

THE THEORETICAL PROBLEM OF SOURCES OF INTERNATIONAL LAW

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INTRODUCTORY REMARKS

The present contribution is a tribute to Professor Karol Wolfke. Personally I treat it as a great privilege that I met the Professor many years ago (when I was a very young beginner in the field of transnational law). I remember his courtesy and nice attitude, which may have been one of the incentives for my ‘betraying’ the EU law to the benefit of public international law. As customary law was the topic of special interest of Professor Wolfke, I deliberately decided that a book dedicated to him is a good place for some reflections on a more general topic of the sources of international law.

The problem of sources of international law is referred to in every manual of that law. That is why one can wonder if there is still any sense to dwell on such a subject. It seems to be too well-known and obvious to deserve attention any more. It is illustrative that, while in the relatively short period between the two World Wars, two Hague Academy lectures were devoted to sources as such¹, but after the Second World War only one such lecture was organized. It is worth adding that it took place as long ago as 1958².

In fact, however, the topic really seems to be simple but is not. As Weil rightly notes, this problem preoccupies the doctrine – generation after generation³.

Its traditional presentation takes as a point of departure art. 38 of the Statute of the International Court of Justice, usually supplementing it with several reservations. It would be difficult not to see important differences of views among several authors writing on the topic. The numbers of identified

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¹ P Heilborn, ‘Les sources du droit international’ (1926) 11 RCADI 1-63. GA Finch, ‘Les sources modernes du droit international’ (1935) 53 RCADI 531.

² P Guggenheim, ‘Contribution à l’histoire des sources du droit des gens’ (1958) 94 RCADI 1.

³ P Weil, ‘Le droit international en quête de son identité. Cours général de droit international public’ (1992) 237 RCADI 133.

sources differ. It goes without saying that these differences should be reflected in the very definition of a source of international law. The aim of the present text is to give account of these differences and try to look behind them – in order to identify their reasons.

Sometimes the reference to sources is treated as a mere didactic introduction to the quantum of statements on treaties, custom, resolutions of international organizations and possibly some other matters. These presentations, as such, are usually very competent and valuable. What is often missing is a clear statement as to why the elements discussed by a given author are sources of international law, or possibly which of the elements which are discussed are not sources and why the elements absent from the list are not included as well.

So e.g. Shaw, when discussing ‘sources’,⁴ writes on custom, treaties, unilateral acts of states, general principles of law, case-law and doctrine. The subchapter ‘other sources’ is the opportunity to discuss the ILC and other bodies as well⁵.

Also Cahier, in his general course of public international law, treats the notion ‘sources of international law’ as an introduction to the law of treaties⁶. Then he examines as ‘other sources’: custom, resolutions of international organizations and jurisprudence⁷.

I must say that I totally disapprove of the tendency to treat references to the notion of sources of international law as a mere introduction to the law of treaties and some other elements. *Nolens volens*, such introductions are treated in a purely instrumental way and are everything but a serious examination of a matter of a highly theoretical nature and of fundamental importance.

Sometimes the authors seem to deliberately run away from very tough statements concerning the essence of a source of international law. In my opinion this method of presentation seems to do a very bad service to the truth. On the contrary, if the notion of a source of law does not work properly in the field of international law, it should be said expressly. If it is a perfect tool it should be confirmed and if necessary proved. If a message for the students is the following: “you fail an exam if you do not list sources of international law, though we – your teachers - have a very unclear idea of those sources or pretend not to see self-contradictions and lack of logics in our teachings”, then it would be futile to expect high esteem from such students.

That is why the topic is worthy of discussion; it being understood that the frames of the present text will obviously be insufficient to exhaust it.

⁴ MN Shaw, *International Law* (2008) 69-128.

⁵ Shaw (n 4) 109. The very systematization of his work is not decisive, however. So e.g. his discussion on the case-law is opened by the reservation that court rulings are not sources of law but subsidiary means of determining the content of norms. See p.113 – for an analogous remark concerning the doctrine.

⁶ P Cahier, ‘Changements et continuité du droit international. Cours général de droit international public’ (1985) 195 RCADI 161-221.

⁷ Cahier (n 6) 222-252.

I. THE DEFINITIONS AND LISTS OF SOURCES IN THE LEGAL LITERATURE

Usually the definition of sources of international law and the catalogue of these sources are treated as two sides of the same coin. That is why it seems difficult, when discussing the views of several authors writing on international law, to divorce the views on definition from the ones concerning the catalogue of sources of international law. On the contrary, it may be possible at a later stage to look in more detail at those elements taken in isolation.

In fact the term source is quite old. It definitely predates the adoption of the Statute of the PCIJ. It was used i.a. by Despagnet. He did not define it, however. He wrote that

‘sources of international law are of different nature, depending upon whether it is considered from the theoretical point of view or from the positive point of view’.⁸

Also Oppenheim notes that ‘(t)he different writers on the Law of Nations disagree widely with regard to the kinds and number of sources of this law’⁹. He finds the reasons of that diversity of views and writes ‘it seems that most writers confuse to conception of ‘source’ with that of ‘cause’ (...)’¹⁰. According to him

‘Source means a spring or well, and has to be defined as the rising from the ground of a stream of water. When we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground. On the spot, we say, is the source of the stream of water. We know very well that this source is not the cause of the existence of the stream of water.’¹¹

This differentiating of source from the cause is the main aim of the picture presented by Oppenheim. Interestingly enough, when he attempts to define the source of law he identifies it with ‘the name for historical fact out of which rules of conduct come into existence and legal force’.¹² These ‘historical facts’ are associated by the author with elements which the majority of contemporary authors would qualify just as formal sources of international law; that is

‘(1) express consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties’ and

‘(2) tacit consent, that is implied consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct’.¹³

He concludes in a slightly mysterious way by saying that

⁸ F Despagnet, *Cours de droit international public* (1910) 69. Translations from French, German and Polish are my own.

⁹ L Oppenheim, *International Law. A Treatise*. Vol. I – Peace, Eighth edition edited by H Lauterpacht, (1955) 24.

¹⁰ Oppenheim (n 9) 24.

¹¹ Oppenheim (n 9) 24.

¹² Oppenheim (n 9) 25.

¹³ Oppenheim (n 9) 25.

‘subject, therefore, to what has been said above (...) as to the meaning of ‘common consent’ and below (...) as to the binding force of general principles of law, treaties and custom must be regarded as the exclusive sources of the Law of Nations.’¹⁴

One can wonder at the value of such statements. Can we say that ‘treaties and custom must be regarded as the exclusive sources’ when they seem ... not to be the exclusive sources. In particular, Oppenheim qualifies general principles of law as such sources.¹⁵ He also uses the notion of ‘subsidiary sources of international law – comprising decisions on judgments of courts and tribunals’ and ‘writing of authors’.¹⁶

The suggestive comparisons of a source of law to ‘spring or well’ with water evidently had influence on other authors. In the Polish legal literature Bierzanek and Symonides write that ‘the science of international law, similarly as other legal disciplines uses a relatively imprecise, metaphorical term ‘sources of law’. A legal norm, similar to a river, takes its beginning – that is flows from a source’.¹⁷

Some authors find it wise to show their reserve to the very term ‘source of law’. So e.g. Rosenne writes ‘Most general works on international law have a chapter on the “sources” of international law. That is a misleading expression, since it confuses the non-juridical factors that give to international law its quality of law with the elemental factors from which a principle or a rule of international law can be traced.’¹⁸

The response to the unquestionable ambiguity of the very term ‘source’ is to be found in an attempt to distinguish a few separate meanings of the term.

II. THREE MEANINGS OF THE TERM ‘SOURCE’ OF LAW

Several authors differ with regard to the number of these different types of sources. Often a three-element differentiation is presented. It comprises then: sources in the material meaning, sources in the formal meaning of the term and sources in the cognitive (informative) meaning of the term. The latter could be just called sources of information on the norms of public international law. Their separation from true sources of law seems to be relatively easy.

The Polish legal doctrine is very attached to this differentiation. It could be found e.g. in the works of Góralczyk¹⁹. He writes that material sources of law are elements which bring about the emergence of norms of international law²⁰. As examples he cites: cooperation, competition or even the conflicts of states. It should be noted that these examples are completely different in nature as compared to the ones invoked by authors using the

¹⁴ Oppenheim (n 9) 25.

¹⁵ Oppenheim (n 9) 29.

¹⁶ Oppenheim (n 9) 31 as to case-law, 33 as to the doctrine.

¹⁷ R Bierzanek, J Symonides, *Prawo międzynarodowe publiczne* (1994) 77.

¹⁸ S Rosenne, ‘The Perplexities of Modern International Law. General Course on Public International Law’ (2001) 291 RCADI 47-48.

¹⁹ W Góralczyk, *Prawo międzynarodowe publiczne w zarysie* (1989) 61.

²⁰ Góralczyk (n 19) 61.

same term or even the same or very similar definition of sources in the material meaning of the term.

The same can be said about his idea of sources in the cognitive meaning of the term. For Góralczyk they are 'collections of documents providing knowledge on the norms of public international law'.²¹ As examples he cites collections of treaties and surveys of state practice.

In this context it would be interesting to know if elements cited in art.38 (1) (d) of the Statute of the ICJ could, and should, be treated as sources in the cognitive meaning of the term. Perhaps the answer is 'no' as regards Góralczyk himself. What is more important, however, is rather to know if they should not be so assimilated. In my opinion an attempt to limit the third meaning of the word 'sources' only to 'documents' is a bad decision, unnecessarily narrowing the scope of a relatively general notion.

The references to three meanings of the term 'source' are usually a pretext to statements that what really interests international lawyers are sources in the formal meaning of the term. Their definitions also differ to a high extent. Some authors put stress on the normative nature of international law. Góralczyk belongs, evidently, to this group of writers.

For him they are 'forms in which norms of international law are created. So they are forms in which the will of states (or other subjects of international law) creating international law is expressed'²².

Quoc Dinh and the contemporary editors of his work also define sources of law (in the formal meaning of the term) as the procedures of creating norms (*les procédés d'élaboration du droit*).²³

Verdross and Simma rightly reflect the double character of a formal source of international law. In their opinion the sources are not only the procedures, in which the norms are created but also the forms in which the norms present themselves (*die Formen in denen die Normen aufscheinen*).²⁴ That is why they call them as "*Erzeugungsarten und Erscheinungsformen*" of the positive international law²⁵.

Also Czapliński and Wyrozumska combine those two elements – that is both processes and forms. For them, a source of law is an 'external expression of the process of creating norms - a form in which law is cast'²⁶. Interestingly enough, in another place the same authors use in this context the word "acts". They wonder whether the term 'source of law' should be narrowed only to acts which contain general (abstract) rules or should be extended to other acts as well²⁷. Putting aside this very question, one can wonder on the underlying reasoning, associating formal sources of law with acts. Weil in his study, poses a fundamental question – whether one should speak about sources or about acts²⁸. Even if the two are interrelated, they are not synonymous. Even the cited authors do not go as far as to insist that

²¹ Góralczyk (n 19) 61.

²² Góralczyk (n 19) 61.

²³ N Quoc Dinh, P Daillier, A Pellet, *Droit international public* (1994) 110.

²⁴ A Verdross, B Simma, *Universelles Völkerrecht. Theorie und Praxis* (1984) 321.

²⁵ Verdross, Simma (n 24) 321.

²⁶ W Czapliński, A Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* (1999) 15.

²⁷ Czapliński, Wyrozumska (n 26) 16.

²⁸ Weil (n 3) 133. As to a very pessimistic assessment of the present and the future of the theory concentrated on acts, see: Weil (n 3) 137.

each and every source of law must be an act. In consequence, there may be some sources being acts and some others not being them. One can easily reverse this statement and say that evidently not every act must be a source of law. Usually the word 'act' is used with respect to measures taken on the basis of sources – directly or even indirectly.

Interestingly enough, when discussing sources other than custom and treaties, Cassese puts them into a chapter 'Other lawmaking processes'²⁹. This is also the term used by Zemanek in his Hague general course³⁰.

Fenwick uses, in this context, three terms. They are: the causes of international law, the sources of international law and evidences thereof. He makes clear that some writers see in them 'sources'. It would be easy to see 'material sources' in the first and 'evidentiary sources' in the last. It would lead to the conclusion that, he himself, reserves the term 'source' for what is called by the majority of writers as formal sources. In fact it is only the qualification of the first element that fits properly. For him, they are 'the forces of international relations that have led to the establishment of the law'³¹. All the same, it is much more difficult as regards the evidence.

The sources (probably formal) are defined by Fenwick as 'certain historical facts, long-established usages and formal treaties, which have appeared to embody the consent of particular nations to be bound by a given rule'.³²

It seems useful to confront this with what the same author writes on 'the evidences which bear witness to the existence of certain rules, the declarations or official documents which indicate that nations have recognized an obligation to do or not to do certain things'.³³

Though the three meanings of the term 'source of law' seem to be widely accepted, it is difficult to speak about full unanimity. The English-speaking doctrine prefers, rather, to use two terms – of formal and material sources. This terminology is used by i.a. Brownlie. According to him, formal sources are 'legal procedures and methods for the creation of rules of general application which are legally binding on the addressees'.³⁴ What deserves attention here is a reference to 'legal procedures and methods'. These legal procedures and methods must be themselves determined by the law. The most important question is where to look for legal procedures of creating legal procedures for the future. It is evident that a mistake of a vicious circle is in place. That is why Brownlie writes that 'in the context of international relations the use of the term 'formal source' is awkward and misleading since the reader is put in mind of the constitutional machinery of law-making which exists within states. No such machinery exists for the creation of rules of international law'.³⁵ Brownlie, on the contrary, refers to a substitute of such formal sources. It is namely 'the principle that the general consent of states creates rules of general application'.³⁶ It goes

²⁹ A Cassese, *International Law* (2005) 183.

³⁰ K Zemanek, 'The legal foundations of the international system. General Course on Public International Law', (1997) 266 RCADI 131 ff.

³¹ Ch Fenwick, *International Law* (1948) 69.

³² Fenwick (n 31) 69.

³³ Fenwick (n 31) 69.

³⁴ I Brownlie, *Principles of Public International Law* (1990) 1.

³⁵ Brownlie (n 34) 1.

³⁶ Brownlie (n 34) 2.

without saying that such a picture hardly works with lists of sources of international law such as treaties, custom and so on. It is futile to look for them in what Brownlie calls as material sources³⁷. They resemble more what can be called as evidence of the existence of custom. He writes namely that 'the material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application'.³⁸

The position of Jennings and Watts is a little bit different. For them formal source of law is 'the source from which the legal rule derives its legal validity'.³⁹ Material source 'denotes the provenance of the substantive content of that rule'.⁴⁰ So e.g. Jennings and Watts write that 'the formal source of a particular rule may be custom, although its material source may be found in a bilateral treaty concluded many years previously, or in some state's unilateral declaration'.⁴¹ In other words, the content of a treaty or a unilateral declaration may pave the way for new custom. This very example does not prejudge whether a bilateral treaty or a unilateral declaration have no importance in the discussion on formal sources of international law.

It seems worthwhile to confront the views of Jennings and Watts with those of Brownlie. They stress that one should not confuse sources of law with the basis of international law. They see the latter in the common consent of the international community.⁴² Also Jennings and Watts underline the connection of sources not only with the process of creation of norms but also with the norms as such. The latter would explain the very emergence of law in its initial form – anticipating the emergence of the more formalized procedures of creation of new rules on the future.

Also Shaw distinguishes between formal and material sources.⁴³ In his opinion, the former '*confer upon the rules an obligatory character*', while the latter '*comprise the actual content of the rules*'. The same matter is approached by a little bit differently by Weil⁴⁴. For him the formal sources tell how the norms are created, while the material ones – why they are created.

III. ART. 38 OF THE STATUTE OF THE ICJ AND THE PROBLEM OF SOURCES OF INTERNATIONAL LAW

Article 38 of the Statute of the ICJ is an important point of reference in discussions on sources of international law. The authors writing on the subject could be divided into two groups. The first group treat art. 38 as directly determining the sources of international law. So e.g. Shaw does it with respect to general principles of law⁴⁵. Also, Zemanek seems to attach

³⁷ Brownlie (n 34) 2.

³⁸ Brownlie (n 34) 1.

³⁹ R Jennings, A Watts, *Oppenheim's International Law*, vol. I, (Ninth ed. 1996) 23.

⁴⁰ Jennings, Watts (n 39) 23.

⁴¹ Jennings, Watts (n 39) 23.

⁴² Jennings, Watts (n 39) 23.

⁴³ Shaw (n 4) 71.

⁴⁴ Weil (n 3) 131-132.

⁴⁵ Shaw (n 4) 98. He does not conceal the dispute on this matter (n4) 99.

the decisive and positive role to the words “whose function it is to decide in accordance with international law”. In his opinion, it puts the end to the dispute whether art. 38 refers to sources of law⁴⁶. Czapliński and Wyrozumska go as far as to write that ‘the doctrine of international law seems to be unanimous that art. 38 of the Statute of the ICJ is a reference to formal sources of international law’⁴⁷.

The authors of the second group (such as e.g. Góralczyk) underline that ‘from the formal point of view art. 38 lists the basis or sources of decision-making by the ICJ. They may coincide with the sources of international law. All the same it must be kept in mind that art. 38 does not have to be treated as an exhaustive list of the sources of international law as well as not all elements from art. 38 must be true sources of international law.’⁴⁸ Also Bierzanek and Symonides stress that the bases of judgments of the ICJ should not be identified with sources of international law.⁴⁹ Dupuy rightly points at the contractual character of this provision and criticizes attempts to give it a quasi-constitutional nature⁵⁰.

Also, Ross stresses that art. 38 of the Statute of the ICJ ‘cannot formally constitute the foundation of the doctrine of the sources of International Law’.⁵¹ He reserves that ‘to this must be added that the doctrine of the sources can never in principle rest on precepts contained in one among the legal sources the existence of which the doctrine itself was meant to prove’.⁵² According to him, the actual practice must be the basis of this doctrine. That is why he notes that ‘the attempt to set up authoritative precepts for the sources of law must be regarded as later doctrinal reflections of the facts, which often are incomplete or misleading in the face of reality’.⁵³ These considerations bring the author to a rather narrow than open catalogue of sources of law. It covers treaties as well as ‘precedent and custom’⁵⁴. He however refers also to one additional category – so-called free factors.⁵⁵ They are to be ‘the free determinative factors in the motivation process of judicial decisions’. They cover such elements as ‘legal principles’, ‘the nature of the case’, ‘the idea of law’ ‘scientific law’ etc. Last but not least general principles of law recognized by civilized states are referred to. Ross recognizes as true sources of law, neither the general principles, nor other free factors, however.

What is more, even the adoption of art. 38 as a point of reference is reconcilable with its critical assessment. Quoc Dinh and the contemporary editors of his work address art. 38 with two critical remarks. They concern the lack of its reference to unilateral acts of states and unilateral acts of international organizations⁵⁶. The same position is presented by Czapliński

⁴⁶ Zemanek (n 39) 131.

⁴⁷ Czapliński, Wyrozumska (n 26) 15.

⁴⁸ Góralczyk (n 19) 63.

⁴⁹ Bierzanek, Symonides (n 17) 78.

⁵⁰ P-M Dupuy, *Droit international public* (2008), 280.

⁵¹ See also: A Ross, *A Textbook of International Law. General Part* (1947) 83.

⁵² Ross (n 51) 83.

⁵³ Ross (n 51) 83.

⁵⁴ Ross (n 51) 84-90.

⁵⁵ Ross (n 51) 90-91.

⁵⁶ Quoc Dinh, Daillier, Pellet (n 23) 114.

and Wyrozumska⁵⁷. Dupuy limits his critical remarks to the latter element only.⁵⁸

This brings us directly to the topic of different sources of international law.

IV. THE CATALOGUES OF SOURCES OF INTERNATIONAL LAW

Different authors present different (though to a large extent similar) catalogues.

Despagnet identifies two sources of positive law. They are: international custom and treaties.⁵⁹ His analysis on the sources, to a great extent, turns into the explanation of the characteristics of the international community. As it does not dispose of a central law-maker, the law is made by states on the basis of their consent – be it express or tacit.

This is also the position of Heilborn. He writes on treaties “by the agreement and by itself alone, various mandatory rules of international law would be created”.⁶⁰ On the other hand custom is seen as a tacit treaty⁶¹.

In this sense the list of sources of international law becomes the result, or rather the hostage, of the general theory of international law. In this sense it may become also its victim.

In the Polish legal literature Góralczyk limits his list of sources of international law to treaties, custom and some resolutions of international organizations⁶². The latter must be not only binding but also law-making, that is creating general and abstract rules for the future⁶³.

Rousseau lists as sources of international law: treaties, custom, and unilateral acts of both states and international organizations⁶⁴.

Cahier lists in this context: treaties, custom, general principles, the jurisprudence, the doctrine and equity⁶⁵. All the same he is ready to examine the value of those elements and e.g. calls general principles an auxiliary source of law. All the same such an attitude is very far from being precise.

Also Dupuy refers to resolutions of international organizations⁶⁶. On the other hand Bierzanek and Symonides limit their catalogue of sources of international law to treaty and custom only.⁶⁷ Quoc Dinh (and contemporary editors of his work) refers also to unilateral acts – both of international organizations and of states⁶⁸.

Cassese divides sources into primary and secondary ones⁶⁹. The first ‘are contemplated by general “constitutional” rules’. They are to comprise:

⁵⁷ Czapliński, Wyrozumska (n 26) 16.

⁵⁸ Dupuy (n 50) 281.

⁵⁹ Despagnet (n 8) 69.

⁶⁰ Heilborn (n 1) 19.

⁶¹ Heilborn (n 1) 19.

⁶² Góralczyk (n 19) 65-66.

⁶³ Góralczyk (n 19) 66.

⁶⁴ Ch Rousseau, *Droit international public* (1970) 59-60.

⁶⁵ Cahier (n 6) 222.

⁶⁶ Dupuy (n 50) 281.

⁶⁷ Bierzanek, Symonides (n 17) 78.

⁶⁸ Quoc Dinh, Daillier, Pellet (n 23) 114.

⁶⁹ The entire scheme and citations Cassese (n 29) 183.

‘custom, treaties, unilateral acts of States creating rules of conduct, general principles of law recognized by the community of nations’⁷⁰. He writes that: ‘binding decisions of international organizations, as well as judicial decisions made *ex aequo et bono*, are ‘secondary’ sources, because they are provided for by rules produced by primary sources (treaties).’⁷¹

Verdross and Simma underline the lack of *numerus clausus* of sources of international law⁷². Besides the elements referred to in art.38 (1) a)-c) of the Statute of the ICJ they see the role of other elements. One of them is international consensus.⁷³ There is no necessity to explain that such an attitude is promising for elements such as the unilateral acts of states.

It is visible that important differences persist as regards several elements. Also the very presence of one and the same element in two lists does not have to mean that their authors are in full agreement as regards that matter. That is why it seems reasonable to refer to those elements.

Usually they are referred to either in general or one by one. My idea is however to get out of that type of presentation. The first is evidently too abstract. On the other hand, references to different elements result rather in ‘islands’ – having not much in common. As was said, it leads to references to sources of law being reduced to mere introduction, devoid of much of its true value. On the other hand the coherence of teaching on sources of law requires seeing interlinks between different elements. In my opinion two basic interlinks can be established. Firstly, the teaching on custom is very strictly connected with the lecture on general principles of law. That is why they will be discussed together in the next section. On the other hand, unilateral acts of a state turn out to be a very serious challenge for the automatic inclusion of all treaties into the notion of sources of international law. That is why these two phenomena will be discussed together – with the resolutions of international organizations.

V. GENERAL PRINCIPLES OF LAW AND CUSTOM

1. General principles

Verdross starts his discussion on general principles from the statement that their problem could not be solved without the solution of the problem of sources of law in general⁷⁴. The basic dilemma for him is whether the source of law should be looked for in the very idea of law or maybe in the will of states⁷⁵.

Authors writing on sources of international law could be divided into two groups. One group includes general principles of law in their lists of sources. The other presents their lists without this element. The reasons for both decisions must be more frequently guessed or inferred than read expressly in the respective works. I have already referred to several

⁷⁰ Cassese (n 29) 183.

⁷¹ Cassese (n 29) 183.

⁷² Verdross, Simma (n 24) 323.

⁷³ Verdross, Simma (n 24) 324.

⁷⁴ Verdross, ‘Règles générales du droit international de la paix’, (1929) 30 RCADI 195.

⁷⁵ Verdross (n 74) 195.

catalogues which cover general principles. It is true that in many instances reference to art. 38 (1) (c) is treated as a surrogate of justification.

It is by no means a decisive element. So e.g. Rosenne, when referring to art. 38 (1) (c), writes 'That is not an allusion to the general principles of *international* law (really part of customary law). It is broader and embraces the general principles of law recognized by the community of States as a whole.'⁷⁶ Such a position does not have to predetermine the stance of a given author as to the list of types of sources of international law.

In the Polish legal literature, the same solution was adopted by Góralczyk. He was ready to justify his position in a somewhat more extended way⁷⁷.

Góralczyk, at the beginning, asks the fundamental question. It is namely whether what is referred to in art. 38 (1) (c) are general principles of law or general principles of international law⁷⁸. In his opinion the former answer is prejudged. He argues that if those principles were to be ones of international law they would have belonged either to treaty law or to custom⁷⁹. That is why his list of sources of law does not comprise general principles.

This teaching is the one which was taught to the present writer and many other Polish lawyers (in fact – almost all graduating from Warsaw University). It is a valuable part of the Polish doctrine of international law. All the same it deserves a critical examination.

First of all, one cannot overlook a peculiar set of circumstances. Góralczyk is critical to art. 38 of the Statute. All the same the analysis of the latter not only influences the teaching on sources but also seems to predetermine one of the most important conclusions on them. One can hardly get rid of the feeling that this teaching should be much less dependent on the Statute. In fact, international law would have been more or less similar had the Statute not been drafted or had it not contained such a precise rule as art. 38. Evidently, the respectful drafters of the Statute of the PCIJ did a great service for the mankind and the community of internationalists but were neither entrusted to write the constitution of the World, nor wrote it. That is why the reasoning that one should not list general principles of law among the sources because of the role of art. 38 (1) (c) seems to go, definitely, too far. The role of that provision is undoubtedly very important, but it does not have to predetermine the shape of sources of international law.

This argument could be reversed, however, and addressed to those writers who confirm the presence of general principles among the sources automatically on the basis of art. 38 c) as such.

Secondly, one cannot overlook the weakness of the argument that the principles of international law could be of either conventional or customary character. What does it really mean? In fact when speaking about a general principle one can expect something of more general application. There is no problem in calling some conventional clauses as general or even as principles or rules. The question is how their application could be extended

⁷⁶ Rosenne (n 18) 47-48.

⁷⁷ Góralczyk (n 19) 63.

⁷⁸ Góralczyk (n 19) 63.

⁷⁹ Góralczyk (n 19) 63.

to other states, that is, states which are not parties to a given treaty. The principle *res inter alios acta* seems to be an insurmountable barrier. So, in fact, what really matters is the limitation of general principles of international law to customary principles. There is no wonder that this is the choice of Górlaczyk, Weil⁸⁰ or Scelle⁸¹.

This is the best proof that the teachings on both general principles and on custom are two interlinked organisms.

2. Traditional lecture on custom

Custom is present in any list of sources of international law that I have encountered. It is interesting as such.

This is a proper place to make two additional points.

Firstly, I cannot abstain from stressing that the books of Prof. Karol Wolfke on custom are of great importance till the present time.

Secondly, it is difficult to discuss custom nowadays without referring also to the works of the ILC on identification of customary international law. In particular one must refer to four excellent reports prepared for the ILC by the special rapporteur Wood. All general references to the special rapporteur mean Wood, as well as all general references to reports mean his reports⁸². Another important document of the ILC was a Memorandum by the Secretariat 'Formation and evidence of customary international law...' ⁸³. It will be referred to simply as Memorandum.

It is interesting to see the vision of custom in the earlier works. So e.g. Despagnet writes that: 'the very establishment of a custom, through its general and constant character (*par sa généralité et sa constance*) proves (*accuse*) a deep feeling (*le sentiment profond*) that the adopted rule is rational and practical (*correspond à une notion considérée comme rationnelle, en même temps qu'à une véritable intérêt pratique*).'⁸⁴ It seems obvious that such a vision presupposes quite an intensive set of behaviours (practice, objective element of a custom). This is all the more when references are made to the time factor of custom.

Usually authors writing on custom find it useful to criticise the definition inserted into art. 38 of the Statute. It defines international custom, as evidence of a general practice accepted as law. So e.g. Cahier writes that it is rather "a general or local practice treated as law".⁸⁵

The view of presence of two elements of custom – constant practice and *opinio iuris* – is widely accepted – both in the case-law of the ICJ and the legal literature.

⁸⁰ Weil (n 3) 150.

⁸¹ Verdross (n 74) 200.

⁸² ILC, 'First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur' UN Doc A/CN.4/663; 'Second report on identification of customary international law by Michael Wood, Special Rapporteur' UN Doc A/CN.4/672; 'Third report on identification of customary international law by Michael Wood, Special Rapporteur' UN Doc A/CN.4/682; 'Fourth report on identification of customary international law by Michael Wood, Special Rapporteur' UN Doc A/CN.4/695.

⁸³ ILC, 'Formation and evidence of customary international law. Elements in the previous work of the International Law Commission that could be particularly relevant to the topic' Memorandum by the Secretariat, UN Doc A/CN.4/659.

⁸⁴ Despagnet (n 8) 70.

⁸⁵ Cahier (n 6) 223.

As regards the case law, the basic point of reference is the famous judgment of *Lotus*.

The PCIJ examined whether there existed a customary norm obliging states other than the flag-state to deny their jurisdiction in connection with collisions on the high seas.

The PCIJ ruled as follows:

‘Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.’⁸⁶

Two other cases which should not be forgotten in this context are the ICJ judgment in the *North Sea Continental Shelf* and the famous *Nicaragua v. USA* case.

The most pertinent element of the first one reads:

‘The essential point in this connection - and it seems necessary to stress it - is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; - for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character, of the acts is not in itself enough.

There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.’⁸⁷

The respective part of the second judgment reads as follows:

‘The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact, however, the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have, on some occasions, clearly stated their grounds for intervening in the affairs of a foreign State

⁸⁶ *Lotus case (France v Turkey)* PCIJ Rep. Series A No 10, 28.

⁸⁷ *North Sea Continental Shelf (Federal Republic of Germany v Denmark/FRG)* (Judgment) [1969] ICJ Rep 44 (para 77).

for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.’⁸⁸

Reference to the two elements of custom can be found in every, or almost every, manual of international law. As the special rapporteur put it

‘There was general support among members of the Commission for the “two-element” approach, that is to say, that the identification of a rule of customary international law requires an assessment of both general practice and acceptance of that practice as law.’⁸⁹

The special rapporteur referred to a phrase of K. Wolfke according to which

“Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law, the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear”.⁹⁰

3. The area of doubts

Customary law is, however, also a source of doubts, sometimes expressed with a great frustration.

Weil writes that ‘All the authors were challenged by the mystery of the custom,

which changes the fact into a standard. Everyone wondered about this alchemy and wondered why and how “what is becomes what must be”’.⁹¹

I decided to cite a few expressions of this frustration of some other authors as well as my own. An important part of the discussion on custom is related to the idea of a persistent objector. Stein points at weaknesses of this formula with respect to four institutions. They are namely: restrictive immunity of a state, extension of the exclusive fisheries zones to 200 miles, the regime of the deep seabed and prohibition of apartheid.⁹² According to him, if the Soviet Union declared itself as the supporter of the absolute immunity, the principle of a persistent objector should grant it such an immunity in the courts of other states. If the USA declared itself as the enemy of zones of exclusive fisheries, states claiming such zones should have respected the right of the USA to deny their applicability to itself. If the USA declared itself against the regime of UNCLOS on deep seabed mining, it should have influenced other states. Finally – if the South Africa had opposed the prohibition of apartheid ‘throughout the period during which the rule matured’, apartheid was legal if applied by South Africa.

⁸⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 109 (para 207).

⁸⁹ ILC, ‘Second report’ (n 82) 2.

⁹⁰ K Wolfke, *Custom in Present International Law* (1964) 40-41, cited on the basis of Second report (n 82) 8, footnote 26.

⁹¹ Weil (n 3) 161-162.

⁹² TL Stein, ‘The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law’ (1985) *Harvard International Law Journal* 460-463.

Those examples need and deserve more attention. It is the most easy to respond to the third one. The states not happy with the UNCLOS regime had the right to oppose it. The same applies, for example, to states which are not happy with the Antarctic Treaty. All the same such a decision means a conflict with those which participate in a system. This is rather the politics that was decisive and led to acquiescence. It formed a kind of consent.

The same is true with respect to fisheries. The persistent objector would probably claim that everyone can fish in the relative proximity of its coast and would claim the right for its ships to fish in the proximity of coasts of other states. The latter scenario was applied by some states in the 1950s, 1960s and 1970s. It led to conflicts. It is just the conflict that surrounds the collapse of former and the probable (though often doubtful) creation of new customary rules. In this sense, consent (if it is really confirmed *in concreto*) may be very far from 'cheerful and express' consent.

In fact it seems that Stein would be ready to propose the requirement for the claimant to a new right to exclude voluntarily a persistent objector from a new practice. It is a very bold proposal. It is worthwhile considering its application to the rules of military conflicts. Let us come back to the time when the legality of aerial bombings was not certain. Accepting the proposal of Stein would amount to the situation in which a state would be allowed to effect such bombings with respect to all enemy states with the exception of the persistent objector. I can hardly imagine an aggressor state playing with such subtleties and I can see no sense in requiring it from a victim state. I think that this proposal is both unrealistic and unnecessary.

The recent remark applies also to first example given by Stein, dealing with the narrowing down of the state immunity. A state which felt itself to be a victim of this narrowing could evidently perceive it as a breach of international law and take countermeasures. On the other hand, narrowing down the immunity makes sense only if it is applied with respect to all states. Had the discussion on state immunity really approached the essence of the topic of customary norms, two lines of argument could have been adopted. The first would have said that there is an attempt to change the old rule of absolute immunity in order to arrive at a new rule of limited immunity. The second line of reasoning would have been the following: the hitherto immunity covered sovereign activities of states. As long as states started to engage in commercial activities, the old rules are still applicable but only to the extent of sovereign but not commercial activities.

It can be seen that the very name (way of formulation) of a proposed customary norm is not neutral to the thesis on its existence and its duration. A proponent of a new rule may simply claim that it is simple application of an old principle to a new type of situation. As a new situation is completely new, the old rule starts to work in a different way *in concreto* than it used to work for years.

Despite the critical remarks, the two-element nature of custom seems to be strongly grounded. First of all, it makes it possible to distinguish between established customary norms from norms in formation⁹³. That is why I do not share the fears of those authors who see problems with the practice contrary to what is presented as a customary norm. Such a

⁹³ See e.g. Stein (n 92) 458.

discussion took place after the famous Nicaragua judgment. A few authors asked how to prove the existence of a norm on prohibition of intervention in the face of the practice to the contrary. There is no such problem if it is established that such a norm existed before and the practice of violating it did not transform into a norm making intervention legal. In fact, however, the fears are pertinent if they are extended in time – back to the moment of the probable formation of a custom.

This is the point with many norms. Let us take a norm *pacta sunt servanda*. Is it really necessary to prove that there was a time in history in which all treaty norms were respected? Such a picture is both impossible and impractical. The same is true with respect to the inviolability of diplomatic envoys. Is it really so, that in order to confirm its presence in international law, it is necessary to choose a shorter or longer period in the history between the last acceptable breach and the first unacceptable one. It suffices to say that nobody is in a position to effect such an analysis. I doubt that it is necessary. What is even a greater challenge is a situation of a rule according to which a treaty concluded in the effect of corruption is void (voidable). I cannot cite a single case of applying it. Is it then a norm of customary law? I have encountered two methods of approaching this question. The first would say that there is no customary norm. The Vienna convention simply developed international law in this respect. What was at stake was a general principle of law – coming back to the Roman law. The second answer would say that what is in place is a norm of customary law. I do not want to conceal my sympathy with the latter interpretation. In my opinion one should count with the presence of unwritten international law in matters which are not subject to many cases.

What is even a greater challenge is the question of *opinio iuris*. Must it be present at the moment of formation of a custom? If so, a fundamental logical question is in place. It seems that quite a peculiar situation is required. First of all a state should do something. Secondly, it should feel that it must do it. Thirdly, the truth should be the opposite - that is a state must be mistaken, being in a position to do the contrary.

As Cahier writes

"But the process of creating custom remains quite mysterious. Its origin undoubtedly rests on a uniform practice, but which cannot be regarded by the States from the outset as binding, otherwise, as Kelsen has pointed out, custom would spring from error" ⁹⁴.

In fact law is neither mathematics nor pure logics. That is why I do not want to explore the above-presented paradox to the extreme. As was also said, different norms may have different origin – the scenario of their creation may be different. Putting them into one scheme may be a very bad service to the truth.

All the same, I have some sympathy with those authors who are very critical to the traditional view on custom. Dunbar is one of them. He presents the traditional view on custom and writes that

‘Students of the subject have, from the cradle so to speak, been brought up to embrace this kind of affirmation as an article of faith. Indeed, to question its veracity might well be regarded as tantamount to a heretical

⁹⁴ Cahier (n 6) 230.

attack on the fundamental beliefs and dogma of the creed, shaking, if not destroying, the very foundations on which international law is built.⁹⁵

The picture is fortunately not as bad as it may seem. There are certainly a lot of myths, half-truths and mistakes in the discussion on custom. Those who expect the level of certainty comparable to the one of the application of tax law, the civil code, the 1997 Constitution of Poland or the EU Treaty could react in one of the two ways. Firstly, they may be very disappointed as to the weakness of custom. Secondly, they can be satisfied as to the lack of custom. In fact however, the lack of custom may mean either the lack of general international law or at least necessity of looking for another source of general international law. If the latter is confirmed the technicalities of custom lose a lot of their importance. That is why, once again, one should stress the importance of the relationship between custom and general principles.

If the discussion on custom is to lead to the conclusion that there is no general international law, it would be difficult to accept this conclusion and trust the very reasoning leading to it. The very position of a state in international law, the very possibility of concluding treaties and conduct diplomatic relationships and similar foundations of international society are legal in nature. They require foundation in law binding on all. It could be treated as certain. The details could be discussed and disputed on. The lack of certainty on these details is not sufficient to put into doubt the very presence of these foundations and their legal character. What can be discussed is whether one has to qualify them as a part of customary law, general principles of international law, general principles of law or to call them by some other name.

As was said, there can be no doubt that there is a strong interrelationship between the essence of custom and the question of general principles. As long as this question is not solved, the precise scope of rights and duties of a given state remains uncertain.

This relationship was somehow hinted during the works of the ILC. Paradoxically, it was, rather, the Memorandum that was much more sensitive to the topic.

So e.g. Observation 29 of the Memorandum reads:

‘In certain instances, the Commission has employed the phrase “general international law” to refer, in a generic manner, to rules of international law other than treaty rules. Also, on some occasions, the Commission appears to have used “general international law” and “customary international law” interchangeably. The phrase “general international law” has also been used by the Commission as an umbrella term that includes both customary international law and general principles.’⁹⁶

The special rapporteur in his second report wrote that

‘There was general agreement that the Commission would need to deal to some degree with the relationship between customary international law and other sources of international law, in particular treaties and general

⁹⁵ NCH Dunbar, ‘The Myth of Customary International Law’ (1978-1980) 8 Australian Yearbook of International Law 1-2 .

⁹⁶ Memorandum by the Secretariat (n 83) 35.

principles of law. In addition, there was interest in looking into “special” or “regional” customary international law’.⁹⁷

However, this promise was not realised so far. The special rapporteur approached it to the extreme when referring to the view according to which, ‘in such fields as international human rights law, international humanitarian law and international criminal law, among others, one element may suffice in constituting customary international law, namely *opinio iuris*’.⁹⁸ However, according to him, ‘the better view is that this is not the case.’⁹⁹

All the same the matter is serious and deserves serious examination. Firstly, one can wonder where to situate the problem. Partly it is a dispute on fundamental issues. Partly it is a dispute on words. A scholar opting for two sources only (treaty and custom) may be ready to accept as customary such rules as *pacta sunt servanda*, prohibition of racial segregation, voidance of a treaty concluded due to corruption or even protection of the environment. Another scholar may see myths in that way of thinking. All the same he/she can accept all those rules as general principles.

On the other hand one must be very careful as regards easy formulation of those principles. There is a tendency (especially among young lawyers) to present as part of general international law everything what they like. This method of thinking is unacceptable. What really matters is a principle of state sovereignty. Only rules that are the subject of general acceptance may be treated as a part of general international law. This is a matter of particular importance. One should expect from lawyers a clear message – what can be done in order to keep in the limits of law. An assumption is made that if a state keeps to those borders it has a chance to win a case. I must say that specialists of international law may have problems with such a clear message. The practical conclusion for a state is to avoid expressing consent for the jurisdiction of courts or arbitrators in order to avoid becoming a victim of international law-creation (or law-discovery) by them. One can officially deplore it, but this reaction is reasonable. All the same the topic deserves a more serious examination from the perspective of sources of law.

VI. TREATIES AND UNILATERAL ACTS OF STATES

I do not know of any publication which would omit treaties when analysing the notion of ‘sources of international law’. The nature of a treaty as a source of law is rather presumed, however. As was said in the introductory part, some authors adopt a purely didactic attitude to the chapter on sources of law. It is mainly to form a good place for discussing the numerous details of the law of treaties and also other elements such as custom, general principles or resolutions. As the presentation of those other elements is usually valuable for the study of sources of international law, the same cannot be said about the first element. In this sense the basic questions

⁹⁷ Second report (n 82) 3.

⁹⁸ Second report (n 82) 12.

⁹⁹ *ibid*.

– ‘are treaties sources of international law?’, ‘is every treaty a source of international law?’, ‘what does it mean for the notion of sources of international law?’ are often overlooked. Perhaps the authors adopting such an attitude would be astonished with the fact that some others may have claims against them. There is no doubt that treaties create obligations for states as well as legal norms, there is also no doubt that the law of treaties is important, complicated and worthy of being taught to students in detail. There is, however, no doubt that the notion of sources of international law is a victim of the traditional presentation of the law of treaties. One of the aims of the present text is to point to this problem and to compensate for its effects.

Some authors make some kind of justification with respect to the position of treaties among the sources. E.g. Cahier¹⁰⁰ seems to attach the decisive importance to the fact that a treaty may deviate from the rules of general international law. In this sense a treaty is a kind of *lex specialis* with respect to the general international law. If the general law is composed of sources of law (or at least one such source, namely custom), elements modifying them should probably be qualified as a source as well.

Thirlway writes that ‘In this treaties resemble the contracts of private law, which similarly impose obligations; those obligations are not normally considered to be ‘law’ for the parties, but this linguistic difference relates to the essentially socially imposed, centrally determined nature of municipal law.’¹⁰¹

This is really the essence of the problem. Taking into account the peculiar position of states, how to distinguish simple acts creating obligations from true sources of law. This dichotomy is especially visible in other languages. In French it is a matter of distinguishing *actes juridiques* from *sources de droit international*. In German - of distinguishing between *Rechtsgeschäften* from true *Quellen des Völkerrecht*.

One must notice however that the attempts to make this dichotomy were present in the earlier writings.

So e.g. Heilborn underlines the difference between, on the one hand, treaties creating rights and obligations only for their parties, and on the other – for treaties aspiring to create more general norms¹⁰². In consequence he distinguishes between treaties-contracts and treaties-laws¹⁰³. He calls the former as *actes juridiques*.

Also Fenwick limits the notion of ‘sources of international law’ to certain treaties only. Treaties are to be qualified as sources only when adopted by the nations as a body.¹⁰⁴ It could be probably understood as referring to treaties establishing certain abstract rules. In any case this qualification is denied by this author to bilateral treaties¹⁰⁵.

It is difficult to accept the division of treaties-laws and treaties-contracts nowadays as such. The feeling that this differentiation is helpful for the study of sources of law seems to be felt by many authors.

¹⁰⁰ Cahier (n 6) 161.

¹⁰¹ H Thirlway, *The Sources of International Law* (2014) 8.

¹⁰² Heilborn (n 1) 23.

¹⁰³ Heilborn (n 1) 26.

¹⁰⁴ Fenwick (n 31) 76.

¹⁰⁵ *ibid*.

E.g. Czapliński and Wyrozumska wonder whether the term ‘source of law’ should be narrowed only to acts which contain general (abstract) rules or should be extended to other acts as well¹⁰⁶. Also, Brownlie used the above-cited definition of formal sources, according to which they are ‘legal procedures and methods for the creation of rules of general application which are legally binding on the addressees.’¹⁰⁷

It would be difficult to transform this feeling into a very precise conclusion as to sources of law. As was said, there is nothing in the law of treaties itself which would make lawyers feel to be under a duty to deny the notion of ‘sources of law’ to certain treaties. On the other hand, a source of real doubts and problems is the position of the unilateral acts of states. A few words must be spoken on them¹⁰⁸.

The lack of reference to unilateral acts of states in art. 38 of the Statute of the International Court of Justice has attracted the attention of several authors.¹⁰⁹ Villagran Kramer underlines that the case-law of the ICJ indicates that unilateral acts of states may give rise to legal obligations, but not necessarily be sources of law.¹¹⁰ Also, Skubiszewski writes that ‘a unilateral act of a State does not constitute a source of international law.’¹¹¹ According to him, ‘[u]nilateral acts may and often do influence the operation of the sources of law.’¹¹² The special rapporteur on the topic of ‘Unilateral acts of states’ in his first report did not attribute special importance to the lack of reference to unilateral acts of states in Art. 38 of the Statute of the International Court of Justice.¹¹³ He indicated that two such omitted sources were unilateral acts of states and (norm-creating) acts of international organizations (an unquestionable source).¹¹⁴ Interestingly enough, while the special rapporteur included unilateral acts of states as sources of international law, the pertinent part of his first report was entitled ‘Sources of international law and sources of international obligations’. He wrote in that part that ‘Legal acts, that is, acts performed with the intent to produce effects in international law, are the main source of obligations in international law. A State can incur obligations through formal acts which are not necessarily sources of international law, within the meaning referred to in Article 38 of the Statute of the International Court of Justice, already discussed briefly.’¹¹⁵ One can understand this statement to mean that unilateral acts of states may be sources of international law, but do not always have to be. That is why it is possible to treat the legal effects of

¹⁰⁶ Czapliński, Wyrozumska (n 26) 16.

¹⁰⁷ Brownlie (n 34) 1.

¹⁰⁸ The views on unilateral acts of states are identical to the ones presented in my book, P Saganek, *Unilateral acts of states in public international law* (2016) 79-81.

¹⁰⁹ So e.g.: P Vellas, *Droit international public. Institutions internationales* (1970) 201; F Villagrán Kramer, ‘Les actes unilatéraux dans le cadre de la jurisprudence internationale’ in *International Law on the Eve of the Twenty-first Century. Views from the International Law Commission* (1997) 139.

¹¹⁰ Villagran Kramer (n 109) 139.

¹¹¹ K Skubiszewski, ‘Unilateral Acts of States’ in M Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 221.

¹¹² Skubiszewski (n 111) 222.

¹¹³ ILC, ‘First Report on unilateral acts of states’ 13 (para 67).

¹¹⁴ ILC (n 113) 13 (para 67).

¹¹⁵ ILC (n 113) 13 (para 69).

unilateral acts of states on one hand, and their relationship to the sources of international law on the other, as two relatively independent questions.

Evidently one must exclude the thesis which would see a source of international law in every unilateral act of a state. This has to do, first of all, with protest. In practice this question could be seriously discussed only with respect to acts giving rise to obligations, or in other words – the creation, transformation or extinction of a legal relationship. What is especially important is whether one can equate the sources of legal obligations with the sources of law. If such an identification takes place with respect to treaties, the basic question is why the same conclusion should not be applied to a unilateral promise.

This problem was faced by Eckart, the author of the recent and very valuable monograph of international promise. He writes that

‘Yet, it should be clear that promises, once accepted as an existing legal mechanism must necessarily share the status of treaties in this respect, at least treaties to which not all states are parties. Surely, either a mechanism creating only rules of particular applicability is considered not a source of law, but merely a source of particular obligations, and thereby, promises along with treaties (even most of the ones often referred as ‘law-making’) are discarded from the sources of law, or this distinction (which would probably also have to exclude regional custom as law) is rejected, whereby both treaties and promises are sources of law.’¹¹⁶

However, if one wants to be consequent, the same question must be asked with respect to acts of recognition or waiver. There is hardly any possibility to persuade anybody to see a declaration on waiver of immunity of a given diplomat or an act of recognition of a state or government as a source of international law. In consequence, one must hesitate to see a source of law in every unilateral act giving rise to obligations of the author-state.

What is more, why not recognize as a source of international law the establishment of a blockade or declaring someone a *persona non grata*?

It must be said that the doctrine of sources has a problem. It can adopt several methods of facing it. The worst would be to ignore it and behave as if nothing has happened. The opposite would be to treat the present situation as a challenge and a chance for a good answer. There may be also attempts to make some tricks.

In fact I can treat as such a trick an answer formulated by the author of one of the recent monographs of sources of international law. He refers to the problem of unilateral acts in the following way:

‘It is therefore tempting to see these cases as the un-avowed recognition of a source outside the Article 38 enumeration. This is, however, by no means a necessary conclusion. The cases will be discussed further in the light also of the ‘Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations’, adopted by the International Law Commission in 2006. The context chosen for that examination will be in connection with the ‘treaties and conventions’ of paragraph 1(a) of Article 38; the reason being (briefly) that it is here argued that what matters is acceptance by another State, that a unilateral act that

¹¹⁶ Ch Eckart, *Promises of States under International Law* (2012) 180.

prompts absolutely no reaction on the level of international relations is of no legal relevance or significance.¹¹⁷

I have the impression that it does not solve the problems. Unilateral acts are different. Some are similar to treaties, some are not. That is why saying that they are *de facto* treaties solves the problem only apparently.

VII. LAW-MAKING RESOLUTIONS OF INTERNATIONAL ORGANIZATIONS

References to acts of international organizations as sources of international law take place from time to time. Among authors referring to them one can cite Quoc Dinh¹¹⁸, Dupuy¹¹⁹ and many others.

Some authors try to be very precise in this matter. Góralczyk is one of them¹²⁰. He precisely divides acts of international organizations into binding and non-binding ones. The latter are totally excluded from the scope of interest. What is more – not every binding act is called as a source of international law. Binding acts are divided into norm-creating and other acts. The first are the ones which ‘adopt the rules of behaviour for the future for situations which may take place in the unlimited number of times’¹²¹. It means that Góralczyk is ready to exclude from the notion of sources of international law ‘binding resolutions which on the basis of pre-existing legal norms adopt the rules of behaviour with respect to concrete, individual cases’¹²².

This attitude puts very strict requirements as regards being a source of international law. It would be difficult for me not to express my gratitude to the fathers of the Polish doctrine of international law. Their logical attitude is really admirable. When compared to utterances on the EU law identifying as its sources recommendations and opinions (usually accompanied with a statement that they are ‘non-binding’) they look like Parnassus. The exclusion of some binding acts is also understandable. The nomination of a given person as the UN Secretary General or the election of a given state to the UN Security Council are evidently binding but calling them as sources is quite difficult. All the same, the intention of Góralczyk is rather to exclude all decisions of the UN Security Council based on chapter VII of the UN Charter. One can only wonder how he would have assessed the decision of this body on the creation of the two criminal courts on the former Yugoslavia and on Rwanda.

All the same, the problems connected with resolutions are much easier than the ones connected with unilateral acts of states. This may be due to the diversity of the latter on the one hand. On the other hand, resolutions of international organizations may be relatively easily assimilated to treaties. So with respect to them, the argument of Thirlway would work much better than with respect to unilateral acts.

¹¹⁷ Thirlway (n 101) 20-21.

¹¹⁸ Quoc Dinh, P Daillier, A Pellet (n 23) 114.

¹¹⁹ Dupuy (n 50) 281.

¹²⁰ W Góralczyk (n 19) 65-66.

¹²¹ W Góralczyk (n 19) 108.

¹²² W Góralczyk (n 19) 108.

SUMMING-UP

There is no doubt that sources of law deserve attention nowadays. One can expect that the lawyers will have to face two fundamental problems. One of them is a real problem. It has to do with the relationship between customary norms and general principles of law. The basic question is whether the latter form a separate group of sources. If so, what are the means of establishing their existence? The second problem is rather a question of definition. It is rather a reflection of the inclusion of all treaties into the notion of sources of international law? If so, the question is why to deny this notion to some unilateral acts of states? If we include the latter, the question is why to deny this notion to other unilateral acts of states?

References

- Bierzanek R, Symonides J, *Prawo międzynarodowe publiczne* (1994).
- Brownlie I, *Principles of Public International Law* (1990).
- Cahier P, 'Changements et continuité du droit international. Cours général de droit international public' (1985) 195 RCADI 161.
- Cassese A., *International Law* (2005).
- Czapliński W, Wyrozumska A, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* (1999).
- Despagnet F, *Cours de droit international public* (1910).
- Dupuy P-M, *Droit international public* (2008).
- Eckart Ch, *Promises of States under International Law* (2012).
- Fenwick Ch, *International Law* (1948).
- Finch GA, 'Les sources modernes du droit international' (1935) 53 RCADI 531.
- Góralczyk W, *Prawo międzynarodowe publiczne w zarysie* (1989).
- Guggenheim P, 'Contribution à l'histoire des sources du droit des gens' (1958) 94 RCADI 1.
- Heilborn P, 'Les sources du droit international' (1926) 11 RCADI 1-63.
- Jennings R, Watts A, *Oppenheim's International Law*, vol. I, (Ninth ed. 1996).
- Oppenheim L, *International Law. A Treatise*. Vol. I – Peace, Eighth edition edited by H Lauterpacht, (1955).
- Quoc Dinh N, Daillier P, Pellet A, *Droit international public* (1994).
- Rosenne Sh, 'The Perplexities of Modern International Law. General Course on Public International Law' (2001) 291 RCADI 47.
- Ross A, *A Textbook of International Law*. General Part (1947).
- Rousseau Ch, *Droit international public* (1970).
- Saganek P, *Unilateral acts of states in public international law* (2016).
- Shaw MN, *International Law* (2008).
- Skubiszewski K, 'Unilateral Acts of States' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (1991).

Stein TL, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) *Harvard International Law Journal* 460-463.

Thirlway H, *The Sources of International Law* (2014).

Vellas P, *Droit international public. Institutions internationales* (1970).

Verdross A, 'Règles générales du droit international de la paix', (1929) 30 *RCADI* 195.

Verdross A, Simma B, *Universelles Völkerrecht. Theorie und Praxis* (1984).

Villagrán Kramer F, 'Les actes unilatéraux dans le cadre de la jurisprudence internationale' in *International Law on the Eve of the Twenty-first Century. Views from the International Law Commission* (1997).

Weil P, 'Le droit international en quête de son identité. Cours général de droit international public' (1992) 237 *RCADI* 133.

Wolfke K, *Custom in Present International Law* (1964).

Zemanek K, 'The legal foundations of the international system. General Course on Public International Law' (1997) 266 *RCADI* 131.