

The Politics of Deformalization in International Law

Jean d'Aspremont*

Table of Contents

A.	Introduction	505
B.	The Concept of Deformalization.....	507
I.	Deformalization of Law-Ascertainment.....	507
II.	Deformalization and Traditional Theory of Sources of International Law.....	511
C.	Contemporary Manifestations of Deformalization	516
I.	Contemporary Persistence of Substantive Validity	517
II.	Effect- or Impact-Based Conceptions of International Law-Ascertainment.....	519
III.	Process-Based Approaches of International Law-Identification and Other Manifestations of the Deformalization of International Law-Ascertainment	524
IV.	The Softness of International Law	526
D.	Multiple Agendas of Deformalization	528
I.	Programming the Future Development of International Law	529
II.	Promoting the Expansion of International Law.....	530
III.	Accountability for the Exercise of Public Authority	531
IV.	A Self-Serving Quest for New Legal Materials	532
V.	Creative Argumentation Before Adjudicative Bodies.....	533
VI.	The Promotion of Legal Pluralism	534

* Associate Professor of International Law, Amsterdam Center for International Law, University of Amsterdam (UvA). This article constitutes a continuation of the argument made by his author in his recent monograph entitled *Formalism and the Sources of International Law* (2011). The author thanks the anonymous reviewers of the *Goettingen Journal of International Law* for their extremely helpful comments.

E.	The Cost of Deformalization	535
I.	Eroding the Normative Character and Authority of International Law.....	535
II.	International Legal Scholars Talking Past Each Other.....	537
III.	Frustrating the Possibility of a Critique of International Legal Rules	538
IV.	Impairing the International Rule of Law	538
V.	Other Potential Hazards of Deformalization	540
F.	The Endurance of Formalism	541
I.	The Return to Formalism in Global Administrative Law	542
II.	Formalism in the Heidelberg Project on the Exercise of Public Authority	543
III.	The “Culture of Formalism”	543
IV.	Post-Modern International Legal Positivism.....	546
G.	Concluding Remarks: the Political Choice for Deformalization	549

Abstract

Confronted with the pluralization of the exercise of public authority at the international level and the retreat of international law as a regulatory instrument, international legal scholars have engaged in two survival strategies. On the one hand, there are international legal scholars who have tried to constitutionalize traditional international law with a view to enhancing its appeal and promoting its use by global actors. On the other hand, there are scholars who, considering any charm offensive to induce global actors to cast their norms under the aegis of classical international a lost battle, have embarked on a deformalization of international law that has led them to loosen the meshed fabric through which they make sense of reality. This deformalization of international law has sometimes materialized in a radical abandonment of theories of sources. The constitutionalist strategy has already been extensively discussed in the literature. The second approach has thrived almost unnoticed. It is this second scholarly strategy to the pluralization of the exercise of public authority that this article seeks to critically evaluate. After describing the most prominent manifestations of deformalization in the theory of international law and examining its agenda, the paper considers some of the hazards of deformalization. This paper simultaneously demonstrates that formalism has not entirely vanished, as it has continued to enjoy some support, albeit in different forms. These variations between deformalization and the persistence of formalism, this paper concludes, are the result of political choices which international legal scholars are not always fully aware of.

A. Introduction

International lawyers have found deformalization an elixir for many of the problems inherent in the current pluralization of the exercises of public authority at the international level. Indeed, deformalization has turned to be perceived as the antidote for many of the anxieties of international lawyers who, in an era where exercise of public authority manifests itself more heterogeneously outside traditional international law-making, have been witnessing the retreat of international law and the proportionally growing

resort to other regulatory instruments. It is not that the pluralization of the exercise of public authority is a new phenomenon; international relations specialists defined it and initiated its study some time ago.¹ It is simply that, amidst the explosion of new manifestations of global governance, international law is playing an incrementally reduced role, thereby placing international lawyers on the defensive. In particular, international lawyers have begun to fret about the shrinking importance of their primary material of study and responded with two main, diverging survival strategies. On the one hand, there are international legal scholars who have tried to constitutionalize traditional international law² in hopes of enhancing its appeal and promoting its use by global actors.³ On the other hand, there are scholars who, considering any charm offensive to induce global actors to cast their norms under the aegis of classical international a lost battle, have embarked on a deformalization of international law that has reshaped the lens through which they make sense of reality. For the latter group, legal pluralism has become the key mantra whilst formalism is castigated as the roots of many of the pains of an embattled profession for “constrain[ing] creative thinking within the discipline for generations”⁴.

¹ One of the first studies on Transnational regulatory networks (TRNs), see A.-M. Slaughter, *A New World Order* (2004). More recently, see P.-H. Verdier, ‘Transnational Regulatory Networks and Their Limits’, 34 *Yale Journal of International Law* (2009) 1, 113.

² For some e.g. B. Fassbender, ‘The Meaning of International Constitutional Law’, in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007) 307, 311. C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, 281 *Collected Courses* 9 (1999), 89. It should be noted, however, that constitutionalists do not reject the fragmentation associated with the multiplication of international judicial bodies, for this can constitute a step towards a more systemic implementation of the international rule of law. See A. Peters, ‘Global Constitutionalism Revisited’, 11 *International Legal Theory* (2005), 39, 65.

³ On the Agenda of constitutionalism, see W. Werner, ‘The never-ending closure: constitutionalism and international law’, in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007), 329; see also J. Klabbbers, ‘Setting the Scene’, in J. Klabbbers, A. Peters & G. Ulfstein (eds) *The Constitutionalization of International Law* (2009) 1, 18; M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’, 70 *Modern Law Review* (2007) 1, 1.

⁴ J. Brunnée & S. J. Toope, ‘International Law and Constructivism, Elements of an International Theory of International Law’, 39 *Columbia Journal of Transnational Law* (2000-2001) 1, 19, 65.

The constitutionalist attitude has already been extensively discussed in the literature.⁵ Deformalization, on the contrary, and despite its current success, has thrived almost unnoticed. This article seeks to critically evaluate this second scholarly strategy to the pluralization of the exercise of public authority.

After sketching a definition of deformalization for the sake of this article (I) and providing some contemporary examples (II), the paper elaborates on the agenda in the international legal scholarship behind deformalization (III). It then argues that, while providing some welcome relief in an era of pluralized normativity, deformalization does not come without some serious costs (IV). The article subsequently shows that these costs explain why most of the deformalization strategies in the contemporary legal scholarship always preserve some elementary formalism, in one way or another (V). This will be illustrated by Global Administrative Law, the Heidelberg Project on the Exercise of Public Authority, Martti Koskenniemi's culture of formalism as well as new streams of international legal positivism. The paper ends with a few critical remarks on the political choice for deformalization (VI).

B. The Concept of Deformalization

I. Deformalization of Law-Ascertainment

For the sake of this article, the concept of deformalization means the move away from formal law-ascertainment and the resort to non-formal indicators to ascertainment legal rules. Deformalization is thus an attitude whereby rules of international law are not identified by virtue of formal criteria. More specifically, it boils down to a rejection of the idea that rules

⁵ See e.g. N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007); A. von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization and International Law', 15 *European Journal of International Law* (2004) 5, 885. I have myself discussed it as well. See J. d'Aspremont & F. Dopagne, 'Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders', 68 *Heidelberg Journal of International Law* (2009) 4, 939, or see J. d'Aspremont, 'The Foundations of the International Legal Order' 18 *Finnish Yearbook of International Law* (2007), 219-255.

must meet predefined formal standards to qualify as a rule of law. This is tantamount to an abandonment of pedigree as the core benchmark of their ascertainment. Traditionally, the definition of such formal indicators – that is the *ex ante* definition of the pedigree of legal rules – has been a task entrusted to the theory of sources. This is why this deformalization often manifests itself in a movement away from formal theory of sources. Alternatively, deformalization can materialize itself in a radical rejection of questions of law-ascertainment, law being exclusively seen as a process or a *continuum*.⁶ A process-based representation of law – which bears uncontested descriptive virtues, far more than than static conceptions⁷ – only generates deformalization to the extent of the accompanying rejection of formal criteria that distinguish between law and non-law or the total rejection of the necessity to ascertain legal rules, as has been advocated by some scholars affiliated with the New Haven Law School.⁸

The concept of deformalization employed here is thus restrictive and is centered around on a rather limited phenomenon: the embrace of informal law-ascertainment criteria or an utter abandonment of a pedigree-based ascertainment theory of law. So defined, deformalization is not used here to refer to norm-making by informal non-territorial networks as is sometimes

⁶ For some famous support to the idea of normative continuum, see R. Baxter, 'International Law and Her Infinite Variety', 29 *International and Comparative Law Quarterly* (1980) 4, 549, 563; O. Schachter, 'The Twilight Existence of Non binding International Agreements', 71 *American Journal of International Law* (1977) 2, 296; A. E. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', 48 *International Law and Comparative Law Quarterly* (1999) 4, 901, 913; C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *International Law and Comparative Quarterly* (1989) 4, 850, 866. A. Pellet, 'Complementarity of International Treaty Law, Customary Law and Non-Contractual Law-Making', in R. Wolfrum & V. Röben (eds), *Developments of International Law in Treaty Making* (2005), 409, 415.

⁷ J. d'Aspremont, 'Non-State Actors in International Law: Oscillating Between Concepts and Dynamics', in J. d'Aspremont (ed.), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (2011), 1.

⁸ In the same vein, see G. J. H. Van Hoof, *Rethinking the Sources of International Law* (1983), 283. See also one of the grounds of the criticisms of F. Kratochwil, *Rules Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989), 194-200.

the case in the literature.⁹ That said, while not constituting a catch phrase for these informal non-territorial networks, deformalization of law-ascertainment is not entirely alien to them as this concept is used in this paper to designate one of these scholarly attitudes that allow the normative practice of these non-territorial networks to be captured by the abstract categories of international lawyers. Likewise, deformalization here does not refer to the attempts to lay bare of the formal camouflage of legal rationality.¹⁰ Indeed, the legal realist critique¹¹ – which has raised objections against the “abuse of logic”¹², the “abuse of deduction”¹³ and the “mechanical jurisprudence”¹⁴ – and the amplification thereof brought about by approaches affiliated with deconstructivism and critical legal studies¹⁵

⁹ M. Koskenniemi, ‘Constitutionalism as a mindset: Reflections on Kantian Themes about International Law and Globalization’, 8 *Theoretical Inquiries in Law* (2007) 1, 9, 13.

¹⁰ This is how formalism is most commonly understood. See e.g. C. C. Goetsch, ‘The Future of Legal Formalism’, 24 *American Journal of Legal History* (1980) 3, 221. See also E. J. Weinrib, ‘Legal Formalism’, in D. Patterson (eds) *A Companion to Philosophy of Law and Legal Theory* (1999), 332-342. See also the remarks of O. Corten, *Méthodologie du droit international public* (2009), 57.

¹¹ On the realist criticisms of formalism as a theory of legal reasoning in adjudication, see gen. A. J. Sebok, ‘Misunderstanding Positivism’, 93 *Michigan Law Review* (1995) 7, 2054, esp. 2071.

¹² *Id.*, 2093

¹³ D. Kennedy, *The Rise and Fall of Classical Legal Thoughts* (2006), xviii.

¹⁴ This is the famous expression of Roscoe Pound, see. R. Pound, ‘Mechanical Jurisprudence’, 8 *Columbia Law Review* (1908) 8, 605.

¹⁵ See e.g. D. Kennedy, ‘The Disciplines of International Law and Policy’, 12 *Leiden Journal of International Law* (1999) 9, 84; D. Kennedy, ‘When Renewal Repeats: Thinking Against the Box’, 32 *New York University Journal of International Law & Politics* (2000) 2, 335; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002), 502 [Koskenniemi, *Gentle Civilizer*]; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 306, [Koskenniemi, *Apology to Utopia*]; N. Purvis, ‘Critical Legal Studies in Public International Law’, 32 *Harvard Journal of International Law* (1991) 1, 81, 81; T. Skouteris, ‘Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship’, 10 *Leiden Journal of International Law* (1997) 3, 415-420; T. Skouteris, *The Notion of Progress in International Law Discourse* (2008), chapter 3, later published as *The Notion of Progress in International Law Discourse* (2010), [Skouteris, *Notion of Progress*]; 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

have long exposed formal legal argumentation as an illusion and thwarted the idea that a formal immanent rationality actually exists. It is under their influence that international lawyers, although not denying its bearing upon legitimacy and authority of judicial decisions,¹⁶ have lost faith in the mathematic formal predictability in the behavior of law-applying authorities. If it were simply to recall this move away from the faith in the immanent rationality of formal legal reasoning, deformalization would be a very banal concept. It is thus not as a forsaking of formal reasoning in legal argumentation that deformalization is associated with here. Furthermore, deformalization does not express the belated recognition by international lawyers that the identification of the subjects of international law is nothing of a formal certification. This type of deformalization is practically a given, for we cannot be lured any longer by a “Montevideo mirage”¹⁷ as well theories that convey the illusion that States are a formal creation by virtue of international law. In this article, deformalization is also not to be understood as the anti-Kantian moveshift in the discipline’s vocabulary as famously depicted by Martti Koskenniemi: from institutions to regimes, from rules to regulation, from government to governance, from responsibility to compliance, from legality to legitimacy, from legal expertise to international relations expertise.¹⁸ Albeit the deformalization of the vocabulary of the discipline will often be the reflection of a deformalization of law-identification, deformalization, for the sake of the argument made here, is more simply construed as the rejection of formal indicators to identify international legal rules.

Scepticism about Sceptical Radicalism’, 61 *British Yearbook of International Law* (1990), 339, 345.

¹⁶ See E. J. Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’, 97 *Yale Law Journal* (1988) 6, 949; S.V. Scott, ‘International Law as Ideology: Theorizing the Relationship between International Law and International Politics’, 5 *European Journal of International Law* (1994) 3, 313, esp. 322. See also the remarks of Koskenniemi, ‘What is International Law For?’, in M. Evans (ed.), *International Law*, 2nd ed. (2006), 57, 69.

¹⁷ This is what I have argued in J. d’Aspremont, ‘Non-State Actors in International Law: Oscillating Between Concepts and Dynamics’, in J. d’Aspremont (ed.), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (2011) 1. See also J. d’Aspremont, ‘Regulating Statehood: The Kosovo Status Settlement’, 20 *Leiden Journal of International Law* (2007) 3, 649.

¹⁸ M. Koskenniemi, ‘Formalism, Fragmentation, Freedom’, Speech given on Kantian Themes in Today’s International Law given in Frankfurt 25 November 2005, 7-17, available at http://www.helsinki.fi/eci/Publications/talks_papers_MK.html (last visited 29 August 2011).

II. Deformalization and Traditional Theory of Sources of International Law

It is necessary to spell out how the traditional theory of international law accommodates deformalization defined above. The following paragraphs make the somewhat iconoclast argument that the traditional theory of international law's sources has long encompassed informal law-ascertainment mechanisms. In that sense, contrary to mainstream understanding, they argue that the traditional theory of sources already encapsulates some forms of deformalization. Thus, the contemporary deformalization that this article depicts should not be seen as a radical rupture from traditional sources theory.

The idea that international law is grounded in a theory of formal sources is an achievement of 20th century scholars. Indeed, to a great majority, 20th century scholars shared their 19th century predecessors' belief that international law rests on the consent of states.¹⁹ They posited the theory that the will of the state is the most obvious *material source* of law,²⁰ and, subject to a few exceptions,²¹ agreed that natural law does not constitute a source of law *per se*, even if the content of rules may reflect principles of morality.²² The main difference between 19th century and 20th

¹⁹ One of the first most complete expressions of this formal consensual understanding of international law has been offered by D. Anzilotti, *Corso di diritto internazionale* (1923), 27. For a more recent manifestation of the voluntary nature of international law, see P. Weil, 'Vers une normativité relative en droit international', 87 *Revue Générale de Droit International Public* (1982) 1, 5.

²⁰ On the distinction between material and formal sources, see gen. L. Oppenheim, *International Law*, Vol. 1, (1955), 24; G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in M. Nijhoff (ed.), *Symbolae Verzijl*, (1958), 153.

²¹ See e.g. L. Le Fur, 'La théorie du droit naturel depuis le XVII^{ème} siècle et la doctrine moderne', 18 *Collected Courses* (1927) 3, 259-442.

²² C. Rousseau, *Principes généraux du droit international public* (1944), 32-33; J. Basdevant, 'Règles générales du droit de la paix', 58 *Collected Courses* (1936) 4, 477-478. See also A. D'Amato, 'What 'Counts' as Law?', in N. G. Onuf (ed.), *Law-Making in the Global Community* (1982) 83, 90. This idea was not fundamentally challenged in the early 21st century. See P.-M. Dupuy, 'L'unité de l'ordre juridique international: cours général de droit international public', 297 *Collected Courses* (2002) 9, 31-32 and 200-202. See J. Verhoeven, 'Considérations sur ce qui est commun', 334 *Collected Courses* (2008), 15, 110. A. Orakhelashvili, *The*

century international legal scholars lies in the fact that the latter tried to devise formal law-ascertainment criteria with which to capture State consent.²³ This is precisely how 20th century scholars ended up basing the recognition of international legal rules in a theory of allegedly formal sources²⁴ – a construction that continues to enjoy a strong support among 21st century scholars.²⁵ It is true that the terminology of “source” is not always considered adequate to describe how international legal rules are ascertained²⁶ and a varying terminology – sources *stricto sensu*,²⁷ formal validation²⁸ or formal law-creating processes²⁹ – is found in the literature. Regardless of the terminology’s variations, there is little dispute that, despite some occasional but significant exceptions, a great majority of 20th century scholars adhered to a formal law-ascertainment blueprint.

Interpretation of Acts and Rules in Public International Law (2008), 51 [Orakhelashvili, *International Law*]; A. Orakhelashvili, ‘Natural Law and Justice’, *Max Planck Encyclopedia of Public International Law*, para. 33, available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e730&recno=1&searchType=Quick&query=Orakhelashvili+Natural+Law+and+Justice (last visited 11 August 2011).

²³ See the refinement of the theory of consent by Elias and Lim, O. A. Elias & C. H. Lim, *The Paradox of Consensualism in International Law* (1998).

²⁴ See gen. A. Pellet, ‘Cours Général: le Droit International entre souveraineté et communauté internationale’, 2 *Anuário Brasileiro de Direito Internacional* (2007) 1, 12, esp. 15, 19 and 31; G. Buzzini, ‘La Théorie des sources face au droit international général’, 106 *Revue générale de droit international public* (2002), 581, esp. 584-590.

²⁵ See e.g. Orakhelashvili, *International Law*, *supra* note 22, 51-60.

²⁶ See e.g. Buzzini, *supra* note 24, 581; R. Quadri, *Diritto internazionale pubblico* (1968), 107, referred to by H. W. Thirlway, *International Customary Law and codification: an examining of the continuing role of custom in the present period of codification of international law* (1972), 40; A. D’Amato, *The Concept of Custom in International Law* (1971), 264; G. Schwarzenberger, *International Law*, Vol. 1, 3rd ed. (1957), 26.

²⁷ For Condorelli, the term sources remains appropriate even with respect to customary international law. See L. Condorelli, ‘Custom’, in M. Bedjaoui (ed.) *International Law: Achievements and Prospects* (1991), 179, 186; see also G. Abi-Saab, ‘La Coutume dans tous ses Etats’, in *Essays in honor of Roberto Ago*, Vol. I (1987), 58; Rousseau, *supra* note 22, 108.

²⁸ See D’Amato, *supra* note 22, 83.

²⁹ See D. P. O’Connell, *International Law*, Vol. 1, 2nd ed. (1970), 7-8; see Schwarzenberger, *supra* note 26, 25-27; R. Jennings, ‘Law-Making and Package Deal’, in D. Bardonnet (ed.), *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* (1981), 347, 348.

Yet, as explained elsewhere in further detail,³⁰ the idea that international law-ascertainment can be exclusively attributed to formal sources is, to a large extent, fallacious and misleading. Indeed, the theory of customary international law and the law-ascertainment criteria concerning international treaties, unilateral promises and other international legal acts give way to deformalization. In other words, it can be argued that the identification of customary rule as well as that of treaties is ultimately dependent entirely upon informal mechanisms. As a result, it can be said that the mainstream theory of sources has long accommodated some form of deformalization.

In the particular case of customary international law, it seems difficult to deny that the conceptualization of the ascertainment of customary international law within mainstream scholarship has always rested on informal criteria. Indeed, in the mainstream theory of the sources of international law, the ascertainment of customary international law is viewed as *process-based*.³¹ More specifically, according to traditional views, customary international rules are identified on the basis of a *bottom-up crystallization process* that rests on a consistent acquiescence by a significant number of states, accompanied by the belief (or intent) that such a process corresponds to an obligation under international law.³² Yet, it has not been possible to formalize that process's recognition. Neither the behavior of states nor their beliefs can be captured or identified by formal criteria.³³ As a result, ascertainment of customary international law does not

³⁰ See J. d'Aspremont, *Formalism and the Sources of International Law* (2011).

³¹ For a classical example, see P. Daillier & A. Pellet, *Droit international Public*, 6th ed. (1999), 318. On the various conceptualizations of customary international law as a process, see the remarks of R. Kolb, 'Selected Problems in the Theory of Customary International Law', 50 *Netherlands International Law Review* (2003) 2, 119, 119-150.

³² On the emergence of the subjective element in the theory of custom in the 19th century, see P. Guggenheim, 'Contribution à l'Histoire des Sources du Droit des Gens', 94 *Collected Courses* (1958), 1, 36-59; D'Amato, *supra* note 26, 44-50.

³³ In the same vein, Koskenniemi, *Apology to Utopia*, *supra* note 15, 388. See also S. Zamora, 'Is There Customary International Economic Law?', 32 *German Yearbook of International Law* (1989), 9, 38; For a classical example of the difficulty to capture the practice, see ICJ, Case concerning the *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), 13 July 2009, ICJ Reports 2009, para. 141. On the particular difficulty to establish practice of abstention, see PCIJ, *Lotus*, Series A, No. 10 (1927), 28 or ICJ, *Military and Paramilitary Activities in and against*

hinge on any standardized and formal pedigree. Like other process-based models of law-identification, custom-identification eschews formal criteria and follows a fundamentally informal pattern of identification.³⁴ This is why custom-identification has often been deemed an “art”³⁵ and why some authors have been loath to qualify customary law as a proper “source” of international law.³⁶ Nonetheless, ambitious attempts to endow custom-ascertainment with formal trappings have resulted in spectacular scholarly efforts to elaborate and streamline the above-mentioned subjective and objective elements of constituting a custom.³⁷ A fair number of these scholarly attempts have asserted that custom is a formal source of law whose rules are identified on the basis of formal criteria.³⁸ It is argued here that the extreme refinement of these two custom ascertainment criteria is insufficient to ensure formal-custom-identification³⁹ and has not transformed custom-ascertainment into a formal process.⁴⁰

Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports (1986), para. 188.

³⁴ M. H. Mendelson, ‘The Formation of Customary International Law’, 272 *Collected Courses* (1998), 159, 172; G. Buzzini, ‘La Théorie des sources face au droit international général’, 106 *Revue générale de droit international public* (2002), 581; this also is what leads R. Kolb to contend that Article 38 does not lay down an entirely formal system of sources. See R. Kolb, *Réflexions de philosophie du droit international Problèmes fondamentaux du droit international public: Théorie et Philosophie du droit international* (2003), 51.

³⁵ M. W. Janis, *An Introduction to International Law*, 2nd ed. (1993), 44.

³⁶ See the discussion in H. Thirlway, *International Customary Law and Codification* (1972), 25-30. See also the remarks by Condorelli, *supra* note 27, 179-211, 186.

³⁷ G. Abi-Saab has compared the formalization through the 2 elements to a genealogy on a new born on his state of health. See G. Abi-Saab, ‘La Coutume dans tous ses Etats’, in *Essays in honor of Roberto Ago*, Vol. I, (1987), 59.

³⁸ On the idea that customary international law is a formal source of law, see E. Suy, *Les actes juridiques unilatéraux en droit international public* (1962), 5; see G. M. Danilenko, *Law-Making in the International Community* (1993), 30. It is interesting to note that P. Daillier, M. Forteau and A. Pellet, for their part, argue that customary international law is a formal source of law because it originates in a law-creating process which is governed by international law and is itself formal. See P. Daillier, M. Forteau & A. Pellet, *Droit international public*, 8th ed. (2009), 353 and 355.

³⁹ One of the most famous objections to this formal conception of customary international law has been offered by R. Ago who has construed custom as “spontaneous law”. See R. Ago, ‘Science Juridique et Droit International’, 90 *Collected Courses* (1956) 2, 851, 936-941; Some support for Ago’s conception of custom has been expressed by B. Stern, ‘La Coutume au Coeur du droit international,

The conclusion that the theory of customary international law rests on the deformalization of custom-identification also holds for the ascertainment of written treaties. Indeed, although written treaties are grounded in a formal instrument, the identification of “treaty status” ultimately remains dependent on the informal criterion in the mainstream theory of the sources of international law.⁴¹ Written treaties’ ascertainment is exclusively dependent upon the intent of the authors of these acts. Although the Vienna Convention is silent as to the decisive treaty-ascertainment criterion,⁴² the International Law Commission found that the legal nature of an act hinges on the intent of the parties,⁴³ an opinion shared by most international legal scholars.⁴⁴ The same is true with respect to unilateral written declarations, considered to enshrine an international legal obligation where the author’s

quelques réflexions’, in D. Bardonnet (ed.), *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* (1981), 479, 484.

⁴⁰ In the same vein, see Dupuy, *supra* note 22, 166-167; P.-M. Dupuy, ‘Théorie des sources et coutume en droit international contemporain’, in M. Rama-Montaldo (ed.), *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (1994), 51, 61-63; See R. Jennings, ‘The Identification of International Law’ in B. Cheng (ed.), *International Law: Teaching and Practice* (1982), 3, 9.

⁴¹ On the regime governing international treaties, see the Vienna Conventions on the Law of Treaties of 1969 and 1986 and the commentary of P. Klein & O. Corten (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article* (2006). On the unsuccessful codification of the legal regime of unilateral acts, see the work of the International Law Commission and the comments of J. d’Aspremont, ‘Les travaux de la Commission du droit international relatifs aux actes unilatéraux’, 109 *Revue générale de droit international public* (2005), 163-189.

⁴² Fitzmaurice had explicitly made a distinction between the law-ascertainment criterion and the consequence of an agreement being ascertained as a treaty. See ILC Report, A/3159 (F) (A/11/9), 1956, chp. III(I), para. 34.

⁴³ ILC Report A/6309/Rev.1 (F) (A/21/9), 1966, part I (E), paras 11-12, and part II, chp. II, paras 9-38; see however Fitzmaurice who sought to make it an explicit criterion: ILC Report, A/3159 (F) (A/11/9), 1956, chp. III (I), para. 34.

⁴⁴ Among others, see A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (2007), 20; R. Jennings & A. Watts (eds), *Oppenheim’s International Law*, Vol. I (1992), 1202. J. Klabbbers, *The Concept of Treaty in International Law* (1996), 68; M. Fitzmaurice, ‘The Identification and Character of Treaties and Treaty Obligations Between States in International Law’, 73 *British Yearbook of International Law* (2003), 141, 145 and 165-166; Orakhelashvili, *International Law*, *supra* note 22, 59; J.-P. Jacqué, *Elements pour une théorie de l’acte juridique en Droit international public* (1972), 121.

intent to be bound can be evidenced.⁴⁵ This means that, although law-ascertainment remains, on the surface, formal because it hinges on the existence of a written instrument, the legal nature of that instrument is itself determined on the basis of an informal criterion: *intent*.⁴⁶ Nothing could be more at odds with formal law-identification. Indeed such a criterion ultimately bases the identification of international legal acts on a fickle and indiscernible psychological element and inevitably brings about the same difficulties as those encountered in the ascertainment of oral promises and oral treaties. It can thus be said that the identification of a written treaty – and other legal acts – has remained a deeply speculative operation aimed at reconstructing the author(s)' intent.⁴⁷

In the light of the mainstream theories of customary international law and treaties, the argument can be made that deformalization is certainly not unknown in the traditional theory of sources. Deformalization has been with us for quite some time. The new development on which this article seeks to shed some light is however that these traditional non-formal law-ascertainment models have now been amplified by new types of deformalization. The following section attempts to describe the latest incarnations of deformalization.

C. Contemporary Manifestations of Deformalization

Deformalization, be it the rejection of formal law-ascertainment and the embrace of informal law-identification criteria or the utter abandonment of law-ascertainment, has grown more diverse and complex in the international legal scholarship. A comprehensive description of all the forms of deformalization of international law-ascertainment would certainly exceed the scope of this article. This article is only concerned with the most common expressions of deformalization in the theory of the sources of international law. The article will turn upon the remnants of substantive

⁴⁵ ICJ, *Nuclear Tests* case (Australia v. France), 20 December 1974, para. 43: “When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking”. See Suy, *supra* note 38, 28.

⁴⁶ See e.g. Orakhelashvili, *International Law*, *supra* note 22, 59-60.

⁴⁷ In the same vein see Klabbbers, *supra* note 44, 11. See also the remarks of Danilenko, *supra* note 38, 57 (who pleads for the necessity of a formal act of acceptance).

validity theories which brings about a deformalization of law-identification (I) as well as effect-based (II) and process-based (III) conceptions of international law. A few words will also be said about the general acceptance of the notion that law is inherently “soft” (IV).

I. Contemporary Persistence of Substantive Validity

Despite being the object – like formal legal argumentation – of compelling objections from international legal scholars associated with deconstructivism and critical legal studies, the application of substantive validity has not vanished completely from the theory of sources of international law. Substantive validity’s persistence is illustrated by the work of those scholars who, faced with the impossibility to resort to formal identification criteria of customary international law, have designed a theory of customary international law that is informed by moral or ethical criteria.⁴⁸ 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 that despite admitting the fluid nature of these criteria, is reminiscent⁴⁹ of the theory of substantive validity.⁴⁹

The work of some radical contemporary liberal scholars,⁵⁰ especially those who have been labeled as “anti-pluralists”,⁵¹ warrants mention.

⁴⁸ See J. Tasioulas, ‘Customary International Law and the Quest for Global Justice’, in A. Perreau-Saussine & J.-B. Murphy (eds), *The Nature of Customary Law* (2007), 307; J. Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’, 16 *Oxford Journal of Legal Studies* (1996) 1, 85; See also B. D. Lepard, *Customary International Law, A New Theory with Practical Applications* (2010), esp.77. This echoes some isolated proposals made at the time of the drafting of Article 38. See e.g. the Argentinean amendment to draft article 38 according to which customary international 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’, 12 *European Journal of International Law* (2001) 4, 627.

⁴⁹ *Id.*, 648

⁵⁰ 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

Indeed, the Kantian foundations of their understanding of international law have led some to revive the classical kinship between morality and international law.⁵² It is fair to say that, in doing so, these scholars have embraced a law-identification blueprint based on substantive validity.⁵³

International case-law is occasionally informed by naturalist approaches 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. Although its case-law on this point is admittedly inconsistent, the tribunal deemed the “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 such practice is scant or non-existent.⁵⁴

Although formal criteria are not entirely absent from Brunnée and Toope’s approach, their transposition of Fuller’s theory to international law can also be viewed as an expression of a substantive validity theory leading to a deformalization of law-ascertainment.⁵⁵ Although modern natural law theory of international law, like most modern natural law theories, has been more concerned with the authority of law than the identification of international legal rules, these two authors have made use of Fuller’s eight

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 des cultures juridiques* (2008), 29, 38.

⁵¹ G. Simpson, ‘Two Liberalisms’, 12 *European Journal of International Law* (2001) 3, 537.

⁵² The most famous example is F. Tesón, ‘The Kantian Theory of International Law’, 92 *Columbia Law Review* (1992) 1, 53. See also F. Tésón, *A Philosophy of International Law* (1998). On Tesón understanding of international law, see G. J. Simpson, ‘Imagined Consent: Democratic Liberalism in International Legal Theory’, 15 *Australian Yearbook of International Law* (1994), 103, 116. For a criticism of Tésón from a natural law standpoint, see A. Buchanan, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (2007), 17-18.

⁵³ For a criticism see P. Capps, ‘The Kantian Project in Modern International Legal Theory’, 12 *European Journal of International Law* (2001) 5, 1003.

⁵⁴ *Prosecutor v Kupreskic*, Case No.IT-95-16-T, 14 January 2000, para. 527.

⁵⁵ See J. Brunnée & S. J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (2010).

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’⁵⁶. They ‘create legal obligation’⁵⁷. Yet, it must be emphasized that, in the eyes of these authors, Fuller’s criteria of legality 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”⁵⁸. In that sense, it is rather the ‘adherence to law’ that is the central indicator by which international legal rules ought to be identified. Accordingly, Brunnée and Toope’s theory comes down to a mix of the substantive validity and effect-based concepts 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.

The few remnants of substantive validity discussed here contribute to the contemporary deformalization of law-ascertainment, as the ethical or moral law-identification criteria that they employ are informal law-identification indicators.

II. Effect- or Impact-Based Conceptions of International Law-Ascertainment

The most common informal law-ascertainment framework is found in *effect- (or impact-) based* approaches of international law which have been embraced by a growing number of international legal scholars.⁵⁹ For these

⁵⁶ *Id.*, 41.

⁵⁷ *Id.*, 7.

⁵⁸ *Id.*, 7.

⁵⁹ For a few examples see, J. E. Alvarez, *International Organizations as Law-makers* (2005); J. Brunnée & S. J. Toope, ‘International Law and Constructivism, Elements of an International Theory of International Law’, 39 *Columbia Journal of Transnational Law* (2000-2001), 19, 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 Kratochwil, *supra* note 4, 206-208. See also F. Kratochwil, ‘Legal Theory and

scholars, what matters is “whether and how the subjects of norms, rules, and standards come to accept those norms, rules and standards [...] [and] if they treat them as authoritative, then those norms can be treated as [...] law”⁶⁰. In their view, any normative effort to influence international actors’ behavior, if it materializes in the adoption of an international instrument, should be viewed as part of 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.⁶¹ It has also resulted in behaviorist approaches to law where only the “normative ripples” that norms can produce seem to be crucial.⁶² Whatever its actual manifestation, effect- (or impact-) based

International Law’, in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009) 1, 58.

⁶⁰ On that approach, see the remarks of J. Klabbers, ‘Law-making and Constitutionalism’, in J. Klabbers, A. Peters & G. Ulfstein (eds), *The Constitutionalization of International Law* (2009).

⁶¹ See e.g. Brunnée & Toope, *supra* note 4, 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”, Brunnée & Toope, *supra* note 4, 65. As has been argued above, their interactional account of international law is nonetheless based on both substantive validity and the impact of rules on actors. For a more elaborated presentation of their interaction theory, see Brunnée & Toope, *supra* note 56.

⁶² Alvarez, *supra* note 59. 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”, Alvarez, *supra* note 59, Preface x. He adds, “we continue to pour an increasingly rich normative output into old bottles labeled treaty, custom, or (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”, Alvarez, *supra* note 59, Preface x-xi. He exclusively focuses on the normative impact and “the ripples” of norms, see Alvarez, *supra* note 59, Preface xiii, 63, 122. A similar account can be found in D. J. Bederman, ‘The Souls of

approaches to law-ascertainment have proliferated throughout in the contemporary international legal scholarship.

The use of the effect or impact of norms to identify rules has not only been observed in studies about the traditional forms of international law-making. Attention must be paid here to two well-known research projects which, although not directly centered 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 previously discussed – Global Administrative Law project. It is true that, because of the specificities of the normative phenomenon with which these two projects deal, the use of informal benchmark of norm-identification in their studies is absolutely crucial. They nevertheless illustrate how, outside the classical realm of international law, effect- (or impact-) based approaches of norm-ascertainment are 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 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 upon the impact of the examined norms but rather the expected impact thereof.⁶³ 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”⁶⁴

International Organizations: Legal Personality and the Lighthouse at Cape Spartel’, 36 *Virginia Journal of International Law* (1996) 2, 275, 372; N. White, ‘Separate but Connected: Inter-Governmental Organizations and International Law’, 5 *International Organizations Law Review* (2008) 1, 175, esp. 181-186.

⁶³ See also M. Goldmann, ‘Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority’, 9 *German Law Journal* (2008) 11, 1865 and A. von Bogdandy, P. Dann & M. Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, 9 *German Law Journal* (2008) 11, 1375.

⁶⁴ Bogdandy, Dann & Goldmann, *supra* note 63, 1375. With respect to the development of “standard instruments”, see A. von Bogdandy, ‘General Principles of International

with a view to fostering both the effectiveness and the legitimacy of international public authority.⁶⁵ These endeavors have not gone so far as to claim that any exercise of international public authority should be construed as law. The use of informal criterion – like the impact of norms – is designed to capture expressions of normative activity which do not strictly speaking constitute international legal rules and are unidentifiable as such under formal criteria. However, their “legal conceptualization”⁶⁶ reflects a deformalization of norm-identification⁶⁷ necessary to ensure the legitimacy of the exercise of international public authority.⁶⁸ Interestingly, the deformalization of law-identification that inevitably accompanies the conceptualization at the heart of this project is only meant to be temporary, since these scholars’ ultimate aim is to re-formalize the identification of those “alternative instruments”⁶⁹.

Global Administrative Law is also significant enough to warrant mention. Although it is primarily focused on alternative modes of norm-making and not on international law, it captures the normative product of these processes through an effect- (or impact-) based conception of norm-ascertainment. In particular, Global Administrative Law is premised on the idea that, regarding these alternative modes of norm-making, problems of law-ascertainment cannot be fully resolved.⁷⁰ This is unsurprising since the norms created through the relevant processes cannot be ascertained under

Public Authority: Sketching a Research field’, 9 *German Law Journal* (2008) 11, 1909. See Goldmann, *supra* note 63, 1865.

⁶⁵ Goldmann, *supra* note 63, 1867.

⁶⁶ *Id.*, 1865.

⁶⁷ Bogdandy, Dann & Goldmann, *supra* note 63, 1376.

⁶⁸ Goldmann, *supra* note 63, 1866-1868.

⁶⁹ *Id.*, 1867-1868.

⁷⁰ See B. Kingsbury, N. Krisch & R. Steward, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 3 & 4, 15-61, 29; C. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *European Journal of International Law* (2006) 1, 187, 197-214. According to Kingsbury, global administrative law rests on an “extended 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 Kingsbury, ‘The concept of ‘Law’ in Global Administrative Law’, 20 *European Journal of International Law* (2009) 1, 23, 29-31 [Kingsbury, Concept of Law].

the classical theory of the sources.⁷¹ Global Administrative Law accordingly resorts to informal benchmarks, particularly effect- (or impact-) based criteria, to identify what it considers a normative product.⁷² Interestingly, the applicable principles of Global Administrative Law are, for their part, identified through substance-based criteria, especially under the principle of publicness.⁷³ Although some of its leading figures have curiously professed that Global Administrative Law bespeaks a Hartian conception of law,⁷⁴ Global Administrative Law can be understood as resting on a subtle use of both effect- (or impact-) and substance-based norm-ascertainment indicators.

I shall return to this and the Heidelberg research project in section V to show that, despite their reliance on some preliminary deformalization to define new forms of normative exercises, these undertakings ultimately seek to develop formal procedures and standards for regulatory decision-making outside traditional domestic and international frameworks in order to promote a formalization of global processes.⁷⁵ That said, it is noteworthy that they rely on a preliminary two-fold deformalization of norm-ascertainment in order to define their object of study. Firstly, the impact that the normative activities they capture is not subject to formal identification for it necessitates that one looks at the behavior of actors – an approach which Judge Ago had famously criticized in its famous separate opinion in the *Nicaragua Case* at the stage of jurisdiction.⁷⁶ Secondly, the actors whose

⁷¹ Kingsbury, Krisch & Steward, *supra* note 71, 25-26.

⁷² “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”, Kingsbury, *supra* note 70, 25.

⁷³ Kingsbury, Krisch & Steward, *supra* note 70, 30-31.

⁷⁴ *Id.*, 23-57; see also B. Kingsbury & L. Casini, ‘Global Administrative Law Dimensions of International Organizations Law’, 6 *International Organizations Law Review* (2009) 2, 319.

⁷⁵ In the same vein, see S. Chesterman, ‘Global Administrative Law (Working Paper for the S.T. Lee Project on Global Governance) (September 2009) available at http://lsr.nellco.org/nyu_plltwp/152 (last visited 29 August 2011), 3-4.

⁷⁶ See *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Separate Opinion of Judge Ago, ICJ Reports 1984, 514, 527 (“A ce sujet je dois faire [...] une réserve expresse quant à l’admissibilité de l’idée même que l’exigence

behavior 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. All-in-all, effect- (or impact-) based identification of international law has thus been synonymous with deformalization.

Interestingly, and somewhat paradoxically, all the abovementioned effect- (or impact-) based approaches to law-ascertainment resemble the compliance-based approaches of international law found in realist theories according to which law only exists to the extent with which it is complied.⁷⁷ It is equally noteworthy that the success of these effect- (or impact-) based approaches to 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 subject to it⁷⁸ – an assertion also at the heart of modern natural law theories. For this reason, effect- (or impact-) based studies have also spurred a need to bolster the legitimacy of international legal rules. The newly-devoted attention to the question of the legitimacy of international law – which was directly shored up by effect- (or impact-) based law-ascertainment theories – has further drawn the attention of international legal scholars away from the inherent problems of effect- (or impact-) based conceptions of law, especially in the context of law-ascertainment.

III. Process-Based Approaches of International Law- Identification and Other Manifestations of the Deformalization of International Law-Ascertainment

The effect- (or impact-) based approaches of international law are not the exclusive manifestation of the deformalization of law-ascertainment in contemporary legal scholarship. Indeed, the general skepticism against

indéniable d'un acte forme l d'acceptation puisse être remplacée [...] par une simple conduite de fait").

⁷⁷ J. L. Goldsmith & E. A. Posner, *The Limits of International Law* (2005). For a criticism of their conception of law, see the very interesting contribution of A. Somek, 'Kelsen lives', 18 *European Journal of International Law* (2007) 3, 409.

⁷⁸ See the famous account made by T. Frank, *The Power of Legitimacy Among Nations* (1990), 25.

formal law-ascertaining criteria has also led to a revival of *process-based* law-identification. In particular, the New Haven School has advocated for a revival of the deformalization of law-ascertainment.⁷⁹ A resuscitation of New Haven has occasionally been expressed in functionalist terms.⁸⁰ Whatever its ultimate manifestation, process-based approaches involve a significant deformalization of law-ascertainment, for it has proved very difficult to formally ascertain the process by which international legal rules are identified.⁸¹

There are other, more marginal, expressions of the deformalization of law-ascertainment in contemporary international legal scholarship.⁸² For instance, it has sometimes been argued that a rule's purpose should be turned into a law-ascertaining criterion.⁸³ While these – more isolated – approaches are not discussed here, they deserve some attention as they further illustrate the general deformalization of law-ascertainment in contemporary international legal scholarship.

⁷⁹ For a classical example of this type of deformalization, see R. Higgins, *Problems and Process: International Law and How We Use It* (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', 32 *The Yale Journal of International Law* (2007) 2, 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', 93 *Iowa Law Review* (2007) 1, 65. The New Haven approach to law-ascertainment has been examined above.

⁸⁰ See Johnston's hybrid theory which is both outcome- and process-based. See D. M. Johnston, 'Functionalism in the Theory of International Law', 26 *Canadian Yearbook of International Law* (1988), 3, esp. 30-31.

⁸¹ On the difficulty to formally ascertain processes, see G. Abi-Saab, 'Cours général de droit international public', 207 *Collected Courses of the Hague Academy of International Law* (1987) 7, 9, 39-49; I. Brownlie 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law', 255 *Collected Courses of the Hague Academy of International Law* (1995), 9, 29; Van Hoof, *supra* note 8, 283.

⁸² For a more precise and systematic taxonomy of these other approaches, see Klabbers, *supra* note 60.

⁸³ This is what J. Klabbers has described the "Functionalist turn". For examples, see Klabbers, *supra* note 60, 99.

IV. The Softness of International Law

Irrespective of deformalization of law identification's manifestation, the rejection of formal law-ascertainment has prompted international legal scholars to acknowledge the existence of a grey zone where distinguishing law from non-law is impossible. More particularly, international law is increasingly viewed as a *continuum* between law and non-law, and formal law-ascertainment is viewed as no longer being capable of defining legal phenomena in the international arena. This occurred hand-in-hand with a conflation between legal acts and "legal facts" (*faits juridiques*)⁸⁴ in the theory of the sources of international law,⁸⁵ and the embrace of the general softness of legal concepts.⁸⁶ Indeed, the theory of the softness of international law has gained acceptance in international legal scholarship. It has been argued that not only has law become soft, but that governance,⁸⁷ lawmaking,⁸⁸ international organizations,⁸⁹ enforcement,⁹⁰ and even – from

⁸⁴ 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', 19 *European Journal of International Law* (2008) 5, 1075.

⁸⁵ For an early systematization of the distinction between legal acts & legal facts, see D. Anzilotti, *Cours de droit international, premier volume: introduction – theories générales* (1929). See also G. Morelli, 'Cours général de droit international public', 89 *Collected Courses of the Hague Academy of International Law* (1956) 1, 437, 589. J.-P. Jacqué, 'Acte et norme en droit international public', 227 *Collected Courses of the Hague Academy of International Law* (1991) 2, 357, 372. See also, M. Virally, *La pensée juridique* (1960), 93; G. Abi-Saab, 'Les sources du droit international. Essai de déconstruction', in M. Rama-Montaldo (ed.), *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (1994), 29, 40.

⁸⁶ I have studied that phenomenon in greater depth elsewhere. See d'Aspremont, *supra* note 84, 1075.

⁸⁷ K. W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 3, 421.

⁸⁸ P.-M. Dupuy, 'Soft Law and the International Law of the Environment', 12 *Michigan Journal of International Law* (1990-1991), 420, esp. 424.

⁸⁹ J. Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law', 70 *Nordic Journal of International Law* (2001) 3, 403.

⁹⁰ O. Yoshida, 'Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions', 95 *Colorado Journal of Environmental Law & Policy* (1999) 1, 95; Boyle, *supra* note 4, esp. 909.

a critical legal perspective – international legal arguments have too.⁹¹ The general concept of softness – especially the softness of the instrument (*instrumentum*) in which international legal rules are contained – originated in the above-mentioned presupposition that law’s binary nature is ill-suited to accommodate the growing complexity of contemporary international relations and that international law contains a very large grey zone where there is no need to define law and non-law.⁹² Norms enshrined in soft instruments, e.g. political declarations, codes of conducts 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 have legal effect. For instance, they can partake in the *internationalization of the subject-matter*,⁹³ provide guidelines for the interpretation of other legal acts⁹⁴ 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.⁹⁵ Yet, if formal pedigree were to be the only law-ascertainment criterion, they would simply be legal facts. Nonetheless,

⁹¹ D. Kennedy, ‘The Sources of International Law’, 2 *American University Journal of International Law and Policy* (*American University International Law Review*) (1987) 1, 1, esp. 20-22.

⁹² On this point see particularly L. Blutman, ‘In the Trap of a Legal Metaphor: International Soft Law’, 59 *International and Comparative Law Quarterly* (2010) 3, 605, 613-614.

⁹³ On this question, see J. Verhoeven, ‘Non-intervention: affaires intérieures ou ‘vie privée’?’, in *Mélanges en hommage à Michel Virally: Le droit international au service de la paix, de la justice et du développement* (1991), 493-500; R. Kolb, ‘Du domaine réservé – Réflexions sur la théorie de la compétence nationale’, 110 *Revue Générale de Droit International Public* (2006) 3, 597, 609-610; B. Sloan, ‘General Assembly Resolutions Revisited (Forty Years Later)’, 58 *British Yearbook of International Law* (1987) 39, 124.

⁹⁴ See A. Aust, ‘The Theory and Practice of Informal International Instruments’, 35 *International and Comparative Law Quarterly* (1986) 4, 787; R. J. Dupuy, ‘Declaratory Law and Programmatic Law: From Revolutionary Custom to ‘Soft Law’’, in R. J. Akkerman *et al.* (eds), *Declarations of Principles. A Quest for Universal Peace* (1977), 247, 255. U. Fastenrath, ‘Relative Normativity in International Law’, 4 *European Journal of International Law* (1993) 1, 305. See Schachter, *supra* note 6, 296.

⁹⁵ This is, for instance, the intention of Article 19 of the ILC articles on Diplomatic Protection on the “recommended practice” by States, see General Assembly, Report of the International Law Commission, UN Doc. Supplement No. 10 (A/61/10), 1 May-9 June and 3 July-11 August 2006.

the international legal scholarship has adopted a strong tendency to construe these legal facts as law.⁹⁶ The softness inherent in the growingly accepted idea of a grey zone 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 described in the previous section.⁹⁷ Softness can thus be seen as constituting an integral part of the contemporary deformalization of international law-ascertainment.⁹⁸

D. Multiple Agendas of Deformalization

This section seeks to demonstrate that the abovementioned manifestations of the deformalization of law-ascertainment are informed by very different agendas.⁹⁹ Interestingly, similar conceptions of law-ascertainment sometimes serve contradictory agendas. This is well-

⁹⁶ A. Boyle & C. Chinkin, *The Making of International Law* (2007), 211-229; V. Lowe, *International Law* (2007), 96-97; A. T. Guzman, 'The Design of International Agreements', 16 *European Journal of International Law* (2005) 4, 579. Pellet has hinted at the idea of a "degrade 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* (1984), 465, esp. 488. See also G. Abi-Saab, 'Eloge du 'droit assourdi'', in E. Bruylant, *Nouveaux itinéraires en droit: Hommage à François Rigaux* (1998) 59, 62-63; Baxter, *supra* note 6, 549; R. Ida, 'Formation des norms internationaux dans un monde en mutation. Critique de la notion de Soft Law', in *Mélanges en hommage à Michel Virally: Le droit international au service de la paix, de la justice et du développement* (1991), 333, 336; M. Virally, 'La distinction entre texts internationaux de portée juridique et texts internationaux dépourvus de portée juridique, Rapport provisoire à l'Institut de droit international', 60 *Annuaire de L'Institut de Droit International* (1983), 166, 244; O. Elias & C. Lim, 'General principles of law', 'soft' law and the identification of international law', 28 *Netherlands Yearbook of International Law* (1997), 3, 45.

⁹⁷ C. M. Chinkin, 'The Challenge to Soft Law, Development and Change in International Law', 38 *International and Comparative Law Quarterly* (1989) 4, 850, 865.

⁹⁸ I have expounded on the idea of softness of international law elsewhere. See d'Aspremont, *supra* note 84, 1075. See also J. d'Aspremont, 'Les dispositions nonnormatives des actes juridiques conventionnels à la lumière de la jurisprudence de la cour internationale de justice', 36 *Revue Belge de Droit International* (2003) 2, 496.

⁹⁹ I have mentioned some of these agendas in previous works, d'Aspremont, *supra* note 84, 1075. See also J. d'Aspremont, 'La doctrine du droit international et la tentation d'une juridicisation sans limite', 112 *Revue Générale de Droit International Public* (2008) 4, 849.

illustrated by the use of effect- (or impact-) based approaches by some of the abovementioned scholars and behavioral approaches defended by (neo-) realists who, although resorting to somewhat comparable approaches to law-identification, pursue radically different aims. The following paragraphs do not seek to identify the motive behind the various understandings of law-ascertainment and mentioned in this chapter. I only sketch some of the main objectives that scholars may be – sometimes unconsciously – pursuing by deformalizing the ascertainment of international legal rules.

Although both ideas share some common characteristics, presentation of the deformalization's agenda of law-ascertainment attempted in the following paragraph takes an external point of view. It does not deal with the motives influencing the behavior of international actors engaged in international norm-making processes and those behind their choices regarding the nature of the norm which they seek to create.¹⁰⁰ Mention is made here of the attempts to programme the future development of international law (I), expand international law (II), promote accountability mechanisms (III), unearth new legal materials worth of legal studies (IV), devise innovative legal arguments for adjudicative purposes (V) as well as promote legal pluralism (VI).

I. Programming the Future Development of International Law

The most common driving force behind the deformalization of law-ascertainment is probably what could be called the *programmatic* character of the use of informal law-ascertainment criteria.¹⁰¹ I hereby refer to international lawyers' use of informal criteria for law-identification with the hope of contributing to the subsequent emergence of new rules in the *lex*

¹⁰⁰ On the reasons why international actors prefer soft law to hard law and vice-versa, see gen. H. Hillgenberg, 'A Fresh Look at Soft Law', 10 *European Journal of International Law* (1999) 3, 499, 501-502; See also the insightful three-tiered analysis of K. Raustiala, 'Form and Substance in International Agreements', 99 *American Journal of International Law* (2005) 3, 581, 591-601; D. Carreau, *Droit International*, 8th ed. (2004), 205; G. Shaffer & M. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance', 94 *Minnesota Law Review* (2010) 3, 706, 717-721.

¹⁰¹ This argument has also been made by Blutman, *supra* note 92, 617-618. In the same vein, see M. Reisman, 'Soft Law and Law Jobs', 2 *Journal of International Dispute Settlement* (2011) 1, 25, 25-26.

lata. In mind are the identification of rules which although not strictly speaking legal rules are seen as constituting an experimentation ground for futures legal rules whose emergence is deemed desirable.¹⁰² In this case, the resort to non-formal law-ascertainment is meant to be conducive to the subsequent emergence of new rules. This programmatic attitude is widespread in the field of human rights law and environmental law.¹⁰³

II. Promoting the Expansion of International Law

Laying the foundation for the construction of formally ascertainable future 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 inherently good and should therefore be expanded. International lawyers tend 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.¹⁰⁴ This faith in the added value of international law in comparison to other social norms is often accompanied by the belief that the cost for non-compliance necessarily outweighs the benefit thereof. Seen in this light, international law is envisaged as an essential element of any institutionalized form of an international community,¹⁰⁵ and any new legal rule is deemed a step away from the anarchical state of nature towards a greater integration of that community.¹⁰⁶ Accordingly, deformalizing

¹⁰² 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 (ed.), *L'élaboration du droit international public, Colloque de Toulouse* (1975) 132; see also Pellet, *supra* note 6, 415; Fastenrath, *supra* note 94, 324; See also F. Sindico, 'Soft Law and the Elusive Quest for Sustainable Global Governance', 19 *Leiden Journal of International Law* (2006) 3, 829, 836.

¹⁰³ See e.g. A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', 12 *Australian Yearbook of International Law* (1988-1989) 22, 47.

¹⁰⁴ This was insightfully highlighted by J. Klabbers, 'The Undesirability of Soft Law', 67 *Nordic Journal of International Law* (1998) 4, 381, 383.

¹⁰⁵ See e.g. G. Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law', 92 *Collected Courses of the Hague Academy of International Law* (1957) 2, 1, 38; Abi-Saab, *supra* note 81, 45.

¹⁰⁶ On the various dimensions of this enthusiasm for the international, see D. Kennedy, 'A New World Order: Yesterday, Today and Tomorrow', 4 *Transnational Legal and Contemporary Problems* (1994), 329, 336; See also S. Marks, *The Riddle of All Constitutions* (2003), 146.

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.¹⁰⁷ 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 informal law-identification criteria is yet another strategy that complements the existing interpretative instruments developed by international lawyers to expand international law.¹⁰⁸

III. Accountability for the Exercise of Public Authority

As previously stated, most of today's international normative activity unfolds outside the traditional framework of international law, generating norms which, according to the traditional law-ascertainment criteria of mainstream theory of the sources of international law, do not qualify as international legal rules. It is by virtue of a preoccupation for the accountability deficit generated by the sweeping impact that such norms could bear on international and national actors, that international legal scholars have nonetheless tried to incorporate these new phenomena into the discipline of international legal studies. Encapsulating these new normative phenomena has required the use of informal 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 endeavor,¹⁰⁹ they were quickly followed by others, such

¹⁰⁷ 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* (The Hague: T.M.C. Asser Press, 2010).

¹⁰⁸ 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', 21 *European Journal of International Law* (2010) 3, 585.

¹⁰⁹ See e.g. Slaughter, *supra* note 1. See also A.-M. Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', 24 *Michigan Journal of International Law* (2003) 4, 1041.

as NYU's Global Administrative Law¹¹⁰ and the Max Planck Institute's study of the International Exercise of International Public Authority'.¹¹¹ Whilst, strictly speaking, the latter do not concentrate on traditional international legal rules, they typify informal law-ascertainment criteria as part of an endeavor to address accountability deficit.

IV. A Self-Serving Quest for New Legal Materials

Deformalization of law-ascertainment also stems from international scholar's – conscious or unconscious – quest 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 changes in 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 an indispensable 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. We presently face a proliferation of international legal thinking.¹¹² Although this may be viewed as an encouraging development that should be celebrated,¹¹³ it has not come about without problems. Because of an abundance of scholars, it is much harder for each to find his or her *niche* in order to distinguish him- or herself. As a

¹¹⁰ See Kingsbury, Krisch & Steward, *supra* note 70, 29; Harlow, *supra* note 70, 197-214; Kingsbury, *supra* note 70, 23-57.

¹¹¹ See also Goldmann, *supra* note 63, 1865 and von Bogdandy, Dann & Goldmann, *supra* note 63, 1375.

¹¹² This is why I have expounded on in J. d'Aspremont, 'Softness in International Law: A Rejoinder to Tony D'Amato', 20 *European Journal of International Law* (2009) 3, 911. See also d'Aspremont, *supra* note 99. See also Raustiala, *supra* note 100, 582 (he contends that 'pledges are smuggled in into the international lawyer's repertoire by dubbing them soft law').

¹¹³ 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, 94 *ASIL Proceedings* (2000), 317. 318.

result, there are fewer unexplored fields and less room for original findings that are sometimes demanded by incongruous institutional constraints, if not by vanity.¹¹⁴ Consequently, it is now much harder to make a significant contribution to the field than at the infancy of international legal thinking. The greater hurdle to finding a niche has placed scholars into more aggressive competition with each other, and ignited a feeling of constriction as if their field of study is too small to accommodate all of them. This battle within the profession has simultaneously been fostered by a battle among professions and, particularly the growing interest of non-legal disciplines for subjects traditionally exclusive to legal scholarship.¹¹⁵ Against that backdrop, many scholars have chosen to advocate for classical international law's expansion by "legalizing" phenomena outside of international law with informal law-ascertainment criteria. The use of informal law-ascertainment criteria, in this context, has helped scholars find new subject material and open new avenues for legal research.¹¹⁶

V. Creative Argumentation Before Adjudicative Bodies

Reference is also made to the abiding and inextricable inclinations of advocates and counsels in international judicial proceedings to take liberty with the theory of the sources of international law.¹¹⁷ To them, formal law-ascertainment frustrates creativity.¹¹⁸ Deformalizing law-ascertainment conversely grants them leeway to stretch the limits of international law and

¹¹⁴ See contra Kennedy, *supra* note 106, 370.

¹¹⁵ On the battle for controlling the production of discourse, see gen. M. Foucault, 'The Order of Discourse', in R. Young (ed.), *Untying the Text: a Post-Structuralist Reader* (1981), 48, 52.

¹¹⁶ For an illustration of that phenomenon, see e.g. D. Johnston, 'Theory, Consent and the Law of Treaties: A Cross-Disciplinary Perspective', 12 *Australian Yearbook of International Law* (1988-1989), 109.

¹¹⁷ See gen. S. Rosenne, 'International Court of Justice: Practice Direction on Agents, Counsel and Advocates', in S. Rosenne (ed.), *Essays on International Law and Practice* (2007), 97; J.-P. Cot, 'Appearing 'for' or 'on behalf of' a State: the Role of Private Counsel before International Tribunals', in N. Ando, E. McWhinney, R. Wolfrum *et al.* (eds), *Liber Amicorum Judge Shigeru Oda*, Vol. 2 (2002), 835; J. P. W. Temminck Tuinstra, *Defence Counsel in International Criminal Law* (2009); U. Draetta, 'The Role of In-House Counsel in International Arbitration', 75 *Arbitration* (2009), 470-480.

¹¹⁸ Interestingly, the same argument has been made as far as legal scholars are concerned. See Brunnée & Toope, *supra* note 4, 65.

unearth rules that support the position of the actor which they represent.¹¹⁹ The use of informal law-ascertainment criteria thus offers more freedom for creative argumentation before adjudicative bodies. This tendency – which bears resemblance with the aforementioned inclination to nurture the development of international law or to promote the expansion thereof – does not appear to conflict with the profession's standards of conduct.¹²⁰ It usually manifests itself in cases where applicable rules are scarce.¹²¹ It commonly materializes in the invocation of soft legal rules or the use of a very liberal ascertainment of custom and general principles of law.

VI. The Promotion of Legal Pluralism

Legal forms, including formal ascertainment indicators, are often perceived as preventing rules from evolving and adapting to unforeseen situations, notably the abovementioned challenges posed by the growing pluralization of international norm-making and the increasing number of informal exercises of public authority at the international level. If legal pluralism is understood as eschewing legal uniformity and a common framework of identification,¹²² the preservation of formal indicators for international law-ascertainment purposes appears to be at odds with legal pluralism.¹²³ In that sense, deformalization is meant to enable the

¹¹⁹ I owe this argument to an interesting discussion with Alan Boyle.

¹²⁰ The Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals* (27 September 2010) available at http://www.ucl.ac.uk/laws/cict/docs/Hague_Sept2010.pdf (last visited 29 August 2011); see also Jan Paulsson, 'Standards of conduct for counsel in international arbitration', 3 *American Review of International Arbitration* (1992), 214-222.

¹²¹ For a recent example, see e.g. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 132-142.

¹²² On the multiple meanings of legal pluralism, see N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law* (2010), 71-78.

¹²³ See, however, on the possibility to withhold a rule of recognition and safeguard pluralism, S. Besson, 'Theorizing the Sources of International Law', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 163, 184; W. Twining, 'Implications of 'Globalisation' for Law as a Discipline', in A. Halpin & V. Roeben (eds), *Theorising the Global Legal Order* (2009), 44-45. On the specific question whether Hart's theory can sustain legal pluralism, see J. Waldron, 'Legal Pluralism and the Contrast Between Hart's Jurisprudence and Fuller's', in P. Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (2010), 135-155 and

development of a more pluralistic discipline that better reflects with the pluralistic international society.¹²⁴

E. The Cost of Deformalization

The foregoing has shown that international lawyers have found a formidable instrument in deformalization, allowing them to steer the future development of international law, expand international law, promote accountability mechanisms, devise innovative legal arguments for adjudicative purposes or ensure greater pluralism. Yet, deformalization does not come without costs, some of which are well known in studies on customary international law and treaty law. The following paragraphs briefly sketch out the main perils associated with deformalization and, in particular, its cost for the normative character and authority of international law (I), the significance of scholarly debate (II), the feasibility of a critique (III) and the international rule of law (IV). Others possible ramifications are also mentioned (V).

I. Eroding the Normative Character and Authority of International Law

Deformalization of law-ascertainment first comes with a high price in terms of normative character of international law. It is widely accepted that some elementary formal law-ascertainment in international law is *a necessary condition to preserve the normative character of international law*, and the greater difficulty of identifying international legal rules that accompanies the forsaking of formal law-ascertainment prevents such rules from providing for meaningful commands.¹²⁵ In the absence of these

M. Davies, 'The Politics of Defining Law', in P. Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (2010), 157-167.

¹²⁴ For an example, Krisch, *supra* note 122, 11-12 and 69-105.

¹²⁵ In the same vein, see H. L. A. Hart, *The Concept of Law*, 2nd ed. (1997), 124. Hart borrows from J.L. Austin the speech-act theory and the claims of the latter regarding the performative function of language, a notion that can be understood in Hart's view by recognizing that "given a background of rules or conventions which provide that if a person says certain words then certain other rules shall be brought into operation, this determines the function, or in a broad sense, the meaning of the words in question". See H. L. A. Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence', in *Hart's collected Essays in Jurisprudence and Philosophy* (1983), 265, 274-276.

elementary formal standards of identification – a result of deformalization – actors are less able to anticipate, and thus adapt to, the consequences (or lack thereof) of the rule in question. Likewise, short of any formal law-ascertainment criteria, law-applying authorities will be at pain to evidence the applicable law in cases before them, which will further reduce the ability of actors to anticipate the consequences (or lack thereof) of the relevant rules. As a matter of consequence, the rule that cannot be clearly ascertained will fall short of altering the behavior of its adherents.¹²⁶ This is why it is argued here that deformalization and its accompanying heightened difficulty in distinguishing law from non-law can debilitate the normative character of international legal rules. Normativity's preservation is not only doctrinally important¹²⁷ as it fundamentally bears upon the ability of international law to fulfill most of the functions assigned to it.¹²⁸ Indeed, many of the functions that can be assigned to international law¹²⁹ – and I do not want to

¹²⁶ J. Hathaway, 'American Defender of Democratic Legitimacy' 11 *European Journal of International Law* (2000) 1, 121, 128-129. Although he embraces a relative normativity, M. Goldmann also pleads for some formalization in the identification of alternative instruments of law with a view to preserving its normative character. See Goldmann, *supra* note 63, 1865, 1879 ("The operator with an internal perspective cannot wait until the instrument causes certain effects, is being complied with or not, before he or she makes a judgment about its legal quality that will allow him or her to determine the conditions for its validity and legality [...]. Only by way of formal criteria the operator within a legal system may anticipate the legal quality of the instrument he or she intends to adopt and apply the legal regime provided by international institutional law for instruments of this kind. Formal criteria would enable the identification and classification of an instrument before its 'normative ripples'").

¹²⁷ For an account of the necessity of preserving law-ascertainment for reasons pertaining to the preservation of international law as a proper field of study, see Kratochwil, *supra* note 4, 205.

¹²⁸ D. Lefkowitz, 'The Sources of International Law: Some Philosophical Reflections', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010) 187, 195. For a review of some of the most important functions that international law can play, see D. M. Johnston, 'Functionalism in the Theory of International Law', 26 *Canadian Yearbook of International Law* (1988) 3, 25.

¹²⁹ In that sense my argument also departs from that of Prosper Weil (see P. Weil, 'Towards Relative Normativity in International Law', 77 *American Journal of International Law* (1983), 413, 420-421) and bears some limited resemblance with that of M. Koskenniemi (M. Koskenniemi, 'What is International Law For?', in M. Evans (ed.), *International Law*, 2nd ed. (2006), 57. For a rebuttal of the idea that Koskenniemi expresses a total disinterest for the question of the functions of international law, see J. Beckett, 'Countering Uncertainty and Ending Up/Down

prejudge any of them here – presuppose that international law retains sufficient meaning to be capable of guiding the actors subject to it. Ultimately, normativity ought to be supported if international law is to retain some *authority*.¹³⁰

II. International Legal Scholars Talking Past Each Other

The current embrace of deformalization in international legal scholarship is not foreign to the growing cacophony in contemporary scholarly debates in the field of international law. Indeed, nowadays, international legal scholars often talk past each other.¹³¹ It is as if the international legal scholarship had turned into a cluster of different scholarly communities, each of them using different criteria for the ascertainment of international legal rules. The use of formal standards to ascertain international legal rules, which does not do away with the rules' inevitable indeterminacy, helps to preserve the significance of scholarly debates about international law and prevent them from becoming a henhouse or a tower of Babel. Deformalization, to the contrary, hinders the existence of a common language among scholars, thereby making it difficult to scholars to debate about the exact same object.

Arguments: Prolegomena to a Response to NAIL', 16 *European Journal of International Law* (2005) 2, 213.

¹³⁰ In the same sense, Danilenko, *supra* note 38, 21. Although he phrased it in terms of effectiveness, A. Orakhelashvili seems to be of the same opinion. See Orakhelashvili, *International Law*, *supra* note 22, 51. S. Besson is more reserved as to the impact of sources of international law on the authority of international Legal rules – a debate she phrases in terms of 'normativity'. She however recognizes that validity – a debate she phrases in terms of 'legality' – is an important part of the legitimacy of international law. See S. Besson, *supra* note 123, 174 and 180. Although contending that formal law-identification is insufficient to ensure the authority of international law, J. Brunnée and S. J. Toope argues that the distinction between law and non-law is fundamental to preserve it. See J. Brunnée & S. J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010), 46.

¹³¹ I already made this point in J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato', 20 *European Journal of International Law* (2009) 3, 911-917. See also J. d'Aspremont, 'La doctrine du droit international face à la tentation d'une juridicisation sans limites', 112 *Revue Générale de Droit International Public* (2008), 849-866.

III. Frustrating the Possibility of a Critique of International Legal Rules

Because deformalization makes the distinction between law and non-law very elusive, it frustrates the possibility of a critique of international law. Indeed, any critique of law – whether moral, economic, political, etc. – presupposes that international rules are already ascertained. In that sense, formal law-ascertainment of international legal rules is also a prerequisite to a critique. Even though formalism in law-ascertainment does little to determinate the whole phenomenon of law – and especially the content of legal rules – and only applies to in the identification of legal rules, it enables the possibility of a critique of law in the first place. Short of any ascertainment – and, in my view, only formal law ascertainment provides a satisfactory ascertainment tool – less critique is possible due to the greater ambiguity shrouding the object of the critique itself.¹³² It should nonetheless be made clear that, while being a prerequisite to the critique of law, formal law-ascertainment does not, however, provide for a yardstick, model or standard of evaluation for that critique. The standard of evaluation remains entirely relative, for it stems from the critique itself and not from law-ascertainment criteria.

IV. Impairing the International Rule of Law

Deformalization does not come without impairing the sustainability of the rule of law in the legal system concerned.¹³³ Deformalization arguably does away with one of the indispensable conditions for ensuring that international law reflects the rule of law.¹³⁴ Indeed, for law to be a substitute

¹³² W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009), 27; J. S. Boyle, 'Positivism, Natural Law and Disestablishment: Some Questions Raised by MacCormick's Moralistic Amoralism', 20 *Valparaiso University Law Review* (1985-1986), 55; A. Buchanan, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (2007), 21.

¹³³ On the Rule of Law in international law, see gen. Société française pour le droit international, *L'Etat de droit en droit international: Colloque de Bruxelles* (2007). On the various meanings of the rule of law in the context of international law, see A. Nollkaemper, 'The Internationalized Rule of Law', 1 *Hague Journal on the Rule of Law* (2009) 1, 74-78.

¹³⁴ This point is irrespective of who is entitled to the rule of law. See the argument of J. Waldron according to whom States are not entitled to the rule of law. J. Waldron,

to unbridled arbitrary power, clear law-ascertaining criteria are needed.¹³⁵ By the same token, the inability to ascertain legal rules with sufficient certainty – the consequence of the deformalization described above – permits a high degree of subjectivity in the identification of the applicable law,¹³⁶ thereby allowing “adherents” to more easily manipulate the rules.¹³⁷ This argument is echoed by *constitutionalist* legal scholars.¹³⁸ International legal constitutionalist approaches presuppose the existence of some elementary formal standards to ascertain the law. According to that view, without formal law-ascertaining standards, no system can sustain the rule of law. Without necessarily espousing a constitutionalist understanding of international law,¹³⁹ it seems undisputable that the rule of law cannot be realized without some elementary law-ascertaining standards. The ascertainment-avoidance strategies that some States deliberately engage to preserve their freedom of action¹⁴⁰ – which allows some glaring manipulations of international legal rules – is blatantly obvious in the case

‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’, *NYU Public Law and Legal Theory Research Paper No. 90-01* (5 January 2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323383 (last visited 10 August 2011), 2. See the reaction of A. Somek, ‘Defective Law’, 5, *University of Iowa Legal Studies Research Paper No. 10-33* (16 September 2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678156 (last visited 29 August 2011).

¹³⁵ N. Onuf, ‘The Constitution of International Society’, 5 *European Journal of International Law* (1995) 1, 1, 13; F. Schauer, ‘Formalism’, 97 *Yale Law Journal* (1998), 509; A. L. Paulus, ‘International Law After Postmodernism’, 14 *Leiden Journal of International Law* (2001), 748; B. Cheng, ‘On the Nature and Sources of International Law’, in B. Cheng (ed.), *International Law: Teaching and Practice* (1982), 203, 206; Lefkowitz, *supra* note 128, 187, 195; See also the introductory remarks of H. Charlesworth, ‘Human Rights and the Rule of Law After Conflict’, in P. Cane (ed.), *The Hart-Fuller Debate Fifty Years On* (2010), 43, 44.

¹³⁶ See gen. J. Raz, ‘The Rule of Law and its Virtue’, in J. Raz (ed.), *The Authority of Law – Essays on Law and Morality* (1979), 210, 215-216.

¹³⁷ In the same vein, see Danilenko, *supra* note 38 16-17. See also Hathaway, *supra* note 126, 121, 128-129.

¹³⁸ See e.g. C. Tomuschat, ‘General Course on Public International Law’, 26-29. On this aspect of constitutionalism, see the remarks of J. Klabbers, ‘Constitutionalism and the Making of International Law: Fuller’s Procedural Natural Law’, 5 *No Foundations: Journal of Extreme Legal Positivism* (2008), 84, 85 and 103.

¹³⁹ I have elsewhere taken distance with the constitutionalist understanding of international law. See d’Aspremont, *supra* note 5, 261-297.

¹⁴⁰ See the account made by C. Lipson of the practice of deformalization and practice and the benefits thereof. C. Lipson, ‘Why are some international agreements informal’, 45 *International Organization* (1991) 4, 495, 501.

of customary international law which, as has been discussed in section B.II, is identified by virtue of informal criteria.

V. Other Potential Hazards of Deformalization

The question of legal systems' viability has always been a central concern of legal theory. For instance, it has been contended that a legal system whose rules are systematically left unenforced would probably grow nonviable.¹⁴¹ This issue has also been discussed in connection with immoral rules,¹⁴² especially since Hart's famous reference to the *minimum content of natural law*, which – in my view – was the object of much misunderstanding.¹⁴³ Likewise, the argument has been made in the literature that, short of any elementary law-ascertainment yardsticks, a legal system would prove nonviable. Indeed, formal law-ascertainment arguably contributes to the viability of the international legal system.¹⁴⁴ This position is certainly not unreasonable, for it cannot be ruled out that a legal system without any clear law-identification standards, in addition to failing to generate meaningful guidance to those subject to it, could be beset by insufficiencies affecting its viability. In that sense, deformalization, beyond a certain threshold, could put the viability of the legal system concerned at risk.

¹⁴¹ A. D'Amato, 'What 'Counts' as Law?', in N.G. Onuf (ed.), *Law-Making in the Global Community* (1982), 83, 85-86. See B. Tamanaha's assumption that a legal system may exist despite the fact that an overwhelming majority of those subjected to the rules live in general disregard of the vast bulk of them. B. Tamanaha, *A General Jurisprudence of Law and Society* (2001), 142-148. According to Tamanaha, the requirement of general obedience does not correspond to social reality.

¹⁴² In the same sense, see, D'Amato, *supra* note 22, 83, 84.

¹⁴³ See Hart, *supra* note 125, 193-200 and H. L. A. Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* (1958) 4, 593, 622-623. The reference to the minimum concept of natural law has often been the object of misunderstanding. It has, for instance, been conflated with a criterion of law-ascertainment. For an illustration of a misuse of Hart's minimum content of natural law as requiring some morality in law to be obligatory, see K. E. Himma, 'Hart and Austin Together Again for the First Time: Coercive Enforcement and Theory of Legal Obligation' (21 May 2006) available at <http://ssrn.com/abstract=727465> (last visited 29 August 2011).

¹⁴⁴ This argument has been made by C. Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law', 281 *Collected Courses* (1999), 9, 26-29; Abi-Saab, *supra* note 81, 35. See also Jennings, *supra* note 40, 3.

Deformalization could also be seen as frustrating the achievement of a *formal unity of international law*.¹⁴⁵ This concept of the unity of international law has been subject to various and divergent theories.¹⁴⁶ It is true that, if international legal rules are identified on the basis of a unified standardized pedigree, they can be seen as belonging to a single set of rules. Such a set of rules can be construed as an order or a system, the distinction between the two – more common in the French and German scholarships – depends on whether international law is not a “random collection of such norms” and whether there are “meaningful relationships between them”.¹⁴⁷ There seems to be little doubt that formal law-ascertainment is conducive to systemic unity of international law and that, in that sense, deformalization comes at the expense of that unity.

F. The Endurance of Formalism

While we witness a deformalization at the level of law-ascertainment as described in section 2, it is noteworthy that we simultaneously see a formalism’s survival. In other words, the deformalization described above is accompanied by a consequent survival of formalism, albeit in various – and sometimes divergent – ways.

Four examples of formalism’s endurance are discussed here. Each pertains to a different type of formalism and, except for one example, is not restricted to formalism in the context of law-ascertainment. These four different illustrations suffice to show that, for some scholars, the deformalization of law-ascertainment described above is often a preliminary and provisional methodological step to expand the net with which they capture their object of study. Attention will be paid here to Global

¹⁴⁵ See gen. Dupuy, *supra* note 22, 9- 489.

¹⁴⁶ For a survey of the various conceptions of the formal unity of international law, see M. Prost, *Unitas multiplex – Les unités du droit international et la politique de la fragmentation* (2008), 149.

¹⁴⁷ See the conclusion of the Report of the ILC Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.702, 18 July 2006, 7, para. 14 (1). See also the seminal article of J. Combacau, ‘Le droit international: bric-à-brac ou système?’, 31 *Archives de philosophie du droit* (1986), 85.

Administrative Law (I), the Heidelberg project on the Exercise of International Public Authority (II), and Martti Koskenniemi's culture of formalism (III). Each of them promotes a unique incarnation of formalism not restricted to the identification of legal rules. Attention is eventually paid to a new emerging stream of international legal positivism which, while accepting descriptive models informed informal parameters, strongly advocates for the preservation of some elementary formalism in law-ascertainment and is the most direct counterpoint to the abovementioned deformalization (IV).

I. The Return to Formalism in Global Administrative Law

Global Administrative Law, briefly examined above, embodies an expression of the current deformalization of law-making. Global Administrative Law has grown very diverse and extremely heterogeneous. It is difficult to define it accurately, for it has deliberately been left undefined. It is however not unreasonable to claim that, as has been explained earlier, Global Administrative Law, despite still resting, among others, on "formal sources" including classical sources of public international law,¹⁴⁸ espouses deformalization in the form of substantive validity (publicness)¹⁴⁹ or effect-based ascertainment of rules.¹⁵⁰ However, Global Administrative Law simultaneously remains focused on the development of institutional procedures, principles and remedies which encompass formal mechanisms of the application of Global Administrative Law.¹⁵¹ The emerging rules it refers to encapsulate formal procedures and standards for regulatory decision-making outside traditional domestic and international frameworks,¹⁵² promoting a formalization of global processes.¹⁵³ Whilst capturing the phenomenon at the origin of Global Administrative Law involves deformalization, its objective remains the development of formal rules and procedures.

¹⁴⁸ Kingsbury, Krisch & Stewart, *supra* note 70, 29-30.

¹⁴⁹ Kingsbury, *supra* note 70, 30 ("Only rules and institutions meeting these publicness requirements immanent in public law [...] can be regarded as law").

¹⁵⁰ Kingsbury, *supra* note 70, 25; See also *supra* C.I.

¹⁵¹ Kingsbury, Krisch & Stewart, *supra* note 70, 27.

¹⁵² S. Chesterman, 'Global Administrative Law (Working Paper for the S.T. Lee Project on Global Governance)' (9 January 2009) available at http://lsr.nellco.org/nyu_plltwp/ 152, 4 (last visited 29 August 2011).

¹⁵³ In the same vein, see *id.*, 3-4.

II. Formalism in the Heidelberg Project on the Exercise of Public Authority

As mentioned above, the Heidelberg project on the Exercise of Public Authority rests on some very subtle and elaborate forms of expectations-based norm-ascertainment models with the goal of capturing normative instruments outside the traditional international law fabric.¹⁵⁴ Yet, these scholars' ambition remains the elaboration of formal "principles of international public authority"¹⁵⁵ to foster both the effectiveness and the legitimacy of international public authority.¹⁵⁶ Their use of informal criterion has been designed to capture norms which are not international legal rules and are otherwise unidentifiable by formal criteria. Their ultimate aim remains a "legal conceptualization"¹⁵⁷ to the extent necessary to ensure that the exercise of international public authority retains its legitimacy.¹⁵⁸ In that sense, the deformalization of law-identification inherent in their attempt to capture new forms of exercises of public authority is accompanied by a reformation of those "alternative instruments" and, in the same vein as Global Administrative Law, an attempt to devise formal principles of public authority.¹⁵⁹

III. The "Culture of Formalism"

The critique of formalism formulated by scholars affiliated with critical legal studies and deconstructivism has primarily been directed at formalism in legal argumentation¹⁶⁰ – rather than formal law-ascertainment itself. These scholars' work has nonetheless simultaneously – and sometimes inadvertently – delivered a fundamental critique of formal law-

¹⁵⁴ See also M. Goldmann, *supra* note 63, 1865 and Bogdandy, Dann & Goldmann, *supra* note 63, 1375.

¹⁵⁵ Bogdandy, Dann & Goldmann, *supra* note 63, 1375-1400. With respect to the development of "standard instruments", see A. von Bogdandy, 'General Principles of International Public Authority: Sketching a Research field', 9 *German Law Journal* (2008) 11, 1909-1939. See Goldmann, *supra* note 63, 1865-1908.

¹⁵⁶ *Id.* 1865, 1867.

¹⁵⁷ *Id.* 1865.

¹⁵⁸ *Id.* 1867-1868.

¹⁵⁹ *Id.*

¹⁶⁰ See generally, Koskenniemi, *Apology to Utopia*, *supra* note 15. See also the remarks of Koskenniemi, *supra* note 16, 57, 69.

ascertainment models. In particular, when applied to law-ascertainment, this critique of formalism equates formal law-ascertainment criteria to a problem-solving tactic purported to avoid theoretical controversies and indeterminacy,¹⁶¹ an attempt that has similarly failed.¹⁶² As problem-solving tactics, formal law-ascertainment criteria, like formal legal argumentation, remain inextricably apologetic or utopian.¹⁶³ Yet, at the same time, some of these scholars have proved strong advocates of formalism. The best example of Martti Koskenniemi's "culture of formalism".

Martti Koskenniemi's plea for a "culture of formalism" is well known.¹⁶⁴ This part of his work – which is not devoid of irony – has singled him out among critical legal studies and deconstructivism because his plea is perceived as an endeavor to soften some of deconstruction's effects.¹⁶⁵ It

¹⁶¹ M. Koskenniemi, 'Letter to the Editors of the Symposium', 93 *American Journal of International Law* (1999) 2, 351, 354.

¹⁶² Skouteris, *supra* note 15. According to Skouteris, "the success of the doctrine of sources cannot be attributed to its (alleged) claim of bringing closure to the perennial questions of law making and law-ascertainment. Sources talk, however, manage to capture the fantasy of an entire profession as a means of moving forward with the discipline. The idea was that, if only one was able to devise a set of finite, universally applicable formal categories of legal norms, one would be able to end the problems of indeterminacy", Skouteris, *supra* note 15, 81.

¹⁶³ M. Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law* (1990) 4, 20-27; D. Kennedy, 'A New Stream of International Legal Scholarship', 7 *Wisconsin International Law Journal* (1988-1989) 1, 30. On the differences between Koskenniemi's and Kennedy's denunciations of the contradictions in a formal understanding of law, see D. Kennedy, 'When Renewal Repeats: Thinking Against the Box', 32 *New York University Journal of International Law and Politics* (1999-2000) 2, 335, 407. Kennedy emphasized that Koskenniemi's account, while echoing Kennedy's earlier work, has the advantage of dynamism, for one move repeatedly from apology to utopia.

¹⁶⁴ See the famous plea of M. Koskenniemi for a culture of formalism. See Koskenniemi, *Gentle Civilizer*, *supra* note 15, 502-509. M. Koskenniemi, 'What is International Law For?', in M. Evans (ed.), *International Law*, 2nd. ed. (2006), 57, 69-70. See also M. Koskenniemi, 'Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations', in M. Byers (ed.) *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 17, 32-33.

¹⁶⁵ He has been categorized as a mild 'crit' for attempting to domesticate deconstruction. On the distinctive aspects of the critical legal project of Martti Koskenniemi, see e.g. J. A. Beckett, 'Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project', 7 *German Law Journal* (2006) 12, 1045, 1065. Such attempts to domesticate deconstruction have long been the object of criticisms in general legal theory. See e.g.

is not necessary to describe the infinite variety of strands in the scholarship affiliated to deconstructivism and critical legal studies. Yet, it is important to emphasize that the formalism in the theory of the sources of international law advocated in the present article cannot be conflated with the culture of formalism famously put forward by Martti Koskenniemi, even if both ideas share some common characteristics.

From Koskenniemi's own work and the interpretations thereof,¹⁶⁶ this culture of formalism can be understood as a "culture of resistance to power, a social practice of accountability, openness and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it"¹⁶⁷. In particular, this culture of formalism, while still premised on the idea of an impossibility of 'the universal', represents the possibility of universal legal argumentation as it avoids the dangers of imperialism by remaining empty while preserving the opportunity for alternative voices to be heard and raise claims about the deficiencies of the law. In that sense, it is opposed to the Kantian formalism in legal argumentation and must be construed as a "regulative ideal"¹⁶⁸ or an unattainable "horizon"¹⁶⁹. According to Koskenniemi, this culture of formalism necessarily accompanies the "critique" of law, for it protects the critique from being hijacked by those who previously instrumentalized the law to conceal their political goals while preserving the possibility of a universal debate. This is why the culture of formalism is a cornerstone of Koskenniemi's project, as it invites international lawyers, once they have laid bare the subjectivity of their claim and to focus on the universality of all legal claims.

P. Schlag, 'Le Hors de Texte, C'est Moi – The Politics of Form and the Domestication of Deconstruction', 11 *Cardozo Law Review* (1990) 5-6, 1631.

¹⁶⁶ Among others, see E. Jouannet, 'Présentation critique', in M. Koskenniemi, *La Politique du Droit International* (2007), 32-33. See also Ignacio de la Rasilladel Moral, 'Martti Koskenniemi and The Spirit of the Beehive in International Law', 10 *Global Jurist* (2010); J. von Bernstorff, 'Sisyphus was an international lawyer. On Martti Koskenniemi's "From Apology to Utopia" and the place of law in international politics', 7 *German Law Journal* (2006) 12, 1015, 1029-1031; Beckett, *supra* note 165, 1045; See also the book review of N. Tsagourias 'Martti Koskenniemi: The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960', 16 *Leiden Journal of International Law* (2003) 2, 397, 398-399.

¹⁶⁷ Koskenniemi, *The Gentle Civilizer*, *supra* note 15, 500.

¹⁶⁸ Koskenniemi, *supra* note 16, 70.

¹⁶⁹ Koskenniemi, *supra* note 167, 508.

Koskenniemi's culture of formalism – like the formalism discussed – is not a tool dictating the outcome of legal reasoning or providing ready-made solutions for political questions to which the law is applied. It is rather a practice or a communicative culture which aspires to the universality of legal arguments for equality and openness's sake. The culture of formalism is thus an “interpretative safeguard”¹⁷⁰.

While the work of Martti Koskenniemi is aimed at spurring the critique of formal legal argumentation, it is interesting, for the sake of this paper, to note that scholars affiliated with critical legal studies and deconstructivism have themselves been advocating for the preservation of some elementary forms of formalism. Whether the culture of formalism encompasses formal law-ascertainment is another question that does not need to be addressed here.

IV. Post-Modern International Legal Positivism

Eventually, a few remarks must be made about a contemporary attempt – probably reflecting a “post-realist” approach¹⁷¹ – to confront the deformalization described above head-on while accepting the descriptive virtues of deformalization. Indeed, there have been recent attempts to reanimate international legal positivism.¹⁷² These scholarly enterprises cannot be lumped together with uncritical ‘orthodox’ positivist approaches, for they have included a move away from consensualism, the latter being seen as nothing more than another form of natural law. These attempts have simultaneously recognized the arbitrary character of their scholarly approach and have come to terms with the idea that positivism was only one of many ways to cognize international law. Some of their views are fundamentally value-relativist with regard to methodology and the possible content of positive regulation.¹⁷³ Another characteristic that they sought to

¹⁷⁰ Beckett, *supra* note 165, 1070.

¹⁷¹ On Post-realism, see D. Kennedy, ‘A Rotation in Contemporary Legal Scholarship’, 12 *German Law Journal* (2011) 1, 338, 346-350.

¹⁷² See J. d’Aspremont & J. Kammerhofer (eds), *International Legal Positivism in a Postmodern World* (2012); J. Kammerhofer, *Uncertainty in International Law. A Kelsenian perspective*, (2010); d’Aspremont, *supra* note 30 See also Olivier Corten, *Pour un positivisme critique* (2008).

¹⁷³ d’Aspremont, *supra* note 5, 261-297.

address is the illusion of formalism which shrouds the mainstream theory of the sources of international law,¹⁷⁴ also discussed in this article.¹⁷⁵ Some of these scholars have also recognized the benefits of the insights of TWAIL and feminist critiques as well as the studies on the dialogue between law-applying authorities, especially since these works can be used to contribute to the clarification of ascertainment's mechanisms of international rules.

Of particular interest for the argument made is that this new generation of international legal positivists has come to accept the relevance of a few deformalized models of cognition for the sake of describing some of the processes of law. To them, static formalism in itself does not provide any satisfactory descriptive framework to capture these new forms of exercise of public authority. They accordingly accept that deformalization may be a necessary step to make sense of a reality unable to be fully captured with formal categories.¹⁷⁶ In their opinion, law can also be considered a process, and law-making processes can be diverse and include different actors.¹⁷⁷ Yet, in their attempt to cognize the rules of the international legal system, some of these scholars have attempted to propose a counterpoint to the deformalization described in this article. Indeed, they suggest that the international legal order is identified through formal criteria enshrined in the rules on law-making (the 'sources of law'), albeit in a different way than the current model offered by the mainstream theory of sources.¹⁷⁸ They have maintained the theory of sources at the center of their modes of cognition of law, thereby claiming that the rules of the international legal system ought to be ascertained via the formal pedigree defined by a theory of sources. In that sense, they have distanced themselves from the project on Global Administrative Law and the International Exercise of Public Authority where the formal ascertainment found in the theory of sources is preliminarily discarded in order to capture as much as possible these new forms of the exercise of public authority. It is noteworthy

¹⁷⁴ This has partly been the ambition of section 1 of this article. For an in-depth analysis of the illusions of formalism permeating the traditional theory of sources, see d'Aspremont, *supra* note 30, especially chapter 7.

¹⁷⁵ See *supra* B.II.

¹⁷⁶ For an example, see d'Aspremont, *supra* note 7, 1.

¹⁷⁷ See gen. J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011).

¹⁷⁸ See d'Aspremont, *supra* note 30.

that, by elevating the theory of sources into the cornerstone of the cognition of law, many, but not all,¹⁷⁹ of these authors have embraced a rejuvenated Hartian social thesis,¹⁸⁰ according to which the meaning of formal pedigree indicators are found in the practice of law-applying authorities broadly defined, and not exclusively restricted to judicial bodies.¹⁸¹ The conclusions drawn from their theory are applicable to new forms of exercises of public authority at the international level, for, in their view, the pluralization of international norm-making, including the deformalization of norm-making processes themselves, need not accompany a deformalization of norm-ascertainment.

It is probably not the place for further elaboration on the emergence of such a refreshed form of international legal positivism. The latter is still in its infancy and too disparate to constitute a new coherent and identifiable stream. Moreover, the description thereof is being attempted elsewhere¹⁸² and it would be of no avail to engage in it here. This being said, it will not have gone unnoticed that the argument made in this article reverberates the very same posture in terms of formalism and, accordingly, can be seen as constituting itself an expression of this new form of legal positivism in the contemporary modes of cognition of international law. At the heart thereof lies the exact same conviction that formalism in law-ascertainment remains an indispensable tool to understand the growingly complex reality of the international society.

¹⁷⁹ This posture has not been espoused by all of them. See e.g. J. Kammerhofer, *Uncertainty in International Law. A Kelsenian Perspective* (2010), 226 (who argues that the social thesis presupposes the same type of absolute and external standard as naturel law does).

¹⁸⁰ See d'Aspremont, *supra* note 30, especially chapter 7; See also Besson, *supra* note 123, 180-181.

¹⁸¹ In this respect, their work has been informed by the insights of B. Tamanaha, *A General Jurisprudence of Law and Society* (2001).

¹⁸² See. J. d'Aspremont & J. Kammerhofer (eds), *International Legal Positivism in a Post-modern World* (2012).

G. Concluding Remarks: the Political Choice for Deformalization

International law's construction and disambiguation fundamentally boil down to a political decision, based on the political stakes associated with each mode of disambiguation,¹⁸³ especially given that no authority can decisively clinch such a debate,¹⁸⁴ Accordingly, maintaining or rejecting formalism at the level of law-ascertainment is only one of several political options available to international lawyers. It has not been the intent of this article to advocate or to reject deformalization.¹⁸⁵ Its sole objective has been to show that deformalization, for the reasons mentioned above, is prevalent in the contemporary international legal scholarship. This article has simultaneously sought to show that this deformalization is not unqualified and that various forms of formalism have endured. The strong deformalization discussed in this article thus continues to coexist with multiple forms of formalism.

The existence of such variations seems to confirm that, like formalism in legal argumentation – which, insightfully described by David Kennedy,¹⁸⁶ weathers periods of disuse before being revived – all forms of formalism undergo such fluctuations in the international legal scholarship. This seems to be true with formal law ascertainment as well. In that sense, it is entirely possible that the current deformalization of the identification of international legal rules may someday be survived by a more resilient formal law-

¹⁸³ L. Murphy, 'Better to see Law this Way', 83 *New York University Law Review* (2008) 4, 1104; L. Murphy, 'The Political Question of the Concept of Law', in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (2001), 371; See also L. Murphy, 'Concepts of Law', 30 *Australian Journal of Legal Philosophy* (2005), 1. See U. Scarpelli, *Qu'est-ce que le positivisme juridique* (1996), 57; F. Schauer, 'Positivism as Pariah', in R. P. George (ed.), *The Autonomy of Law: Essays of Legal Positivism* (1996), 31, 34; J. Waldron, 'Normative (or Ethical) Positivism', in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001), 410, 411-433; J. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law', 12 *European Journal of International Law* (2001) 4, 627, 648; Beckett, *supra* note 129, 214-219.

¹⁸⁴ Kingsbury, *supra* note 70, 23, 26.

¹⁸⁵ This is something I have attempted elsewhere. See d'Aspremont, *supra* note 30.

¹⁸⁶ Kennedy, *supra* note 163, 335. It is interesting to note that such a finding had already been made by Hart. See Hart, *supra* note 125, 130.

ascertainment. At the same time this does not foreclose the possibility of the exact opposite. In fact, because of the growing pluralization of international law-making and the new exercises of public authority at the international level, it is equally possible that deformalization will continue unabated. It is probably hard (and useless to try) to predict the directions of such future trends. What matters now is that the movements of this pendulum – which are ultimately determined by international legal scholars' own conceptual choices – is more systematically informed by sufficient critical distance. Indeed, as this article has tried to demonstrate, deformalization is not a benign tool. It must be wielded with care.