

CHAPTER 7

THEORIZING THE SOURCES OF INTERNATIONAL LAW

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I. Introduction

Although, and probably because, it is one of the most central questions in international law, the identification of the sources of international law, that is, its law-making processes, remains one of the most difficult. Not only is it important in practice to identify valid international legal norms and the duties that stem from international law. It also implies understanding the nature of international law itself, i.e. the *legality* of international law.¹ Furthermore, determining the sources of international law also means (briefly) explaining some of the origins of its *normativity* and claim to authority, but more importantly of its *legitimacy* and justification in imposing exclusionary reasons to obey on its subjects. p.164

1. Legal Accounts of the Sources of International Law

Interestingly, the question of sources is often met with placative confidence among international legal scholars. It is usually solved by reference to the formal sources of international law, and in particular to the now largely obsolete but still venerated triad of sources one finds in Article 38 of the 1945 International Court of Justice (ICJ) Statute: treaty law, customary law, and general principles, complemented by other sources usually deemed as ‘ancillary’ or ‘auxiliary’, that is, the case law and the writings of eminent specialists. The first drawback of those legal accounts is to unduly corset international legal sources in state-like categories despite important differences in practice.

First of all, international *law-makers* are of a collective nature, i.e. mostly states and international organizations (IOs), and only sometimes individuals, whereas law-makers in the national legal order are individuals. There, individuals are the primary law-makers, albeit not in their private capacity: either directly *qua* citizens or indirectly *qua* officials. In international law, by contrast, there is a plurality of different law-makers and they usually take part in international law-making processes individually rather than officially in the name of an international political community. Traditionally, states have been the prevalent international law-makers and have produced alone laws that apply not only to them, but also to other international subjects such as IOs and, more and more, to individuals. As a consequence, there is a widespread lack of congruence between international lawmakers and legal subjects, whereas that congruence is the main claim of democratic constitutional municipal orders.

Second, the *law-making process* is mostly legislative in national legal orders, with other sources retaining a minor role, whereas there is currently no single world legislator in the international legal order and hence a plurality of equivalent sources of international law. As a result, those sources have always been and are increasingly intermingled in their respective processes and they influence each other mutually.

Of course, treaty-making has been prevalent and increasingly so, but customary law traditionally constitutes the backbone of general international law and has been strengthened in recent years by the development of multilateral treaty-making and codification processes. Finally, the national *legal order* is usually centralized and unitary with a hierarchy among sources and even among various areas of national law, whereas the international legal order

is vertically pluralistic in the absence of a hierarchy among legal sources, on the one hand, and horizontally pluralistic or fragmented in many parallel legal regimes on different matters but also in different regions, on the other.

A second difficulty with current legal accounts of the sources of international law is their relative blindness to the important changes that have occurred in p.165 international law-making in recent years. Through the so-called legalization of international law, its density has increased with more legal norms being adopted over more issues previously left to national law-making processes and by many lawmakers at the same time.² First of all, international *legal subjects* have multiplied and with them the potential scope of law-makers, thus threatening the legal monopoly of states *qua* law-makers in favour of international organizations and, to a lesser degree, individuals.³ Second, with the emergence of new law-makers, international *law-making processes* have become institutionalized and evolved towards similar multilateral and quasi-legislative processes. Finally, and as a result, international law's *normativity* has also evolved drastically: from being subjective international law has become more objective, from relative it has turned more universal and, in terms of degree of normativity, it now ranges from low-intensity or soft law to imperative law.

2. Philosophical Accounts of the Sources of International Law

Traditional philosophical accounts of the sources of international law also offer a skewed view of international law-making. Theories of international law are often starkly contrasted, with legal positivism, on the one end of the spectrum, and natural law theory, on the other. This contrast leads to a Manichean opposition of treaty-law *qua* posited law, on the one side, to customary law and general principles *qua* natural law, on the other.

An important reason for this opposition lies in the central feature of the modern international legal order, that is, the equal sovereignty of states. This principle has implications for international law's authority: *pacta sunt servanda*, i.e. the principle according to which states are only bound by the laws they have consented to.

Consensualism can mean three things in terms of international law's authority: international law can only be subjective in content, i.e. limited to what those states have consented to; it can only be relative in (personal) scope, i.e. limited to those states which have consented; and it can only be of one single degree, i.e. the one set by the consent of each and every state. No wonder therefore that this binary opposition was translated in terms of a stark opposition between legal positivism p.166 and natural law theory. In terms of legal validity, indeed, consensualism implies legal positivism, i.e. the account of law which links its validity to its being posited, as opposed to natural law theory, which links the validity of law back to its moral content.

The difficulty with this approach to legal validity and to legal sources is double, however. First of all, consensualism is primarily an approach to normativity and to legitimacy and not—at least immediately—to legality. Moreover, as we will see, state consent can no longer be deemed as the most important source of normativity and legitimacy in international law. It is important therefore that the theory of sources of international law be clearly separated from the latter. The problem, however, is that legal positivism is often coined as necessarily consensualist in international law, and the reverse is also true: a non-consensualist approach to international law and legitimacy is only deemed as plausible in a natural law framework. The second difficulty, therefore, is that legal positivism does not necessarily imply consensualism and its opposition to natural law theory has been seriously exaggerated. There is nothing about legal positivism that is incompatible with objective, universal, and imperative international law. Nor, more importantly, does legal positivism contradict majoritarianism. As a result, the opposition between legal positivist and natural law accounts of international law is far less diametrical than it is alleged to be.

The aim of the present chapter is to develop a theory of the sources of international law that takes up those different challenges. Its purpose is not, therefore, to provide a detailed discussion of all sources of international law.⁴ Theorizing international law does not amount

to descriptive sociology, but sets standards for a coherent and legitimate international legal practice. As a result, it is as normative as the processes it purports to explain. There are, it shall be argued, normative grounds for positing international law and adopting a positivist approach to the sources of international law, and these are in particular grounds of global justice and peaceful cooperation among equal international subjects whose conceptions of justice diverge. The proposed account of international law relies on a democratic theory of sources, according to which the democratic nature of the international law-making process makes for the conditions of equal respect and inclusion of all those affected, necessary for legal coordination among different subjects of international law in conditions of pervasive and persistent moral and social pluralism. p.167

II. Public International Law and Its Sources

1. Public International Law

a. Notion

In a nutshell, one may say that public international law is a set of legal norms pertaining to the international community and to the cooperation between international legal subjects, whether states, international organizations, or, less frequently, individuals.

First of all, the *international* dimension of international law should be understood as broader than *interstate* or *intergovernmental* law, since its subjects, object, and law-making processes now implicate individuals and IOs as much as states. In fact, international law also differs from other forms of law generated beyond the municipal level such as *supranational* law. The difference between international and supranational law has been said to revolve around the decision-making procedure (unanimity versus majority-rule), the personal scope of the law produced (relative versus universal), and the origin of its normativity (subjective versus objective). Nowadays, however, the development of multilateral and majoritybased international law-making provides a good example of the increasing overlap between those categories.

What is strictly speaking international as opposed to *national* about international law no longer lies in its subjects nor in its objects; certain international legal norms now apply directly to individuals in national territories (even without national transposition or specification in national law) and overlap with other national and regional norms over the same territory and the same legal subjects, since they address at least in part the same objects. Nor can the difference be traced back to the law-makers since individuals have become law-makers in certain regional and international law-making processes as in the European Union (EU). The difference must therefore lie in the law-making processes themselves or, in other words, in the sources of international law: international law-making processes take place above the national state or sometimes inside it, but by implicating other subjects than the national law-makers only. It is important, in other words, to distinguish carefully the *sources of national, regional, or international law* from the *national, regional, or international sources of the law* applicable at each and every layer of the complex global legal order. p.168

Second, international law is sometimes referred to as *public* international law.

For a long time, international law was the product of a law-making process between states only and its object was inter-state relations only, thus making it public both in respect of its subjects and objects. Nowadays, however, there is no longer much that is only public about international law whether in its legal subjects and its law-makers (which also include individuals) or in its objects (which also include private relationships). As a result, it is the public or, more exactly, the official nature of the international law-making process itself, by contrast to mere inter-state contracts or transnational forms of private regulation,⁵ that makes international law public. In this context, the international law-making role of individuals should be thought of as official, taking part in processes where states participate *qua* officials and where individuals participate *qua* post-national citizens or accountable representatives as in the EU and not only *qua* bankers, NGO lobbyists, or natural resource dealers.⁶ Whereas

private norms are a common feature of autonomous regulatory mechanisms in certain areas of national law as well, they are not usually regarded as sources of law, but merely as legal acts empowered by law to give rise to legal obligations in specific cases.⁷

b. Distinctions

International law is often divided between *general* international law and international law *tout court*. In principle, law is by definition general in its personal scope as opposed to a relative source of mutual obligations. The distinction can therefore only be one among legal obligations as opposed to sources. The personal scope of a specific obligation, as when it is *erga omnes* or *omnium* for instance, is not necessarily a function of its sources. As a result, the universality of international law should not be confused with its generality that is a quality of its being law; international law applies *per se* to an indefinite number of subjects provided they qualify with the conditions set by each legal norm (generality) and it is then up to each legal norm to define its personal scope more or less universally. The distinction is made difficult in international law, however, because, contrary to national law, certain sources of general law, like treaty-law, usually give rise to non-general legal norms.⁸

What the distinction means therefore is, first of all, that general international law is the kind of international law that applies to all international legal subjects, like customary law or general principles, while international law *tout court* applies only p.169 to those subjects which are its law-makers as with most kinds of treaties. Of course, this does not exclude all treaties from the scope of general international law;⁹ many of them regulate all legal subjects and, even when they regulate the case of certain states only, as with treaties applying to states with a seashore, they are general in their specific personal scope. In fact, the distinction between general and non-general treaty-law is becoming increasingly moot, as demonstrated by the third-party effect of certain multilateral treaties, the development of so-called world-order treaties and, more generally, what one may refer to as the 'customization' of given parts of multilateral treaties.¹⁰

International law can also be deemed as *general* in a second sense. It is opposed to the specific international law stemming from so-called special regimes.¹¹ The difference here is not (only) one of personal scope, but one of material scope and more precisely of specificity of the legal norms at stake. Special regimes regulate a functional area of law, as with World Trade Organization law, or a specific territory, as with EU law. The distinction has been heavily contested of late given the progressive consolidation of a background general regime common to all international regimes; this is the case of the international responsibility regime or treaty-making procedures.¹² In fact, one may argue that special regimes are not so different from specific material regimes in national law. As we will see, they are not autonomous legal orders—with the exception of EU law which is not only a special regime, but arguably also a self-contained and independent legal order—but merely groups of specific legal norms with territorial or material specificity in application.

2. Sources of Public International Law

a. Notion

The sources of law are all the facts or events that provide the ways for the creation, modification, and annulment of valid legal norms.¹³ Sources of international p.170 law refer to *processes* by which international legal norms are created, modified, and annulled, but also to the *places* where their normative outcomes, i.e. valid international legal norms, may be found.

A first distinction ought to be drawn between *formal* and *material* sources of international law; the latter refer to all the moral or social processes by which the content of international law is developed (e.g. power play, cultural conflicts, ideological tensions), as opposed to the formal processes by which that content is then identified and usually modified to become law (e.g. legislative enactment).

Second, formal sources of international law *stricto sensu* should be kept distinct from so-called *probationary* sources, i.e. places where one finds evidence of the outcome of the law-making process. It is important in this respect to distinguish the documents issued by the

law-making process from the outcome of that process; not all international law-making processes result in a document evidencing their outcome. Often, of course, distinguishing material and probatory sources from formal sources of international law becomes rather artificial. For instance, in the case of a custom *qua* formal source of customary law, the latter is difficult to distinguish from the material source of those customary norms, that is, the practice or *consuetudo*, and from its probatory source, for example, a United Nations (UN) General Assembly Resolution which attests of an *opinio juris* or of an existing and widespread practice.¹⁴

International law-making processes can give rise to complete legal norms (*lex lata*), but also to intermediary results such as legal projects (*lex ferenda*);¹⁵ both types of outcomes may have the same sources and are part of the same law-making processes. Intermediary legal products, although they are not yet valid legal norms, may be vested with a certain evidentiary value in the next stages of the law-making process. Thus, non-binding UN resolutions may provide evidence of both state practice and *opinio juris* which might then support the final development of a customary norm. This is what is often meant by the distinction between hard and soft law,¹⁶ although soft law is also sometimes used to refer to *lex lata* and hence to valid legal norms whose degree of normativity is very low.¹⁷ Given the plurality of international law-making processes, it should come as no surprise that such intermediary or incremental legal products may be important both in quantity and quality. While many regret the lack of a clear passage from non-law to law in the international legal practice, soft law provides a useful source of coordinative p.171 norms. This is even more important as soft law-making processes are usually more multilateral and inclusive than others, and implicate more IOs and individuals.

b. Distinctions

International law-making processes should be distinguished from their outcome: the great variety of *international legal norms*. Certain international legal norms may be found in different sources, of which only the first one created the norm and the latter amended or re-edicted it to give it another personal or material scope. As a result, sources of international law should also be distinguished from their outcome's personal scope or degree of normativity. Thus, contrary to what one often reads, soft law is not a source of international law; it is a kind of intermediary international legal outcome whose legality might be questioned and hence whose normativity *qua* law is almost inexistent. Soft law may stem from many sources of international law and not only from unilateral acts. Nor is *jus cogens* a source of international law; it is a kind of international legal norm whose degree of normativity is the highest, but which may be found in various sources of international law.

Second, if international legal norms ought to be distinguished from their sources, legal obligations ought to be distinguished from legal norms. International legal norms create *legal obligations* which are general and abstract, but not all international legal obligations arise out of legal norms. For instance, certain relative obligations may arise out of specific international agreements without corresponding to general obligations. Whereas in principle all sources of international law including treaties, like any source of national law, should give rise to legal norms and hence to general obligations, this is not true of all treaties. Legislation-like treaties give rise to general obligations, while contract-like treaties only provide relative and reciprocal obligations.¹⁸

Finally, one sometimes finds mention of an intermediary layer between the international legal norm and its source: that of the *legal act* by which legal obligations are created. The difficulty with this intermediary step is double: first, it only exists in the case of voluntary or subjective sources of international law, as with the exchange of consent in the treaty-making process, and, second, it begs the pre-existing question of the source itself.¹⁹ Indeed, if the exchange of consent is able to create general legal obligations, it is because treaty-making is in itself a source of general international law. The problem is that, contrary to contracts in national law, certain treaties are sources of international law *stricto sensu*, while others are legal acts and cannot produce general legal obligations. p.172

III. Sources and the Legality, Normativity, and Legitimacy of International Law

1. The Sources of International Law and its Legality

a. Legality and International Law

Legality is the normative quality of legal norms as opposed to other social norms and hence the quality of a legal order in general as opposed to other kinds of social orders.

In a stronger and more substantive sense adopted here, legality is also often associated with the political ideal of the *Rule of Law*. To identify a society as having a system of law, as opposed to some other sort of order, is to identify it as satisfying some or all of the requirements associated with the Rule of Law.²⁰ The Rule of Law celebrates features of a well-functioning system of government such as among others publicity and transparency in public administration, the generality and prospectivity of the norms that are enforced in society, the predictability of the social environment that these norms help to shape, the procedural fairness involved in their administration, the independence and incorruptibility of the judiciary, and so on. More precisely, it identifies a society where those in power exercise it within a constraining framework of public rules rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.

As a result, legality is also a matter of the quality of the law's sources. The law-making processes by which we identify valid legal norms should themselves be such as to satisfy the requirements associated with the Rule of Law. The same should be said about the legality of international law. International law-making processes should therefore be such as to satisfy some of the requirements associated with the *Rule of International Law* and in particular the requirements of clarity, publicity, certainty, equality, transparency, and fairness.²¹

b. International Legality and the Sources of International Law

The contours of the Rule of International Law are less well defined than at the national level and primarily so because the main international legal subjects are p.173 states. The indeterminate nature of the ideal at the international level should not, however, hide the fact that the ultimate legal subjects of those laws are individuals, whether indirectly or, and increasingly so, directly and that when states act as law-makers, they act not only as subjects of international law, but also as officials.²²

As a consequence, there is no reason not to vindicate that ideal in international law as well.²³ The connexion between the Rule of International Law and the quality of the sources of international law explains why the idea of illegal international law propounded by some authors²⁴ does not pay sufficient heed to the value in the legality of international law and hence to the normative requirements this value imposes on its law-making processes. These normative requirements inherent in the very legality of international law—together or possibly by contrast to those relative to its procedural or substantive legitimacy—make it counterproductive to hope for the illegal making of international law whatever the urgency of the matter.²⁵ In the long run, and despite the occurrence of such forms of illegal law-making in the current circumstances of international law, international law's legality will only be able to consolidate itself if its law-making processes are organized so as to reflect the very values inherent in the Rule of International Law.

2. The Sources of International Law and Its Normativity

a. International Legality and Normativity

Legal normativity corresponds to the law's claim to authority, that is, its claim to provide its legal subjects with exclusionary albeit *prima facie* reasons for action through binding legal

norms or in other words its claim to create obligations to obey the law that in principle preclude some countervailing reasons for action.²⁶

By contrast to the plain normativity of social rules in general, legal rules are characterized by their claim to exclusionary normativity. p.174

The same may be said of the normativity of international law. International law claims to give its subjects, whether states, international organizations or individuals, exclusionary albeit *prima facie* reasons for action. Of course, these differ depending on the subjects; individual and collective agents cannot necessarily abide by the same reasons, or at least not in the same ways. They also differ depending on the law-makers. When states are only binding themselves through treaty obligations, the reasons they need to provide are different from those they have to provide when they also aim at binding other states non-parties and other subjects of international law.

b. International Normativity and the Sources of International Law

The normativity of a legal rule may vary in degree, in personal scope, and in sources, depending on the values underlying a legal norm. International legal norms as well may have different degrees of normativity: their normativity can range from being low (or soft)²⁷ as with legal norms in the making to being imperative as with norms of *jus cogens*. International legal norms may also have different personal scopes: some may have a general *erga omnes* scope, while others may be relative to a few subjects (even though the obligations are general). Finally, the quality of the normativity of international legal norms may vary: some international norms may have only a subjective authority due to their consensual origin, while others may, on the contrary, draw their normativity from their objective nature.

As a matter of fact, international law's normativity has increased and diversified over the years, and with it have emerged difficult questions pertaining to international legal norms' universality, objectivity, and hierarchy. Prosper Weil's fears about what he called the 'relative normativity' of international law have now been confirmed in practice:²⁸ some international legal norms bind subjects who have not agreed to them (e.g. third-party effect of treaties) or who have expressly objected to them (e.g. limitations on persistent objections to customary law), be they states or individuals; they bind them even if they have made reservations when agreeing to them; and, finally, they sometimes bind them in an imperative fashion.

This does not yet mean, however, that all questions pertaining to the normativity of legal rules are specific to their legal sources. On the contrary, there are good reasons for keeping legal sources apart from the question of international law's normativity. While normativity is linked to legality, its degree and personal scope do p.175 not directly depend on the sources of international law, but on each international legal norm. The same sources may give rise to soft and imperative norms and to general or relative norms. For instance, a treaty may entail *erga omnes* and relative norms, while UN resolutions may contain *jus cogens* norms as much as so-called soft law. Moreover, certain treaty-based norms such as human rights have become objective law, while others still accommodate consent-based inroads such as reservations. Finally, while a *jus cogens* norm is usually *erga omnes*, there are *erga omnes* rules which are not imperative.

As a consequence, the recent evolution in the normativity of international law does not *per se* threaten the equivalence of sources of international law or the generality of international law; if the latter are threatened, it is for reasons broader than changes in the sources of international law. It is merely the effect of the coming of age of the international legal order. Progressively, indeed, the international community is emerging through legalization and constituting itself through the recognition of certain values recognized at law, values whose degree and personal scope may vary.²⁹

3. The Sources of International Law and Its Legitimacy

a. International Legality, Normativity, and Legitimacy

The legitimacy of law refers to the justification of the law's claim to authority and of its normativity. Reasons traditionally brought forward for the legitimacy of law are multifarious and range, very schematically, from consent to justice.

The same diversity may be found relative to international law's legitimacy. As we saw in the introduction, the traditional ground put forward for international law's legitimacy is *state consent*. This explanation fails to convince entirely, however, both *per se* for well-known reasons and, in international law, for reasons related to the emergence of new subjects of international law and the development of its law-making processes.³⁰ Without going all the way to the other end of the spectrum, and arguing that international law's legitimacy stems from natural duties of *justice*, with the well-known epistemological difficulties and other complexities linked to moral and social pluralism this approach implies, one may suggest a middle path explanation of the legitimacy of international law. The proposed account explains both the duty to constitute an international legal order and the duty to obey some of its legal norms. p.176

To start with, one may argue for the duty to create a positive international legal order to secure peaceful cooperation over matters of global justice.³¹ The legitimacy of international law might be better explained therefore by reference to the duty to coordinate on issues of justice, and in particular the duty of peaceful cooperation among equal international subjects whose perspectives about issues of global justice and governance are bound to diverge. In those circumstances, international law is the most adequate means of signalling the intention to coordinate and of securing clear and efficient coordination among different international legal subjects.

With respect to the duty to obey international legal norms themselves, second, one should start by emphasizing that there is no general *prima facie* obligation to obey the law *qua* law. Legality alone is not a sufficient ground for legitimacy. At the same time, the authority of a given legal norm should not be conflated with that stemming from the correct moral content of the legal norm; the reasons it gives are content-independent and are specific to its legal nature. As a result, following Raz's normal justification thesis, a given legal norm can be said to have legitimate authority when it matches pre-existing moral reasons, but in such a way that the person is in a better position to comply with the latter if it complies with the former. Although legality in itself is not sufficient for legitimacy, it is an important part of it; the law binds differently from a moral norm of the same content because it is law and this is due to the ways in which the law can signal participants' intention to coordinate and abide by a certain rule by reference to social facts.³²

Of course, signalling and coordinating is not enough; there must be something about the way the law signals that calls for obedience in each case. If this is so, legitimacy is an essential part of legality, in the sense that the law should be made in such a way that it *can claim* to be legitimate and hence to bind those to whom it applies. This in turn means that the sources of law, i.e. the law-making processes, should be organized so as to vest the law with a claim to authority. In circumstances of pervasive and persistent disagreement about substantive moral issues and justice, the *democratic* nature of the law-making process is often regarded as the best justification for that claim.³³ It allows for a decision to be made by coordination, while also respecting the equality of all participants and their own individual reasons—at least by taking turns in getting the final word on controversial issues. p.177

b. International Democratic Legitimacy and the Sources of International Law

Because legality alone is not enough for the legitimacy of international law,³⁴ international law should be made so that it can claim legitimacy.³⁵ It follows from what was said of democracy *qua* most respectful source of legitimacy in pluralist societies that international law should be produced according to democratic procedures that vest its norms with legitimacy. This coordination-based approach to legal legitimacy is suited to international law as the latter applies to very different subjects and in very different places in the pluralistic international community.³⁶

This is not the place to give a full account of what the democratization of international law-making could amount to. In a nutshell, global democracy groups all democratic processes that occur within and beyond the national state and whose outcomes affect individuals within

that state, but in ways that link national democracy to other transnational, international, or supranational democratic processes.

As I have argued elsewhere, the best account of international legitimacy is a *democratic* account, that is, an account based on the functional and territorial inclusion (pluralistic) in national, regional, and international law-making processes, and at different levels in those processes (multilevel), of all states (and groups of states) *and* individuals (and groups of individuals) *qua* pluralistic subjects of the international political community (multilateral), whose fundamental interests are significantly and equally affected by the decisions made in those processes.³⁷

Of course, democratic international law will not always be *substantively* legitimate in practice, but in conditions of moral disagreement it is sufficient that it can justifiably claim to be such. This is the case if it is *procedurally* legitimate and respects the political equality of all participants. This does not, however, preclude the coexistence of other sources or enhancers of legitimacy of international law, such as justice or state consent in certain more limited cases. Nor does it imply that all sources of international law should become democratic to be vested with legitimacy; some simply cannot for reasons pertaining to their law-making process³⁸ and draw their **p.178** legitimacy from other justifications and may call for respect on grounds of state consent. However, even in the latter cases, one may identify democratic probationary processes to attest of the existence of norms of non-democratic sources. Finally, democracy requires minimal guarantees of human rights to function properly and these should therefore be part of the legitimating processes of international law besides democracy.³⁹

IV. A Democratic Account of the International Legal System

1. International Secondary Rules

If international law is to be considered as a system of law and not only a set of rules, sources of international law should be organized according to *secondary rules*; these rules identify in advance the ways in which primary rules of international law may be validly created, modified, and annulled, that is, the processes of international law-making. This requirement follows from the argument made before about the *International Rule of Law*, but also about the circumstances of *international democratic legitimacy*.

Of course, some may claim, following Hart,⁴⁰ that international law is not yet sufficiently developed to be regarded as a legal system. On such an account, international subjects would know how international legal rules are created, amended, or annulled simply by observing or not observing them at each moment in time.

This critique is largely obsolete, however, and shows too little respect for the *facts of international law*. Numerous secondary rules may be retrieved in international law nowadays. They can be of various legal origins: some are treaty-based like the Vienna Conventions on the law of treaties, while others are customary like the secondary rules pertaining to the creation of customary law. Of course, secondary rules are less determinate in international law than they are at national level. This is due to the scope and density of the international law-making process, but also to the extreme variety between its different sources and their respective processes, on the one hand, and to their complementarity and overlap in practice, on the other.

A common critique at this stage is that there can be no secondary rules about international *customary law-making*. The importance of the practice of coordination in the creation of the norm seems indeed to imply that creating a new norm always paradoxically implies breaking the previous one.⁴¹ The greater weight recognized in **p.179** practice⁴² to the *opinio juris* proves, however, that state practice is often elusive,⁴³ or at least that, when a new customary norm is about to arise, it is unlikely that the previous norms will be respected extensively in practice and this without,

however, threatening the existence of the norm. A customary norm, once created and confirmed by state practice, can subsist without being respected actively and even despite

being violated by some. Holding the contrary would mean conflating the creation and content of a legal norm with the practice of those respecting it.

In this context, Tasioulas distinguishes between the *opinio juris* that is necessary to create a customary norm and the *opinio juris* that one needs to maintain it in force. While the former seems paradoxical (it requires mistakenly believing that something which is about to become law through being practised as such is already law), the latter is perfectly understandable once the customary norm has been created.⁴⁴ The paradox can be lifted away even further by considering the first *opinio juris* as the expression of the belief that others will keep their coordination commitment and that one should therefore abide by the outcome of coordination. Since this first *opinio juris* is actually the belief that all participants in the coordinative practice need to have to then be able to coordinate and hence create this legal norm, one may expect it to differ in its expression from the further *opinio juris* relative to the persistence of an existing customary norm. Thus, the difference between a mere breach of customary law and a legal change of customary law must lie in the way in which the coordination around the new customary norm is signalled and hence in the way the new practice that will give rise to the new norm is organized.

This is actually confirmed by the ways in which customary law-making procedures are developing, making increasing use of multilateral law-making arenas to ascertain the existence of an *opinio juris*. One of the advantages of these mechanisms lies precisely in the fact that they match the requirements of the international Rule of Law, such as transparency and inclusion, and those of international democracy through their quasi-legislative iterative and deliberative qualities. Of course, one may claim that these mechanisms are evidentiary at the most, rather than law-making processes *per se*. Even so, however, they constitute a signal that is respectful of all international subjects' equality and necessary to coordinate legitimately on customary norms. This suffices to draw a line between secondary rules about customary law-making and customary law-making itself. p.180

2. The International Rule of Recognition

a. The Single and Finite Rule of Recognition

For the rules regulating the international law-making processes to be respected as secondary rules, the international system needs a rule of recognition, that is, a rule which identifies the secondary rules and hence the sources of valid international law. It is the rule by reference to which the validity of the other rules in the system is assessed, and in virtue of which the rules constitute a single system.⁴⁵ As a matter of fact, having a rule of recognition constitutes one of the normative requirements of the International Rule of Law and of democratic legitimacy in the international legal order. The identification of an international rule of recognition is not a 'luxury', contrary to what Hart would say,⁴⁶ but a requirement in a democratic international community in which participants should be able to constitute themselves as such in advance and determine together the legal processes by which they will bind themselves in the future.

First of all, having a rule of recognition implies identifying a *finite number of sources* or else the canonical and signalling function of legal norms as opposed to other social norms would not arise. *Prima facie*, of course, the list of sources of international law seems to be less determinate and hence finite than in national law.

Even if recent years have seen an important development in international lawmaking procedures, not all of the new law-making mechanisms constitute new sources of international law, however. Thus, the extensive development of soft law as opposed to hard law is a sign *a contrario* of the existence of a finite and precise list of formal sources of international law. Moreover, these new instruments serve a finite list of law-making processes; thus, multilateral conferences and instruments are used to produce customary law, treaty law, or general principles. What they show is an increasing convergence in terms of law-making procedures and lawmakers among the different sources of international law. While those sources and their processes can still apply in many cases as they always did,⁴⁷ their outcomes are increasingly reached following the same multilateral, inclusive, and quasi legislative procedures. This qualitatively important, albeit quantitatively limited, convergence may be taken as a sign of democratization of international law-making processes.

Secondly, the international rule of recognition should in principle be *single*. If sources of law help us identify signals for coordination from others, it is important that the list of sources is unique to avoid conflicting signals. In terms of origins, p.181 the source of sources of international law cannot itself be legal, at least in a common sense of stemming from the very sources it identifies. This is why rules of recognition are usually constitutional in a constitutive sense, although they need not be written.

At this stage, there is no international constitution in a formal (and entrenched) sense that might entail such a list of sources.⁴⁸ There clearly seems, however, to be coordination over the three formal sources of international law mentioned before and, increasingly, over the extension of the triad of sources to two further sources: unilateral law issued by states but most importantly by IOs, on the one hand, and non-conventional concerted acts issued by states, on the other.⁴⁹ Confirmation of this coordinative practice on sources may be found in various lists of sources available in positive international law and in particular in arbitration conventions' lists of applicable law.⁵⁰ The most universal list to date is, of course, the list of the law applicable by the ICJ in Article 38 ICJ Statute. True, the latter only applies to the International Court of Justice and dates back to 1945. But many of the lists of sources in municipal law are equally limited and dated.

b. The Rule of Recognition and the Plurality of Sources

The existence of a single international rule of recognition does not equate with the existence of a *hierarchy of sources of international law*. There is none to date since there is no general priority of the norms issued by one source of international law over the other and this even in the context of general international law. This is confirmed by the evidence one gets from existing lists of sources such as Article 38 ICJ Statute, despite its numbering and the reference to subsidiary means for the determination of rules of law. This is also what one may coin (*internal*) *international vertical pluralism*. In fact, there is nothing about the existence of a rule of recognition, however, that requires a hierarchy among the sources recognized by the rule of recognition.

It is not because rules of recognition are usually entrenched in formal constitutions at national level, that they require priorities among other sources of national law. All that is required is that the rule of recognition itself is protected through entrenchment from secondary rules of change, i.e. from the sources of primary law in a given legal order. This implies, in other words, a *superior rank in the legal order* and, as a consequence, autonomous secondary rules of change. This clearly seems to be the case of the current list of sources of general international law and of p.182

Article 38 ICJ Statute in particular. Historically, the quasi-universal compromise on Article 38 was difficult to attain. Nowadays, it could not realistically be discarded without quasi-universal state assent.⁵¹

More positively, there are democratic reasons for the absence of hierarchy of other sources in general international law, with respect to both process and content.

One of the first reasons to recognize a hierarchy of sources is to acknowledge the superiority of certain law-making processes over others in terms of their legitimacy and in particular of the *democratic quality of the processes*. In national law, the superiority of the legislative process over customary law lies in its democratic inclusion and majority-based functioning. Given the embryonic democratic dimension of international law-making processes and the lack of perfect overlap between the different international law-makers, it does not come as a surprise that sources of international law are still deemed as equivalent in rank.

Another reason for the absence of hierarchy of sources of international law might be related to the *content of the norms* issued according to certain sources. Thus, in the national legal order, fundamental rights are usually protected by constitutional law and their ultimate value explains the need to make their source hierarchically ultimate. Constitutional entrenchment provides a first barrier of agreement against pervasive disagreement, but also an agreement to disagree further about the detail of the values entrenched and their respective normative strengths.⁵² Here again, the fact that international legal norms protecting important values are scattered across different legal sources does not favour the formal prioritization of some of them over others according to their source. In fact, the diversity of law-makers and the moral and cultural pluralism that prevails at the international level might explain the fear of quasi-

constitutional entrenchment of certain international legal sources over others. Thus, although *jus cogens* norms are imperative and cannot be infringed, their revision process corresponds to the processes of revision applicable to their sources in each case, whether treaty-based or customary; there are no mechanisms of entrenchment barring change in their content other than that of the degree of normativity of the norm replacing them in the eye of the international community (see e.g. Article 53 Vienna Convention on the Law of Treaties).

Similarly, even though international secondary rules about law-making processes are usually normatively weightier, as in the case of the equal sovereignty of states or *pacta sunt servanda*, their sources can be treaty-based or customary and usually both, without a higher ranking of their sources over those of primary norms of international law. p.183

Of course, the absence of a hierarchy of sources of international law does not affect the numerous *hierarchies of international legal norms*.⁵³ Sometimes, the priority of norms stems from the degree of their normativity as in the case of the priority of *jus cogens* norms over other international norms. This is also what one calls *material* hierarchies of norms. As a result, if one may argue that certain international legal norms have a constitutional status, it is in terms of normative weight and by reference to their content rather than to their formal source. The material nature of international constitutionalism confirms that the decentralization, and what some have called the fragmentation, of international law, are not something to be feared, but on the contrary a constitutive and democratic feature of international law. Of course, the more democratic the international law-making procedures, the more hierarchical the sources of international law might become.

c. *The Rule of Recognition and the Plurality of Legal Regimes*

The existence of a rule of recognition in general international law does not equate with the existence of a *hierarchy of regimes in international law* either. There is no such hierarchy to date given the fragmentation of the international legal order between different legal matters and regions, and what one may refer to as (*internal*) *horizontal legal pluralism*.

Of course, the progressive consolidation of a background regime of general international law common to all special international regimes is now accepted. As a result, the rule of recognition and secondary rules of general international law are also common to other regimes of international law, as far as sources of general international law are concerned. The sources of law in those special regimes are determined within those regimes, only provided they differ from those of general international law; if they do, however—which does not seem to be the case at the moment, except in EU law which has become a self-contained regime—those regimes have actually become separate legal systems or at least separate sets of rules.

The existence of a rule of recognition of international law (with its minimal entrenched content) common to all regimes of international law does not provide a rule of conflict when norms from the general regime conflict with those of special ones. All we have, besides normative hierarchies based on the content of the norms in conflict, are special rules of conflict within specific regimes (so-called *formal* hierarchies of norms), such as Article 103 UN Charter applicable to UN Member States. One should also mention the *lex specialis* or *lex posterior* principles which also find application in international law. Finally, it is important to mention other p.184 coordination principles such as the principle of compliant interpretation or the principle of coherence that help prevent and possibly solve conflicts of international norms, without prioritizing one over the other.

As a matter of fact, the multilateral and pluralistic nature of global democracy alluded to previously, together with the interlocking political communities constituting the international community, explain why the fragmentation of international law between different regimes is a constitutive feature of international law. Those communities do not perfectly overlap in all areas of international law and this is what forbids clear hierarchies among the law they produce. Of course, the more inclusive and egalitarian international law-making processes will become, the clearer priorities will become in terms of *democratic credentials*, with certain processes being more inclusive of all those with equal stakes than others.

d. *The Rule of Recognition and the Plurality of Legal Orders*

Last but not least, the rule of recognition of general international law can coexist with national and regional rules of recognition, without threatening the autonomy of the respective legal orders. And this despite the fact that the international rule of recognition identifies some of the (international) law applicable within regional and national legal orders and hence legal norms that can be immediately valid and applicable to the same set of people.

When conflicts between legal orders occur, the solution lies in the principles governing the relations between legal orders. In a nutshell, these could be organized according to the principle of monism (one single legal order grouping all others under one single rule of recognition with a priority given either to the national or the international legal order), dualism (separate legal orders with no interferences apart from those decided by each order's rule of recognition), or pluralism (separate legal orders with separate rules of recognition but mutual validity). Because neither monism nor dualism can fully account for both the increasing intermingling between the national and international legal orders and the fact that neither of them gets primacy in deciding about mutual validity in all cases,⁵⁴ the model of pluralism between legal orders is usually favoured. In fact, *external legal pluralism* is actually called for by the pluralistic model of global democracy promoted in this chapter. Political self-constitution and hence democratic legitimacy lie behind the autonomy of legal orders. Because the political communities constituted in those different legal orders overlap but only partly so, neither monism nor dualism can perfectly account for their relationships and their mutual validity.

What remains to be seen, once pluralism among legal orders has been ascertained, is how conflicts between national, European and international legal norms ought **p.185** to be resolved. This can first be done by reference to *democratic credentials*, and in particular to the principle of inclusion of all those equally affected by a decision—which amounts to a democratic conception of the principle of subsidiarity albeit one that can privilege either the local or the international level. Conflict resolution can also depend on the *content* of each norm. When the international legal norms in question are imperative, the conflict is resolved by reference to the hierarchy of norms. This normative hierarchy cuts across legal orders, however, and may result in giving priority to the most imperative norm whether international, as in most cases, or, more rarely, regional or national. Finally, one should also mention preventive duties of (normative) coherence that apply to the different legal orders binding the same people. ⁵⁵

V. Conclusion

Sources of international law condition its legality, normativity, and legitimacy. They are best organized, this chapter has argued, by following a normative positivist model of international law that grounds the latter's legality in the respect for the International Rule of Law, its normativity in the duty to coordinate over issues of global justice, and its legitimacy in multilevel and pluralist democratic processes of international law-making. International legal subjects have multiplied and are often described as members of a pluralist international community. This community's main bond is international law and the values it decides to express through its laws. As a result, sources of international law are the processes of self-constitution and constant reshaping of that community. Developing international law in due respect of the equality of all those affected in that community is what international constitutionalism is about. Nothing more but nothing less.