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Reflections on the Role of Fairness for the Sources of International Law

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Abstract

The paper seeks to discuss the relationship between the sources of international law and fairness. The author intends to address this issue within the framework the following main question: what is the role of fairness for the formal sources of international law? By analysing the relationship between fairness and the formal sources of international law, the author also seeks to respond two other, although substantively relevant, questions: is the typology of these sources listed in Article 38 of the Statute of the ICJ fair?; is soft law a means to fairness in the sources? He claims that fairness is neither material or formal source of international law but it is a procedural value which supports the legitimacy of the making of international law. Thus, it is relevant to the formal, not material, sources of international law. The term 'formal sources' is used in the paper in the twofold meaning. First, as *instrumentum* or 'containers' for rules and principles (where the law can be found), and, second, as processes and forms by which rules and principles are made. The author's proposition is that fairness is primary relevant to the latter meaning. When the international law-making processes are fair, then their results, i.e., the formal sources conceived as *instrumentum* or 'containers' are also fair, and the law may be known. Rules and principles of international law are fair when they satisfy the requirements of a fair international law-making process, in particular, certainty, transparency and authoritativeness/representativeness. That is why, fairness may be seen as a crucial criterion of the legitimacy of international law-making processes. There are close relationships between fairness, law-making, legal certainty, effectiveness of rules and principles and the rule of law. These relationships mark the place of fairness in the sources of international law. The author seeks to point out thar fairness as a product of the constantly changing social and political environment, does not occur in its pure form in practice. As such, fairness is a 'matter of degree' in the international law-making. That is why, a realistic goal of the international legal order is neutralization of unfairness as much as possible.

Keywords

fairness, sources of international law, making of international law, legal certainty, soft law, custom, treaties, general principles of law

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1. Introduction

Fairness and justice are almost intuitively assigned a large role in every legal order. Regardless of the problem of the relationship between fairness and justice, however, it is the ambiguity of the meaning of the term 'fairness' that is largely responsible for the difficulties in clearly indicating the place and role of fairness in the law, including international law. There are considerable problems in this regard. As George Flecher points out, '[r]emarkably, the concept of fairness does not readily translate into other languages' and 'it is virtually impossible to find a suitable translation for fairness in European and Semitic languages'[1]. As a result, Flecher claims, 'the term is transplanted directly in some languages, such as German and Hebrew, and absent in others, such as French, that are resistant to adopting loan words that carry unique meanings'[2]. Indeed, the absence in many languages of a precise term corresponding to the English term for a fair procedure necessary to generate just results often lead to misunderstandings, which may, in turn, increase the difficulties in accurately representing the role of fairness in the legal order. In any case, what is related to the meaning of the term

[1] George P. Fletcher, *Basic Concepts of Legal Thought* (Oxford University Press, New York: 1996) 81.

[2] Ibid. It is clearly visible in the title of the 2023 ESIL Annual Conference. Its English version – *Is international law fair?* was translated into French as *Le droit international est-il juste ?* There are similar problems in many other European languages. For instance, in Polish the term 'fairness' is translated as 'impartiality' or 'reliability'. It is translated as 'impartiality' in the Polish version of John Rawls' *A Theory of Justice*, while 'right to a fair trial' contained in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms is translated into Polish as 'right to a reliable trial'.

'fairness' is important for law in general and for international law in particular. As Thomas Franck put it almost 30 years ago,

> *Like any maturing legal system, international law has entered its post-ontological era. … Thus emancipated from the constraints of defensive ontology, international lawyers are now free to undertake a critical assessment of its content. … The questions to which the international lawyer must now be prepared to respond, in this post-ontological era, are different from the traditional inquiry: whether international law is law. Instead, we are now asked: is international law effective? Is it enforceable? Is it understood? And, the most important question: Is international law fair?*[3].

If one asks whether international law is fair, the question should first be referred to its sources. It is the sources that point to the normative underpinnings of international law and, as a result, to rights and duties of the addressees of its norms. However, the term 'sources of international law' is, like 'fairness', ambiguous. In the article, I deal with the sources of international law in their formal sense. This meaning, generally speaking, indicates where law can be found and how it is made. In relation to the latter, I consider the processual approach to the making of international law to be particularly valuable. Following John Rawls, I approach fairness itself in procedural rather than substantive terms. This is why, making of international law can be assessed in terms of fairness. I seek to address the relationship between fairness and the formal sources of international law within the framework of the following main question: what is the role of fairness for the formal sources of international law? By analyzing the relationship between fairness and the formal sources of international law, I also seek to respond two other, although substantively relevant, questions: is the typology of these sources listed in Article 38 of the Statute of the ICJ fair?; is soft law a means to fairness in the sources?

The article is organised into eight parts, including this introduction and the conclusion. It starts by defining the terms 'fairness' and 'sources of international law' (Part II). Defining the terms 'sources of international law' and 'fairness' is needed for a precise, clear, and coherent discourse on the relationship between them. This part is divided into two subsections: one on the sources, and the other on fairness. In particular, in this part I present and discuss two probably most important positivistic approaches to the sources of international law, that is, formalism and processualism. The article then seeks to respond the question of when rules and principles of international law can be recognized as fair and thus indicate the requirements of fairness of the international legal regulations (Part III). In this part consequences of the absent of fairness in its pure form in practice are also addressed. The next part is devoted to the analysis of close relationships between fairness, international law-making, legal certainty, effectiveness of international obligations and the rule of law (Part IV). Part V addresses the issue of fairness in the international law-making from the perspective of its representativeness; more precisely, from the perspective of the participation in this process of States and non-state actors. Roles of soft law in the making of international law and their impact upon the relationship between fairness and the sources are discussed in part VI. And Part VII aims to respond the question whether the typology of the sources listed in Article 38 of the Statute of the ICJ is fair. This question is discussed under roles of fairness for the making of general international law and it is addressed against the background of the recent works of the

[3] Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press, Oxford: 1995) 6.

International Law Commission (ILC) on custom and general principles of law. The last part provides the conclusions resulting from the paper.

2. Meanings of the Terms 'Sources of International Law' and 'Fairness'

A. 'Sources of International Law'

The term 'sources of law' is used in two basic meanings: formal and material. The meaning of formal sources of law, indicating the authority for the rules as rules of law, should be distinguished from the meaning of material sources of law, which denotes 'the provenance of the substantive content of rules'[4], or things 'which inspire the content of the law'.[5] It is worth keeping in mind the distinction between 'formal' and 'material' sources of international law because these two meanings of the term 'sources of international law' concern different things and provide answers to different questions. The material sources say why international law is made, whereas the formal sources can answer the following three questions: how is international law made? Where can its rules and principles be found? Who makes international law? In this article I deal with the sources of international law in the latter, i.e. formal, meaning.

For jurists the problem of sources of law has traditionally been seen as one of the most important issues, especially from the perspective of legal certainty. As Rosalyn Higgins put it, '[t]he question of sources is … of critical importance; and the jurisprudential an philosophical debates that continue to range have much more than an academic significance'[6]. Indeed, in every legal order, and perhaps especially in international law, which lacks a legislature and a judicial system with compulsory jurisdiction, striving for a precise definition of the sources seems to be a problem of great practical importance. The formalistic approach to sources, typical of legal positivism, plays a special role in this problem as it makes it possible to identify the formal factors which distinguish binding legal rules from both *de lege ferenda* rules and other social rules. The formal sources of law generally concern the way in which the legal force of new rules of conduct is established and by which existing rules are changed.[7] The idea of formal sources has been intensely and widely discussed, as well as criticized, by international

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[4] Robert Jennings and Arthur Watts, *Oppenheim's International Law* (Longman, 9th ed, 1996) vol 1, 23.

[5] Gerald G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in F M Van Asbeck et al (eds), *Symbolae Verzijl. Présentés au Professeur J.H. Verzijl à L'occasion de Son LXX-ième Anniversaire* (Martinus Nijhoff, La Haye: 1958) 153, at 154. However, it should be noted that some of 'the most highly qualified publicists', as stated in Article 38(1) (d) of the Statute of the ICJ, give the term 'material sources of international law' a different meaning, which confirms the large inconsistency of using the term 'sources of law'. See, e.g., Hugh Thirlway, 'The Sources of International Law' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 3rd ed, Oxford: 2010) 96 (claiming that 'the material source is simply the place – normally a document of some kind – in which the terms of the rule are set out'). Besides, the meanings of the terms 'formal sources of law' and 'material sources of law' are sometimes deliberately combined, also by positivists. See e.g. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed., Oxford: 2009) 47-8 (arguing that 'the sources of law are those facts by virtue of which it is valid and which identify its content. This sense of "source" is wider than that of "formal sources" which are those establishing the validity of a law …).

[6] Rosalyn Higgins, *Problems and Process. International Law and How We Use It* (Clarendon Press, Oxford: 1995) 17.

[7] Jennings and Watts (n 4) 23.

lawyers. As a result, there has emerged a strong anti-formalist approach to the international law-making. Under this approach, various proposals have been made for getting rid of the traditional idea of formal sources and the structure of source-based international law.[8] It is true that the formal source-based approach to international law presents some difficulties. However, it is still strongly supported in jurisprudence. For instance, Hugh Thirlway claims that, 'it has so far proved the most workable method of analysing the way in which rules and principles develop that States in practice accept as governing their actions'.[9] Today, the formal source-based approach is championed in international law scholarship for its virtues of distinguishing law from non-law, and consequently as necessary to the ascertainment of international legal norms.[10] This is why, the important function of the formal sources theory is to guarantee the objectivity of law. There is a close link between the formal sources approach and the ascertainment of law, since the formal sources show where the law may be found, which makes it possible to know the law.[11] Indeed, the idea of formal sources matters because its precise understanding allows determining whether certain rules have acquired legal validity in the process leading to their creation. This process gives the rules legal attachment, i.e., it identifies them with the legal order. It is a 'step from the pre-legal into the legal world', as Hart put it when he spoke of the *secondary rules*.[12] In this sense, the formal source of law primarily denotes a supreme criterion of legal validity.

The formalistic approach to sources of international law is questioned by jurists who perceive international law not as a set of rules and principles but as a process.[13] For Rosalyn Higgins, the question of sources is crucial for the 'identification of international law', which means that what is described as the nature and function of international law and how we recognize it and where we find it are essentially intertwined.[14] According to her, international law is a 'continuing process of authoritative decisions' rather than a set of rules. As she claims,

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[8] Among the anti-formalist approaches to the sources of international law, the New Haven School is perhaps the best known. See Mónica Garcia-Salmones Rovira, 'Sources in the Anti-formalist Tradition: A Prelude to Institutional Discourses in International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, Oxford: 2017) 203, 207-14.

[9] Thirlway (n 5) 97-8.

[10] See generally Jean d'Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules* (Oxford University Press, Oxford: 2011). See also Pierre d'Argent, 'Sources and the Legality and Validity of International Law: What Makes Law 'International'' in Besson and d'Aspremont (eds) (n 8) 541, 543-6; Martii Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge University Press, rev ed, Cambridge: 2005) 303-5; Oscar Schachter 'International Law in Theory and Practice. General Course in Public International Law' (1982) 178 *Recueil des Cours* 9, 60. It should also take into account the ICJ's position. The ICJ emphasised in the *South West Africa* cases that legal rights and obligations must have a 'sufficient expression in legal form'. See *South West Africa* (Ethiopia v South Africa) (Second Phase) [1966] ICJ Rep 6, 34, para 49.

[11] d'Aspremont (n 10) 13.

[12] Herbert L.A. Hart, *The Concept of Law* (Oxford University Press, 3rd ed, Oxford: 2012) 94.

[13] See esp. Rosalyn Higgins (n 6) 1-3, 8-10, 17-22 (claiming that 'international law is process rather than rules'); Vaughan Lowe, *International Law* (Oxford University Press, Oxford: 2007) 122 (arguing that 'international law is better regarded as an activity, a way of doing things, rather than as a set of norms').

[14] Higgins (n 6) 2.

> *[I]f international law was just 'rules', then international law would indeed be unable to contribute to, and cope with, a changing political world. To rely merely on accumulated past decisions (rules) when the context in which they were articulated has changed — and indeed when their content is often unclear — is to ensure that international law will not be able to contribute to today's problems and, further, that it will be disobeyed for that reason.*[15]

However, I do not believe that processual and formalistic approaches to the sources of international law are by their nature mutually exclusive[16]. I rather think they can inspire each other. In particular, formalism emphasising the importance, for reasons of legal certainty, of the forms in which legal rules exist, could focus more on the international law-making processes, i.e. how international law is made. In other words, international lawyers do not have to choose between formalism and processualism or dynamism to conceptualise the contemporary making of international law.[17] It should be borne in mind that the formal sources, as *instrumentum* or 'containers'[18] of valid legal rules and principles, are hardly distinguishable from the very processes which led to their existence. That is why, Koskenniemi says, formal sources of international law 'seem, on the one hand, like descriptions of law-creating processes and, on the other, like the objectified results of those processes'.[19] This is especially noticeable in the case of customary international law, as confirmed by the works of the ILC.[20] Therefore, I use the term 'formal sources of international law' in the twofold meaning. First, 'containers' for rules and principles (where the law can be found), and, second, processes and forms by which rules and principles are made. These processes give norms legal attachment, i.e., identify them with the international legal order. Concluding remarks about the meanings of the term 'sources', I claim that the processes and forms by which principles and rules are formed and where they may be found can be considered as the primary meaning of the term 'formal sources of international law'.[21]

B. 'Fairness'

The meaning of the term 'fairness' is an even more complex issue due to the aforesaid difficulties in translating this English term into other languages. It seems that a discourse on

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[15] Ibid, 3. See also Rosalyn Higgins, 'The Identity of International Law' in Bin Cheng (ed), *International Law. Teaching and Practice* (Stevens & Sons, London: 1982) 27, reprinted in Rosalyn Higgins, *Themes and Theories* (Oxford University Press, Oxford: 2009) 91, 101.

[16] However, Rosalyn Higgins questions the constructiveness of any attempts to reconcile the 'rule' and 'process' approaches. According to her, 'superficially attractive though "reconciliation" or "synthesis" or "middle views"may seem (as writers frequently want to claim to offer these attractive middle ways), they avoid or blur the essential questions rather than provide an answer to them'. Higgins (n 6) at 8.

[17] See Yannick Radi, 'Standardization: A Dynamic and Procedural Conceptualization of International Law-Making' (2012) 25(2) *Leiden Journal of International Law* 283.

[18] See on these terms d'Aspremont (n 10) 174-78 (claiming that 'the container (*instrumentum*) of the rule is thus where the element that allows a distinction between law and non-law must be sought', at 178).

[19] Koskenniemi (n 10) 36.

[20] See Report of the International Law Commission, *Draft Conclusions on Identification of Customary International Law and Commentaries Thereto*, 70th session, UN Doc A/73/10/GE. 18-13644 (30 April-1 June and 2 July-10 August 2018).

[21] Cf Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford: 2010) 163, 169-70; d'Aspremont (n 10) 13; Rüdiger Wolfrum, 'Sources of International Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford: 2012) vol IX, para. 6 (online at 6 March 2024).

fairness must be preceded by an agreement on any basic assumptions to govern discourse. An important first task, therefore, is to identify irreducible core of shared assumptions about fairness and unfairness.[22] My initial assumption is to treat fairness as the main value of the international law-making processes. Thus, how international law is made directly affects its normative content and, consequently, the specific rights and duties of the recipients of legal norms as well as the dispute settlement procedures. Making this assumption, I am inspired by what John Rawls says in his *A Theory of Justice* about fairness in general, and about its relation to justice in particular. It should be taken into account that it is the role played by fairness in Rawls' theory of justice which is the main reason for qualifying his theory as a procedural theory of justice. The relationship between fairness and the sources of international law may, as I think, be explained analogously to the relationship between fairness and justice in Rawls's theory of justice. Rawls says that

> *the propriety of the name "justice as fairness" conveys the idea that the principles of justice are agreed to in an initial situation that is fair. The name does not mean that the concepts of justice and fairness are the same, any more than the phrase "poetry as metaphor" means that the concepts of poetry and metaphor are the same.*[23]

I similarly argue that the phrase 'fairness as a source of international law' does not mean that fairness is material or formal source of international law.[24] Fairness, however, is essential for the sources of international law. My initial proposition is that fairness is primary relevant to the formal sources of international law as a 'fair process'. I also share another Rawls's conviction that in its pure form, a fair process or procedure is needed to generate a just result so that no one complains about the outcome as unjust.[25] But as Rawls claimed, it does not mean that the concepts of justice and fairness are the same.[26] Although Rawls dealt with international law only in one brief section of his book[27], his comments on fairness seem to have been insufficiently used by international scholars. In particular, the most important, procedural dimension of his concept of fairness has been marginalised.[28] I believe there is no need to distinguish between substantive and procedural fairness, as Thomas Franck, for example, does.[29] It is rather worth following Rawls' line of reasoning, namely, treating fairness as a procedural value in the legal order, the implementation of which is necessary for the effective achievement of substantive values. In this perspective, fairness would be an instrumental value in relation to the main substantive values of a legal order. It is an essential means of bringing about the expected changes in the substance of a legal order, or 'the achievement of common

[22] Likewise Franck (n 3) 11 (claiming that 'to think about globally shared notion of fairness requires, initially, some considerations of how to think about fairness').

[23] John Rawls, *A Theory of Justice* (Harvard University Press, rev ed, Cambridge, Massachusetts: 1999) 11.

[24] But cf. contra Catharine Titi, *The Function of Equity in International Law* (Oxford University Press, Oxford: 2021) at 136-6 (arguing that fair treatment is closely interconnected with equity, and the latter is 'a source of international law').

[25] Rawls (n 23) 10-13. See also Fletcher (n 1) 81.

[26] Rawls (n 23) 11.

[27] Ibid, 332-335.

[28] For instance, Anthony D'Amato in his 1975 review of Rawl's book, made no mention of fairness at all. Meanwhile, for Rawls, justice without fairness is not possible in social practice. See Anthony D'Amato, 'International Law and Rawl's *Theory of Justice*' (1975) 5 *Denver Journal of International Law and Policy* 525.

[29] See infra n 33.

values', as Higgins put it.[30] As such, fairness is not something static and immutable. That is why, it fits well into the processual approach to the sources of international law. As law should contribute to, and cope with, a changing political and social world, fairness remains in constant flux because the law-making processes are constantly transformed.

Thus, I claim that fairness is an inherent procedural value or feature of the international law-making processes, and the degree of its implementation in practice has a significant impact upon other values of the international legal order. Therefore, my second initial proposition is that there are close relationships between (un)fairness of the international law-making process, effectiveness of legal obligations, legal certainty and the rule of law. A fair international law-making process supports legal certainty in the international community, while without legal certainty, in particular, without knowing where international law can be found, it is rather not possible to comply with the law, which is a core of the ideal of the rule of law. When the international law-making processes are fair, then their results, i.e. the formal sources conceived as *instrumentum* or 'containers', are also fair, and the law may be known and respected. These interrelationships determine, in my opinion, the place of fairness within the sources of international law. And my third initial proposition is that fairness is a "matter of degree" and a realistic goal of any legal order, including international law, is the highest possible level of absorption or assimilation of unfairness.

3. When International Rules and Principles Are Fair? A Question of Requirements of a Fair International Law-making Process

Two issues are discussed in this part. First, how international rules and principles should be made and by whom? And second, consequences of unfairness in the practice of the international law-making.

I share Thomas Franck's view that fairness is not 'out of there' waiting to be discovered, since it is a product of social and historical context.[31] It follows that fairness is relational and may change in the course of the development of international law, in particular due to the changes of its purposes and the substantial values protected by it. As the ICJ stated in its 1949 Advisory Opinion on *Reparation for Injuries,* '[t]hroughout its history, the development of international law has been influenced by the requirements of international life'.[32] So is fairness in the international law-making. Relying on fairness conceived as a fair international law-making process is needed due to the effective protection of the legitimized interests and rights through international law. It follows, in my opinion, that rules and principles of international law can be fair when they are made in processes that satisfy the requirements of a fair international law-making process. In this sense, fairness is a necessary, although not always sufficient, condition to meet the legitimized expectations of the addressees of rules and principles. To put it in other

[30] Higgins (n 6) 1.
[31] Franck (n 3) 14.
[32] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, [1949] ICJ Rep 174, 178. James Crawford suggestively put it in his Hague general course: the making of international law is a 'conversation across time' and 'like good coffee, international law has to be brewed'. James Crawford, *Chance, Order, Change: The Course of International Law* (Hague Academy of International Law, The Hague: 2014) 143.

way, fair procedures of the law-making are essential for the rule of law in the international community, which be discussed in next parts.

The law-making process should meet several formal requirements about how rules and principles are made to be a fair process. These formal requirements amount to the secondary rules of the international legal order, because they say how treaties, custom and general principles are made and changed to be validly attached to international law. A fair law-making process favours stability and order in international law, which seems its great value worth striving for and defending.[33] The requirements of a fair international law-making process are of a twofold character. Some of them concern how international law should be made or how the law-making process should be proceeded, while the others are about who should make international law. The first group primarily includes certainty, publicity and transparency, the second group concerns the authoritativeness or 'representativeness' of the law-making process. The latter requirement applies to the participation in the international law-making process. It does matter, since the participation in the international law-making legitimates the exercise of authority in the international community. When the international law-making process satisfies the mentioned requirements, then it is a fair process. Therefore, its results (rules and principles) may be seen as fair, because they were made in accordance with the fair requirements.

When Article 38 of the Statute of the Permanent Court of International Justice was drafted States were recognized as the primary, and even sole, makers of international law. In this positivistic paradigm based on the consent of States, international law was actually conceived as a law made, changed and applied only by sovereign international law-makers. But since that time the social practice of the international law-making has changed due to the rise of various non-State actors. It goes without saying that as the number of actors using international law has expanded, needs and expectations for participation of these new actors in the international law-making have emerged. However, many lawyers, including scholars, continue to insist that these new international actors have not changed the fundamental underpinnings of international legal norms, either in terms of process by which treaties, custom, or general principles are made, or in terms of the content of international principles and rules.[34] As a consequence, there is still a clear disagreement between the positivistic paradigm and anti-positivistic schools of legal thought in the discourse on the sources of international law in general and on the international law-making in particular. This disagreement largely concerns the active participation in the international law-making. It can be put as follows: does the law-making process based on the consent of States which favours the law-making role of States and marginalises the law-making capacity of other actors, meet the requirements of a fair law-making process? It is, in other words, the question of who should create international law to make the international law-making process fair. Any theory of the international law-making should take into account this question. It is discussed below in part V.

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[33] For Franck this procedural aspect of fairness, which he calls "right process", amounts to the legitimacy of international law. It may remain in tension, even in conflict, with the other (substantive) aspect of his concept of fairness - "distributive justice", which favours change. See Franck (n 3) 7-8; Thomas Franck and Dennis Sughrue, 'The International Role of Equity-as-Fairness' (1993) 81 *Georgetown Law Journal* 563, 566. See also Titi (n 24) 113-136. However, I do not think that it is necessary to distinguish the substantive aspect in the legal concept of fairness.

[34] See José E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, Oxford: 2005) 48-57.

Fairness in its pure form does not exist in practice. Fairness like legal certainty is a matter of degree. As far as legal certainty is concerned, some scholars claim that a realistic goal of any legal order is the highest possible level of "uncertainty absorption".[35] So it is with the absorption of unfairness. The phenomenon of unfairness in the law-making is neither confined to international law, nor is it resolvable in many cases. There are two consequences which follow from that. First, while fairness in the law-making is a "matter of degree" because there is no such thing as a legal system in which all the law-making processes are fair, a realistic goal of any legal order, including international law, is to neutralize unfairness as much as possible. And second consequence - the larger neutralization of unfairness the stronger the rule of law.

4. The Relationships between Fairness, Legal Certainty, Effectiveness of International Obligations, and the Rule of Law

The reference to the rule of law in the context of neutralizing unfairness is grounded in the close interdependencies between it and the (un)fair law-making process as well as other internal values of any legal order – legal certainty and effectiveness of legal obligations. The requirements of international law-making processes by which we identify the valid legal rules and principles should satisfy the basic requirements associated with the rule of law as a fundamental ideal of any legal order. Therefore, they should be certain, transparent, public, clear and subjectively representative.[36] Fairness in the law-making may be seen as a key condition for realising the rule of law in practice. By the rule of law I mean, following Joseph Raz, what this term simply says: the rule of the law.[37] In the international community it means that all international law actors should obey international law and be ruled by it. It is, however, hardly possible to obey the law without fair rules of the law-making and, as a result, without knowing where to find the law. It follows that when the requirements of such conceived fairness are not satisfied then international regulations are not certain and effective, and the ideal of the rule of law fails. Thus, there are intermediate and inevitable stages between fairness in the law-making and the rule of law, which are legal certainty and effectiveness. The close relationships between them mark the place of fairness within the sources of international law. I propose a model that is a kind of pyramid of these relationships, with fairness as its basis. To put it in other words, it is not fairness that depends on ensuring legal certainty, effectiveness and the rule of law, but rather the reverse, i.e., it is legal certainty, effectiveness and the rule of law that are based on fairness. In consequence, fairness in the law-making as a procedural value supports legal certainty, legal certainty supports effectiveness, and legal certainty and effectiveness, in turn, support the rule of law. When the international law-making processes are fair, then their results, i.e., the formal sources conceived as *instrumentum*, are also fair, and the law may be known and respected. Fair made and certain rules and principles are likely to command respect and pull towards voluntary compliance. That is why, fairness in the international law-making may be seen as a crucial criterion or prerequisite of the rule of law in the international community.

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[35] See e.g. Hart (n 12) 124–41; Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge, London: 2010) 1–5.

[36] Cf Besson (n 21) 172 (claiming that 'international law-making processes should […] 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' [emphasis in original]).

[37] Raz (n 5) 212.

Effectiveness of international obligations is highly relevant to the rule of law in the international community because when international legal obligations are ineffective, then international actors are not ruled by the law. Therefore, it cannot be said that without the effectiveness of international obligations, the rule of law is grounded in the international community. But to be effective, international obligations should derive from rules and principles which are made in accordance with what is accepted by their addressees as a fair process. This is another argument in favour of my statement that the fair law-making process is a prerequisite for the rule of law.

5. Who Should Make International Law? A Question of Representativeness in the International Law-making

It is hardly possible to avoid addressing the problem of State consent in the international law-making when the relationship between the sources of international law and fairness is discussed. As known, there is still a clear tension between legal positivism and anti-positivistic school of legal thought in the discourse on a role of the consent of States in the international law-making. This discourse repeatedly invokes a distinction between consensually and non-consensually based norms.[38] In the positivist legal tradition the law-making in the international community is based on and legitimised by the consent of States. According to the positivist interpretation of international law, the will and consent of States are seen as an ultimate justification of international legal obligations. Therefore, in this perspective it seems fair that it is States that make international law. The positivist paradigm was actually formulated only for States as sovereign international law-makers, and, as a consequence, international law was seen as a strictly State-centric legal order. The famous *dictum* of the PCIJ's judgment in the *Lotus* case may be considered as an emblem of this paradigm.[39] But since that time the social practice of the international law-making has changed due to the rise of various non-State actors. As the number of actors using international law has expanded, needs and expectations for new sources of international law have emerged. However, despite the rise of various non-state actors and an evolving social practice of the international law-making, many lawyers, including scholars, continue to insist that these new international actors have not changed the fundamental bases of international legal norms, either in terms of process by which treaties, custom, or general principles are made, or in terms of the content of international principles and rules.

If it is true that States are primary, even sole, the international law-makers and the international law-making processes are based on the State consent, then 'consent to be bound' would legitimise all formal sources of international law. Therefore, in this perspective international custom is often explained as a "tacit agreement". And another consequence of this positivist or voluntarist perspective: if States have not agreed on an alternative, then stability and legal certainty demand that Article 38 of the Statute of the World Court be presumed to contain the

[38] David Kennedy, 'The Sources of International Law' (1987) 2(1) *American University International Law Review* 1, 88.

[39] 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims'. *The Case of the S.S. "Lotus"*, [1927] PCIJ Publ., Series A, No. 10, at 18.

'complete list of sources' of international law, as José Alvarez put it.[40] However, international law is an open system as it is a product of historical and social changes. So is the international law-making. The rise of various non-state actors has *nolens volens* changed a scene of the law-making in the international community. In order to be a fair process, the international law-making process should satisfy the legitimised expectations of new actors, including their active participation in the law-making. A scope of this participation may vary between various actors. The ICJ's standpoint about legal capacity to act upon the international plane expressed in its 1949 *Reperations for Injuries* advisory opinion still seems convincing and worth remembering:

> *The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.*[41]

As the participation in the international law-making process legitimises the authority in the international community, there is a persistent tension between expectations generated by non-state actors and the State-centricity of international law. Therefore, as David Kennedy claims, 'the sources discourse argues about the normative forms which can bind states without overthrowing their authority'.[42]

The problem of the State consent in international law in general and for the sources in particular matters and should be carefully considered in view of the increasing role of various non-state actors in the international law-making. This problem raises the question whether the position of States as the primary international law-makers object to the requirements of a fair law-making process. Does the consensually based law-making process support its certainty and transparency? In particular, is it certain and transparent and, as a result, fair to recognise all international legal instruments, including treaties, as a product of pre-determined State interests and legitimised by the State consent? There are serious doubts in this regard. In particular, some binding international legal acts have not resulted from the actions of States, but they have been generated by non-state actors. Moreover, "consent to the rule" does not amount to "consent to be bound", as Gerald Fitzmaurice argued.[43] He rejected the opinion that consent, acquiescence, assent, or recognition, express or implied, evidenced in terms or by conduct was the only basis of obligations in international law. Fitzmaurice claimed:

> *[T]he sources of international law cannot be stated, or cannot fully or certainly be stated, in terms of international law itself, and that there are and must be rules of law that have an inherent and necessary validity, in whose absence no system of law at all can exist or be originated. Such a rule, for instance, is the rule pacta sunt servanda. This rule does not require to be accounted for in terms of any other rule. … It is not dependent on consent, for it would exist without it.*[44]

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[40] Alvarez (n 34) 46.
[41] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, [1949] ICJ Rep 174, 178.
[42] Kennedy (n 38) 92.
[43] Fitzmaurice (n 5) 162-8.
[44] Ibid, 164.

Pacta sunt servanda indicated by Fitzmaurice belongs to the *secondary rules* of international law. However, the rules of international law whose validity does not result from the consent of States also include some of the *primary rules*. This is what the ICJ clearly said in its 1951 *Reservations to the Genocide Convention* advisory opinion regarding the obligations of States to prevent and punish genocide and has consistently confirmed it to this day. The Court then stated: '[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[45] Under this *dictum*, it is hardly argued that all rules of international law are legitimised by the State consent. That is why, each and every new State is obliged to respect some rules of general international law as a law which is effective and opposable *erga omnes*.[46]

The aforementioned normative validity in the international legal order of acts generated by non-state actors also undermines the position of States as the sole international law-makers. However, in the light of the requirements of a fair international law-making process, the participation of non-state actors in the law-making may be assessed as ambiguous. On the one hand, the acceptance of their legitimised position in the law-making process meets the requirement of representativeness, but on the other hand, it is not clear whether their participation serves the certainty and transparency of the international law-making. It is discussed below in the context of soft law as a means to fairness.

6. Is Soft Law a Means to Fairness in the Making of International Law?

Most acts and instruments generated by non-state actors are not formally binding. States themselves also make such formally non-binding acts in their practice. The non-binding international acts and instruments, known as soft law, are not the formal source conceived as 'containers' for valid rules and principles. Nonetheless, soft law is relevant to the formal sources of international law because it plays important roles in the international law-making processes resulting in the sources as 'containers' listed in Article 38 of the Statute of the World Court. For this reason, the international law-making processes are better explained from the perspective of processual rather than formalistic approaches to sources, because the former reflects the dynamics and relationality of these processes.

Acts of soft law generated by non-state actors perform several functions. First, acts of this law, say, non-binding resolutions of the UN General Assembly, may have effects on customary international law. To be more precise, soft law instruments generated by the UN GA, e.g., the

[45] *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide,* Advisory Opinion, [1951] ICJ Rep 15, 23. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Hercegovina v Yugoslavia) (Preliminary Objections),* [1996] ICJ Rep 595, 616 [31]; *Armed Activity on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda) (Jurisdiction and Admissibility),* [2006] ICJ Rep 6, 31 [64]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, [2007] ICJ Rep 43, 104 [147]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment [2015] ICJ Rep 3, 41, 42 [85] [87].

[46] Rosalyn Higgins summarizes the discussion on sources and obligations in her *Problems and Process* (n 6, at 34) as follows: 'General international law creates and contains norms which are always obligatory'.

1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*[47], or the 1963 *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*[48], may be evidence of binding law, or formative of the *opinio juris* and State practice that may generate new law. The ICJ pointed out in its 1971 Advisory Opinion on *South West Africa* that it was incorrect to assume that non-binding resolutions are necessarily without legal effect.[49] The Court put it even more clearly in the advisory opinions on *Nuclear Weapons* and *the Chagos Archipelago*:

> *The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character.*[50]

Thus, on the one hand, non-binding resolutions of declaratory character may provide evidence of rules of general international law, and, on the other, those of law-making character may be a precursor to hard rules. In both cases non-binding resolutions can and do contribute to the corpus of international law.[51] That is why, as evidenced in the recent works of the ILC, international organisations (IOs) may have impact on customary international law[52], which be discussed in the next part.

Second, soft law is sometimes regarded by States as a preferable alternative to hard legal obligations (e.g. Memoranda of Understanding), and/or as components of treaty obligations. Third, it can also provide an authoritative interpretation of treaty obligations. Fourth, soft-law can provide technical standards for implementation of treaty obligations. But it is the standard-setting function of IOs that is probably the greatest challenge to the positivist State-centricity perspective of the sources of international law. Alvarez claims that IOs generated standard-

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[47] UN Doc A/RES/1514 (XV).

[48] UN Doc A/RES/1962 (XVIII).

[49] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*), Advisory Opinion, [1971] ICJ Rep16, 56.

[50] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, [1996 (I)] ICJ Rep 226, 254-255, [70]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, [2019] ICJ Rep 95, 131, [151].

[51] See Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford: 1963) *passim*; Alvarez (n 34) 217-57; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, Oxford: 2007) 211-12; Alan Boyle, 'Soft-law in International Law-making', in Malcolm Evans (ed), *International Law* (3rd ed, Oxford University Press, Oxford: 2010)122-40; Alan Boyle, 'Soft Law', in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd ed., Oxford University Press, Oxford: 2021) 420-35.

[52] Report of the International Law Commission, *Draft Conclusions on Identification of Customary International Law and Commentaries Thereto*, 70th session, UN Doc A/73/10/GE. 18-13644 (30 April-1 June and 2 July-10 August 2018). Conclusion 4(2): 'In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law'. For comments, see Georg Nolte, 'How to Identify Customary International Law? On the Final Outcome of the Work of the International Law Commission (2018)' (2019) 37 *KFG Working Paper Series* 1.

setting as 'law-making by subterfuge'.[53] In that way IOs produce many formally non-binding, but effective regulations, such as "codes of conduct", "standards", "recommended practices", "recommendations", outside treaties, custom and general principles. It is this type of soft law that primarily proves that it is no longer only a precursor to hard rules, but also play an autonomous normative role in the international law-making. It also evidences that the distinction between hard law and soft law is no longer as clear cut as it was in the practice of States. It is also advisable to emphasise the role of a special category of soft law, i.e. treaties that have not yet entered into force. The role of treaties as declaratory or constitutive of customary international law was discussed thoroughly by the ICJ in 1969 judgment in the *North Sea Continental Shelf* cases.[54] Indeed, the judgment can be considered as a landmark judgment in determining the relationship between customary law and treaty law.[55] The ICJ also drew attention to the role on not yet binding treaties in the making of international law. For the Court, some multilateral treaties can become an important part of the international law-making process even before entry into force. This is well illustrated in the reasoning of the ICJ in the 1985 *Continental Shelf* case. In particular, the Court recognized as its duty to consider in what degree any of the provisions of the *UN Convention on the Law of the Sea* [56] were binding upon the parties to the proceeding as rules of customary international law.[57]

Non-binding acts and instrument of States, IOs and various transnational networks and expert bodies may shape both general practice and *opinio juris* which are inevitable for valid rules generated by custom, general principles of law, and treaties. The activities of these various actors satisfy at least two requirements of a fair international law-making process, i.e. its representativeness and public character. Therefore, soft law may be seen a means to fairness in the international law-making process.

7. Is the Typology of the Sources Listed in Article 38 of the Statute of the ICJ fair?

As instruments and acts of soft law are relevant to the formal sources because they play important roles in the making of the sources listed in Article 38 of the ICJ Statute, some scholars claim that Article 38 cannot be longer regarded as a 'definitive code of sources'.[58] I

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[53] Alvarez (n 34) 595. He also emphasizes another function of IOs in the international law-making. IOs initiated concluding important treaties which go beyond interests of their member states, e.g. Landmines Convention, or WHO's Tobacco Control Convention. Their activities had also impact upon how multilateral treaties are concluded.

[54] *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Merits)* [1969] ICJ Rep 3.

[55] See Roger Baxter, 'Treaties and Custom' (1970) 129 *Recueil des Cours* 25, 33; Yoram Dinstein, 'The Interaction between Customary International Law and Treaties' (2006) 322 *Recueil des Cours* 243, 264; ; Eduardo Jiménez de Aréchaga, 'Custom' in Antonio Cassese and Joseph Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter, Berlin: 1988) 3-4; Krystyna Marek, 'Le Problème des Sources du Droit International dans l'Arrêt sur le Plateau Continental de la Mer du Nord' (1970) 6(1) *Revue Belge de Droit International* 44, 45, 76; Kennedy (n 38) 79.

[56] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

[57] *Continental Shelf (Libyan Arab Jamahiryia/Malta*) *(Judgment)* [1985] ICJ Rep 13, 30 [27]. On the ICJ's approach to identifying custom see Stephen Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *European Journal of International Law* 417 (arguing that 'in a majority of cases the Court has not examined the practice and *opinio juris* but, instead, has simply asserted the rules that it applies').

[58] See Alvarez (n 34) 600.

do not think, however, it is necessary to look for new formal sources other than those mentioned in Article 38.[59] It lists sources that are the formal sources of general international law, that is custom and general principles of law. It is hardly possible to indicate alternatives to them. This issue requires at least a brief comment. I argue it is unwritten international law that is substantially equivalent to general international law, including *jus cogens* norms.[60] Another proposition follows from this: only what is a formal source of general international law is the formal source of international law. It means that the formal source of international law is from which the rules applicable, opposable and effective *erga omnes* derive. This inclines, on the one hand, to scepticism of treaties in this regard and, on the other hand, to see custom and general principles of law as the normative underpinnings of international law. Without the latter sources, the process of codification of international law would be pointless. The declaratory provisions of treaties, including the codification treaties, can be seen as the primary evidence of the normative validity of the unwritten general law, while the law-making provisions of such treaties as, say, the *Vienna Convention on the Law of Treaties*[61]*,* or the *UN Convention on the Law of the Sea*[62] are primarily a source of legal obligations for the parties. Thus, the parties can shape their treaty practice based on these provisions. But neither the declaratory treaty provisions nor the provisions intended to create new law are formal sources of international law. The former, as indicated, are evidence of the normative validity of the rules of customary law and general principles already in force; while compliance with the latter by the parties means the performance of treaty obligations. In consequence, it is custom and general principles of law that are the formal sources of general international law. Custom is turned to the past and therefore is the formal source of international law in force today. Meanwhile, like soft law instruments, the law-making treaties look to the future. Soft law and treaties have been used as instruments of anticipatory legal regulations of future activities and situations because they may stimulate the practice of international actors and shape their *opinio juris*. Therefore, the law-making treaties and soft law instruments as a starting point and a catalyst for consistent practice are often useful for forming a new custom. In this sense, the law-making treaties and, say, non-binding resolutions of IOs, can support the development of general international law. Yet, it is custom and general principles that are its formal sources, not treaties, not to mention acts of soft law.[63]

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[59] I share the opinion of Allain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmernan *et al* (eds), *The Statute of the International Court of Justice. A Commentary* (3rd ed., Oxford University Press, Oxford: 2019).

[60] Roman Kwiecień, 'The Formal Sources of International Law, the Relationship between Treaties and Custom, and the International Law-Making Process' (2022) 40 *Australian Year Book of International Law* 46. Likewise e.g. Luigi Condorelli, 'Customary International Law: The Yesterday, Today, and Tomorrow of General International Law' in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law* (Oxford University Press, Oxford: 2012) 148-52, 148; Erika de Wet, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in Besson and d'Aspremont (eds), (n 8) 625, 633. See also Hans Kelsen, *Principles of International Law* (Rinehart, New York: 1952) 307-8; Christian Tomuschat, 'General International Law: A New Source of International Law?' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer, 2018) 185.

[61] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[62] *United Nations Convention on the Law of the Sea* (n 56).

[63] The author addressed this view extensively in Kwiecień (n 60) 46.

Bearing in mind the above argumentation, I claim that it is not necessary to look for new formal sources other than those mentioned in Article 38. In this sense, the typology of sources of general international law from Article 38 is fair. However, considering that the formal sources as *instrumentum* for rules and principles are inextricably linked to law-making processes, it is unconvincing to see the States as the sole law-makers of general international law, as argued in the previous parts. True, the crucial role of States in the international law-making goes without saying. But, as evidenced in the recent works of the ILC on custom and general principles of law, other actors are playing an increasingly important role in it. The ILC lists in the *Draft Conclusions on Identification of Customary International Law* of 2018[64] these other actors in addition to States and international organizations. Nonetheless, fairness of the making of general international law outlined by the ILC may rise some doubts under the requirements of certainty, transparency and representativeness. Conclusion 4 reads:

> 1.The requirement of a general practice, as a constituent element of customary international law, refers primarily to 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 organisations 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 paragraphs 1 and 2.

The question arises who are these other actors and, consequently, whose custom is it? Surely these other actors are more passive subjects than intergovernmental international organizations, let alone States. The absence of their clear identification in the ILC's *Draft Conclusions* is quite symptomatic. The ambiguity about who makes international law weakens the requirements of fair process, i.e., certainty, publicity and transparency. The only certainty is that all States under the principle of sovereign equality are the international law-makers and that their consent is still crucial in the international law-making. Therefore, it cannot be said that international law has ceased to be a State-centric legal order.

Actors other than States and IOs are only indirect or secondary participants in the law-making process, that is, their actions may have impact on the practice of States and IOs. How influential this contribution will be, however, depends on the legitimacy of democratic governance in the international community. Much remains to be done in this field. The right to democratic governance has still not been established in the international legal order. But democracy and self-determination are not irrelevant to fairness as a desirable standard of the international law-making. People due to the democratic procedures and self-governance may impact, e.g. through legislative acts relevant to international law, upon *opinio juris* of States as well as their practice as the essential elements for identification of customary rules.

[64] Report of the International Law Commission, *Draft Conclusions on Identification of Customary International Law and Commentaries Thereto* (n 52).

Doubts about fairness in the making of general international law also arise under the ILC's *Draft Conclusions on General Principles of Law* provisionally adopted in May 2023.[65] Conclusions 2 and 3 read:

> *For general principle of law to exist, it must be recognised by the community of nations (conclusion 2).*
> *General principles of law comprise those:*
> *(a) that are derived from national legal systems;*
> *(b) that may be formed within the international legal system (conclusion 3).*

Who shapes general principles of law within the international community? Does recognition by 'the community of nations' amount to recognition only by States? I do not think so. Here reveals the place both for democratically governed national communities and self-governed peoples to co-making general principles of law as the source of general international law. Therefore, a legal status of civil societies under international law can be seen as something more than mere passive subjects. This may make the international law-making processes more representative, more public, more certain, more transparent, and, as a consequence, fairer.

8. Conclusion

The concept of fairness, presented in this article, as a fair process is primary relevant to the formal sources of international law conceived as processes and forms by which rules and principles are made. I tried to argue, first, that fairness is an inherent procedural value or feature of the international law-making process, and the degree of its implementation in practice has a significant impact upon other values of the international legal order. My second proposition is that there are close relationships between (un)fairness of the international law-making process, effectiveness of legal obligations, legal certainty and the rule of law. These interrelationships determine, in my opinion, the place of fairness within the sources of international law, including in particular the importance of fairness in the international law-making. My third proposition is that fairness is a "matter of degree" and a realistic goal of any legal order, including international law, is the highest possible level of absorption or assimilation of unfairness. And, fourth, there is no need to look for new sources other than those listed in Article 38 of the Statute of the ICJ.

The truth is that as the number of actors using international law has expanded, expectations for new sources have emerged. These expectations are justified when it comes to the participation of non-state actors in the making of international law. But there is no need to look for new formal sources understood as *instrumentum* or 'containers' for rules and principles other than those listed in Article 38 of the ICJ Statute. The main reason for this is the difficulty in identifying sources of general international law other than custom and general principles of law. Even multilateral treaties are hardly its source. Nevertheless, both treaties and acts of soft law play an important role in the making of custom and general principles of law.

[65] International Law Commission, *General Principles of Law. Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee on First Reading*, 74th session, UN Doc A/CN.4/L.982 (24 April–2 June and 3 July–4 August 2023).

Fairness is not a static but a dynamic procedural value that changes in the course of the development of international law. Indeed, international law is a continuing process rather than a set of rules, as Rosalyn Higgins put it. Therefore, it should be taken into account that fairness in its pure form does not exist in the law-making practice. In any legal order, fairness, like legal certainty, is a "matter of degree". There are two consequences which follow from that. First, while fairness in the law-making is a "matter of degree" because there is no such thing as a legal system in which all the law-making processes are fair, a realistic goal of the international legal order is to absorb unfairness in the law-making as much as possible. And second, the larger absorption of unfairness, the stronger the rule of law in the international community.

Although States are no longer the sole makers of international law, they still remain its primary makers. International law has not ceased to be a State-centrist legal order. Therefore, the State consent in the international law-making is still a vital problem both in theory and practice. In particular, it is still disputed whether the consent of States justifies the validity of all rules and principles of international law. Participation and role(s) in the international law-making processes matter because a position in these processes legitimates the exercise of authority within the international community. That is why, there is a persistent tension between the expectations generated by non-state actors and the State-centricity of the making of international law. Fairness as a fair law-making process may bring a balance between these expectations and the leading role of States in the international law-making processes. The requirements of certainty, representativeness and transparency are particularly important in these processes.