

HUGH THIRLWAY (1937–2019)

It was, above all, to his deep and unparalleled mastery of the process and jurisprudence of the International Court of Justice that Hugh Thirlway owed his influence and reputation. He belongs to a select group of international public servants whose contribution to the wider world of international law went well beyond their official role, through their published writings, which were notable, in his particular case, for their scrupulous attention to detail and an elegant methodology and style. These were the same qualities he brought to his teaching, inspiring numerous students with enthusiasm for international law, as perhaps only someone with inner knowledge of its workings can. A list of Thirlway's publications is given at the end of this obituary. What he wrote, in all fields, was marked by the acuteness of his insight, but at the same time by the style and clarity with which it was expressed, thus adding to its weight and influence. It was both stylish and entertaining, enlivened also by flashes of wry humour, often in a footnote.¹ He never lost the bigger picture, but knew the importance of detail, even small detail, and was meticulous in the care and accuracy that went into everything he put into print.

Thirlway came to the law via classics, which was his first subject of study at Cambridge. He was also a formidable linguist, speaking French to conference interpreter standard, and also mastering in due course German and Spanish and, to some extent, Italian.² These wider skills and interests encouraged him to seize an opportunity offered by the Law Society, as the UK edged towards accession to the European Communities, to move from domestic practice as a solicitor in

¹ For example, the statement in the preface to *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* that '[n]o research assistants have been harmed in the making of this book' (vii); the assertion in *The Sources of International Law* (2019) that in much of the discussion of *jus cogens* in a separate opinion, 'as in quite a lot of areas where *jus cogens* is invoked, the term is used throughout as though it meant "very important"' (185, note 87); the citation in *The International Court of Justice* of the advice to a would-be author in Ecclesiastes 12:12: 'of making many books there is no end: and much study is a weariness of the flesh' (vi); and the citation from AP Herbert at the front of *Law and Procedure*: 'The question is, "What is the law?"—a question which frequently arises in our Courts, and sometimes receives a satisfactory answer'.

² He also later made himself fluent in Dutch, but apparently very much in his own way!

Cambridge to study for an academic year at the University of Nancy in France. The added boost which that gave to his French along with his first introduction to private international law led him to enrol for a special *doctorat d'université*. His thesis, written in French in his spare time on return to his Cambridge legal practice, was on the reciprocal recognition and enforcement of judgments between Great Britain and the countries of the Common Market—a subject which he later liked to joke was destined to become out of date almost immediately, as it was completed in 1970, shortly before UK accession took place.

By then, however, Thirlway had already begun what became his life-long engagement with public international law. He applied for one of the junior professional positions in the Registry of the International Court, the staff of which was, in those days, still very small. The post was more administrative than legal, but with substantial duties for translation and interpretation from French into English. Those responsible for the selection spotted his legal ability and offered him the position. His prize-winning work on *International Customary Law and Codification* appeared only a short while later. Its appearance coincided with his promotion to one of the few positions of First Secretary in the Registry, followed after some five years by elevation to the new post of Principal Legal Secretary, which had been created especially for him in recognition of his increased role, notably in the preparation of the Court's decisions.³ Not having been chosen in 1994 to succeed to the post of Registrar, he resigned from the Court's staff, but subsequently came back, by invitation, to serve two spells in his old post of Principal Legal Secretary between 2003 and his final retirement in 2008.

It was natural, given his academic bent and his keenness on writing, that, after leaving the Registry in 1994, Thirlway moved to a succession of academic positions, both full-time and visiting. Between 1994 and 2001 he was Professor of International Law at what was then still the Graduate Institute of International Studies in Geneva, where he taught the general course on international law for non-specialists, and also the law of the sea, sources of international law, and a course on international law through the cases. He was a visiting professor at the Universities of Bristol (2001–2009) and Leiden (2007–2015); at Bristol he was responsible for a course on international dispute settlement, and gave seminars on other topics for the LLM. In addition, he lectured at a good number of universities around the world including East China Normal University, the University of Wuhan, and Xi'an Jiaotong University, as well as at Munich University. He was a visiting fellow at the

³ A journal article written many years later, after Thirlway had left the permanent service of the Court, raised eyebrows in appearing to suggest that the Registry played a greater part in drafting the Court's decisions than many assumed was the case, or thought proper. A similar issue has become one of great sensitivity, notably in investor-state arbitration. The article does, however, contain interesting sidelights on Thirlway's relations with the two British Presidents of the Court in his time, Sir Humphrey Waldoock and Sir Robbie Jennings.

Lauterpacht Centre for International Law at the University of Cambridge, which added him to its select group of Honorary Fellows.

The teaching was hard going for someone who had not come to it along the academic track, and especially for someone like Thirlway who insisted on meticulous care and accuracy in the preparation of his courses. But what he offered was greatly appreciated by his students who benefited from his inside-track observations on the workings of the Court and what was really going on in some cases, and they enjoyed his anecdotes, which brought the subject to life.

His work in the Registry and his teaching aside, Thirlway was an unusually versatile and gifted person. His linguistic abilities have already been mentioned. Music was an enduring passion; he sang, played the piano (owning a fine instrument which he would play every day on getting home from work) and the flute, and taught himself in later years to play the bassoon. And it did not stop there, as he went on to compose several works which were given public performances in The Netherlands, and created through his enthusiasm a private chamber group which performed for friends in The Hague. He loved poetry, theatre, and amateur dramatics, and (for a closed circle only) gave vent to his irrepressible good humour—as well, one suspects, as relieving his frustrations—by satirizing long and ponderous ICJ proceedings in light verse. Along with all this, and although he never drove a motor car, he was fascinated by aviation and flew a light plane in The Hague.

It may be thought surprising, against this adventurous background, that, in his legal writing, Thirlway was conservative and resolutely non-speculative. Closer examination, though, makes this conservatism of outlook less paradoxical. Thirlway was at the end of the day a man for whom thought served merely as the prelude to practice. Hence his concentration on what he considered a correct approach to international law, and therefore his intense preoccupation with its sources, the methods for its ascertainment, and with making a reality of both through judicial settlement. Theory for its own sake was of no interest. This would explain why his major contributions to the literature were on customary international law, on sources more broadly, on the law and practice of the ICJ, and (more narrowly) on non-appearance before the Court. It also explains his enthusiasm for the ILC's work on identification of customary international law (2012–2018), which was able to benefit greatly from his perceptive suggestions. His Cambridge LLD, awarded the year before his death, was in recognition of his body of published work as a whole rather than any individual item of study.

The recent deaths, first of Shabtai Rosenne and now of Hugh Thirlway, have removed from the field two of the most thoughtful and profoundly knowledgeable expert authorities on the law and practice of the International Court. Like Rosenne, Thirlway wrote from the standpoint of a deep concern for and commitment to the Court as the pinnacle of the post-War system of judicial settlement of international disputes, a

concern and commitment that were neither demonstrative nor polemical, but designed to pay the Court the compliment of closely studying what it actually did. The aim was to influence the future development by the Court of its case-law and procedure not by lecturing it, but rather through a discriminating mix of exposition and comment aimed at bringing out the implications and probable consequences of the decisions and the reasons behind them. If Rosenne was deeply committed and well informed, he remained an outsider, whereas Thirlway was the quintessential insider, whose commentary was fuelled by an encyclopaedic familiarity with everything the Court had done, and the seeming ability to recollect just why each troubling phrase in every one of its judgments or decisions had come out the way it did. The result was to make his writings on the Court an invaluable resource for practitioners. To look at what Thirlway had written on a point that was, or might arise, before the Court was the logical first step for any seasoned counsel, and was seldom undertaken without gaining the benefit of a new piece of information or a fresh avenue of approach.

Thirlway's writings on the International Court are essential reading, not only for the legal practitioner but also for anyone, scholar, diplomat, or international civil servant, interested in the real world of international dispute settlement through the Court and more widely. His magnum opus, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, was published by OUP in 2013 and is based on two series of lengthy articles appearing in this Yearbook, the first from 1989 to 2003 and the second from 2005 to 2011. This monumental work (two volumes, almost 2000 pages) left Thirlway's editors at OUP in awe of his ability to deliver, year after year, a monograph-length piece of work of sufficient quality to satisfy the Yearbook's editors. The decision had been taken by the OUP Delegates that the collected articles would be published when they were completed, originally estimated for 2003, but Thirlway himself was so keen to make sure the collection was up to date that he produced a series of supplements which were also published in the Yearbook up to the 2011 edition (volume 82), with the result that the collected work did not appear until 2013. The articles had been seen from the outset as a continuation of Fitzmaurice's series on the case-law of the Court, also in this Yearbook, although the viewpoint is different: Fitzmaurice knew the Court well, but from within the service of a government which was a staunch supporter of the Court. Thirlway, as already indicated, was by contrast the quintessential insider.

The reference above to Thirlway's views being conservative does not mean that they were either predictable or uncritical. When the Court (in his view) went wrong, he was more than willing to say so, and to tell his reader why. He was, for example, famously at odds with the Court's decision in *LaGrand* on the binding force of provisional measures (*Law and Procedure*, vol II, 968: 'a disaster for the system'), and he frowned at *Barcelona Traction* as a 'generally disappointing decision' (vol I, 168).

But for the most part he sought to explain decisions and to place them in their proper legal context. Whereas the Court's handling of considerations of humanity in the second *South West Africa* judgment and in *Nicaragua* came in for a chorus of external criticism, Thirlway (vol I, 142–48) declined to join in, concentrating instead on bringing out what the majority on the Court intended and what the dissents were about.

Similarly, in his 1985 monograph on *Non-Appearance before the International Court of Justice*, his approach was resolutely pragmatic. He treated the matter simply as a procedural possibility open to a respondent under the Court's Statute and Rules, which needed, therefore, to be handled appropriately, and he did so in a straightforward and practical way which seems likely, in view of recent trends in state behaviour, to stand the test of time.

Alongside the above works stands also a slim volume, *The International Court of Justice*, published in 2016 at Thirlway's own initiative, which neatly filled the need for a simple and non-specialist account of the Court and its workings left by the fact that Rosenne's short study⁴ had not been updated for some time. There were also a number of shorter pieces on specific aspects of the Court's work. These range from two articles published in 1984 on the admissibility of illegally obtained evidence and on reciprocity in the jurisdiction of the Court, to, most recently, a chapter on the significance of procedure in the judicial settlement of international disputes. The last of these, shortly to appear in the forthcoming *Research Handbook on International Procedural Law*, was a piece he completed—to his great personal satisfaction—just a few days before he died.

Thirlway's interest in the sources of international law reflected his work on the Court and tended to follow the same approach as the Court itself. His first monograph, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law*, was written as an entry for the prestigious John Westlake Prize of the *Institut de Droit International*. It is worth bearing in mind that the book was written before the Court's 1969 judgment in the *North Sea Continental Shelf* cases, and for reasons connected with the Prize could only be lightly amended to refer briefly to that seminal judgment. Central to the theme of the book is the important point that:

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. (145)

⁴ T Gill (ed), *Rosenne's The World Court: What It Is and How It Works* (6th edn, Nijhoff 2003).

Thirlway perhaps revealed most about his beliefs and approach to international law, as well as his understanding of the role of international law in the international community, in his Hague Academy lectures, *Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning* (2002). The lectures shed interesting light on the reasons for his scepticism about ‘the general principles of law recognized by civilized nations’ and about the validity of argument by analogy from domestic law: ‘the whole thrust of [the] lectures is an attempt to identify some of the circumstances in which it is inappropriate, because of the nature of international law and international society, to have recourse to general principles identified in national legal systems’ (345). The lectures begin with a clarion call: ‘International law is different’. The author then proclaims that he will ‘be adopting broadly what is known as a positivist and rule-based approach’, and warns: ‘Words are the tools of the lawyer; and they are, or should be, precision tools’ (280). It is characteristic that he deals at length with the question of language, and languages, in relation to international law (280–87). Important insights—often referred to, equally characteristically, as ‘statements of the obvious’—may be found on almost every page. A short passage on customary international law concludes that ‘custom in domestic law and custom in international law are so different in operation that one may speak of a difference of kind rather than degree’ (345).

The Sources of International Law (now in its second edition, 2019) is an up-to-date and practical work on the sources of public international law as set out in article 38(1) of the Court’s Statute. The book first assumes, but then goes on to demonstrate, that the doctrine of sources continues to play a central role in the discipline of public international law. Unsurprisingly, given Thirlway’s background, the overall approach again reflects international law as it is practised. Each of the chapters on the three sources in article 38(1)(a), (b), and (c), and on the subsidiary means listed in article 38(1)(d), provides a perceptive, convincing, and reliable introduction to the source in question, without side-stepping controversial issues. Thirlway deals in a practical and realistic manner with issues that may initially perplex the practitioner as well as the student; theory is not ignored, though he is (understatedly) impatient with academic questioning of the continuing relevance of article 38(1).⁵

In the long chapter on customary international law, Thirlway cuts through the academic speculation, and brings the reader back to the basic principles encapsulated in the much maligned but far-sighted wording of article 38(1)(b) of the Statute: ‘international custom, as evidence of a general practice accepted as law’. There is a clear account of the basic approach reflected in the language of article 38(1)(b) comprising the two constituent elements of ‘general practice’ and ‘acceptance as

⁵ Thirlway had also completed a revision of the chapter on sources for the next edition of *Oppenheim’s International Law*.

law'. This is followed by a separate section on the role of UN General Assembly resolutions in the possible establishment or determination of a customary rule. He then tackles the difficult subject of how customary international law changes, followed by a somewhat sceptical account of what he terms 'the relevance of ethical principles to customary law'. The final sections of the chapter deal with the two very different exceptions to the generality of customary international law, the 'persistent objector' rule and particular (regional, etc) customary international law.

If the above seems a traditional approach to the sources of law, it would be a mistake to think of it as dated. It reflects, rather, the considered and collected views of a practitioner, deeply imbued with the structure and the grain of the law. As the international community—and also the ILC—now more seriously engages with the problem of sources, Thirlway's work serves as a crucial contribution against which to measure recent theories.

Thirlway was ever courteous, but deeply confident in his views and ready to stand his ground in support of them. His writings reflect the man: modest, even unassuming, in his meticulous scholarship, but sparkling in its presentation. His first book, which won the John Westlake Prize in 1971, had been dedicated '[t]o all those from whom I have learned, in gratitude'.

SIR FRANKLIN BERMAN, KCMG, QC
SIR MICHAEL WOOD, KCMG

PRINCIPAL PUBLICATIONS

Books

The Sources of International Law (2nd edn, OUP 2019)

The International Court of Justice (OUP 2016)

The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence, vols I and II (OUP 2013) (containing the text of articles appearing in this Yearbook from 1989–2003, and again from 2005–2011)

Non-Appearance before the International Court of Justice (CUP 1985)

International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law (Sijthoff 1972)

Articles, chapters, and others

'The Significance of Procedure in the Judicial Settlement of International Disputes' in J Gomula and S Wittich (eds), *Research*

- Handbook on International Procedural Law* (Edward Elgar 2020, forthcoming)
- ‘Foreword’ in F Baetens (ed), *The Legitimacy of Unseen Actors in International Adjudication* (CUP 2019)
- ‘Article 30’ in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019)
- ‘Advisory Opinions’, ‘Compromis’, ‘Judgments of International Courts and Tribunals’, and ‘Preliminary Objections’ in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP, updated 2019)
- ‘Provisional Measures’ in E Sobenes Obregon and B Samson (eds), *Nicaragua before the International Court of Justice* (Springer 2018)
- ‘The International Court of Justice’ in M Evans (ed), *International Law* (5th edn, OUP 2018) (this chapter also appeared in the 1st to 4th editions)
- ‘Territorial Disputes and Their Resolution in the Recent Jurisprudence of the International Court of Justice’ (2018) 31 LJIL 117
- ‘The Role of Non-State Actors: A Response to Professor Ryngaert’ (2017) 64 Netherlands International Law Review 141
- ‘The International Court of Justice: Cruising Ahead at 70’ (2016) 29 LJIL 1103
- ‘Human Rights in Customary Law: An Attempt to Define Some of the Issues’ (2015) 28 LJIL 495
- ‘Procedural Fairness before the International Court of Justice’ in A Sarvarian and others (eds), *Procedural Fairness in International Courts and Tribunals* (BIICL 2015)
- ‘The Sources of International Law’ in M Evans (ed), *International Law* (4th edn, OUP 2014) (this chapter also appeared in the 1st to 3rd editions)
- ‘Peace, Justice, and Provisional Measures’, in G Gaja and JG Stoutenburg (eds), *Enhancing the Rule of Law through the International Court of Justice* (Nijhoff 2014)
- ‘Quelques observations sur le concept de dispute (différend, contestation) dans la jurisprudence de la C.I.J.’ in M Kamga and M Mbengue (eds), *Liber Amicorum en l’honneur de Raymond Ranjeva* (Pedone 2013)
- ‘Responsibility of International Organizations: What Role for the International Court of Justice?’ in M Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Nijhoff 2013)
- ‘Some Observations on Recent Trends in the Work of the International Court of Justice’ (2012) 55 Japanese Yearbook of International Law 4
- ‘Unacknowledged Legislators: Some Preliminary Reflections on the Limits of Judicial Lawmaking’ in R Wolfrum and I Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2012)

- ‘Dulce est Desipere in Loco’ in U Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011)
- ‘The International Court of Justice 1989–2009: At the Heart of the Dispute Settlement System?’ (2010) 57 *Netherlands International Law Review* 347
- ‘Reflections on Multiculturalism and International Law’ in S Yee and J-Y Morin (eds), *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Nijhoff 2009)
- ‘The Recommendations Made by the International Court of Justice: A Sceptical View’ (2009) 58 *ICLQ* 151
- ‘The Role of the International Law Concepts of Acquiescence and Estoppel’ in S Douma and F Engele (eds), *The Legal Status of the OECD Commentaries*, vol 1 (IBFD 2008)
- ‘The Drafting of ICJ Decisions: Some Personal Recollections and Observations’ (2006) 5 *Chinese Journal of International Law* 15
- ‘The Contribution of the International Court of Justice to the Development of International Law’ in Zeng Lingliang and Xiao Yongping (eds), *Wuhan University Lectures on International Law II* (Wuhan University Press 2006)
- ‘Injured and Non-Injured States before the International Court of Justice’ in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005)
- ‘Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning’ (2002) 294 *Recueil des Cours de l’Académie de Droit International* 265
- ‘Judicial Activism and the International Court of Justice’ in N Ando and others (eds), *Liber Amicorum Judge Shigeru Oda*, vol 1 (Kluwer 2002)
- ‘Reflections on *lex ferenda*’ (2001) 32 *Netherlands Yearbook of International Law* 3
- ‘The International Court of Justice and other International Courts’ in N Blokker and H Schermers (eds), *Proliferation of International Organizations: Legal Issues* (Kluwer 2001)
- ‘Counterclaims before the International Court of Justice: The Genocide Convention and *Oil Platforms* Decisions’ (1999) 12 *Leiden Journal of International Law* 197
- ‘The Nuclear Weapons Advisory Opinions: The Declarations and Separate and Dissenting Opinions’ in L Boisson de Chazournes and P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999)
- ‘The Proliferation of International Judicial Organs and the Formation of International Law’ in W Heere (ed), *International Law and The Hague’s 750th Anniversary* (TMC Asser 1999)
- ‘Dispute between Taiwan and Japan over the Diaoyu/Senkaku Islands: Possibilities of Recourse to the International Court of Justice’ in

- International Law Conference on the Dispute over Diaoyu/Senkaku Islands* (Taiwan Law Society 1997)
- ‘Procedural Law and the International Court of Justice’ in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996)
- ‘The Contribution of the International Court of Justice to the Development of Law: The South West Africa Experience’ in *Proceedings of the Seventh Annual Conference, Johannesburg 21–24 August 1995* (African Society of International and Comparative Law 1995)
- ‘Reflections on the Articulation of International Decisions and the Problem of “Mootness”’ in R Macdonald (ed), *Essays in Honour of Wang Tieya* (Nijhoff 1994)
- ‘The Indication of Provisional Measures by the International Court of Justice’ in R Bernhardt and H Mosler (eds), *Interim Measures Indicated by International Courts* (Springer 1993)
- Entries on ‘Advisory Opinions of International Courts’, ‘Evidence before International Courts and Tribunals’, ‘Preliminary Objections’, and ‘Procedure of International Courts and Tribunals’ in R Bernhardt (ed), *Encyclopedia of Public International Law* (Elsevier 1992, 1995, 1997)
- “Normative Surrender” and the “Duty” to Appear before the International Court of Justice: A Reply’ (1990) 11 *Michigan Journal of International Law* 912
- ‘La recherche de la solution équitable en droit international privé’ in *Droit international privé: Travaux du Comité français de droit international privé, 4e année, 1981–1982* (1985)
- ‘Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication’ (1984) 78 *AJIL* 622
- ‘Reciprocity in the Jurisdiction of the International Court’ (1984) 15 *Netherlands Yearbook of International Law* 97

Blog posts

- ‘Professor Baxter’s Legacy: Still Paradoxical?’ (2017) 6(3) *ESIL Reflections* <https://esil-sedi.eu/post_name-121/>
- ‘EJIL Debate: A Whale or a Weasel? The Antarctic Whaling Case, and a Reply to Professor d’Aspremont’ (Part I, Part II, and a Rejoinder) (*EJIL:Talk!*, 15, 16, and 19 January 2018) <www.ejiltalk.org/author/hughthirlway/>

Thesis

- ‘La reconnaissance et l’exécution réciproques des jugements en matière patrimoniale dans les rapports entre la Grande-Bretagne et les pays du Marché Commun’ (Thesis, Nancy 1969)

Book reviews

- 'A von Bogdandy and I Venzke: In Whose Name? A Public Law Theory of International Adjudication', (2015) 62 *Netherlands International Law Review* 475
- '*The International Court of Justice*, by Robert Kolb' (2013) 84 *BYIL* 344
- '*The Development of International Law by the International Court of Justice*, by Christian J Tams & James Sloan (eds)' (2013) 84 *BYIL* 351
- 'Y Shany, *Assessing the Effectiveness of International Courts*' (2014) 61 *Netherlands International Law Review* 476
- 'Ruth Mackenzie, Cesare P Romano and Yuval Shany, with Philippe Sands, *The Manual on International Courts and Tribunals*' (2011) 24 *LJIL* 535
- '*International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary*, by Ole Spiermann' (2007) 101 *AJIL* 246
- '*Les engagements internationaux en matière de règlement pacifique des différends entre états*, by Photini Pazartzis' (1994) 88 *AJIL* 571
- '*Cour permanente de justice internationale 1922–1945. Volume 5-I: La responsabilité internationale. Volume 5-II: La guerre et la neutralité*. Edited by Peter Haggemacher, Richard Perruchoud and Haritini Dipla' (1991) 85 *AJIL* 204