武大国际法讲演集

第二卷

Wuhan University Lectures on International Law Ⅱ

Vladimir Djuro DEGAN

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Photo of Vladimir Djuro DEGAN

Preface

Wuhan University Institute of International Law has been fortunate to receive various distinguished scholars of international law from time to time. In the Autumn Semester of 2009, we had Professor Vladimir Djuro DEGAN here as our Expert in Residence.

During his stay on campus, Professor DEGAN participated in the teaching of "Advanced Studies in Public International Law", a course given in English for graduate students. Both the staff members of our institute and the students benefited greatly from his lectures, our conversations with him, and generally, his presence.

Some time ago, Wuhan University Institute of International Law started a series of publications under the title of "Wuhan University Lecutres on International Law", collecting lectures given by distinguished visitors both in English and in Chinese. Volume one of this series was published in 2006. The Lectures given by Professor Vladimir Djuro DEGAN present us with the opportunity to produce Volume 2 of this series, completely in English.

Readers of these Lectures will find that while attempting to provide teaching materials to the graduate students of international law, Professor DEGAN has given us a great deal of his personal insights. We are certain that Professor DEGAN's Lectures will be of great value to students and researchers alike. We are pleased that these Lectures now feature as Volume 2 of our Wuhan University Lectures series.

Yu Mingyou, Acting Director
Sienho Yee, Chief Expert
Wuhan University Institute of International Law

Biographical Note

Vladimir Djuro DEGAN was born on 2 July, 1935 at Bosanski Brod (Bosnia-Herzegovina). He is now Vice-president of the Institute of International Law; Head of the Adriatic Institute of the Croatian Academy of Sciences and Arts in Zagreb; Marco Polo Fellow of the Silk Road Institute of International Law, Xi'an Jiaotong University (China); and Emeritus Professor of the University in Rijeka.

Having finished his studies at the Faculty of Law in Sarajevo, he lectured between 1969 and 1981 Comparative Government and Public International Law at the Faculty of Political Sciences of the Sarajevo University. Since 1981 until his retirement in 2005 he was Professor of International Law at the Faculty of Law, University of Rijeka (Croatia).

During the period between 1979 and 1991 he organized three-week courses in International Law and International Relations at the Inter-University Centre in Dubrovnik, each year alternately in English and French.

In 1984, he was professeur associé to l'Université du Maine (Le Mans); and in 1990 and 1993 professeur invité to l'Université de Nanterre (Paris XIII) and l'Université Panthéon-Assas (Paris II).

In 1988 and 1992, he lectured at the Helsinki Summer School of International Law.

In 1999, he lectured at the Hague Academy of International law on the topic of "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)".

In 2006 he presented a course on "The Scope and Patterns of Erga Omnes Obligations in International Law" at the Bancaja Euromediterranean Courses of International Law in Castellon (Spain).

In 2008 he has done postgraduate courses on various topics of international law at the Silk Road Institute of International Law, Xi'an Jiaotong University in China.

In 2009 he was invited as "Expert in Residence", and took part in the teaching

of "Advanced Studies in Public International Law" within the Wuhan University Institute of International Law.

In 1983 he was elected associé, and since 1989 he has been full member of the Institute of International Law.

Between 1991 and 1995, he was a Croatian member at the Expert Groups on Human and Minority Rights, and on State Succession at the International Conference on the Former Yugoslavia. Between 1996 and 2001, he was Member of Croatian delegation at the negotiations on Succession issues of the former Yugoslavia.

Decorations: by the French Republic, dans l'Ordre des Palmes Académiques chevalier in 1988; officier in 1997; commandeur in 2004. No decorations or prizes received in Croatia or the former Yugoslavia.

Contents

Chapter I
On Sources of International Law in General

Bibliography: Max SOERENSEN: *Les sources du droit international*, Copenhague 1946, 274 pages; Clive PARRY: *The Sources and Evidences of International Law*, Manchester Univ. Press 1965, 122 pages; G. J. H. VAN HOOF: *Rethinking the Sources of International Law*, The Hague 1983, 314 pages; Gennadi Mikhailovich DANILENKO: *Law-Making in the International Community*, Martinus Nijhoff Publishers 1992, 343 pages; Julio A. BARBERIS: *Formación del derecho internacional*, Buenos Aires 1994, 324 pages; V. D. DEGAN: *Sources of International Law*, The Hague 1997, 564 pages.

I. Introduction

The notion of sources of international law seems to be of utmost importance for proper understanding of this entire discipline. Although no author of treaties on international law can avoid its explanation, in some books the treatment of it is limited and simplified. Their authors give otherwise excellent explication of most of other problems of this discipline, but they did not treat the complex problem of sources of international law quite properly. That is the origin of much confusion on this subject matter.

However, the sources of international law, including here the law of treaties, customary law, general principles of law, and unilateral acts of States—together with responsibility of States for internationally unlawful acts—form the core of this entire discipline. They form as to say "the lawyer's law". To students who understand these problems well, all other topics such as the law of the sea, law of diplomatic and consular relations, etc., are much simpler to grasp.

Ⅱ. Different meanings of the term "sources of law"

Many different, and even opposite meanings are ascribed to this term. Late American scholar Herbert Briggs warned of the confusion of the term "sources" with: (1) *basis* of international law, i. e. basis of obligation of this law (which is the question of philosophy of law); (2) with *causes*, i. e. factors of influencing its development, which have been understood by some writers as "material sources" of international law (unlike its sources in formal sense); or (3) its *evidences*, being sometimes confined to "documentary evidences" in which the substantive rules find expression.

For the sake of clarity and precision Briggs has advocated the employment of the term "sources" in a formal sense, as indicating *the methods or procedures by which international law is created.* ① Of a similar view was the British writer Georg Schwarzenberger. ②

Ⅲ. Article 38 of the *Statute of the International Court of Justice*

It seems however difficult to find out a solution to this problem without envisaging written rules of positive international law determining its own sources. Of far the greatest importance in this respect is Article 38 of the Statute of the present International Court of Justice (ICJ), as adopted in 1945. It reads as follows:

"1. *The Court*, whose function is to decide in accordance with international law

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① *Cf.*, Herbert Briggs: *The Law of Nations*, Second Edition, New York 1952, p. 44.

② He proposed the term *law-creating processes* for treaties, custom and general principles of law; and *law-determining agencies* for "subsidiary means for determination of law", i. e. judicial practice and doctrine. But this notion is not confined to them. In this respect Schwarzenberger has asserted: "Whereas in the case of the law-creating processes, the emphasis lies on the form by which any particular rule of international law is created, in the case of the law-determining agencies it is on how an alleged rule is to be verified." Georg Schwarzenberger: *International Law*, International Law as Applied by International Courts and Tribunals, vol. I, 3rd ed., London 1957, pp. 26-27.

such disputes as are submitted to it,①*shall apply*:

(a) *international conventions, whether general or particular, establishing rules expressly recognized by the contesting States*;

(b) *international custom, as evidence of a general practice accepted as law*;

(c) *the general principles of law recognized by civilized nations*;

(d) *subject to the provisions of Article* 59,② *judicial decisions and the teachings of the most qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

2. *This provision shall not prejudice the power of the Court to decide a case* ex aequo et bono, *if the parties agree thereto.*" (Emphasis added.)

It must be stressed at once that paragraph 2 of Article 38 is not of importance for determining the sources of international law. It only provides for a kind of settlement of a dispute, subject to the express consent of all parties to it, which is not entirely based on positive international law.

The doctrine ascribes, however, to paragraph 1 of Article 38 the utmost importance as being the evidence of sources of positive international law. That is for a plenty of reasons. The Statute of the International Court of Justice forms, according to Article 92 of the *UN Charter*, an integral part of the Charter itself. As a treaty in force this Statute binds at present almost all sovereign States in the world, with only one known exception, that of the State of Vatican (if it is a genuine territorial State).

Moreover, the International Court of Justice, "whose function is to decide in accordance with international law", is, under Article 7 of the *United Nations Charter*, one of six permanent organs of the UN Organization. It is, in addition, its

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① The words "whose function is to decide in accordance with international law such disputes as are submitted to it" were included at the 1945 San Francisco Conference in the text of the *Statute* of the new Court. They did not exist in the Statute of its predecessor, the Permanent Court of International Justice, which was established in 1920.

② Article 59 reads: "*The decision of the Court has no binding force except between the parties and in respect of that particular case.*" The matter is therefore of the general principle of law: *sententia jus facit inter partes.*

"principal judicial organ", as is provided in Article 92. Therefore, the law applied by the principal judicial organ of the UN is the law obligatory to almost all States in the world.

It can therefore be presumed that Article 38 (1) determines sources of that international law which is generally accepted by States. This conclusion applies even to the parties of the Statute that have not accepted the compulsory jurisdiction of the Court, either by their unilateral commitments on the basis of its Article 36(2), or on behalf of some bilateral or multilateral treaties.

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Let us now give an explanation of the content of Article 38. Its paragraph 1 displays the existence of two kinds of sources of international law. Conventions, custom and general principles of law, qualified by Briggs and Schwarzenberger as "law-creating processes", are for the Court itself the main sources of this law. Judicial decisions and doctrine are its subsidiary sources (or according to Schwarzenberger "law-determining agencies"), being according to the wording of this provision: "subsidiary means for the determination of rules of law."

Besides this distinction, Article 38 does not provide any ground for a hierarchy as between the main sources of international law. Such a hierarchy, based on the general principle of law *lex specialis derogat generali*, does not seem to be admissible at the present time.

Article 53 of the *1969 Vienna Convention* on the *Law of Treaties* (the *1969 Vienna Convention*) avows the existence of peremptory norms of general international law (*jus cogens*), as being accepted and recognized "*by the international community of States as a whole*". Practically all norms of this kind are general customary rules. This means that general norms of this character and scope make void or terminate any special rules conflicting with them. ① When the matter is of operation of these norms, the general principle *lex specialis derogat legi generali* does not apply.

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① See an interesting approach to this problem in Sienho Yee: "Strategies for Settling the Hierarchy of the Sources of International Law", V. CRNIĆ-GROTIĆ, M. MATULOVIĆ (Ed): *International Law and the Use of Force at the Turn of Centuries*, Essays in honour of V. D. DEGAN, Rijeka 2005, pp. 341-375.

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However, in spite of the highly authoritative character of Article 38 of the ICJ Statute, its wording can no longer be considered as exhaustive and all-embracing, when the matter is either of main or of subsidiary sources of international law.

(i) First of all, its sub-paragraph (b) describes international custom as evidence of "a general practice", accepted as law. This could mean that only general customary international law is provided in it. However the State practice, some Judgments of the Court itself and the doctrine have for a long time ago ascertained the existence of *particular customary law*. Although not frequent in practice, the rules of this kind are very much similar to non-written agreements. They are in many other important aspects dissimilar to the general customary law.

(ii) Next to them, *unilateral acts* by which a State assumes certain new legal obligations, or relinquishes its actual rights (waiver), or even acquires new rights, can no longer be denied as a principal and autonomous source of international law. The legal effects of unilateral acts of this kind are not dissimilar to the effects of treaties or of particular customary rules.

(iii) There is a tendency in the practice within some international organizations to give rise to another autonomous source of international law. Some UN specialized agencies—namely the World Health Organization, the World Meteorological Organization and the International Civil Aviation Organization—issue within their competencies some *standard rules*. Formally, they are not obligatory for their member States as such. Nevertheless, all the respective States almost invariably conform themselves with these the so-called "non-obligatory" rules, which are the product of high technical expertise and knowledge. That is because member States are usually not able to impose the alternatives, and because their refusal by them might harm their own interests. These are for instance numerous regulations concerning the safety of airports.

In case that some new intergovernmental organizations were established with similar competencies, and in case of proliferation of rules of this kind, one could discuss of the appearance of this new main source of international law. But it seems still to allege that.

A tendency in this respect seems to be some provisions of the *1982 UN Law of the Sea Convention* which refer to "generally accepted international rules and

standards" in the domain of protection of marine environment. ① The competent organization for issuing these rules and standards is the International Maritime Organization, a UN specialized agency.

The legal scope of these "rules and standards" is still uncertain. There is not enough of State practice in order to demonstrate that some of them have transformed into customary rules of general international law. Still less can be proved that all State parties to the *1982 Convention* have committed themselves in advance to respect them as a kind of treaty obligations. However, in case of new grave accidents at seas with disastrous consequences such a law-creating by the I. M. O. could acquire in a short period of time universal approval by States.

(iv) Furthermore, there have been views in the doctrine ascribing to *the UN General Assembly resolutions* the role of a source of direct obligations for its member States. That would be tantamount to assign at least to some of these resolutions the character of an autonomous source of international law, distinct from others. That allegation does not seem to be justified. Neither is it, however, correct to deny a legal importance of any of these resolutions. Some of them can play an important role as a material source or documentary evidence of customary international law. The same can be claimed for some portions of the *1975 Helsinki Final Act* in respect to European States.

(v) Finally, Article 38 of the Court's Statute is not all embracing any more in its *enumeration of subsidiary means for the determination of legal rules.* The matter is in practice mainly of subsidiary means (or "law-determining agencies"), for determination of customary legal rules. On the contrary, when the matter is of a treaty in written form, its own text is the main agency for the determination of the rights and duties of its parties.

Besides judicial decisions and doctrine, that role can play in customary process: multilateral and bilateral treaties, and especially conventions on codification of international law; concordant unilateral acts of a larger number of States; or some non-conventional instruments like the UN General Assembly resolutions, final acts of

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① That was an attempt to harmonize the protection of the marine environment with the preservation of the freedom of navigation. The matter is mainly of paragraphs 2, 5 and 6 of Article 211, paragraph 1 (a) of Article 226, and paragraph 2 of Article 21.

diplomatic conferences, joint statements of heads of State and Government, etc.

IV. Law-creating processes and law-determining agencies

After ascertaining the distinction between the main and the subsidiary sources of positive international law, we can now return to the controversy on the meaning of the term of "sources of international law". It seems that this legal term has several and distinct meanings in practice.

In its simplest sense, the term "source of law" means the source of legal rights and obligations of parties to a legal instrument. In this sense a treaty is the source of rights and obligations for its parties. The same can be said for these unilateral acts of States, which are a genuine source of international law.

Such a narrow interpretation of this term is correct but not sufficient. When discussing some specific sources we associate at the first glance to the form and origin of a particular legal norm. Thus, when speaking of treaty rules we imply written legal norms, although, there are agreements not in written form, which are infrequent in practice.

When we speak of customary rules we mean unwritten norms that appear in practice of States and are accepted by them as law (*opinio juris*). However, the most important customary rules are today codified in conventions, or they can arise from other treaty provisions, or from some resolutions of the UN General Assembly, or even from judicial decisions. Strictly speaking, in these cases customary rules are not "unwritten".

Finally, under general principles of law are usually meant principles common to the municipal civil, criminal or constitutional legal orders, which are, subject to circumstances, applicable as legal norms in international relations, but are distinct from customary rules. There is however no convincing reasons why a norm of that kind should not operate both as a customary legal rule and as a general principle of law at the same time.

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Nevertheless, the meaning of the main sources cannot be reduced to their bare form or to their origin only. Like Schwarzenberger and Briggs, we understand under this term primarily *the law-creating processes*. And we shall also take into account the respective law-determining agencies in the sense: how an alleged rule is to be

verified as a norm of positive international law.

The main agency of conclusion and operation of a treaty is a concordance of wills of two or more subjects of international law (i. e. international persons), intended to achieve an effect in international law by creating a legal relationship of their mutual rights and duties. In absence of that concordant will there is no treaty.

In the same sense, a source of international law is the will of one State issuing a unilateral act, intended to achieve an effect in international law by assuming a new legal obligation, or by waiving its actual legal rights, or in some circumstances by acquiring new rights. In absence of such a will the matter is not of a source, i. e. of a law-creating process.

The customary process is of a more complex nature. Normally, a uniform practice of several international persons precedes *opinio juris*.① Their practice and *opinio juris* can be manifested in their conduct, but also in various written acts such as treaties, acts of diplomatic conferences, declarations of political organs of international organizations, or concordant unilateral acts of legislative, executive, military or judicial organs of a number of States. In this customary process of importance can be, in addition, some other pronouncements which can influence future practice of States, namely decisions of international courts or tribunals, and sometimes even writings of publicists (doctrine).

Subject to circumstances, some of these acts can be evidence of a practice, or constitute the practice itself. At a later stage of customary development they can be a catalyst for creation of *opinio juris*, or they can simply be declaratory of a customary rule already in force. Therefore, the law-determining agencies can be material sources (i. e. factors) in a customary process in progress. In case of a final and successful transformation of these acts into new legal rules, they can serve *ex post facto* as documentary evidences of its contents and scope in law. Hence, the very role of these acts in customary process can change in time.

Specific problems can arise in regard to general principles of law. Operation of some principles of this kind, like that of *pacta sunt servanda*,② is a prerequisite to

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① *Opinio juris sive necessitatis* is the conviction of participating States that their actual practice has become legally obligatory.

② The rule *pacta sunt servanda* means that all their parties in good faith must perform treaties.