On 30 May 2016, the International Law Commission (ILC) adopted a set of 16 draft Conclusions providing a methodology on how to identify customary international law. Although largely based on the two elements approach set forth in Article 38(1)(b) of the ICJ Statute, the ILC study pushes the boundaries of the formal sources of international law beyond the realm of state practice by recognizing that the practice of international organizations (IOs) as such may be constitutive of custom. This article critically examines the ILC draft Conclusions concerning the role of IOs in the process of custom creation. It examines the concept of resolution adopted by the ILC and assesses the coherence of the interpretive methodology devised by the ILC using the UN General Assembly resolutions as a case study. The findings show that the draft Conclusions fall short of expectation in providing authoritative guidance to scholars and practitioners alike.

1 Introduction
The study of the International Law Commission (ILC) on Identification of Customary International Law has sparked a renewed interest in an old academic debate: how is it possible to establish the existence of a customary rule? Aimed at providing a set of guidelines for practitioners,¹ the Draft Conclusions contain one of the boldest statements ever made about the process of formation of customary rules: the practice of international organizations (IOs) as

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such can contribute to the formation of customary international law (CIL). This view is not supported by the jurisprudence of the International Court of Justice (ICJ), nor does it find recognition in the academic literature. Quite the contrary, it appears to contradict previous studies, such as the International Law Association’s Statement of Principles Applicable to Customary International Law (2000).

The text of the draft conclusions is based on two unstated assumptions on the role IOs play in the process of custom creation. The first one holds that IOs are agents of states. Accordingly, Draft Conclusion 4(2) entails that the practice of IOs endowed with exclusive competence may be equated with that of states and, in that limited sense, contribute to the formation of customary rules in its own right. Such a formalistic conception of the role of IOs in international relations does not reflect contemporary international practice, nor does it account for the variety of instruments adopted by IOs which are capable of influencing state behaviour. The second, and related, unstated assumption is that, according to the ILC, resolutions represent collective acts of states instead of acts of the IO as such. Thus, Draft Conclusion 12(2) establishes that resolutions may provide evidence for establishing the existence and content of a customary rule or contribute to its development.

The combined interpretation of Draft Conclusions 4(2) and 12(2) suggests that IOs do not possess a distinctive normative identity as subjects of international law, but rather represent a forum of independent states. Their practice can thus contribute to the formation of CIL only insofar as it is conceived as a surrogate of state practice. The purpose of this article is to analyse the substantive and methodological implications of the restrictive conception of IOs adopted by the ILC in the Draft Conclusions and provide a set of recommendations on how to improve the coherence of the message sent out to practitioners by the two Draft Conclusions.

For each of the two unstated assumptions discussed above, the method of inquiry includes three components. Firstly, it briefly discusses the doctrinal challenge posed by the narrow conception of IOs adopted by the ILC. Secondly, it analyses the opinions expressed by individual members of the ILC in plenary session with a view to determining whether the Draft

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3 The closest type of remarks about the practice of IOs as constitutive of custom appear in H. Boko-Szegő, *The Role of the United Nations in International Legislation* (North-Holland Publishing Company, Amsterdam, 1978) p. 51 (implying, without demonstrating, that ‘resolutions of the UN General Assembly have exerted an influence on the conduct of States and thereby have contributed to the evolution of new customary rules’).


Conclusions reflect a unanimous or quasi-unanimous position. Thirdly, it assesses the message Draft Conclusions 4(2) and 12(2) send out to practitioners, thus criticizing relevant aspects of the methodological underpinnings of the ILC study.

The following section provides an overview of the origins, aim and scope of the Draft Conclusions. Sub-section 2.1 outlines the structure of the Draft Conclusions, sub-section 2.2 evaluates the concept of CIL endorsed by the ILC while sub-section 2.3 examines the role of IOs practice as a constituent element of a customary rule. Section 3 evaluates the evidentiary function of resolutions in the process of creation and development of already existent rules of international custom. Section 4 critically examines the role of resolutions in the process of creation of CIL using the resolutions of the United Nations General Assembly as a case study. Sub-section 1 presents an original database of General Assembly’s practice while sub-section 2 evaluates the implications of the systemic character most resolutions have acquired for the process of identification of custom. Section 5 provides an assessment of the overall coherence of the structure of Draft Conclusions 4 and 12. Section 6 concludes.

2 The ILC study on identification of customary international law: an overview

At its sixty-four session (2012), the ILC decided to include the topic of “Formation and evidence of customary international law” in its current programme of work. The title of the study was subsequently changed into ‘Identification of customary international law’ to better reflect that the study deals with a methodological, as opposed to a substantive, question about the existence and content of rules of CIL.

The ILC inscribed the topic of identification of CIL on its agenda with a view to describe, systematically, the process of creation of CIL. Whether the stated aim of the study falls within the remit of Article 24 of the ILC Statute, either in the form of progressive development or codification of international law, is doubtful. Nevertheless, the outcome of the ILC work is not intended to be a series of hard-and-fast rules for the identification of CIL, but rather an

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9 Memorandum prepared by the Secretariat (A/CN.4/659), pp. 4-5, paras. 5-7.
10 First Report, supra note 7, p. 7, para. 18.
authoritative guidance about the process of legal analysis and evaluation required to ensure that a customary rule is properly identified.\footnote{Official Records of the General Assembly, Sixty-eighth session, Supplement No. 10 (A/71/10), p. 1, para. 79 and p. 3, para. 80.}

\textbf{2.1 Structure of the Draft Conclusions}

The Draft Conclusions are divided into seven parts. Part One delimits the scope of the Draft Conclusions\footnote{Draft Conclusion 1.} while Part Two endorses the two elements approach set forth in Article 38(1)(b) ICJ Statute for the existence of a customary rule\footnote{Draft Conclusion 2.} and clarifies that, in assessing evidence of general practice and acceptance as law, “regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found”.\footnote{Draft Conclusion 3(1).}

Part Three\footnote{Draft Conclusions 4 to 8.} deals with the first constituent element of a customary rule, namely, a general practice. While recognizing that this element primarily refers to the conduct of states, the expression ‘general practice’ remains open enough to include the practice of IOs. Part Four describes the characteristics of the second constituent element of custom – \textit{opinio juris}.\footnote{Draft Conclusion 9 and 10.} It describes it as consisting of the conduct of states, both in their own capacity and ‘in connection with resolutions adopted by an [IO] or at an intergovernmental conference’.\footnote{Draft Conclusion 10(2).}

Part Five provides a non-exhaustive list of materials which may have evidentiary value for the purposes of identification of customary rules. They include treaties,\footnote{Draft Conclusion 11.} resolutions of IOs and intergovernmental conferences,\footnote{Draft Conclusion 12.} decisions of courts and tribunals,\footnote{Draft Conclusion 13.} and the teachings of the most highly qualified publicists.\footnote{Draft Conclusion 14.} There is no reference to the work of the ILC itself. Part Six deals with the persistent objector rule\footnote{Draft Conclusion 15.} while Part Seven provides some general criteria on how to identify a rule of special custom.\footnote{Draft Conclusion 16.}

\textbf{2.2 The concept of customary international law endorsed by the ILC}

The study of the ILC is not explicitly based on any specific theory of CIL. However, any statement made in the Draft Conclusions in relation to the formation and identification of CIL
can be related to a defined theoretical stance about the nature of law in general and international law in particular. It is in this light that the originality of the text of the Draft Conclusions may be contested and the relevance of the statement on the contribution of the practice of IOs to the formation of customary rules qualified. In particular, the ILC study is built upon the unstated premise that the concept of CIL refers to both the process through which customary rules are formed and the outcome of that process. As a result, the scope of the Draft Conclusions covers the requirements for the formation of a customary rule as well as the types of evidence that establish the fulfilment of those requirements.

In addition, the final text of the Draft Conclusions is largely influenced by the views expressed by the ILC Special Rapporteur, Sir Michael Wood. Without explicitly referring to it, the Special Rapporteur has devised a methodology for identifying CIL firmly rooted on a stream of positivist scholarship which posits that customary rules are the result of a process through which factual elements acquire legal character and that the rule explaining the binding character of CIL is *pacta sunt servanda*. From this point of view, the customary process turns out to be a voluntary one eventually, and entirely, governed by the will of states. This also entails that states only constitute the primary subjects of international law while IOs are mere agents of states.

It is therefore not surprising that the text of the Draft Conclusions recognizes that a rule of CIL consists of two constituent elements: a general practice and the acceptance of that practice as law. By mirroring the text of Article 38(1)(b) of the ICJ Statute, which the majority of scholars consider as referring exclusively to the practice of states, the ILC Draft Conclusions

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25 Draft Conclusion 1. See also First Report, *supra* note 7, para. 15.
26 During the discussion in the Sixth Committee, a number of delegations stressed the topic’s inherent difficulties, including the complexity of assessing the existence of CIL. *Topical Summary of debate in the Sixth Committee* (A/CN.4/657), p. 12, para. 47; *Third Report of the ILC Special Rapporteur on Identification of Customary International Law* (A/CN.4/682), para. 27. See also the comments by the ILC members Murase and Tladi questioning the usefulness of the ILC study altogether, in *Summary record of the 3148th meeting* (A/CN.4/SR.3148), pp. 5-11.
28 Treves (*supra* note 24) paras. 4-5.
30 Draft Conclusion 2.
devote a great deal of attention to the role of state practice in the process of identification of customary rules while reserving a residual role to IOs practice.

2.3 The residual role of the practice of international organizations
The main implication stemming from the restrictive conception of general practice endorsed by the ILC is that only verbal and material acts containing an unmediated manifestation of state will can count as evidentiary sources of CIL.³³ Specifically, Draft Conclusion 4 refers to three types of practice that may be relevant to determining the existence of a customary rule:

1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.
2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.
3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.³⁴

The formulation of Draft Conclusion 4 is problematic in at least two ways. Firstly, it conflates the assessment of instances of relevant practice during the formative process of customary rules and instances of practice as evidentiary sources of an already formed customary rule.³⁵ It is widely recognized that during the formative stage of custom, manifestations of practice may or may not be based on the belief that they correspond to a legal obligation.³⁶ Conversely, when determining an applicable rule of CIL, the practice must be seen to conform to the law by the generality of states.³⁷ As a guide to practitioners, Draft Conclusion 4 should discern between, or warn about, the different weight to be attributed to relevant practice at the constitutive and evidentiary stages. Secondly, the second paragraph states that ‘in certain cases’ the practice of IOs may be constitutive of custom. The text of the Draft Conclusions, however, does not contain

³³ Second Report, supra note 1, paras. 33-37.
³⁴ Emphasis added. The distinction between the practice of states (relevant), IOs (exceptionally relevant) and non-state actors (irrelevant) was temporarily decided by the Drafting Committee. It has however remained in the final text of the Draft Conclusions. See the interim report of the Draft Committee, 7 August 2014, available at: <legal.un.org/ilc/guide/1_13.shtml>, 1 February 2017.
³⁵ Treves (supra note 24) para. 14.
³⁷ Ibid.
any parameter that helps determining the relevant circumstances in which the practice of IOs as such may contribute to the creation of a customary rule.38

One instance in which the relevance of the practice of IOs as such appears to be uncontroversial is represented by the practice of those IOs endowed with exclusive competence.39 In this case, the practice of the IO can be equated to the practice of its member states,40 provided that the practice in question is the external practice of an intergovernmental body of the IO.41 The foremost example is the practice of the European Union,42 although the acts of IOs which are functionally equivalent to the acts of states may also count. The practice of Secretariats when serving as treaty depositary, for instance, might contribute to the development of customary rules in this field.43

The proposal of the Special Rapporteur to include the practice of IOs among the relevant sources of CIL is innovative, but it has not been received positively by a number of states.44 The members of the ILC have also expressed different, and irreconcilable, positions about the inclusion of the practice of IOs within the remit of the notion of general practice relevant to the creation of CIL. Some members have defended the inclusion of the practice of the IOs as a constituent element of custom.45 Others have fiercely opposed it.46 Others have qualified the practice of the IOs as a special form of state practice and, in this limited sense, relevant as evidence of either state practice47 or opinio juris.48

38 See Summary record of the 3252nd meeting (A/CN.4/SR.3252), pp. 5-6, statement by Hassouna. The argument put forward by the Special Rapporteur according to which, as a general rule, “the more directly a practice is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the great weight it may have in relation to the formation, or expression, of rules of customary international law” does not seem to be particularly helpful. Official Records of the General Assembly, supra note 10, pp. 89, para. 8. See also Draft Commentary (Conclusion 4), Official Records of the General Assembly, Sixty-eight session, Supplement No. 10, supra note 11, pp. 88-89, paras. 3-6.
40 Wood (supra note 39), p. 617. See also Third Report, supra note 26, para. 77.
41 Second Report, supra note 1, para. 43. See also Third Report, supra note 26, para. 72; Wood (supra note 39) 618.
43 Official Records of the General Assembly, supra note 11, p. 89, para. 5.
46 See, for instance, the remarks by Kamto, ibid.
47 See ibid., remarks by Gevorgian.
48 See ibid., remarks by Hmoud. Contra see remarks by Murphy, ibid.
Likewise, during the debate in the Sixth Committee of the UN General Assembly several delegations have raised concerns about the reference contained in Draft Conclusion 4(2) to the practice of IOs, the reason being that it puts resolutions on the same level as other instances of state practice. As a matter of fact, it seems that reference to the practice of the IOs in Draft Conclusion 4(2) largely reflects the personal opinion of the Special Rapporteur rather than the views of the majority of states. This makes Draft Conclusion 4(2) one of the most misinterpreted provisions of the Draft Conclusions, not least because it does not reflect the common understanding of the requirement of general practice. The ambiguity of Draft Conclusion 4(2) is also exacerbated by the reference in other parts of the Draft Conclusions to ‘conduct in connection with resolutions adopted by an international organization and at an intergovernmental conference’ as a form of both general practice and opinio juris. As explained by the Special Rapporteur, in the Draft Conclusions resolutions are regarded as an instance of state practice and not as an instance of the practice of the IO as such.

What transpires from the formulation of Draft Conclusion 4, and the restrictive interpretation of what type of practice may contribute to the creation and development of CIL, is a profound contradiction between the aim of the ILC study and the scope of the Draft Conclusions. As the title of the study suggests, the aim is to provide a set of guidelines to assist courts and practitioners in the task of identifying customary rules. Instead, the scope of the ILC study extends to cover the different topic of the formation of customary rules. Although the two aspects are, at least to some extent, related to each other, the Draft Conclusions conflate them making relevant evidence of custom limited to the acts of the actors that can create customary rules and, among them, states in particular. However, as delegations have pointed

50 During the discussion in the Sixth Committee about the inclusion of the topic of identification of CIL on the ILC agenda, a number of delegations expressed the opinion that ‘the Commission should not give too much weight to resolutions of international organizations.’ Topical Summary of Debate in the Sixth Committee (A/ACN.4/657), p. 13, para. 50. Conversely, see the remarks by the Special Rapporteur on the relevance of the practice of IOs, Note by the Special Rapporteur, supra note 8, para. 19.
52 Draft Conclusion 6(2).
53 Summary record of 3250th meeting (A/ACN.4/SR.3250), pp. 10-11. See also the remarks by Mr Hmoud in the plenary discussion, Summary record of 3251st meeting (A/ACN.4/SR.3251), p. 10.
54 See the recommendation of the Working Group, supra note 8, para. 1.
55 The Special Rapporteur refers indirectly to this problem in the Second Report; see supra note 1, para. 173.
out, reference to IOs is not consistent throughout the Draft Conclusions, since at times they refer to state practice alone\textsuperscript{56} and other times to the practice of IOs.\textsuperscript{57}

As it is currently formulated, the text of the Draft Conclusions leads to the awkward conclusion that resolutions such as the Universal Declaration of Human Rights (UDHR)\textsuperscript{58} and the Declaration on Friendly Relations among States\textsuperscript{59} have played no role in the creation of universally accepted rules of customary law. Yet the sentiment of the international community goes in the opposite direction. The contradiction is generated by the fact that the Draft Conclusions assume that the practice of states and the practice of IOs, chiefly in the form of resolutions, serve different purposes. At the same time, the Draft Conclusions recognize IOs as entities subordinated to the will of states. Taken together, these amount to unstated assumptions about the capability of the practice of IOs to contribute to the creation of customary rules and, consequently, to count as evidentiary sources of CIL.

3 Resolutions as evidentiary sources of international custom
The lack of coherence in Draft Conclusion 4 is mainly dictated by the strict adherence to the positivist, state-centred understanding of custom set forth in Article 38(1)(c) of the ICJ Statute. Whether it is arguable that Article 38 ICJ Statute accurately reflects the contemporary role of states as the primary subjects of international law, it does not take into consideration the role IOs play in international relations and how they influence the development of international law, including CIL.\textsuperscript{60} As a result, the provisions of the Draft Conclusions on the practice of IOs are both arbitrarily restrictive and often inconsistent with other provisions of a general nature. In particular, Draft Conclusion 12 reads:

\begin{enumerate}
\item A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
\item A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.
\end{enumerate}

\textsuperscript{56} Fourth Report, supra note 49, paras. 19-20.

\textsuperscript{57} See, for instance, Third Report, supra note 26, paras. 71 and 74-75; Summary record of 3252nd meeting (A/CN.4/SR.3252), p. 9-10, statement by Escobar Hernández.

\textsuperscript{58} Universal Declaration of Human Rights, UNGA Resolution 217A(III).

\textsuperscript{59} Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Resolution 2625(XXV).

\textsuperscript{60} White (supra note 5).
3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (opinio juris).61

The first paragraph of Draft Conclusion 12 excludes the possibility that resolutions create instant customary law.62 This is a relatively uncontested position among states and scholars alike.63 However, during the debate in the Sixth Committee, some delegations have proposed to delete the reference to the possible contribution of resolutions to the development of customary rules from the second paragraph.64 The proposed changes are not merely stylistic as, by reflecting the state-centred theoretical underpinnings of the study, they question the relevance of IOs in the process of international custom altogether.65 A comparison with Draft Conclusion 11 dealing with the significance of treaties for the identification of CIL helps clarifying the implications of the provisions on the practice of IOs. The text of Draft Conclusion 11 reads:

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
   a) codified a rule of customary international law existing at the time when the treaty was concluded;
   b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
   c) has given rise to a general practice that is accepted as law (opinio juris), thus generating a new rule of customary international law.
2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.66

According to the provision above, a treaty rule can either declare (that is, codify), crystallize or create new CIL.67 These are all uncontested facts which find abundant confirmation in national and international practice.68 However, what strikes the most is that Draft Conclusion 11 refers

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61 Emphasis added.
63 ILA Statement of Principles (supra note 4), p. 62. See also Third Report, supra note 26, para. 53 (arguing that resolutions of the General Assembly cannot ‘of themselves and ipso facto create [CIL]’).
65 On top of that, the current formulation of paragraph 3 contradicts text of paragraph 2 as it establish that a resolution may contribute to the development of a customary rule, but a provision in a resolution can only ‘reflect’ existent CIL. If the last part of paragraph 2 were to be deleted, as suggested by numerous delegations, the text of paragraph 3 would become redundant.
66 Emphasis added.
67 See also Summary record of 3253rd meeting (A/CN.4/SR.3253), p. 10, statement by Vázquez-Bermúdez.
68 For a detailed discussion of the topic, see the Secretariat’s Memorandum, supra note 9.
exclusively to treaty provisions (‘rules’) whereas Draft Conclusion 12 refers to resolutions as if they contained a homogeneous set of provisions regulating only one issue. This appears to be a gross generalization. In his Fourth Report, the Special Rapporteur explains that the rationale behind the statement according to which resolutions cannot, in and of themselves, create CIL applies to treaties as well, the reason being that in principle treaties do not create obligations for third parties. However, Draft Conclusion 11 does not contain a statement comparable to the one contained in Draft Conclusion 12(1).

It may be argued that reference to resolutions in Draft Conclusion 12 as a unitary category has far richer implications than those mentioned by the Special Rapporteur. Had equal attention being paid to individual provisions within resolutions, the findings would certainly contain a very different conclusion. For example, in a number of resolutions the UN Security Council has explicitly denied that a specific provision in the text of a resolution contributes to the development of CIL, thus recognizing that individual provisions can create customary rules. A passage from resolution 2146(2014) on Libya, for instance, reads:

“[The] authorization provided by paragraph 5 of this resolution applies only with respect to vessels that are the subject of a designation made by the Committee pursuant to paragraph 11 and shall not affect the rights or obligations under the United Nations Convention on the Law of the Sea, including the general principle of exclusive jurisdiction of a flag state over its vessels on the high seas, with respect to other vessels and in any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law.”

Such and similar examples raise the question of why, as a matter of principle, only a treaty provision can start a new rule of CIL, or develop an existing one, whereas a provision contained

70 Draft Conclusion 12, para. 1.
72 Ibid.
73 UNSC Resolution S/RES/2146, para. 9 (emphasis added). The preparatory work of the resolution shows that the authorization contained in paragraph 5 of the resolution is of an exceptional nature and it is not intended to modify the basic norms concerning the exclusive jurisdiction of the flag states over their vessels on the high seas. The exceptional nature of this measure is also regarded as compliant with the relevant norms of international law, including the regime established by the UN Convention on the Law of the Sea (1982), international human rights and humanitarian law. See the statements of the representatives of Argentina and the Russian Federation, S/PV.7142, 19 March 2014.
74 Several resolutions on the situation in Somalia reiterate the concept that SC resolutions are not intended to create CIL. See, for instance, UNSC Resolution S/RES/1918, Preamble, para. 4 (“underscoring that resolution 1897 shall not be considered as establishing customary international law”). See also UNSC Resolution S/RES/1897, para. 8; UNSC Resolution S/RES/1950, para. 8; UNSC Resolution S/RES/2020, para. 10; UNSC Resolution S/RES/2077,
in a resolution cannot.\textsuperscript{75} The text of Draft Conclusion 6 clarifying relevant forms of general practice is not helpful in this regard. Paragraph 2 thereof states that ‘conduct in connection with resolutions adopted by an [IO] or at an intergovernmental conference’ as well as ‘conduct in relation to treaties’ are both forms of state practice.\textsuperscript{76} Yet treaties and resolutions are treated as two types of written texts with different legal values while no reference is provided to the practice of IOs themselves.\textsuperscript{77} During the debate in the Sixth Committee, delegations have proposed to delete the reference to the conduct in connection with resolutions as it best reflects the requirement of acceptance as law.\textsuperscript{78} Likewise, members of the ILC have described the practice of IOs as ‘a subsidiary form of practice’\textsuperscript{79} or as ‘a series of unsupported assertions that presents a distorted picture of international law.’\textsuperscript{80} The positions expressed by individual members of the ILC appear to relegate the relevance of resolutions adopted by IOs to the realm of mere or symbolic politics,\textsuperscript{81} thus denying that they can, in and of themselves, serve as conclusive evidence of the existence and content of rules of CIL.\textsuperscript{82} At the same time, resolutions of organs composed by states are regarded as ‘reflect[ing] the views expressed and the votes cast by States within them,’ thus constituting ‘state practice or evidence of opinio juris.’\textsuperscript{83} This apparent contradiction confirms that, in the view of the ILC, the source of opinio juris is necessarily restricted to state practice.

If the same rationale applies to both treaties and resolutions, then the Special Rapporteur’s observation that “ascertaining whether a conventional formulation does in fact correspond to an alleged rule of [CIL] cannot be done just by looking at the text of a treaty” should equally

\textsuperscript{75} Mathias (supra note 69), pp. 24-25. The personal views of the Special Rapporteur on this subject appear to contradict the position of the ILC: “When the UN Security Council adopts a resolution with implications for customary international law, it is an act of the Security Council as an organ (and hence of the United Nations)”. Wood (supra note 39), p. 615.
\textsuperscript{76} See Summary record of 3251\textsuperscript{st} meeting (A/CN.4/SR.3251), p. 10, statement by Hmoud (describing resolutions as ‘written texts with a lesser legal value than treaties’).
\textsuperscript{77} Fourth Report, supra note 49, para. 34. Draft Conclusion 10, para. 2, lists ‘conduct in connection with resolutions’ among possible forms of opinio juris.
\textsuperscript{78} Summary record of 3251\textsuperscript{st} meeting (A/CN.4/SR.3251), p. 11, statement by Hmoud. Contra see ibid., p. 12, statement by Al-Marri (“The practice of [IOs] is fundamental. It is essential to study the role that might be played by UN resolutions”).
\textsuperscript{79} Summary record of 3301\textsuperscript{st} meeting (A/CN.4/SR.3301), p. 16, statement by Murphy.
\textsuperscript{80} Topical summary of debate in the Sixth Committee, supra note 50, p. 13, para. 50 (“While it was proposed that the Commission examines the role of international organizations in the formation and identification of customary law, the opinion was also expressed that the Commission should not give too much weight to resolutions of international organizations”).
\textsuperscript{81} Commentary to Draft Conclusion 12, p. 106 para. 1, and p. 108, para. 8. Contra see Summary record of 3303\textsuperscript{rd} meeting (A/CN.4/SR.3303), p. 3, statement by Šturma.
\textsuperscript{82} Third Report, supra note 26, para. 74.
apply to the interpretation of the text of resolutions.\textsuperscript{84} Such interpretation appears to find support both in the observation by the Sixth Committee that the UN General Assembly bears particular relevance as a forum of near universal participation\textsuperscript{85} and in the suggestion by one delegation that the work of the ILC, which is currently not recognized in the Draft Conclusions, may feed into resolutions of the General Assembly.\textsuperscript{86} However, by strictly adhering to the formalistic logic of Article 38 of the ICJ Statute, the ILC has erected a mental barrier which prevents the practitioner to appreciate the role of IOs as full-fledged actors of international law and how resolutions influence state behaviour, at times contributing to the formation or development of CIL.

4 Resolutions, the limits of legal theory and the need for a multidisciplinary approach: the case of the UN General Assembly resolutions

Article 38 of the ICJ Statute does not, and cannot, explain how custom is made.\textsuperscript{87} Moreover, the ILC’s understanding of the role of IOs in the process of custom creation is grounded on a functional vision of IOs as merely agents of states\textsuperscript{88} that does not reflect the modern idea of international organization.\textsuperscript{89} Nor does it explain why states adopt resolutions rather than, for example, treaties or why some resolutions are binding while others are not.

States adopt resolutions for different reasons, primarily to negotiate shared expectations of mutuality. It may further be argued that certain General Assembly resolutions create international regimes.\textsuperscript{90} For instance, sometimes states decide to endorse specific resolutions in

\textsuperscript{84} Fourth Report, supra note 49, para. 24 (also stating that “in each case the existence of the rule must be confirmed by practice [and \textit{opinio juris}]").

\textsuperscript{85} \textit{Ibid.} para. 25.

\textsuperscript{86} \textit{Ibid.} para. 26. Some delegations have also pointed out that some resolutions may be evidence of existing or emerging customary law: \textit{ibid.}, para. 25.


\textsuperscript{88} Third Report, supra note 26, para. 70 (“States remain the primary subjects of international law and… it is primarily their practice that contributes to the formulation, and expression, of rules of [CIL]. It is also States that (for the most part) create and control international organizations, and empower them to perform as separate international legal persons, a variety of functions on the international plane in pursuit of certain goals common to their members”).

\textsuperscript{89} The concept of international organization refers to the relations between states and IO. It is widely accepted that he modern idea of international organization is the one that emerged in the aftermath of World War II with the establishment of the United Nations. On the evolution of the concept of international organization, see I. Claude, \textit{Swords into Plowshares: The Problem and Process of International Organization} (4th ed, Random House, New York, 1984) pp. 3-8.

\textsuperscript{90} In international relations, regimes are defined as clusters of principles, norms, rules and decision-making procedures of an IO regulating issue-specific areas. The related regime theory analyses the effects of the creation of international regimes on the behaviour of states and, to a lesser extent, other actors. See J. S. Barkin, \textit{International Organization: Theories and Institutions} (2nd ed, Palgrave Macmillan, New York, 2013) pp. 29 and 40.
order to make certain relations with other states as efficient as possible. Among many, the group of resolutions on outer space and those on the law of the sea over time have created a regime of legal certainty regulating how to exploit shared natural resources in fields which were not previously regulated by international law. On other occasions, states have decided to adopt resolutions with a view to creating legitimate standards of behaviour. The UDHR in the field of human rights and the Declaration on Friendly Relations in the field of international peace and security are prominent examples of standard-setting resolutions.

Beyond any doubt, by influencing the behaviour of states, resolutions establishing international regimes can variously contribute to the creation and development of CIL. Indeed, the reports of the Special Rapporteur often mention the resolutions of the General Assembly as the prominent example of acts of IOs capable of contributing to the creation of customary rules. However, based on the unstated assumption that resolutions are non-conclusive acts of the state, the Draft Conclusions do not provide any clear guidance on how they perform that task.

To ask whether resolutions contribute to the creation of CIL amounts to ask how a decision of an IO can affect the behaviour of states. In the ILC study, resolutions are defined as “all decisions and other acts adopted by international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding”. Since evidence of this gradual process does not emerge from the text of individual resolutions, it is not possible to find evidence of either state practice or opinio juris by looking at the text of the resolutions alone, as recognized by the Special Rapporteur himself in his third report. However, the ILC study simply states that the resolutions drafted in normative language “are those that might be of relevance, and the choice (or avoidance) of particular terms may be significant”.

91 Ibid., 41-48.
92 See, for instance, UNGA Resolution A/RES/70/26 on prevention of an arm race in outer space and previous ones; UNGA Resolution A/RES/70/235 on oceans and the law of the sea and previous ones.
93 Supra note 58.
94 Supra note 59.
95 As also recognized in Third Report, supra note 26, para. 52.
96 Second Report, supra note 1, para. 41(i). See also Topical summary of debate in the Sixth Committee (A/CN.4/666), p. 12, para. 46; Third Report, supra note 26, para. 46; Commentary to Draft Conclusion 12, Official Records of the General Assembly, supra note 11, para. 2.
97 Third Report, supra note 26, para. 51.
98 This is also referred to as the need to explore the interrelationship between non-binding norms and the formation of rules of CIL. See Topical summary of debate in the Sixth Committee, supra note 96, p. 11, para. 44.
99 Commentary to Draft Conclusion 12, Official Records of the General Assembly, supra note 11, p. 107, para. 2.
100 Third Report, supra note 26, para. 29.
101 Ibid. para. 48.
The ILC position seems too restrictive to accurately capture the role resolutions play in international relations. Instead, the inquiry into the contribution of resolutions to the process of custom creation should be broadened as to include how states use IOs, in addition to the use of relevant resolutions by states and other international actors. It follows that any inquiry into the evidentiary value of General Assembly resolutions as either general practice or opinio juris should be complemented by an empirical study of the systemic character groups of resolutions have acquired over time. The following sub-sections present an original database of General Assembly practice with a view to assessing the relevant findings in the light of the methodology devised by the ILC to detect the presence of custom.

4.1 Overview of the database of General Assembly practice
Quantifying the practice of the UN General Assembly is not an easy task due to the sheer number of resolutions adopted over seven decades. Changes in the General Assembly’s working methods also affect the counting of resolutions in two ways. Firstly, groups of closely related resolutions are often assigned the same document number followed by a Latin letter – for example, A/RES/70/249A-C. Such resolutions are at times listed as a group or as individual resolutions, or both. Secondly, the method of adoption of individual resolutions – namely, without voting, by majority, by consensus, by unanimity or by acclamation – is at times provided for the individual resolutions, at times for the group of resolutions while sometimes it is omitted. For the purposes of this article, individual resolutions accompanied with an indication of their method of adoption count as one resolution. Likewise, groups of resolutions adopted without a vote and groups of unqualified resolutions count as one resolution.

From 1946 to 2016, the General Assembly has adopted 16,935 resolutions, of which 6,362 with a vote and 10,564 without voting. Of all the resolutions, the overwhelming majority...
have been adopted by the six main committees rather than in plenary session, subject only to approval in plenary session. The findings also show that the majority of resolutions adopted in plenary session and by the Second, Third, Fifth and Sixth Committees have not been put to vote.

![Chart 1: resolutions adopted (1946-2016)*](chart)

<table>
<thead>
<tr>
<th>Plenary/Committee</th>
<th>With vote</th>
<th>Without</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plenary</td>
<td>1019</td>
<td>1810</td>
</tr>
<tr>
<td>Committee 1</td>
<td>1409</td>
<td>1034</td>
</tr>
<tr>
<td>Committee 2</td>
<td>543</td>
<td>1955</td>
</tr>
<tr>
<td>Committee 3</td>
<td>946</td>
<td>2075</td>
</tr>
<tr>
<td>Committee 4</td>
<td>882</td>
<td>561</td>
</tr>
<tr>
<td>Committee 5</td>
<td>735</td>
<td>2308</td>
</tr>
<tr>
<td>Committee 6</td>
<td>260</td>
<td>627</td>
</tr>
</tbody>
</table>

What the empirical reconstruction demonstrates is that the General Assembly in plenary session and the individual committees have developed different behavioural patterns in terms of number of resolutions adopted and methods of adoption. A possible explanation emerges from the particular working methods informally developed over time by each committee. The information contained in the Handbook of institutional practice of the General Assembly reveals that the resolutions adopted by the First and Sixth Committees are usually tabled only once the text has already been negotiated whereas those adopted by the Second, and Third Committees are not negotiated in advance. With regard to the resolutions passed by the Fourth Committee, those addressing issues taking place in the Middle East are usually adopted by consensus, so are all the resolutions adopted by the Fifth Committee.

The combined interpretation of the empirical evidence stemming from the database of General Assembly practice and the information about the informal practices developed by the committees contained in the Handbook shows that states regularly use the First Committee as

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111 In addition, the Special and Political Committee (1952-1992) and other committees have adopted 762 resolutions.

a standing diplomatic conference to discuss and negotiate issues of international peace and security. As a result, such resolutions are more likely to be direct expression of state will and, as such, they are likely to bear direct evidentiary value of state practice which is relevant for the process of custom creation. The use of normative language in the text of resolution in this case is, as the ILC suggests, a strong indication of possible presence of customary law, either developed or fully formed. Conversely, resolutions passed by Committee 2 and Committee 3 do not necessarily reflect or express the official position of states. In such cases, the emphatic use of normative language, such as in the resolutions on the New International Economic Order, is not in itself a strong indication of either *opinio juris* or general practice. This suggests that those Committees are mainly used as standard setting platforms.

Finally, the resolutions recommended for adoption by Committee 5 and Committee 6 serve a different purpose. The former deal with administrative and budgetary matters and produce only internal effects. The latter mainly complement the work of other Committees, with the exception of resolutions regulating private international law matters, and are usually framed in precise normative language. However, the Sixth Committee is largely composed of experts working in their personal capacity rather than representatives of states. Hence, for the purposes of identification of customary rules, the value of the text of resolutions must be qualified.

### 4.2 Relationship between groups of resolutions

A closer look at the composition by subject matter of the resolutions adopted within individual committees shows that, with a handful of exceptions, resolutions form groups of re-cited resolutions. Moreover, such groups of re-cited resolutions tend to refer to each other, thus forming broader thematic areas. The table below illustrates a fraction of the pattern of clustering which has developed over time in the practice of the Fourth Committee:

<table>
<thead>
<tr>
<th>Subject-matter of resolutions</th>
<th>No. of resolutions adopted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples</td>
<td>48</td>
</tr>
<tr>
<td>Dissemination of information to Non-Self-Governing Territories on the Declaration on the Granting of Independence to Colonial Countries and Peoples</td>
<td>1</td>
</tr>
<tr>
<td>Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples</td>
<td>30</td>
</tr>
<tr>
<td>Offers by member states of study and training facilities for inhabitants of Non-Self-Governing Territories</td>
<td>45</td>
</tr>
<tr>
<td>...</td>
<td>...</td>
</tr>
</tbody>
</table>

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113 *Supra* note 101.

114 UNGA Resolution A/RES/63/224 *et seq.*

115 Examples include the resolutions appointing the new Secretary-General or merely celebratory resolutions such as those instituting international days or years.
The empirical reconstruction of General Assembly’s behavioural patterns demonstrates that resolutions have a systemic character – that is to say, they do not exist in isolation from each other. This in turn suggests that, when it comes to identifying CIL, there is little or no value in trying to establish how a specific resolution has contributed, or is contributing, to the development of a customary rule.

For example, in the field of human rights the UDHR cannot be regarded as evidence of international custom in its own right. On the one hand, the practice of the General Assembly shows that the recognition of both certain rights of women and the freedom of association precedes the adoption of the UDHR. The continuing relevance of both issues has then been reiterated in groups of thematic resolutions up to day. On the other hand, once adopted, the UDHR has appeared as a stand-alone issue only in General Assembly resolutions celebrating the various anniversaries of the Declaration while the individual rights proclaimed in it have been discussed and refined over time as separate thematic issues. Similar considerations apply to the Declaration on Friendly Relations in the field of international peace and security. Adopted in 1970, the Declaration has been preceded by six resolutions on the same subject-matter. Individual provisions of the Declaration have then been discussed by the General Assembly under the narrower items of non-use of force in international relations and peaceful settlement of international disputes.

As the examples above suggest, resolutions are better understood as a complex construct comprising both legal and political elements. On the one hand, the legal element lies in the fact that resolutions can be seen as the formalization of interactions between states into a written text. On the other hand, the political element lies in the effects the adoption of resolutions produce on states. If the analysis of resolutions is conducted exclusively from the perspective of law, as suggested in the ILC Draft Conclusions, the political element of resolutions ends up being neglected. This leads to the further conclusion that the methodology for identifying customary rules contained in the Draft Conclusions almost deprives the process of custom creation of its spontaneity and informality. Nor does it explain the role of IOs in the creation of international law.

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116 See resolution UNGA Resolution 56(I) (rights of women) and UNGA Resolution 128(II) (freedom of association).
117 See, for instance, UNGA Resolution 36/169.
118 See, for instance, UNGA Resolution 1780(XVII) and et seq. (racial discrimination) and UNGA Resolution 1386(XIV) (the rights of the child) et seq.
119 UNGA Resolution 1815(XVII) et seq.
120 UNGA Resolution 2936(XXVII) et seq.; UNGA Resolution 3283(XXIX) et seq.
121 Cf. Summary record of 3301st meeting (A/CN.4/SR.3301), p. 15, statement by Murase (“[CIL] could be created spontaneously and there [is] no way of knowing systematically when and how a rule of [CIL is] created”).
of customary law. A better approach is to consider resolutions as political acts of IOs capable of producing a range of legal effects, including contributing to the creation or development of customary rules, the assessment of which must be conducted on a case-by-case basis.

5 Assessing the coherence of the Draft Conclusions: what message do they send to practitioners?

A second reading of the ILC Draft Conclusions on Identification of Customary International Law is expected in 2018. However, the current text of the Draft Conclusions leaves open the question: is providing ‘a methodology’ for identification of CIL beyond the scope of the ILC Statute? The stated aim of the study is to provide “authoritative guidance for those called upon to identify [CIL], including national and international judges”\(^\text{122}\) in order to overcome the problem of finding consensus about the process of formation of CIL.\(^\text{123}\) However, the majority of ILC members have interpreted the scope of the study as to elucidate the process of formation and identification of rules of CIL\(^\text{124}\) rather than the identification of already formed rules. Such an approach implies that at least elements of the process of custom creation possess an objective character, irrespective of the specific customary rules under observation.

The attempt to explain the ‘method’ for identification of CIL, including the process leading to its formation, is meant to mark the difference between the Draft Conclusions and the 1950 study on evidence of CIL.\(^\text{125}\) As it transpires from certain remarks of the Special Rapporteur, his intention was to start a study mirroring the one on interpretation of treaties.\(^\text{126}\) However, the work of the ILC ends up providing an ambiguous set of rules describing the process of formation of CIL.\(^\text{127}\) The desirability of engaging in this type of study has already been denied in an unofficial survey on items that should not be inscribed on the ILC’s agenda.\(^\text{128}\) Recent scholarly contributions have also shown that the international actors able to create custom, and


\(^{124}\) *Note by the Special Rapporteur, supra* note 8, para. 24.

\(^{125}\) “The Commission implementation of Article 24 was, to a significant extent, conceptually distinct from the topic under consideration here. Concerned primarily with the availability and accessibility of materials relevant to evidence of customary law, the report of the Commission identified existing collections of texts and international materials and suggested that the Secretariat prepare certain publications to increase the availability of evidence of potential relevance to international custom.” Memorandum prepared by the Secretariat, *supra* note 9, p. 6, para. 10.

\(^{126}\) *First Report, supra* note 7, p. 5, para. 10.

\(^{127}\) “It is of course not the object of the present topic to determine the substance of the rules of [CIL], or to address the important question of who is bound by particular rules… The topic deals solely with the methodological question of the identification of [CIL]”. *Second Report, supra* note 1, para. 13.

\(^{128}\) As reported in *First Report, supra* note 7, p. 5, para. 10.
chiefly among them the ICJ, do not rely on any specific methodology or approach to identify the existence of customary rules.¹²⁹

The current text of the Draft Conclusions raises a number of questions. One refers to the usefulness of denying the value of clarifying any theoretical approach underpinning the conception of custom adopted by the ILC while at the same time strictly adhering to the letter of Article 38 ICJ Statute and the interpretation given to it by the ICJ.¹³⁰ Such an approach has not even been met by the unanimous approval of the ILC members.¹³¹ Another, and more basic, question refers to the appropriateness of assuming that IOs are agents of states. By doing so, the ILC has in essence denied the relevance of the practice of IOs to the process of custom creation while proclaiming the contrary.¹³²

The lack of clarity about the role of IOs in the process of formation of customary rules also affects the relevance attributed to resolutions as evidentiary sources of custom. The formalistic approach endorsed by the ILC, according to which resolutions adopted by intergovernmental organs reflect the views expressed and the votes cast by states,¹³³ fails to recognize that the resolutions of IOs in general, and those of the General Assembly in particular, have now acquired a systemic character.¹³⁴ Consequently, focussing on individual resolutions as evidence of custom in a decontextualized way does not, and cannot, show the role resolutions play in the process of custom creation. As Franck points out, the General Assembly is the place where politics congeal meaning that states do not adopt resolutions to create or develop international law.¹³⁵ Quite the contrary, they pass resolutions to establish international standards of behaviour to be followed on a voluntary basis. Viewed from this angle, the general remark that resolutions framed in normative language have a special evidentiary value for the purposes of identification of CIL is not entirely convincing.¹³⁶

Another problematic aspect is that Draft Conclusions 4 and 12 are rooted on the assumption that for the purposes of custom creation, resolutions count as acts of states rather than acts of the IOs. A passage from the Special Rapporteur’s third report reads:

¹³⁰ Second Report, supra note 1, para. 17.
¹³¹ Ibid., para. 16.
¹³² Third Report, supra note 26, para. 45.
¹³³ Ibid., para. 74.
¹³⁴ Most of the resolutions adopted by the General Assembly today form part of thematic groups and cannot be read in isolation from each other.
¹³⁶ Supra note 101.
"if one were not to equate the practice of such international organizations with that of States, this would mean not only that the organization’s practice would not be taken into account, but also that its Member States would themselves be deprived of or reduced in their ability to contribute to state practice."\textsuperscript{137}

From this limited perspective, the ILC Draft Conclusions mirror the position of a much criticized strand of scholarship which, moving from the assumption that the General Assembly is a permanent diplomatic conference,\textsuperscript{138} qualify resolutions as acts of states participating in the work of the institution\textsuperscript{139} while denying that they constitute formal sources of international law.\textsuperscript{140} At the same time, the Draft Conclusions recognize that the practice of IOs as such may contribute to the development of international custom.\textsuperscript{141} However, in the plenary debate the Special Rapporteur, faced with criticism by other members of the ILC,\textsuperscript{142} clarified that although the adoption of resolutions can be equated to the practice of states, the practice of the IO is a different issue.\textsuperscript{143} By making this remark, the Special Rapporteur has ended up endorsing another, and radically opposed, understanding of the nature of General Assembly resolutions as acts of the IO rather than of states.\textsuperscript{144}

The overall impression one has of Draft Conclusions 4 and 12 is that they do not either reflect a common position of states or provide any authoritative guidance for practitioners.\textsuperscript{145} Quite the contrary, they confirm that it is impossible to try to make objective an inherently flexible process such as the one of custom creation.\textsuperscript{146} By refusing to engage with the theoretical

\textsuperscript{137} Third Report, supra note 26, para. 77.
\textsuperscript{138} O. Y. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations (Nijhoff, The Hague, 1966) pp. 54 (‘The United Nations is essentially a standing diplomatic conference and its resolutions should be regarded as evidence of state practice’) and 62 (‘The United Nations is a development of the diplomatic conference and represents a form of it’). This view was also expressed by the ICJ in \textit{South-West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)} (1962) ICJ Rep 346. See also Shabtai Rosenne, ‘United Nations Treaty Practice’ Recueil des Cours (1954) 310.
\textsuperscript{139} Asamoah (supra note 138) pp. 50, 54 (“A vote for a resolution is a formal state act. A resolution, therefore, is a collective act resulting from individual acts and represents evidence of state acts”).
\textsuperscript{140} Third Report, supra note 26, paras. 46, 57.
\textsuperscript{141} Ibid., para. 76.
\textsuperscript{142} See, for instance, Summary record of 3251\textsuperscript{st} meeting (A/CN.4/SR.3251), p. 8, statement by Park.
\textsuperscript{143} Fourth Report, supra note 49, p. 20, para. 7; A/CN.4/SR.3250, pp. 10-11.
\textsuperscript{144} According to this stream of scholarship, resolutions are formal manifestations of the opinion of the IO and, as such, represent “the culmination of [the organization’s] deliberative and decision-making process”. Jorge Castañeda, Legal Effects of United Nations Resolutions (Columbia University Press, New York, 1969) pp. 1, 3 and 5-6 (also arguing that resolutions are a means to achieve the objectives of an international body, but not sources of international law).
\textsuperscript{145} Cf. Summary record of 3301\textsuperscript{st} meeting (A/CN.4/SR.3301), pp. 12-13, statement by Wood (acknowledging that the precise role of IOs in the process of custom creation and identification continues to be debated); Summary record of 3339\textsuperscript{th} meeting (A/CN.4/SR.3339), pp. 3-6 (on the lack of agreement on the role of IOs in the process of custom); and Fourth Report, supra note 49, p. 5, para. 19.
\textsuperscript{146} As also recognized by the ILC in the Second Report, supra note 1, para. 12. On the spontaneous character of custom creation, see also Summary record of 3251\textsuperscript{st} meeting (A/CN.4/SR.3251), p. 5, statement by Forteau; J.
underpinnings of CIL as a source of international law, the ILC has deliberately left open the
option for practitioners to pick and choose the conception of custom as well as the one of
resolution that best fits their particular needs. In this respect, the ILC study has failed to achieve
its goal of providing authoritative guidance.

6 Conclusion
The ILC study on identification of CIL represents a very ambitious attempt to clarify vital
aspects of the process of creation of the most elusive source of international law. Whatever the
outcome of the ongoing discussion of the Draft Conclusions by states, once approved by the
General Assembly the final text will become authority in the field by virtue of the prestige of
the ILC, to which the study was commissioned in 2012. To a certain extent, the current text of
the Draft Conclusions formalizes a number of shared assumptions among practitioners relating
to the structure of a customary rule, chiefly among them the two element approach. However,
it may also be argued that, in relation to the role of IOs in the process of custom creation, the
ILC has gone a step too far by blending elements of established international practice with
theoretical assumptions unrelated to such practice, like the recognition that acts of IOs endowed
with exclusive competence can create customary rules simply by virtue of their adoption
irrespective of considerations of subsequent state practice and acceptance as law. As a result,
the Draft Conclusions on the practice of IOs are not entirely coherent.

Narrowing down the focus of the study to the practical issue of identification, rather than
the more theoretical one of formation, of CIL may help eliminate the ambiguity of the role of
IOs in the process of custom. As it is currently formulated, the text of the Draft Conclusions
does not provide practitioners with useful guidelines to determine which practice, and under
what circumstances, might contribute to identify an existent customary rule. In this regard, the
simple reference to the probative value of certain General Assembly resolutions is not sufficient
to provide any authoritative guidance on the process of legal analysis required to ensure that a
rule of CIL is properly identified. Perhaps, it would be useful to provide, at least in the
Commentaries, a more thorough explanation of how a specific resolution has contributed to the
development of CIL. A comparative analysis with the resolutions of other IOs would also be a
welcome addition. Last but not least, the ILC should revisit the formulation of Draft Conclusion
12(2) and draw a distinction between resolutions adopted by IOs and resolutions adopted at

D’Aspremont, Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules
international conferences, since the former are expression of the will of the IO whereas the latter express the collective will of the participating states.

Some of the suggested recommendations imply a radical departure from the method of identification of CIL proposed by the ILC. They may not make the Draft Conclusions particularly original in the light of the 1950 study of the ILC on CIL, but at least they would increase the degree of coherence of the current text making it more compliant with the stated goal of the study.