Summary Contents

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 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. Stewart, '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 4.2.3. 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 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 explaining 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 C.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).