REFLECTIONS OF CUSTOMARY INTERNATIONAL LAW: THE AUTHORITY OF CODIFICATION CONVENTIONS AND ILC DRAFT ARTICLES IN INTERNATIONAL LAW

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Abstract Codification conventions and draft articles completed by the International Law Commission are often—and increasingly—invoked by courts, tribunals, governments and international organizations as 'reflections of customary international law'. This article discusses the factors explaining the authority that these 'non-legislative codifications' have come to enjoy in international legal reasoning. Moving beyond the traditional explanations of codification conventions as evidence of State practice and ILC draft articles as the teaching of publicists, it considers how, against the backdrop of the uncertainty of customary international law, institutional factors (relating to authorship, representation and procedure) and textual factors (including prescriptive form and the absence of a distinction between 'codification' and 'progressive development') converge to convey the image that the resulting texts constitute the most authoritative restatement of the existing law. It then assesses this phenomenon in light of the political ideal of the international rule of law. While non-legislative codifications contribute to enhancing the clarity, consistency and congruence of international law, the fact that they may portray novel rules as reflecting existing law inevitably raises legality concerns.

Keywords: authority, codification and progressive development, customary international law, ILC draft articles, international rule of law.

I. A PARADOXICAL RELATIONSHIP BETWEEN FORM AND AUTHORITY

In an insightful piece published in the *American Journal of International Law*, David Caron pondered the paradoxical relationship between form and authority that the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) convey.[1] Caron was referring to the curious phenomenon that the ASR should enjoy considerable authority even though, rather than being adopted as a treaty, they were merely 'taken note of' by the United Nations General Assembly

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[1] D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 866.

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(UNGA).[2] Indeed, despite a number of lingering controversies, at the time of their adoption the Articles were already perceived as generally restating the customary international law of international responsibility. Caron's prediction that courts, tribunals and other institutions involved in dispute settlement would be tempted to rely on the ASR without much further probing has proved accurate: in compilations prepared upon the request of the Sixth Committee of the UNGA, the UN Secretary General reported that by 2013 the ASR and the commentaries accompanying them had been cited in 210 decisions.[3]

The Articles on State Responsibility may be one of the most successful codification projects on which the International Law Commission (ILC) has ever embarked on, but they are hardly the only instrument of their kind to present a paradoxical relationship between form and authority. In varying degrees, many of the codification conventions and sets of draft articles that purport to articulate rules of general international law have proved influential, being relied upon by governments, international organizations and judicial and arbitral institutions even when they are not formally binding on the parties to the dispute in question. These instruments are examples of what Nils Jansen has aptly referred to as 'non-legislative codifications'—texts that the legal profession accepts as authoritative despite the fact that they have not been enacted by the official law-making entities established by the political community.[4]

There are several examples of such texts in legal history. In medieval times, when there was no centralized legislative authority in Europe, the *Corpus Juris Civilis* was routinely invoked and applied alongside customary law.[5] Having been 'rediscovered' in the eleventh century and adapted to the prevailing social and political conditions by generations of glossators and post-glossators, the *Corpus Juris* became an invaluable source of legal authority for medieval lawyers.[6] Even in present times, where developed legal systems are endowed with sophisticated formal procedures for making and applying the law, non-legislative codifications still have a role to play. The most striking example is provided by the Restatements adopted by the American Law Institute, which carry considerable weight before courts in the United States.[7]

[2] UNGA Res 56/83 (2001).

[3] United Nations, 'Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies', Report of the Secretary-General, A/62/62, 1 February 2007, para 5, United Nations, 'Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies', Report of the Secretary-General, A/65/76, 30 April 2010, para 7 and United Nations, 'Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies', Report of the Secretary-General, A/68/72, 30 April 2013, para 5.

[4] N Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (OUP 2010) 7–8.

[5] ibid 32–3.

[6] See eg the Introduction of Ibbetson and Lewis to *The Roman Law Tradition* (CUP 1994) at 3–5. This was especially true in the territory of modern Germany and the Netherlands, where a few centuries later the phenomenon of the 'reception' of Roman law took place, and the *Corpus Juris* was officially assimilated into the law of the different principalities; see Lee, *The Elements of Roman Law* (4th edn, Sweet & Maxwell 1956) 23–4.

[7] Jansen (n 4) 50–6.

Likewise, transnational efforts towards the uniformization of private law, such as the UNIDROIT Principles of International Commercial Contracts, have been a relevant resource in the hands of international arbitrators.[8]

The authority of a particular non-legislative codification depends on the prevailing historical, political and social circumstances of the legal system of which it is part.[9] What would be the factors explaining the appeal of codification conventions and ILC draft articles in contemporary international law? Traditional commentary regards codification conventions as evidence of State practice and/or *opinio juris* of the States parties,[10] and texts produced by the ILC as examples of 'subsidiary means for the determination of rules of law' in the sense of Article 38(1)(d) of the Statute of the International Court of Justice.[11] From a technical perspective, this view is irreproachable: it is widely accepted that treaties may be relevant to prove the existence of international custom, and the work of a Commission composed of individuals elected by the UNGA by virtue of their expertise in international law must surely belong to the 'teachings of the most highly qualified publicists of the various nations'. But these explanations can be somewhat misleading. Viewing codification conventions and ILC draft articles as individual instances of State practice or the work of law professors does not fully account for the role that these texts play in international legal argument.

What is it that makes these texts so distinctive then? In the present article, I give an account of the factors explaining the authority of non-legislative codifications that have proven influential in international law.[12] The focus is on draft articles completed by the ILC in an exercise of codification and progressive development of international law pursuant to Article 13 of the UN Charter, and on codification conventions[13] concluded by diplomatic conferences on the basis of such draft articles. While the ILC is by no means the only institution to have drafted pivotal instruments of public international law,[14]

[8] ibid 72.

[9] ibid 95.

[10] See eg RR Baxter, 'Treaties and Custom' (1970) 129/I Recueil des Cours 55.

[11] See eg M Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2013) CJICL 148–9; Caron (n 1) 867; and the literature review in I Sinclair, *The International Law Commission* (Grotius Publications 1987) 120–7.

[12] The use of the term 'legislative' to refer to instruments of international law may be objectionable insofar as the international community has evidently not established a legislature. Yet, one can find references to 'international legislation' in the literature—in the sense of treaty rules of (potentially) universal application; eg A Clapham, *Brierly's Law of Nations* (7th edn, OUP 2012) 103–11 —and this vocabulary is helpful to contextualize the present study within the debate on codification in general, and to facilitate the comparison of codification conventions and ILC draft articles with analogous instruments from domestic or transnational law.

[13] By referring to codification conventions as non-legislative codifications, I mean to emphasize the role that these treaties perform when they are invoked as reflections of customary international law. Of course, in the relations between States parties, these conventions apply to them *qua* treaty.

[14] One could mention, for example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UNGA on the basis of a draft prepared by the UN Secretariat and revised by an *ad hoc* committee established by the Economic and Social

it still occupies a unique position and provides a helpful starting point for an analysis that can be later extended to texts elaborated by other institutions.

The article begins by considering how codifications of the non-legislative kind have become current in international law and seeks to substantiate its empirical premise—namely that formally non-binding texts have been taken to reflect international custom (Part II). I argue that, against the background of the endemic uncertainty existing at the level of the sources of international law, institutional features of the ILC, combined with certain properties of the texts that it produces, converge to convey the image that the resulting texts constitute the most authoritative statement of the content of customary international law (Part III). The article then assesses the authority of non-legislative codifications in light of the political ideal of the international rule of law. I suggest that whilst this authority is buttressed by the epistemological difficulties involved in the identification of rules of customary international law, the same epistemological difficulties present a constant challenge to it. This creates a dilemma for members of the legal profession committed to rule of law values—while non-legislative codifications contribute to enhancing the clarity, consistency and congruence of international law, the fact that they may portray novel rules as reflecting existing law raises legality concerns (Part IV).

Before proceeding further, a terminological clarification has to be made. 'Authority' ranks amongst the most contested concepts in legal and political philosophy,[15] and it is necessary to explain how the term is being used here. The focus of the present study is not on the abstract notion of the authority of international law as a set of rules providing reasons for actions and 'exclusionary reasons for disregarding reasons for non-conformity'.[16] Rather, authority is here understood as the claim that certain normative texts expressly or implicitly make to reflect existing law (*lex lata*), and the manner in which this claim is received and endorsed by the legal profession.

II. THE EMERGENCE OF NON-LEGISLATIVE CODIFICATIONS IN INTERNATIONAL LAW

A. A Paradigm Shift: From 'Legislative' to 'Non-Legislative' Codifications

Since its inception in 1949, the ILC has produced a considerable number of draft articles, guidelines and studies. Examples of successful projects carried out by the Commission are the sets of draft articles that served as a basis for the four law of the sea conventions concluded in Geneva in 1958; the two sets

Council. The UN Convention on the Law of the Sea, prominent among existing codification conventions, consolidated three early conventions that had originated from drafts of the ILC, the text of which was complemented by numerous new provisions drafted by the UN Conference on the Law of the Sea.

[15] J Raz, 'Legitimate Authority' in J Raz, *The Authority of Law* (Clarendon Press 1979) 3.

[16] J Raz, 'The Claims of Law' in Raz (n 15) 30.

of draft articles that were adopted as the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations; the draft articles that served as a basis for the 1969 Vienna Convention on the Law of Treaties (VCLT); and the Articles on State Responsibility, of which the UNGA took note in 2001. The Commission also made contributions to the codification and progressive development of several other fields of international law, including international criminal law,[17] jurisdictional immunities of States[18] and diplomatic protection.[19]

As an institution, the ILC has been the subject of considerable criticism. Commentators point to problems with the Commission's composition and election, its method of work, and its often unsatisfactory relationship with the Sixth Committee of the UNGA.[20] Whether the Commission has achieved enough in its 60 years of activity may be a matter of personal opinion, and commentators seem to agree that 'yes, the Commission has done much' and 'no, the Commission could have done more'. Yet, however many criticisms the Commission may deserve, and however many challenges it may face, if it wishes to remain relevant now that several of the main topics of its original programme of work have been finalized,[21] it is undeniable that the Commission has played a crucial role in shaping the landscape of general international law.

On occasion, the impact of the work of the Commission is demonstrated by the numbers: the 1961 and 1963 Conventions on diplomatic and consular relations have attracted 187 and 173 ratifications, respectively. But this is rarely the case. In its early stages, the ambition of the so-called 'codification movement' was to produce conventions that would be eventually ratified by all States thus replacing customary international law with binding codes.[22] Accordingly, in the first three decades following the establishment of the ILC, members of the Commission and States expressed a marked preference for convening diplomatic conferences to consider and adopt sets of draft articles in

[17] See eg the Draft Statute for an International Criminal Court in ILC Yearbook 1994, vol II, pt 2, at 91ff. On the topic, see R O'Keefe, 'The ILC's Contribution to International Criminal Law' (2007) 49 GYIL 201.

[18] See the 1991 Draft articles on jurisdictional immunities of States and their property, ILC Yearbook 1991, vol II, pt 2, at 28ff.

[19] Draft Articles on Diplomatic Protection, ILC Yearbook 2006, vol II, pt 2, at 24, ch IV.

[20] See eg the summary of criticisms presented by J Dugard, 'How Effective is the International Law Commission in the Development of International Law? A Critique of the ILC on the Occasion of Its Fiftieth Anniversary' (1998) 23 SAYIL 35–6.

[21] cf G Nolte, 'The International Law Commission Facing the Second Decade of the Twenty-First Century' in U Fastenrath et al (eds), *From Bilateralism to Community Interest* (OUP 2011) 781–92.

[22] Reviewing its Programme of Work in 1973, the Commission noted that 'it is to be expected that in the years ahead the codification convention will continue to be considered as the most effective means of carrying on the work of codification. Its preciseness, its binding character, the fact that it has gone through the negotiating stage of collective diplomacy at an international conference, the publication and wide dissemination of the conventions, all these are assets that will not lightly be abandoned'. ILC Yearbook 1973, vol II, 230, para 169.

treaty form.[23] This way of proceeding is envisaged by Article 23 of the ILC Statute, pursuant to which the Commission may propose to the UNGA that the Assembly recommend the completed articles to Member States with a view to the conclusion of a convention, or that it itself convene a conference to conclude such a convention.[24] The prevailing zeitgeist is illustrated by an anecdote concerning Sir Gerald Fitzmaurice and Sir Humphrey Waldock, who both served as Special Rapporteurs for the Commission's work on the law of treaties. Fitzmaurice had proposed that the outcome of the work of the ILC take the form of a non-binding 'code', for he did not think that a treaty was the appropriate instrument to enact the general law applicable to treaties.[25] In contrast, Waldock only agreed to take on the role of Special Rapporteur (and lead the project to completion) on the condition that the Commission redirect its efforts towards the elaboration of a convention.[26] The reasons that the Commission offered for taking the route proposed by Waldock were that 'an expository code, however well formulated, [could not] in the nature of things be so effective as a convention for consolidating the law' and that 'the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished'.[27]

However, the limits of the treaty as an instrument of international legislation were apparent from an early stage.[28] Even the most celebrated codification conventions failed to command universal adherence. The Vienna Convention on the Law of Treaties, often seen as the highest achievement of the 'codification movement', took over a decade to come into force and has been ratified by less than two-thirds of the members of the international community.[29] At the end of the day, codification conventions concluded with a view to restating general international law have not produced the effect of becoming 'legislative codifications' formally binding on States.

As the optimism with respect to the adoption of codification conventions began to wane, the notion that the outcome of the work of the ILC should instead take the form of non-binding restatements experienced a revival.[30] This opinion had been voiced by a number of early commentators, who thought that

[23] cf Sinclair (n 11) 36.

[24] Statute of the International Commission (UNGA Res 174 (II), Nov 1947).

[25] ILC Yearbook 1956, vol 2, 106–7, para 9 (First Report, Fitzmaurice).

[26] M Villiger, 'The 1969 Vienna Convention on the Law of Treaties: 40 Years After' (2011) 344 Recueil des Cours 28.

[27] ILC Yearbook 1962, vol II, 160, para 17 (Report of the ILC to the UNGA).

[28] cf eg K Zemanek, 'Codification of International Law: Salvation or Dead End?' in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (A Giuffre 1987).

[29] It attests to the continuing success of the VCLT, however, that 18 States have ratified the Convention since 2000, including Saudi Arabia, Ireland, Vietnam and Brazil. cf the United Nations Treaty Collection <http://treaties.un.org/>.

[30] For a detailed account—and an excellent analysis—of this paradigm shift with reference to the codification of the law of treaties and of the law of responsibility, see S Villalpando,

codification by treaty should not be attempted due to the inherent shortcomings of treaties as a source of general international law and their potentially detrimental impact on customary law.[31] Nowadays, ILC members appear to be conscious of the risks involved in the adoption of unsuccessful conventions, and States no longer appear to be interested in convening conferences to discuss matters of general international law.[32] This means that the other options envisaged by Article 23 of the ILC Statute—most notably that of recommending that the General Assembly 'take note of or adopt the report [of the Commission] by resolution'—have come to be favoured in the recent practice of the ILC.

The turning point was the adoption of the Articles on Nationality of Natural Persons in Relation to the Succession of States in 1999. Instead of following the recommendation of the Commission, which wished to see the draft articles adopted in the form of a declaration, the General Assembly decided to take note of the articles and annex them to a resolution.[33] The same course of action was taken when the ASR were submitted to the General Assembly, this time as urged by the Commission itself. At the time when the ILC was about to complete the second reading of the Articles, there was a lively debate on the form that they should take.[34] Those opposing that the Articles be adopted in the form of a convention claimed that doing so might be a risky enterprise, for a diplomatic conference would reopen debate on polemic issues (such as crimes of State and countermeasures) and upset the balance of a text that had been carefully crafted over four decades.[35] It was also feared that an unsuccessful convention on State responsibility would result in 'reverse codification', as the status of customary rules restated by the draft articles would be put into question if States showed reluctance to ratify that convention.[36] Thus, on the suggestion of Special Rapporteur James Crawford,[37] the Commission recommended to the General Assembly that it take note of the Articles, which the Assembly did in Resolution 56/83 of 12 December 2001.[38] Although the Sixth Committee continues to periodically discuss the ASR,[39]

'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) VIII Brazilian Yearbook of International Law 117–55.

[31] See C Hurst, 'A Plea for the Codification of International Law on New Lines' (1946) 32 Transactions of the Grotius Society 144 and R Jennings, 'The Progressive Development of International Law and its Codification' (1947) 24 BYBIL 303–7.

[32] C Tomuschat, 'The International Law Commission: An Outdated Institution?' (2007) 49 GYIL 91.

[33] GA Res 55/153 (2001).

[34] ILC Yearbook 2001, vol II, pt 2, 24–5, paras 61–7.

[35] ibid 3, 24, para 63. See also J Crawford and S Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959.

[36] ILC Yearbook 2001, vol II, pt 2, 24, para 63. See Tomuschat (n 32) 96–7, describing the decision not to recommend the convening of a conference as 'extremely clever'.

[37] Fourth Report on State Responsibility (Crawford 2001) paras 21–26.

[38] UNGA Res 56/83 (2001).

[39] cf most recently UNGA Res 68/104 (2013).

there is no indication that a conference of plenipotentiaries will be convoked to adopt them in the form of a convention in the foreseeable future.

More recent projects completed by the ILC have also been kept in 'soft form'. While the Commission did not follow the precedent set by the ASR and recommended instead that the 2006 Draft Articles on Diplomatic Protection be adopted as a treaty, its proposal was met with hesitation by the General Assembly, which does not seem likely to sponsor a conference on diplomatic protection in the near future.[40] Meanwhile, the Commission has been working on a number of projects that were conceived from the very beginning as 'soft' instruments, such as the recently adopted Guide to Practice on Reservations to Treaties.[41]

A notable exception to the current trend was the adoption, via resolution of the General Assembly,[42] of a Convention on Jurisdictional Immunities of States and Their Property in 2004. This was done on the basis of a set of articles completed by the Commission in 1991 and subsequently revised by a working group of the UNGA. The adoption of the 2004 Convention indicates that, whenever it is necessary or otherwise convenient that rules of international law be enacted in the domestic law of States, treaties will remain the preferred method of codification.[43] Yet, the Convention on Jurisdictional Immunities is a long way from becoming a 'legislative' codification—at the time of writing it had attracted only sixteen ratifications.[44]

B. The Continuing Appeal of Non-Legislative Codifications

This was how the legacy of the 'codification movement' in international law has come to consist, for the most part, in codifications of the non-legislative kind, that is, texts that have not taken the form of universally applicable binding codes. But the fact that the codification conventions adopted in the past fifty years have not become universal, and the fact that more recent projects have been kept in 'soft form', does not mean that the 'codification movement' has been unsuccessful.

In a survey prepared at the behest of the UN Secretary-General in 1949, Hersch Lauterpacht predicted that ILC drafts submitted to the UNGA would enjoy considerable authority even if they were never adopted by a diplomatic

[40] See the summary of the debate at <www.un.org/en/ga/sixth/62/DiplProt.shtml>.

[41] ILC Yearbook 1995, vol II, pt 1, 154–5, paras 170–9 (1st Report, Pellet). See also Seventeenth Report on Reservations to Treaties (Pellet 2011) 15–20.

[42] UNGA Res 59/38 (2004).

[43] A Boyle and C Chinkin, *The Making of International Law* (OUP 2007) 182. In the context of the codification of State responsibility, the fact that '[t]he law of State responsibility operates at an international level and does not require to be implemented in national legislation' was raised as an argument in favour of not sending the draft articles to a diplomatic conference. Fourth Report on State Responsibility (Crawford 2001) para 25.

[44] Pursuant to art 30(1) of the UN Convention on Jurisdictional Immunities of States and their Property, 30 ratifications are required for the Convention's entry into force.

conference.[45] These predictions have proved accurate—successful codification projects tend to have a stabilizing effect and become recurrent reference texts for States, judicial institutions and practitioners.[46] Thus, the influence that the VCLT has enjoyed within the legal profession is not reducible to the 113 instruments of ratification that States have deposited when expressing their consent to be bound by it. Even before the Convention entered into force, the International Court of Justice (ICJ) had regarded many of its provisions as restatements of customary international law.[47] And to this day the ICJ has rarely applied the Vienna Convention as a treaty binding on the parties to a dispute. Even in cases involving States that were party to the VCLT, the Convention's inter-temporal law clause led the Court to rely on its provisions only to the extent that they reflect custom.[48]

Most significantly, more polemic codification conventions drafted by the Commission, such as the 1978 Vienna Convention on Succession of States in Respect of Treaties, have on occasion been regarded as authoritative. An example is provided by the *Gabcikovo-Nagymaros* case, in which the ICJ declared Article 12 of the 1978 Convention, concerning succession to treaties of a territorial character, to reflect a rule of custom.[49] The 1978 Convention,

[45] United Nations, *Survey of International Law in Relation to the Work of Codification of the International Law Commission, Memorandum submitted by the Secretary-General*, UN Doc A/CN.4/1/Rev.1 (1949) 16, para 21.

[46] Villalpando suggests that the versions of customary rules that the ILC provides tend to become 'inseparable from our internal representations of such rules, to the point that [a] particular codification establishes itself as the unique and unavoidable instrument to found any legal reasoning in the field'—a phenomenon that he colourfully refers to as the 'Santa Claus effect'. cf Villalpando (n 30) 120. Further, the view was expressed within the Commission that a report adopted or taken note of by the UNGA 'would be seen as an authoritative study of current rules, State practice and doctrine aimed at providing guidance to States on their rights and responsibilities, thereby contributing to legal stability and predictability in international relations', and that 'such "soft law" instruments did have a decisive impact on international relations and the conduct of States, as evidenced by the jurisprudence of the ICJ'; ILC Yearbook 2001, vol II, pt 2, 24, para 64.

[47] See eg *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), [1971] ICJ Rep 16, paras 94 and 96 (citing art 60 and noting that '[t]he rules laid down by the [VCLT] concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject') and *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 18, paras 24 and 36 (referring to arts 52 and 62 of the VCLT; the Court said that the latter could 'in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances').

[48] See eg *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, para 99: 'The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty.'

[49] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, para 123: 'The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this.' See also *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)* [1982] ICJ Rep 18, para 84.

alongside with the 1983 Convention on Succession in Respect of Property, Archives and Debts, were also influential in guiding State practice in the aftermath of the dissolution of the former Federal Republic of Yugoslavia in the 1990s.[50] Many more examples could be given in this context. Recently, in the case concerning *Jurisdictional Immunities of the State*, the ICJ relied on the text of Articles 6(2), 12 and 19 of the Convention on Jurisdictional Immunities of States and Their Property. Even if the Court was reluctant to declare these provisions to be part of customary law (at least not in their entirety), they clearly constituted the starting point for the Court's reasoning in that judgment.[51]

Likewise, the record indicates that international courts and tribunals have adjusted to the current zeitgeist, as recent judicial and arbitral practice has seen a sharp increase in the number of direct references to ILC draft articles. While in the past the ICJ would only make sparse reference to the work of the ILC, usually in construing or assessing the status of provisions of codification conventions,[52] from 1997 onwards the Court started to cite ILC draft articles directly. In the *Gabcikovo-Nagymaros* case, the Court relied on Article 33 (currently Article 25) of the draft articles on State responsibility as adopted on first reading, and went on to state that it reflected a customary rule.[53] Ever since, the Court has applied a number of provisions of the ASR, most notably in its judgment on the merits of the *Bosnia Genocide* case.[54] Similarly, in its judgment on preliminary objections in the *Diallo* case, the Court relied on the text of Article 1 of the Articles on Diplomatic Protection.[55]

The influence exercised by codification conventions and ILC draft articles is of course not confined to the ambit of the ICJ. The compilations prepared

[50] See eg Conference for Peace in Yugoslavia, Arbitration Commission Opinion No 13 (16 July 1993) 32 ILM 1591, 1592, paras 2–4. See also J Crawford, 'Remarks' (1992) 86 ASILPROC 17; Tomuschat (n 32) 89; and C Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (2002) 96 AJIL 379.

[51] *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* [2012] ICJ Rep 99, paras 66, 117 and 129. Noting that the UN Convention and the European Convention on State Immunity were not binding on both parties, the Court observed that 'the provisions of these Conventions [establishing the 'torts exception' were] relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law'.

[52] eg *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany /Netherlands)* [1969] ICJ Rep 3, paras 49–54.

[53] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, paras 51–52. Similarly, in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, para 38, the Court declared that art 6 (now art 4) of the draft articles adopted on first reading reflected customary international law.

[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, paras 385, 398, 420 and 431 (in which the Court expressly referred to the text of arts 4, 8, 14(3) and 16). cf also *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, para 273 (referring to arts 34–37).

[55] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582, paras 31 and 91 (although the Court did not find it necessary to assess the customary status of art 11(b)).

by the UN Secretary General show that the ASR have been applied by a diverse group of judicial or quasi-judicial institutions, including arbitral tribunals, the dispute settlement bodies of the World Trade Organization, international criminal tribunals, regional human rights courts and the International Tribunal for the Law of the Sea.[56] Moreover, the 2011 Articles on the Responsibility of International Organizations were referred by the European Court of Human Rights and by domestic courts even before the ILC had adopted them on first reading.[57]

It must be noted, however, that institutions such as the ICJ sometimes refrain from referring to ILC draft articles in their judgments, even when it is apparent that these articles informed the reasoning substantiating the decision. For example, in the *Wall* advisory opinion, the Court found that States were under an obligation not to recognize violations of *erga omnes* obligations committed by Israel, and not to render aid or assistance to maintain the situation caused by these violations.[58] While this finding echoes the text of Article 41 ASR, which lays down the legal consequences of a serious breach of a peremptory norm of international law, the Court made no mention of that provision.[59] Likewise, in *Belgium v Senegal*, where the Court for the first time recognized the notion that multilateral treaties may create obligations '*erga omnes partes*' in the compliance of which all parties to the treaty have a legal interest, the judgment did not include a reference to Article 48 ASR.[60] While the Court's reluctance to expressly refer to ILC draft articles in these occasions casts doubt on the extent of their authority, the fact that the Court used language taken directly from the text and commentaries to the articles in question suggests that they provided the normative framework upon which the reasoning of the Court was based. With respect to Article 41 ASR, it is noteworthy that the Court has recently observed that 'recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid

[56] cf (n 3).

[57] cf *Behrami v France* (App no 71412/01) and *Saramati v France, Germany and Norway* (App no 78166/01), ECtHR, 2 May 2007, paras 133–134 (applying art 5 of the ARIO—now art 6) and *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* (2007) UKHL 58, paras 5ff (Lord Bingham).

[58] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 159.

[59] See, in this respect, the separate opinions of Judges Kooijmanns and Higgins. One reason that could explain the Court's decision not to quote the ASR was its general reluctance to refer to the notion of peremptory norms, on which art 41 is based. A couple of years later, the Court recognized the *jus cogens* character of the prohibition of genocide in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 64.

[60] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, para 69. Art 48(1)(a) reads: 'Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group.'

and assistance in maintaining that situation, and so cannot contravene the principle in Article 41'.[61] This may have fallen short of an explicit recognition of the customary status of Article 41, but it suggests that the Court might have been ready to treat Italy's argument as one grounded in law.

III. INSTITUTIONAL, TEXTUAL AND CONTEXTUAL FACTORS OF THE AUTHORITY OF CODIFICATION CONVENTIONS AND ILC DRAFT ARTICLES

A. The Context of Authority: Uncertainty in Customary International Law

As the survey above indicates, codification conventions and ILC draft articles have been invoked as the textual basis for rules of customary international law that courts and tribunals have found to exist. As in most of those cases courts and tribunals have refrained from undertaking a meaningful examination of the relevant State practice and *opinio juris*, these non-legislative codifications appear to have been regarded as genuinely authoritative, and not as just another instrument providing evidence of the existence of the relevant rules.[62] In the *Hostages* case, the ICJ expressed the view that codification conventions may restate customary international law in the following terms:

> The [1961 and 1963] Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions.[63]

In a similar vein, referring to the ASR, an arbitral tribunal constituted to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico* made the following observation:

> The Tribunal acknowledges the fact that the ILC Articles are the product of over five decades of ILC work. They represent in part the 'progressive development' of international law—pursuant to its UN mandate—and represent to a large extent a restatement of customary international law regarding secondary principles of state responsibility.[64]

[61] *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* [2012] ICJ Rep 99, para 93.

[62] cf S Villalpando, 'On the International Court of Justice and the Determination of Rules of Law' (2013) 26 LJIL 247, who notes that in instances in which the ICJ applied ILC draft articles, 'the Court's finding that these provisions reflect customary international law is as brief and categorical as its own autonomous determinations of the rules of law, which apparently indicates an increasing trust placed by the Court on the Commission'.

[63] *US Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, para 45. Curiously, while in this case the Court was in a position to apply the Conventions *qua* treaty law, since both parties to the dispute had ratified them, it still decided to pronounce on their customary status.

[64] ICSID, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v the United Mexican States*, Case No. ARB(AF)/04/05, Award, 21 November 2007, para 116.

Appraising the relationship between codification conventions or ILC draft articles and customary international law is crucial to understanding the authority of non-legislative codifications in international law. First of all, customary international law provides non-legislative codifications with the formal validation necessary for them to be considered—and invoked as—texts reflecting positive law. However diverse the philosophical inclinations espoused by members of the legal profession may be, it is undeniable that international legal practice subscribes to one or another variation of the sources theory. This means that in international legal discourse valid rules of international law can only be identified by reference to one of the 'formal sources', that is, the accepted rules of recognition of the international legal system.[65]

Secondly, it is the inherent uncertainty by which customary international law is characterized that accounts for the influence that non-legislative codifications exercise on members of the legal profession. Non-legislative codifications tend to become authoritative when there is a perceived insufficiency in the law originating from the institutional law-making processes established by the political community. For example, one of the reasons why the *Corpus Juris Civilis* was applied as law in medieval times was that 'there were simply no satisfactory alternatives to the Roman texts'.[66] Likewise, the American Law Institute's initiative to take on the task of elaborating Restatements was animated by the perception that the intricate and fragmented law of the United States was 'unnecessarily uncertain and complex, that many of its rules [did] not work in practice, and that its administration often [resulted] not in justice, but in injustice'.[67]

In what, exactly, lies the perceived insufficiency of international law? Identifying rules of international custom is an incredibly difficult exercise, especially if one attempts to make sense of the multiple claims, counterclaims, actions and omissions of the 193 States that compose the international community. To quote a leading case, international customary law arises from 'extensive and virtually uniform' State practice that is 'carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[68] This apparently straightforward

[65] cf art 38(1) of the ICJ Statute, generally recognized as an authoritative list of the accepted formal sources of international law. For the view that the three sources listed in art 38—treaty, custom and general principles—form the rule of recognition of international law, see S Besson, 'Theorizing the Sources of International Law' in S Besson and J Tassioulas (eds), *The Philosophy of International Law* (OUP 2010) 180–1 and A Paulus, 'The International Legal System as a Constitution' in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 74.

[66] Jansen (n 4) 34.

[67] American Law Institute, 'Report of the Committee Proposing the Establishment of an American Law Institute' (1923) 1.

[68] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany /Netherlands)* [1969] ICJ Rep 3, paras 74–75.

formula poses a great number of questions.[69] What counts as State practice? How does one demonstrate the existence of *opinio juris sive necessitates*? How much practice and *opinio juris* is required before one can postulate the existence of a customary rule?

These questions are all the more difficult to tackle in a system where there is no centralized system of courts empowered to interpret and apply the law, thus reducing uncertainty.[70] It is no wonder that the ICJ itself rarely engages in extensive reviews of State practice and *opinio juris* when it identifies a rule of international custom,[71] and that the ILC has recently added the topic 'Formation and Evidence of Customary International Law' to its programme of work, in the hope of producing a helpful study of the methodology for the identification of customary rules.[72]

It is against this backdrop of uncertainty that the appeal of non-legislative codifications has to be understood. As Caron noted with regard to the ASR, 'when there is a "legal vacuum" of authority relevant on an issue, courts and arbitral panels will turn to whatever is available', which means that '[i]n that situation, a set of articles adopted by the ILC will be quite influential, perhaps even more influential than a treaty'.[73] In a similar vein, referring to codification conventions, Baxter noted that 'the fact that [a codification convention] represents, relative to the rest of the evidence of the law, a clear and uniform statement of the law commends it to non-parties', especially because '[i]t is evidence that is *easy* to use'.[74] The epistemological challenges involved in the proof of custom, combined with the reluctance on the part of States to adopt codifying texts formally, set the context for international judges, practitioners, academics and State officials to look to codification conventions and completed set of draft articles as a shortcut for the content of customary international law.

[69] On these questions, see eg G Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL, especially at 524–36. In an interesting analysis of custom as a source of international law, Lefkowitz suggests that a rule of recognition serves two distinct functions: an 'ontological function', which means that it is by reference to the rule of recognition that one can justify or criticize a 'rule-governed practice for identifying norms as legally valid'; and an 'authoritative resolution function', which provides criteria for solving disputes about what the law is. The rule whereby custom is a law-creating fact would perform the ontological function, for it denotes 'adherence to a shared normative standard for legal validity'. It would fall short, however, from satisfactorily performing the authoritative resolution function insofar as the vocabulary of State practice and *opinio juris* does not provide a workable methodology for identifying the particular valid norms of the system. See D Lefkowitz, '(Dis)solving the Chronological Paradox in Customary International Law' (2008) 21 CJLJ 146.

[70] Clapham (n 12) 60.

[71] cf eg Villalpando (note 62) 244. On the recent practice of the Court, see A Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009' (2011) 60 ICLQ 681.

[72] See the substantial first report submitted by Sir Michael Wood, Special Rapporteur for the topic, for consideration at the sixty-fifth session of the Commission in 2013. Doc A/CN.4/663 (17 May 2013).

[73] Caron (n 1) 866.

[74] Baxter (n 10) 100.

B. The Institutional and Textual Factors of the Authority of Non-Legislative Codifications

A perceived insufficiency in the law is of course not sufficient to explain why non-legislative codifications prepared by the ILC have become so authoritative. What are, then, the other factors inducing the relevant stakeholders to associate codification conventions and draft articles with customary international law? In a recent study on the authority of non-legislative codifications from a comparative perspective, Nils Jansen provides a historical account of classical and contemporary texts that have played or continue to play an important role in their respective contexts.[75] Whilst noting that the relative authority that each of these texts enjoys depends on prevailing historical, political and social circumstances,[76] Jansen identifies a number of criteria that help explain why non-legislative codifications are or were regarded as authoritative. These include, on the one hand, authorship of the text, the extent to which the codifying agency is representative of the legal profession (and of the political community in general), and the process whereby the text is drafted; and, on the other hand, formal and substantive properties of the text, and the way each codification 'stages authority'. As there is a clear parallel between the texts Jansen examines and non-legislative codifications in international law, the present inquiry draws upon his analytical framework.

1. Authorship and representation

The authority of a non-legislative codification partly derives from the position that the entity that produced it occupies in a given legal system. Perceptions relating to the status of the entity, its composition and the procedure it follows in discharging its mandate provide a partial explanation of why the participants in the legal system come to regard the work of this entity as authoritative.

In this respect, the position of the ILC in the ambit of public international law is unique. The Commission was established by the UN General Assembly to fulfil the task of '[initiating] studies and [making] recommendations for the purpose of … encouraging the progressive development of international law and its codification' that States entrusted to the organization.[77] The ILC Statute requires that a balance be achieved between representativeness and legal expertise in the composition of the Commission: the 34 members of the ILC must be 'persons of recognized competence in international law' representing the several regional groups informally identified within the United Nations.[78] Subject to these criteria, candidates are elected by the General Assembly to exercise a term of five years in the Commission, where they act in their personal capacity and not as representatives of the States that proposed their

[75] Jansen (n 4). [76] ibid 95. [77] art 13(1), UN Charter.
[78] cf arts 2 and 9, ILC Statute, and General Assembly resolution 36/39 of 18 November 1981.

candidature.[79] Nowadays, roughly one-third of the members of the Commission are law professors, while the remaining members are former or current governmental officials, mostly diplomats.[80] Though there is a long-standing debate on what would constitute the ideal composition of the Commission, and despite charges of 'politicization', most commentators agree that a balance between academics and governmental officials is beneficial. It is often said that whereas academics ensure that the work of the Commission is technically and methodologically rigorous, governmental officials contribute with their professional experience and ensure that the Commission's output is in tune with the realities of the international life.[81]

In the case of codification conventions, considerations of authorship and representation take on a different dimension. The resulting text is not only the outcome of the work of a codifying agency, but also of the States that debated, amended and eventually voted in favour of it. Codification conventions are usually adopted by international conferences convened under the auspices of the United Nations, which ensures wide representation.[82] Thus, when a text is adopted by a substantive majority of the States participating in the conference, it is likely to be regarded as an instrument stemming from the international community. As a commentator has pointed out, '[c]onventions in the legal field . . . have tended to influence state practice from the moment of their adoption', for they 'represent the verdict by the international community on a set of issues'.[83] In this case, the subsequent attitude of States—in particular their decision whether or not to sign and/or ratify the treaty—is relevant for assessing the measure of authorship and representation.

At the same time, the fact that States are ultimately responsible for adopting the text does not mean that the role the ILC played in the drafting is to be neglected. The work of the Commission is considered an integral part of the *travaux préparatoires* of the convention,[84] and is likely to carry particular

[79] cf arts 3 and 10, ILC Statute.

[80] For the list of current and past ILC members, access <www.un.org/law/ilc>. It should be noted that several law professors are active practitioners in international law, while several governmental officials engage in academic activities.

[81] cf Sinclair (n 11) 17.

[82] Before the UN became an international organization of truly universal membership, a concern was voiced to increase the representativeness of international conferences. cf eg UNGA Res 2166(XXI) (1966), which, convoking a conference on the law of treaties, invited all members of the UN, members of specialized agencies and parties to the Statute of the ICJ, and envisaged the possibility that the UNGA extend the invitation to States not falling within any of these categories.

[83] DH Anderson, 'Law-Making Processes in the UN System: Some Impressions' (1998) 2 Max Planck Yearbook of United Nations Law 40.

[84] See eg *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany /Netherlands)* [1969] ICJ Rep 3, paras 48–55 (reviewing the work and position taken within the Commission with respect to the provision that was eventually adopted as art 6 of the 1958 Geneva Convention on the Continental Shelf) and *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* [2012] ICJ Rep 99, para 69 (referring to the work of the Commission when determining the scope of art 12 of the 2004 UN Convention on Jurisdictional Immunities).

weight when the normative status of a provision that was adopted by the diplomatic conference without significant changes comes into question. In *North Sea Continental Shelf*, the ICJ concluded that because the text of Article 6 of the 1958 Geneva Convention on the Continental Shelf had been adopted 'almost unchanged from the draft of the International Law Commission', 'the status of the rule in the Convention therefore [depended] mainly on the processes that led the Commission to propose it'.[85]

2. Procedure for adoption

The association between codification conventions and ILC draft articles and customary international law is linked both to the procedure whereby the texts are formulated and to certain textual properties of the instruments adopted by the Commission.

I shall begin by discussing procedure. Sets of articles prepared by the ILC are gestated over years of studies and debates.[86] The Commission appoints a Special Rapporteur that performs the task of guiding the collective work on a given subject by preparing reports, which compile the relevant authorities and (typically) propose a set of draft articles. The Commission discusses these draft articles in plenary and, when general consensus is achieved, sends them to the drafting committee, where the articles are subject to further scrutiny and debate. The work on a given subject usually takes place in two readings, which allows for careful consideration of the feedback given by States and other interested entities. Ultimately, the length of this process guarantees that consideration is given to most of the available materials (State practice, judicial decisions, arbitral awards, scholarly work), which are then cited in the commentaries accompanying the draft articles adopted.

Specific to the procedure followed by the ILC is the dialogue that the Commission maintains with States and other relevant stakeholders. The ILC works in close (if somewhat erratic[87]) collaboration with the Sixth Committee of the General Assembly in a number of ways.[88] First, the Commission reports to the UNGA on an annual basis. This means that the political organs of the United Nations are informed of the progress and challenges faced by the Commission, and are able to provide it with feedback. Second, the Commission solicits comments from States and, when appropriate, international organizations and other entities, and tends to take their position into

[85] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany /Netherlands)* [1969] ICJ Rep 38, para 62.

[86] On the working methods of the Commission, see generally Sinclair (n 11) 32–44.

[87] S Rosenne, 'Codification Revisited after 50 Years' (1998) 2 Max Planck Yearbook of United Nations Law 7.

[88] cf in general F Berman, 'The ILC within the UN's Legal Framework: Its Relationship with the Sixth Committee' (2007) 49 GYIL 107. All in all, Berman sees this relationship as a 'healthy one' (at 125).

account. Third, as noted above, upon completion of a topic the Commission recommends a course of action to be taken by the General Assembly, which normally secures that a set of draft articles will at a minimum be 'taken note of' by the Assembly.

Accordingly, when the Commission is most successful, the provisions it formulates reflect a synthesis of scholarly opinion tempered by the general trends emerging from the opinions voiced by States. Even if there is much room for improvement in what concerns the relationship of the Commission with the Sixth Committee, the system of consultations and the exposure that States are given to the work in progress are key factors for the acceptability of a completed project. This contributes to the assumption in the legal profession that a set of draft articles formulated by the Commission may authoritatively restate customary law, or, where disagreement persists, that the solution found by the Commission reflects a plausible compromise.

In the case of codification conventions, this procedure is taken one step further. When draft articles produced by the ILC are formally adopted in a diplomatic conference, States have the last word on their content and drafting. If a provision is adopted by consensus, the general agreement between States as to the text and content of that provision may be an important factor in the assessment of its legal status. As the ICJ noted in *North Sea Continental Shelf*, a treaty provision can be relevant vis-à-vis non-parties if it codifies a pre-existing customary rule or if it crystallizes an emerging customary rule.[89] The process whereby a codification convention was concluded may either serve as evidence that its provisions are declaratory of international law,[90] or that its ultimate adoption effected the 'crystallization' of the rule in question.[91]

3. Staging authority: Textual qualities and prescriptive form

The place that the ILC occupies in the UN system, its composition and the procedure that it follows contribute to perceptions that, from an institutional point of view, the Commission is particularly well positioned to restate rules of customary international law. This perception can be reinforced when the text is well received by States in a successful diplomatic conference. But the influence of a non-legislative codification also depends on its textual qualities and the way in which it stages authority.[92] The codification will only be taken as a reference by the legal profession if it addresses the relevant subject-matter in a clearer and more conclusive way than other available materials. That being so, the form that the text takes is of particular importance in the assessment of its authority.

[89] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany /Netherlands)* [1969] ICJ Rep 3, para 62.
[90] Baxter (n 10) 42–3.
[91] That was the argument advanced by Denmark and the Netherlands in *North Sea Continental Shelf*, para 61.
[92] Jansen (n 4).

On the one hand, technical excellence—resulting in a coherent and systematic presentation of the relevant rules—is essential in securing the acceptance of the non-legislative codification. Of course, the standards against which technical excellence are measured change over time. Few would consider that the *Corpus Juris Civilis*, with its chaotic juxtaposition of legal texts and lengthy doctrinal discussions, would meet current standards of presentation and coherence,[93] so much that it is somewhat difficult for the contemporary observer to appreciate fully how the *Corpus Juris* appealed to the medieval lawyer. In contrast, contemporary examples of non-legislative codifications such as the American Restatements and the UNIDROIT principles take the form of systematic sets of prescriptive statements that share many of the characteristics of modern legislative codes and statutes enacted in domestic legal systems. In formulating its draft articles, the ILC draws on the experience of modern legislation, and the technical quality of its texts undoubtedly meets contemporary expectations. As a former member of the Commission pointed out:

> The slow, tiresomely slow at times, and repetitive procedures followed by the ILC ensure that its drafts are thoroughly researched and carefully worded. . . . The ILC is well aware of the fact that if its work is to enjoy authority it will only do so by reason of its quality. This quality is achieved by the excellence of the report submitted by the special *rapporteur*, the high standard of scrutiny to which the report is subjected in plenary debate, and the meticulously careful attention to the nuances of language displayed by the drafting committee.[94]

On the other hand, the way in which the instrument stages authority, by presenting a clear prescriptive position as to what the law requires, plays an instrumental role in the process whereby a non-legislative codification becomes authoritative. Codification conventions and ILC draft articles invariably consist in a series of provisions drafted in prescriptive form that provide conclusive solutions to legal questions arising from the field that they purport to codify and progressively develop. These texts tend to be relatively accessible and readily applicable to the factual situations that they seek to regulate.[95]

[93] ibid. Referring to the once highly authoritative *De Jure Belli ac Pacis*, Grotius' most important work, Lauterpacht reminds the reader, who may be tempted to criticize the book for its 'methodological confusion', that 'in the seventeenth century eclecticism was as important as systematic accuracy'; H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYIL 52.

[94] Dugard (n 20) 38. See also O Schachter, 'Law-Making in the United Nations' in N Jasentuliyana, *Perspectives on International Law* (Kluwer 1997) 134: 'Even if the Commission's articles never attain treaty status, they achieve persuasive authority from the material presented in the reports and the agreement of the Commission. Much depends on the quality of this work, not simply as a register of past practice but as an adequate response to new conditions and felt needs.'

[95] This is despite what could be seen as an excessive use of 'saving clauses' reserving questions on which no agreement could be reached or which were deemed not yet 'ripe' for codification. An example is provided by art 74(3) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, pursuant to which the Convention 'shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which

By taking such prescriptive form, they conceal disagreement that may have existed in the practice, precedents and scholarly opinion that substantiated the proposed rules. Likewise, the practice of adopting provisions by consensus, which sometimes can only be achieved through lengthy debate, contributes to understating controversy that may have arisen *within* the Commission.[96]

To an extent, concealing disagreement is inherent to the process of codification, which, by definition, involves an element of law creation.[97] Indeed, the process of translating regularly observed practices into words must necessarily involve choices on the part of whoever is entrusted with the task. This is particularly true in the case of international law—as noted above, being a legal system based on customary law which does not comprise judicial institutions with compulsory jurisdiction, international law suffers from endemic uncertainty. The upshot is that, as Hersch Lauterpacht pointed out with respect to efforts to codify the law of treaties and the law of the sea, while there may have been wide agreement as to broad principles of customary law, this agreement collapsed once particular rules and problems were brought to the table. In the case of the law of treaties, Lauterpacht noted that '[a]part from that general unavoidable acceptance of the basic principle, *pacta sunt servanda*, there [was] little agreement and there [was] much discord at almost every point'.[98] In a way, the codification and progressive development of international law boils down to managing disagreement and proposing sensible solutions that better reflect existing practice, precedent and doctrinal opinion, and that better meet the needs of the international community.[99]

that organization is a party'. This clause raises the question of whether the rules contained in arts 34 to 37 of the Convention apply to members of an international organization, the upshot being that the Convention fails to take a position on one of the crucial issues arising from the subject-matter it sought to codify.

[96] cf Sinclair (n 11) 34–5. In this respect, Ramcharan notes that '[t]he Commission has discovered through experience that the only way in which it can make progress is to seek consensus on the rules that it drafts. Experience has taught it that to adopt rules by majority vote would be a fruitless exercise, for once there is a serious division of views within the Commission which it has been unable to resolve, to push a decision through by a majority vote is a sure way of killing it in the General Assembly or at a subsequent codification conference.' BG Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (Nijhoff 1977) 39–40.

[97] cf eg Jennings (n 31) 301–3. As Crawford puts it, '"codifying" the law means stating what is to be, rather than—or at least as much as—stating what it has been. A codification is a formally complete statement of the law in the chosen field, which in a customary law system is likely to require further specification going beyond any basis in experience and practice.' J Crawford, 'Multilateral Rights and Obligations' (2006) 319 Recueil des Cours 453.

[98] Lauterpacht, 'Codification and Development of International Law' (1955) 49 AJIL 17.

[99] As pointed out by Cançado Trindade, codification conventions 'are bound to be long-lasting if they give expression also to the progressive development of the matter at issue, so as properly to fulfil the needs and aspirations of the international community as a whole'. cf AA Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium (Martinus Nijhoff 2010) 628.

But how exactly does the ILC deal with the uncertainty inherent in customary international law when it undertakes to codify and progressively develop international law? In Article 15 of the ILC Statute, the activities of codification and progressive development of international law are distinguished for reasons of 'convenience'.[100] While codification is defined as the 'more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine', progressive development is understood as the 'preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'. Commentators often point out that any strict differentiation between the two activities is bound to be artificial,[101] and the Commission took note of this fact at an early stage of its existence. With respect to the codification of the law of the sea, it observed that:

> In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the Statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already 'sufficiently developed in practice,' but also several of the provisions adopted by the Commission, based on a 'recognised principle of international law,' have been framed in such a way as to place them in the 'progressive development' category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.[102]

A similar approach was taken during the early stages of the codification of State responsibility:

> the topic of international responsibility was one of those where the progressive development of international law could be particularly important .... The Commission wishes expressly to state, however, that in its own view the relative importance of progressive development and of the codification of accepted principles cannot be settled according to any pre-established plan. It must emerge in practical form from the pragmatic solutions adopted to the various problems.[103]

While the justification that the Commission provided for taking this approach is persuasive, it is not without consequences, especially when the outcome of the work takes the form of non-binding instruments as opposed to codification conventions. The absence of a distinction between codification and progressive

[100] Adopted by the General Assembly in resolution 174 (II) (1947), as amended by resolutions 485(V) (1950), 984(X) (1955), 985(X) (1955) and 36/39 (1981).

[101] eg A Pellet, 'Responding to New Needs through Codification and Progressive Development' in V Gowland-Debbas, *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process* (Martinus Nijhoff 1998) 15–16.

[102] ILC Yearbook 1956, vol II, 255, para 26 (Report of the ILC to the UNGA).

[103] ILC Yearbook 1974, vol II, 276, para 122 (Report of the ILC to the UNGA).

development in the ILC enhances the work of the Commission's potential to stage authority.[104] Even if it is true that the distinction between the two endeavours cannot be strictly maintained in practice, the vocabulary of 'codification' and 'progressive development' still holds explanatory power when used to assess the legal status of a project as a whole or of a specific provision. If the project or the provision are said to fall predominantly on the codification side of the spectrum, the elements of progressive development that they may contain are likely to be regarded as negligible, a mere side effect of the codification activity. The project or provision is likely to be applied as reflecting existing law and over time it will be impossible to distinguish what has been restated from what has been created by the codifying agency. Conversely, if a set of draft articles or a specific provision are considered to fall predominantly on the progressive development side of the spectrum, it is assumed that the project cannot exercise any authority of its own unless it is adopted in treaty form, in which case it will be binding solely upon States that have ratified/acceded to the respective treaty.[105] It is no wonder that some commentators would wish the Commission to be 'more open and more honest' in indicating whether it is engaging in codification or in progressive development.[106]

In fairness to the ILC, it does on occasion indicate that certain provisions were proposed in an exercise in progressive development of the law. The distinction can be found in some provisions of the ASR and of the Articles on Diplomatic Protection.[107] Remarkably, in the general commentary to the 2011 Articles on the Responsibility of International Organizations the Commission

[104] Boyle and Chinkin suggest that the absence of a 'sharp distinction between codification and progressive development' has made it possible for the ILC 'to engage in a certain amount of creative law-making or law-reform' and for 'the ICJ and other tribunals to rely on ILC conventions without overtly enquiring whether particular articles represent existing law, revision of existing law or a new development of the law'. cf Boyle and Chinkin (n 43) 200.

[105] It is telling that in *North Sea Continental Shelf* the Court found it determinant that the principle of equidistance had been 'proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law' to conclude that that was not 'the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule' (para 61).

[106] Berman (n 88) 127. See also Ramcharan (n 96) 104–5, who thought that whenever the Commission adopts a draft that will take the form of a convention, '[i]t would be imperative . . . to distinguish in each case what is existing law from what is put forward by way of progressive development', lest the whole draft be perceived as a *lex ferenda* and governments be reluctant to refer to the work of the Commission. Ramcharan did not anticipate that the absence of such a distinction would have the effect of enhancing the authority of non-binding articles more often than not.

[107] See, for example, ILC Yearbook 2001, vol II, pt 2, at 114 (on art 41 of the ASR, considering that '[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law') and 127 (on art 48(2)(b) of the ASR: 'This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake.') See also ILC Report 2006, pt II, at 36, 48 and 83 (recognizing that elements of arts 5, 8 and 15 of the arts on Diplomatic Protection were exercises in progressive development).

stated that '[t]he fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter', and that the provisions of that set of articles 'do not necessarily yet have the same authority as the corresponding provisions on State responsibility'.[108] But while this caveat calls into question the normative status of the project as a whole, the commentary does not provide guidance on where to draw the line. Individual provisions contained in the 2011 Articles may thus still manage to stage, to a considerable degree, the 'authority of codification'.

There is yet another way in which the authority of ILC texts appears to have been conveyed in recent times. Now that the adoption of codification conventions has fallen into disfavour, there have been subtle shifts in the way ILC draft articles have been referred to by the General Assembly once the drafting process is completed. In cases where ILC draft articles have been 'taken note of' by the UNGA, the word 'draft' has been dropped somewhere in the process. Thus, in 2001, after welcoming the adoption of the '*draft articles*', the UNGA took note of the '*articles*' on the responsibility of States for internationally wrongful acts.[109] Subsequently, the Assembly commended the '*articles* on diplomatic protection' and took of the '*articles* on the responsibility of international organizations'.[110] International courts and tribunals have tended to follow suit by referring to ILC projects as 'articles' instead of 'draft articles'.[111] The omission of the term 'draft' is of symbolic value and reinforces perceptions that the codification is a finalized project, thereby enhancing its claim to authority.

In short, the use of straightforward prescriptive language which conceals disagreements in practice and in doctrine; the lengthy commentaries presenting the authorities for each and every provision; the conspicuous silence as to the legal status of particular provisions; and even the way ILC projects have been

[108] ILC Report 2011, at 2–3, para 5. It should be noted that the fact that in the elaboration of the ARIO the ILC could only partially rely on practice and precedent does not mean that the articles should be considered an exercise in progressive development in the narrow sense. Rather, the articles were drafted on the basis of an analogy between States and international organizations that, to the extent that it proves to be a plausible systemic legal argument, may provide some justification to extending to those organizations rules originally devised for States.

[109] UNGA Res 56/83 (emphasis added). The same formulation had been used when the UNGA took note of the 'articles on nationality of natural persons in relation to the succession of States' (UNGA Res 55/153 (2001)). It should be noted that before 2001 the UNGA had always referred to the output of the Commission as 'draft articles': cf Res 2166(XXI) (1966) (on the 'draft articles on the law of treaties'); Res 3315(XXIX) (1974) (on the 'draft articles on State succession with respect to treaties') and Res 46/55 (1991) (on the 'draft articles on jurisdictional immunities of States and their property').

[110] cf UNGA Res 62/67 (2008) and UNGA Res 66/100 (2011). Emphasis added.

[111] Curiously, while the ICJ has consistently referred to the 'Articles' on State responsibility in its case law, it made reference to the 'draft Articles on Diplomatic Protection' in its judgment in *Diallo*; this was probably due to the fact that the latter judgment was given on 24 May 2007, that is, before the General Assembly formally took note of the 'articles on diplomatic protection' in Res 62/67.

referred to by the UNGA all contribute to bestowing upon the texts adopted by the Commission the aura of a restatement of the existing law.

Before moving further, a few words should be said about how codification conventions stage authority. What has been said about ILC draft articles is also relevant for codifications adopted in the form of a treaty, but it should also be noted that States occasionally seek to further enhance the text's claim to reflect customary international law.[112] A striking example is the 1958 Geneva Convention on the High Seas, in the preamble of which States recognized that 'the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established principles of international law'.[113] In a similar—albeit more restrained—vein, the preamble of the 2004 UN Convention on Jurisdictional Immunities states that 'the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law'. In contrast, the preambles of other codification conventions make less categorical statements about the normative status of the rules that they embody; more economically, they tend to refer to 'the codification and the progressive development' of international law 'achieved' by the convention.[114]

C. Reassessing the Significance of Codification Conventions and ILC Draft Articles as Subsidiary Sources

Factors of authorship, representation, procedure and form enhance the authority of non-legislative codifications originating from the work of the ILC, providing a partial explanation of why codification conventions and draft articles have come to be regarded in international legal discourse as 'reflections of customary international law'. The level of institutionalization of the Commission and its status as a UN organ should be sufficient to explain why the work of the Commission conveys more authority than the work of non-governmental professional associations which similarly engage in codification activities, such as the *Institut de droit international* and the International Law Association. As much though these institutions may have contributed to

[112] Baxter (n 10) 42–3.

[113] A similar example, though not belonging to a codification convention prepared by the ILC, is art I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, in which the parties 'confirm that genocide … is a crime under international law'.

[114] cf eg the preambles of the 1969 Vienna Convention on the Law of Treaties, the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1982 UN Convention on the Law of the Sea. It is noteworthy that the preamble to the 1978 Vienna Convention affirms that 'questions of the law of treaties other than those that may arise from succession of States are governed by the relevant rules of international law, including those rules of customary international law which are embodied in the Vienna Convention on the Law of Treaties of 1969', thus confirming the customary status of provisions of the VCLT.

elucidating rules of international law, their resolutions and reports are not given the same recognition as those stemming from the Commission.[115]

Similarly, the traditional position that conflates the work of the ILC with the teaching of international law professors has to be reassessed. As influential as the work of publicists of the likes of Lassa Oppenheim, Hersch Lauterpacht, Charles Rousseau and Roberto Ago may be—to quote but a few late scholars whose membership in the group of 'highly qualified publicists' few would dare question—their work is not expressly cited by the participants in the legal system as a depiction of existing law in the same way as codification conventions and ILC draft articles are.[116] It is telling that a recent empirical study of the use of scholarly writings in judgments of the ICJ found that in a total of 59 citations to 'publicists' contained in judgments and advisory opinions of the Court (as of 1 May 2012), 45 were to the ILC.[117] The better comparison, perhaps, would be between non-legislative codifications and decisions of international courts and tribunals, notably the ICJ, in the sense that both are regarded in legal discourse as highly authoritative statements of the existing law.[118]

Thus, in assessing the significance of non-legislative codifications in international law it is important to observe that these codifications occupy a rather special place in the list of 'subsidiary means for the determination of rules of law' envisaged by Article 38(1)(d) of the ICJ Statute. Codification conventions and ILC draft articles are not, of course, to be assimilated with custom, and their characterization as subsidiary sources remains technically correct. And yet, the tendency to associate these texts with customary international law makes it somewhat simplistic to treat them as mere evidence of State practice or as the work of publicists. Their unusual authority, which cannot be easily placed within the scheme of the formal sources of international law, is bound to raise normative concerns. The next section focuses on one of the perspectives from which these concerns can be addressed —that of the international rule of law.

[115] On considerations militating against 'private codification' and the reasons explaining the decline of the authority of institutions such as the *Institut de droit international*, see G Abi-Saab, 'La Commission du droit international, la codification et le processus de formation de droit international' in United Nations, *Making Better International Law: Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law* (1998) 188–9.

[116] See Peil (n 11) 152.

[117] ibid 152. In fairness to publicists, it should be said that their work is frequently referred to by judges of the ICJ in their individual opinions. Yet, Peil's study concluded that the ILC 'is far and away the most common source relied upon by the judges. Of the 3,857 references in the survey, 384 (approximately ten per cent) are to the ILC'. It should also be noted that other international judicial bodies such as the European Court of Human Rights and International Tribunal for the Law of the Sea are less economical than the ICJ in referring to publicists. But the general point about the different degree of authority enjoyed by the work of the ILC is also valid for those jurisdictions.

[118] On the authoritativeness of judgments rendered by the ICJ, see eg M Shahabuddeen, *Precedent in the World Court* (Grotius Publications 1996) 238–40.

IV. NON-LEGISLATIVE CODIFICATIONS AND THE INTERNATIONAL RULE OF LAW

A. Legality Concerns Posed by Non-Legislative Codifications

As noted above, when ILC draft articles and codification conventions are perceived as restatements of existing law, they are likely to exercise authority even when not formally adopted by States. In other words, the authority of the outcome of the Commission's work depends on its being regarded as 'codification projects' as opposed to 'progressive development projects'. Similar considerations apply to codification conventions, the text and *travaux préparatoires* of which may provide guidance for assessing their customary status.

It has also been stressed that the context in which this authority becomes possible is that of uncertainty in customary international law. However, just as the uncertainty of customary international law accounts for the appeal of non-legislative codifications, it also sets the limits of their authority. Because neither the ILC nor international conferences are given the competence to *legislate*, the normative status of provisions embodied in codification conventions and draft articles can always be challenged by reference to the same State practice, *opinio juris* and relevant precedents that inspired the formulation of those provisions.[119] Ultimately, each and every provision has to stand on its own merits. Considerations of authorship, representation and procedure may establish a presumption in favour of the view endorsed in the non-legislative codification,[120] but one should not too easily succumb to the temptation of endorsing this view solely on the basis of such considerations. As Caron warned judges and arbitrators in his essay on the ASR:

> [t]o apply [the ASR] correctly, decision makers must avoid a simple reading of the articles but, instead, must consult the commentaries and reports for each article, which illuminate the practice underlying the rule, the discussions of the

[119] In this regard, see Y Chen, 'Structural Limitations and Possible Future of the Work of the ILC' (2010) 9 ChineseJIL 476–7.

[120] Notably, in the context of the codification of State responsibility, members of the ILC expressed the view that 'if the report of the Commission were adopted by resolution of the Assembly or taken note of, it would be seen as an authoritative study of current rules, State practice and doctrine aimed at providing guidance to States on their rights and responsibilities, thereby contributing to legal stability and predictability in international relations', and that '[a]doption in the form of a declaration would effectively place the burden on opposing States to prove that it was not binding'. ILC Yearbook 2001, pt I, 24, para 64). A similar view had been expressed by Baxter: '[t]he very existence of multilateral treaties declaratory or constitutive of law will induce even the non-parties to conform their conduct to some, if not all, of the rules of the treaty. . . . The dissenter's way is not easy when so many States are prepared to carry out the obligations of the treaty' (n 10, 103). See also L Sohn, 'Unratified Treaties As a Source of Customary International Law' in A Bos and H Siblesz, *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen* (Martinus Nijhoff 1986) 245–6 (recognizing the existence of a 'clear presumption that the rule agreed upon at the conference, though the agreement [may not yet have been] ratified, has become an accepted rule of customary international law').

> ILC, and the complements of various governments. Together these sources bring life to the articles and reveal the degree of consensus.[121]

That uncertainty in customary law should both set the context for the authority of non-legislative codifications and at the same time make this authority precarious means that members of the legal profession are put in a difficult position. Given that the formidable epistemological challenges surrounding the proof of customary international law can rarely be avoided, how far should the law-applier committed to rule of law values second-guess the compromise solutions reached by the ILC and diplomatic conferences in codifying and progressively developing international law? To put the question in normative terms, how are these non-legislative codifications to be evaluated when one takes the perspective of the political ideal of the international rule of law?

A brief overview of this political ideal is apposite here.[122] In recent times, the international rule of law has become a prominent feature in international political discourse. That legality is a goal to be promoted in the international sphere is for example affirmed by several resolutions and declarations adopted under the auspices of the United Nations.[123] It is nevertheless true, as Arthur Watts pointed out, that the rule of law in international affairs has been more frequently invoked than properly understood.[124] It has been invoked *inter alia* to convey the necessity of obeying international law, as an argument for expanding the scope of international regimes, and as a tool for criticizing the behaviour of States and international institutions.[125]

Transposing the political ideal of the rule of law from the domestic to the international context is no easy task, especially when one considers the institutional challenges that a legal system not possessing centralized institutions to

[121] Caron (n 1) 873. A similar opinion was recently voiced by the Special Rapporteur on formation and evidence of customary international law. In a note on the Articles on the Responsibility of International Organizations, Sir Michael Wood suggested that 'it is the attitude of others, including courts and tribunals, that makes [the ILC a "dangerous place"], in the sense that undue homage is sometimes paid to its work, whether that work is good, bad or indifferent, and whatever stage it has reached'. His conclusion was that 'courts and others should approach [the Articles] with a degree of circumspection'. M Wood, '"Weighing" the Articles on Responsibility of International Organizations' in M Ragazzi (ed), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Nijhoff 2013) 65–6.

[122] I follow Joseph Raz in referring to the rule of law as a 'political ideal' (cf J Raz, 'The Rule of Law and its Virtue' in Raz (n 15). One could also refer to the rule of law as a *legal* ideal, or as Raz himself suggests, a 'legal virtue'.

[123] UNGA Res 2625(XXV) (1970); UNGA Res 55/2(2000); UNGA Res 61/39(2006); 62/70(2008); and 63/443(2008).

[124] A Watts, 'The International Rule of Law' (1993) 36 GYIL 15.

[125] Resolutions of the General Assembly, for instance, link legality with democracy, sustainable growth, eradication of poverty and protection of human rights. Hence Rosalyn Higgins's concern that the subject is being treated so broadly that it runs the risk of becoming 'all things to all people'. R Higgins, 'The ICJ, the United Nations System, and the Rule of Law' (speech given 13 November 2006, available at <www.lse.ac.uk/publicEvents/events/2006/20060904t1059z001.aspx>) 14.

enact and apply the law faces.[126] Yet, it is widely accepted that the principles of generality, publicity, non-retroactivity, clarity, absence of contradictions, possibility of performance, constancy over time and congruence that Lon Fuller has famously identified should be adhered to if international law is to constitute a healthy, functional legal system.[127] The assumption, therefore, is that one can evaluate international law by some of the same standards by which one evaluates domestic law. There is no reason why one should not embrace a robust conception of the international rule of law if the political ideal is to be taken seriously.[128]

Some of the difficulties posed by non-legislative codifications from the perspective of the international rule of law should then become apparent. First, the practice of applying provisions of codification conventions and ILC draft articles that only putatively reflect existing law is not conducive to international legality. The rule of law pedigree of a non-legislative codification is bound to remain problematic.

Second, moving from the legal to the institutional level, rule of law concerns may lead one to question the manner in which institutions such as the ILC engage in governance functions. At a time when influential codification projects have been kept in soft form, with the ILC having the last word on their content and drafting, it could be asked whether the Commission is not exercising 'public authority' in the sense that it is putting forth rules that '*determine*' participants in the legal system by reducing their freedom of action or affecting their legal or factual situation.[129] In particular, one has to consider what it is appropriate for a codifying agency such as the ILC to do, and the extent to which it is justified in conveying the impression that it is restating existing law when in fact it may be only managing disagreement. At the same time, it is important to bear in mind that States not only have the ultimate control over the process of codification and progressive development of international law: they are also ultimately responsible for it. Any evaluation of the

[126] eg the absence of compulsory jurisdiction, problems of unaccountability of organs such as the UN Security Council and instances of endemic non-compliance. It is thus no wonder that writers strive to show that international law to an extent complies with rule of law principles in spite of everything, and conclude their analysis by affirming the need to achieve the international rule of law at a global level. See J Crawford, 'International Law and the Rule of Law' (2003) 24 AdelLRev 10.

[127] Watts (n 124) and Beaulac, 'An Inquiry into the International Rule of Law' (2007) EUI Max Weber Programme Series, Working Paper No 2007/14. Fuller's seminal work is *The Morality of Law* (Yale University Press 1964).

[128] But see, for a more critical view, J Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 EJIL 315.

[129] This is the concept of 'public authority' conceived by a research project at the Max Planck Institute for Comparative Public Law and International Law— A von Bogdandy et al, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in A von Bogdandy et al, *The Exercise of Public Authority by International Institutions* (Springer-Verlag 2010) 11. Similarly concerned with the exercise of authority at the international level is the Global Administrative Law project, on which see B Kingsbury et al, 'The Emergence of Global Administrative Law' (2005) 68 LCP 15.

'legislative authority' that the ILC may be inadvertently exercising has to take into consideration the fact that States may consider to be in their interest that the codification process favour formally non-binding draft articles over conventions.[130]

B. Non-Legislative Codifications and the Concretization of the International Rule of Law

Paradoxically, while the authority conveyed by non-legislative codifications raises these legality concerns, it is precisely the notion of the international rule of law that animates the pursuit of the codification and progressive development of international law.[131] International law, as an evolving legal system rooted in custom, is at pains to meet two requirements that, often taken for granted at the domestic level, are essential for the concretization of the rule of law. The rule of law presupposes that, first, the relevant social behaviour of the subjects of the legal system be governed by law (the requirement of *completeness*), and, secondly, that legal rules and principles achieve the degree of determinacy that is needed to render them intelligible and operational (the requirement of *determinacy*).[132]

Does international law meet these requirements? Can it do so? However many challenges the uncertainty of international custom may create, the notion that international law constitutes a legal system that is relatively complete and sufficiently determinate is a regulative idea to which the legal profession adheres.[133] International law may contain *lacunae* and areas in which the

[130] Villalpando (n 62) 249, suggesting that 'governments appear to be agreeing to downgrade their intervention, by giving up the opportunity of negotiating conventions of codification'. One of the advantages of the current approach to codification is that States can benefit from great certainty and predictability in international affairs without having to officially express their consent to be bound by the rules and facing the domestic and international difficulties involved in the process. More fundamentally, one should also ask, as Jeremy Waldron does, to what extent sovereigns are entitled to the benefits of the rule of law as conceived at the domestic level. cf Waldron (n 127) 337–43.

[131] Lauterpacht (n 98) 19: 'It is probably a fact that the absence of agreed rules partaking of a reasonable degree of certainty is a serious challenge to the legal nature of what goes by the name of international law. That circumstance alone supplies cogent proof of the justification, nay, of the urgency of the task of codification of international law.'

[132] Watts (n 124) 26. Speaking about the 'basic idea' of the rule of law, Raz remarks that the 'basic intuition from which the doctrine of the rule of law derives' is that 'law must be capable of guiding the behaviour of its subjects', that is, 'that it must be such that they can find out what it is and act on it'; Raz (n 122) 214.

[133] On international law as a system, see Conclusions of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', International Law Commission, submitted to the General Assembly, UN Doc A/61/10 (2006) para 1. For the idea of completeness of the international legal system, see H Lauterpacht, 'Some Observations on the Prohibition of "*non liquet*" and the Completeness of the Law' in E Lauterpacht (ed), *International Law* (CUP 1970) 217. On standard views as to the relative determinacy ('objectivity') of international law, but taking a critical approach, see M Koskenniemi, *From Apology to Utopia* (CUP 2005) 41–58.

existing law will be difficult to ascertain, but it provides a number of accepted methods with which these problems can be addressed. On the one hand, 'closure rules' such as the so-called '*Lotus* principle', whereby freedom of action is inferred from the absence of a prohibition, may be of help in certain situations.[134] On the other hand, the general principles of law to which Article 38(1)(c) of the ICJ Statute makes reference were conceived to make 'available without limitation the resources of substantive law embodied in the legal experience of civilized mankind'.[135]

But more fundamentally, the notion that international law constitutes a system that can cope with indeterminacy also influences the way statements about customary international law are made. The fact that inquiring into State practice and *opinio juris* may produce a dubious or inconclusive result is not always taken to mean that there is no law governing a certain matter. Codification conventions and ILC draft articles, insofar as they aspire to provide a sensible synthesis of competing trends in State practice, legal precedent and doctrinal opinion, are relied upon by law-appliers whose starting point is the premise that there may some be customary law to be found. This refines what has been said above about uncertainty as a context for the authority of non-legislative codification in international law. The notion of the international rule of law animates members of the legal profession to persevere in the search of existing rules of customary international law and is part of the explanation of why they feel justified to treat codification conventions and ILC draft articles as authoritative instruments.

In this respect, it is also helpful to consider how non-legislative codification may be part of the *process* whereby international custom is formed. It is a truism that the emergence of international organizations has had a great impact on the making of international law.[136] Ever since permanent international forums assisted by secretariats and relying on well-developed rules of procedure became available, the logistics of multilateral treaty-making has been considerably facilitated.[137] But the emergence of international

[134] *The Case of the S.S. 'Lotus' (France/Turkey)*, 1927 PCIJ Rep Series A No 10 at 18. In the *Nicaragua* case and the *Nuclear Weapons* advisory opinion, the premise adopted by the ICJ was that restrictions to the use of weapons were articulated in terms of prohibition. *Military and Para-Military Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, para 269; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 52. Likewise, in the *Kosovo* advisory opinion, the Court analysed the lawfulness of the declaration of independence under general international law on the basis that State practice did not establish a prohibition. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para 79. For the idea of closure rules, see J Raz, 'Legal Reasons, Sources and Gaps' in Raz (n 15), 77.

[135] Lauterpacht (n 133) 221–2. On the use of general principles of law and principles of international law in the jurisprudence of the ICJ, see *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, Sep Op Judge Cançado Trindade, paras 20–25.

[136] See in general J Alvarez, *International Organizations as Law-makers* (OUP 2005).

[137] This does not mean, however, that the conclusion of multilateral treaties has become easier. The procedural developments of the last 50 years were accompanied by a radical expansion of the

organizations has not only had an impact on how treaties are concluded: it appears to have also affected the way in which custom emerges.

In a particularly illuminating study, Georges Abi-Saab distinguishes between the 'traditional custom' that the international legal system has inherited from its formative period and the 'new custom' that is in the process of formation with the help of international institutions.[138] While traditional rules of customary international law such as those pertaining to diplomatic relations originated from a lengthy process of consolidation of actions and convictions of States, a process which was at the same time spontaneous and heterogeneous, more recent rules of customary international law are the product of relatively centralized and deliberate law-making processes that often occur under the auspices of the UN and other international organizations.[139] In the formation of this 'new custom'—of which the law of the outer space, the law of self-determination and new aspects of the law of the sea are examples—the starting point for the creation of new rules has been a somewhat detailed set of provisions that a majority of States endorse by *inter alia* voting in favour of resolutions of the UNGA or adopting conventions in a diplomatic conferences.[140] This means that the emerging *opinio juris* is often expressed before the required general practice takes shape: first States indicate that they are inclined to consider the negotiated rule as required by law, and then State practice starts to converge on what the negotiated rule prescribes.[141] Thus, the 'new custom' subverts the logic behind the formation of traditional customary rules, in which *opinio juris* was distilled from a general practice followed over a relatively long period of time.[142]

This phenomenon points to the constructive role of non-legislative codifications in international law. Though a codification convention or a set of ILC draft articles will in part reflect 'old custom', they will also be the

international community, which created new obstacles for the adoption of satisfactory treaties. On the shortcomings of modern treaty-making, see Alvarez (n 136) 370–93.

[138] Abi-Saab (n 115) 195–7.

[139] ibid 196–7. This phenomenon is also captured in Rene-Jean Dupuy's colourful metaphor of a 'coutume sage' being opposed to a 'coutume sauvage'—cf Dupuy, 'Coutume sage et coutume sauvage' in *Mélanges offerts à Charles Rousseau: La communauté internationale* (1974) 75–87.

[140] cf J Charney, 'Universal International Law' (1993) 87 AJIL 546–7 ('[t]he products of multilateral forums substantially advance and formalize the international lawmaking process. . . . Decisions taken at such a forum, support for the generally applicable rule, publication of the proposed rule in written form and notice to the international legal system call for an early response. . . . This process avoids some of the mysteries of customary lawmaking. It also permits broader and more effective participation by all states and other interested groups and allows a tacit consent system to operate legitimately'.)

[141] cf Dupuy's idea of the 'fonction révolutionnaire' that custom occasionally performs, in which case 'l'idée précède le fait; on assiste à une projection factuelle de l'idée politico-juridique' (Dupuy (n 139) 84). For an insightful analysis of the emergence of customary law on the Continental shelf, making the point that custom is to be understood as a process, see J Crawford and T Viles, 'International Law on a Given Day' in J Crawford, *International Law as an Open System* (Cameron May 2002) 69.

[142] For a critical view of this approach, see B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988–89) 12 AustYBIL 95–8.

catalysers of 'new custom'. As Robert Jennings put it, 'in the procedures which have developed under Article 13(a) of the [UN] Charter, we have to hand and actually working a procedure which is not limited to drafting and proposing but is, within its limits, genuinely law-making'.[143] In due course, through converging practice and the work of other authoritative institutions in the system, the initial uncertainty associated with the status of specific rules embodied in non-legislative codification may be overcome.[144] And one of the reasons why practice comes to converge on the new rule may be precisely the putative claim that the provision (explicitly or implicitly) makes to reflect already existing law.

Appraising the role of codification conventions and ILC draft articles from this perspective makes it easier to consider how these texts can contribute, in the longer term, to promoting international rule of law values. If on the one hand concerns may arise when a codification convention or a set of draft articles stretches the barrier between the *lex lata* and the *lex ferenda*, such instruments play a pivotal role in building an international legal system that is functional and in which the requirements of clarity, publicity, absence of contradictions and congruence are abided by.

All of this does not—and could not—solve the dilemma in which members of the legal profession relying on non-legislative codifications may find themselves in situations of doubt, as a rule of law approach will still require them to rigorously identify—and reject—unwarranted claims to authority that such codifications may make. What can then be expected from international lawyers? The caution suggested by Caron is definitely part of the answer, but this does not mean that members of the legal profession should be excessively suspicious of non-legislative codifications. Ultimately, an awareness of the context and factors militating in favour of the authority of codification conventions and ILC draft articles, combined with an awareness of the role that these texts may play in the crystallization or formation of new rules, is instrumental for the law-applier called upon to appraise the weight to be given to non-legislative codifications in individual cases.

V. CONCLUDING REMARKS

Non-legislative codifications, here understood as codification conventions that are not applicable *qua* treaties and draft articles produced by the ILC, have been enjoying considerable authority in international legal argument, being often cited by courts and tribunals as 'reflections of customary international law'. Regarding them merely as evidence of State practice (in the case of codification conventions) or the teaching of publicists (in the case of ILC

[143] R Jennings, 'Recent Developments in the International Law Commission: Its relation to the sources of international law' (1964) 13 ICLQ 397.
[144] Baxter (n 10) 73–4.

draft articles) falls short of properly appraising the pivotal role that these texts have played and continue to play in articulating rules of general international law. This article provided an account of the factors that, in the context of uncertainty that characterizes the international legal system, explain the appeal of non-legislative codifications within the legal profession. These are the position of the ILC within the UN system; a procedure which includes a dialogue with States and other relevant entities; the prescriptive form that the texts take; the tendency not to distinguish between codification and progressive development; and the eventual recognition or adoption of the texts by the UNGA or diplomatic conferences. The article also emphasized the ultimate limits of the claim to authority that non-legislative codifications explicitly or implicitly make, and pondered the dilemma in which the law-applier committed to rule of law values may find herself when called upon to consider a provision originating from any these codifications.

The authority that codification conventions and ILC draft articles have enjoyed in recent times points to some of the structural deficiencies faced by a legal system in which neither treaty law nor international custom satisfactorily ensure the certainty and determinacy to which—at the level of general rules of universal application—the system aspires. At the same time, it points to the ways in which the system has managed to evolve and become more sophisticated in spite of these shortcomings. Thus, if the fact of this authority is in many ways troubling, it is also auspicious. It is hoped that a clearer understanding of the context and factors explaining the appeal of codification conventions and ILC draft articles may shed light on the process whereby contemporary international law is made and lead to a sensible use of these texts by members of the legal profession.