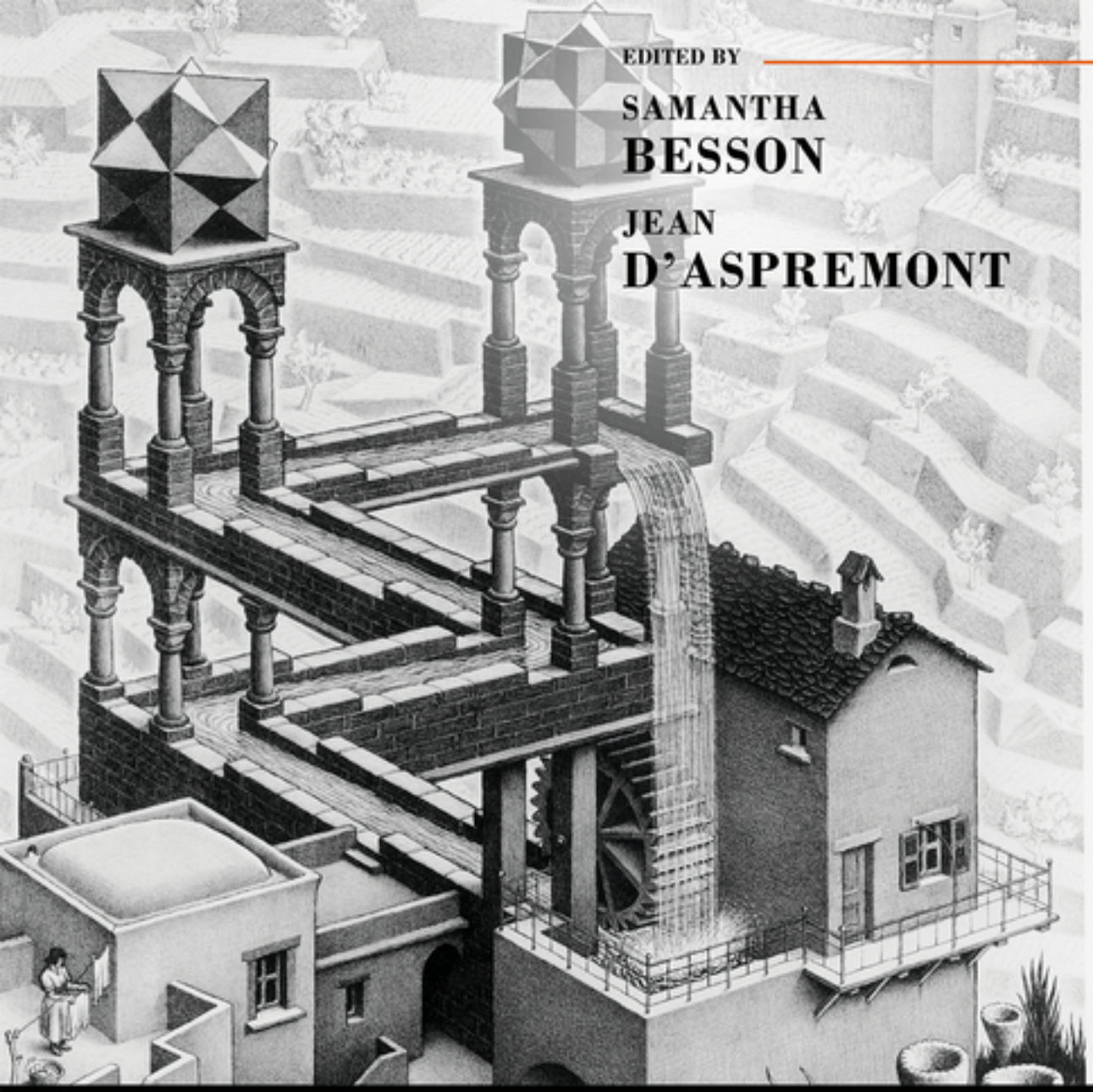

EDITED BY

SAMANTHA BESSON

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The Oxford Handbook *of* THE SOURCES OF INTERNATIONAL LAW

THE OXFORD HANDBOOK ON

THE SOURCES OF INTERNATIONAL LAW

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Edited by

SAMANTHA BESSON

and

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With the assistance of

SÉVRINE KNUCHEL

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Preface

The sources of international law have always constituted a thriving field of theoretical and practical enquiry. This Handbook takes stock of those debates and contains fifty-two cutting-edge chapters by fifty-six leading international lawyers and theorists. An introduction co-authored by the two editors sets the scene by identifying the origins, functions, centrality, and limitations of the doctrines of the sources of international law, also addressing some of the main challenges with which they are confronted, as well as presenting the aims of the volume and the chapters that compose it.

The contributions to this volume, published here in English for the first time, address central questions about the sources of international law. The Handbook does neither follow the usual structure of discussions of sources of international law to date nor a source-by-source model. On the contrary, the structure of this volume questions the previous order and presentation of the sources of international law, and focuses on four novel perspectives: the histories, theories, functions, and regimes of sources of international law. Chapters in Part I (Histories) provide detailed and critical accounts of how sources of international law have been conceived by both practitioners and scholars during the history of international law (from the scholastic period to the contemporary anti-formalist era), including a chapter on the history of Article 38 of the Statute of the International Court of Justice. Chapters in Part II (Theories) explore how the main theories of international law have addressed and understood sources of international law. Chapters in Part III (Functions) examine the relationships between the sources of international law and the characteristic features of the international legal order that are or should be related to international law-making. Chapters in Part IV (Regimes) address various questions pertaining to the sources of international law in specific fields of international law. The correspondence or, on the contrary, lack of correspondence between the arguments made in the different sections constitutes one of the innovative features of the Handbook.

Another characteristic of this volume lies in its 'dialogical' method: it contains two chapters on each topic, with the author of the second chapter engaging as much as possible with the arguments of the author of the first chapter. Yet, each chapter may also be read independently from the other, as a self-standing contribution to the topic. Cross-fertilization and coherence, as well as the emphasis on discrepancies

among the views presented in the volume have been made possible thanks to the excellent and intensive discussions that took place between authors of each pair of chapters and each section of the book, but also across these divisions during the two workshops that were organized in December 2014 and September 2015 in Fribourg.

We wish to thank warmly Dr Sévrine Knuchel, senior research assistant at the University of Fribourg from 2015 to 2018, for her tremendous and unfailing editorial assistance throughout the long process that brought us from the collection of first abstracts to the finalization of fully fledged chapters. Special thanks are also due to Dr Anne-Laurence Graf Brugères for her assistance in the first phase of the project (2013–2014), and especially in drafting the application to the Swiss National Science Foundation and the organization of the first authors' workshop. We are grateful to Ms Merel Alstein and Mrs Emma Endean-Mills at Oxford University Press for their support and kind forbearance during the long, and sometimes challenging, process of putting this book together. We would also like to thank the University of Fribourg's Research Pool and the Swiss National Science Foundation for providing vital financial support for the research project as a whole from 2013 to 2018, and especially for two (hopefully memorable!) authors' workshops we held in Fribourg. Last, but not least, our special thanks are owed to all of our contributors for making this ambitious project such a stimulating, formative, and worthwhile experience. Thinking about sources goes on!

Samantha Besson and Jean d'Aspremont
Fribourg and Manchester, February 2017

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List of Abbreviations

AB	Appellate Body
AML/CFT	Anti-Money-Laundering and Controlling of the Financing of Terrorism
ARIO	Articles on the Responsibility of International Organizations
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ATS	Alien Tort Statute
AU	African Union
BIT	Bilateral Investment Treaty
CAT	UN Council Against Torture
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CFSP	Common Foreign and Security Policy
CIL	Customary International Law
CITES	Convention on International Trade in Endangered Species
CJEU	Court of Justice of the European Union
COP	Conference of the Parties
CSR	Corporate Social Responsibility
DHRL	Domestic Human Rights Law
DPH	Direct Participation in Hostilities
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECHR	European Convention on Human Rights
ECSC	European Coal and Steel Community
ECtHr	European Court of Human Rights
EEC	European Economic Community
EEZ	European Economic Zone
EMU	European Monetary Union
ETI	Ethical Trading Initiative
EU	European Union
FAO	Food and Agriculture Organization
FATF	Financial Action Task Force on Money Laundering
FET	Fair and Equitable Treatment
FLA	Fair Labour Association
GAIRS	Generally Accepted International Rules and Standards
GAL	Global Administrative Law
GATT	General Agreement on Tariffs and Trade
GPIL	General Principles of International Law

GPUL	General Principles of Union Law
HRC	Human Rights Committee
IASB	International Accounting Standards Board
IBA	International Bar Association
IC	Independence Condition
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICSID	International Convention on the Settlement of Investment Disputes
ICT	International Criminal Tribunal
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IEL	International Environmental Law
IFRS	International Financial Reporting Standards
IGO	International Governmental Organization
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIL	International Investment Law
ILA	International Law Association
ILC	International Law Commission
ILHR	International Legal Human Rights
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
IMT	International Military Tribunal
IO	International Organization
IPPC-BAT	Integrated Pollution Prevention and Control Reference document on Best Available Techniques in the pulp and paper industry
ISIS	Islamic State of Iraq and Sham
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organization
JHA	Justice and Home Affairs
LRTAP	Long-Range Transboundary Air Pollution
MEA	Multilateral Environmental Agreement
MFA	Ministry of Foreign Affairs
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict
NJT	Normal Justification Thesis
NL	Natural Law
NLF	National Liberation Front
NMT	Nuremberg Military Tribunals

OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPEC	Organization of the Petroleum Exporting Countries
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PICRW	International Convention for the Regulation of Whaling
POPs	Persistent Organic Pollutants
ROSC	Report on the Observance of Standards and Codes
SANAF	Argentinian Society of Analytical Philosophy
SCSL	Special Court for Sierra Leone
SS	Schutzstaffel
TBT	Technical Barriers to Trade
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOT	United Nations Conference on the Law of Treaties
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
UPU	Universal Postal Union
VCLT	Vienna Convention of the Law of Treaties
WCO	World Customs Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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THE SOURCES OF INTERNATIONAL LAW

AN INTRODUCTION

SAMANTHA BESSON
AND JEAN D'ASPREMONT*

I. Introduction

The sources of international law constitute one of the most central patterns around which international legal discourses and legal claims are built. It is not contested that speaking like an international lawyer entails, first and foremost, the ability to deploy the categories put in place by the sources of international law.

It is against the backdrop of the pivotal role of the sources of international law in international discourse that this introduction sets the stage for discussions conducted in this volume. It starts by shedding light on the centrality of the sources of international law in theory and practice (II: The Centrality of the Sources of International Law in Theory and Practice). Secondly, it traces the origins of the doctrine(s) of sources of international law back to the modern tradition of international legal thought (III: The Enlightenment, Modernity, and the Origins of the

* Many thanks to Dr Sévrine Knuchel for her editorial assistance.

Sources of International Law). The following section maps the types of controversies permeating contemporary debates on the sources of international law, and, in doing so, makes a virtue of the persistent and pervasive disagreements that pertain to the origins, criteria, functions, limitations, unity, and hierarchy, as well as the politics of the sources of international law (IV: The Disagreements about Sources in International Legal Theory and Practice). The final part provides a survey of the main choices made by the editors as to the structure of discussion of the sources of international law that takes place in this volume and sketches out the content of its successive chapters (V: A Preview of the Contents of the Volume).

II. The Centrality of the Sources of International Law in Theory and Practice

The question of the sources of international law pertains to how international law is made or identified.

As is similarly witnessed in contemporary domestic law and theory,[1] sources are one of the most central questions in contemporary international law, both in practice and in theory.[2] Not only is it important for practitioners to be able to identify valid international legal norms and hence the specific duties and standards of behaviour prescribed by international law, but the topic also has great theoretical significance. The sources help understand the nature of international law itself, i.e. the legality of international law.[3] Furthermore, accounting for the sources of international law means explaining some of the origins of its normativity,[4] but, more importantly, discussing some of the justifications for its authority and for the exclusionary reasons to obey it places on its subjects, and hence its legitimacy.[5] Sources

[1] For a discussion in domestic legal theory, but with some comparisons with international law, see the various contributions in Isabelle Hachez, Yves Cartuyvels, Hugues Dumont, Philippe Gérard, François Ost, and Michel van de Kerchove, eds, *Les sources du droit revisitées* (Brussels: Publications des Facultés universitaires Saint-Louis, Anthémis, 2012), especially its vol. 4, *Théorie des sources du droit* and the contributions by Philippe Gérard, Isabelle Hachez, Pierre d'Argent, Olivier Corten, and Jean d'Aspremont.

[2] For an overview of the relationship between sources of international law and legality, normativity, and legitimacy, see Samantha Besson, 'Theorizing the Sources of International Law', in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 163–85, 172–8.

[3] See chapter 25 by Pierre d'Argent in this volume.

[4] See chapter 31 by Detlef von Daniels and chapter 32 by Nicole Roughan in this volume.

[5] See chapter 33 by Richard Collins and chapter 34 by José Luis Martí in this volume.

simultaneously shape the contours of the sites and tools of contestation in international legal discourse.

Since it touches upon the nature, legality, normativity, and legitimacy of international law, as well as the sites and tools of its contestation, it is no surprise that the question of the sources of international law is and has been at the heart of perennial debates among international lawyers and scholars for centuries. Although—and, probably, because—it is one of the key questions in international legal discourses, the identification of the sources of international law has remained one of the most controversial legal issues in international legal practice and scholarship. It being so central enhances its controversial nature, but, interestingly, it being disputed also contributes to reinforcing its pivotal nature, thereby making sources one of the essentially contested concepts of international law.[6] This is as true in theoretical and doctrinal scholarship, as it is in practice.[7]

A few observations may be formulated about the contentious character of the sources in theoretical, doctrinal, and practical debates.

As far as international legal *theory* is concerned, theorists have long agreed to disagree about sources of international law. Many of those disagreements have originated in international lawyers' inclination to transpose domestic categories or principles pertaining to sources in domestic jurisprudence into the international realm. It is therefore no surprise that some of the philosophical debates around sources in international law have come to reflect domestic ones.[8]

The problems related to such transposition of domestic law categories to international law are well known and it suffices to mention a few of them here. First of all, because large parts of international law are still articulated around the idea that States are the sole law-makers and sole legal subjects, disagreements have arisen because the configuration of international law-making processes fundamentally departs from the centralized and top-down processes experienced in domestic law. Secondly, sources of international law are equivalent and apply concurrently, and they are not therefore situated in a hierarchy to one another.[9] Thirdly, sources of international

[6] On essentially contestable concepts, see Walter B. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* 56 (1956): 167–98; Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', *Law and Philosophy* 21 (2002): 137–64; Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Oxford: Hart, 2005), p. 69 ff. Interestingly, François Ost, 'Conclusions générales', in Hachez et al., eds, *Les sources du droit revisitées*, vol. 4, 865–997, 877, refers to this centrality *cum* controversy of sources in the practice, doctrine, and theory of law as a form of 'schizophrenia' on the part of lawyers.

[7] On the relationship between the practice and the theory (and doctrine) of international law, see Samantha Besson, 'International Legal Theory *qua* Practice of International Law', in Jean d'Aspremont, André Nollkaemper, and Tarcisio Gazzini, eds, *International Law as a Profession* (Cambridge: Cambridge University Press, 2016), 268–84.

[8] See e.g., Philippe Gérard, 'Les règles de reconnaissance et l'identification des normes juridiques valides', in Hachez et al., eds, *Les sources du droit revisitées*, vol. 4, 19–49; Isabelle Hachez, 'Les sources du droit: de la pyramide au réseau, et vice-versa?', in Hachez et al., eds, *Les sources du droit revisitées*, vol. 4, 51–100.

[9] See chapter 29 by Erika de Wet and chapter 30 by Mario Prost in this volume.

law are often closely intertwined with sources of domestic law and require, to some extent, incursions into comparative law;[10] not only does the list of sources in international law largely emulate that of domestic law, but their respective sources often share processes or criteria, as exemplified by customary international law or general principles, but also by the interpretative role of the domestic judge in international law.[11] Finally, not all sources of international law are general, and most of them actually give rise to relative obligations, thus triggering Prosper Weil's famous critique of the 'relative normativity' of international law.[12]

Leaving aside these problems related to the lack of comparability between domestic and international law sources, it must be stressed that, at the theoretical level, the greatest challenge probably lies in the fact that there are potentially as many theories of the sources of international law, and the functions they perform, as there are theories of international law. This diversity in theoretical approaches to sources explains in turn some of the jurisprudential disagreements pertaining to the sources of international law.[13]

Importantly, nothing weds the theoretical interest for the sources of international law to legal positivism (and its so-called 'sources thesis'),[14] even if, and for different reasons, legal positivist categorizations (e.g. references to the rule of recognition) have largely dominated the practical and doctrinal discourse within certain regimes of international law.[15] Moreover, that does not mean that, within the legal positivist tradition, there has been a consensus on the understanding of the sources and their functions. There are theoretical disagreements aplenty about sources. They relate to various issues,[16] in particular to the relationship between the 'rule of recognition' *qua* rule and its (diverging or complementary) practice by international legal officials, especially, but not only, judges;[17] to the assimilation between Article 38 of

[10] See Olivier Corten, 'Les rapports entre droit international et droits nationaux: vers une déformalisation des règles de reconnaissance?', in Hachez et al., eds, *Les sources du droit revisitées*, vol. 4, 303–39. See also chapter 36 by Bruno de Witte and chapter 50 by Stephan W. Schill in this volume.

[11] See, in this volume, chapter 51 by Ingrid Wuerth and chapter 52 by Cedric Ryngaert, but also chapter 38 by Eleni Methymaki and Antonios Tzanakopoulos.

[12] Prosper Weil, 'Towards Relative Normativity in International Law', *American Journal of International Law* 77 (1983): 413–42. See also John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', *Oxford Journal of Legal Studies* 16 (1996): 85–128.

[13] See chapter 21 by Matthias Goldmann and chapter 22 by Alexandra Kemmerer in this volume.

[14] See Besson, 'Theorizing the Sources', section 2. See, for instance, chapter 44 by Jutta Brunnée or chapter 26 by Mary Ellen O'Connell and Caleb M. Day in this volume.

[15] For the same observation in domestic law, see Hachez, 'Les sources du droit: de la pyramide au réseau', pp. 53–4. In international law, see, for instance, chapter 47 by Joost Pauwelyn or chapter 43 by Catherine Redgwell in this volume.

[16] See e.g., Besson, 'Theorizing the Sources'; Liam Murphy, *What Makes Law. An Introduction to the Philosophy of Law* (Cambridge: Cambridge University Press, 2014), ch. 8 ('What Makes Law Law? Law Beyond the State'). See also chapter 15 by David Lefkowitz, chapter 16 by Jörg Kammerhofer, chapter 27 by Michael Giudice, or chapter 31 by Detlef von Daniels in this volume.

[17] See e.g., Richard Collins, *The Institutional Problem in Modern International Law* (Oxford: Hart, 2016).

the Statute of the International Court of Justice (ICJ) and the rule of recognition;[18] to the indeterminacy of the rule of recognition; to its validity and authority; to its plurality;[19] and to its ability to account for sources like customary international law or general principles.[20]

It is important to realize that sources have not only been central in the legal positivist tradition in international law. Natural law approaches have continued to bestow important functions to the sources of international law, but have been permeated by similar controversies. Whilst shedding light on the inability of sources to distinguish between law and non-law, as well as the exercise of power inherent in ascertaining international law,[21] critical approaches themselves have been infused with debates as to the possible preservation of the law-ascertainment mechanism that is put in place by the sources of international law. These various perspectives, and the ways in which each of them construes sources and their functions are examined in the following chapters.

As far as *doctrinal* debates about international law are concerned, disagreements are just as pervasive as in theory. To illustrate this point, it suffices to take the example of the 'first-year international law student'. Famously, first-year international law students and newcomers to the field are repeatedly referred to Article 38 of the ICJ Statute's catalogue of sources, albeit with a long list of caveats as to the exemplary and non-exhaustive nature of that list and as to its lack of authority except for the ICJ. Source after source, they are then warned, time and again, about various seeming contradictions and imperfections in those sources and the criteria which they prescribe for the ascertainment of international legal rules: they are told about the existence of treaties that possibly bear effects on non-parties, about the paradoxes of customary international law that binds by mistake, and about the lack of general authority of the international case law whose interpretations of international law actually fill the pages of their textbook and learning material. Students are also informed about the no longer so 'subsidiary' role of judicial decisions in determining international rules of law,[22] or the increasing importance of doctrine in international law-ascertainment.[23] Worse, by the end of their study of Article 38's list

[18] Statute of the International Court of Justice (ICJ) (San Francisco, 26 June 1945, 33 UNTS 993). For a challenge of the idea that sources constitutes secondary *rules*, see Jean d'Aspremont, 'The Idea of "Rules" in the Sources of International Law', *British Yearbook of International Law* 84 (2014): 103–30.

[19] See chapter 27 by Michael Giudice in this volume.

[20] On the latter, see e.g., Samantha Besson, 'General Principles in International Law—Whose Principles?', in Samantha Besson and Pascal Pichonnaz, eds, *Les principes en droit européen—Principles in European Law* (Geneva: Schulthess, 2011), 19–64.

[21] For some remarks, see chapter 19 by Ingo Venzke in this volume.

[22] See e.g., Samantha Besson, 'Legal Philosophical Issues of International Adjudication—Getting Over the *Amour Impossible* Between International Law and Adjudication', in Karin Alter, Cesare P. R. Romano, and Yuval Shany, eds, *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014), 413–36, 413–14. See chapter 37 by Yuval Shany and chapter 38 by Eleni Methymaki and Antonios Tzanakopoulos in this volume.

[23] See chapter 23 by Iain Scobbie and chapter 24 by Alain Papaux and Eric Wyler in this volume.

of sources, students are usually informed about the existence of other sources of international law that do not seem to have much to do with law. For instance, they are told about *soft law* that is described, in a sibylline way, as a kind of international law that is not yet law, but law in the making.[24] They are also warned about new and, as a result, 'non-official' international law-making processes, i.e. law-making that does not correspond to any of the processes officially recognized as sources of international law and hence that cannot be part of its sources strictly speaking, but that still produces international law (e.g. international organizations' law).[25] Here, distinctions start to proliferate, in particular between formal and informal sources, between formal and material sources, and so on.[26] Law-making is indeed an area of the practice of international law that has changed most radically over the past fifty years, especially since the list of sources of international law of Article 38 of the ICJ Statute was last codified in 1945. This may actually explain, as we will see, why so many international lawyers refer to the so-called 'traditional' or 'classical' (list of) sources of international law and doctrines thereof,[27] either to endorse them or to distantiate themselves from them.

A final cause of puzzlement for the student reading doctrinal accounts of sources of international law lies in the fact that those new developments in the international law-making process seem to be accommodated differently in different regimes of international law, and their respective understanding of the sources of international law. This is rightly perceived by some as a challenge to the existence of a general doctrine or, at least, of a general regime of the sources of international law, as it raises the well-known threat of the fragmentation of international law's 'secondary rules' of international law-making.[28] This challenge, if vindicated, would seem to constitute a final blow to the possibility of a unified doctrine of sources of international law, and hence arguably to a unified concept of (general) international law itself.[29]

Finally, as far as *practice* is concerned, the deployment of modes of legal reasoning associated with the sources of international law may be observed in almost

[24] On soft law in domestic and international legal theory, see Hachez, 'Les sources du droit: de la pyramide au réseau', pp. 87–93; Gérard, 'Les règles de reconnaissance', pp. 35–47. See also chapter 31 by Detlef von Daniels, chapter 43 by Catherine Redgwell, and chapter 50 by Stephan W. Schill in this volume.

[25] See chapter 45 by Jan Klabbers and chapter 46 by August Reinisch in this volume.

[26] On those distinctions and their respective meanings, and on the relations between those types of sources, see Hachez, 'Les sources du droit: de la pyramide au réseau', pp. 53–7.

[27] For a useful overview of the various conceptions of 'doctrine', see Thomas Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: Asser Press, 2010), pp. 94–5 (he distinguishes three meanings of the term legal doctrine).

[28] See e.g., chapter 41 by Raphaël van Steenberghe and chapter 42 by Steven R. Ratner in this volume.

[29] On sources and general international law, see chapter 39 by Samantha Besson and chapter 49 by Jorge E. Viñuales in this volume.

all legal arguments.[30] Unsurprisingly, most contentious points in argumentative disagreements then often boil down to—direct or indirect—disagreements on the sources of international law. This explains in turn why a critical aspect of the education of international lawyers is precisely the mastery of those modes of legal reasoning associated with the sources of international law.[31] Indeed, in most professional environments, operating as an international lawyer and the making of international legal arguments primarily require the capacity to speak the language of the sources of international law.[32]

It is submitted here that the theoretical, doctrinal, and practical controversies about the sources of international law that have been sketched out in the previous paragraphs are bound to continue unabated. They are inherent in a normative practice like the legal practice, on the one hand, and in a discipline that has become largely confrontational, on the other. It is precisely the abiding nature of those debates that calls for a rigorous and comprehensive guide to help international lawyers navigate the broad range of theories and the debates about the sources of international law. Important changes in international law-making processes in recent practice also make this taking-stock exercise timely. This is even more crucial as classical or seminal works on the sources of international law are by and large outdated.[33] There have been recent publications on the topic, but most of them are selective and do not offer the kind of comprehensive approach to sources that is sought in this volume.[34] Finally, most recent and comprehensive publications on the

[30] For the contrary observation and argument that (domestic or international) legal practitioners do not discuss sources as much as legal scholars, see the discussion in chapter 34 by José Luis Martí in this volume.

[31] That may be conducive to what has been called 'romanticism' by Gerry Simpson, 'On the Magic Mountain: Teaching Public International Law', *European Journal of International Law* 10 (1999): 70–92, 72.

[32] See, generally, Jean d'Aspremont, *Epistemic Forces of International Law* (Cheltenham: Edward Elgar, 2015), pp. 9–15.

[33] It suffices here to mention, for instance: Max Sørensen, *Les sources du droit international, étude sur la jurisprudence de la Cour permanente de justice internationale* (Cophenhagen: Munksgoard, 1946); Clive Parry, *The Sources and Evidences of International Law* (Manchester: Manchester University Press, 1965); G. J. H. Van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer, 1983); Antonio Cassese and Joseph H. H. Weiler, eds, *Change and Stability in International Law-Making* (Berlin: De Gruyter, 1988); Gennady M. Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff, 1993); and Vladimir Duro Degan, *Sources of International Law* (The Hague: Martinus Nijhoff, 1997). Even Martti Koskenniemi's edited book *The Sources of International Law* (London: Routledge, 2000), is a compilation of articles published between 1958 and 1997.

[34] They are focused either on a specific source of international law—Hugh Thirlway, *International Customary Law and its Codification* (Leiden: A. W. Sijthoff, 1972); Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971); Karol Wolfke, *Custom in Present International Law*, 2nd edn (Dordrecht, Martinus Nijhoff, 1993); Jan Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer Law International, 1996); David Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010); Amanda Perreau-Saussine and James B. Murphy, eds, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2009); Curtis Bradley, *Custom's Future: International Law*

sources of international law lack a philosophical or jurisprudential approach, and remain largely doctrinal as a result.[35]

A terminological caveat is in order, at this stage. The concept of 'sources' is known to all legal traditions (whether domestic, regional, or international). Originally used as a metaphor (of fluidity) within a particular stato-positivist theoretical framework,[36] and maybe thanks to the transformative potential of that metaphor,[37] the concept has acquired some semantics of its own in legal discourses. Unsurprisingly, the meanings of the concept vary dramatically,[38] often according to the functions that are vested therein and the theories informing them. Authors in the volume have been asked to spell out their understanding of the sources as well as the functions they vest upon them in each chapter. As a result, the present introduction does not aim to put forward a single and uniform concept of sources or a canonical list thereof, but only to map the terrain for discussion.

III. The Enlightenment, Modernity, and the Origins of the Sources of International Law

The centrality of the (doctrine of) sources of international law in contemporary international legal theory and practice, while probably taken for granted by most (domestic and) international lawyers nowadays, is not self-evident. Indeed, sources of law do not constitute pattern-of-argument structures that are inherent to law. Law

in a Changing World (Cambridge: Cambridge University Press, 2016); Brian Lepard, *Reexamining Customary International Law* (Cambridge: Cambridge University Press, 2017)—or on a specific issue in the international law-making process or on a specific approach to the latter—Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters, eds, *Informal International Lawmaking* (Oxford: Oxford University Press, 2012); Jean d'Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011); and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

[35] See e.g., Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007); Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014); for an exception, however, see Yannick Radi and Catherine Brölmann, eds, *Research Handbook on the Theory and Practice of International Lawmaking* (Northampton: Edward Elgar, 2016).

[36] Hence the drawing by M. C. Escher chosen for the Handbook's cover. See also chapter 16 by Jörg Kammerhofer on the metaphor's incompatibility with Hans Kelsen's legal theory.

[37] See Ost, 'Conclusions générales', pp. 868–9, 870–6.

[38] See ibid., 886–913. See e.g., the taxonomy of Philippe Jestaz, 'Source délicieuse . . . Remarques en cascade sur les sources du droit', *Revue trimestrielle de droit civil* (1993): 73–85.

can certainly be practised in a way that leaves no room whatsoever for the sources of law. The same holds with international law.[39] In that respect, the cyclically recurring attempt to reinvent international law outside the sources of international law,[40] before or even after the first codification of Article 38 of the ICJ Statute,[41] while looking heretic to some contemporary international lawyers, may not be inherently contradictory with the idea of law and, respectively, of international law *qua* practice[42]—or of early international law at least.[43]

In fact, while present in pre-classical legal thought,[44] sources of law constitute an artefact which grew into prominence with the Enlightenment,[45] and reached an unprecedented sophistication with modernity.[46] International law is no different in this respect.[47] As a prominent and central pattern of argumentative argument structure,

[39] For a discussion whether sources are a structural or conceptual feature of the law rather than a contingent feature and what the implications are either way for their justifications across (domestic and international) legal orders and for legal positivism, see chapter 34 by José Luis Martí in this volume.

[40] For a discussion of contemporary attempts, see chapter 9 by Mónica García-Salmones Rovira and chapter 10 by Upendra Baxi in this volume. On cycles in international legal thought, see David Kennedy, 'Renewal Repeats: Thinking Against the Box', *NYU Journal of International Law and Politics* 32 (2000): 335–500.

[41] See chapter 6 by Lauri Mälksoo, chapter 7 by Ole Spiermann, and chapter 8 by Malgosia Fitzmaurice in this volume.

[42] Although it may be with (international) law as a discipline: see chapter 1 by Peter Haggenmacher in this volume.

[43] On the role of sources *qua* processes of *re*-cognizing what is already cognate—i.e. what he calls 'double-institutionalization' through sources—and hence on the distinction between the absence of sources in non-complex or original normative (including legal) orders and their role in more complex or advanced legal ones, see Ost, 'Conclusions générales', pp. 918–23.

[44] See chapter 1 by Peter Haggenmacher and chapter 2 by Annabel S. Brett in this volume.

[45] According to the liberal doctrine of politics, political freedom can only be preserved by a social order that does not pre-exist and must accordingly be projected and legitimized. According to the liberal doctrine of politics, that order is legitimized by its grounding in the substantive consent of individuals. This liberal paradigm has huge implications for how law and modes of legal reasoning are understood and constructed. On classical international legal thought, see chapter 3 by Dominique Gaurier and chapter 4 by Randall Lesaffer in this volume.

[46] The consolidation of the sources of international law should not necessarily be equated historically with the rise of legal positivism, as sources had long played a central role in natural law theories. See chapter 5 by Miloš Vec and chapter 6 by Lauri Mälksoo in this volume. See also chapter 15 by David Lefkowitz, chapter 16 by Jörg Kammerhofer and chapter 26 by Mary Ellen O'Connell and Caleb M. Day in this volume.

[47] The transposition of the Enlightenment project to international law was made possible by virtue of an analogy between the State and the individual of the liberal doctrine of politics. After Thomas Hobbes and Baruch Spinoza paved the way for a human analogy, Samuel von Pufendorf ascribed an intellect to the State and created anthropomorphic vocabularies and images about the main institution of international law, i.e. the State. Such anthropomorphism was later taken over by Emer de Vattel—not without adjustment—and subsequently translated itself in the classical positivist doctrine of fundamental rights of States which contributed to the consolidation of modern international law in the nineteenth century. See Anthony Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press, 1986), pp. 44–6; Jean d'Aspremont, 'The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law', *Cambridge Journal of International and Comparative Law* 4 (2015): 501–20; Catherine

the sources of international law—and the modes of legal reasoning associated therewith—are a product of the Enlightenment project and, arguably, of the liberal doctrine of politics.[48] More specifically, some argue, sources constitute the linchpin of Enlightenment's legalism,[49] whereby international law is supposed to displace politics, or, at least, differentiate itself from it. This is how the sources of international law have been elevated into the central device to keep 'politics' or 'morality' at bay and to reduce international law to a 'legal-technical instead of ethico-political matter',[50] whereby rules are formal, objectively ascertainable, and distinct from a programme of governance or a catalogue of moral values.[51] With the Enlightenment, the sources of international law put in place a series of content-independent criteria,[52] whereby membership to the domain of legal bindingness—by opposition to the domain of morality and politics—could be ensured.[53]

It is noteworthy that, while being an offspring of Enlightenment's legalism, the central role of sources in the way international law is thought and practised consolidated itself with the rise of modern international law in the nineteenth and twentieth centuries in the wake of the professionalization of the discipline.[54] In fact, modern international law perpetuated the liberal structure of legal thought and

Brölmann and Janne Nijmann, 'Legal Personality as a Fundamental Concept of International Law', in Jean d'Aspremont and Sahib Singh, eds, *Concepts for International Law—Contributions to Disciplinary Thought* (Cheltenham: Edward Elgar, forthcoming).

[48] Roberto M. Unger, *Knowledge and Politics* (New York: The Free Press, 1975), pp. 76–81; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) (reissue with a new epilogue), p. 71; Martti Koskenniemi, 'The Politics of International Law', *European Journal of International Law* 1 (1990): 4–32, 4–5. Timothy O'Hagan, *The End of Law?* (Oxford: Blackwell, 1984), p. 183; Paul W. Kahn, *The Cultural Study of Law. Reconstructing Legal Scholarship* (Chicago: The University of Chicago Press, 1999), pp. 16–18; Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1986), pp. 8–9 and 16–23.

[49] On the idea of liberalism in international legal thought, see Koskenniemi, 'The Politics of International Law', pp. 5–7 and Koskenniemi, *From Apology to Utopia*; Florian Hoffman, 'International Legalism and International Politics', in Anne Orford and Florian Hoffman, eds, *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), 954–84, 961; Shklar, *Legalism*, p. viii and pp. 1–28.

[50] Koskenniemi, *From Apology to Utopia*, p. 82.

[51] See chapter 17 by Jean d'Aspremont and chapter 18 by Frederick Schauer in this volume. See also Jean d'Aspremont, 'La déformalisation dans la théorie des sources du droit international', in Hachez et al., eds, *Les sources du droit revisitées*, vol. 4, 265–301.

[52] It is content-independent because ascertainment does not depend on the substance of the norm whose membership to the legal order is tested. See H. L. A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982), pp. 243–68 and Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), pp. 35–7. See also Fabio P. Schecaira, *Legal Scholarship as a Source of Law* (Heidelberg: Springer, 2013), pp. 26–7.

[53] See Jean d'Aspremont, 'Bindingness', in d'Aspremont and Singh, eds, *Concepts for International Law* (forthcoming).

[54] See Jean d'Aspremont, 'The Professionalization of International Law', in Jean d'Aspremont et al., eds, *International Law as a Profession*, 19–37. See also Koskenniemi, *From Apology to Utopia*, pp. 122–3.

the division of the normative world between the 'political' or the 'moral' and the 'legal'.[55] Hence, in modern international law, sources remained a means for the displacement of politics and morality by law. Yet, with modern international law, the rudimentary modes of legal reasoning originally devised to determine membership to the domain of the legally binding appeared insufficient, overly State-centred, and content-dependent. This is how, in modern international law, what was later called 'voluntarism' by twentieth-century international lawyers was supplanted by a new sophisticated and multi-dimensional doctrine of sources geared towards the distinction between international law and politics for the sake of the legalistic project of displacement of the latter by the former.[56] Even if the reference to State will has somewhat surprisingly persisted in contemporary international legal discourses as a strawman of convenience,[57] or for other reasons related to the legitimating role of State consent,[58] voluntarism was decisively jettisoned with modern international law in favour of an elaborate device that could supposedly ascertain legal validity with more 'objectivity'. Most of the narrative of progress witnessed in the early twentieth century came to be traced back to the new sophisticated and supposed objectivity of the doctrine of the sources of international law.[59]

This modern heritage still deeply permeates the way in which international lawyers understand and resort to the sources of international law today. For contemporary international lawyers, the sources of international law continue to constitute the criteria for legal validity and the device by virtue of which a given norm or standard of behaviour is determined to be binding upon those actors subjected to it.[60] Once a norm is ascertained as a legal norm by virtue of the doctrine of sources (and thus anchored in the international legal order), it becomes binding material

[55] David Kennedy, 'The Disciplines of International Law and Policy', *Leiden Journal of International Law* 12 (1999): 9–133; David Kennedy, 'Tom Franck and the Manhattan School', *NYU Journal of International Law and Politics* 35 (2003): 397–435; Koskenniemi, 'The Politics of International Law', pp. 5–7 and *From Apology to Utopia*, p. 158. See also Emmanuelle Jouannet, 'A Critical Introduction', in Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart, 2011), 1–32, 15.

[56] On the development of this doctrine, see chapter 5 by Miloš Vec and chapter 6 by Lauri Mälksoo, as well as chapter 7 by Ole Spiermann and chapter 8 by Malgosia Fitzmaurice in this volume.

[57] See Jean d'Aspremont and Jörg Kammerhofer, 'Introduction: The Future of International Legal Positivism', in Jörg Kammerhofer and Jean d'Aspremont, eds, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), 1–22; Richard Collins, 'Classical Positivism in International Law Revisited', in Kammerhofer and d'Aspremont, eds, *International Legal Positivism*, 23–49.

[58] On the distinction between international legal positivism and consensualism or voluntarism, on the one hand, and, more generally, between international legal validity or legitimacy and consent, on the other, see Besson, 'Theorizing the Sources', section 2; Samantha Besson, 'State Consent and Disagreement in International Law-Making—Dissolving the Paradox', *Leiden Journal of International Law* 29 (2016): 289–316.

[59] On how this was perceived as progress, see Martti Koskenniemi, 'International Law in a Post-Realist Era', *Australian Yearbook of International Law* 16 (1995): 1–19; Skouteris, *The Notion of Progress*, especially ch. 3.

[60] See chapter 25 by Pierre d'Argent in this volume.

that is eligible for use in international legal argumentation.[61] The continuous centrality of the sources in contemporary legal thought and practice remains informed by the Enlightenment's idea of a displacement of politics and morality by law to which the sources of international law are meant to contribute. Yet, that centrality can probably also be explained by the 'power-sharing agreement' of sorts about how to divide 'the international': to international lawyers the 'legally binding', to moral philosophers the 'morally binding', and to political scientists or international relations' specialists all the rest.[62]

The enduring centrality and popularity of the sources of international law since the Enlightenment probably show that international lawyers have found in sources a useful tool to build international legal arguments and conceptualize international law.[63] They are, however, no evidence that sources of international law actually perform (all) the functions assigned to them since the Enlightenment. Nor do they demonstrate that the sources of international law constitute a meaningful construction. The opposite argument could even be made. It is because the sources of international law are such a cardinal pattern of argument structure, someone may claim, that all the problems, loopholes, contradictions, and deceitfulness that come with modes of international legal reasoning associated with the sources of international law are so conspicuous.

It suffices here to mention just a few of the many insufficiencies associated with the sources in international legal theory and practice.[64]

First of all, sources can partly explain the making and the bindingness of those standards identified as legal rules, but cannot account for that of systemic mechanisms,[65] including of the sources themselves,[66] and their nature.[67] Secondly, the sophistication of the sources of international law that came with modernity did not provide for any indications as to how the sources themselves ought to be interpreted, the doctrine of interpretation being traditionally reserved

[61] It is sometimes exceptionally contended that bindingness generates validity and not the other way around. See Giovanni Sartor, 'Validity as Bindingness: The Normativity of Legality', EUI Working Papers LAW No. 2006/18, <http://ssrn.com/abstract=939778>, accessed 16 January 2017. See also Nicole Roughan, 'From Authority to Authorities: Bridging the Social/Normative Divide', in Roger Cotterrell and Maksymilian Del Mar, eds, *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Cheltenham: Edward Elgar, 2016), 280–99.

[62] See d'Aspremont, 'Bindingness'. For a critique, see Samantha Besson, 'Moral Philosophy and International Law', in Orford and Hoffman, eds, *The Oxford Handbook of the Theory of International Law*, 385–406.

[63] See chapter 27 by Michael Giudice and chapter 28 by Gleider I. Hernández in this volume.

[64] For an overview, see Besson, 'Theorizing the Sources', pp. 164–5.

[65] On sources and system, see chapter 27 by Michael Giudice and chapter 28 Gleider I. Hernández in this volume.

[66] See Besson, 'Theorizing the Sources', pp. 180–1.

[67] On sources *qua* practice rather than rules, see also Gérard, 'Les règles de reconnaissance', p. 29; Ost, 'Conclusions générales', pp. 923–40.

for the interpretation of those rules identified as legal rules by virtue of the sources.[68] A third and related conceptual problem brought about by the sources of international law pertains to the occasional collapse of the distinction between sources, construed as law identification, and interpretation, approached as a content-determination technique, the latter being allegedly deployed only after a legal rule has been identified as a legal rule by virtue of the former.[69] Fourthly, it has also been observed that the closure of the legally binding world at the heart of this construction also comes with internal contradictions.[70] Fifthly, the doctrine of the sources of international law has similarly suffered from the artificiality of its supposedly inductive techniques of identification as well as its reductive descriptive and explanatory virtues.[71] Finally, another cause of perplexity lies in the incapacity of sources to account for the perceived diversification of international law-making processes and the multiplication of participants in those processes,[72] obfuscating the actors and subjects at work behind the sources.[73]

Although the abovementioned difficulties—mostly of a jurisprudential nature—are often discussed, they have not frustrated the paramount role assigned to the sources of international law. Of course, some of them have actually ignited some severe contestations of the sources of international law in the twentieth century and the beginning of the twenty-first century.[74] Those contestations have enjoyed some occasional, albeit short-lived, success. Yet, they have not significantly dented the attachment of international lawyers to the sources of international law. Indeed, attempts to radically break away from the sources are marginal nowadays, theorists

[68] On this distinction between the interpretation of primary rules and that of secondary rules in international law, see Duncan B. Hollis, 'The Existential Function of Interpretation in International Law', and Jean d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished', in Andrea Bianchi, Daniel Peat, and Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015), respectively 78–109 and 111–29. See also Gérard, 'Les règles de reconnaissance', pp. 26–7. See chapter 19 by Ingo Venzke and chapter 20 by Duncan B. Hollis in this volume. See also chapter 18 by Donald H. Regan, and on the distinction between law-making and law-enforcement, chapter 37 by Yuval Shany and chapter 38 by Eleni Methymaki and Antonios Tzanakopoulos. For an illustration, see Jean d'Aspremont, 'The International Court of Justice, the Whales and the Blurring of the Lines between Sources and Interpretation', *European Journal of International Law* 27 (2016): 1027–41.

[69] See generally Koskenniemi, *From Apology to Utopia*. [70] ibid.

[71] Thomas Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990), p. 5.

[72] See chapter 35 by Robert McCorquodale and chapter 36 by Bruno de Witte in this volume. See also Besson, 'Theorizing the Sources', p. 170.

[73] See also Pierre d'Argent, 'Le droit international: quand les sources cachent les sujets', in Hachez et al., eds, *Les sources du droit revisitées*, vol. 4, 243–64. See also Samantha Besson, 'The Authority of International Law—Lifting the State Veil', *Sydney Law Review* 31:3 (2009): 343–80.

[74] For an overview of those contestations, see Jean d'Aspremont, 'Towards a New Theory of Sources', in Orford and Hoffman, eds, *The Oxford Handbook of the Theory of International Law*, 545–63.

preferring to focus on reform of the sources rather than on emancipation from them.[75] For better or worse, sources of international law remain nowadays deeply entrenched, not only in the practice and theory of international law, but also in the consciousness of international lawyers.

The foregoing does not mean that the abovementioned contestations of the sources have been futile. Many international lawyers have ceased to believe in the ideal of an objective device that allows the distinction between law and non-law and the displacement of politics and morality, as contemplated by the Enlightenment and pursued by modernity. As is illustrated by many of the chapters in this volume, there seems to be more self-reflection today in how international lawyers approach the sources of international law. Very few disparage sources altogether, but most of them distantiate themselves from what they have come to call the 'traditional' or 'classical' (list of) sources and identify new ones, together with new doctrines of sources.

IV. The Disagreements about Sources in International Legal Theory and Practice

The entrenchment of the sources of international law in the practice and theory of international law should not be construed as the manifestation of a consensus among professionals of international law about them. On the contrary, and arguably for that very reason, the dominant adherence to the sources of international law has been accompanied by constant contestation among international lawyers about their origins, criteria, functions, unity, and hierarchy.

In short, disagreements among international lawyers about the sources of international law can be of four different types.

First, it has become more blatant that international lawyers disagree on how the sources came to play the abovementioned cardinal role in international legal thought and practice. Even the above account of the sources as pattern-of-argument structures that was promoted by the Enlightenment is contested. Secondly, the criteria for the sources of international law, and especially the way in which the criteria to distinguish law and non-law are to be deployed, are the object of relentless

[75] See e.g., Harlan Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community', *NYU Journal of International Law and Politics* 44 (2012): 1049–1107. See also d'Aspremont, 'Towards a New Theory of Sources'.

contention. Those disagreements on the law identification criteria provided by sources now extend beyond divides between schools of thought. Thirdly, disagreements about the very function(s) performed by sources of international law have equally emerged, for the sources of international law may carry very different meanings: a descriptive tool of law-making processes; a set of yardsticks to ascertain existing legal rules; a system to interpret and determine the content of rules; a coalescing and structuring mechanism to ensure the unity and/or the systematicity of international law; a device to vindicate or consolidate the morality of law; a tool to progressively develop new rules; a model to describe the exercise of public authority at the international level; a factor of identity for all professionals dealing with international law, etc. Finally, fractures have surfaced in relation to the unity of the doctrine of sources and its application to all regimes of international law in its mainstream version, international lawyers feeling that the projects carried out in some areas of international law are hampered by the rigidity of the sources of international law.

This Handbook's aim is not to salvage the centrality of the sources of international law, let alone Enlightenment's legalism. Nor is it an endeavour to generate a consensus on the origins, the criteria, the functions, and the unity of the sources of international law. On the contrary, it is premised on the idea that there is a wide variety of conceptions and perspectives from which one may understand, assess, debate, or use the sources of international law. Indeed, it should be clear by now that the sources of international law may carry very different meanings for all those resorting to the sources of international law. These conceptions or perspectives are not only numerous and in potential tension with one another, but are themselves in constant transformation. They have changed a lot across time, space, culture, and schools of thought. They vary also between and within specific regimes of international law (e.g. whether that regime is submitted to compulsory adjudication or not), and depending on the kinds of international legal norms (e.g. rights or duties) or international legal subjects (e.g. States, international organizations, or individuals) at stake.[76]

Considering the multiple conceptions and perspectives on sources of international law, the Handbook refrains from seeking to propose anything like *a* or even *the* doctrine of sources, but endeavours to offer an authoritative guide to navigating the doctrine*s* and debate*s* about the sources of international law. It features original essays by leading international law scholars and theorists from a wide range of theoretical and legal traditions, nationalities, and perspectives, in order to reflect the richness and diversity of scholarship in this area. At the same time, it is essential to stress that the Handbook is not a textbook on the sources of international law. It does not aim to restate diverse doctrines on the sources of international law, but to

[76] See d'Argent, 'Le droit international: quand les sources cachent les sujets'; see also chapter 25 by Pierre d'Argent and chapter 35 by Robert McCorquodale in this volume.

probe at and revise them when needed. To do so, authors have been asked to produce novel and thought-provoking chapters.

Among many others, four main sets of perspectives have been chosen as backbone to the book: historical, theoretical, functional, and regime-related ones. This choice is inevitably arbitrary, for other perspectives, probably equally interesting, could have been selected. Yet, it is the editors' judgement that these perspectives are those which account the most insightfully for the different uses and understandings of sources around which the debates are organized, within both the international legal scholarship and domestic and international practice of international law. The focus on history is particularly important, especially in view of the embryonic state of the literature on the history of international law to date and on the topic of sources in particular. It also seems essential to allow historians to address those issues outside of a theoretical agenda, and vice versa for theorists who should not necessarily have to go over the history of the ideas discussed in their chapters. Another important question pertaining to the history of international law is how it penetrates the latter's sources themselves.[77]

Because this volume does not envisage any settlement of the debate about the sources of international law and, more generally, acknowledges the confrontational nature of scholarship, it is configured so as to offer a platform for such debates on the histories, theories, functions, and regimes. At each level, it offers, with some exceptions, a set of pairs of chapters meant to provide a dialectical snapshot of the variations in international legal thought and practice on some of the most pressing issues that arise in connection with the sources of international law. This means that two distinct chapters are devoted to each issue, such chapters offering different views and engaging with one another as to shed light on the extent and cause of disagreements.[78]

One reason for adopting the dialogical approach is to underscore that there is a diversity of views that might be defended on a given topic, as opposed to some canonical view. However, we have not gone further and made a point of choosing in each case pairs of authors with radically contrasting views.[79] Quite apart from anything else, this would have conveyed a seriously distorted impression of the nature of legal disputation. Sometimes, the most interesting and instructive disagreements are between authors who share a lot by way of agreement on fundamentals. More importantly, we have opted for a dialogical methodology in recognition of the fact that law develops through a process of genuine dialectical

[77] See chapter 13 by Robert Kolb and chapter 14 by Samuel Moyn in this volume.

[78] This structure was adopted in the Proceedings of the Aristotelian Society, <http://www.aristoteliansociety.org.uk/the-proceedings/>, accessed 17 February 2017, and, closer to the legal field, in the book co-edited by Besson and Tasioulas, *The Philosophy of International Law*.

[79] Nor did we adopt the policy of ensuring that at least one of the authors on any given topic is a professional international lawyer.

engagement with the views of others. Others' views are not simply fodder for literature surveys or scholarly footnotes; instead, they are to be carefully articulated and subjected to critical scrutiny in light of the best arguments that can be formulated in their support.

V. A Preview of the Contents of the Volume

The book is divided in four parts: histories, theories, functions, and regimes of the sources of international law. Chapters in Part I (Histories) provide detailed and critical accounts of how sources of international law have been conceived of, both by practitioners and scholars, during the history of international law (from the scholastic period to the contemporary anti-formalist era). Chapters in Part II (Theories) explore how the main theories of international law have addressed and understood sources of international law. Chapters in Part III (Functions) examine the relationships between the sources of international law and the characteristic features of the international legal order that are or should be related to international law-making. Chapters in Part IV (Regimes) address various questions pertaining to the sources of international law in specific regimes of international law. The correspondence or, on the contrary, lack of correspondence between the arguments made in the chapters in the different sections constitutes one of the interesting features of the Handbook.

The topics chosen for each pair of chapters under the four headings had to be carefully delineated so as to avoid overlaps or to encourage only productive ones, but also in order to keep the size of the book reasonable. Importantly, and for the same reasons, the editors decided against inserting 'textbook' topics, and, in particular, against addressing each of Article 38's sources one by one, 'new' sources of international law per se, or the relationship between domestic and international sources of law. They have chosen instead to ask authors to address some or all of these key topics in their respective chapters albeit under a specific lens each time, thus most probably giving rise to productive contrasts of views on these topics and perhaps even allowing for the identification of new topics instead of continuously focusing on the same ones.

In each chapter, authors were invited to be selective and to concentrate on elaborating upon and responding to some questions that seemed especially pressing or interesting to them. No attempt was made by any author, or combination of authors,

to offer a comprehensive discussion of the legal questions arising within their topic. Instead, each author has had to limit the scope of coverage in their chapter in order to enhance its depth.

Part I The Histories of the Sources of International Law

Chapters in Part I of the volume (Histories) provide detailed and critical accounts of how sources of international law have been conceived of, both by practitioners and scholars (were they both at the same time, as it was often the case, or distinct individuals), during the history of international law (from the scholastic period to the contemporary anti-formalist era), including two chapters on the history of Article 38 of the ICJ Statute. Importantly, the focus on sources in the history of international law may not be universal, and this is discussed in two meta-historical chapters. The last contributions of this first part of the book discuss whether legal history itself may be considered a source of international law.

In his chapter on 'Sources in the Scholastic Legacy: *Ius Naturae* and *Ius Gentium* Revisited by Theologians', Peter Haggenmacher argues that enquiring into the sources of international law in the scholastics is somewhat adventurous, for the concept of sources of law obtained general currency in legal discourse, and international law took shape as a legal discipline, only after the heyday of scholasticism. And yet the two main pillars of what was to become classical international law in the eighteenth century—natural law and the law of nations—were both part of the theologians' teachings of moral philosophy, especially with the Dominicans and later the Jesuits. Examining the two concepts handed down from Antiquity, Thomas Aquinas assigned them distinct places in his system of legal norms, while fathoming their respective grounds of validity. His endeavours were continued by his sixteenth-century Spanish followers, who set out to explore the 'internationalist' dimensions of the Protean concept of *ius gentium*. Two names stand for the most significant contributions to its clarification: Francisco de Vitoria and Francisco Suárez. The latter in particular decisively shaped the concept by cutting it down to a specifically interstate law of customary origin, supposed to complement the all-too-general principles of natural law in governing the intercourse of nations. Considerably developed by Grotius, this twofold law of nature and nations was also to lie at the bottom of his treatise on waging war and making peace.

In her chapter on 'Sources in the Scholastic Legacy: The (Re)construction of the *Ius Gentium* in the Second Scholastic', Annabel S. Brett observes that talking of the 'sources of international law' is complicated in relation to later scholastic authors, both because they have no doctrine of 'sources' and because the phrase *ius gentium*, as they employ it, is not appropriately translated by 'international law'. When they write about the *ius gentium*, they are engaged in an exercise of hermeneutic reconstruction of a domain of law that was legislated in the past, a reconstruction which

is at the same time a construction of their own position in the present. They draw their materials for their reconstruction from scholastic authorities, from natural law, and from human practice and history. The possibility of abrogation, however, which has to be accounted for because of current Christian practice, puts pressure on even their most innovative thinking about the *ius gentium*, and shows yet again how difficult they find it to conceptualize making international law in the present, and thus to conceive of sources of international law in anything like the modern sense.

In his chapter on 'Sources in the Modern Tradition: An Overview of the Sources of the Sources in the Classical Works of International Law', Dominique Gaurier observes that early writers on the law of war or on the law of peace offered their contributions in an intellectual context that was very different from our own. They were really attempting to provide explanations for the questions related to war and peace, and in doing so drew upon interesting elements in Roman or canon law. Yet, none of the sources available to them were sufficient to offer a comprehensive response to related legal issues, such as the sources of the law of nations, war prisoners, frontiers, diplomacy, or neutrality, among others. Although these authors were all largely relying on the Bible and on ancient or contemporaneous history, some also drew information from their own life experiences. The majority, however, built their theories on the basis of their own readings and legal knowledge. Only very few authors addressed the question of the sources of international law, which at the time consisted of common customs and the treaties concluded between the European nations.

In his chapter on 'Sources in the Modern Tradition: The Nature of Europe's Classical Law of Nations', Randall Lesaffer maintains that the modern historiography of international law has ascribed pride of place to the jurisprudence of the law of nature and nations of the Early Modern Age, especially to the period running from Hugo Grotius to Emer de Vattel. Whereas these classical writers undeniably have exercised a significant influence on nineteenth-century international law, their utility as a historical source for the study of the classical law of nations of the late seventeenth and eighteenth centuries has been far overrated. The development of the law of nations in that period was much more informed by State practice than historians have commonly credited. Moreover, historiography has overestimated the novelty of the contribution of Early Modern jurisprudence and has almost cast its major historical source of inspiration into oblivion: the late medieval jurisprudence of canon and Roman law. It is important to restore medieval jurisprudence to its rightful place in the grand narrative of the evolution of international law. Doing this renders a deeper insight into the dynamics and concerns of the natural jurisprudence of the Early Modern Age. It shows that natural jurisprudence acted as a vessel to recycle many of the doctrines of general medieval jurisprudence back into the language of the newly autonomous law of nations. For most of the Early Modern Age, the writers of the law of nations did not give the same central place to the doctrine of sources as nineteenth- and twentieth-century positivist international legal theory. The main thrust of their theoretical discourse centred on the

dualist nature of the law of nature and nations and the relation between natural and positive law. It was the articulation of the positive law of nations as a distinct, if not completely independent body of law over the late seventeenth and eighteenth centuries which urged on the discussion about its sources. By the turn of the eighteenth century, a mainstream position had been formed around a rudimentary theory which placed 'consent' at the basis of legal obligation and indicated treaties and custom as the sources of the law of nations. This scholarly position was an apt, if only partial reflection of what practitioners understood the law of nations to be. Practitioners had a somewhat wider understanding of the theory of sources as they also comprehended general principles of law and political maxims under the notion of law of nations. Moreover, while scholars placed much emphasis on the role of consent—which can be considered to preconfigure the later doctrine of *opinio juris sive necessitatis*—in reality customs were accepted on the basis of the longevity and commonality of their application and invocation.

In his chapter on 'Sources in the Nineteenth-Century European Tradition: The Myth of Positivism', Miloš Vec analyses the sources of international law in the nineteenth-century European tradition. The chapter includes scholars and theorists from a range of nationalities (German, English, American, French, Italian, Swiss, Austrian, Dutch, Belgian, Danish, Portuguese, Russian-Estonian, Chilean, Argentinean), different professions and perspectives, focusing on selected authors from various European and American countries and regions between 1815 and 1914. These jurists, philosophers, political writers, and theologians discussed the notion of 'source' and elaborated extensively on a theory of sources. Such elaborations could then be found in all contemporary textbooks, but no consensus was identified. Terminology changed as much as the canon of sources did from author to author. Different to what was often claimed, natural law was not excluded from the list of international law's sources. On the contrary, close entanglements between natural law (in different varieties) and positive law were claimed by nineteenth-century international lawyers. Even divine law was sometimes explicitly named as a source when debating international law's normativity. This had often to do with their linking of international law to various kinds of morality. Within this canon of sources no clear hierarchy existed, no rules for the collision of different kinds of sources were posited. The field thus remained very flexible for attaining any results when debating regulatory matters, although the authors claimed to be non-political.

In his chapter entitled, 'Sources in the Nineteenth-Century European Tradition: Insights From Practice and Theory', Lauri Mälksoo examines how international lawyers arrived in 1920 at the codification of Article 38 in the Statute of the Permanent Court of International Justice (PCIJ) (later ICJ). The codification is explained as a victory of legal positivist ideas over natural law concepts, although natural law ideas never went away completely. An overview of the positions defended in the late-nineteenth-century literature of international law demonstrates that the codification largely reflected predominant ideas in the European

tradition of international law. Legal positivism had undertaken quite a successful attack against natural law, even though leading international lawyers like Georg Friedrich von Martens had become 'syncretists' and combined legal positivist and natural law ideas. When comparing the predominant views on sources of international law in the nineteenth century and in the twenty-first century, the differences in the practice of international law must be kept in mind, for example the different understandings of State sovereignty and the shortage of international courts back then. In this sense, the nineteenth-century doctrine of sources partly reflected a different reality.

In his chapter entitled 'The History of Article 38 of the Statute of the International Court of Justice: "A Purely Platonic Discussion"?', Ole Spiermann observes that Article 38 of the ICJ Statute intends to define so-called sources or origins of international law to be used by the World Court. The text dates back to 1920, before the predecessor of the ICJ, i.e. the PCIJ, took up its activities. The author notes that since 1920, Article 38 has featured prominently in the theory on so-called sources of international law, while the provision has been of little relevance in the case law of the ICJ and its predecessor. Based mainly on historical records, the chapter seeks an explanation, which in turn may shed new light on sources theory.

In her chapter entitled 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present', Malgosia Fitzmaurice critically analyses the history of Article 38 of the ICJ Statute with a view to reflecting on its current status. The main focus of her chapter is to look at sources of international law through the prism of their historical development, including potential 'new' sources (acts of international organizations, unilateral acts of States, soft law) which have emerged long after the twelve 'wise men' of the Advisory Committee of Jurists had completed their task of drafting Article 38. The chapter also deals with the 'classical' sources of international law, such as customary international law and general principles of law, taking into account how various courts and tribunals approach these sources.

In her chapter on 'Sources in the Anti-Formalist Tradition: A Prelude to Institutional Discourses in International Law', Mónica García-Salmones Rovira traces the legal and political principles of two important schools of the twentieth century—the New Haven School and the School of Carl Schmitt—and situates them in their geographical and historical contexts. The chapter analyses commonalities, and especially differences in their political and legal projects. It further argues that reaction against a naïve positivism reigning during the past century in international law essentially determined developments in both schools' understanding of the concept of sources of law. Another important factor in those developments was the peculiar geo-political projects of each school. In the discussion of Schmitt, the chapter focuses on sources of domestic law and seeks to understand the relationship between the sources of domestic and international law as Schmitt saw it through the notion of 'concrete-order thinking'. Finally the chapter also addresses a trait shared

by New Haven and Schmitt when connecting sources of law with politics, international organizations, and institutions.

In his chapter entitled 'Sources in the Anti-Formalist Tradition: "That Monster Custom, Who Doth All Sense Doth Eat"', Upendra Baxi explores the dialectics of international customary law: in his view, custom is at once a sheet anchor of public international law and its rope of sand as well. The chapter discusses aspects of Mónica García-Salmones Rovira's chapter; the Third World Approaches to International Law (TWAIL) contexts of 'custom' as the source of international law norms and standards; the jusnaturalist invocation of custom specifically in the context of Warren Hastings' trial and impeachment before the House of Commons; and the idea of a 'future' custom. Of course, if the perspective of a universalistic precolonial theory and movement in customary international law is to be accepted, much of the exciting TWAIL thought about resistance and renewal stands redirected to the varieties of imperial legal positivisms. While the Global South State practice in relation to customary obligation is yet to be adequately theorized, the author asks whether the UN Charter principle-and-purpose-centric perspective, rather than Empire-centric, is a perspective more relevant to our reconceptualization of the role of custom as a source for a future international law, especially in the Anthropocene era.

The chapter by Anthony Carty and Anna Irene Baka, entitled 'Sources in the Meta-History of International Law: From Liberal Nihilism and the Anti-Metaphysics of Modernity to an Aristotelian Ethical Order', offers an alternative to the Hegelian meta-historical narrative. It criticizes the aversion to metaphysics which essentially governs the whole history of the sources of international law. Ludwig Wittgenstein's logical positivism and anti-metaphysics paved the way to legal positivism, which took a new pathological turn with Hans Kelsen's and Carl Schmitt's fixation on ideological purity due to suspicion and fear of the other. International legal positivism means acquiescence in coercive international relations. The history of international law is one of continuing coercion, rooted in the racial shadow of liberalism. The authors offer a discussion of the theory of legal obligation in Emer de Vattel, the place of imperialism in the history of international law, and the continuing mainstream discussion of unequal treaties. Edmund Husserl's phenomenology provides an analytical frame for the bracketing and suspension of these historical pathologies and subsequent exposition of the primordial empirical data that gave birth to the very idea of international law. Anti-metaphysics implies an ontological void which produces a lack of empathy and trust. The authors suggest that this void can and must be replaced with a new dialectic based on Aristotelian virtue ethics and idea of justice.

In his chapter entitled 'Sources in the Meta-History of International Law: A Little Meta-Theory—Paradigms, Article 38, and the Sources of International Law', Mark Weston Janis introduces a meta-theory—that is a theory about theories—of international law. To do so, it employs the insights of Thomas Kuhn, a historian of

science, who invented the widely used terms 'paradigm' and 'normal science'. Kuhn argued that once a paradigm has been accepted by a scientific community, most scientists accept it without much question. Scientists become simple 'problem solvers' working within the scope of the paradigm, within normal science. When the paradigm is overwhelmed—a 'scientific revolution'—a new paradigm emerges. For international law, a paradigm of sources answers a multitude of questions, including the definition of the field and the legitimacy and universality of its rules. Earlier paradigms of the sources of international law were rooted in the Bible and church commentary, then in philosophy, for example, naturalism, positivism, and Marxism-Leninism. Today, the paradigm for the sources of international law is Article 38 of the ICJ Statute. Article 38 emerged during and after World War I when international lawyers, faced with the horrors of that awful conflict, lost faith in their old discipline, what might be termed, per Kuhn, a scientific revolution. Nowadays, Article 38 remains attractive, first because the ICJ and its Statute are almost universally accepted, secondly because it is neatly formulated, thirdly because the paradigm has been confirmed in case law and commentary, and fourthly because it is widely taught.

Robert Kolb, in his chapter on 'Legal History as a Source of International Law: From Classical to Modern International Law', examines to what extent 'history' can be considered a source of international law. His chapter argues, in a classical way, that history is a material source of international law, but also examines some norms of positive international law which refer to historical facts.

In his chapter on 'Legal History as a Source of International Law: The Politics of Knowledge', Samuel Moyn claims that no serious theory of the sources of international law can avoid what professional historians now take for granted: namely, that historical knowledge is necessarily political. Indeed, the uses of history in the ascertainment of the requirements of international law fit well the theory that historical knowledge is ineradicably political, though contained by professionalism itself. This theory is outlined in the chapter, then tested by examining the search in recent litigation of the United States Supreme Court for whether there is a customary international law norm of corporate liability for atrocity.

Part II The Theories of the Sources of International Law

Chapters in Part II of the volume (Theories) explore how the main theories of international law have addressed and understood sources of international law. Even though some of the issues in this section may overlap with the historical discussions in Part I, the focus and the method of the chapters in this section are fundamentally different. The chapters in Part II spell out clearly what the main positions are on sources within each theoretical tradition and discuss them normatively, rather than historically. Although this is not without an overlap with some of the chapters

in Part III, the present part also includes a chapter on the role of sources in theories that are devoted to interpretation. Again, the focus on sources in the theory of international law may not be universal, and this is discussed in two meta-theoretical chapters. The last contributions discuss whether legal theory itself may be considered a source of international law.

It must be acknowledged that this part of the volume devoted to theories of international law engages with only a limited number of them. Editorial as well as material constraints led the editors to pair the chapter written by Mary Ellen O'Connell and Caleb M. Day originally entitled 'Sources in Natural Law Theories: Natural Law as Source of Extra-Positive Norms' with the chapter of Pierre d'Argent entitled 'Sources and the Legality and Validity of International Law: What Makes Law "International"?', thereby moving the former to the part devoted to the functions of sources where the latter was and still is located. Together, these two chapters, now found in Part III, provide the reader with useful and innovative insights on the various ways in which the sources contribute to the validity (and validation) of international law and the limitations thereof. The resulting limited number of theories examined in the current part is also alleviated by the extent to which theories—and the methodological, argumentative, and value-based choices of which they are the shortcuts—inform all chapters in the volume.

The chapter by David Lefkowitz on 'Sources in Legal Positivist Theories: Law as Necessarily Posited and the Challenge of Customary Law Creation' begins by examining the case for legal positivism, understood as the thesis that the existence of law is a matter of its social source, regardless of its merits. Descriptive, normative, and conceptual arguments are considered with the aim of demonstrating that what follows for the sources of international law from the commitment to positivism depends on the specific defence offered for accepting it as an account of the nature of law. The remainder of the chapter examines the possibility of customary international law: given that custom can and does serve as a source of international law, positivists owe a plausible account of how customary rules are made or posited. The account defended in the chapter characterizes customary norms as elements of a community's normative practice, and custom formation as normative interpretations of patterns of behaviour that are successfully integrated into that normative practice. The normative practice account avoids the chronological paradox in custom formation, allows for so-called instant custom, and explains why customary norms apply even in the absence of consent. A preliminary argument for the compatibility of the normative practice account of custom with Hans Kelsen's and Joseph Raz's respective arguments for legal positivism brings the chapter to a close.

Jörg Kammerhofer's chapter on 'Sources in Legal Positivist Theories: The Pure Theory's Structural Analysis of the Law' claims that we look for the law in its 'sources'. However, as many recognize, the mainstream riverine metaphor is fatally flawed. This chapter argues that there is an unlikely saviour—the Kelsen–Merkl *Stufenbau* theory of the hierarchy of norms. This may seem far-fetched, but this

theory is the closest there is to a legal common-sense theory of the sources of international law. It is close to the mainstream, but provides a solid theoretical basis. It does so by fashioning the only necessary link between norms into the ordering principle of legal orders: the basis of validity of one norm is another. A special type of rule—the empowerment norm—is this basis; norms are created 'under it'. In other words, law regulates its own creation. This chapter demonstrates that this understanding of hierarchy avoids many of the misconceptions of orthodox scholarship. False necessities are deconstructed: the sources are neither a priori nor external to the law. Applying the *Stufenbau* theory to international law, the chapter concludes by sketching out the possibilities of ordering the sources of international law. A structural analysis of the international legal order clears the way for level-headed research on this legal order's daily operations: norm conflict and its application/interpretation.

Jean d'Aspremont's chapter on 'Sources in Legal Formalist Theories: The Poor Vehicle of Legal Forms' is premised on the idea that international lawyers, even those self-declared anti-formalists, are continuously engaged with the reinvention of the role of legal forms and that, in their engagement with formalism, international lawyers have continued to give a central role to the sources construed as a vehicle of formalism. It is the object of this chapter to reflect on how sources function as a vehicle of legal forms in international legal thought and practice. It more specifically examines the extent to which the sources of international law are instrumental in the formalization of the determination of the contents of international legal rules, as well as the formalization of the ascertainment of international legal rules. The chapter starts by distinguishing between two types of formalist theories, namely content-determination formalism and law-ascertainment formalism and offers some comparative insights. It then evaluates the extent to which sources contribute to the formalization of content-determination and law-ascertainment in international legal thought and practice. In doing so, this chapter demonstrates that the sources of international law turn out to be a very poor vehicle for formalism and that international lawyers should accordingly cease to think of the sources of international law as conducive to the formalization of international legal argumentation.

In his chapter entitled 'Sources in Legal Formalist Theories: A Formalist Account of the Role of Sources in International Law', Frederick Schauer claims that the idea of formalism exists in literary and artistic interpretation and designates an approach that takes the text as the exclusive object of interpretation, independent of the creator's intentions or some readers' or viewers' reactions. In legal theory, formalism, similarly, refers to taking the indications of existing law, whether written or unwritten, as presumptive or conclusive, even against arguments from morality or policy that might produce a better outcome on a particular occasion. The same idea applies to legal sources, including the sources of international law, and thus formalism about the sources of international law is an approach that takes the existing catalogue of acceptable sources, wherever that catalogue may come from,

as presumptively or conclusively exclusive, despite the fact that adding to that list on some occasion might produce a morally or pragmatically superior outcome with respect to that particular controversy or application.

Ingo Venzke's chapter entitled 'Sources in Interpretation Theories: The International Law-Making Process' maintains that it is generally recognized that interpretations do not *take* meanings from norms but *give* meanings to them. In this way, the practice of interpretation contributes to the process of international law-making. The chapter takes as a starting point the understanding of interpretation in international law as an argumentative practice about the meaning of legal norms. But which meaning should interpreters give to a norm? How should they justify their interpretative choices? Turning from the rule of interpretation to the reality of the practice, the chapter further asks: what do interpreters do when they interpret? It draws attention to the power that the interpreters exercise, and to the biases of interpreters and of interpretative communities. In conclusion, as large parts of international law are made by way of interpretation, it is necessary to keep a keen eye on the role of power and rhetoric in that interpretative practice.

In his chapter on 'Sources in Interpretation Theories: An Interdependent Relationship', Duncan B. Hollis examines the relationship between international law's sources and its theories of interpretation. Challenging assumptions that the two concepts are, at best, casual acquaintances, his chapter reveals and explores a much deeper, interdependent relationship. Sources set the nature and scope of international legal interpretation by delineating its appropriate objects. Interpretation, meanwhile, operates existentially to identify what constitutes the sources of international law in the first place. The two concepts thus appear mutually constitutive across a range of doctrines, theories, and authorities. Understanding these ties may offer a more nuanced image of the current international legal order. At the same time, they highlight future instrumental opportunities where efforts to change one concept might become possible via changes to the other. This chapter concludes with calls for further research on whether and how such changes might occur and asks if international lawyers should embrace (or resist) such a mutually constitutive relationship.

In his chapter on 'Sources in the Meta-Theory of International Law: Exploring the Hermeneutics, Authority, and Publicness of International Law', Matthias Goldmann endeavours to identify common assumptions characterizing the sources doctrine in international law. Those are the autonomy of international law from politics, morality, economics, etc.; the focus on binding, enforceable rules; and State consent as the source of legitimacy of international law. Today, each of these assumptions is challenged. To address these challenges, the chapter proposes to further develop the sources theory and elaborate the concept of principles of international law (as they ensure international law's autonomy), a concept of authority (as non-binding acts may have similar effects as binding law), and to distinguish international legal

rules (or authoritative acts) which require democratic legitimacy from those which do not.

In her chapter on 'Sources in the Meta-Theory of International Law: Hermeneutical Conversations', Alexandra Kemmerer claims that a meta-theoretical approach to sources opens reflexive spaces, situates theories in time and space, and allows for a contextual interpretation of sources. Drawing on the hermeneutic philosophy of Hans-Georg Gadamer and the writings of his most perceptive readers in international law, the chapter develops a concept of reflexive situatedness prompting a constructive contextualization of sources and their interpreters in our 'normative pluriverse' (d'Aspremont). Following the traces of international law's current 'turn to interpretation' and a reading of international law as 'hermeneutical enterprise', the chapter's assessment of the limits and potentials of Gadamerian philosophical hermeneutics prepares the ground for an analysis of the writings of international lawyers who have developed theories of international legal interpretation inspired by his work—and in particular for a closer look at the writings of Outi Korhonen, linking her concept of situationality to an emphasis on context(s) that engages with the rhetorical dimension of Gadamer's work. Gadamer's conversational hermeneutics opens new perspectives for a contextual theory and praxis of international legal interpretation that brings together various disciplinary perspectives and cultural experiences, and thereby allows for a more nuanced and dynamic understanding of sources and their interpreters within their respective interpretative communities.

In his chapter on 'Legal Theory as a Source of International Law: Institutional Facts and the Identification of International Law', Iain Scobbie argues that legal theory provides conceptions of the sources of international law that differ according to time and place. The chapter employs Neil MacCormick's explanation of institutional order to frame the ensuing discussion by arguing that conceptual understandings of law, including international law, are socially constructed. The chapter starts from John Austin's denial that international law possesses the quality of law because the international society lacks an ultimate sovereign that is superior to States. It further considers the function that sovereignty has played in some explanations of international law and its sources, which raises the significance of State consent. The analysis then focuses on the paradigm shift that Grotius introduced into natural law, and consequently into international law, by substituting consent for theology as its underpinning explanation. The chapter also considers twentieth-century transatlantic variants of natural law and examines three influential British theorists—James Brierly, Gerald Fitzmaurice, and Hersch Lauterpacht—each of whom relied on natural law to overcome perceived inadequacies of consent-based positivist theories. Finally, before drawing some, inevitably imperfect, conclusions, the chapter examines the more instrumentalist naturalism of the New Haven School, which endeavoured to ensure the promulgation of American democratic values by emphasizing policy and choice in decision-making.

In their chapter on 'Legal Theory as a Source of International Law: Doctrine as Constitutive of International Law', Alain Papaux and Eric Wyler observe that with treaties, customs, general principles, decisions, doctrines, and soft law, we are dealing first and foremost with signs. The very structure of signs is inference. This reveals the necessity of interpreting all sources of law. Because doctrine's first task is interpretation, its role in understanding law is essential. Law, therefore, should not be conceived as a science; it is concerned with what is *just*, not what is *true*. From that follows the importance of *auctoritas* and dogmatics: law establishes values to orient practice. Centred on this practice, doctrine, which lies at the foundation of modern international law, reveals itself to be *savante* rather than scientific or theoretical. Scientific and symbolic (activist) doctrines must be distinguished from the '*doctrine savante*'; '*doctrine savante*' refers to the writings of scholars and practitioners devoted to ordering and criticizing the practice—including the judicial practice—of public international law.

Part III The Functions of the Sources of International Law

Chapters in Part III (Functions) examine the relationships between the sources of international law and the characteristic features of the international legal order that are, or should be related to international law-making. Here again, there may be some overlap in issues with chapters in Part II, but the method and the focus are different. The chapters in Part III also provide for the expression of a wider diversity of views than provided in the previous parts.

In his chapter on 'Sources and the Legality and Validity of International Law: What Makes Law "International"?', Pierre d'Argent argues that, from the perspective of a theory about the sources of international law, what matters is not so much to determine whether international law is really law, but, rather, what makes law 'international'. Article 38 of the ICJ Statute is revisited in light of this perspective. The chapter also addresses the intriguing phenomenon of the multiple legal character of sources.

In their chapter on 'Sources and the Legality and Validity of International Law: Natural Law as Source of Extra-Positive Norms', Mary Ellen O'Connell and Caleb M. Day contend that international law, like all law, can be understood as a hybrid of positive and natural law. Positive law relies on material evidence to support conclusions as to the existence of principles, rules, and processes. Natural law relies on a very different method to explain aspects of law that positivism cannot, including peremptory norms (*jus cogens*), general principles inherent to law, and legal authority. The history of natural law thought from Ancient Greece to today's global community reveals three integral elements in the method employed to produce these explanations of extra-positive features of the law. The method uses reason,

reflection on nature, and openness to transcendence. Certain contemporary natural law theorists, concerned about the association of natural law with Christianity, attempt to suppress transcendence from the natural law method, focusing only on reason and nature. Yet, the history of natural law thinking shows that transcendence is integral to the method. History also reveals, however, that religion is not the only avenue to transcendence. Aesthetic theory, for example, invokes the beauty of the natural world and of the arts to provide 'glimpses of transcendence'. Transcendence completes a natural law method capable of explaining persuasively why law binds in general and why certain principles are superior to positive law.

In his chapter on 'Sources and the Systematicity of International Law: A Philosophical Perspective', Michael Giudice notes that questions about the systematicity of sources of international law range over a variety of different concerns and issues. What does it mean to say that international law's sources form a legal system or not? Is there more than one way in which international law's sources might or might not form a legal system? Must there be an international legal system for there to be sources of international law at all? How are we to distinguish between claims of systematicity which are of a descriptive-explanatory nature from those that are aspirational, and is there a connection between these two types of questions? His chapter takes up these questions and others from the perspective of analytical legal theory. Michael Giudice argues that while it is common to think about the sources of international law in terms of the idea of legal system, there are certain costs associated with this approach. These costs warrant looking for alternative explanatory tools for understanding the ways in which the sources of international law are (and are not) related.

In his chapter on 'Sources and the Systematicity of International Law: A Co-Constitutive Relationship?', Gleider I. Hernández aims to illuminate the role that sources doctrine plays in construing international law as a system, too often taken as an unexplored tenet of faith within the international legal discipline. Moving beyond modelling international law as a system as such, the chapter frames international law's systemic qualities within the recursive relationship between sources doctrine and debates over international law's systematicity. Sources doctrine reinforces and buttresses international law's claim to constitute a legal system; and the legal system demands and requires that legal sources exist within it—a form of normative closure which constitutes the legal system itself. International law's systematicity and the doctrine of international legal sources exist in a mutually constitutive relationship, and cannot exist without one another. This recursive relationship privileges unity, coherence, and the existence of a unifying inner logic which transcends mere interstate relations and constitutes a legal structure. In this respect, the social practices of those officials who are part of the institutional workings of the system, and especially those with a law-applying function, are of heightened relevance in conceiving of international law as a system. Accepting a conception of system as

rooted in such social dynamics might help the international lawyer to reflect on her position as a professional actor within the system.

In her chapter on 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law', Erika de Wet questions whether there is a hierarchy among the sources of international law and, if so, whether such a hierarchy is important for resolving norm conflicts stemming from the different sources of international law. Her chapter takes a functional approach to hierarchy among sources. It first examines whether the order between the sources listed in Article 38 (1) (c) of the ICJ Statute is an indication of a hierarchy in accordance with the order and form in which the sources are listed or moulded. Thereafter, it examines whether peremptory norms represent a substantive hierarchy, based on the superior nature of the norms in question. It also questions whether peremptory norms can be categorized in accordance with the sources listed in Article 38 (1) (c) of the ICJ Statute, or whether they constitute a separate source in international law. The chapter further engages in a similar analysis of obligations under the United Nations Charter. It concludes that peremptory norms and obligations under the Charter are indicative of a substantive hierarchy in international law. The former is based in customary law, while the latter is treaty-based. The practical relevance of these hierarchies for norm conflict resolution is, however, limited.

Mario Prost's chapter, entitled Sources and the Hierarchy of International Law: Source Preferences and Scales of Values', maintains that the doctrine of sources is constructed around a set of shared intuitions and accepted wisdoms. One of them is that there exists no hierarchy among sources of international law and that these are, to all intents and purposes, of equal rank and status. Sources are said to exist alongside each other in no particular order of pre-eminence, in a kind of decentralized and pluralistic arrangement where no source ranks higher than the other. This chapter takes a critical look at this 'non-hierarchy' thesis, arguing that it is descriptively problematic as it tends to conceal the fact that international legal actors (States, judges, scholars) constantly establish more or less formalized hierarchies of worth and status among law-making processes. These are, admittedly, soft and transient hierarchies that very much depend on contexts, circumstances, the identity of the legal subjects, and the projects they pursue. But they are hierarchies nonetheless, inasmuch as they involve a differentiation of sources 'in a normative light', i.e. normative judgements in which some sources are deemed superior (good, effective, democratic) and others inferior (bad, inefficient, illegitimate).

In his chapter on 'Sources and the Normativity of International Law: A Post-Foundational Perspective', Detlef von Daniels finds that questioning the normativity of the sources of international law inevitably leads into the domain of legal philosophy. For showing that legal philosophy itself is a contested field of approaches, a hermeneutic perspective on the question of normativity is developed that stresses historical and contextual forms of understanding. Incidentally, Kelsen's theory

serves as a switchboard to relate a variety of historical debates to the contemporary discourse in the tradition of analytical jurisprudence. In practical terms, the relevance of this approach is discussed with regard to three contested topics: the status of general principles, soft law, and practical reasoning. The historical and theoretical awareness thus achieved provides reasons to oppose contemporary attempts to moralize the legal point of view.

In her chapter entitled 'Sources and the Normativity of International Law: From Validity to Justification', Nicole Roughan enquires what role the sources of international law do play in establishing or generating the normativity of international law. While sources of law are typically treated as determinants of the validity of international legal norms, this chapter argues that the normativity of international law is not co-extensive with the idea of legal validity. Instead, the study of sources and normativity must be, at least in part, about the values that are embodied in or generated through law-making processes and the role they play in an overall justification for international law. The chapter first develops a series of jurisprudential arguments which treat the normativity of law, including international law, as dependent upon both the procedural and substantive values of its norms. It then turns to international law in particular, arguing that the sources of international law can contribute towards international law's full normativity only if they carry forward procedural values that respect the autonomy and responsibility of those who are subject to the law. The chapter then concludes with a discussion of the normativity-generating potential of first treaties and then custom, using the two leading sources of international law as case studies for the deployment of the account of full normativity.

Richard Collins' chapter on 'Sources and the Legitimate Authority of International Law: A Challenge to the "Standard View"?', is concerned with the relationship between the legitimate authority of international law and the role played by the doctrine of sources. It argues that the kind of formal assessment of legality inherent in the sources doctrine expresses a particular view of the legitimate authority of international law: one grounded in a broadly consensual form of social validation, but which also attempts to mediate the inter-subjectivity of international society by providing 'content-independent' reasons for the compliance with legal norms. Whilst his aim is not necessarily to defend the coherence of this doctrinal account completely, the author tries to defuse two misleading lines of attack: one based on the vagaries of the processes of customary law formation and ascertainment and the other based upon the exhaustiveness of sources doctrine as traditionally conceived. In his view, both criticisms miss their target by overplaying what is at stake in this view of international law's legitimate authority. Whilst he therefore defends this doctrinal view to this extent, the author nonetheless shows how a broader theory of the legitimacy of international law—one which aims wider than the doctrine of sources itself—will necessarily have to balance content-dependent and content-independent normative evaluation.

In his chapter on 'Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law', José Luis Martí notes that sources of international law have been widely debated by international law theorists. Whether these sources are legitimate, or not, is another question. The chapter highlights that political philosophers in recent years have been paying growing attention to the legitimacy of international law and international institutions and are asking who has the right to rule and adequate standing to create international laws, and how. This chapter attempts to contribute to this debate in normative political philosophy through the more specific lens of democratic legitimacy. After presenting certain conceptual clarifications, the chapter identifies three basic principles of democratic legitimacy: the principle of ultimate popular control, the principle of democratic equality, and the principle of deliberative contestability, which can be instantiated in six more concrete requirements. The chapter continues by exploring the limitations of two influential views on the democratic legitimacy of international law, one that articulates the legitimate sources based on the principle of State consent, and another that replaces that principle with a focus on practices of deliberative contestability among State and non-State actors. Finally, the chapter concludes by expressing some scepticism about the degree to which the current system of sources of international law is democratically legitimate.

In his chapter on 'Sources and the Subjects of International Law: A Plurality of Law-Making Participants', Robert McCorquodale maintains that States were once considered the sole 'subjects' of international law and sources of international law were solely about the actions of States. However, the realities of the international community indicate that there is now a range of participants who are sources of law-making in international law. This chapter explores the range of participants involved in international law-making, including corporations, non-State armed groups, and non-governmental organizations, in addition to States and international organizations. The approach taken in this chapter in order to determine whether non-State actors can be included as a source of international law is that of global legal pluralism. Global legal pluralism is the recognition that there are a number of different normative systems that operate and interact at the international level. Such an approach recognizes that there can be multiple actors participating in a legal system to create law, and accepts disparities in powers. This is consistent with an approach to the sources of international law that is made by more participants than States alone. Examples of law-making by non-State participants in the international legal community are given in this chapter. In addition, the chapter indicates that the terminology of 'subjects' is deeply problematic in international law and should be abandoned.

In his chapter on 'Sources and the Subjects of International Law: The European Union's Semi-Autonomous System of Sources', Bruno de Witte observes that the law of international organizations poses challenging questions for the doctrine of sources of international law, which was originally developed for a world in which

only States were envisaged as subjects of international law. His chapter addresses some of those questions by focusing on the most 'advanced' international organization, the European Union. The chapter is organized in two main parts. The first one emphasizes the separate character of the EU's system of sources, whereas the second part notes the various ways in which that system continues to rely on the traditional sources of international law, particularly on the treaty instrument. Together, these two parts aim to justify the choice of the words 'semi-autonomous system of sources' used in the subtitle of the chapter.

In his chapter entitled 'Sources and the Enforcement of International Law: What Norms Do International Law-Enforcement Bodies Actually Invoke?', Yuval Shany analyses the sources of law used by international law-enforcing bodies, thus informing our prophecies about their output. The chapter discusses the practice of international and domestic bodies, that claim to enforce international law, or can be plausibly described as doing just so, and juxtaposes the sources of international law norms on which such bodies rely with the list of international law sources found in Article 38 (1) of the ICJ Statute. It offers in this connection two interrelated surveys: a categorization of the main bodies that engage in international law enforcement, and an overview of the process of law enforcement pertaining to two sets of norms that appear to enjoy exceptional prominence in the world of law enforcement—international judgments and resolutions of international organizations. These surveys underlie the contention that Article 38—the standard reference point for studying the sources of international law—does not necessarily predict well which international law norms are likely to be invoked in practice by law enforcement bodies. The chapter concludes with a discussion of some of the explanations for the differences between the general list of sources of international law and the sources actually relied upon by international law enforcement bodies.

In their chapter on 'Sources and the Enforcement of International Law: Domestic Courts—Another Brick in the Wall?', Eleni Methymaki and Antonios Tzanakopoulos examine the role of domestic courts in the ideal continuum commencing from sources (where the law begins its life) and ultimately ending at the enforcement of the law in a specific case. Where, if anywhere, do they fit in this continuum? Put differently, are domestic court decisions a cause (source) or an effect (enforcement) of international law? The authors argue that the enforcement of international law is reflexive, rather than reactive. Reflexivity is defined as a circular relationship between cause and effect, and there is indeed such a circular relationship—a 'feedback loop'—between the sources of international law and its enforcement: neither of the two can be finally identified as the ultimate cause or the ultimate effect. There is thus no real continuum, with domestic courts occupying this or that position on it. Rather, domestic court decisions are both part of the cause (sources) and of the effect (enforcement) of international law. The enforcement of a rule of law in a specific case constitutes, in accordance with the sources doctrine, yet another brick in the wall of that same, ever-changing rule. And given the increasingly important

position that domestic courts are assuming in the enforcement of international law, they become ever more important agents of development of that law, reinforcing their position in the doctrine of sources.

Part IV The Regimes of the Sources of International Law

Chapters in Part IV (Regimes) address various questions pertaining to the sources of international law in specific regimes of international law. Thereby they also assess whether the secondary rules of international law-making are as fragmented as they are sometimes claimed to be. Part IV also includes a chapter on how sources of international law impact the relation between international law and domestic legal orders, such a chapter inevitably coming with a comparative law dimension. The potential correspondence or, on the contrary, lack of correspondence between the arguments made in the chapters in this part and those in the previous ones constitutes one of the interesting features of the Handbook.

In her chapter entitled 'Sources of International Human Rights Law: How General is General International Law?', Samantha Besson claims that a cursory survey of the practice of international human rights law reveals that its sources differ, at least *prima facie*, from those foreseen in the general rules of international law (and in particular those listed under Article 38 of the ICJ Statute), on the one hand, and from those practised in other regimes of international law, on the other. This raises the question of the autonomy of international human rights law as a self-contained regime of international law and, accordingly, that of the 'generality' of general international law in respect of sources. Those questions were actually at the heart of intense debates post-war, and well into the 1980s. Curiously, they no longer seem to be a central concern in international human rights scholarship. The chapter aims to revive this discussion, thereby also contributing hopefully to debates about the legitimacy of international human rights law. There are— and this is the chapter's argument—at least three features of international human rights law that account for their specificities in terms of sources and are reflected thereby: their dual moral and legal nature as rights, and the corresponding objectivity of their sources; their dual domestic and international legality as legal rights, and the corresponding transnationality of their sources; and their universality as moral and legal rights, and the corresponding generality of their sources. Various aspects of these three types of specificities of the sources of international human rights law are discussed in each section. By way of a conclusion, the chapter reverts to the question of the kind and degree of distinctiveness of the sources of international human rights law and draws some implications for the sources of international law in general and what may be coined the 'general international law of sources'.

In his chapter entitled 'Sources of International Human Rights Law: Human Rights Treaties', Bruno Simma investigates the structure of the rights and obligations

running within human rights treaties as legal instruments designed for the realization of common humanitarian interests. He does so from a legal positivist point of departure, that is, s*ine ira et studio.* In the first instance, he deconstructs the mantra of the so-called 'objective' human rights treaty obligations. He then analyses the legal position of the individuals whose rights are consecrated in human rights treaties and identifies these rights as genuine treaty entitlements, albeit, strictly legally speaking and in contrast to the views of most writers, possessing a more limited status than the treaty rights belonging to States parties. This is followed by a concise depiction of the specific legal consequences derived from the characteristics of the treaties, focusing on the hotly debated topic of reservations. The author concludes his study by comparing his views with those expressed in Samantha Besson's chapter on the topic of sources of international human rights law.

Raphaël van Steenberghe's chapter on 'Sources of International Humanitarian Law and International Criminal Law: Specific Features' analyses the specific features which characterize the sources of international humanitarian law (IHL) and criminal law (ICL). The first part examines those which are claimed to characterize IHL and ICL sources in relation to the secondary norms regulating the classical sources of international law. It concludes that they must only be seen as specific applications of these secondary norms and not as derogating from them and implying that IHL and ICL amount to special regimes in that regard. The second part examines the specific features of some IHL and ICL sources in relation to the others of the same fields. Particular attention is given to the Rome Statute of the International Criminal Court and the impact of its features on IHL and other ICL sources, as well as to the commitments made by armed groups, whose characteristics make them difficult to classify under any of the classical sources of international law. In general, this chapter shows how all those specific features derive from the particular fundamental principles and evolving concerns of these two fields of international law.

In his chapter on 'Sources of International Humanitarian Law and International Criminal Law: War/Crimes and the Limits of the Doctrine of Sources', Steven R. Ratner maintains that IHL and ICL cast serious doubt on the traditional doctrine and understanding of sources. Article 38 of the ICJ Statute proves inadequate to describe key modes for prescribing law in these areas, including roles for expert bodies, the special place of *nullum crimen sine lege* in ICL, and the influence of non-State actors such as the International Committee of the Red Cross and non-State armed groups. International courts are particularly important actors for both areas, despite, or perhaps because of their unprincipled approach to the indicia of custom. More fundamentally, IHL and ICL suggest that sources scholarship should see itself not as determining necessary and sufficient methods for the making of law (let alone a set of methods that applies across all subject areas), but rather as a search for relevant inputs that become indicators of law. Under this view, certain processes are more authoritative than others, but all deserve scrutiny. Moreover, a theory of sources must take account of the purpose of understanding sources, which is to

promote compliance with rules. Different actors and institutions have different criteria for acceptable sources, a reality that lawyers must accept to avoid talking past the decision-makers they are trying to persuade. IHL and ICL also shed light on the importance of morality and ethics as inputs to the law-making process.

In her chapter on 'Sources of International Environmental Law: Formality and Informality in the Dynamic Evolution of International Environmental Law Norms', Catherine Redgwell considers the applicability to environmental problems of the traditional sources of international law using as the starting point the formal sources enumerated in Article 38 of the ICJ Statute. The discussion points amongst other things to innovative methods of law creation, the dynamic evolution of environmental treaty texts, and the particular role played by soft law in the development and application of international environmental norms. It concludes that, nonetheless, as a branch of general international law, the sources of international environmental law are the same.

Drawing on her interactional account of international law, Jutta Brunnée's chapter on 'Sources of International Environmental Law: Interactional Law' begins with a reflection on the concept of 'sources of law', which it takes to refer to processes that are shaped by requirements of legality and through which legal norms are made and remade. This alternative understanding of sources does not entail that the law-making methods listed in Article 38 of the ICJ Statute have ceased to matter in international environmental law—far from it. The interactional law framework takes seriously what international actors do, both as they continue to rely on sources listed in Article 38, and as they develop new ways of making international law. The chapter, therefore, explores the law-making processes listed in Article 38 in turn, and then moves on to consider newer processes. The interactional framework and its practice-based understanding of legality illuminate the existence of resilient and relatively stable law-making processes, such as treaty-based and customary law-making, as well as the emergence of new law-making processes, such as the various modes of 'soft' standard-setting that have seen a steady rise in international environmental law, and beyond.

In his chapter on 'Sources of International Organizations' Law: Reflections on Accountability', Jan Klabbers aims to reflect on the uncertainties regarding the question why international organizations would be bound by international law. The chapter places these uncertainties in the broader framework of a vague and ill-defined 'turn to accountability', discusses in some detail the 1980 *WHO–Egypt* advisory opinion of the ICJ, and reviews several recent attempts to overcome the 'basis-of-obligation' problem in the law of international organizations, such as the putative constitutionalization of international law or international organizations, the adoption of accountability models, and the emergence of Global Administrative Law.

In his chapter on 'Sources of International Organizations' Law: Why Custom and General Principles are Crucial', August Reinisch observes that for a considerable period of time, international organizations scholarship was preoccupied

with establishing its objects of study, international organizations, as actors enjoying their own international legal personality. With the fulfilment of various, increasing tasks by such organizations, the question has come to the fore to what extent these subjects of international law may become responsible for their actions. This debate has actually overshadowed the more fundamental question of what kind of obligations can be identified as binding upon international organizations. In the author's view, the latter central question requires one to turn to the sources of international organizations' law.

In his chapter on 'Sources of International Trade Law: Mantras and Controversies at the World Trade Organization', Joost Pauwelyn claims that the World Trade Organization (WTO) approach to sources of law is legal positivist, non-teleological, focused predominantly on WTO covered agreements, explicitly agreed to by WTO members, with heavy reliance on a de facto rule of precedent and an increasing role for non-binding instruments, with little or no reference to academic writings and a limited role—essentially one of guiding interpretation of the WTO treaty—for non-WTO rules of international law, other than mainly procedural rules of general international law. The WTO's sources doctrine remains relatively traditional or mainstream. It is difficult to speak of a WTO—or trade—specific 'deviation' from the general rule of recognition regarding the establishment of sources. At the same time, the WTO experience does have specific features, with a more prominent role for some sources over others and some pushing of the boundaries when it comes to certain less traditional sources of international law such as prior Appellate Body decisions or non-binding instruments.

In his chapter on 'Sources of International Trade Law: Understanding What the Vienna Convention Says about Identifying and Using "Sources for Treaty Interpretation"', Donald H. Regan notes that international trade law is overwhelmingly treaty-based. For practical purposes, the unique traditional 'source' of WTO law is the WTO treaty. But treaties require interpretation, and there are many controversial questions about what might be called the 'sources for treaty interpretation'. What materials can be used to interpret a treaty, and how are they to be used? The standard source for answering these questions, especially in the WTO, is the Vienna Convention on the Law of Treaties (VCLT). This chapter discusses a fundamental, and largely overlooked, question about the structure of the VCLT. What is the rationale of the distinction between Articles 31 and 32 of the VCLT? The answer is central to understanding particular provisions of these Articles, such as 31 (3) (c). It is thus central for the interpretation of trade law, or any other law based in treaties.

In his chapter on 'Sources of International Investment Law: Conceptual Foundations of Unruly Practices', Jorge E. Viñuales addresses the challenges posed by the practice of international investment law to the conventional theory of the sources of international law. After a brief overview of what is generally understood as the main 'sources' of 'international investment law', the chapter examines in turn three challenges to this basic understanding, which arise from the need to account

for the domestic laws governing different aspects of foreign investment transactions, the detailed jurisprudential norms generated by investment tribunals to specify broadly formulated norms, particularly investment treaty provisions, and the norms of general international law expressing the sovereignty of the State. For each category of norms the author selects a number of problems that put the most widely accepted understanding of the sources of international law to the test, and explains why the problems examined, far from mere academic points, have potentially important practical implications. The chapter concludes with some observations on the interactions between practice and the theory of the sources of international law.

Stephan W. Schill's chapter on 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' discusses the use of sources of international law in the settlement of disputes arising under bilateral, regional, multilateral investment treaties and investment chapters in free trade agreements, focusing specifically on particularities this field of international law displays in comparison to general international law. It first addresses the importance of bilateral treaties in international investment law and shows that their bilateral form is not opposed to the emergence of a genuinely multilateral regime that behaves as if it was based on multilateral sources; secondly, the pre-eminent importance arbitral decisions assume in determining and developing the content of rights and obligations in the field; thirdly, the increasing influence of comparative law; and, fourthly, the significance of soft law instruments. It argues that the particular sources mix in international investment law is chiefly connected to the existence of compulsory dispute settlement through investment treaty arbitration.

The chapter by Ingrid B. Wuerth on 'Sources of International Law in Domestic Law: Domestic Constitutional Structure and the Sources of International Law' takes a new approach to the much-analysed relationship between domestic and international law. It considers how global changes in domestic constitutional structures have changed the sources of international law. It argues that domestic constitutional structures have changed in similar ways in many countries around the world over the past century, including the rise of judicial review, the growth in legislative power at the expense of the executive power, the rise of the administrative State, and the protection of individual liberties. Treaties, custom, and 'soft law' as sources of international law, have each been shaped by these changes, in particular the rise in legislative power for treaties, the rise in legislative and judicial power for custom and general principles, and the rise of the administrative State for soft law. This chapter also considers how each source of international law derives its content from domestic law and is influenced by domestic constitutional structures. It concludes with some normative perspectives on the relationship between each source of international law and changes in domestic constitutional structures.

In his chapter on 'Sources of International Law in Domestic Law: Relationship Between International and Municipal Law Sources', Cedric Ryngaert maintains that as both municipal and international law use legal norms to regulate social

relationships, a space for inter-systemic interaction between both legal spheres emerges. Municipal legal practice can have an 'upstream' impact on the formation of the content of the sources of international law, where these require proof of State practice and/or *opinio juris* for valid norms to be generated. In particular, domestic court decisions can have a jurisgenerative effect on customary international law, where they become part of a transnational dialogue between domestic and international courts on questions of international law determination. Admittedly, this dialogical process is hamstrung by the particularities of domestic law and the hard-to-eradicate selection bias of international law-appliers. However, a more objective comparative international law process can be grounded that is geared to effective problem-solving guided by the persuasiveness and quality of reasoning of municipal court decisions relevant to international law.

PART I

THE HISTORIES OF THE SOURCES OF INTERNATIONAL LAW

SECTION I

SOURCES IN THE SCHOLASTIC LEGACY

CHAPTER 1

SOURCES IN THE SCHOLASTIC LEGACY

IUS NATURAE AND *IUS GENTIUM* REVISITED BY THEOLOGIANS

PETER HAGGENMACHER

Whereas the scholastics played a decisive part in the development of jurisprudence in general, their specific contribution to international law and its sources is much less conspicuous. The most obvious reason for this is that international law hardly existed as a separate legal discipline before the middle of the seventeenth century, when the creative impetus of scholasticism was largely spent. Moreover, the very notion of sources of law as we know it took even longer to emerge; it was fully established in the field of international law only in the nineteenth century. For these two reasons an enquiry into the scholastic conception of the sources of international law threatens to be an exercise in anachronism. This calls for some preliminary observations.

* * *

In the first place such an enquiry obviously presupposes that international law exists both in theory and in practice as a coherent corpus of legal principles and rules applying to a given community of subjects in their mutual dealings. Such a system can first be made out in Richard Zouche's *Iuris et iudicii fecialis explicatio* of 1650, which significantly bears in its subtitle the expression *ius inter gentes* and has been rightly hailed as the 'first manual comprising the entire law of nations' by

Dietrich von Ompteda, the author in 1785 of a repertory of the writings on that relatively recent 'science'.[1] Zouche's manual was indeed first to encompass all the various strands of the specific 'relationship that takes place between different princes and peoples', that is, between a determined class of collective entities confronting each other in Hobbesian manner as so many individual persons.[2] By the same token, Zouche defines the categories of rules that apply to this particular order of legal subjects in a way that looks familiar even to a modern eye: common practices, on the one hand, deriving either from natural principles or from general consent and, on the other hand, particular rules agreed upon between single nations by way of treaties and alliances.[3]

In fact none of the materials gathered by Zouche were properly new, but up to his time they had been dealt with under other headings as separate, self-contained subject matters. Foremost among these figured the law of war, which had since the thirteenth century been developed by canonists, legists, and theologians. Quite as important, though less conspicuous, was the law of embassies, which also had grown into a genre of its own. In both fields there existed a long-standing European-wide practice as well as a growing amount of literature; and both were made the subject of extensive monographs in the late sixteenth century, by Alberico Gentili among others, a predecessor of Zouche in the chair of civil law at Oxford.[4] Shortly afterwards, Hugo Grotius was in turn to write his monumental treatise on the law of war and restoration of peace.[5] Zouche mentions the two authors as his '*coryphaei*'.[6] The essential novelty of his own manual lay in its widened systemic approach, which included these formerly independent topics—and several others such as treaties—into a single common structure rigorously built on the two simple criteria of its legal subjects and sources of law. While he had neatly detached his *ius inter gentes* from the time-honoured though ambiguous Roman notion of *ius gentium*,[7] it was nevertheless the latter expression that was soon after to become—with its vernacular equivalents such as Law of Nations, *Droit des Gens*, or *Völkerrecht*—the normal designation of that newly charted, exclusively interstate legal discipline.

[1] Dietrich H. L. von Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts* (Regensburg: J. L. Montags Erben, 1785), para. 64, p. 252.

[2] Zouche calls it '*Communionem, quae inter diversos Principes aut Populos intercedit*'. Richard Zouche, *Iuris et iudicii fecialis, sive iuris inter gentes, et quaestionum de eodem explicatio* (Oxford: H. Hall, 1650), *Ad lectorem*. The author refers explicitly to Hobbes at part I, sect. I, para. 2 (footnotes), p. 3; he probably had in mind *De Cive*, ch. XIV, para. IV. Zouche's name is also spelt Zouch.

[3] '[*P*]*raeter mores communes pro jure etiam inter Gentes habendum est, in quod gentes singulae cum singulis inter se consentiunt, utpote per pacta, conventiones* & *Foedera*.' Zouche, *Iuris fecialis explicatio*, part I, sect. I, para. 1, p. 2.

[4] Albericus Gentilis, *De legationibus libri tres* (1585) (Hanau: Apud Guilielmum Antonium, 1594); *De iure belli libri tres* (1598) (Hanau: Apud Haeredes Guilielmi Antonii, 1612). The latter work was first published in 1588–9 in three separate, less elaborate *Commentationes*.

[5] Hugo Grotius, *De iure belli ac pacis libri tres* (1625), ed. B. J. A. De Kanter-van Hettinga Tromp (Aalen: Scientia Verlag, 1993).

[6] Zouche, *Iuris fecialis explicatio, Ad lectorem*.

[7] ibid., part I, sect. I, para. 2, p. 2.

This is not to say of course that international law came to life only with Zouche. There were plenty of international relations and situations that had generated practices and had called for corresponding legal regulations ever since Antiquity. During the late Middle Ages and Early Modern times—which was the heyday of scholasticism—such regulations were mostly drawn from civil and canon law texts through the creative interpretation by their glossators and commentators. Now and then in the sixteenth century we meet with a vague intuition that these questions belonged to a higher legal sphere and were therefore somehow connected by overarching principles detached from single polities, governing them, as it were, from without and above. Gentili, as Francisco de Vitoria before him, testified to such glimpses, and several passages in Grotius' treatise betray a similar insight. And yet it is only with Zouche's—otherwise rather down-to-earth and plain—*Explicatio* that this superior sphere is consciously posited and articulated as a comprehensive 'law between nations' governing the whole ambit of interstate relations in peace and in war. Only at this stage does it really make sense to raise the question of the sources of international law: it is above all a doctrinal question which presupposes a clear awareness of the new legal discipline with its own inner logic.

* * *

At this juncture, however, we run into yet another difficulty, for, while we instinctively read Zouche's summary indications on the relevant categories of rules as setting out the 'sources' of his *ius inter gentes*, he does not himself use the word '*fontes*' as we should normally expect. In fact this is hardly surprising, since the very notion of source of law, however familiar and elementary it may seem to us, had no place as yet in the legal discourse of the time. In its origins it was not a term of art at all among professional jurists, but at best a rhetorical figure of speech in legal philosophy.

Cicero had first used the source metaphor (*fons legum et iuris*) in his dialogue *De legibus*, where he was enquiring into the true legal order of the commonwealth he had devised in the companion dialogue *De republica*. To that effect he endeavoured to retrace the original fount of law (*iuris ortum a fonte repetamus*) 'in the innermost recesses of philosophy', and came to retrieve those *iuris principia* in nature herself.[8] The metaphor recurs almost axiomatically in his last philosophical tractate, *De officiis*: 'since nature is the source of the legal order (*quoniam iuris natura fons sit*), it is not in accordance with nature that anyone [in a real estate transaction] should take advantage of his neighbour's ignorance'.[9] Obviously there is no question here of the formal sources of law in our modern understanding. Rather, Cicero tries to identify the ultimate foundation of law and justice (as parts of a general moral and political order) and places it in rational nature which he believes, in a Stoic vein, to

[8] Cicero, *De legibus*, ed. Georges de Plinval (Paris: Société d'édition 'Les Belles Lettres', 1968), bk I, V (15–17)–VI (18–20), pp. 9–12.

[9] Cicero, *De officiis*, ed. Walter Miller (Cambridge: Harvard University Press, 1956), bk III, XVII (72), p. 342.

be shared by humans and gods alike and to form the very basis of society. The metaphor *fons iuris* plainly has no technical import; it is therefore easily substituted by other expressions like *iuris ortus, stirps, principium*, or *exordium*, all of which carry the same idea of marking the origin and true basis of law.[10] Cicero's reflections are purposely in a philosophical key, clearly removed from the preoccupations of professional jurisconsults and practitioners.

The latter would hardly have cared about those remote principles of law. It is no surprise therefore that the expression '*fons iuris*' occurs nowhere in the Roman legal texts compiled in emperor Justinian's *Digest* or in his *Institutes*. Instead of enumerating the 'sources' of law as we habitually do, the Roman jurists would rather speak of the 'divisions', or 'positions', or 'species' into which the law is 'distributed', or of the 'parts', 'positions', or 'portions' of which it 'consists'.[11] Cicero himself had done so now and then in his didactic writings on rhetoric when he examined the types of legal rules that could be invoked by the orator.[12] This was the normal, professional view of the matter. It envisages the law simply as an existing corpus that can be broken down into its several components without asking about the law-creating principles whence they 'flow' as from so many 'sources'. At best such an approach is suggested in a few places by verbs like 'flow' or 'come' from. Thus civil law is said by Papinianus to 'come from laws, plebiscites, *senatus consulta*, imperial decrees, and authoritative statements of jurists', whereas honorary law was 'introduced' by way of praetorian edicts.[13] To us these would be as many 'sources' of Roman law. Not so for the Romans, which is eloquently shown by the fact that in Justinian's rendering of Papinianus' statement, the verb *est* is substituted for *venit*, which suggests a simple equivalence instead of a derivation.[14] The source metaphor becomes more apparent in some passages retracing the historical origin of the civil law: it is said to be divided into written and unwritten law because in its beginnings it seems to have 'flown' from the institutions of the two cities of Athens and Sparta;[15] or again it is declared to have initially 'flown' from the Twelve Tables (ca. 450 BC);[16] in Livy's well-known phrase the Twelve Tables were indeed considered as *fons omnis publici privatique iuris*.[17] Yet none of these passages fully conveys our

[10] Cicero, *De legibus*, bk I, VI (18–20), pp. 9–12.

[11] Lanfranco Mossini, 'Fonti del diritto. Contributo alla storia di una metafora giuridica', *Studi Senesi*, 3rd series, 11 (1962): 139–96, 178–93. I have drawn heavily on this most enlightening study.

[12] See e.g., Cicero, *De inventione rhetorica*, bk II, 65, in *Opera Omnia*, ed. Dionysius Lambinus (Geneva: Iacobus Stoer, 1624), p. 63.

[13] Iustinianus, *Digesta*, ed. Theodor Mommsen and Paul Krueger (Berlin: Apud Weidmannos, 1908), 1, 1, 7.

[14] Iustinianus, *Institutiones*, ed. Paul Krueger (Berlin: Apud Weidmannos, 1908), 1, 2, 3.

[15] ibid., 1, 2, 10.

[16] Iustinianus, *Digesta*, 1, 2, 2, 6.

[17] Titus Livius, *Historiarum ab Urbe condita libri, qui supersunt omnes*, bk III, ch. 34, p. 6; ed. Arn. Drakenborch (Stuttgart: Ex Typographia Societatis Wuertenbergica, 1821–1828), tomus 2, pars 1, p. 284. To be precise, Livy says this of the first ten Tables, which were adopted before the two last ones were devised by a new decemviral commission, in order 'to complete as it were the whole body of Roman law'.

notion of sources of law. The nearest we get to it is with the *iuris constituendi viae* mentioned by Pomponius in his historical sketch of the civil law:[18] these 'ways of establishing the law' do indeed correspond to the law-creating procedures which are (somewhat inadequately) meant by the 'sources of law' in their formal and technical sense. Yet, in spite of these occasional hints, our conception of the legal order as deriving from such sources remains foreign to, or at least marginal in, Roman legal thinking. Instead of a theory of sources, there is at most an enumeration of applicable categories of law.

The medieval Romanists in their turn had no reason to dwell on the 'sources' of the resuscitated law they were studying. First to revive the Ciceronian metaphor seem to have been some sixteenth-century humanist jurists who, feeling freer with regard to the Roman texts, happened to include literary works into their analyses. Thus François Connan, at the beginning of his Commentaries on Civil Law, posthumously published in 1553, locates the basis of law in rational human mind, and hence in human being itself (*fontem ipsum iuris a nobis ipsis sumimus, aut potius ipsi nos sumus*), its ultimate origin being God, whom he declares to be *fons totius iuris et aequitatis*, 'whence all the laws and institutions flow into this human society'.[19] In the chapter dealing with the 'true understanding of the law of nature and nations' he reproaches the Roman jurisconsults with having merely pointed out desultorily the sources of law (*cum satis habuissent iuris fontes tanquam digito ostendisse*).[20] Here the expression *fontes iuris* appears in the plural and applies to what the Romans had called *partes iuris*; which is more or less the way in which we nowadays use the expression 'sources of law'. Connan was doubtless among the first to do so.

We meet the metaphor again three-quarters of a century later in Hugo Grotius' treatise on the law of war and peace. It occurs several times in the singular in its famous *Prolegomena*;[21] but Grotius most importantly uses it to mark the transition between the first chapter (where he sets out the various meanings and types of *ius* involved in his work) and chapter II (where he starts with its proper subject matter, the law of war): 'Having examined the sources of the law (*Visis fontibus iuris*), let us come to the first and most general question, which is whether any war can be just, or whether it is ever allowed to make war.'[22] Grotius certainly knew the expression from Cicero; but his plural *fontes iuris* could indicate that he also had culled it from Connan's *Commentariis*, which counted among his earliest legal readings. He even had an additional reason to use it in this way, for instead of commenting on a well-established discipline like civil law he saw himself as delineating an ill-explored

[18] Iustinianus, *Digesta*, 1, 2, 2.

[19] Franciscus Connanus, *Commentarii iuris civilis* (Paris: Iacobus Kerver, 1553), bk I, ch. I, foll. 4r and 6v.

[20] ibid., bk I, ch. 6, fol. 18r.

[21] Grotius, *De iure belli ac pacis*, Prolegomena, 8, p. 9, and 15, p. 11.

[22] ibid., bk I, ch. II, para. I (1), p. 48.

field wholly governed by unwritten legal norms, the very existence of which was disputed.

However that may be, it was probably through his authoritative treatise that what had still remained with him a simple metaphor slowly crept into the language of German publicists and Pandectists as a technical term. It is clearly used as such in Johann Jacob Moser's compendia on German public law (1731) and on the law of nations (1750/1752).[23] The same is true of Johann August Hellfeld's essay of 1743 *On the Sources of Law which are Relied upon by the Illustrious*.[24] The concept of sources figures neither in Wolff's *Jus Gentium* (1749) nor in Vattel's *Droit des Gens* (1758), but Ompteda uses it in his *Litteratur des Völkerrechts* in 1785.[25] Only in the nineteenth century does the notion become firmly rooted in German and Anglo-Saxon treatises on what was increasingly named 'International Law'.

* * *

All this is hardly reassuring when one turns to the scholastics and tries to assess their possible contribution to defining international law and its sources. Indeed, for the reasons just mentioned, the subject simply did not exist during the Middle Ages. Several theologians did, however, pay some attention to what were, centuries later, to become the core elements of the nascent discipline of international law; that is, natural law and the law of nations. Thomas Aquinas especially discussed both concepts in his *Summa theologiae*, in purely abstract terms as parts of a general system of law, without any 'internationalist' implications.[26] Only in Early Modern times would these potentialities slowly come to the fore, owing to the Thomistic renascence brought about by the so-called second scholasticism in sixteenth-century Spain. Its centre of radiation was the University of Salamanca, where the Dominican Francisco de Vitoria in the 1520s initiated a new way of teaching moral theology on the basis of Aquinas' *Summa theologiae*, which had shortly before been rejuvenated

[23] Johann Jacob Moser, *Compendium juris publici moderni regni Germanici, Oder Grund-Riss der heutigen Staats-Verfassung des Teutschen Reichs* (1731) (Tübingen: Johann Georg Cotta, 1742), bk I, ch. 2–8, pp. 12–57; *Grund-Sätze des jetzt-üblichen Europäischen Völker-Rechts in Fridens-Zeiten* (Hanau, 1750), Introduction, para. 48, p. 12.

[24] Johann August Hellfeld, *De fontibus iuris quo Illustres utuntur* (Jena: Joh. Adam Melchior, 1743–1753). The essay was intended as a preface to Burkhard G. Struv's *Iurisprudentia heroica, seu ius quo Illustres utuntur privatum*, which was published posthumously by Hellfeld, his son-in-law. See also Ompteda, *Litteratur*, para. 82, pp. 302–6. Whereas Struv's work confines itself to private law relationships of the *Illustres* (i.e. sovereigns and other rulers), Hellfeld's preface also includes their public law relationships, and constitutes in fact an exposition of the sources of the law of nations in general.

[25] Ompteda, *Litteratur*, para. 2, p. 8, and para. 4, p. 13. Sometimes he uses, instead of *Quellen*, the term *Arten* (i.e. kinds), as at para. 5, p. 16, and para. 7, p. 20, both terms being obviously deemed equivalent. At para. 13, p. 37, he distinguishes, as Moser had done in his German public law compendium, *Hauptquellen* ('reason, usage, conventions') and *Nebenquellen* ('natural law, state law, history, statistics, politics, etc.'), the latter being 'more exactly auxiliary means' (*Hülfsmittel*). This goes some way towards the modern distinction between 'formal' and 'material' sources.

[26] For Aquinas' keen interest in law in spite of papal animosity against Roman law, see B. C. Kuhlmann, *Der Gesetzesbegriff beim Heiligen Thomas von Aquin im Lichte des Rechtsstudiums seiner Zeit* (Bonn: Peter Hanstein, 1912).

by Cardinal Cajetanus' authoritative commentaries. Vitoria's teaching produced a whole breed of *teólogos-juristas*—mainly Dominicans and later Jesuits—who were intensely interested in legal philosophy. The second part of Aquinas' *Summa* offered them ample food for their disquisitions on law and justice. This was the framework in which the concepts of *ius naturae* and *ius gentium* came to be examined by the late scholastics in the wake of their medieval predecessors. Even without naming them sources of law, it was in fact as such that they were to analyse both notions.

While they were distinct by their origins, both concepts had a long and tortuous, partly intertwined genealogy, reaching back to classical Antiquity. The idea of natural law originated in Greek philosophy and was carried over to Roman law mostly by the teaching of rhetoric; in due course it was taken up by the Church fathers and much later by the schoolmen. Conversely, the law of nations was from its inception a genuinely legal category created by Roman jurists and was only later enriched with quasi-philosophical overtones, owing to its identification by some authors with natural law. Both notions came to figure side by side in the introductory titles of emperor Justinian's Roman law compilations (AD 533), as well as in the *Etymologies* of Isidore of Seville (ca. 630), which were in turn quoted in Gratian's *Decretum* (ca. 1140), the cornerstone of canon law.

* * *

Natural law by itself has no vocation to govern properly international relationships. In its various historical expressions it addresses individuals, not political entities (except by analogy, if these are personified). On the other hand, however, natural law transcends the limits of national legal orders, since it extends by definition to the whole of mankind; at least in that sense it can be said to apply transnationally and to be common to all nations. This is indeed how Isidore of Seville explained the concept in his widely authoritative encyclopaedia: 'Natural law is common to all nations, being followed everywhere by nature's impulse, not by dint of institution.'[27] Isidore's explanation hinges on the etymological link between *naturae instinctus* and *omnes nationes*, both words deriving from the verb *nasci*, i.e. to be born. Natural law is thus deemed to have arisen with humanity itself and therefore to constitute an objective normative standard of universal validity. Obviously this is why, almost a thousand years after Isidore, the Spanish scholastics and Grotius himself would consider natural law as an indispensable basis of their legal systems supposed to span the whole world (*totum orbem*, in Francisco de Vitoria's parlance).

It was over a thousand years before Isidore's *Etymologies* that Greek philosophers had set to pondering on the idea of a law grounded in nature. Positing nature, and human nature in particular, as a formal source of law—as Grotius explicitly did when he called human nature the 'mother' of natural law[28]—is bound to seem problematic to our modern mind. All we would agree to, with contemporary natural

[27] Isidorus Hispalensis episcopus, *Etymologiarum sive originum libri XX*, ed. W. M. Lindsay (Oxford: Clarendon Press, 1911), bk V, para. IV, 1 (unpaginated).

[28] Grotius, *De iure belli ac pacis*, Prolegomena, 16, p. 12.

sciences, is to apply the term 'law' metaphorically to observable physical processes and regularities by calling them 'natural laws' in a purely factual sense. Natural law in a normative sense supposes a pre-Galilean conception of nature and cosmos, such as they were first developed by the early Greek philosophers on the Ionian coast and in Southern Italy.[29] Rather than being induced by methodical experimentation and scientific investigation, this view of nature proceeded from random observations, quasi-poetical intuitions, sweeping generalizations, and metaphysical speculations. This is why it lent itself not only to factual statements but also to normative conclusions.

It was brought to maturity by Greek idealism, especially with Aristotle's teleological conception of nature, and was infused with an almost mystical fervour by the Stoics. 'Living in agreement with nature' was their paramount maxim. Nature to them meant both the individual rational constitution of man and the rational texture of the universe which was governed by an immanent cosmic law identified with Zeus; they clearly considered it as a theological as much as a physical reality.[30] It was mainly Cicero who—without being himself properly a Stoic—transplanted this conception to Latinity and in typically Roman fashion made it palatable to lawyers by imbuing it with a legal tinge. In his above-mentioned dialogue *De legibus* he extolled this law as 'something eternal, ruling the whole world', and as 'supreme reason, implanted in nature, ordaining what ought to be done and forbidding the contrary'.[31] Earlier on, in his *De republica*, he had already identified this *vera lex* with *recta ratio* and praised it as 'conforming to nature, spread in all beings, firm and everlasting', and as 'governing all nations in all times'.[32] Right reason is its spring of validity, pervading men and gods alike, enclosing them all in a legal community, so that 'this whole world can be regarded as one single state common to the gods and to men'.[33]

Reason was thus the dominating principle governing Greek and Roman natural law; will was left at best with an ancillary part. But with the rise of Christianity the role of will was fundamentally reconsidered and steadily enhanced against reason. The transcendent, personal Biblical god was indeed wholly different

[29] See in general W. K. C. Guthrie, *A History of Greek Philosophy. I: The Earlier Presocratics and the Pythagorians* (Cambridge: Cambridge University Press, 1987), esp. pp. 82–3 and 206–12. On the opposition between *nomos* (as purely conventional, artificially imposed rule) and *physis* (the true nature of things) highlighted by the sophists, see Felix Heinimann, *Nomos und Physis. Herkunft und Bedeutung einer Antithese im griechischen Denken des 5. Jahrhunderts* (Basel: Friedrich Reinhardt Verlag, 1945), esp. pp. 110–62. See also Hans Erich Stier, 'Nomos Basileus', *Philologus* 83 (1928): 225–58, 244–50.

[30] Antony Long and David Sedley, *The Hellenistic Philosophers* (Cambridge: Cambridge University Press, 1987), vol. I, pp. 266–437. See also Hans Diller, 'Der griechische Naturbegriff', *Neue Jahrbücher für Antike und deutsche Bildung* 2 (1939): 241–57.

[31] Cicero, *De legibus*, bk II, IV (8), p. 42, and bk I, VI (18), p. 11.

[32] Cicero, *De republica*, ed. Charles Appuhn (Paris: Editions Garnier Frères, 1954), bk III, ch. XXII, p. 162.

[33] Cicero, *De legibus*, bk I, VII (22), p. 13.

from the immanent divine *logos* of the Stoics. In spite of some affinities possibly owed to the Semitic background of their founders, there was a far cry from Stoic providence and *fatum* to Paulinian and Augustinian predestination. God's absolutely free will, unbound by any sort of outward constraint, rational or otherwise, became the exclusive source of good and evil. In any event, an ontologically rooted natural law hardly made sense with human nature corrupted since the Fall of man. Instead, revealed law had to step in, pending man's restoration through divine grace.[34]

Natural law was not totally discarded for all that, but ever since patristic times it tended to be identified with revealed divine law. We meet with this equation at the very beginning of Gratian's *Decretum*: 'Natural law is what is contained in [Mosaic] Law and in the Gospel.'[35] Therefore 'natural law commands nothing but what God wants to be done and forbids nothing but what God prohibits'.[36] Although Gratian's *Decretum* was in the first place a legal treatise, and indeed the basic manual of canon law, it was relevant also to theologians, owing to the mass of patristic materials gathered in it. But the theologians soon were offered their own textbook with Peter Lombard's *Liber sententiarum* (ca. 1150), which was equally stuffed with patristic excerpts. Among them was a reference to Augustine's tract against the Manicheans in which he characterized sin as 'any infringement of eternal law, by deed, word, or intent', eternal law being defined as 'divine reason and the will of God enjoining to maintain the natural order and forbidding to disturb it'.[37] The Stoic notion of eternal law, closely linked up with natural law, which is but an expression of it, figures here as a yardstick for sin. We shall come back to it in a moment; it suffices at this stage to note that, on the threshold of medieval scholasticism, reason and will both held a comparable share in the validity of natural law. Their possible conflict had remained latent up to that juncture.

This delicate balance was disrupted a century later with the Aristotelian revival initiated by the Dominican Albert the Great in the natural sciences and pursued in moral theology by his disciple Thomas Aquinas. Unlike Gratian, Aquinas sharply dissociated natural law from divine law. Both are emanations of God's eternal law, the latter (aiming at man's supernatural destination) by revelation, the former

[34] Felix Flückiger, *Geschichte des Naturrechtes* (Zollikon-Zürich: Evangelischer Verlag, 1954), vol. I, pp. 285–359.

[35] Gratianus, *Decretum magistri Gratiani*, ed. Emil Friedberg (Leipzig: Tauchnitz, 1879), part I, distinctio I, i. pr., col. 1.

[36] ibid., distinctio IX, dictum post can. 11, col. 18.

[37] The passage reads thus: '*Ergo peccatum est, factum vel dictum vel concupitum aliquid contra aeternam legem. Lex vero aeterna est, ratio divina vel voluntas Dei ordinem naturalem conservari iubens, perturbari vetans.*' Aurelius Augustinus, *Contra Faustum manichaeum libri triginta tres* (ca. 400), bk XXII, ch. 27, ed. J.-P. Migne, *Patrologiae cursus completus, Series Latina* (Paris: Apud J.-P. Migne, 1865), vol. 42, col. 418. Peter Lombard reproduces (approximately) only the first sentence; see *Liber sententiarum* (Basel: Nicolaus Kesler, 1492), bk II, distinctio XXXV (unpaginated). But in subsequent discussions both sentences were taken into consideration; see below, nn. 42 and 43.

(aiming at man's natural end) through the natural order inherent in God's creation.[38] Acting in accordance with natural law is man's specific way, as a rational creature, to participate in eternal law.[39] In Aquinas' view, law (of whatever kind) is indeed essentially a product of reason, will being only a subservient agent.[40] In line with Greek intellectualism, Aquinas thus re-established not only the predominance of reason over will, but also the ontological substratum of natural law.

Aquinas' natural law, based as it was on a teleological conception of nature, was soon challenged by the Franciscan John Duns Scotus and utterly shattered by his fellow friar William of Ockham. In line with early Christian authors, divine will again became the fountain-head of ethics and law; totally free in its determinations, unhampered by any rationalistic eternal law, divine will and love were declared the exclusive source of moral values. Good and evil, therefore, are not inherent in nature but freely decreed by God. Ockham would even go as far as to admit the possibility of God bidding man to hate Him, which had been the only limit Scotus had recognized to divine omnipotence. Strictly speaking the very idea of natural law was thereby abandoned; positive law, divine or human, had to take its place, and it is only by reference to the highest divine injunctions—the first Table of the Decalogue—that Scotus nevertheless acknowledged a sort of 'consonant' natural social order.[41]

Ockham's hyperbolical positions in defence of absolute divine freedom called forth objections even within what was henceforth called *via moderna*, i.e. nominalism, as against the more traditional realism of Aquinas and Scotus. Such was the case in particular with the Augustinian Gregory of Rimini discussing the concept of sin with reference to Augustine's above-mentioned sentence quoted by Peter Lombard. A human action is sinful, Gregory asserts, when it infringes not only divine reason but right reason in general. *Recta ratio* thus becomes an absolute normative standard obliging man 'even if by impossibility divine reason or God did not exist'.[42] Although the rule deduced by right reason is only a *lex indicativa* (as being inferred from statements in the indicative mode), it is not less mandatory than the *lex imperativa* directly manifesting God's explicit command: both types of laws are declared to entail sin in case of transgression.[43]

[38] Thomas Aquinas, *Summa theologiae* (1265–1273) (Alba-Rome: Editiones Paulinae, 1962), Ia IIae, qu. 91, art. 4, pp. 944–5.

[39] ibid., Ia IIae, qu. 91, art. 2, pp. 942–3.

[40] ibid., Ia IIae, qu. 90, art. 1, pp. 939–40.

[41] Ioannes Duns Scotus, *Quaestiones tertii voluminis scripti oxoniensis super sententias* (ca. 1303), ed. Salvator Bartolucius (Venice: Apud Haeredes Melchioris Sessae, 1580), dist. 37, qu. unica, 336–42. See also Günter Stratenwerth, *Die Naturrechtslehre des Johannes Duns Scotus* (Göttingen: Vandenhoek und Ruprecht, 1951), pp. 21–59, 73–94, and Hans Welzel, *Naturrecht und materiale Gerechtigkeit*, 4th edn (Göttingen: Vandenhoek und Ruprecht, 1962), pp. 66–89.

[42] Gregorius Ariminensis, *Super secundo sententiarum* (1344), ed. Montefalconius Augustinus (Venice: Luceantonius de Giunta, 1522), dist. 34–7, qu. I, art. 2, fol. 118v (J).

[43] ibid., dist. 34–7, qu. I, art. 2, coroll. 2, fol. 118v (O)–119r (H).

What was at stake beyond that theological debate on sin is the very nature of law: does it necessarily presuppose a command expressed by a superior—as John Austin would much later maintain in the steps of Hobbes—or are there objective, rationally ascertainable moral values generating legal obligations by themselves? The debate was continued by other medieval schoolmen such as Jean Gerson and Gabriel Biel, and it was resumed by the Spanish scholastics up to the time of Grotius.[44] While it never quite lost its theological flavour, it more and more turned into a problem of legal philosophy, especially with the Thomists of the School of Salamanca. Basically, they adhered to Aquinas' intellectualist position, recognizing moral values inherent in human actions: *proprietates et inclinationes naturales*, in Francisco de Vitoria's words;[45] and yet they were not ready, for all that, to accept 'Gregory's fancies',[46] and considered therefore that right reason had to be supplemented by God's command to make up the full legal validity of natural law. Such compromise formulas combining the rival principles of reason and will were increasingly favoured by the Spanish Dominicans and Jesuits.[47] A prominent example figures in Francisco Suárez's legal treatise *De legibus ac Deo legislatore* published in 1612: a divine command is required for natural law to be legally binding; yet this command cannot but conform to the intrinsic moral value of the actions concerned, as implanted by God himself in his creation and revealed by right reason.[48]

This was also in substance Grotius' position in his well-known definition of natural law, except that the terms are reversed: 'Natural law is an injunction of right reason indicating that an action, by its concordance or discordance with rational nature itself, involves either moral baseness or moral necessity, and is in consequence either forbidden or commanded by God, the author of nature.'[49] That definition is usually taken to lie wholly on the intellectualistic side. Coming as it does from an 'enlightened' Protestant, Grotius' formula is therefore seen as the critical point where 'modern' natural law gets freed from its scholastic shackles. This 'secularizing' interpretation seems in tune with another no less emblematic passage affirming the validity of natural law 'even if we were to grant that God does not exist'.[50] In fact, this 'blasphemous supposition' is but a late echo to the speculative experiment of Gregory of Rimini. Grotius is far from expelling God from natural law, as the context amply shows. All he does in both passages is to contrast natural

[44] Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983), pp. 484–5, 489–96.

[45] Franciscus de Vitoria, *De homicidio*, 4, in *Obras de Francisco de Vitoria. Relecciones teológicas*, ed. Teófilo Urdánoz (Madrid: Biblioteca de Autores Cristianos, 1960), p. 1099.

[46] '. . . *relicta imaginatione Gregorii* . . . '. Vitoria, *De eo ad quod tenetur homo cum primum venit ad usum rationis*, 10, in *Obras*, p. 1354.

[47] Haggenmacher, *Grotius*, pp. 489–95.

[48] Franciscus Suárez, *De legibus ac Deo legislatore* (Coimbra: Didacus Gomez de Loureyro, 1612), bk II, ch. 5–6, pp. 115–29.

[49] Grotius, *De iure belli ac pacis*, bk I, ch.I, para. X (1), p. 34.

[50] ibid., Prolegomena, 11, p. 10.

law with divine law, just as Aquinas and his sixteenth-century followers had done, in order to highlight their respective properties. Whereas revealed divine law proceeds entirely from God's free will, which is therefore its sole source of validity, natural law rests on rational human nature in the first place, but also on concomitant divine will inasmuch as God is the creator of nature and the author of human rationality. This is why reason is indeed the autonomous basis of natural law, but the latter's full normative status remains at least indirectly predicated on divine will.[51]

Grotius is here much less 'modern' than he is usually proclaimed to be. Though a Protestant and a humanist to the marrow, he was a close relative of the Spanish scholastics with respect to the foundations and structural features of his legal system.[52] Natural law was its ultimate basis, yet, while Grotius stressed its objective rational aspects, its discrete link with divine will did not make it any less acceptable to the opposing religious camps of his day.

* * *

The other pillar of emerging international law, *ius gentium*, presented its own ancestry and difficulties. It was a somewhat ambiguous notion, fraught with divergent connotations which entailed protracted debates as to its true nature. From its origins in the third century BC, it carried an international dimension with it, inasmuch as it had to do with relationships between Roman citizens and foreigners. In the writings of the jurisconsults these relationships appear sometimes (in modern terms) as a common private law under the jurisdiction of the *praetor peregrinus*, sometimes as public law involving foreign nations, for example in the guise of diplomatic envoys. This latter international character, which had originally been associated with the *ius fetiale*, was particularly vivid among historians such as Livy and Sallustius.[53] Apart from the vagueness as to the substance of the *ius gentium*, there was yet another ambivalence concerning (again in modern language) its status as a source of law. Judging by the doctrinal fragments retained in the introductory title of the *Digest*, partly recycled in Justinian's *Institutes, ius gentium* was somewhat uneasily poised between *ius naturae* and *ius civile*.[54]

In some of these texts, especially in an excerpt from Hermogenianus, it appears as a loose set of institutions shared by all or most nations (*gentes*),[55] who seem to have freely and informally adopted them by customary imitation in answer to practical needs (*usu exigente et humanis necessitatibus*).[56] In other places *ius gentium* seems to derive from some higher necessity and is more or less identified with natural law. Thus Gaius famously defines it, in contrast to civil law which is 'established by each people (*populus*) for itself', as that 'what natural reason has established among

[51] Haggenmacher, *Grotius*, pp. 496–506.

[52] See in particular his rather favourable appreciation of the scholastics at *De iure belli ac pacis*, Prolegomena, 52, p. 25.

[53] Max Kaser, *Ius gentium* (Cologne: Böhlau Verlag, 1993), pp. 10–74.

[54] Haggenmacher, *Grotius*, pp. 313–20.

[55] Iustinianus, *Digesta*, 1, 1, 5.

[56] Iustinianus, *Institutiones*, 1, 2, 2.

all humans (*quod vero naturalis ratio inter omnes homines constituit*) and which is therefore equally observed by all peoples (*apud omnes* [*populos*]); it is called law of nations (*ius gentium*), being as it were in use among all nations (*quasi quo iure omnes gentes utuntur*)'.[57] This etymological explanation recurs almost identically in Isidore of Seville's definition of *ius gentium*, which found its way into the canonistic *Decretum Gratiani*.[58] Yet, although it strikingly echoes Gaius' formula, Isidore does not refer to any higher principle such as *naturalis ratio*; and the examples he adduces rather seem to point the other way towards conventional arrangements and custom. The main interest of his definition for us lies in the institutions it enumerates, which are all linked somehow to international relations.

The medieval jurists, both legists and canonists, spent much effort in clarifying the concept itself and its relationships with the neighbouring categories of natural law and civil law. In the end the solution that prevailed, particularly among the civilian commentators, following the example of Bartolus of Sassoferrato, was to split the concept into a primeval *ius gentium* that was but an expression of natural law, and a secondary *ius gentium* which was devised later, through positive enactments, following the needs of the growing human race.[59]

Thomas Aquinas for his part, instead of distinguishing two kinds of *ius gentium*, managed to maintain it as a unitary notion by discussing its incongruous elements separately in both sections of the second part of his *Summa theologiae*. In the *Prima secundae*, he considered its formal features and its ground of validity, classifying it as a type of human positive law along with civil law.[60] In the *Secunda secundae*, he analysed it in its substance, which he found to be akin to natural law from which it was rationally deduced.[61] In neither of the two places, however, is there any hint at a possible international function of *ius gentium*.

It was up to the sixteenth-century followers of Aquinas to develop these internationalist potentialities. First among them was Francisco de Vitoria, who several times during his twenty years' teaching in Salamanca touched upon *ius gentium*, be it in his ordinary lectures on the *Summa theologiae* or in some of his solemn *relectiones*, most notably in those he delivered 'on civil power' in 1528 and 'on the Indians and the law of war' in 1538 and 1539. Just as in Aquinas, *ius gentium* appears double-faced, at times as a kind of positive law, and then again as a derivation from

[57] Iustinianus, *Digesta*, 1, 1, 11, and *Institutiones*, 1, 2, 1. The English rendering is approximate. The term '*populus*' between square brackets figures in Gaius' original text (ca. AD 160, rediscovered in 1816 on a Veronese palimpsest); it was dropped by Justinian's jurists (or possibly by some earlier copyist), but it remains obviously implied, owing to the *apud*.

[58] Isidorus, *Etymologiae*, bk V, para. VI; Gratianus, *Decretum*, part I, dist. I, can. 9.

[59] Haggenmacher, *Grotius*, pp. 325–6 and 330–3.

[60] Both categories of norms derive from natural law through human legislative agency, *ius gentium* 'by way of conclusion from common principles', *ius civile* less directly 'by way of particular determination'. Aquinas, *Summa*, Ia IIae, qu. 95, art. 2 and 4, pp. 959–60, 961–2. See also Jean-Marie Aubert, *Le droit romain dans l'œuvre de saint Thomas* (Paris: J. Vrin, 1955), pp. 91–108, especially at pp. 99–105.

[61] Aquinas, *Summa*, IIa, IIae, qu. 57, art. 3, 1330. See also Haggenmacher, *Grotius*, pp. 327–30.

natural law.[62] The positive law option is clearly taken in the ordinary lectures, where Vitoria neatly differentiates *ius gentium* from *ius naturae* and declares it founded 'on the common consent of all peoples and nations'.[63] In his solemn lecture *De potestate civili* he goes even one step further, considering it not only as proceeding from 'a compact and convention among men', but as having in addition force of law; indeed, he explains, it is enacted 'by the authority of the whole world', the *totus orbis* appearing 'in some way as one single commonwealth' endowed with authority to 'edict equitable laws convenient for everyone, such as are found in the law of nations'.[64] One decade later, in the *Relectio de indis*, Vitoria veers round and chooses the naturalist option: on the authority of Justinian (and Gaius) he equates *ius gentium* with a rational law binding on the whole of mankind, including indigenous populations who have never even heard of it before.[65] The reason for this volte-face is simple, for a genuine consent was difficult to construe in this transatlantic setting, so that Vitoria preferred to appeal to common human nature in order to bring the 'natives' under one common legality with their colonizers. And yet, a little further on in the same discussion, he has no qualms about shifting back, as a possible alternative, to his earlier 'positivist' tack, with the *totus orbis* again acting as a supreme, quasi-parliamentary legislator: granted that some of the *ius gentium* does not derive from natural law, he argues, it might still obligate the Indians, even against their will, if it was adopted for the general welfare by consent of the greater part of the world (*satis videtur esse consensus maioris partis totius orbis*).[66]

Vitoria's teachings, as reported by the notes of his students, betray a genuine reflection on *ius gentium* as a source of law, not just in general as with Aquinas, but specifically among nations. His preferred illustration is the law of embassy with its central principle, the inviolability of ambassadors. Yet his observations on *ius gentium* remain largely unsystematic; at least in the *relectiones* they are no more than scattered, context-bound hints and clues; only in the ordinary *lecturae* on Aquinas do we find the inklings of a coherent theory.[67] Even its properly international dimension remains somewhat vague and inarticulate. This is so in spite of the above-mentioned passage of the *Relectio de indis* where, owing to a drastically shortened quotation of Gaius' definition, *ius gentium* appears as valid *inter omnes*

[62] Haggenmacher, *Grotius*, pp. 334–41.

[63] Vitoria, *De justitia*, ed. Vicente Beltrán de Heredia (Madrid: Publicaciones de la Asociación Francisco de Vitoria, 1934), in 2.2. qu. 57, art. 3, pp. 12–17. Somewhat paradoxically, Vitoria takes the 'positivist' stance when commenting on the *Secunda secundae*, where Aquinas had dealt with the 'naturalist' aspects of *ius gentium*.

[64] Vitoria, *Relectio de potestate civili*, 21, in *Obras*, pp. 191–2.

[65] Vitoria, *Relectio de indis prior*, part III, 2, 1°, in *Obras*, p. 706.

[66] ibid., part III, 4, 2°, in *Obras*, p. 710.

[67] For a similar appreciation, see Brian Tierney, 'Vitoria and Suárez on ius gentium, natural law and custom', in Amanda Perreau-Saussine and James B. Murphy, eds, *The Nature of Customary Law* (Cambridge: Cambridge University Press, 2007), pp. 101–24, 110–11.

gentes instead of *inter omnes homines*. A careful reading of the passage reveals that Vitoria had no intention whatsoever of anticipating Zouche's comprehensive presentation of *ius inter gentes* as a specifically interstate law. His main point in this particular demonstration was to link up *ius gentium* with natural law, in order to make it binding even on peoples hitherto unknown to each other. What mattered for him in Gaius' definition was, therefore, that it made *ius gentium* proceed from *naturalis ratio*, instilling a general sense of hospitality, not *between*, but *among* all *gentes*: it is indeed *apud omnes nationes*, as Vitoria explains, that receiving strangers badly is normally deemed inhuman, whereas behaving kindly towards them is considered humane and duteous.[68] Instead of Zouche's *ius inter gentes*, Vitoria was rather anticipating Kant's *ius cosmopoliticum*, quite in tune with his *totus orbis* conception of humanity as one single family in spite of its division into several nations.[69]

It was after Vitoria's demise, by the middle of the sixteenth century, that *ius gentium* was made the theme of a wider debate among his followers as well as among humanist jurists such as François Connan and Alberico Gentili.[70] The most outstanding among the theologians was again the Jesuit Francisco Suárez, who was first to give a fully fledged theory of *ius gentium*. He decisively clarified the concept in three respects. In the first place he considers it as purely positive law, severing thereby its age-old association with natural law. Secondly, as to its formation and enactment, he sees no other means than custom, in the absence of a legislator among independent nations; which of course perfectly accords with its feature as unwritten law. Finally, Suárez draws a crucial distinction between two types of *ius gentium*, removing thereby another of its traditional ambiguities: the expression could indeed denote, on the one hand, a set of municipal law institutions common to all or most nations (*ius intra gentes*), which was in fact how the Roman jurists had mostly understood it; on the other hand, it could mean a category of properly international law (*ius inter gentes*) which entailed true legal relationships between states; and he obviously considered this as the preferable acceptation, maybe without fully realizing that it was fairly new.[71]

[68] Vitoria, *Relectio de indis prior*, part III, 1°, 2, in *Obras*, p. 706. For similar renderings of Gaius' *ius gentium* as *ius inter omnes gentes* by several of Vitoria's contemporaries, without the least 'internationalist' connotation, see Haggenmacher, *Grotius*, p. 340, fn. 1633, as well as Haggenmacher, 'La place de Francisco de Vitoria parmi les fondateurs du droit international', in Antonio Truyol Serra, Henry Mechoulan, Peter Haggenmacher, Antonio Ortiz-Arce, Primitivo Marino, and Joe Verhoeven, *Actualité de la pensée juridique de Francisco de Vitoria* (Brussels: Bruylant, 1988), 27–80, 57–64, and Haggenmacher, 'L'idéologie de la conquête et la notion de droit international chez les grands auteurs espagnols', in *1492. Le choc de deux mondes. Ethnocentrisme, impérialisme juridique et culturel, choc des cultures, droits de l'homme et droits des peuples* (Paris: La Différence, 1993), 210–22, 218.

[69] Haggenmacher, 'Kant et la tradition du droit des gens', in Pierre Laberge, Guy Lafrance, and Denis Dumas, eds, *L'année 1795. Kant. Essai sur la Paix* (Paris: J. Vrin, 1997), 122–39, 127–8.

[70] Haggenmacher, *Grotius*, pp. 341–3 and 353–6.

[71] Suárez, *De legibus*, bk II, ch. 19, pp. 187–91, and bk VII, ch. 3, para. 7, pp. 779–80. See also Haggenmacher, *Grotius*, pp. 348–51.

This threefold specification does not, however, imply that Suárez's *ius gentium* by itself formed a complete, self-contained, and self-sufficient system of international law as was to be the case with Zouche's *ius inter gentes* less than half a century later. In fact, these *consuetudines totius orbis, quae ius gentium constituunt*,[72] merely comprise some particular rules and institutions (*aliqua specialia iura*),[73] complementing the very general natural law principles which, though in essence inter-personal, equally apply to the relations between independent nations and their rulers. It is only in combination that both *ius naturae* and *ius gentium* would form together something like today's general international law (treaties being still considered as a wholly distinct matter, since they are merely contractual arrangements *inter partes* devoid of properly *legal* force): this is the vision of the international legal order Suárez outlines in a celebrated passage of his monumental treatise, as a striking counterpart to Vitoria's *totus orbis*.[74]

The two scholastics here again found an eminent continuator in Hugo Grotius, whose definition of *ius gentium* corresponds in essence to that given by Suárez. He also divides it into two kinds, one being merely common domestic law, the other properly international law; and in all probability he reached this distinction by himself in his first work on the law of war, the *De iure praedae*, a disquisition written in his early twenties as a young lawyer, several years before the publication of Suárez's legal treatise. The manuscript, which remained unknown for over two-and-a-half centuries, contains a stupendous system of sources of law calling to mind a composite baroque fountain, where *ius gentium* springs up, from opposite points, in the two variations distinguished by Fernando Vázquez de Menchaca in the wake of the medieval Bartolists: *ius gentium primarium* boils down to natural law as applied to human beings as such, whereas *ius gentium secundarium* comprises various rules and institutions freely adopted by civilized nations.[75] This positive kind of *ius gentium* is in turn subdivided in a manner reminiscent of Suárez's *ius intra gentes* and *ius inter gentes*.[76] In his mature work on the law of war and peace, Grotius reformulated his system of sources of law, probably under the impression of Suárez's *De legibus*, which had been published in the meantime. The two sorts of *ius gentium* he had distinguished as a youth were relabelled *ius naturae* and *ius gentium*, respectively.[77]

[72] ibid., bk VII, ch. 3, para. 7, p. 779.

[73] ibid., bk II, ch. 19, para. 9, p. 191.

[74] ibid., bk II, ch. 19, para. 9, pp. 190–1.

[75] Grotius, *De iure praedae commentarius* (1604–1606), ed. Gerard Hamaker (The Hague: Martinus Nijhoff, 1868), ch. II, p. 12 and pp. 26–7. See also Fernandus Vasquius Menchacensis, *Illustrium controversiarum aliarumque usu frequentium pars prima, tres priores libros continens* (1564) (Lyon: Iacobus Stoer and Franciscus Faber, 1599), bk II, ch. 89, paras 23–39, pp. 743–9.

[76] Grotius, *De iure praedae*, ch. II, p. 27. See also Haggenmacher, *Grotius*, pp. 358–99, and 'Genèse et signification du concept de "ius gentium" chez Grotius', *Grotiana New Series*, 2 (1981): 44–102.

[77] Grotius, *De iure belli ac pacis*, bk I, ch. I, paras X and XIV. For the distinction between *ius gentium intra se* and *inter se*, see Grotius, *De iure belli ac pacis*, bk II, ch. III, para. V, and ch. VIII, para. I. In line with Suárez, Grotius characterizes *ius illud gentium proprie dictum* as pertaining *ad mutuam gentium inter se societatem*; but instead of insisting on its customary origin, he stresses the fact that it has *vim pacti inter gentes*. Rather than being contradictory, the two approaches would appear as

Just as with Suárez, the law of nations fulfils a merely interstitial function, completing the principles of natural law by more specific regulations tacitly agreed upon by all, or most nations. Here too, it is only in combination that the two categories of rules would form something resembling international law as we know it.

* * *

Not before the second half of the seventeenth century would the expression *Jus Gentium* (as it was by then spelt in its full majesty) stand for the whole of the Law of Nations as a legal discipline of its own. As stated earlier, it was not Zouche who led the way in this respect; while he had outlined and charted the discipline, he preferred to name it *ius fetiale*, the archaic law governing Rome's foreign relations. If in spite of him the appellation *ius gentium* soon carried the field, it may well have been owed to the tremendous prestige of his almost exact contemporary, Thomas Hobbes. Strangely so, since Hobbes was later to become the figure-head of the so-called 'deniers of international law'. His 'law of nations' indeed boils down to what he named 'law of nature' inasmuch as it applied between sovereigns; and this *lex naturalis* was merely a set of prudential injunctions calculated to facilitate man's survival in an essentially lawless and hostile state of nature by inducing him as far as possible to 'endeavour Peace' instead of making war.[78] Although these 'naturall lawes' were 'found out by Reason',[79] they had more in common with scientific laws such as known to modern physics, physiology, or psychology than with the Thomistic *ius naturae* of Suárez and the Ciceronian *recta ratio* of Grotius. Hobbes remained somewhat elusive as to the normative status of his law of nations: it was not law in the ordinary sense which exists only under constituted authorities wielding effective power; and yet it could properly be called law inasmuch as the 'theorems' and 'conclusions' of the law of nature were 'delivered in the word of God, that by right commandeth to all things'[80] and especially 'to the Consciences of Soveraign Princes and Soveraign Assemblies'.[81] Whatever may have been Hobbes' true thought in the matter, the important point in our context is that the entire range of the relations between sovereign powers was identified with the law of nations.

Hardly less important was the fact that Hobbes' conception was taken up by Samuel von Pufendorf, the most influential legal philosopher on the Continent during the Ancien Régime. Explicitly referring to Hobbes (with whom he shared a marked taste for Euclidian geometry and a hearty aversion for Aristotelian

complementary, since custom was generally supposed to rest on an implicit 'pact'; but the divergence nevertheless tends to mark their reciprocal independence. Custom was usually disparaged as a source of law; it had no part either in Vitoria's *ius gentium*, except incidentally as *consuetudo et usus belli* at *Relectio de iure belli*, 49, in *Obras*, pp. 850–1.

[78] Thomas Hobbes, *Leviathan, or The Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civil* (1651) (Oxford: Clarendon Press, 1965), part I, ch. 14, p. 100.

[79] ibid., part I, ch. 14, p. 99.

[80] ibid., part I, ch. 15, pp. 122–3. See also Thomas Hobbes, *Elementa philosophica de cive* (1642) (Amsterdam: Apud Henricum et Viduam Th. Boom, 1742), ch. III, para. 33, pp. 95–6.

[81] Hobbes, *Leviathan*, part II, ch. 30, p. 273.

scholasticism), he considered *ius gentium* to be merely *ius naturae* writ large as applied between sovereign nations, rather than a distinct, positive source of law as Grotius (and Suárez) would have it.[82] In fact the whole of Pufendorf's system of universal jurisprudence was thoroughly Hobbesian in character, however much he made it look Grotian. On this appearance, however, Grotius was soon perceived as the founding hero of an entirely new science of *Jus Naturae et Gentium*; that is, a purely rational, secular natural law and the pseudo-law of nations that went with it like a shadow.[83] The true structure of his law of war and peace with its two-fold source in nature and consent—a core of immutable principles interlaced with a web of complementary usages—was thereby largely overlooked, no less than its far-flung scholastic ancestry. Without perceiving them yet as the twin 'sources' of an integrated *ius inter gentes*, and still less as dynamic 'law-making processes', the schoolmen from Aquinas to Suárez had indeed decisively contributed to crystallizing in themselves what were to become the two main components of classical international law. Perhaps one could even suggest that by their way of going about it—not as jurists pragmatically distinguishing traditional categories of rules from each other but as moral theologians speculatively retracing their principles of validity—they may at least indirectly and unwittingly have fostered the emergence of the very concept of formal sources of law.

Research Questions

- Could it be that the dualistic system of sources devised by Suárez and Grotius, combining as it does a permanent core of natural law principles with a loose set of positive rules of *ius gentium*, reflects a basic and enduring structure of international law as a legal discipline, beyond changing fashions and terminologies?
- Notoriously, Sir Gerald Fitzmaurice numbered natural law among the formal sources of international law: how far is that claim tenable in modern international law, which likes to think of itself as exclusively 'positive'?

[82] Samuel von Pufendorf, *Elementorum jurisprudentiae universalis libri duo* (1660), 2nd edn (Cambridge: John Hayes and John Creed, 1672), bk I, def. 13, pp. 190–2; *De Jure Naturae et Gentium libri octo* (1672) (Frankfurt am Main: Friedrich Knochius and Johann Friedrich Andreae, 1706), bk II, ch. III, para. 23, pp. 216–19.

[83] The main propagators of that distorted vision were Pufendorf's disciple Christian Thomasius and his translator Jean Barbeyrac, who saw Grotius 'as the one who broke the ice' after the long scholastic winter, and as first to lay the true foundations of a system of natural law. Samuel von Pufendorf, *Le Droit de la Nature et des Gens, ou Système général des Principes les plus importans de la Morale, de la Jurisprudence, et de la Politique*, trans. Jean Barbeyrac (Amsterdam: Chez Henri Schelte, 1706), Préface du Traducteur, para. XXVIII, p. LXXVII.

Selected Bibliography

Choderow, Stanley, *Christian Political Theory and Church Politics in the Mid-Twelfth Century. The Ecclesiology of Gratian's Decretum* (Berkeley: University of California Press, 1972).

Flückiger, Felix, *Geschichte des Naturrechtes*. Vol. I: Altertum und Mittelalter (Zollikon-Zürich: Evangelischer Verlag, 1954).

Haggenmacher, Peter, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983).

Kaser, Max, *Ius gentium* (Köln: Böhlau Verlag, 1993).

Larequi, J., 'Del "Jus Gentium" al Derecho internacional. Francisco de Vitoria y los teólogos españoles del siglo XVI', *Razón y Fe* 83 (1928): 21–37.

Larequi, J., 'El P. Suárez creador del concepto de Derecho internacional', *Razón y Fe* 83 (1928): 225–40.

Schuster, Johann B., 'Was versteht Franz Suarez unter ius gentium?', *Zeitschrift für öffentliches Recht* 16 (1936): 407–95.

Soder, Josef, *Die Idee der Völkergemeinschaft: Francisco de Vitoria und die philosophischen Grundlagen des Völkerrechtes* (Frankfurt am Main: A. Metzner, 1955).

Soder, Josef, *Francisco Suarez und das Völkerrecht: Grundgedanken zu Staat, Recht und internationalen Beziehungen* (Frankfurt am Main: A. Metzner, 1973).

Welzel, Hans, *Naturrecht und materiale Gerechtigkeit*, 4th edn (Göttingen: Vandenhoek und Ruprecht, 1962).

CHAPTER 2

SOURCES IN THE SCHOLASTIC LEGACY

THE (RE)CONSTRUCTION OF THE *IUS GENTIUM* IN THE SECOND SCHOLASTIC

ANNABEL S. BRETT

1. Introduction

Chapter 1 aptly lays out the problem of including the second scholastic in a volume on the sources of international law.[1] Later scholastic authors have no doctrine of 'sources'. Nor is the phrase '*ius gentium*', as they employ it, appropriately translated by 'international law'. It is true that, using the tripartite division found at the beginning of the *Digest* of Roman law, they identified a domain of *ius*, meaning both 'law' and right', which covers all peoples but is not natural law (*ius naturale*). Moreover, given that for them the *ius gentium* is not natural (and still less divine), it must have *come from* some human institution. It could not have been created by the authority of any

[1] See chapter 1 by Peter Haggenmacher in this volume.

particular commonwealth, because then it would be civil law (*ius civile*). Therefore, the *ius gentium* must have originated in some way from all nations, *omnes gentes* (or 'almost all nations', *fere omnes gentes*). This thesis of origins is one way in which we can try to apply the notion of 'sources' in respect of it. But even if we do, it is still critically important to understand that the *ius gentium*, for them, was not something that is still being made from these origins. It is something that *has already come into being*. As we shall see, while it can theoretically be changed, in practice it cannot, except 'in part'; and even of this there was only one example, the practice of Christian nations in not enslaving their own captives in war. Scholastic writers did not understand specific contemporary legal arrangements like peace treaties between commonwealths as part of the *ius gentium*. For them, the *ius gentium* was instead the unwritten juridical framework in which all such arrangements are necessarily accommodated. The task that later scholastics set themselves was a kind of hermeneutic reconstruction of the principles of that domain of unwritten law—a reconstruction that was always, of course, at the same time a construction of their own position.[2] From that position they might, in their lectures and published texts, subsequently comment or even pronounce on the legality of events or practices of their contemporary world, but they would not have understood themselves to be making law in so doing. In this sense, while we may read their works as works 'of' international law, they themselves did not. No sixteenth- or seventeenth-century scholastic production could be a work 'of' the *ius gentium* as they understood it. This simple instance of untranslatability should serve sufficiently to establish the difference between the two concepts.

The focus of this chapter, therefore, is upon how and why later scholastic theologians reconstructed the *ius gentium* in the way that they did. In order to answer those questions, we have to see how they themselves understood their broader enterprise, both intellectual and political.[3] While members of the second scholastic were familiar with law—civil law, canon law, and to some extent the laws of particular commonwealths, especially Castile—by profession they were not lawyers

[2] The title of a recent edited volume aptly captures the politics of their legal enterprise: Kirstin Bunge, Stefan Schweighöfer, Anselm Spindler, and Andreas Wagner, eds, *Kontroverse um das Recht. Contending for Law. Beiträge zur Rechtsbegründung von Vitoria bis Suárez. Arguments about the Foundation of Law from Vitoria to Suárez* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2012).

[3] The most recent comprehensive survey of the Dominican 'School of Salamanca' is Juan Belda Plans, *La escuela de Salamanca y la renovación de la teología en el siglo XVI* (Madrid: Biblioteca de Autores Cristianos, 2000). Harro Höpfl, *Jesuit Political Thought. The Society of Jesus and the State, c. 1540–1630* (Cambridge: Cambridge University Press, 2004), concentrates on the Jesuit political self-understanding and enterprise. An earlier account which handles Jesuit as well as Dominican authors can be found in Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 1978), vol. II, ch. 5; reflections in Annabel S. Brett, 'Scholastic Political Thought and the Modern Concept of the State', in Annabel S. Brett and James Tully, eds, *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006), 130–48. Annabel S. Brett, 'Later Scholastic Philosophy of Law', in Fred D. Miller and Carrie-Ann Biondi, eds, *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, 2nd edn (Dordrecht: Springer, 2015), 335–75, offers a full survey of Dominican and Jesuit legal thinking.

but theologians, and the distinction between the two professions was an important element of their self-understanding. They worked primarily in a university context, within faculties of theology, delivering lectures on the *Summa theologiae* of Thomas Aquinas. Aquinas had treated the question of law and right (*ius*: the Latin term in our authors can mean both, and sometimes both at the same time) in the course of his *Summa*, and his Dominican and then Jesuit successors in the sixteenth and seventeenth centuries followed suit. In one sense, then, their enterprise in discussing the *ius gentium* was simply part of their normal academic activity in teaching theology, including moral theology, to their students. Certainly, Aquinas had given law a centrality that it had not had prior to his work. Half of the *Summa*—the whole of the second part, including the *Prima secundae* and the *Secunda secundae*—is given over to an exhaustive theological treatment of human agency. Law as a command of reason figures as an external principle of moral action in the *Prima secundae*, and right as what is objectively just figures in the discussion of justice in the *Secunda secundae*, justice being a virtue and hence one of the internal principles of moral action. Thus the theologians of the second scholastic, inheriting and developing a theology in which agency and action were central categories, also developed the questions of law and right that those categories involved.

The 'founder' of the Dominican 'School of Salamanca', Francisco de Vitoria, had deliberately introduced the *Summa* (which he had come to know as a student of Peter Crockaert at the Collège de Saint-Jacques in Paris) as a replacement for the *Sentences* of Peter Lombard as the text upon which to lecture from his chair in Salamanca. One of the advantages of the *Summa* over the *Sentences* was precisely the way in which it allowed professors to handle moral theology systematically. The demand for such treatment was not purely academic. The later Middle Ages had seen a major rise in the publication of casuistic theology designed for the forum of conscience. These works, aimed at priests in their capacity as confessors, gave increasing space to questions of the legality and rightfulness of individual actions, especially contracts of all kinds: questions that were becoming ever more intricate with the development of the monied economy.[4] One of Vitoria's base references, even if he was not always very respectful towards it, was the *Summa summarum* of the Italian Dominican Sylvester Mazzolini da Prierio, a massive alphabetical treatment of the rights and wrongs involved in potential cases of conscience.[5] Such works had already digested the mass of Roman and canon law into a theologically usable resource upon which theologians of the second scholastic could draw, although it is clear that some members of the school did not merely derive their knowledge of law second-hand, but read with interest works by medieval and contemporary

[4] See Wim Decock, *Theologians and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Leiden: Brill, 2013), ch. 2 for background.

[5] For Mazzolini, see Michael Tavuzzi, *Prierias. The Life and Works of Sylvestro Mazzolini da Prierio, 1456–1527* (Durham: Duke University Press, 1997).

jurists, and had even studied law themselves. Nevertheless, despite the centrality of law in their moral theology, they distinguished their theological treatment of law from law as practised by lawyers.[6] Law as handled by a theologian was law in relation, ultimately, to God. It was because of this that theologians could pronounce on the rationale of law in a way that professional lawyers could not. They worked within their given field of law, and were expert as such. But they were not competent, as theologians were, to pronounce on matters of general legal principle or on any legality outside their specific field.

The importance of the 'forum of conscience' in how these theologians constructed the domain of *ius* (both law and right) is increasingly being recognized.[7] By contrast, another context, that of European expansion and the conquest of the New World, has always been acknowledged, whether this is viewed in a positive or a negative light. The violent encounter with peoples and lands totally alien to the European world threw up questions of law and right that theologians felt themselves to be in a privileged position to answer: not merely because, as members (often) of missionary orders, their information as to what was actually going on was often superior, but primarily because their theological handling of the juridical universe did not tie them to any European law, canon, civil, Castilian, or anything else. The *ius gentium* thus came to be central to the theologians' claim not merely to intellectual authority but also to political relevance and involvement. Especially for the first generation of the School of Salamanca, it was in this sense definitional for their intellectual enterprise, and the need to articulate it breathed new life into the entire study of law and right that they had inherited from Aquinas.[8]

Two extra-civil spheres of law, then, the law of conscience and the law of nations, formed the basis of the late scholastic engagement with law and right, leading to a proliferation of theological treatments of these subjects cut free from the traditional format of commentary on the *Summa theologiae*. It is important, however, to see that these two domains were not separate in their handling. For the later scholastics, as we shall see, the central element of the *ius gentium* was what they called, following the Roman law, *dominia distincta*, 'divided domains': relationships of property and of lordship that belonged to separate individuals or bodies. But *dominia distincta* were also at the heart of the casuistry of conscience in its late medieval, contract-orientated form. Moreover, although the *ius gentium* was theoretically enforceable

[6] See, in relation specifically to Francisco Suárez, the editors' introduction in Oliver Bach, Norbert Brieskorn, and Gideon Stiening, eds, 'Auctoritas omnium legum': *Francisco Suárez'* De legibus *zwischen Theologie, Philosophie und Jurisprudenz* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2013), xiii–xxvii.

[7] See e.g., Decock, *Theologians and Contract Law*.

[8] Andreas Wagner considers the relationship between *ius gentium* and *ius* per se in 'Zum Verhältnis von Völkerrecht und Rechtsbegriff bei Francisco de Vitoria', in Kirstin Bunge, Anselm Spindler, and Andreas Wagner, eds, *Die Normativität des Rechts bei Francisco de Vitoria. The normativity of law according to Francisco de Vitoria* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2011), 255–86.

through a just war, in practice most violations of the *ius gentium* could only ever be convicted, if at all, in the court of conscience. Vitoria made the intersection between the two spheres of law very clear at the beginning of his 'relection' *On the American Indians* (1539):

> I say that it is not the province of lawyers, or not of lawyers alone, to pass sentence on this question. Since these barbarians we speak of are not subjects [of the Spanish Crown] by human law (*iure humano*) . . . their affairs cannot be judged by human statutes *(leges humanae*), but only by divine ones . . . since this is a case of conscience, it is the business of priests, that is to say of the Church, to pass sentence upon it.[9]

II. Reconstruction from Authorities

Understanding in this way the place of the *ius gentium* within the legal thought of the second scholastic, and the work it had to do, we can now ask how the theologians reconstructed its more specific content. One part of the answer is, simply, through the traditional scholastic method: that is, through the creative use of 'authority' as a source of argument. Scholastic theologians deliberately worked within a tradition of inherited discourse that stretched back not only to Aquinas and the Middle Ages, but back beyond that to the great patristic scholars, to all the writings of Antiquity and to the Bible itself. That hinterland gave them a vast repository of authoritative pronouncements upon which to draw. The Salamanca theologian and pupil of Vitoria, Melchor Cano, listed ten major types of 'authority' as the ten 'places' from which theological arguments could be drawn in his *De locis theologicis*, published posthumously in 1563.[10] These were, in order: the authority of Scripture; the authority of the traditions of Christ and the apostles; the authority of the Catholic Church; the authority of Church Councils; the authority of the Roman Church; the authority of the old saints; the authority of scholastic theologians, including those learned in

[9] Francisco de Vitoria, *Vitoria. Political Writings*, eds Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), p. 238. For commentary on this work see, in addition to Bunge et al., eds, *Die Normativität des Rechts*, Norbert Brieskorn and Gideon Stiening, eds, *Francisco de Vitorias 'De indis' in interdisziplinärer Perspektive. Interdisciplinary Views on Francisco de Vitorias 'De indis'* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2011).

[10] Melchor Cano, *De locis theologicis*, ed. Juan Belda Plans (Madrid: Biblioteca de Autores Cristianos, 2006), ch. 3. For Cano, see Belda Plans, *La escuela de Salamanca*, ch. 6. For the idea of arguments 'coming out of' common places in sixteenth-century rhetorical theory, see Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996), p. 115 on Erasmus, who pictured *loci communes* as little houses from which, if one knocked at the door, an argument might emerge.

canon law; the authority of natural reason; the authority of philosophers, including those learned in civil law; and the authority of human history. These broad 'authorities' lay behind the more specific authority of particular texts. Only one text, the Bible in the Vulgate translation, was authoritative *as a text*. But as the continued use of the Vulgate itself demonstrated, the Bible was not regarded as self-interpreting. In the Counter-Reformation period in which these authors wrote, the authority of Church tradition was central to the Catholic repudiation of the Lutheran hermeneutic principle *sola scriptura*, and thus the Bible had to be understood through the Church and through generations of inherited exegesis. In this context, the texts of the Church Fathers were high in authoritative status, and they were understood to have been written with some kind of divine illumination, although not with the direct inspiration of Scripture. Other, lesser but sometimes equally important textual authorities had been constituted as such precisely through the scholastic practice of appealing to them.

In principle, then, any text with some claim to authoritative status within the tradition could be used as an argument for the nature of the *ius gentium*. In practice, particular 'authorities' sedimented around particular topics and indeed became part of the definition of that topic. On the nature of *the ius gentium*, the opening title of the Digest of Roman law, *De iustitia et iure*, was a key reference, especially D. 1.1.5 (l. *Ex hoc iure*) and D. 1.1.9 (l. *Omnes populi*). The latter linked the *ius gentium* firmly with natural reason. But the former listed a series of institutions which did not appear to be strictly natural: '[o]f this law of nations wars were brought in, peoples separated, kingdoms founded, properties distinguished (*dominia distincta*), boundaries put on fields, buildings set in place, trade, buyings and sellings, lettings and hirings, and obligations instituted: except for some that were brought in by civil law'. This mixed bag of contents, covering both public bodies and private individuals, continued to define the *ius gentium* in scholastic thought up until the beginning of the seventeenth century. Canon law similarly constituted an authority on the subject, especially the excerpt from Isidore of Seville's *Etymologies* at Decretum D. 1 cap. 6: 'the *ius gentium* is so-called because almost all nations (*gentes*) use that law'. Clearly, too, for these authors Aquinas was another fundamental authority, although scholastic theologians did not feel bound to follow him in everything. Patristic authors, especially Augustine pronouncing on the subject of the Roman empire and the justice of war in *The City of God*, and pagan philosophers such as Aristotle in Book I of the *Politics* could also be brought in to frame a question, say, on slavery as an institution of the *ius gentium*. Occasionally, too, historical and contemporary examples played a role, as for example in Vitoria's mention of the alliance of the Tlaxcalans in *On the American Indians*, or in a series of Jesuit authors referring to the practice of the Chinese in not admitting strangers to the interior of their country. These 'authorities' functioned in two ways. In one way, they served as a kind of intellectual handrail to the theologian in approaching a potentially controversial topic. To proceed without such a handrail—not to appeal to any authorities