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The Sources of International Law

By Hugh Thirlway. Oxford, Oxford University Press, 2014.

272 pp, £70 (hardcover), £24.99 (paperback).

*Sir Michael Wood KCMG**

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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¹ Some 50 years after Clive Parry's classic text, Clive Parry, 'The Sources and Evidences of International Law' (1965), reproduced in Anthony Parry (ed), *Collected Papers of Professor Clive Parry*, vol 2 (Wildy, Simmonds and Hill 2012) 1–105.

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.

⁵ He has done so before, more briefly, in successive editions of *International Law*, most recently the fourth edition (Hugh Thirlway, 'The Sources of International Law' in Malcolm Evans (ed), *International Law* (4th edn, OUP 2014) ch 4). See, also, in respect of particular aspects, Hugh Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Brill Academic Pub 1972), which was awarded the John Westlake Prize (1971) of the *Institut de droit international*; Hugh Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 294 *Recueil des cours* 269; and, the relevant sections of Hugh Thirlway, *The Law and Practice of the International Court of Justice: Fifty Years of Jurisprudence* (OUP 2013).

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 iudex, 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.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.'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.'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' (*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 *South West Africa Cases* judgment¹⁰ that 'the unpopularity at the time of this decision should not blind the reader to the force of its general arguments.'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

⁷ *ibid* 221. For the genesis of Chapter IX, see preface, vii.

⁸ *ibid* 54.

⁹ *ibid*.

¹⁰ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase, Judgment) [1966] ICJ Reports 6.

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*.¹² 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.¹³

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.¹⁴

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.¹⁵

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.¹⁶

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.

¹⁵ There are good expositions in French, including the relevant sections of Patrick Dailler, Mathias Forteau and Alain Pellet (eds), *Droit international public* (9th edn, LGDJ 2015). See also Alain Pellet, ‘Article 38’ in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012).

¹⁶ Thirlway (n 2) ‘Series Preface’.