The Sources of International Law. By Hugh Thirlway. Oxford: Oxford University Press, 2015. 239 + xxi pages.

Vol. 53 [2015], doi: 10.1017/cyl.2016.12

Hugh Thirlway has already written about the sources of international law generally, for example in dedicated chapters in Malcolm D. Evans' *International Law* and his own collection *The Law and Practice of the International Court of Justice*.[1] The book under review, however, represents an innovation in at least two respects. First, it is more thorough and detailed. Second, it has a broader scope. The book chapters were mostly limited to dogmatic enumeration and discussion of the sources and how they are to be applied. While the book under review does this, it also discusses various challenges to what Thirlway calls a "traditional" approach to the sources of international law. This makes the book part of a broader ongoing debate on the theory and nature of these sources. The book is thus not satisfied with merely presenting the sources of international from a dogmatic point of view; it also justifies why it does so. Whatever one may wish to call this added perspective (for example, "meta" or "self-reflective"), it greatly enhances the depth of the book.

The field of international law can also be said to have lacked (at least until now) a standard work on sources. Alain Pellet's chapter on Article 38 of the *Statute of the International Court of Justice* (*ICJ Statute*), in *The Statute of the International Court of Justice: A Commentary* is thorough and, at 140 pages, quite long for a book chapter, but it is written in the context of a particular statute of a particular court.[2] Vladimir Đuro Degan's 1997 book *Sources of International Law* is a rare book-length treatment of the subject but is starting to show its age and lacks discussions of "subsidiary means" — that is, (at least) judicial decisions and scholarship (recalling Article 38(1)(d) of the *ICJ Statute*).[3] Martti Koskenniemi's edited book of the same title is an interesting collection of articles but does not seek to give a systematic presentation of the subject.[4] There are chapters on sources in various general international law textbooks, but these are of necessity too short to analyze the subject with the comprehensiveness and level of detail that is possible in a dedicated book. Against this backdrop, the potential appeal of Thirlway's book should be clear.

[1] Malcolm D Evans, ed, *International Law*, 4th edition (Oxford: Oxford University Press, 2014), ch 4; Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford: Oxford University Press, 2013).

[2] *Statute of the International Court of Justice*, 24 October 1945, 1 UNTS 16, art 38 [*ICJ Statute*]; Andreas Zimmermann et al, eds, *The Statute of the International Court of Justice: A Commentary*, 2nd edition (Oxford: Oxford University Press, 2012) ch 2, art 38.

[3] Vladimir Đuro Degan, *Sources of International Law* (The Hague: Martinus Nijhoff, 1997).

[4] Martti Koskenniemi, ed, *Sources of International Law* (Aldershot, UK: Ashgate, 2000).

The book is divided into ten chapters. The first is called "The Nature of International Law and the Concept of Sources." It is a key chapter and can be said to briefly summarize the contents of all of the subsequent chapters and, thus, outlines the entirety of the author's argument. The following four chapters deal with specific sources, namely treaties, customary international law, general principles, and subsidiary means, as per Article 38(1) of the *ICJ Statute*. The next two chapters discuss "Interaction or Hierarchy between Sources" and what Thirlway calls "Specialities" respectively, with the latter term referring to *jus cogens* norms, obligations *erga omnes*, and soft law. Chapter 8 is devoted to "Subsystems of International Law" and touches on familiar themes such as self-contained regimes and fragmentation. Chapter 9 is titled "Alternative Approaches" and discusses specific writers' approaches to the sources of international law, generally, and customary international law, in particular. Chapter 10 is a conclusion. The book can also be divided into two parts, where Chapters 2–7 contain doctrinal discussions of sources, while chapters 8 and 9 move beyond this to more jurisprudential questions.

The first part of the book treats the sources of international law as any other field of international law, by drawing conclusions about the law governing the sources of law that are themselves built on sources of law. This raises the philosophical questions of where the sources come from or what they are ultimately based on. This is touched on briefly at the end of the book, where Thirlway notes that international law is "what … States … will it to be."[5] Some other legal philosophy is also included. The book has a succinct summary of a discussion of customary international law by John Finnis, in the context of examining the more general problem that "an authoritative rule can emerge … without … an authorised way of generating rules."[6] The views of Ronald Dworkin are also mentioned, albeit only in a single sentence. This is in the chapter on general principles to show that these are not "case-specific," not "automatic in their operation," and that they "may even conflict."[7]

One aim of the book is to defend what Thirlway calls "traditional sources theory" or a "traditional approach."[8] Various "alternative approaches" are discussed and found either not to conflict with Thirlway's approach or to be open to criticism.[9] Thirlway seems to equate his "traditional approach" with a "theory … that attributes each norm, directly or ultimately,

[5] Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2015) at 231.

[6] *Ibid* at 55–56.

[7] *Ibid* at 94.

[8] See, eg, *ibid* at 9, 28–30, 232.

[9] *Ibid*, ch IX.

https://doi.org/10.1017/cyl.2016.12 Published online by Cambridge University Press

to one of the sources identified in article 38 of the ICJ Statute," and he considers this article "a pillar of rock" in an otherwise changing landscape.[10] Thus, Thirlway aims to subsume every potential source of international law under the four categories identified in Article 38(1) of the *ICJ Statute*, as he states explicitly both at the beginning and end of the book.[11]

Chapters 2–5 therefore follow the enumeration found in Article 38(1) of the *ICJ Statute*. Article 38 does not use the word "sources" and applies only to the International Court of Justice (ICJ), but it is generally taken to reflect sources of international law recognized under customary international law.[12] The book has excellent passages on the status of unilateral declarations and the relevance of the *Nuclear Tests* decisions, eventually concluding that such declarations can be subsumed under the concept of treaties ("international conventions") within the meaning of Article 38(1)(a).[13] Similarly, according to Thirlway, UN General Assembly resolutions are subsumed, or a "constituent element" of, customary international law.[14] Equity is discussed under the heading of general principles.[15] Even soft law is quite convincingly argued to be covered by the various categories enumerated in Article 38(1) of the *ICJ Statute*.[16]

It would be possible, however, to maintain a classical, positivist, doctrinal, or formalist (or whatever similar term one prefers) approach while recognizing sources beyond those listed in Article 38. Designating unilateral declarations as treaties is perhaps a stretch, and it is hard to see what is gained from doing so. Similarly, resolutions of the UN General Assembly and similar bodies can be a subsidiary means for the determination of rules of law to the same extent as judicial decisions and scholarship, even though they are not mentioned in Article 38(1)(d). As Thirlway himself notes, customary international law may well recognize a source of international law other than those listed in Article 38.[17] Moreover, and importantly, this can be done without resorting to alternative, non-traditional, or non-formalist approaches. It is simply a question of how one views

[10] *Ibid* at 231.

[11] *Ibid* at 6, 232.

[12] *Ibid* at 5–6.

[13] *Nuclear Tests (Australia v France)*, Judgment, [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France)*, Judgment, [1974] ICJ Rep 457; *ICJ Statute*, *supra* note 2, art 38(1)(a). See Thirlway, *supra* note 5 at 44–52.

[14] See Thirlway, *supra* note 5 at 23, 79–81.

[15] *Ibid* at 104–10.

[16] *Ibid* at 171.

[17] *Ibid* at 50.

https://doi.org/10.1017/cyl.2016.12 Published online by Cambridge University Press

and interprets the existing law governing the sources of international law. Furthermore, even if no sources beyond those recognized in Article 38 currently exist, there is no principled reason why they cannot do so in the future.

One potential issue with recognizing sources outside Article 38(1) is that the ICJ may be unable to apply those sources, since the ICJ's jurisdiction to apply international law is limited to Article 38(1) (unless the parties have agreed to a judgment *ex aequo et bono* under Article 38(2)). However, the court has applied, for example, unilateral declarations, UN General Assembly resolutions, and principles of equity without specifying whether it considers itself to be acting within the limits of Article 38(1) in so doing. Even more significantly, the Permanent Court of International Justice (PCIJ), which was bound by an almost identical Article 38, applied national law, which cannot be subsumed under Article 38 of the *ICJ Statute*.[18] In light of this, the fact that some sources may be beyond the wording of Article 38(1) should not pose any particular problems for the ICJ.

Thirlway also discusses "Subsystems of International Law" in chapter 8. He generally argues against fragmentation and (rightly) sees the sources of international law as a unified whole. One question the author discusses in this context is the relationship between international law and religious law and, in particular, between international human rights law and Islam.[19] The question is whether religious law, including Islamic law, is a rival, alternative, or additional source of law that may be "not only separate but overriding" in relation to international law.[20] This could include "the view … that an Islamic State cannot be held bound to an international legal obligation that contradicts Islamic law."[21] Thirlway's view is that the religious laws of any particular state or group of states "is … not legally significant on the international plane."[22] This must be correct.

[18] See *Statute of the Permanent Court of International Justice*, 16 December 1920, reprinted in (1930) 16 Trans Grotius Soc 131, art 38, online: <http://www.refworld.org/docid/40421d5e4.html>. See the discussion in Lorand Bartels, "Applicable Law and Jurisdiction Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before It?" in Tomer Broude & Yuval Shany, eds, *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011) 115 at 131–34. However, Robert Kolb, *The International Court of Justice* (Oxford: Hart Publishing, 2013) at 355 concludes that the ICJ 'does not … have the right to decide disputes directly on the basis of municipal law'.

[19] Thirlway, *supra* note 5 at 25–28, 181–84.

[20] *Ibid* at 25–28, 183–84.

[21] *Ibid* at 28.

[22] *Ibid.*

https://doi.org/10.1017/cyl.2016.12 Published online by Cambridge University Press

As Thirlway notes, national law, regardless of its origin, "afford[s] no defence" for breaches of international law.[23]

However, it is hard to see why religious law should be singled out as a special case. Its claim to supremacy is no different from that of any national legal system or even that of international law itself. Just like the existence of national law is no defence against responsibility for breaches of international law, international law is of no relevance to the application of national law, unless the international rule is covered by a rule of national law that makes the international rule relevant. International law, national law, and religious law all claim the same internal supremacy in relation to other legal systems. Moreover, just like a religious government may be unwilling to obey an international rule that conflicts with its religious laws, a more secular government may be unwilling to obey an international rule that conflicts with non-religious values. The United Kingdom's denial of voting rights to prisoners, contrary to the rulings of the European Court of Human Rights, is just one example.[24] Thus, there seem to be no international law-related issues, either practical or theoretical, that are particular to religious law.

Despite, or perhaps because of, its traditionalist approach, *The Sources of International Law* feels like a breath of fresh air in its field. The book gives a comprehensive, detailed, and balanced review of the sources of international law. It does so through a positivist approach, while at the same time giving a rationale for this approach and raising a variety of interesting questions. The book should be considered obligatory for anyone who researches the topic. It should also be of great use to practitioners who grapple with particular problems and to students who wish to dig deeper than the treatment given in standard general textbook chapters.

Sondre Torp Helmersen
PhD Research Fellow, Department of Public and International Law, Faculty of Law, University of Oslo

[23] *Ibid* at 26.

[24] Eg, *Hirst v United Kingdom (No 2)*, 2005 ECHR 681.

https://doi.org/10.1017/cyl.2016.12 Published online by Cambridge University Press