ascertainment of international legal rules. It has been shown in chapter 3 that international lawyers and scholars, while proving very amenable to Hart's source thesis (and especially the rule of recognition), curiously paid very little attention to his idea that the social practice provides the foundations of formal law-ascertainment.[2] It is the ambition of the following paragraphs to demonstrate the relevance of the social thesis for the ascertainment of international legal rules. It is acknowledged, however, that the application of the social thesis to

[1] Cfr *supra* 2.1.1 and 3.1.3.

[2] Dupuy is among those who has been the most explicit on this point. See P.-M. Dupuy, 'L'unité de l'ordre juridique international: cours général de droit international public' (2002) 297 RCADI 9–489, 200. He argues on p. 201 that law is a language which 'repose sur des conventions, c'est-à-dire sur des significations acceptées par tous ceux qui doivent l'employer'.

international law does not come without problems and will have to be tailored to fit the international context. For example, the concept of a law-applying authority must no doubt be reconceptualized. One cannot simply mechanically transpose Hart's social thesis to the theory of the sources of international law. Subsequent amendments to the social thesis devised by Hart's followers will also prove of relevance here.

This chapter starts by explaining how the meaning of law-ascertainment criteria can be grounded in social practice without falling into the pitfall of objectivism. In doing so, it borrows from Wittgenstein's recourse to communitarian semantics produced by law-applying authorities (8.1). Because of the fragmented and horizontal character of the international legal order, the concept of law-applying authorities whose practice is generative of law-ascertainment criteria will necessitate a refinement (8.2). While it is argued that the international legal order has the potential to generate sufficient communitarian semantics for the sake of the ascertainment of international legal rules, it will nonetheless be explained that those actors participating in the emergence of such social practice may be lacking sufficient social consciousness (8.3). This section will then demonstrate how the model of formal law-ascertainment based on the social practice of law-applying authorities makes the question of the validity of international law moot from the vantage point of law-ascertainment (8.4). It will eventually shed light on some of the conciliatory virtues of the social thesis against the backdrop of the theoretical controversies riddling the general theory of international law (8.5).

8.1 The foundations and meaning of law-ascertainment criteria: communitarian semantics

Formalism in law-ascertainment is, in itself, incapable of producing any meaningful criteria for the ascertainment of rules. The meaning of the formal standards of law-ascertainment ought to be sought elsewhere. As was explained in chapter 3, Hart himself recognized that law-ascertainment criteria—in his words: the 'rule of recognition'—are vague and open-textured.[3] This 'concession' by Hart is not, however, as ground-breaking as it is sometimes portrayed in general legal theory. Indeed, as was explained in chapter 3, the rejection of the idea of an intrinsic meaning of words was already found in Bentham's work. Bentham was loath to employ the expert language used by lawyers for he found that this was an intimidating tactic[4]—a feeling that was subsequently voiced by scholars affiliated to critical legal studies and structuralism.[5] Bemoaning the fact that such technical language has so often been used as an instrument of mystification and oppression to deceive men,[6] Bentham—probably

[3] H.L.A. Hart, *The Concept of Law* (2nd edn, OUP, Oxford, 1997) 144–50.

[4] H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon, Oxford, 1982) 29–30.

[5] See M. Koskenniemi, 'Politics of International Law: 20 Years Later' (2009) 20 EJIL 7–19.

[6] J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Kessinger, Whitefish, 2005, first published 1781, London) 332–3. On this particular point of Bentham's theory, see the remarks of

influenced by Hobbes[7]—dismissed the Aristotelian idea that words have meaning of their own. In doing so, he came to be one of the first thinkers to contend that sentences, not words, are the unit of meaning and that the meaning of sentences is thus informed by practice.[8] Bentham, although his accounts of legal statements remained reductive, thus opened the door for a conceptualization of the formal identification of rules based on social practice. In that sense, by breaking with the Aristotelian tradition, he prefigured the idea that the meaning of law-ascertainment criteria is based on communitarian semantics.

Such a concept was subsequently refined by the philosophers of language, and especially by Wittgenstein. According to that communitarian conceptualization of the meaning of rules which is found in the philosophy of language, the meaning of formal law-ascertainment criteria arises out of their *convergence in use*. That means that it is law-ascertainment 'at work' that informs the meaning of the formal criteria of law-identification. That also indicates that the meaning of law-ascertainment criteria originates in the convergences of the practice of law-applying authorities.[9] According to the argument made here, short of any convergence, lawyers end up speaking different languages, thereby depriving law of any normativity.

It is this concept of the meaning of rules that influenced Hart and informed his social thesis described in chapter 3.[10] This correlatively proves instrumental in the development of his famous 'internal point' of view. The extent of Wittgenstein's actual influence on Hart has been subject to some controversy.[11] It has even been contended that Hart's foray into Wittgenstein's philosophy has been of little avail, because he actually failed to fully use his insights.[12] Yet, the communitarian semantics which he borrows from Wittgenstein have not been challenged by his

Hart: H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon, Oxford, 1982) 9.

[7] T. Hobbes and E. Curley (ed), *Leviathan* (Hackett, Indianapolis, 1994) 175 and 242.

[8] H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon, Oxford, 1982) 10.

[9] On the criticism of that part of Hart's argument by Dworkin, see *supra* 4.1.3. In his Postscripts, Hart has denied that he suffers from a semantic sting: H.L.A. Hart, *The Concept of Law* (2nd edn, OUP, Oxford, 1997) 246.

[10] H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon, Oxford, 1982) 10. See also Hart's essay, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence', reproduced in *Hart's Collected Essays in Jurisprudence and Philosophy* (Clarendon, Oxford, 1983) 265, 277. See the remarks by Stavropoulos, who argues that such a concept of meaning can only come from Wittgenstein: N. Stavropoulos, 'Hart's Semantics' in J. Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP, Oxford, 2001) 59, 86.

[11] T. Endicott, 'Herbert Hart and the Semantic Sting', in J. Coleman (ed), ibid, 39, 41. Lacey also argues that 'one can speculate with more confidence about the intellectual basis for Herbert's engagement with the linguistic philosophy school': N. Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble* Dream (OUP, Oxford, 2004) 142. She also submits that, at a later stage, Hart 'came to regard the illuminating power of linguistic philosophy as more limited than he had in the 1940s and 1950s': N. Lacey, ibid, 143. See also her comments, 218–19. See *contra* N. Stavropoulos, ibid, 59, 59.

[12] See J. Raz, 'The Nature and Theory of Law' in J. Coleman (ed), ibid, 1, 6; see also T. Endicott, 'Herbert Hart and the Semantic Sting' in J. Coleman (ed), ibid, 41.

followers.[13] This being said, neither Hart nor his followers have been very voluble as to the exact influence that Wittgenstein—whose written style was found by Hart to be scandalously obscure[14]—on their understanding of the social foundations of law-ascertainment criteria. This is why a brief inroad into Wittgenstein's philosophy is necessary here in order to supplement Hart's social thesis and allow it to be adapted to the specificities of international law. Moreover, as is widely assumed, especially by legal theorists, Wittgenstein's use of the concept of 'rules' in his work refers to all normative constraints which can guide the practice of individuals, and his insights are entirely relevant to the debate about the indeterminacy of law-ascertainment criteria.[15]

As is well-known, Wittgenstein denied the possibility of private language and thus participated in the demise of philosophical foundationalism.[16] Wittgenstein famously asserted the impossibility of private language in paragraph 201 of his *Philosophical Investigations*.[17] In this much-discussed text, Wittgenstein rejects the idea that language has a structure and a meaning that can be revealed through analysis. He argues that there is no such thing as a unified theory about any given linguistic concept. Wittgenstein's assertion on the impossibility of private language is considered to have brought general scepticism towards self-knowledge much further than Hume's scepticism about private causation.[18] However, contrary to other sceptics, Wittgenstein did not intend to leave that impossibility unresolved. This is the essence of the ensuing well-known paragraph 202 of his *Philosophical Investigations,* where he famously envisaged a communitarian foundation of the meaning of rules.[19] To Wittgenstein, clarification of the meaning of words—a task which he assigns to Philosophy[20]—is all about how the participants in human activities

[13] See e.g. J. Coleman, *The Practice of Principle* (OUP, Oxford, 2001) 99. J. Coleman, 'Negative and Positivism', in D. Patterson (ed), *Philosophy of Law and Legal Theory: An Anthology* (Blackwell, Oxford, 2003) 116, 121; See also D. Patterson, 'Wittgenstein and Constitutional Theory' (1993–1994) 72 Tex. L. Rev. 1837; D. Patterson, 'Wittgenstein on Understanding and Interpretation' (2006) 29 *Philosophical Investigations* 129–39; D. Patterson, 'Interpretation of Law' (2005) 42 San Diego L. Rev. 685.

[14] N. Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (OUP, Oxford, 2004) 218–19.

[15] L. Wittgenstein, *Philosophical Investigations* (3rd edn, Blackwell, Oxford, 2001) para. 43. See the remarks of B. Bix, 'The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory', in D.M. Patterson (ed), *Wittgenstein and Legal Theory* (Westview, Boulder, 1992) 209, 209.

[16] The abandonment of the varieties of philosophical foundationalism is described in R. Rorty' s famous book, *Philosophy and the Mirror of Nature* (25th Anniversary Edition, Princeton UP, Princeton, 2009).

[17] L. Wittgenstein, *Philosophical Investigations* (3rd edn, Blackwell, Oxford, 2001) para. 201: 'This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: If *any* action can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here'.

[18] On Hume's scepticism towards private causation, see D. Hume, *A Treatise of Human Nature* (Courier Dover, NY, 2003) 50. On the differences between Hume and Wittgenstein, see S.A. Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP, Cambridge, 1982) 62.

[19] 'And hence also "obeying a rule" is a practice. And to *think* one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule "privately"; otherwise thinking one was obeying a rule would be the same thing as obeying it'.

[20] Wittgenstein, *Tractacus Logico-Philosophicus* (Dover, NY, 1999, first published 1922) 4.112.

conduct such a clarification.[21] It is how the word is used that will teach us the meaning of the word. The meaning of words thus stems from the agreement in action. This harmony in application is constitutive of our understanding of words.

It must be acknowledged that the interpretation of these two famous paragraphs has been the object of wide disagreement. Both the extent of his sceptical diagnosis[22] and that of the suggested antidote[23] have stirred enormous controversy and have taken their place among the most debated questions in the philosophy of language. Because these two paragraphs are so laconic and cryptic, they have been used by both supporters of the radical indeterminacy thesis and supporters of the relative indeterminacy thesis. For the sake of the argument made here, it is not necessary to grapple with the determination of the degree of Wittgenstein's scepticism, for it is not contested here that there is no inner meaning of words and that the language of law is fundamentally indeterminate. Rather, what is of greater relevance for the demonstration undertaken here is to zero in on the antidote. This being said, it is not the ambition of the following paragraphs to discuss or to solve the controversy pertaining to the tool which allows us to rein in the impossibility of meaning. Indeed, it is certainly not up to an international legal scholar barely versed in the philosophy of language to take up a position in a debate which is beyond his expertise. I thus want to avoid endorsing one particular reading of Wittgenstein that will itself lend support to criticism. Moreover, all that matters here is that our formal model of law-ascertainment is informed by this debate. It suffices here to sketch out the two main interpretations that have been made of Wittgenstein's conception of the meaning of rules, with a view to showing that they can provide some insight for the foundations of law-ascertainment criteria in general.

There are scholars who contend that Wittgenstein did not intend to convey that meaning is derived from the practice of rule-followers, but rather that only the rule itself can be the source of its meaning. They argue that Wittgenstein requires an 'internal relation' between a rule and a practice, and that the practice only shows that people are actually complying with the rule.[24] Departing from that first interpretation, there are other scholars who understand Wittgenstein as constructing the determination of meaning as an entirely social question. According to that interpretation, meaning is not found in the rule itself but lies in the temporary consensus of the society. It is grounded in a 'bedrock of practice'[25] by the community of

[21] See the famous example by L. Wittgenstein, *Philosophical Investigations* (3rd edn, Blackwell, Oxford, 2001) paras 1, 3e.

[22] See, for instance, the interpretation of Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP, Cambridge, 1982) 7–54. See the rejection of that interpretation by B. Bix, 'The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory', in D.M. Patterson (ed), *Wittgenstein and Legal Theory* (Westview, Boulder, 1992) 209, 209. See also the remarks by G.A. Smith, 'Wittgenstein and the Sceptical Fallacy', in D. Patterson (ed), ibid, 157–88 or B. Langille, 'Political World' in D. Patterson (ed), ibid, 233–47.

[23] This controversy is especially discussed by D. Patterson, 'Law's Pragmatism: Law as Practice and Narrative', in D.M. Patterson (ed), ibid, 85–121, 85.

[24] A classical example of that approach is that of G.P. Baker and P.M.S. Hacker, *Scepticism, Rules and Language* (Blackwell, Oxford, 1984).

[25] B. Langille, 'Revolution Without Foundations' (1988) 33 McGill L. J. 451, 498.

rule-followers. It is thus the conduct of the social group that determines the meaning of the rule—at least what constitutes acting in accordance with the rule.[26] This interpretation is the so-called 'community consensus'.[27] It corresponds with the 'private language argument' as was interpreted by Kripke.[28] Attempts have been made to bridge these two approaches by Dennis Patterson, who has advocated an antidote to the paradox of rule-following which not only rests on the community consensus but also requires a disclosure of the purpose of the rule in the legal system—what he calls 'the point of the rule'.[29] The concept of 'the point of the rule' constitutes the purpose of the rule or its ground of justification. According to Patterson, short of any perception of the purpose of the rule within the practice of law, one cannot identify the meaning of that rule.

It does not seem necessary to delve further into this discussion. It is uncontested that it is the second interpretation of Wittgenstein (i.e. community consensus) that Hart had in mind.[30] This is also the understanding of Wittgenstein which proves the most relevant to the conception of formal law-ascertainment presented here. Furthermore, it should be noted that Wittgenstein is not the only philosopher who could offer some theoretical support for a conceptualization of the social foundations of law-ascertainment. Similar insights can be inferred from other philosophers, as is illustrated by Quine—although his work is more restricted to behavioural evidence of the meaning of rules taken in isolation, for he tries to infer from the behaviour of the speaker the meaning of his words.[31] Ultimately, whether the idea of communitarian semantics comes from Wittgenstein or not is of little importance. The argument made here does not need to seek any sort of authority in the philosophy of language. The short detour into the philosophy of language made in this book is solely directed at gaining additional indications as to the social foundations of law-ascertainment at the basis of the social thesis. By the same token, whether the communitarian semantics must be supplemented by a sense of purpose of the norm—i.e. the 'point of the rule' according to Patterson—by the rule-follower does not seem to require much discussion either.

[26] N. Malcom, *Nothing is Hidden* (Blackwell, Oxford, 1986).

[27] D. Patterson, 'Law's Pragmatism: Law as Practice and Narrative', in D.M. Patterson (ed), *Wittgenstein and Legal Theory* (Westview, Boulder, 1992) 85, 86.

[28] S.A. Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP, Cambridge, 1982). Kripke's interpretation of Wittgenstein has been much discussed. For a criticism, see B. Bix, 'The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory', in D.M. Patterson (ed), ibid, 209, 210.

[29] D. Patterson, 'Law's Pragmatism: Law as Practice and Narrative', in D.M. Patterson (ed), ibid, 85, 95.

[30] It is not necessarily the same interpretation as Fuller—who was also influenced by Wittgenstein—endorsed. See L. Fuller, *The Morality of Law* (revised edn, Yale UP, New Haven, 1969) 186.

[31] M.V. Quine, *Word and Object* (MIT, The Technology Press, Cambridge, 1960); on the differences between Quine and Wittgenstein, see S.A. Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP, Cambridge, 1982) 56. Noam Chomsky's critique of B.F. Skinner's *Verbal Behavior* is usually considered as a simultaneous critique of Quine's work. See N. Chomsky 'A Review of B. F. Skinner's Verbal Behavior', in L.A. Jakobovits and M.S. Mirón (eds), *Readings in the Psychology of Language* (Prentice-Hall, Englewood Cliffs, 1967) 142.

According to the formal model of law-identification discussed here, the foundations and meaning of law-ascertainment criteria are thus found in the converging practice of law-applying authorities. My argument embraces an 'exclusive internal point of view'[32] as to the meaning of the formal yardsticks that are used to ascertain the rules of international law. Yet, the *degree of convergence* necessary for a practice to provide enough meaning to law-ascertainment still needs to be spelled out. This is of special importance in international law where there is limited practice in law-ascertainment, for there are few law-applying authorities and—as described in the previous section[33]—these authorities have not always yielded a consistent practice as to what are those formal yardsticks that determine what is law and what is not law.

It will not be contested that establishing an absolute convergence between all the law-applying authorities of a legal system as to what the criteria for identifying the law are is probably elusive. This is a point astutely raised by Dworkin.[34] According to this argument, there will never be total agreement among law-applying authorities. Moreover, even when the law-applying authorities may on the surface yield the impression that they are applying the same law-ascertainment criteria, their readings of the meaning of these criteria may not be the same.[35] Indeed, there is always a risk that law-applying authorities are not talking about the same thing.

Yet, concurring with Wittgenstein and, subsequently, Hart and rejecting Dworkin's semantic sting objection,[36] I argue that the social foundation of formalism in the ascertainment of international legal rules does not call for actual, total, and absolute agreement among law-applying authorities. It essentially requires a shared *feeling* of applying the same criteria. In that sense, formalism in law-ascertainment is no different from ordinary language. Two persons may well be using the same words and believe that they attribute to them the same meaning, but in actual fact are talking past each other. That, however, does not preclude that they are speaking the same language. Accordingly, moderate misunderstandings that can beset the use of words—and hence the use of law-ascertainment criteria—do not constitute an insurmountable obstacle to the emergence of communitarian semantics. What is simply needed is the *feeling* of using the same criteria.[37] Needless to say that such a feeling will necessarily hinge on their respective understandings of formal law-ascertainment criteria *dovetailing to a reasonable extent*. Short of any minimal correspondence in meaning, law-applying authorities will never come to share the

[32] For a similar espousal of an 'exclusive internal point of view', see G.P. Fletcher, 'Law as a Discourse' (1991–1992) 13 Cardozo L. Rev. 1631, 1634.

[33] Cfr *supra* 7.2.4 and 7.2.5.

[34] Cfr *supra* 4.1.3.

[35] See W. Gallie, *Essentially Contested Concepts, Proceedings of the Aristotelian Society*, vol. 56 (Harrison, London, 1955–5), cited by B. Bix, 'The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory', in D.M. Patterson (ed), *Wittgenstein and Legal Theory* (Westview, Boulder, 1992) 209, 220.

[36] Cfr *supra* 4.1.3.

[37] See the remarks of Raz: J. Raz, 'The Nature and Theory of Law', in J. Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP, Oxford, 2001) 1, 19. *Contra* B. Tamanaha, *A General Jurisprudence of Law and Society* (OUP, Oxford, 2001) 153–4.

feeling that they speak the same language and, hence, their practice will not generate any communitarian semantics.

It is further submitted that the reasons underlying such a feeling of a common language are without relevance. What matters is simply that law-applying authorities do in fact share such a feeling. This is consistent with the point made by Wittgenstein—at least as it has been interpreted by Kripke[38]—that convergence is a brute fact that is self-sufficient to be generative of a practice relevant for the establishment of law-ascertainment criteria. This similarly corresponds with what Hart defended when he submitted that the reason why law-applying authorities abide by the rule of recognition does not need to be answered and that the meaning of the rule of recognition is independent from the motive behind such converging attitude of law-applying authorities.[39]

It must still be added that the existence of such a shared feeling presupposes the ability for each law-applying authority to check whether other law-applying authorities use the law-ascertainment criterion at stake according to a similar perception.[40] It is argued here that the current circulation of decisions of authorities called upon to apply international law and their translation into a language spoken by most of them are sufficient to ensure such a mutual confirmation system. This certainly is the case regarding decisions of international courts and tribunals. Modern developments have also sweepingly expanded the information available about domestic decisions involving questions of international law.[41] Moreover, these law-applying authorities have been resorting to a certain type of language which, despite being contingent on the specific legal tradition in which it is rendered, is usually accessible to most other law-applying authorities. This type of language constitutes a type of formalism that has not been tackled here, that is the formalism in legal argumentation.[42] While formal legal argumentation is obviously guilty of the contradictions highlighted by the realist and postmodern critiques described in chapter 4, that form of formalism has at least the virtue of ensuring a better readability of most judicial decisions. Despite all its inconsistencies, this type of formalism partakes in the 'readableness' of the practice of law-applying authorities, thereby allowing each authority to gain the feeling that they all share the same law-ascertainment language. The practice of other types of law-applying authorities also seems to be sufficiently disseminated, including through yearbooks and law reviews.[43]

[38] S.A. Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP, Cambridge, 1982) 96.

[39] H.L.A. Hart, *The Concept of Law* (2nd edn, OUP, Oxford, 1997) 115–16. This part of Hart's argument has not always been construed like this. For a different interpretation of Hart on this point, see G.J. Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 JLS 165–203.

[40] S.A. Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP, Cambridge, 1982) 99–107.

[41] See e.g. the International Law in Domestic Court (ILDC) Database, available at <http://www.oxfordlawreports.com/>.

[42] See my comments *supra* 2.1.2.

[43] This aspect of law reviews surely does not fall within the scathing criticisms of F. Rodell, 'Goodbye to Law Reviews' (1936) 23 Va. L. Rev. 38 and 'Goodbye to Law Reviews—Revisited' (1962) 48 Va. L. Rev. 279.

It is hoped that the foregoing sufficiently shows that the social foundations of law-ascertainment criteria cannot be conflated with utter objectivism. There is no such thing as an objective agreement among law-applying authorities as to the criteria to which they resort to distinguish between law and non-law. There only is a shared feeling that they use the same criteria to ascertain international legal rules. The account of formal law-ascertainment made here thus remains a sceptical one which does not purport to convey objectivism in law-ascertainment. It seems that the Kelsenian objection that the social thesis necessarily presupposes the same type of absolute and external standard as natural law is not compelling.[44]

The idea that a mitigation of indeterminacy can be found in communitarian semantics and that the meaning of rules is derived from the social practice of the rule-followers—in the case of law-ascertainment criteria, the practice of law-applying authorities—must now be further substantiated in the specific context of international law. In particular, it must revisit the abovementioned concept of law-applying authorities in a way that allows it to accommodate the specificities of international law.

8.2 The concept of law-applying authority in international law: judges, non-State actors, and legal scholars

According to the argument made here, the social practice that is instrumental in gauging the communitarian semantics necessary to provide meaning to law-ascertainment criteria is that of the law-applying authorities.[45] In Hart's view as was described in chapter 3, the concept of 'law-applying authorities' has been narrowly construed, for Hart devised his social thesis exclusively in the context of domestic law. The restricted concept of law-applying authorities makes its transposition in international law highly problematic. For the sake of determining those who provide the social foundations to the formal ascertainment of international legal rules, the concept of law-applying authorities must be refreshed with a view to accommodating the specificities of the application of international law.

As was mentioned in chapter 3, a refinement of the concept of law-applying authorities has been offered by Brian Tamanaha. According to the modernization proposed by Tamanaha, a law-applying authority is 'whomever, as a matter of social practice, members of the group (including legal officials themselves) identify and treat as "legal" officials'.[46] The social practice on which the rule of recognition is based must accordingly not be restricted to strictly-defined law-applying officials but

[44] J. Kammerhofer, *Uncertainty in International Law. A Kelsenian Perspective* (Routledge, London, 2010) 226. It is true that the social thesis may end up including the study of 'Is'-proposition in the scope of the science of law, thereby including sociological enquiries in the scope of a science primarily centered on the study of 'Ought'-proposition. If this is true, it is argued here that this may well be the price to pay for any theory of formal law-ascertainment. On this discussion, see also A. Somek, 'The Spirit of Legal Positivism' (2011) 12 *German Law Journal* 729, cfr *infra* 8.4.

[45] Cfr *supra* 3.1.3.

[46] B. Tamanaha, *A General Jurisprudence of Law and Society* (OUP, Oxford, 2001) 142.

must include all social actors.[47] This expansion of the concept of law-applying authority is undoubtedly of great relevance in a legal order—like the international legal order—which lacks any vertical and institutional hierarchy. Tamanaha's definition, although proving somewhat all-embracing to a certain extent, can help provide a better grasp on those who actually engage in the ascertainment of international legal rules and generate social practice of law-ascertainment. It surely points to the insufficiency of a too narrow construction of the concept of law-applying authority as well as to the necessity not to restrict the production of communitarian semantics to the practice of formal judicial authorities only. In the reality of international law, it can hardly be contested that other 'social actors' participate in the practice of law-ascertainment and should be taken into account in the determination of the communitarian semantics constitutive of the meaning of law-ascertainment criteria. The following paragraphs accordingly mention those social actors whose practice must be deemed relevant for the sake of the theory of formal ascertainment of international legal rules put forward here.

It must, as a preliminary point, be made very clear that being a 'social actor' whose practice of law-ascertainment is instrumental to the meaning of the formal criteria of the identification of law does not necessarily amount to being a formal international law-maker. It is true that some of the actors mentioned here may well wield some undeniable law-creating powers—as is illustrated by judges whose role in the development of international law is almost uncontested[48]—or some influence on the making of international law—as exemplified by the influence of non-State actors.[49] However, the potential law-creating or law-making role of these actors as regards the (progressive) development of substantive international legal rules is of no relevance here. Indeed, although law-determination by international courts may sometimes come close to law-creation and even if law-identification and law-creation may be carried out simultaneously,[50] the practice relevant for the sake of law-

[47] B. Tamanaha, ibid, 159–66.

[48] H. Kelsen, 'La Théorie Pure dans la Pensée Juridique' in C. Leben and R. Kolb (eds), *Controverses sur la Théorie Pure du Droit* (LGDJ, Paris, 2005) 173; H.L.A. Hart, *The Concept of Law* (2nd edn, OUP, Oxford, 1997) 136; See also Hart and A.M. Honore, *Causation in the Law* (OUP, Oxford, 1985) 5 or N. Bobbio, *Essais de théorie du droit* (Bruylant/LGDJ, Paris, 1998) 10 and 38; J. Raz, *Authority of Law* (Clarendon, Oxford, 1983) especially 41–52. As regards international law more specifically, see R. Jennings, 'What is International Law and How Do We Tell it When We See it' (1981) 37 *Annuaire Suisse de Droit international* 77; H. Thirlway, 'The Sources of International Law' in M. Evans (ed), *International Law* (2nd edn, OUP, Oxford, 2006) 115, 129–30; H. Lauterpacht, *The Development of International Law by the International Court* (2nd edn, Praeger, NY, 1958); M. Lachs, 'Some Reflections on the Contribution of the International Court of Justice to the Development of International Law' (1983) 10 Syracuse J. Int'l L. & Com. 239; R. Higgins, *Problems and Process: International Law and How We Use It* (OUP, Oxford, 1995) 202. A. Boyle and C. Chinkin, *The Making of International Law* (OUP, Oxford, 2007) 266–9 and 310–11. See however the statement of the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 1996-I, ICJ Rep. 237, para. 18 (according to which the Court 'states the existing law and does not legislate' and this is so 'even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes not is general trend'). Art. 38 of the ICJ Statute also seems to lend support to a strictly cognitivistic task of international courts.

[49] See generally J. d'Aspremont, *Participants in the International Legal System—Multiple Perspectives on Non-State Actors in International Law* (Routledge, London, 2011).

[50] See R. Jennings, 'General Course on Principles of International Law' (1967-II) 121 RCADI 341.

ascertainment is alien to any question of a law-making power properly so-called. The communitarian semantics that they generate by identifying international legal rules do not constitute a substantive law-making exercise. The actors mentioned below simply partake in the semantics of the formal criteria of law-ascertainment, which—although they are often captured through the Hartian concept of the rule of recognition—do not constitute legal rules in the same sense as the substantive rules of international law.

There is no doubt that the central law-applying authority whose behaviour is the most instrumental in defining the standard of law-ascertainment is the International Court of Justice (ICJ). This is why its case-law was the object of much attention in the previous section.[51] Yet, the ICJ is not the only law-applying authority in the international legal order. Arbitral tribunals have also applied international legal rules and thus participated in the elaboration of the linguistic indicators of law-ascertainment.[52] Moreover, and despite the ICJ occasionally being still endowed with a natural monopoly to set the tone in the international judicial arena,[53] a growing number of international tribunals have been applying international law, thereby participating in the elaboration of the criteria for the ascertainment of international legal rules. Furthermore, all these various tribunals are engaged in an uncontested 'cross-fertilization' which further shores up the importance of the social practice which they generate.[54]

Even though the contribution of the ICJ in this respect has not always been consistent and fully satisfying—as is illustrated by the fluctuations in its case-law regarding the formal evidence of custom,[55] the law-ascertainment criteria of unilateral promises,[56] or the evidence of intent to make law for the sake of the

[51] Cfr *supra* 7.2.

[52] For a recent example see the final award in the Abyei Arbitration, *The Government of Sudan/The Sudan People's Liberation Movement/Army*, 22 July 2009, paras 425–35 available at <http://www.pca-cpa.org/showpage.asp?pag_id=1306>.

[53] See the famous rebuke of the ICTY by the ICJ in its decision on 26 February 2007 in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep. (2007) para. 402–7; See also *Report of Stephen M. Schwebel, President of the International Court of Justice*, UN GAOR, 54th Sess., Agenda, Item 13, UN Doc. A/54/PV.39 (26 October 1999) 3–4; *Report of Gilbert Guillaume, President of the International Court of Justice*, UN GAOR 55th Sess., Agenda Item 13, UN Doc. A/55/PV.42 (26 October 2000) 7; See also G. Guillaume, 'The Future of International Judicial Institutions' (1995) 44 ICLQ 848–62, 860–2; G. Guillaume, 'La Cour Internationale de Justice. Quelques propositions concrètes à l'occasion du cinquantenaire' (1996) 100 *Revue générale de droit international public* 323, 331; S. Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 ICLQ 863–72, 864.

[54] See e.g. F. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal System: The European Court of Human Rights' (2008) 38 Texas Int'l L. J. 547; C. Koh, 'Judicial Dialogue for Legal Multiculturalism' (2004) 25 Mich. J. Int'l L. 979; P. Tavernier, 'L'interaction des jurisprudences des tribunaux pénaux internationaux et des cours européennes et interaméricaines des droits de l'homme', in P. Tavernier (eds), *Actualité de la jurisprudence internationale: à l'heure de la mise en place de la Cour pénale internationale* (Bruylant, Bruxelles, 2004) 251–61.

[55] Cfr *supra* 7.1 and 7.2.1.

[56] Compare ICJ, *Nuclear Tests case (Australia v. France)*, 20 December 1974, para. 43 and ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Rep. (1986) para. 40.

identification of international treaties[57]—the practice of the ICJ has nonetheless proved more indicative than that of other tribunals. Whatever the varying weight of each of these tribunals, it is uncontested that the practice of law-ascertainment in the international arena, now emerging from a greater variety of tribunals, is thus far the most generative of communitarian semantics for the sake of law-ascertainment criteria in international law.

International courts and tribunals are not the only judicial authorities which generate communitarian semantics of law-ascertainment. Indeed, international law has long become more regulatory of internal matters and issues affecting individuals. Compliance with international law has accordingly incrementally required the adoption of domestic rules, thereby increasing the application of international law by domestic courts.[58] Even rules regulating inter-State relations have required domestic implementation. This infiltration by international law into domestic systems is thus a natural consequence of the extension *ratione materiae* of its object.[59] That international law now regulates objects previously deemed of domestic relevance is insufficient, however, to explain the growing application of international law by domestic courts. Because international law only enters domestic legal orders if so allowed, the greater presence of international law in the domestic legal orders of States is also the direct consequence of the growing amenability of States towards international law.[60] In this respect, it is not disputed that States are becoming less reluctant to let international law pervade and enter their own legal order. Incorporation is not the only means by which international law has been applied by domestic courts. Indeed, most States in the world instruct their courts to construe domestic law in a manner that is consistent with the international obligations of that State. If international law is not the 'law of the land' because it has not been incorporated, it may still yield effects in the domestic legal order if domestic judges interpret national law in accordance with international law.[61] The growing effect of international law

[57] Cfr *supra* 7.2.3.

[58] For an analysis of some significant decisions of domestic courts applying international law, see A. Nollkaemper, *National Courts and the International Rule of Law* (OUP, Oxford, 2011).

[59] According to Provost and Conforti, 'The truly legal function of international law essentially is found in the internal legal system of States'. See Provost and Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff, Dordrecht, 1993) 8; J.H.H. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547, 559–661; See also A. von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization and International Law' (2004) 15 EJIL 885, 889; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) EJIL 907, 917; See *contra* Arangio-Ruiz, 'Le domaine reservé. L'organisation internationale et le rapport entre le droit international et le droit interne'. Cours général de droit international public' (1990-VI) 225 RCADI, 29–479, especially 435–79.

[60] See generally J. Nijman and A. Nollkaemper, 'Beyond the Divide', in J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP, Oxford, 2007) 341–60.

[61] This principle of *consistent interpretation* of domestic law is also known as the 'Charming Betsy' principle. See US Supreme Court, *Murray v. The Schooner Charming Betsy* 6 US (2 Cranch) 64 (1804); see also *Restatement (Third) of Foreign Relations Law*, § 114 (1987). On the 'Charming Betsy' principle, see generally R.G. Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction' (1990) 43 Vand. L. Rev. 1103 or J. Turley, 'Dualistic Values in an Age of International Legisprudence' (1993) 44 Hastings L. J. 185. A similar principle is found in regional legal orders, as is illustrated by

in the domestic legal order through incorporation and consistent interpretation has been accompanied by a general amenability of domestic judges towards international law as a whole, irrespective of whether it is incorporated into national law and is binding upon the State.[62] Whether the entry of international law into domestic legal orders takes the path of incorporation, consistent interpretation, or simple persuasiveness, and to whomever this entry can be traced back, it is uncontested that international law is becoming increasingly present in domestic legal orders and is relentlessly applied by domestic courts. In applying international law, these domestic courts are thus called upon to ascertain its rules, thereby participating in the general practice of international law-ascertainment. It has thus become undeniable that domestic courts count as actors participating in the generation of the communitarian semantics of law-ascertainment as well.[63]

Despite the multiplicity of international and domestic judicial authorities engaged in the ascertainment of international legal rules, their practice has remained too scarce to generate sufficient communitarian semantics. After all, these law-applying authorities are of a limited number and their case-law is proportionally modest, especially if compared to the practice of law-ascertainment of domestic legal rules generated by domestic courts. This is precisely why, in line with Tamanaha's proposition as described in chapter 3, the practice of other actors engaged in the application of international law should be included in the social practice necessary to establish the social practice at the heart of formal law-ascertainment in international law.

It cannot be denied that some non-State actors also provide interesting insights as to the meaning of law-ascertainment criteria. Although it is expected that other actors than those mentioned here will come to influence the social practice of international law-ascertainment, particular mention should be made here of the International Committee of the Red Cross (ICRC). It is true that the recent study produced by the ICRC on customary international law[64] provokes some severe reservations in terms of the consistency of its methodology in the establishment of

the European legal order where European law ought to be interpreted in conformity with international law. See Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337; see also *Poulsen and Diva Corp.* [1992] ECR-I 6019.

[62] See generally, Y. Shany, 'National Courts as International Actors: Jurisdictional Implications' *Hebrew University International Law Research Paper* No. 22–08 (October 2008). See also the remarks by E. Benvenisti and G.W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 EJIL 59–72; Betlem and Nollkaemper, 'Giving effect to Public International Law' (2003) 14 EJIL 569; see also J. d'Aspremont, 'Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order', in A. Nollkaemper and O.K. Fauchald (eds), *Unity or Fragmentation of International Law: The Role of International and National Tribunals* (Hart, Oxford, 2011) (forthcoming).

[63] On the application of international law by domestic courts, see generally K. Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 NYU JILP 501; A. von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 ICON 397–413.

[64] J.-M. Henckaerts, 'Study on Customary International Humanitarian Law: a Contribution to the Understanding and Respect for the Rule of law in Armed Conflict' (2005) 87 *International Review of the Red Cross* 175–212.

customary international law[65]—a large part of which can be traced back to the non-formal character of custom-ascertainment for which the ICRC cannot be blamed. Yet, it cannot be denied that the determination of what is law and what is non-law by the ICRC—as is illustrated by the extent to which States took pains to react to it—constitutes a practice of law-ascertainment that is to be reckoned with. A few other non-State actors are probably also instrumental in the consolidation of a practice of law-ascertainment.[66] It is not my intention to list them all here.[67] It must simply be recalled once again that recognizing that law-ascertainment by non-States actors like the ICRC constitutes relevant practice from the standpoint of the social thesis does not amount to saying that these bodies or entities are endowed with law-making authority.[68]

It is could be tempting to include the International Law Commission (ILC) among those non-state bodies which engage in a practice of ascertainment of international legal rules. Certainly, the ILC ascertains international legal rules when it codifies international law. In this respect, its codification undertakings could potentially yield some relevant social practice for the sake of law-ascertainment. Yet, the ILC is also endowed with the responsibility of proposing progressive developments of international law. Whilst these two tasks ought to be clearly distinguished according to its Statute,[69] the practice shows that the ILC carries them out simultaneously and does not deem it necessary to make any distinction in this regard.[70] The final outcome of the ILC's work, whatever form it may take,

[65] See the critique of A. Boyle and C. Chinkin, *The Making of International Law* (OUP, Oxford, 2007) 36. See also the critique expressed by J.B. Bellinger and W.J. Haynes, 'A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study' (2007) 46 ILM 514, also available at <http://www.defense.gov/home/pdf/Customary_International_Humanitiarian_Law.pdf>; See the reaction of J.-M. Henckaerts, 'Customary international humanitarian law—a response to US comments' (2007) *International Review of the Red Cross* 473.

[66] See e.g. the 2004 *Report of the UN Secretary General's High Level Panel*, available at <http://www.un.org/secureworld/>. See also the 2001 *Report of the Independent International Commission on Intervention and State Sovereignty* (established by the Government of Canada in September 2000), available at <http://www.iciss.ca/report-en.asp>.

[67] On the role of non-State actors in the international legal order, see generally J. d'Aspremont (ed), *Participants in the International Legal System—Multiple Perspectives on Non-State Actors in International Law* (Routledge, London, 2011).

[68] Such a perception often permeates the legal scholarship. See generally, C. Thomas, 'International Financial Institutions and social and economic rights: an exploration' in T. Evans (ed), *Human Rights Fifty Years On: A Reappraisal* (Manchester UP, Manchester,1998) 161–85, especially 163; for a mild approach, see I.R. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1990–1991) 31 Va J. Int'l L. 211; A.-M. Slaughter is not far from recognizing such a law-making role to individuals: 'The Real New World Order' (1997) 76 *Foreign Affairs* 183. See also E. Beigzadeh, 'L'évolution du droit international public', in E. Jouannet, H. Ruiz-Fabri, and J.-M. Sorel (eds), *Regards d'une génération sur le droit international public* (Pedone, Paris, 2008) 75, 78. For a criticism of that perception, see J. d'Aspremont, 'The Doctrinal Illusion of Heterogenity of International Lawmaking Processes', in H. Ruiz-Fabri, R. Wolfrum, and J. Gogolin (eds), *Select Proceedings of the European Society of International Law*, vol. 2 (Hart, Oxford, 2010) 297–312.

[69] See e.g. arts 16–18 of the ILC Statute, UN General Assembly Resolution 174 (II), 21 November 1947. The Statute, as was subsequently amended, is available at <http://www.un.org/law/ilc/>.

[70] This is why the Commission suggested that such a distinction be abolished. See the *Report of the International Law Commission*, 48th session (1996), A/51/10, para. 147(a) and paras 156–9. On that

will generally fall short of making any distinction between those rules that have been codified and those that originate in a progressive development. It is usually the commentary that will usually indicate whether a rule must be considered the mere codification of an existing rule or whether it constitutes a progressive development of international law. But such indications do not always suffice, and rules meant by the ILC to be progressive development of international law are sometimes subsequently elevated to rules that have been the object of a codification by the judicial bodies applying them.[71] The almost impossibility of distinguishing between progressive development and codification explains why the ILC's contribution to the practice of law-ascertainment ought to be seen as very modest. The same is probably true with respect to the *Institut de Droit international*.[72]

Finally, mention must be made of the secondary role played by international legal scholars in the ascertainment of international legal rules. It is argued here that international legal scholars, although they are not at the origin of a practice of law-ascertainment generative of communitarian semantics, undoubtedly participate in the fine-tuning and streamlining of the formal criteria of law-ascertainment which, in turn, are picked up by the social actors involved in the application of international legal rules. In other words, it is submitted here that legal scholars come to play the role of grammarians of formal law-ascertainment who systematize the standards of distinction between law and non-law.

It is undeniable that scholars may occasionally be instrumental in the progressive development of primary norms. Indeed, while they certainly are not law-makers,[73] international legal scholars often play a public role or participate in public affairs.[74]

aspect of the ILC Statute, see J. d'Aspremont, 'Les travaux de la Commission du droit international relatifs aux actes unilatéraux des Etats' (2005) 109 *Revue générale de droit international public* 163–89.

[71] See the famous contention of the ICJ that art. 16 of the 'Articles on the Responsibility of a State for its Internationally Wrongful Acts' corresponds with a rule of customary international law, a position contrasting with that of the Special Rapporteur of the International Law Commission. Compare ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ Rep. (2007), para. 420 and J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (CUP, Cambridge, 2005) 148.

[72] On the Institut de Droit international, see e.g. F. Rigaux, 'Non-State Actors from the Perspective of the Institut de Droit international', in J. d'Aspremont (ed), *Participants in the International Legal System—Multiple Perspectives on Non-State Actors in International Law* (Routledge, London, 2011) 179.

[73] J. d'Aspremont, 'Softness in International Law: A Self-serving Quest for New Legal Materials' (2008) 19(5) EJIL 1075–93; A. Bianchi, 'Une generation de "communautaristes"', in E. Jouannet, H. Ruiz-Fabri, and J-M. Sorel (eds), *Regards d'une génération sur le droit international* (Pedone, Paris, 2008) 95–105, 105; J. Kammerhofer, 'Law-Making by Scholarship? The Dark Side of 21st Century International Legal "Methodology"', in J. Crawford et al. (eds), *Selected Proceedings of the European Society of International Law*, tome 3 (Hart, Oxford, 2011) (forthcoming), available at <http://ssrn.com/abstract=1631510>.

[74] For an illustration of the public role that scholars may play according to the conception submitted here, see M. Craven, et al., 'We Are Teachers of International Law' (2004) 17 LJIL 363; See also the letter published in the Guardian, 'War Would be Illegal', 7 March 2003, available at <http://www.guardian.co.uk/politics/2003/mar/07/highereducation.iraq/print>; See also the 'appel de juristes de droit international concernant le recours à la force contre l'Irak' initiated by the Centre de droit international of the Free University of Brussels (ULB) in January 2003, reference available at <http://www.ridi.org/adi/special/

Although international legal scholars themselves may be tempted to see their offerings as more influential than they really are,[75] and even though their contribution is more modest today than it used to be a century ago—for States have grown weary of the influence that scholars can have[76]—their writings, their opinions, and their decisions also influence law-making and international legal adjudication.[77] Article 38 of the Statute of the International Court of Justice has long shrouded the influence of scholars and judges upon law-making in a formal veil by elevating them to a 'subsidiary means for the determination of rules of law'. Nothing could be more illusory than the formalization of their influence on law-making which—albeit recognized as secondary—is not tangible in the making of international law and can hardly be captured in formal terms. The role of legal scholars in the making of substantive rules of international law falls outside the ambit of our inquiry. All that matters is to shed light on their contribution to the practice of law-ascertainment and their corresponding contribution to communitarian semantics.

Clearly legal scholars do not constitute law-applying authorities *sensu stricto*. Nor are they social actors as was understood by Tamanaha. Indeed, strictly speaking they do not apply the law but interpret and comment upon it. However, it cannot be denied that international legal scholars have always constituted grammarians of the language of international law.[78] By contrast with domestic

index.htm>. On the idea that international legal scholars are not immune from the political debates in which they have been claiming a say, see L. Mälksoo, 'The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Iurev/Tartu 1855–1985' (2005) 76 BYBIL 499–500.

[75] For a classical example of this belief, see O. Schachter, 'The Invisible College of International Lawyers' (1977–1978) 72 NYULR 217: 'We should be mindful, however, that international lawyers, both individually and as a group, play a role in the process of creative new law and in extending existing law to meet emerging needs. This legislative role is carried out principally through multilateral treaties, but it may also be accomplished through the evolution of customary international, the use of general principles . . . . In all of these processes, the professional community may perform a significant function'.

[76] M. Virally, 'A Propos de la "Lex Ferenda"', in D. Bardonnet (ed), *Mélanges Reuter: le droit international: unité et diversité* (Pedone, Paris, 1981) 521–33, 520.

[77] See the famous statement of Justice Gray in the case of *The Paquete Habana* and the *Lola* in 1920: '. . . where there is not treaty, and no controlling executive or legislative act or judicial decision, resort must be made to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is' (cited by R. Jennings, 'International Reform and Progressive Development', in G. Hafner et al. (eds), *Liber Amicorum Professor Ignaz Seidle-Hohenveldern in honour of his 80th Birthday* (Kluwer Law International, The Hague, 1998) 333). See also L. Mälksoo, 'The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Iurev/Tartu 1855–1985' (2005) 76 BYBIL 383, 499–500.

[78] See Dupuy: 'un internationaliste ne devrait jamais prétendre à autre chose que d'être un bon grammarien du language normatif du droit international'. ('Cours général de droit international public' (2002) 297 RCADI 9, 205). P. Reuter, 'Principes de droit international public' (1961-II) 103 RCADI 425–655, 459: 'Le droit n'est pas seulement un produit de la vie sociale, il est également le fruit d'un effort de pensée, s'efforçant d'agencer les données ainsi recueillies dans un ensemble cohérent et aussi logique que possible. C'est l'aspect systématique du droit international, il est à la fois plus important et plus délicat que celui des droits nationaux. Il est plus important parce que les sociétés nationales, du fait qu'elles sont

law,[79] the systematization of international law has primarily been an achievement of legal scholarship rather than of legal practice.[80] International law would not have reached its current level of systemic development without the input of international legal scholarship. One of the paramount tasks undertaken as grammarians has been the systematization and the streamlining of the criteria for the distinction between law and non-law.[81] While their work in this respect does not constitute, strictly speaking, the practice of law-applying authorities, the law-ascertainment criteria carved out and polished by legal scholars have been very conducive to shaping the practice of law-applying authorities. That means that international legal scholars do not themselves yield social practice. Yet, they clearly impact that practice by contributing to the elaboration of the communitarian semantics of law-ascertainment in international law.

This role played by international legal scholars in the streamlining of the communitarian semantics is inevitably accompanied by a need for a greater self-reflective consciousness. Indeed, international legal scholars should neither deny nor minimize their contribution to the social practice of law-ascertainment under the guise of purely cognitivistic responsibility, but should come to terms with the extent of their impact on the emergence of communitarian semantics and assume it. Whilst the motives behind the practice of law-ascertainment are irrelevant as to the existence of this social practice, unveiling the motives and the reasoning behind legal scholars' grammatical postures should thus be a prevalent attitude of the profession. The call for a 'culture of formalism'[82] construed as a communicative practice aimed at the universality of legal argumentation takes on even more relevance. Hence, the work of international legal scholars affiliated with critical legal studies and deconstructivism is particularly germane for those construing the role of international legal scholars as falling within the ambit of the social thesis.[83]

profondément centralisées par l'autorité étatique, engendrent un droit déjà systématisé par ses conditions d'élaboration. Au contraire, la "décentralisation du pouvoir politique" qui règne dans la société internationale rejette sur le juriste un fardeau plus lourd. Il est plus délicat parce que le désordre de la société internationale n'est pas tant désordre de la pensée que désordre du pouvoir; certes le juriste peut se laisser aller à la systématisation, mais s'agit-il de systématiser seulement ses pensées ou de systématiser aussi la réalité ? Certes, de par sa nature même, le droit est avide d'ordre mais à quoi servirait-il, par excès de rigueur dans la pensée, de poursuivre une systématisation en dehors du cadre des solutions admises'. See also G.J.H. Van Hoof, *Rethinking the Sources of International Law* (Kluwer, Deventer, 1983) 291 or J. Von Bernstorff and T. Dunlap, *The Public International Law Theory of Hans Kelsen—Believing in Universal Law* (CUP, Cambridge, 2010) 266.

[79] The Code Napoléon has been instrumental in the systematization of continental European domestic orders.

[80] For some general thoughts on the contribution of legal scholars to the systematization of law, see N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP, Oxford, 2008) 6.

[81] A. D'Amato, 'What 'Counts' as Law?' in N.G. Onuf (ed), *Law-Making in the Global Community* (Carolina Academic Press, Durham, 1982) 83, 106–7; See also M. Virally, 'A Propos de la "Lex Ferenda"', in D. Bardonnet (ed), *Mélanges Reuter: le droit international: unitei et diversitei* (Pedone, Paris, 1981) 521–33, 532.

[82] Cfr *supra* 2.1.2.

[83] For a concise account of this stream of scholarship, cfr *supra* 4.2.4.

The practice of law-ascertainment generating the communitarian semantics necessary to ensure the meaning of the formal criteria of law-ascertainment advocated above is thus made by a multi-fold practice by a diverse set of social actors, including international judges and a few non-State actors. International legal scholars, while they do not themselves directly yield a practice of law-ascertainment, undoubtedly partake in the shaping of the communitarian semantics necessary to ensure the meaningfulness of formal law-ascertainment criteria. The role played in this regard by domestic courts and non-State actors in generating social practice for the sake of the meaning of the law-ascertainment criteria of the international legal system, participates in the reinforcement of the possibility for the international legal system of producing a vocabulary enabling the ascertainment of the rules of which it is composed.

The plurality of the sources of the communitarian semantics necessary for the meaningfulness of law-ascertainment criteria nonetheless accentuates the risk of conflicting social practice. This is of particular import since, as has been explained above, a reasonable degree of convergence is necessary to ensure that formal law-ascertainment not be riddled with utter indeterminacy. For this social practice to remain sufficiently consistent, the argument could be made that the central role currently played by international courts and tribunals in this respect should be preserved. This inevitably accentuates the State-centricism of the current configuration of the production of communitarian semantics in the international legal order. Yet, the claim for the preservation of the role of international courts and tribunals does not constitute an all-out support for how the social practice necessary for formal ascertainment of international legal rules actually and currently emerges. Indeed, the abovementioned account of the main features of the contemporary practice constitutive of communitarian semantics of the formal standards of law-ascertainment does not seek to prejudge its *adequateness*. For instance, it cannot be denied that the social practice of law-ascertainment, as it currently stands, still suffers from the structural biases identified by the feminist approaches to international law.[84] The same is true with the prejudices identified by the Third World Approaches to International Law (TWAIL).[85] These cogent critiques may well call for an amendment to the composition of the various bodies participating in the production of the communitarian semantics for the sake of formal law-identification or the way it is disseminated. This book is nonetheless not the place to study this wide variety of biases and the way in which they should be addressed.[86] The foregoing simply shows that, as far as international law is concerned, there exists a heterogeneous community able to produce enough communitarian semantics to endow formal international law-ascertainment criteria with sufficient meaning. It also demonstrates that the law-ascertainment theory put forward here has the ability to renew itself from within and potentially take into account new practices—by new actors—more attentive to the

[84] See *supra* note 200 (chapter 4).
[85] See *supra* note 201 (chapter 4).
[86] On some of the biases behind the role of international judges, see generally L.V. Prott, *The Latent Power of Culture and the International Judge* (Professional Books, Abingdon, 1979).

biases and prejudices of the current social practice of law-ascertainment in the international society.

8.3 The deficient social consciousness of law-applying authorities in the international legal order

Whilst the account made here shows, in my view, that the international society, in spite of its limited institutionalization, is *in a position* to produce sufficient communitarian semantics for the sake of the social thesis, it seems more questionable whether the current configuration of the international legal society allows the emergence of a sustainable *feeling* of convergence of the practices of law-ascertainment. Indeed, as was explained above,[87] for communitarian semantics to be generated, the mere existence of a practice is insufficient. What is also needed is a sense by the abovementioned actors that they are using the same criteria and thus the sense that they belong to the same linguistic community.[88] Such a social consciousness may well be lacking in the current configuration of the international society, thereby hampering the emergence of a meaningful social practice. For instance, international judges, even though they seem to be generally heedful of the need to achieve the overall consistency of international legal rules,[89] do not manifest much sense of membership to the same linguistic community in terms of law-ascertainment. In general, questions of international law-ascertainment are tackled by national and international law-applying authorities in total isolation of each other's practice. International law-ascertainment is not conceived by the actors taking part in the emergence of a social practice as necessitating a common language. It could even be contended that issues of law-ascertainment have grown secondary, not only in the legal scholarship,[90] but also in the adjudicatory practice.[91] It is accordingly argued here that the problem is thus not really the fragmentation of the production of the social practice but rather the absence of social consciousness among the variety of actors contributing to the production of communitarian semantics. The problems of law-ascertainment in international law nowadays are thus not only the result of an illusory formalism—as was demonstrated above[92]—but also that of the limited social consciousness of law-applying authorities.

For a social consciousness to emerge among all the actors partaking in law-ascertainment practice at the international level, a greater—even informal—

[87] Cfr *supra* 8.2.

[88] See the remarks of Raz: J. Raz, 'The Nature and Theory of Law' in J. Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP, Oxford, 2001) 1, 19. *Contra* B. Tamanaha, *A General Jurisprudence of Law and Society* (OUP, Oxford, 2001) 153–4.

[89] See ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 30 November 2010, para. 66, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=gc&case=103&k=7a>.

[90] Cfr *supra* 1.

[91] Cfr *supra* 7.2.3.

[92] Cfr *supra* 7.1 and 7.2.

collaboration—and thus mutual respect—among the abovementioned law-applying authorities is needed. This finding inevitably brings the question of judicial dialogue into the limelight. The question of dialogue between international law-applying authorities is not new and does not need to be taken on here.[93] It only is necessary to emphasize now that, applied to international law, the social thesis reinforces the pertinence of the work of those liberal scholars who have examined the dynamics of the dialogues between law-applying authorities around the world.[94] In my view, such studies should now be pursued with a greater heed of law-ascertainment practice.

It must be acknowledged that the necessity of a greater social consciousness by actors participating in the emergence of communitarian semantics for the sake of meaningful ascertainment of rules may stir up fears of an exercise of 'power'—however secondary and diffuse it may be—by another 'invisible college'[95] or professional community. Such fears are certainly not ill-founded. They call for means to ensure better legitimacy of the process of production of communitarian semantics by these actors. The question of legitimacy in the making of communitarian semantics by the actors mentioned above is accordingly a serious concern that ought to be born in mind, especially if those actors participating in the social practice of law-ascertainment were to grow more aware of their responsibilities in this regard and develop a stronger sense of community. However severe the need to ensure greater legitimacy of the production of the social practice necessary for meaningful law-ascertainment may someday be, it seems important to point out, at this stage, that the legitimacy of processes of production of communitarian semantics for the sake of law-ascertainment ought not be envisaged in the same terms as the legitimacy of the making of primary rules. First, it is not certain that, in producing communitarian semantics for law-ascertainment, these abovementioned actors exercise anything that resembles 'power'. Second, even if we were to consider that the production of communitarian semantics constitutes a sort of power in disguise, such a power could not be equated with the public authority that they may simultaneously be exercising when developing primary rules of international law.[96] I am of the opinion that the legitimacy of the former ought not to be conceived according to the patterns of legitimacy designed for the latter. This being said, the question of legitimacy of the production process of the social practice necessary for the ascertainment of international legal rules is too sweeping a debate to be further discussed here. It is a question which I consciously and purposely leave for future research. Yet, the foregoing was only meant to highlight that the application of the social thesis to the ascertainment of international legal rules inevitably necessitates that the question of the legitimacy

[93] See generally A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 Harv. Int'l L. J. 191.

[94] See e.g. the famous work of those scholars affiliated with the liberal school of international law mentioned above. See e.g. A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 Harv. Int'l L. J. 191.

[95] The expression was famously coined by O. Schachter 'The Invisible College of International Lawyers' (1977) 72 Northwest. U. L. Rev. 217–26.

[96] On the development of primary rules by courts and tribunal, see *supra* note 48. On the role of international legal scholars in the developments of primary rules, see *supra* note 73.

of the processes leading to the production of communitarian semantics for the sake of law-identification is not disregarded.

8.4 The vainness of the question of the validity of international law

The previous sections have spelled out the various components of the social thesis which support the model of formal ascertainment of international legal rules presented in this book. It has been argued that the practice of various social actors can generate communitarian semantics indispensable to reining in the indeterminacy of the language on which formal law-ascertainment is based while not falling back into pure objectivism. The move away from objectivism inherent in the model of formal law-ascertainment advocated here is further underpinned by the immediate consequences of its social foundations to the question of the validity of international law as a whole. Indeed, grounding the formal ascertainment of international legal rules in the practice of law-ascertainment allows us to circumvent, for the sake of law-ascertainment, some of the abiding theoretical difficulties inherent in the question of the overall validity of international law and which have been at the centre of some of the critiques described in chapter 4.[97]

Ensuring the overall validity of the international legal system has been one of the abiding riddles of the theory of international law.[98] It is well-known that Kelsen—who, on this point, was partly followed by some important international legal scholars like Anzilotti[99] or Guggenheim[100]—argued that the whole system necessarily rests on a Grundnorm which itself must be presupposed.[101] It surely is not the place to discuss this aspect of Kelsen's theory.[102] Kelsen's ambition to design a general theory of law may well have required such a construction.[103] It is argued here, however, that, *as far as the ascertainment of international legal rules is concerned*, the social thesis makes the question of the validity of the international legal order as a whole utterly vain. Ascertaining legal rules only necessitates a sufficiently clear and consistent social practice able to produce enough communitarian semantics. This

[97] I have further elaborated on that point in J. d'Aspremont, 'Hart et le positivisme postmoderne' (2009) 3 *Revue générale de droit international public* 635–54.

[98] On positivism in international law, see my remarks *supra* 2.1.2.

[99] Anzilotti adopted Kelsen's understanding of validity as resting on a hypothetical norm: D. Anzilotti, *Scritti di diritto internazionale pubblico* (Cedam, Padova, 1956–7) 57.

[100] G. Schwarzenberger, *International Law* (3rd edn, Stevens, London, 1957); P. Guggenheim, 'What is positive international law?', in G. Lipsky, *Law and Politics in the World Community, Essays on Hans Kelsen's Pure Theory and Related Problems of International Law* (University of California Press, Berkeley, 1953) 15–30.

[101] H. Kelsen, 'Théorie générale de droit international public: problèmes choisis' (1932–IV) 42 RCADI 117, 124–37.

[102] It is well-know that some scholars have construed that aspect of Kelsen's theory as a 'closure of convenience'. See e.g. N. Bobbio and D. Zolo, 'Hans Kelsen, the Theory of Law and the International Legal System: A Talk' (1998) 9 EJIL 355–67, 355. For an attempt to rebut that point, see J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge, London, 2010) 197 and 231.

[103] On Kelsen, cfr *supra* 3.1.3.

social practice does not need to unfold under the umbrella of a Grundnorm that guarantees the validity of the international legal system and ought not to be subject to a judgment of validity to produce the communitarian semantics necessary for law-ascertainment.[104] The social practice of law-ascertainment is not valid or invalid, for it simply is a fact. In other words, if the formal ascertainment of international legal rules is solely a question of social practice by law-applying authorities and a few non-state actors as has just been argued above,[105] it is not necessary to seek the validation of that practice. What matters is simply that law-applying authorities, sharing some sufficient social consciousness and making use of similar law-ascertainment language, do actually recognize some norms as constituting international legal rules.

It is true that the existence of the legal system is to some extent dependent on there being valid legal rules within that system. Indeed, if a legal system does not recognize any single rule as valid, it can hardly exist as a legal system. Yet, this does not mean that, from the standpoint of law-ascertainment, the existence of a legal system boils down to a question of validity similar to that of individual rules[106]—and this is the reason why validity is not necessarily tautological and circular as it has sometimes been contended.[107] If we can say of the system itself that it is valid, this is only in the sense that its rules are valid.[108] Seen through the lens of law-ascertainment, the existence of a legal system—and the same is true with respect to the international legal system—is not a question of validity.[109] While the validity of a given norm must be appraised in the light of the norm from which it is derived, it makes no sense, from the standpoint of law-ascertainment, to gauge the legal system as a whole in the same manner.[110] The existence of the (international) legal system boils down to a *mere question of fact*.

[104] As Kelsen himself would argue, there cannot be contradiction between an 'Ought' proposition and an 'Is' proposition, that is, between a rule and a fact. See H. Kelsen, *Introduction to The Problems of Legal Theory* (Clarendon, Oxford, 1992) 30.

[105] Cfr *supra* 8.2.

[106] It is commonly accepted that a rule which is not valid within that system is not a legal rule within that system. See J. Raz, *Authority of Law* (Clarendon, Oxford, 1983) 146; Kelsen, for his part, famously argued that validity is the specific form of existence of legal rules in a given system, such contention applying to all norms. See H. Kelsen, *General Theory of Law and State* (Harvard UP, Cambridge, 1945) 175–7; See, however, the critique by Scandinavian realists, who see a contradiction between the existence of the rule and its reality. See A. Ross, *Introduction à l'empirisme juridique* (LGDJ, Paris, 2004) 25–6.

[107] This argument has been made by M. Koskenniemi, '*Hierarchy in International Law: A Sketch*' (1997) 8(4) EJIL 566–82, 578.

[108] J. Raz, *Authority of Law* (Clarendon, Oxford, 1983) 148.

[109] See H.L.A. Hart, *The Concept of Law* (Clarendon, Oxford, 1997) 100. See in particular 108–9: 'We only need the word "validity" and commonly only use it to answer questions which arise within a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid, but simply accepted as appropriate for use in this way'. In the same vein, see J. Raz, ibid, 69; See also M. Virally, *La pensée juridique* (LDGJ, Paris, 1960) 140.

[110] It would be misleading to conceal that such a 'retreat' in the direction of empirical sources has remained—although unconvincingly—immune from controversy. See S. Coyle, 'Hart, Raz and the Concept of Legal System' (2002) 21 *Law and Philosophy* 288–9.

Authors embracing a Kelsenian understanding of law will commonly argue that abandoning the question of the validity of international legal system by grounding law-ascertainment in social practice demotes legal science to legal sociology, for such a conception of law-ascertainment includes the study of 'Is' in the scope of a science which should only be concerned with the study of 'Ought'.[111] Whether this is true or not, it is argued here that this objection does not really undermine the theory of ascertainment presented here, for it only pertains to a question of how one construes the mission(s) of the (international) legal scholarship and the scope of the science of law. This is a fundamentally different debate from that of law-ascertainment which is at the heart of this book. Ultimately, even if the social thesis, by bypassing the question of the validity of the international legal system as a whole and grounding law-ascertainment in facts, were to lead legal science to encapsulate sociological analysis, such an enlargement of scope of the science of law—far from being unprecedented[112]—would then be the necessary condition for a lasting and solid theory of ascertainment of international legal rules.

It is true that, if applied to international law, the contention that the existence of the international legal system is a question of fact is not utterly unheard. Some international legal scholars, albeit falling short of grounding their contention in a strong theory of law-ascertainment,[113] have occasionally claimed that the question of the validity of international law as a whole is pointless and that questions of validity ought to be restricted to problems of existence of individual rules.[114] It is hoped that the argument made in this section provides some theoretical underpinnings to their discerning intuitions.

8.5 The conciliatory virtues of the social thesis for the international legal scholarship

It must finally be highlighted that the social thesis discussed here—i.e. the idea that the foundations of formalism in the ascertainment of international legal rules is to be sought in the practice of law-applying authorities—has some doctrinal conciliatory virtues, for, in my view, it helps reconcile some allegedly antonymic trends in

[111] J. Kammerhofer, *Uncertainty in International Law. A Kelsenian Perspective* (Routledge, London, 2010) 227.

[112] It probably is a lesson learned from Legal Realism as well as the Policy-Oriented Jurisprudence. Cfr *supra* 4.1.2 and 4.2.3. For a contemporary attempt to ground the study of international law in its social context, see M. Hirsch, 'The Sociology of International Law: Invitation to Study International Rules and Their Social Context' (2005) 55 UTLJ. 891. On the possible roles for sociology in the study of international law, see also A. Carty, 'Sociological Theories of International Law', in *Max Planck Encyclopedia of Public International Law*, available at <http://www.mpepil.com> paras 42–6.

[113] On the anti-theoretical attitude of the international legal scholarship, cfr *supra* 3.2.2.

[114] See e.g. I. Brownlie, 'International law at the fiftieth anniversary of the United Nations: general course on public international law' (1995) 255 RCADI 9–228, 30–1. In the same sense, G. Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' (1957-III) 92 RCADI 1–227; L. Condorelli, 'Custom', in M. Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff, The Hague, 1991) 179–211, 180.

9

Concluding Remarks: Ascertaining International Legal Rules in the Future

We undoubtedly live in an age of pluralized normativity. Indeed, as was explained above,[1] both the norm-making processes and the norms produced thereby at the international level have undergone a profound pluralization. Such a pluralized normativity is not a new phenomenon but it has grown to a degree never witnessed before. It is even fair to say that most of the international normative activity nowadays manifests itself in one these pluralized forms of exercise of public authority outside the classical channel of traditional law-making and sometimes outside its sphere of origin. There is no reason why this phenomenon will not continue unabated in the future. Accordingly, the conceptualization of the norms generated by these pluralized exercises of public authority will surely remain a chief area of inquiry of the international legal scholarship in the 21st century. This book has focused on traditional forms of international law-making and sought to lay bare the illusions of formalism in the mainstream theory of the sources of international law as well as the lack of social consciousness of those authorities applying international law. However, on the occasion of these final recapitulatory remarks, a few words must be said about the relevance of formal law-ascertainment for our current and future scholarly debates about pluralized norm-making at the international level.

It has been explained here that, confronted with the growing normative activity outside the classical law-making framework, international legal scholars have been inclined to deformalize the ascertainment of international legal rules with a view to capturing these new manifestations of public authority in their conceptual 'net'.[2] Such a stretch of international legal scholars' nets—which has materialized in an growing use of non-formal law-ascertainment criteria—has most of the time[3] been driven by lofty purposes, primarily the domestication of these new exercises of

[1] Cfr *supra* chapter 1.

[2] 'We can catch nothing at all except that which allows itself to be caught in precisely our net': F. Nietzsche, *Daybreak. Thoughts on the Prejudices of Morality, Book II, Aphorism, para. 117* (CUP, Cambridge, 1982) 73. I owe this citation to Andrea Bianchi. For further insights on this idea, see A. Bianchi, 'Reflexive Butterfly Catching: Insights from a Situated Catcher', paper submitted for the Informal International Public Policy Making (IIPPM) Geneva Workshop, 24–25 June 2010 (on file with the author), to be published in J. Pauwelyn, R. Wessel, and J. Wouters (eds), *Informal International Law Making—Mapping the Action and Testing Concepts of Accountability and Effectiveness* (forthcoming 2011). See also *supra* 5.1 and 5.2.

[3] See however the occasional self-serving quest for new legal materials, *supra* 5.3.

public authority, their subjection to accountability mechanisms, and a better programmation of the emergence of new rules of international law.[4] Some very serious doubts have nonetheless been cast in the previous chapters as to whether deformalization of law-ascertainment actually contributes to the realization of any of these noble objectives.[5] It has also been argued in the previous chapters that, besides failing to meet the objectives assigned thereto, the deformalization at play in contemporary theory of the sources of international law comes with a disproportionately high price in terms of normativity and authority of international law, meaningfulness of scholarly debate, and the possibility of a critique of international legal rules.[6] Likewise, such a deformalization is not without impact on respect for the rule of law at the international level. Indeed, as has been explained above, deformalization may also serve the interest of those actors that are seeking to preserve some unfettered room for manoeuvre and evade their international obligations and which, for that reason, may find it particularly useful that rule-ascertainment remains non-formal.[7]

Against that backdrop, this book has made the argument that the pluralization of international norm-making—including the deformalization of norm-making processes themselves—ought not necessarily to be accompanied by a deformalization of law-ascertainment. Indeed, deformalization of the former does not automatically call for a deformalization of the latter. More specifically, it has been shown that the use of specific linguistic indicators for the sake of law-ascertainment is not at loggerheads with the use of non-formal norm-making procedures, for the practice of resorting to written linguistic indicators contemplated here does not require international legal acts to be devised in accordance with a formally-defined procedure. It has even been shown that elaborating formal indicators for the identification of international legal acts allows a greater and sustainable use of non-formal law-making procedures while simultaneously preserving the possibility of distinguishing law from non-law without which law's authority, the meaningfulness of scholarly debates, the possibility of a critique of international legal rules, as well as some elementary respect for the rule of law, would be gravely enfeebled.

The attempt of this book to provide a counter-point to the current deformalization of law-ascertainment in the theory of the sources of international law has clearly remained alien to any endeavour to rehabilitate or defend mainstream theory of the sources of international law. On the contrary, this book has sought to shed some light on the illusions of formalism which shroud the mainstream theory of the sources of international law.[8] Unearthing such mirages of formalism has been construed here as the prerequisite to initiating a rejuvenation of formal law-ascertainment in the age of pluralized normativity. Indeed, it is only once the theory of the sources of international law has been stripped of its fake formalist trappings that it can be more critically re-evaluated, especially in the context of the above-mentioned pluralized forms of exercise of public authority at the international level.

[4] Cfr *supra* 5.3. [5] Cfr *supra* 5.3. [6] Cfr *supra* 2.2.
[7] Cfr *supra* 2.2. [8] Cfr *supra* 7.1.

Arguing for the relevance of formal law-ascertainment grounded in social practice and the need to dismantle some of the illusions of formalism embedded in the mainstream theories of sources of international law has not been the sole ambition of this book. It has also sought to reveal some of the specificities of the theoretical foundations of formal ascertainment of international legal rules, especially when it comes to the social practice necessary to endow formal law-ascertainment indicators with sufficient meaning as to avoid utter indeterminacy. In this regard, the spotlight has been turned on the growing role of domestic courts and a growing number of non-state actors—next to international courts and tribunals—in the production of the communitarian semantics necessary for the use of relatively determinate formal law-indicators. This aspect—and the deficient social consciousness by law-applying authorities in the international legal order that has been noted on that occasion—constitutes one of the particular characteristics of formal ascertainment of international legal rules. Needless to say, the exact same customization will be required in devising the formal ascertainment of the normative products of today and tomorrow's pluralized exercise of public authority if the source and social theses are to retain any relevance in this framework. As in the case of an application of the social thesis to the international legal order, the insights gained from the 'culture of formalism', TWAIL, and feminist critiques, as well as the liberal studies on the dialogue between law-applying authorities, will probably remain of utmost relevance.

While demonstrating that problems of ascertainment of international legal rules nowadays are the result of simultaneous and mutually reinforcing factors—amongst others, the move away from formal law-ascertainment, the illusions of formalism that permeate the mainstream theory of the sources of international law, or the limited social consciousness of law-applying authorities in generating communitarian semantics in the practice of international law-ascertainment—this book has not meant to clinch all the debates pertaining to the formal ascertainment of international legal rules. Regarding for instance the comprehensive determination of those actors that participate in the production of the communitarian semantics necessary to ensure the relative determinacy of formal law-ascertainment or the legitimacy and appropriateness of current social practice-making processes at the international level, this book has only done some very preliminary spadework, limiting itself to showing that the model of law-ascertainment based on the source and social theses is endowed with an—often underestimated—ability to renew itself from within and take into account changes in social practice as well as among the law-applying authorities conducive thereto. Far from resolving all the controversies riddling the ascertainment of rules, the argument made in this book rather calls for a continuous attention to the evolving social practice of law-applying authorities, broadly conceived.

Many of these conclusions hold for the new manifestations of the exercise of public authority at the international level. The insights that can be gained from the model of law-ascertainment presented here are irrespective of whether or not these new forms of exercise of public authority constitute international law, properly

so-called.[9] However we construct and apply rule-ascertainment in respect of these new forms of exercise of public authority, and whether or not we include them in traditional international law, it is submitted here that the relevance of formalism—construed here as the use of formal law-ascertainment indicator based on a social practice—will not evaporate in a world of pluralized normativity and postnational law. In that sense, I contend that formal rule-ascertainment remains germane beyond the traditional forms of international law-making which have been examined here. It is true that formalism itself, as has been continuously argued here, does not provide any descriptive framework to capture these new forms of exercise of public authority.[10] It is also true that the mere transposition of the law-ascertainment theory elaborated here to new normative orders and processes cannot be mechanical. In the same way that the source and social theses cannot be converted from general legal theory to the theory of the sources of international law without sweeping adaptions, we must resist the temptation of simply filling the voids created by the new forms of exercise of public authority at the international level with what we already know.[11] However, in a world of pluralized normativity and postnational law, the necessity for legal boundaries[12] will remain unaffected and, with it, the necessity for formal rule-ascertainment criteria. There is thus little doubt, in the view of the author of these lines, that the configuration as well as the foundation of the ascertainment of the rules produced by these new forms of exercise of public authority can be usefully informed by the abovementioned theory of international law-ascertainment grounded in the social practice of—widely construed—law-applying authorities.

[9] In the framework of the current and future scholarly pursuits to cognize these pluralized normative activities at the international level, it is utterly conceivable, at least theoretically, that the mainstream model of ascertainment of international legal rules be reconstructed in a way that allows the normative products thereof to fall in the remit of international law. New formal international law-ascertainment criteria could indeed be devised as to elevate the norms originating in these pluralized exercises of public authority at the international level into rules of international law. It has not been the ambition of this book to prejudge the outcome of this scholarly reflection. Yet, it must be acknowledged that such attempts would inevitably stumble on a paradox. Indeed, it can hardly be contested that the products of such normative activities have been consciously and purposely used and designed by international actors to remain outside the traditional channels of international and domestic law-making. If encapsulated in international law by virtue of newly designed law-ascertainment criteria, any inclusive theory of the sources of international law would most likely prod international actors to reinvent again other forms of norm-making processes to escape such an ever-expanding international law. In that sense, any new expansion of international law towards a more inclusive conceptualization of the sources of international law could arouse a new move by international actors towards even more deformalized forms of norm-making. Such a paradox does certainly not mean that attempts to revamp the ascertainment of international legal rules with a view to embracing pluralized forms of exercise of public authority ought to be abandoned. This simply calls for a greater awareness of the risk that international legal scholars and international actors run of ending up in a perpetual circular move that can aggravate the disconnect between them.

[10] Cfr *supra* 2.1.1 and 2.1.2.

[11] See N. Krisch, *Beyond Constitutionalism—The Pluralist Structure of Postnational Law* (OUP, Oxford, 2010) 26: 'We tend to fill voids with what we know. When we are thrown into unfamiliar spaces, we try to chart them with maps we possess, construct them with the tools we already have'.

[12] On the relevance of legal boundaries for postnationalism, see H. Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73 MLR 30–56.