**The Sources of International Law**


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To have an up-to-date and practical work on the sources of public international law as set out in article 38(1) of the Statute of the International Court of Justice, 18 April 1946 (ICJ Statute) is more than timely.¹ Hugh Thirlway’s book,² which adopts an avowedly ‘traditional approach,’³ will be welcome to all who are called upon to apply international law in practice, as well as to students coming new to the subject. This is a highly readable, entertaining and elegant book. Although concise, it takes time to read and digest. It is worth pausing over almost every sentence, each word sometimes, usually to agree, or to reflect on the challenge that is raised.⁴

Thirlway is particularly well placed to write on the sources of public international law.⁵ He knows of what he writes, through long experience of the inner workings of the International Court of Justice (the Court). Between 1968 and 1987 he was Secretary, then First Secretary in the Registry of the Court. Between 1987 and 1994, and again between 2003 and 2007, he was Principal Legal Secretary, a post specially created to take

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2 Hugh Thirlway, Sources of International Law (OUP 2014).

3 ‘[T]he primary aim of this book is to convey an understanding of the traditional approach’: ibid 9.

4 The footnotes should not be ignored. They contain some gems, for example: ‘In much of the discussion in [one recent concurring opinion], as in quite a lot of areas where *jus cogens* is invoked, the term is used as though it meant “very important”:’ ibid 163, footnote 69.

account of his increased role as a legal adviser within the Court and in the preparation
of the Court’s decisions. It thus comes as no surprise that his overall approach reflects
international law as it is practised. Yet just as the reader begins to feel comfortable with
the presentation, the author questions his own assumptions, only to return swiftly to his
original position with reinforced conviction.

Thirlway nails his colours to the mast early in the book. On page 2 we read that:

All law has ultimately to be put to the test of ‘How would a court decide?’ (ubi judex, ibi
jus), even when, as in the case of disputes between many members of the international
community, there exists no mechanism for judicial examination and settlement unless and
until the parties so agree.

A particularly important assumption, reflecting the essential unity of international law,
is also stated at the outset:

it is assumed here that the available sources are the same for all branches of international law,
even though the extent to which each specific source (treaty, custom, general principle) has in
fact operated in, or affected, that branch will vary, sometimes quite markedly. 6

The book has ten chapters, though the last is no more than a page or so of ‘concluding
reflections’. After an introductory chapter addressing the nature of international law and
the concept of sources, Chapters II to V consider in turn each of the sources set out in
subparagraphs (a), (b) and (c) of article 38(1) of the ICJ Statute (treaties and conventions,
custom and general principles of law) as well as the subsidiary sources set out in article
38(1)(d) (judicial decisions and writings). Each chapter provides a rich, convincing and
reliable introduction to the source in question, without sidestepping controversial issues.
The author deals clearly and in a thoroughly practical and realistic manner with issues
that may initially perplex student and practitioner alike. He does not ignore theory—
about which he knows a great deal—though he is clearly impatient (in an understated
manner) with academic questioning of the continuing relevance of article 38(1).

The same basic approach is to be seen in the following three chapters, which deal
with issues that cut across the various sources: hierarchy (Chapter VI); jus cogens,
obligations erga omnes and ‘soft law’ (Chapter VII); and certain ‘subsystems’ (Thirlway’s
term) of international law: human rights law; humanitarian law; trade and investment
law dispute settlement; international environmental issues; and international criminal
law (Chapter VIII).

Chapter IX addresses three ‘alternative approaches’ to the sources of public
international law. While full of insights, this chapter is the least satisfactory part of the
book, and appears to be something of an afterthought. It does little more than introduce
the reader to three ‘modern’ theories, which are shown not to be particularly helpful in
the real world. As the author says, ’in face of some of the subtle and intricate (to use only
positive adjectives) arguments underpinning some modern theories, one may wonder

6 Thirlway (n 2) 9.
how useful they will be to the perplexed Foreign Minister dealing with an international dispute.\textsuperscript{7}

The author’s own approach may be illustrated by looking in a little more detail at a central chapter of the book, Chapter III (‘Custom as a Source of Law’). This is a subject over which a great deal of ink has been spilt, unnecessarily one might think. Academic speculation and theorising, often far removed from the day-to-day experience of states and practitioners, has cast a long shadow over the subject, and has led some to question the role and legitimacy, the utility and even the existence, of customary international law. Thirlway cuts through all this, and brings the reader back to basic principles, encapsulated in the much maligned but farsighted wording of article 38(1)(b) of the ICJ Statute: ‘international custom, as evidence of a general practice accepted as law’.

By some degree the longest at 39 pages, the chapter begins with the realistic assertion that custom ‘is a form of development of law of which the outcomes are often not as “tidy” as those that a far-seeing lawgiver might lay down’; and the statement that ‘[t]he precise nature and operation of the process have (…) always presented obscurities.’\textsuperscript{8} Such admonitions are not entirely encouraging for anyone aspiring to seek to clarify matters, though they could be read as a challenge to do so, a challenge Thirlway amply meets.

Thirlway’s starting point is that, subject to two exceptions (the ‘persistent objector’ and local custom), ‘a rule of customary international law is binding on all States, whether or not they have participated in the practice from which it sprang.’\textsuperscript{9} There is a clear account of the basic approach reflected in the language of article 38(1)(b) of the ICJ Statute, the two constituent elements, ‘general practice’ and ‘acceptance as law’ (\textit{opinio juris}). This is followed by a separate section on the role of General Assembly resolutions in the possible establishment or determination of a customary rule. The author then tackles the difficult subject of how customary international law changes, followed by a somewhat sceptical account of what the author terms ‘the relevance of ethical principles to customary law’. The final sections of Chapter III deal with the two very different exceptions to the generality of customary international law, the ‘persistent objector’ notion and ‘local customary law’.

There is much in this work, indeed, virtually all that is self-evidently correct, though better expressed than elsewhere. There is also much that is quite bold. The author apparently does not mind raising a few hackles. Take for example the observation on the notorious 1966 \textit{South West Africa Cases} judgment\textsuperscript{10} that ‘the unpopularity at the time of this decision should not blind the reader to the force of its general arguments.’\textsuperscript{11}

Thirlway’s central thesis is that the listing of sources in article 38(1) is not in need of expansion (just as well for the International Court of Justice and other courts and

\textsuperscript{7} ibid 221. For the genesis of Chapter IX, see preface, vii.

\textsuperscript{8} ibid 54.

\textsuperscript{9} ibid.

\textsuperscript{10} \textit{South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)} (Second Phase, Judgment) [1966] ICJ Reports 6.

\textsuperscript{11} Thirlway (n 2) 201, footnote 8.
tribunals bound by similar provisions). Nor may the list be expanded, according to the author, except through the sources therein listed, a point made as early as 1972 in his monograph *International Customary Law and Codification.* As he then wrote:

we must be on our guard against allowing the desirability of a given development to blind us to the obstacles it will have to overcome, and against assuming that they have been overcome. In particular, it is clear that no new source of law can come to exist except through the operation of the law flowing from one of the existing and recognised sources.

Thirlway proceeded to defend article 38 from all quarters, not least from the world of academe. Over 40 years later, this same theme is summarised in the ‘concluding reflections’ of the present book:

Respect for that text [article 38 of the ICJ Statute] has been shown, by the work of the Court, not to prevent development of the law, but merely to limit—or, rather, perhaps to guide—the way in which such development is to be looked for, and looked at.

The book assumes, and demonstrates, that the doctrine of sources continues to play a central role in the discipline of public international law. In this reviewer’s opinion, what practitioners (including those not specialising in public international law) need above all else is a sound understanding of the sources of international law. A study of the sources of public international law should form part of modern judicial studies around the world. It is, or should be, central to student education, as it is, for example, in the Jessup and other international law moots. The present book will go a long way to supplying this need for an up-to-date and accessible work on the subject.

Malcolm Evans and Phoebe Okowa capture the essence of Thirlway’s achievement, when they write by way of introduction:

The existing body of literature tends to focus on exploring the theoretical foundations of the sources of law, or ‘reconceptualising’ it in some way in the light of the challenges which it is said to face. There has for some time now been a need for an authoritative, measured, and informed exposition and analysis of the subject as a whole.

This book is highly recommended. If read by future—and indeed present—generations of lawyers, it will contribute greatly to the sound understanding and development of public international law. The publishers too have contributed to this cause first by suggesting that the author write this important book, and then by making it available immediately in paperback.

12 Thirlway (n 5).
13 ibid 145.
14 Thirlway (n 2) 231.
16 Thirlway (n 2) ‘Series Preface’.