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The Sources of International Law

Hugh Thirlway

Foundations of Public International Law

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Series Preface

Whilst all lawyers are concerned to know what the law on a given topic is, and why it is, the question of 'where does it come from' tends not to loom quite so large—except, that is, for international lawyers, whose near-obsession with the subject has at least in part formed a part of their rebuttal to the claim that international law is not law at all. The fallacy inherent in that claim has now been successfully refuted and few would seriously make it today, but the outpouring of scholarship on the subject remains. Yet the centrality of the techniques, methodology and processes by which rules of international law become binding has never been more pressing, especially in light of the proliferation of new actors and institutions whose conduct permeates these processes. The continuing public sensitivity to the importance of human rights and environmental values has continued to invigorate the debate about hierarchy of norms, and how the emerging normative regimes should attempt to reconcile what are at times conflicting value systems. 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 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. That need has now been met by this volume. With his approach firmly rooted in the practice of states and established legal doctrine, Professor Thirlway guides the reader with a masterly ease through the intricacies of the sources of international law, reflecting on the scholarship which it has generated whilst demonstrating it to be a cohesive and coherent body of law. Informed by a deep understanding of the practice of international law, this is the work which is likely to provide the *vade mecum* to the subject for years to come.

Malcolm D Evans
Phoebe Okowa

whose views are discussed in Chapter IX; they may not be fully representative of all current trends of thinking, but I hope my treatment will provide a starting-point for those who wish to go further into this field.

For the research that has gone into this work, while I have not employed research assistants, I have been fortunate in having access to the immense resources of the library of the Peace Palace in The Hague, and the invaluable assistance of the ICJ Librarian, Juliana Rangel, and her team; it is a pleasure here to record my gratitude to them. Gratitude is also due to three colleagues and friends of long standing, Dr Cristina Hoss, Legal Officer with the International Court of Justice, volunteered to read the first complete manuscript of this work, and then offered such valuable comment and criticism that considerable improvements were made possible. The General Editor of the series, Professor Malcolm Evans, read a later draft, and drew my attention to a number of passages that needed to be supplemented or improved. Finally Dr Eric de Brabandere of the University of Leiden kindly read the section on the law of WTO and ICSID and gave me the benefit of his knowledge and experience in that field. It goes without saying that I accept sole responsibility for all errors or omissions that may be detected in the text.

H.T.

The Hague
December 2013

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FOUNDATIONS OF PUBLIC INTERNATIONAL LAW

General Editors: Professor Malcolm Evans, University of Bristol and
Dr Phoebe Okowa, Queen Mary

The question of what is, and what is not, part of international law is of course fundamental. Traditionally, treaties between states and custom (state practice) have been seen as the primary means by which international law is created. These two sources, along with the 'general principles of law', are specified in the Statute of the International Court of Justice (Article 38), and this text has long been treated as generally authoritative. However, whether this is still an adequate definition of the sources of international law, and how they may operate in modern international society, has been questioned in significant ways. Taking Article 38 ICJ Statute as starting-point, this book provides a careful assessment of all the recognised, or asserted, sources of international law. Among the issues considered are: the impact of ethical principles on the creation of international law; the existence of peremptory norms (those of *jus cogens*), and whether they come into being through the same sources as other norms; the place of these, and of norms involving rights and obligations *erga omnes*, in the operation of international legal relationships; the definition and role of 'general principles of law'; whether any of international law's sub-disciplines involve the application of additional sources; and the continuously evolving relationship between treaty-based law and customary international law. Re-examining the traditional model, the work takes account of the increasing role of international jurisprudence, and looks at international organisations and non-state actors as potential new sources of international law. The book provides a perfect introduction to the law of sources, as well as innovative perspectives on new developments, making it essential reading for anyone studying or working in any field of international law.

Hugh Thirlway is a former Principal Legal Secretary of the International Court of Justice, and former Professor of International Law at the Graduate Institute of International Studies in Geneva.

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