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Rethinking the Sources of International Law

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by

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RETHINKING THE SOURCES OF INTERNATIONAL LAW

TO MARION

IN GRATITUDE TO MY PARENTS

PREFACE

The title of this book may strike the reader as rather immodest. Its author can come up with no better justification for the selection of the subject matter than the fundamental character of the doctrine of sources to any study of international law. Particularly in today's world, the many questions involved leave hardly any field of international law unaffected, and no international lawyer can hope to escape them completely. I felt that in my case this early stage of my legal writing was as good a time as any to face some of these questions. However, I am perfectly aware that the contribution of this book to the doctrine of sources of international law can only be a modest one.

The completion of this book would have been impossible without the advice, assistance and support of many persons and institutions. First of all, I am grateful to all those whose scholarly work I have been able to use in writing this book, including those whom I have criticized. Often one learns best from those with whom one disagrees.

More specifically I am indebted to the scholars under whose guidance this study was conducted. Professor P. van Dijk, over the years that I had the privilege of working with him, taught me the craft of scholarship by patiently correcting my many mistakes. As my supervisor he meticulously read consecutive versions of the manuscript and in each stage stimulated me by offering ideas, suggestions and comments which have improved this book to no small extent. Professor M. Bos provided very valuable advice and comments on the manuscript. Moreover, he was my main teacher of the theory of international law, both during the time I was a student and afterwards, as is witnessed by the numerous references to his scholarly work throughout this book. I have also benefited greatly from discussing the manuscript with Professor J. de Vree. His advice and comments as a political scientist have prevented me from losing sight of the many other than legal aspects involved in the subject-matter.

I thank all my (former) colleagues of the Department of International and Social and Economic Law of the University of Utrecht for their inspiring interest in my work. Among them particularly Professor A. Koers and Professor L. Bouchez provided me with encouraging comments on my research. In addition, Professor Koers has been extremely helpful with respect to the technical aspects of this publication. Mr. J. Rood offered to read parts of the manuscript and made useful suggestions.

During the academic year 1979/1980 I was given the opportunity to conduct research at the Harvard Law School in Cambridge (Mass.), U.S.A.. The inspiring atmosphere and the excellent facilities of that place have contributed considerably to the completion of this book. I am indebted to Professor L. Sohn who supervised my work at Harvard. Dean D. Smith and his staff, as well as the staff of the library of International Legal Studies, in particular Mr. F. Chapman, in various ways helped to make may visit rewarding.

My stay in the U.S.A. was made possible through generous financial support of the Netherlands Organization for the Advancement of Pure Research (ZWO). The University of Utrecht kindly granted me leave of absence. I also received funding from the Foundation Hugo Grotius. I am sincerely thankful to these institutions for thus enabling me to conduct the research for this book.

The Netherlands Organization for the Advancement of Pure Research (ZWO) in addition enabled me to finalize my research in U.S.A. during October and November of 1982. At that time I had the opportunity to profit from the expert-advice of Professor L. Henkin of Columbia University in New York, who had kindly offered to read major parts of the manuscript.

A number of friends have been extremely helpful. Mr. J. de Jong has rendered invaluable services by checking all the footnotes and reading the entire manuscript. I asked Professor H. Hovenkamp to correct the English and Mr. K. de Vey Mestdagh to assist in proof-reading. Both readily agreed and did an excellent and speedy job. In the process each of them managed to critically read the manuscript and suggested me a number of important improvements. Messrs. M. Sikking and G. Knol encouraged me at times when this book seemed never to be completed.

Last but not least, Mrs. M. Kiel has earned my gratitude for the vital role she played in the publication of this book. She patiently typed and retyped the various versions and studiously prepared the manuscript for printing. In the final stage she was efficiently assisted by Mrs. M. Smith. The attention paid to the publication of this book by Mr. W. Siegers of Meyers and Siegers Printers, and by Messrs. M. Nieuwenhuis and A. Vonk of Kluwer Law and Taxation Publishers is gratefully acknowledged.

It goes without saying that the errors, which this book contains despite all this help, are mine.

The contribution of my parents is beyond description. The role of my family has been pivotal. Marion's support has been indispensable *inter alia* by her ability to create a balance between an atmosphere conducive to writing and the requirements of family-life. Joost, Esther and Gijs contributed in their own particular way by their tireless efforts to upset that balance, thereby enabling me to put my work in a proper perspective.

IJsselstein, May 1983.

LIST OF ABBREVIATIONS

AdV	Archiv des Völkerrechts
AFDI	Annuaire Français de Droit International
AJIL	American Journal of International Law
ASDI	Annuaire Suisse de Droit International
BJIL	Brooklyn Journal of International Law
BYIL	British Yearbook of International Law
CLR	Columbia Law Review
CWILJ	California Western International Law Journal
CWRJIL	Case Western Reserve Journal of International Law
CYIL	Canadian Yearbook of International Law
DA	Deutsche Aussenpolitik
DJILP	Denver Journal of International Law and Policy
FW	Die Friedens-Warte
GJICL	Georgia Journal of International and Comparative Law
GYIL	German Yearbook of International Law
IA	International Affairs
ICJ Communiqué	Communiqué of the International Court of Justice
ICJ Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
ILC Yearbook	Yearbook of the International Law Commission
ILM	International Legal Materials
ILR	Israel Law Review
IO	International Organization
JICJ	Journal of the International Commission of Jurists
JöRG	Jahrbuch des öffentlichen Rechts der Gegenwart
JZ	Juristenzeitung
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
ÖZöR	Österreichische Zeitschrift für öffentliches Recht
PASIL	Proceedings of the American Society of International Law
PCIJ Series B	Permanent Court of International Justice, Collection of Advisory Opinions
Ph	Philosophica
PYIL	Polish Yearbook of International Law
RBDI	Revue Belge de Droit International
RCADI	Recueil des Cours de l'Académie de Droit International de La Haye
RDISDP	Revue de Droit International de Sciences Diplomatiques et Politiques

RGDIP	Revue Générale de Droit International Public
RITD	Revue Internationale de la Théorie du Droit
ROW	Recht in Ost und West
RYDI	Revue Yougoslave de Droit International
SIR	Studies on International Relations
TLR	Texas Law Review
UILF	University of Illinois Law Forum
UNTS	United Nations Treaty Series
UTLR	University of Toledo Law Review
VJIL	Virginia Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law
WA	World Affairs
YWA	Yearbook of World Affairs
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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CHAPTER I

GENERAL INTRODUCTION: STATEMENT OF THE PROBLEM AND METHOD OF STUDY

As law is primarily a device for regulating and ordering relations in society, any system of law should be able to answer clearly the question of what the law is or where it can be found.[1] The question of sources is therefore fundamental in any system of law. Particularly in the present time in which so large a number of most important fields of international relations require so quick and effective a regulation, it is a matter of great anxiety to international lawyers and, more generally, to all those concerned with the destiny of the international community that in international law this vital issue of the sources so controversial and confusing. In a nutshell the foregoing represents both the focus of the present study as well as the main justification for undertaking it.

The era following World War II and particularly the most recent decades have been witnessing a kind of revival of attention for the theory of international law. The space devoted to the theoretical aspects in books and leading journals on international law is considerable. Furthermore, if this author is not mistaken, the theoretical renaissance in international law is still gaining momentum. At least from hindsight this is not surprising. The post-war history of international relations up to the present moment has seen far-reaching changes. The ensuing new situations have raised new questions and posed new problems to States in the conduct of their international relations. As international law is a major instrument for keeping these relations viable, the new situations referred to have also put (new) strains on that body of law. It is therefore not surprising that this state of affairs has prompted renewed reflection on the theoretical underpinnings of international law. The wide-ranging and multifarious questions and problems arising in practice can be adequately coped with only on the basis of a consistent and appropriate concept of what international law is and how it actually works. The theories inherited from past centuries and preceding generations of international lawyers may still provide powerful insights, but they cannot meet, in all respects, the challenges posed by modern developments. Consequently, the need is felt to review, reconsider and, if necessary, reformulate the traditional views in the light of the changed circumstances.

The question of the sources of international law is an important aspect of the theoretical revival just mentioned. Indeed, as one of the fundamental issues of international law, the doctrine of the sources has always attracted considerable

1. Similarly R. Jennings, "What Is International Law And How Do We Tell It When We See It?", XXXVII *ASDI* (1981), pp. 59-88 (59): "although lawyers know that the quality of certainty of law is one on which there must be much compromise, not least in the interest of justice, it is a *desideratum* of any strong law that there is reasonable certainty about where one should look to find it".

attention. Similarly, because of the peculiar features of the international society, the sources of international law have at all times been, to a greater or lesser extent, controversial. However, one may wonder whether or not the recent changes have affected the sources of international law and if so to what extent. On the one hand, it would seem that they have resulted in a situation where an increasing need is felt for rapid and often detailed regulation in many fields of international relations. On the other hand, the process of creating international law would seem to grow more cumbersome, in that it becomes more time-consuming and its outcome less satisfactory measured against what is needed in practice. These two contradictory tendencies no doubt help to explain the greater attention for the sources and probably also contribute to the fact that the issue has taken on a more confusing and controversial character.

Every international lawyer is of course familiar with the problems surrounding the sources, because their impact is felt, at least to some extent, in nearly every field of international law. However, the magnitude and the ramifications of the problematical nature of the sources become clear above all in the newer fields of international law. It is particularly in these fields that the impact of the uncertainties and ambiguities which at present characterize the doctrine of the sources of international law are felt. The present author was first confronted with these issues as a student of the international law of human rights. In that comparatively young area of international law the question quite frequently arises of what the precise legal status of a certain document is. Well-known, for instance, is the long-standing debate on whether or not the Universal Declaration on Human Rights, adopted by the General Assembly of the United Nations in 1948, constitutes binding international law.

Comparable difficulties may be encountered when one tries to pinpoint the legal or non-legal character of instruments belonging to other fields of international law, such as that of peace and security or that of the international economic relations, including the documents relating to a "new international economic order". Because it is the main task of the doctrine of sources to answer questions like how rules of international law come into being and whether or not (and if so, to what extent exactly) a given rule is a rule of international law, it is here that the heart of the problem concerning the sources lies. For, to the extent that the doctrine of sources is incapable of answering these questions, the ability of international law to serve effectively as an instrument for ordering and regulating international relations diminishes.

Because of the fundamental character of the issue of the sources, moreover, the scope of the problem is not confined to the just-mentioned questions. The uncertainties and ambiguities surrounding the sources also permeate other important issues in international law. A notable example can be found in a matter which has equally dominated and troubled the theory of international law, *i.e.* the question of enforcement of international law, or, to put it more broadly, of the supervision of international obligations on the part of States. With respect, for instance, to the supervision of implementation of international obligations on the part of States in the field of human rights, which the present author's research has to a large extent been concentrated upon thus far, it frequently appears that the (effectiveness of the) supervision is not only dependent upon the particular features of the supervisory mechanism concerned, notably the functions and powers of the organs entrusted with supervision, but also on

the precise legal status of the obligations to be supervised.[2] To put it differently, supervision as a rule appears to be more effective in the case of rules of a clear normative status than in the case of rules whose precise legal character is more ambiguous.

This suggested relation between supervision and the exact normative status of a rule was made one of the objects of study, although not a primary one, in a research project on supervision within international economic organizations initiated by the Department of the Law of International Organizations of Utrecht University, in which the present author participated. This research project purported to analyze the supervisory mechanisms of various international economic organizations and other arrangements of an economic character in search of their effectiveness. From the outset it was taken into account that the activities of supervisory organs or law-determining agencies in general are seldom confined to the application of existing law strictly speaking. Judgments and other assessments, of course, never evolve mechanically from the mere application of existing rules to a given set of facts. Some measure of interpretation is always involved. Furthermore, existing rules frequently require concretization, adaptation, elaboration and even sometimes the creation of new (additional) rules by law-determining agencies before they can be successfully applied in practice. From the beginning, therefore, a so-called "creative-function" was introduced in the model according to which the activities of supervisory mechanisms were to be analyzed.

It turned out *inter alia* that the amount of "creative" aspects involved in the work of supervisory organs of various international organizations was considerably more important than was expected. These organs proved to perform a good deal of law-making, although this is usually disguised as determination, interpretation or application of the law.[3] One of the main explanations for the fact that supervisory organs on the international plane usually resort to "creative" activities on a larger scale than at the national level would seem to be found in the international law-making process itself. In a number of important respects the latter is inferior to the legislative mechanisms usually found in municipal legal systems; mainly because of its decentralized or horizontal character the international law-making process not infrequently produces quite ambiguous rules of law and, more importantly, it is not very well equipped to adapt international law to changing circumstances. As a result it was found that the defects of the international law-making process came to the fore very clearly in the phase of supervision and, therefore, quite often had to be remedied in that phase.

The present author initially intended to further elaborate this relation between law-making and supervision. For a number of reasons the Final Act of Helsinki of 1975 was chosen as the principle object of study for that purpose. The Final Act constitutes the concluding document of the Conference on Security and Cooperation in Europe which assembled in three phases between

2. For a detailed study on the supervision of international obligations in the field of human rights, with reference also to the just- mentioned link between supervision and the legal status of the rules concerned, see A. Khol, *Zwischen Staat und Weltstaat* (Wien 1969).
3. The results of the researchproject will be published in 1983 by Kluwer, Deventer, under the title: P. van Dijk (ed.), *Supervision within International Economic Organizations: The NIEO Perspective*.

3 July 1973 and 1 August 1975 in Helsinki, Geneva and Helsinki again.[4] It was solemnly signed by the heads of state and the heads of government of the United States, Canada and all European States with the exception of Albania. This very elaborate document comprising more than sixty pages in print deals with a great variety of highly important issues in the political, military, economic, humanitarian, cultural and educational field.[5] Furthermore, the Final Act established a highly interesting kind of supervisory or, in its own terminology, follow-up mechanism in the form of subsequent meetings of representatives of participating States at intervals of approximately two years.

This summary description of the Final Act's general features is sufficient to show that there were a number of reasons for studying the document. Generally speaking, the Helsinki Final Act was widely considered to be a very important instrument. More important, however, from the perspective of the object of study which the present author had in mind was the fact that the Final Act, although it did not result in an institutional set-up belonging to the class of international organizations, does provide for some form of international organization consisting of regular follow-up meetings. Furthermore, the Helsinki Final Act shows a number of characteristics which are interesting in view of the link between law-making and supervision just mentioned. In the part devoted to the follow-up of the Conference the participating States first declare their resolve to continue the multilateral process initiated by the Conference. Subsequently, they map out a two-tier system to this end. Their aim is to be attained "by proceeding to a thorough exchange of views on the implementation of the provisions of the Final Act and of the tasks defined by the Conference, as well as, in the context of the questions dealt with by the latter, on the deepening of their mutual relations, the improvement of security and the development of cooperation in Europe, and the development of the process of détente in the future;". In other words, the Final Act in fact charges the follow-up meetings with a two-fold task: firstly, review of implementation; and, secondly, a more "law-making" task of deepening, improving and developing what has already been achieved.

In addition to this special arrangement on follow-up, another feature making the Helsinki Final Act a most interesting object of study is that its precise legal nature or status was left vague and consequently uncertain by the participating States.[6] Apart from the exact reasons of this state of affairs, the combination of

4. For an elaborate report on the *travaux préparatoires* and the course of the Conference, see L. Ferraris (ed.), *Report on a Negotiation, Helsinki-Geneva-Helsinki 1972-1975*, Institut Universitaire de Hautes Etudes Internationales (Alphen aan den Rijn/Genève 1979); see also the commentary on the text of the Final Act contained in Publication No. 115 of the Netherlands Ministry of Foreign Affairs, *Conferentie over Veiligheid en Samenwerking in Europa, Helsinki-Genève-Helsinki 1973-1975* [Conference on Security and Cooperation in Europe, Helsinki-Geneva-Helsinki 1973-1975] ('s Gravenhage 1976). The most important documents relevant to the Conference are collected in H. Jacobsen e.a. (eds.), *Sicherheit und Zusammenarbeit in Europa; Analyse und Dokumentation 1973-1978* (Köln 1978).
5. For a fairly recent survey of the various aspects of the Helsinki Final Act with a great number of further references, see P. van Dijk, "The Final Act of Helsinki - Basis for a Pan-European System?", XI *NYIL* (1980), pp. 97-124.
6. See in this respect the analysis of the declarations by the representatives of the participating States at the occasion of the signing of the Final Act by A. Klafkowski, "CSCE Final Act - The Bases for Legal Interpretation", 8 *SIR* (Warsaw 1977), pp. 76-87 (79-84). The classifications