

Chapter 2

Talking About Sources: The Constant Reliance on a Non-objectified Element

Abstract In this chapter, I argue that since the emergence of international law in the sixteen hundreds until the present, every account of the sources applicable to international law has relied on a normative form that challenges the theoretical objectivity and internal logic of the doctrine itself at a given time. That is, at least one of the elements taken into consideration by the diverse authors cannot be precisely described as an objective source. Therefore, as precise as the doctrine attempts to be, there has always existed an element that ultimately allows for a free interpretation of what constitutes law. I argue that these ‘not objectified factors’—barring from the terminology used by Alf Ross—have always been present in international legal theory. In this chapter, I engage in a historical analysis of how scholars have spoken about legal sources from the 16th century until now. The main focus will be to identify relevant trends by virtue of the not-objectified factor that was predominant.

2.1 Introduction

*“[L]e débat sur les sources du droit international, cet « evergreen » de la doctrine internationaliste, continue, génération après génération, à fasciner les juristes et à figurer au premier rang de leurs préoccupations.”*¹ The amount of pages devoted to describing, explaining, and conceptualising the sources of international law is not small. It seems that most international law scholars have wondered about this topic at some point in their careers. For practitioners, the sources of law are not so much a point of reflection and study as they are for scholars. However, they constitute the foundations of the profession. Because the most basic piece of knowledge that a lawyer must have is that which allows him or her to identify legal norms, all modern manuals on international law deal with this issue.

In this chapter I will argue that since the emergence of International Law until the present, the doctrine of sources applicable to this branch of the law has relied on—at the very least—a normative form that challenges the theoretical objectivity

¹Prosper Weil, “Le droit international en quête de son identité: cours général de droit international public” (1992) 237 Rec des Cours 11 at 133.

and internal logic of the doctrine itself at a given time. That is, at least one of the elements taken into consideration by the diverse authors cannot precisely be described as an objective source. Therefore, as precise as the doctrine attempts to be, there has always existed an element that ultimately allows for an open interpretation of what constitutes law.

This chapter will review three trends that have appeared since the publication of Alberico Gentili's *De Iure Belli Libri Tres* in 1589 up until the adoption of the Charter of the UN in 1945. The trends are distinguished by changes to the elements included as sources of international law, and, particularly, the element that seems to break with the internal logic of the doctrine at a particular moment. Needless to say, these trends do not necessarily succeed each other in time. Some of them are extremely long, some are extremely short, and some even overlap. Since they are not mutually exclusive, I do not consider that this lack of symmetry invalidates the point I wish to make. For the purposes of determining duration, and since the plausibility of the idea is my only measure, I will consider each trend alive and on-going for as long as an actor in the international legal order is willing to make an argument on its bases.

In Sect. 2.2, I identify the use of God or divine law as a trend, covering the classic doctrine as stated by Grotius² and some of his predecessors,³ who divided law into that which emanated from God, from nature, and from consent.⁴ While arguably, it is possible to trace the origins of modern international law to the writings of Rev. Francisco de Vitoria in the 16th century, Hugo Grotius takes precedence over his contemporaries because of the fact that he was the first to actually present and justify a system of sources as we understand it today. By the very nature of this trend, most of the law is actually not objectified. However, the reliance on God and the Bible as evidence of a divine law differentiates it from subsequent trends.

Section 2.3 is devoted to the decline of divine law and the rise of a secular conception of natural law in legal theory and, subsequently, legal sources. Vattel,⁵ Pufendorf,⁶ and

²See Hugo Grotius, *De Jure Belli ac Pacis*, vol. 2, trans. by Francis W. Kelsey (Oxford: Clarendon Press, 1925) at 38 [Grotius, *De Jure Belli ac Pacis*].

³See also Alberico Gentili, *De Iure Belli Libri Tres*, vol. 2, trans. by John C. Rolfe (Oxford: Clarendon Press, 1933) at 7 (although he did not discuss agreements in international law, he declared that "international law is a portion of the divine law").

⁴To be absolutely fair, such division is present since ancient Greece, Le Fur affirms that "l'antiquité a connu un droit naturel international", Louis Le Fur, "La Théorie du Droit Naturel" (1927) 18 Rec des Cours 260 at 272; See also Serge A. Korff, "Introduction à l'histoire du droit international" (1923) 1 Rec des Cours 1.

⁵See Emmerich de Vattel, *The Law of Nations or The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, trans. by Charles G. Fenwick (Washington D.C.: The Carnegie Institution, 1926) at 3–8.

⁶See Samuel Pufendorf, *De Jure Naturae et Gentium*, vol. 2, trans. by C.H. Oldfather and W.A. Oldfather (Oxford: Clarendon Press, 1934) at 112.

other writers contemporary to them,⁷ postulated the existence of a natural law that comes from the rational thinking of the human being. The characteristic of this period is a more or less open concept of a natural law which does not respond to God.

Section 2.4 begins with the decline of natural law at the beginning of the 20th century and the inclusion of the general principles of international law in the Statute of the PCIJ. Here, I will review the initial understanding of the general principles of international law that was held by the drafters of the Statute. Originally devised as an open-ended concept which would allow the Judges to avoid situations of *non liquet*, the general principles of international law have evolved into rigid elements that rely more and more on the consent of States.

To conclude, I review the codification efforts in the period between World Wars I and II and the beginnings of the UN. Particular attention is paid to the draft code of public international law for the American Republics, prepared by Alejandro Alvarez. This draft code created a complex system of sources which ultimately relied on the principles of international justice, if no positive rule or general principle was available. However, Alvarez's idea of justice was not absolutely abstract. Evidence of those principles of international justice was to be found in the "voeux of international conferences, resolutions of recognised scientific institutions or opinions of contemporary publicists of authority."⁸ The theory of this period still contributes to the increasing value given to the resolutions of international organizations.

One can say, with little fear of generalization, that two normative forms have enjoyed universal recognition of their relevancy since the emergence of international law: treaties and custom. Expositions of the doctrines of sources of international law diverge on the issues of whether there are other relevant forms, and if so, what their respective normative values are.

The initial premise of this chapter is that treaties and custom have in common their relative objectivity as sources. That is, it is relatively easy to identify by objective standards whether an instrument or a repeated practice constitutes law. Treaties are concluded between States and more recently between States and International Organizations. While the way in which consent is expressed by a State has changed through the years, the requisite of the expression of will remains a necessary element for the validity of a treaty. To make things easier, the rules that establish the required expression of will for a treaty to be valid have been codified in a treaty: the VCLT. The situation of custom is slightly different. The current doctrine establishes that a customary norm exists when State practice is

⁷Wolff, for example, follows the Grotius in its classification; Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, vol. 2, trans. by Joseph H. Drake (Oxford: Clarendon Press, 1934) at 9, 10 and 18; while sustaining the existence of the Law of Nature, Rachel sustained that the Law of Nations was only formed by what Grotius called voluntary law; contra Samuel Rachel, *De Jure Naturae et Gentium Dissertationes*, vol. 2, trans. by John Pawley Bate (Washington D.C.: The Carnegie Institution, 1916) at 163–165.

⁸International Commission of Jurists, "Public International Law: Projects to be Submitted for the Consideration of the Sixth International Conference of American States" (1928) 22 AJIL Supp 234 at 239.

accompanied by *opinio juris*, that is, that States' acceptance that such practice is law.⁹ While the requirement of *opinio juris* is a rather recent development,¹⁰ the practice of Sovereigns—whether kings or States—has always been an element of the formula.

In sum, the will of the State, whether tacit or expressed, remains central to the mainstream understanding about the formation of international law.¹¹ Therefore, in order to discover what constitutes law under the classification of treaties and custom, the legal professional needs only to identify the expressions of the will of the State that have traditionally been associated with those normative forms.

Custom and treaties are not the only sources of international law.¹² To borrow an expression coined by Alf Ross, customs and treaties are complemented by “free, not formulated, not objectified factors”.¹³ For the purposes of this chapter I will define ‘not objectified factors’ as any possible source of law that is presented as an a priori indiscernible category that requires a process of concretization for its practical application. I will argue that ‘not objectified factors’ have been present throughout the whole history of international law, and that they operated as sources, which were in some form relevant to the legal actors at a given time. While by nature those free factors are relatively easy to conceptualise, it is difficult to authoritatively state their normative content and value. In a sense, they can be called ‘informal’. For instance, while it is common for international lawyers to use the concept of the ‘general principles of law’ in their daily work, it is impossible to authoritatively

⁹Or, as put by Judge Negulesco, “the mutual conviction that the recurrence is the result of a compulsory rule”; *Jurisdiction of the European Commission of the Danube* (1927), Dissenting Opinion by M. Negulesco, PCIJ (Ser. B) No. 14 at 105.

¹⁰Paul Guggenheim, “Contribution à l’histoire des sources du droit des gens” (1958) 94 Rec des Cours 5 at 52–53.

¹¹See Volker Röben, “What About Hobbes? Legitimacy as a Matter of Inclusion in the Functional and Rational Exercise of International Public Power” in Rüdiger Wolfrum and Volker Röben, eds., *Legitimacy in international law* (Berlin; New York: Springer, 2008) at 356 (“[w]hether states can be expected to obey international law depends in essence on their being included in the exercise of this [public] power”); such a view is also shared by those who have separated sources of law from sources of obligations, having as a consequence that treaties are obligations while the source of the law is the will of states; see e.g., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 14 at 32 (Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo) (“The fact that in so many of the multilateral conventions [...] the parties have agreed to create new rules of law or to declare existing rules of law, with the result that this activity is often described as ‘legislative’ or ‘quasi-legislative’, must not obscure the fact that the legal basis of these conventions, and the essential thing that brings them into force, is the common consent of the parties”); See also Gerald G. Fitzmaurice, “Some Problems Regarding the Formal Sources of International Law” in Frederick Mari van Asbek, ed, *Symbolae Verzijl, présentées au professeur J.H.W. Verzijl à l’occasion de son LXX-ième anniversaire* (The Hague: Martinus Nijhoff, 1958) 124 at 155–160.

¹²See, Malcolm N. Shaw, *International law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 92–119.

¹³Alf Ross, *A textbook of international law: general part* (London: Longmans & Green, 1947) at 80–91.

state all the general principles of law, and extremely risky to formulate one in the absence of previous, perhaps even judicial, recognition of its status.

The given definition of a ‘not-objectified factor’ requires explaining what is meant by a ‘source of law’. This is particularly difficult to determine, considering that throughout the history of international law the concept has been extensively used with diverse meanings, to the point where it is practically empty.¹⁴ While generally speaking, Kelsen is right in that it is preferable to “introduce an expression that clearly and directly describes the phenomenon [I have] in mind”,¹⁵ the nature of this particular historical revision requires us to understand the term ‘sources of law’ for what it has meant at various times, for there is no change in the content of a concept without the concept changing in itself.

In the following pages the term ‘sources’ will be used to refer either to our current understanding of material source¹⁶ or to a formal source.¹⁷ When a clear distinction between these is required because of changes in language, it will be so indicated. In any case, the term ‘source’ will not be used to mean ‘evidence’. For example, while ‘divine will’ is a source, the Bible will be evidence of it.

While contemporary theorists/historians of international law have argued that the doctrine of sources has gone through different periods in which its internal logic allowed it to embrace different normative elements,¹⁸ the doctrine of sources has justified the use of normative forms that challenge the purpose of the doctrine. As discussed below, the presence of such normative forms constitutes a tacit recognition of the inherent incompleteness of the international legal system, and of the impossibility of confining the legal method to strictly legal elements.

Sources are, ultimately, the justification for a legal solution as expressed by a relevant actor in the system. The immediate contribution of this chapter to the general argument of the book is to show that the doctrine of sources of international law has never been a rigid construction in the mind of scholars. By reviewing the diverse trends that have proposed and sustained the existence of free factors in

¹⁴Kelsen stated: “[t]he ambiguity of the term ‘source’ of law seems to render the term rather useless”, Hans Kelsen, *Principles of international law* (New York: Rinehart, 1952) at 304 [Kelsen, *Principles*]; he was obviously uncomfortable with the terminology of the time, since in his opinion, by calling custom and treaties ‘sources’, “*on se sert d’une abréviation, qui risque facilement d’induire en erreur*”, Hans Kelsen, “Les rapports de système entre le droit interne et le droit international public” (1926) 14 *Rec des Cours* 227 at 265.

¹⁵Kelsen, *Principles*, *ibid*.

¹⁶“[T]he material sources might better be described as the ‘origins’ of law[... material historical, indirect sources represent, so to speak, the stuff out of which the law is made”, Fitzmaurice, “Some Problems”, *supra* note 11 at 153.

¹⁷“[T]hose provisions operating within the legal system on a technical level”, Shaw, *supra* note 12 at 66.

¹⁸See e.g. Martti Koskenniemi, *From apology to Utopia: the structure of international legal argument* (Cambridge: Cambridge University Press, 2005) at 307 [“A period of naturalism is contrasted with a period of positivism and these again with some ‘eclectic’ period. Yet, the contrasts re-emerge within modernism as it understands different sources...”].

international law, I will demonstrate that the determination of what constitutes international law has never been an exact science.

The period of time chosen for this chapter requires further explanation. In order to do justice to the argument and also to mark a fundamental change of paradigm that occurred in the first half of the 20th century, I chose the adoption of the Statute of the ICJ as the final point for the purposes of this chapter. The constant production of resolutions and declarations by UN organs and bodies, and the permanent fora that were created for the codification and progressive development of international law, are just a few examples of the transformations that have followed the creation and evolution of international organizations. The trends established by the reaction of the international judiciary to these changes will be the subject of subsequent chapters.

2.2 God as the Law

As it has been the case with most law, it is especially true for international law that “[i]n the beginning was the Word, and the Word was with God, and the Word was God.”¹⁹ For most of the earliest Europeans writing about the law of nations or *jus gentium*, all law emanates from a divine will.²⁰ In the words of Hugo Grotius, “let us give first place and pre-eminent authority to the following rule: What God has shown to be His Will, that is law.”²¹

There is a particular difficulty with this section: While all other trends discussed in this chapter—and also those that are not—appeared within a more or less established discipline of international law, the idea that divine law was a relevant aspect of the law predates the origins of modern international law. In fact, it can be rightfully argued that there was no trend at all since international law, as all other law of the time, was, at conception, dependant on divine will. However, “historical rationality is something that can only be known retrospectively”,²² and from today’s perspective, there are more or less identifiable points where the influence of religion upon international law started and ended. The fact that the moment when

¹⁹*The Gospel of John* at 1:1 (please note that as the Gospel was originally written in Greek, the phrase “the Word” is a translation of the Greek word “*Logos*”); while John was clearly using *logos* to speak of Jesus, it is interesting to compare it with the legal connotations that some Greek philosophical schools have given to the term: “[i]n Stoicism the *logos* is the divine order and in Neoplatonism the intelligible regulating forces displayed in the sensible world. The term came thus to refer, in Christianity, to the Word of God, to the instantiation of his agency in creation, and, in the New Testament, to the person of Christ”, *The Cambridge Dictionary of Philosophy*, 1999, s.v. “*logos*”.

²⁰See Francisco Suarez, *Selections from Three Works*, vol. II (Oxford: Clarendon Press, 1944) at 172; Gentili, *supra* note 3 at 7–8.

²¹Hugo Grotius, *De Jure Praedae Commentarius*, vol. 1, trans. by Gwladys L. Williams and Walter H. Zeydel (Oxford: Clarendon Press, 1950) at 8 [Grotius, *De Jure Praedae*].

²²Judith N. Shklar, “Comment On Avineri” [1973]:1 *Political Theory* 399 at 402.

the modern tradition of international law started coincides with the moment when religion effected great influence over society and law, does not invalidate the argument.

It is worth noting that the emergence of modern international law was a long process that can be identified through the progressive disappearance of the Roman conception of *jus gentium*.²³ In the Roman system enunciated by Ulpian, natural law was the law applicable to all living beings, *jus gentium* was applicable to the whole of humanity, and *jus civile* was the human-made law of a city.²⁴ *Jus gentium* was the divine order of things applicable to human beings; above it was natural law, applicable to beasts and humans equally.

In this section, I will discuss how the earliest scholars spoke about the sources of international law, particularly Grotius. However, the issue of the sources of law rarely appears as such in the writings of the time. Instead, it appears in the relationship among natural law, the law of nations and divine law. By organizing these different laws into a system, the scholars of the time defined the hierarchy among human and divine sources of law and their respective evidences. This trend is characteristic for the presence of God or divine law as the superior mandate which shapes both the law of nations and natural law, and for the extensive use of the Bible and other religious texts as evidence of their content.

Some of the writers of the time did not consider that divine law was intelligible to human beings. However, it still remained essential to the task of the lawyer to discern God's design of nature in order to find rules applicable to international relations. The point to make in this section is that the scholars of the time saw actual positive law only as subsidiary to either a divine law²⁵ or a natural law dictated by God and understood in reference to His will.²⁶ In this sense, the determinacy and preciseness found in the writers of the time in relation to custom and agreements stands in contrast to the reference to the natural state of things created by God.

As stated above, Grotius was the first to elaborate a system of sources as we understand it today. This was a transitional moment in which God was both above the law and within the sources of the law. While many of Grotius' contemporaries dealt with important issues which today would be considered within the realm of international law (such as war, embassies, law of the sea, etc.), their treatment was rather topical and did not elaborate on methodological issues.²⁷ However, an influence of divine law on issues that would today be attributed to international law

²³See Gordon E. Sherman, "Jus Gentium and International Law", [1918] 12:1 AJIL 56 at 60–61.

²⁴Dig. 1.2.1–2 (Ulpian).

²⁵Grotius, *De Jure Belli ac Pacis*, *supra* note 2.

²⁶"From the foregoing, then, I conclude and state as my third proposition that the natural law is truly and properly divine law, of which God is the Author", Suarez, *supra* note 20 at 198.

²⁷See e.g., Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri III*, vol. II (Washington, D.C.: Carnegie Institution, 1912); Pierino Belli, *De Re Militari et Bello Tractatus*, vol. II, trans. by Herbert C. Nutting (Oxford: Clarendon Press, 1936); Francisci de Victoria, *De Indis et de Ivre Belli Relectiones*, trans. by Franciscus de Victoria (Washington D.C.: Carnegie Institution, 1917).

was present centuries before Grotius. For instance, in discussing the origins of war, Giovanni de Legnano acknowledged it was based on divine law and the law of nations.²⁸ In making such a statement, Legnano made reference to books of the Old Testament as evidence of the former, and to old Latin texts (such as the *Codex Hermogenianus* and Saint Isidore's *Etymologiae*) as evidence of the latter. Whether Legnano meant to speak of the law of nations in the sense that the Romans spoke about *jus gentium*, or in the slightly more modern conception of Saint Isidore,²⁹ is outside the scope of this analysis. However, it suffices to note that, in his view, neither the Bible nor Roman law could wholly explain the recognition of war. As he expanded on the regulation of war in the law of nations, he used natural law to explain the human inclination to war and therefore, its origins.

Before entering into Grotius' system, it is worth reviewing how the relationship between God and the laws of nations, as presented by his predecessors, became an issue of sources. According to Alberico Gentili, the law of nations was natural law: "That which is in use by all nations of men, which native reason has established among all human beings, and which is equally observed by all mankind."³⁰ However, he acknowledged that these are unwritten laws given by God.³¹ Evidently, as God was the creator of nature, whatever laws were understood by men were ultimately linked to His will. Whether stated by the Romans, Greeks or by the Bible, what was true for many and resisted the test of time was assumed to be law. In this sense, human reason as directed by God is the source of law: "We have not received them through instruction, but have acquired them at birth; we have gained them, not by training, but by instinct."³²

As for the evidence of this God-given reason, Gentili used the authority of "philosophers and other wise men [who] are regarded as honourable and of good repute", "persuasive arguments", "the civil law of Justinian", and "the Sacred Books of God".³³ Gentili gave special weight to the Bible as evidence of this law, and for this he quoted the *Codex Agobardinus* of Tertullian: "[t]hese testimonies are forthwith divine; they do not need the successive steps which the rest require."³⁴

Hugo Grotius did not only start a transition but also experienced it himself in his writings. His first book, *De Iure Praedae*, was written between 1604 and 1605,³⁵ and it presents a system of international law different from in his later writings. However, only its twelfth chapter was published during Grotius' life, under the title *Mare*

²⁸Giovanni de Legnano, *Tractatus De Bello, De Represaliis et De Duello* (Oxford: Oxford University Press, 1917) at 224.

²⁹See James Brown Scott, *Law, the state, and the international community* (New York: Columbia University Press, 1939) at 202.

³⁰Gentili, *supra* note 3 at 8.

³¹*Ibid* at 9–10.

³²*Ibid* at 10.

³³*Ibid* at 11.

³⁴*Ibid* at 11.

³⁵Grotius, *De Iure Praedae*, *supra* note 21 at xiv.

liberum sive de jure quod Batavis competit ad Indicana commercia dissertati, and the world would not come to discover *De Iure Praedae* until 1864.³⁶ Since the existence of this book did not influence the thinking of its time and, after discovery, was appreciated more for its historical value than for the currency of its argument, it will not be discussed at length here. It suffices to say that *De Iure Praedae* presents a system in which the natural law common to all men, as imprinted by God himself in man, constitutes the primary law of nations.³⁷ Grotius also recognised that a secondary law of nations exists by the will between nations, its main institution being the international pact with custom in second place because “not everything customary among the majority of people will forthwith constitute law”.³⁸ Grotius later published a book that had great influence during his time, and is today recognised as one of the foundational texts of international law: *De Iure Belli ac Pacis*.

While acknowledging the superiority of an eternal natural law over man-made precepts, *De Iure Belli ac Pacis* presents a slight difference in its sources than *De Iure Praedae*. Grotius enunciates and explains that the law “concerned with the mutual relations among states or rulers of states”³⁹ was formed by the rules, “derived from nature, or established by divine ordinances, or having its origin in custom and tacit agreement”.⁴⁰ A note of caution: Grotius’ *De Iure Belli ac Pacis* was published in 1625, that is, two decades after *De Iure Praedae* was written. The time did not pass in vain as he “abandoned the scholastic concept of natural law as a basic element of his argument.”⁴¹ No mistake should be made, for although God remained the source of all law,⁴² precedence was given to the law of nature.

As understood by Grotius in *De Iure Belli ac Pacis*, the collective sense of humanity was central to the law of nature. The rational capacity of human beings and their preference for social life made them capable of expediently understanding nature’s design and the laws that governed it. Thus, natural law was viewed as being discernible through the exercise of good human judgement, free from passions and undisturbed by external pressure.

Grotius did not enter into much detail when explaining the nature of divine law, as in his opinion the existence, benevolence and superiority of God were verifiable facts. However, he did devote some sections to the differentiation of divine and natural law with respect to the Bible and other religious books. By the same token, Grotius did not discuss the nature of custom and agreement, beyond enunciating the basics of social contract theory.

³⁶Ibid at xvi; Karl Zemanek, “Was Hugo Grotius Really in Favour of the Freedom of the Seas?” (1999) 1 J Hist Int’l L48 at 50–51 and fn 8.

³⁷Grotius, *De Iure Praedae*, ibid at 13.

³⁸Ibid at 26–27.

³⁹Grotius, *De Iure Belli ac Pacis*, supra note 2 at 9.

⁴⁰Ibid.

⁴¹Ibid at xxi.

⁴²See David Kennedy, “Primitive Legal Scholarship” (1986) 27 Harv Int’l LJ 1 at 79 and 82.

It is remarkable, though, that according to Grotius' system in *De Jure Belli ac Pacis* all sources are interdependent yet not hierarchical. That is, custom and agreements are justified under the natural law obligation to abide by pacts, while natural law is recognizable thanks to the "essential traits implanted in man"⁴³ by God himself. In *De Jure Praedae* custom was not law in the same sense as expressed will was, and therefore hierarchically inferior to treaties.

But even if the system of *De Jure Belli ac Pacis* constitutes a departure from Grotius' previous views on the relationship between natural and divine law, this book is no less religious than *De Jure Praedae*.⁴⁴ Grotius' use of the Bible as evidence of the law is extensive in both texts.⁴⁵ Therefore, it would be wrong to see *De Jure Belli ac Pacis* as the start of secular iusnaturalism.⁴⁶

Over one hundred years after Grotius' books appeared, his opinions would be tested by Jean-Jacques Burlamaqui's 1747 *Principles du droit naturel*. It must be

⁴³Ibid at 14.

⁴⁴Somos, who has done an impressive analysis of Grotius and his contemporaries' writings is of the view that Grotius "presented an unbroken string of forced interpretations that had shocking implications for just war theory, and he did so in order to show that the Bible should not be used in international law at all", however, he also states: "Grotius was clearly no atheist, and I doubt that he set out to write [*De Jure Praedae*], and later [*De Jure Belli ac Pacis*], to construct a secular theory of international relations", Mark Somos, "Secularization in *De Iure Praedae*: from Bible Criticism to International Law" (2005–2007) 26:1 *Grotiana* 147 at 157 and 190.

⁴⁵The 1738 edition of *De Jure Belli ac Pacis* translated by Jean Barbeyrac—which is not my preferred edition—contains a very useful index of "Passages of Scripture, Illustrated examined or corrected in this Treatise", which illustrates the point here made, Hugo Grotius, *The Rights of War and Peace*, trans. by Jean Barbeyrac (Clark: Lawbook Exchange, 2004); see also David J. Bederman, "Reception of the Classical Tradition in International Law: Grotius' *De Jure Belli ac Pacis*" (1996) 10 *Emory Int'l L Rev* 3 at 5 (although Bederman discusses Grotius use of Greek and Latin sources, he noted that "Almost the entirety of this textual authority (at least for the 1625 edition of the book) came from antiquity. Those sources can, in turn, be equally divided between biblical quotes and the writings of classical authors.").

⁴⁶Mark W. Janis, "Religion and the Literature of International Law: Some Standard Texts" in Mark W. Janis, Carolyn Maree Evan, eds, *Religion and International Law* (The Hague: Martinus Nijhoff, 1999) at 123 ("His theory of a law of nations based on the consent of sovereigns was meant to be more or less religiously neutral. However, from a reading of his text, it is doubtful that Grotius meant to be or was irreligious or secular"); William P. George, "Grotius, Theology, and International Law: Overcoming Textbook Bias" (1999–2000) 14:2 *J L & Religion* 605 (arguing that English-language international law textbooks "present Grotius as the one who finally liberated international law from theology when, in fact, his approach to international law was unabashedly theological"); *contra*, Benedict Kingsbury and Adam Roberts, "Introduction: Grotian Thought in International Relations", in Hedley Bull, Benedict Kingsbury and Adam Roberts, eds, *Hugo Grotius A and International Relations* (Oxford: Clarendon Press, 1990) 1 at 3–4 (in their view, Grotius presented a "systematic reassembling of practice and authorities on the traditional but fundamental subject of the *jus belli* [laws of war], organized for the first time around a body of principles rooted in the law of nature"); Somos, *supra* note 44 at 190 ("The fact remains that his use of biblical references in [*De Jure Praedae*] indicate that he was already thinking in terms of the essentially secular, new system of laws that we find in *De iure belli ac pacis*"); Mark Somos, *Secularization and the Leiden Circle* (Leiden: Koninklijke Brill, 2011) at 384 ("If one has to date the birth of secular international law, one cannot find a better year than 1625").

noted that, by that time, the influence of Suarez in the separation of natural law and the *jus gentium* had disappeared. Burlamaqui resembles secular iusnaturalists, such as Christian Wolf and Emmerich de Vattel, who came after him and believed that “the Law of Nations was, in its origin, merely the Law of Nature applied to Nations.”⁴⁷ However, like Johann Gottlieb Heineccius,⁴⁸ he recognised the superiority of God over the latter.

Burlamaqui’s critique to Grotius would depart from the latter’s reduction of the law of nations to a human law. That is, Burlamaqui rejected the importance that Grotius gave to treaties and custom. Burlamaqui viewed God as the only origin of any common law among nations, and thus denied the existence of a universal and obligatory custom.⁴⁹ While Burlamaqui did not construct a system of sources or present the evidence upon which he relied, he drew the principles of a system of law, the validity of which, ultimately resides in God. He divided the law of nations into those that are necessary and those that are arbitrary, the former being natural law and the latter understood as express or tacit convention. However, as with Grotius, even his arbitrary law ultimately depended on the natural law obligation to abide by pacts.⁵⁰

In the writings of scholars belonging to this trend, the content of the law of nations remains, for the most part, a matter of natural law. However, this natural law is handed down in accordance with God’s will to all men by way of reasoning. As “things which are well known ought to be stated, but not demonstrated”,⁵¹ the content of the law was mostly stated in absolute and universal terms. Evidently, using accepted religious text and God-given reason as irrefutable evidence of the law, elevates the argument to dogma.

A corollary to my argument is that trends re-appear every once in a while, not necessarily because their influence is still important to the body of knowledge they belong to, but rather because a particular scholar felt the need to bring back an argument. A clear example of this is Sir Robert Phillimore’s “Commentaries upon international law”. Although its first volume was published in 1854, supposedly more secular times, Phillimore’s work restates the Grotian model and gives primacy to divine law:

States are therefore governed, in their mutual relations, partly by Divine, and partly by positive law. Divine Law is either (1) that which is written by the finger of God on the heart of man, when it is called Natural Law; or (2) that which has been miraculously made known to him, when it is called revealed, or Christian law.⁵²

⁴⁷Vattel, *supra* note 5 at 4.

⁴⁸Johann Gottlieb Heineccius, *Elementa Juris Naturae et Gentium* (Indianapolis: Liberty Fund, 2008) at 323.

⁴⁹Jean-Jacques Burlamaqui, *The Principles of Natural Law and Politic Law* (Indianapolis: Liberty Fund, 2006) at 176.

⁵⁰*Ibid* at 177.

⁵¹Gentili, *supra* note 3 at 10.

⁵²Robert Phillimore, *Commentaries upon international law*, vol. 1 (London: W.G. Benning, 1854) at 56.

2.3 Natural Law

While “God’s in his Heaven—All’s right with the world!”⁵³

For international law, this meant leaving the divine law to the clergy and putting the Bible away. The change that came along was dramatic yet not total. That is, scholars started to omit references to God, divine law or religious texts, while keeping most of the general structure of the system created by Grotius. In simpler words, natural law became secular.

This section deals with the trend of natural law, but a different kind of natural law. Among Grotius and his contemporaries, natural law was a product of human reason as directed by God. In their view, since God created all nature, and especially the mind of men, any rule deduced by the mind of men from nature was a direct consequence of God’s will. The natural law that emerged in the middle of the 17th century, and was present until the beginning of the 20th, was a law that came directly from human reason. No divine will and no master design came into play.

However, with the decline of God and the religious text that was evidence of His will, all other sources gained relevance. That is, in this trend, valid law could come as “the dictate of right reason”⁵⁴ or the treaties and other agreements entered into by states. This comes from the need to order the loosely regulated public international realm (which, judging from the writers of the time, was reduced to the laws of war, the law of the sea, and diplomatic relations) at a time when modern multilateral treaty-making was not yet possible.

The disappearance of God and the Bible from international legal texts was a gradual process, which arguably started in 1650 with Richard Zouche’s *Iuris et Iudicii Fecialis, sive, Iuris Inter Gentes*. Zouche’s book was a systematic exposition of questions of law that might rise between sovereigns and individuals in times of war and peace. In defining the law that deals with these questions, Zouche stated: “That which natural reason has established among all men is respected by all alike, and is called the Law of Nations, as being a law which all nations recognise.”⁵⁵ Zouche separated the law of nations and the law of nature, for the former comes from “some general agreement” expressed either by “common customs” or by “compacts, conventions and treaties”.⁵⁶ However, such separation is rather deceiving as the agreement of nations must be in harmony with reason.⁵⁷ Still, there is no mention of a divine will behind either type of law. As for the evidence of this law, Zouche still made use of the Bible along with Roman law and the usual Greek,

⁵³Robert Browning, *Pippa passes* (Cambridge: Chadwyck-Healey, 1994) at 25, online: Literature Online <<http://lion.chadwyck.com>>.

⁵⁴Rachel, *supra* note 7 at 8.

⁵⁵Richard Zouche, *Iuris et Iudicii Fecialis, sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio*, vol. 2, trans. by J.L. Brierly (Washington D.C.: Carnegie Institution, 1911).

⁵⁶*Ibid* at 2.

⁵⁷Rachel, who wrote after Zouche, denounced his reliance on reason as confusing the law of nations and the law of nature, Rachel, *supra* note 7 at 179.

Latin and other writings, but “because when many persons at different times and places lay down the same principle, that principle must be referred to a universal cause.”⁵⁸ The authority of the Bible did not come as a divine mandate but as evidence to “establish what has been received [...] in accordance with natural reason by the custom of nations”,⁵⁹ and in fact it was quoted only a few times throughout the text.⁶⁰

The importance of reason and usage became more evident with Johann Wolfgang Textor’s *Synopsis Juris Gentium*. In opposition to Zouche, Textor did see a common ground between natural law and the law of nations: both come from natural reason. However, while the law of nature comes directly from that reason, “the Law of Nations issues through the medium of international usage.”⁶¹ Textor postulates what can arguably be the earliest express separation between material and formal sources of international law:

[T]wo sources of the Law of Nations are indicated: (1) Reason, which, as the proximate efficient cause, dictates to the various nations that this or that is to be observed as Law among the human race; (2) the Usage of nations, or what has been in practice accepted as law by the nations.⁶²

It is, therefore, up to experts to give evidence of the reason behind the practice of States, which itself constitutes the law; “and these two are what I named as the authentic sources of the Law of Nations.”⁶³ So necessary is the interplay of both elements for Textor that, in his opinion, the new law of nations must be allowed to displace what he referred to as an old law of nations, a law strictly based on custom.

Cornelius van Bynkershoek, in his *Questionum Juris Publici Libri Duo* agreed with Zouche and Textor: “It is only from reason and custom that we can learn the general law of nations in this matter.”⁶⁴ The relevance of reason as a source points to the idea of an action of discovery by men. The objects to be discovered are the laws of a natural society of nations.⁶⁵

Before the end of the first half of the 18th century there was a return to the conception of the laws of nations as the laws of nature applied to nations, first in the

⁵⁸Zouche, *supra* note 55 at 2.

⁵⁹*Ibid.*

⁶⁰*Ibid* at 2 (Psalms), 4 (Exodus), 8 (Genesis and Kings), 61 (Daniel) and 70 (Ezekiel).

⁶¹Johann Wolfgang Textor, *Synopsis Juris Gentium*, vol. 2, trans. by John Pawley Bate (Washington, D.C.: Carnegie Institution, 1916) at 4.

⁶²*Ibid* at 1.

⁶³*Ibid* at 2.

⁶⁴Cornelius van Bynkershoek, *Questionum Juris Publici Libri Duo*, vol. 2, trans. by Tenney Frank (Oxford: Clarendon Press, 1930).

⁶⁵Vattel, *supra* note 5 at 8.

religious sense with Heineccius⁶⁶ and Burlamaqui,⁶⁷ but more decidedly and in the secular sense with Christian Wolf⁶⁸ and Emmerich de Vattel.⁶⁹

In Wolf's *Jus Gentium Methodo Scientifica Pertractatum*, this natural law applied to nations was only one part of the laws of nations and is called, following the Grotian tradition, the necessary laws of nature.⁷⁰ In opposition to this necessary law, there is a positive law of nations, which is subdivided as voluntary, 'stipulative' or customary depending on the type of will that generates them. "[T]he voluntary law of nature rests on the presumed consent of nations, the stipulative upon the express consent, [and] the customary upon the tacit consent."⁷¹ Under this system, the voluntary law of nature is one "to have been laid down by its fictitious ruler and so to have proceeded from the will of nations."⁷² That is, under this highly organised system, Wolf recognised a set of universal rules or principles that come from a supposed consensus of nations that is binding upon them.

In *Le Droit des Gens*, Vattel follows the same classification as Wolf and expands on the possible confusion between the voluntary law and the natural or necessary law of nations.⁷³ According to Vattel, the voluntary law of nations should develop and complement the necessary law of nations:

[A]fter having established on each point what the necessary law prescribes, we shall then explain how and why these precepts must be modified by the voluntary law; or, to put it in another way, we shall show how, by reason of the liberty of nations and the rules of their natural society the external law which they must observe towards one another differs on certain points from the principles of the internal law, which, however, are always binding upon the conscience.⁷⁴

The principal change that came with the secularization of natural law was in the places where international law was to be found. While Textor, Zouche and van Bynkershoek integrated natural law with the objective sources, Vattel and Wolf treated them separately but placed natural law above treaty and custom. The result is similar: The practice of States could not produce law unless it was somehow in accord with the rules and principles derived from nature. Vattel is clear in stating that "all treaties and customs contrary to the dictates of the necessary Law of Nations are unlawful."⁷⁵

⁶⁶Heineccius, *supra* note 48 at 323.

⁶⁷Burlamaqui, *supra* note 49 at 174.

⁶⁸Wolff, *supra* note 7 at 9.

⁶⁹Vattel, *supra* note 5 at 4.

⁷⁰Wolff, *supra* note 7 at 10.

⁷¹*Ibid* at 19.

⁷²*Ibid* at 18.

⁷³Vattel, *supra* note 5 at 9.

⁷⁴*Ibid*.

⁷⁵*Ibid* at 5.

As for the evidence of that reason, scholars of this trend rely on their own arguments and in the writings of their predecessors.⁷⁶ Baldus' dictum seems appropriate to explain their method: "What the world approves, I do not venture to disapprove."⁷⁷ This however, makes the content of 'natural' as elusive and unpredictable as dependence on God's will. Even as natural law started to decay and became neglected in modern international law manuals, the writings of celebrated authors continued to appear as evidence of law. In the first edition of Henry Wheaton's *Elements of International Law* (1836), the writings of renowned authors were listed as the first source of international law, above treaties and custom.⁷⁸

2.4 General Principles of Law

The first years of the 20th century were characterised by a constant debate between the rising positivists and the declining iusnaturalists.⁷⁹ It eventually became evident that natural law had lost its hegemonic place:

The law of Nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; but they have failed as a durable foundation of either municipal or international law and cannot be used in the present day as substitutes for positive international law, as recognised by nations and governments through their acts and statements.⁸⁰

That being said, scholars quickly realised that positivism was incapable of delivering all the answers to the problems of the inter-war period.⁸¹ There was a need to look for another non-objectified element. The trend identified in this section is the recognition of the general principles of law as a source of international law.

It is difficult to establish when the general principles of law started to appear as a source of international law. Verdross traces them back to the 'principles of objective law' applied by arbitral tribunals in the Middle Ages⁸² and cites arbitral

⁷⁶Zouche, for instance, bases his chapter on "the law of nations" on Iustinianus's Digest, Jean Bodin's fifth book of the Commonwealth, Hobbe's Leviathan and Grotious's *De Jure Belli et Pacis*, Zouche, *supra* note 55 at 3.

⁷⁷Baldus de Ubaldi, *Consilia IV* at cccxcvi, as quoted by Gentili, *supra* note 3 at 11.

⁷⁸Henry Wheaton, *Elements of international law: with a sketch of the history of the science* (London,: B. Fellowes, 1836).

⁷⁹Le Fur, *supra* note 4 at 325.

⁸⁰*North American Dredging Company of Texas (U.S.A.) v. United Mexican States* (1926), IV RIAA 26 at 29 (para 12).

⁸¹On this point, see Hans J. Morgenthau, "Positivism, Functionalism, and International Law" (1940) 34:2 AJIL 260 at 261–273.

⁸²Alfred Verdross, "Les principes généraux du droit dans la jurisprudence internationale" (1935) 52 Rec des Cours 191 at 207 [Verdross, "Les principes généraux"].

decisions as early as 1861 which use a principle in order to overcome the absence of specific rules of international law.⁸³ This demonstrates only that the applicability of principles of law was a practice among arbitral tribunals,⁸⁴ or at its best that international customary law allowed for the application of principles in certain cases.⁸⁵ It was their inclusion in the Statute of the Permanent Court of International Justice that “cemented their role as a source of international law.”⁸⁶

The inclusion of the general principles of law in the Statute of the PCIJ was rather controversial. The task of producing a draft-scheme for the PCIJ was entrusted to an Advisory Committee of Jurists, which met in June and July 1920. Baron Edouard Descamps, president of the Advisory Committee, prepared a draft article defining the sources of international law to be applied by the Court. Those were: treaties, custom, “the rules of international law as recognised by the legal conscience of civilized nations” and “international jurisprudence as a means for the application and development of law.”⁸⁷ Elihu Root immediately rejected the draft article, as he believed that States would submit only to positive rules.⁸⁸ Åke Hammarskjöld, deputy secretary of the Committee, described the debate in the following terms:

The President had, according to his custom, presented four points representing his point of view, and as usual he expressed his opinion that they would be adopted as they stood. Mr. Root, however, in a long and, for once, vehement speech, criticised the points, their basis, their logic, their everything, so that when he had finished nothing was left but a very queer impression.⁸⁹

As the debate continued, Professor Francis Hagerup argued that, if Root’s views were adopted, the Court might encounter cases in which no conventional or

⁸³Ibid at 210; Raimondo explains five arbitral cases where general principles were used as subsidiary sources of international law, Fabián Raimondo, *General principles of law in the decisions of international criminal courts and tribunals* (Leiden; Boston: M. Nijhoff Pub., 2008) at 10–15.

⁸⁴See e.g. *Eastern Extension, Australasia and China Telegraph Company, Ltd. (Great Britain) v. United States* (1923), VI RIAA 112 at 114 (“International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem”).

⁸⁵Karl Wolff, “Les principes généraux du droit applicables dans les rapports internationaux” (1931) 36 Rec des Cours 479 at 483.

⁸⁶Raimondo, *supra* note 83 at 16.

⁸⁷Permanent Court of International Justice—Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (The Hague: Van Langenhuysen Frères, 1920) at 306 (13th Mtg., 1 July 1920, annex No. 3) [*Procès-Verbaux*].

⁸⁸Ibid at 293–294 (13th Mtg., 1 July 1920).

⁸⁹Ole Spiermann, “‘Who Attempts Too Much Does Nothing Well’: The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice” (2002) 73 Brit YB Int’l L 187 at 213 [Spiermann, “Who Attempts Too Much”].

customary rule could be applied.⁹⁰ Upon the willingness of most members of the Court to contemplate the possibility of *non liquet*, Lord Walter G.C. Phillimore and Root proposed a new draft which included ‘the general principles of law recognised by civilised nations’⁹¹ as a third source. This wording was provisionally adopted and would eventually form part of the draft-scheme that was submitted to the League of Nations⁹² and of the Statute of the Permanent Court as Article 38(c).⁹³

Evidently, the broad acceptance that Article 38 enjoys today⁹⁴ and the recognition of the general principles of law as a source of international law was not automatic. For many years after the entry into force of the Statute of the PCIJ, scholars considered that the only formal sources of international law were custom and treaties.⁹⁵ This, however, was a correct appreciation according to the language of the times. For the scholar of the 1920s, ‘formal sources’ were the methods of creating positive law,⁹⁶ while the general principles of law were legal maxims recognised in the internal law of all States.⁹⁷ Since principles are not created but rather a product of deductive logic, they did not constitute formal sources of international law. “Only two of the three sources—treaty and custom—are clearly positive in character; i.e. they specify obligations and entitlements pursuant to acts of human will. The character of the general principles is, as we shall see, more ambiguous.”⁹⁸

In the 1927 *Lotus* case, the PCIJ was asked to interpret the meaning of the phrase ‘principles of international law’ in the Treaty of Peace between the Allied Powers

⁹⁰*Procès-Verbaux*, *supra* note 87 at 296 (13th Mtg., 1 July 1920) and 308–309 (14th Mtg., 2 July 1920).

⁹¹*Ibid* at 344 (15th Mtg., 3 July 1920, annex No. 1).

⁹²James Brown Scott, “The Draft Scheme of the Permanent Court of International Justice” (1920) 7 *International Conciliation* 507 at 525.

⁹³Protocol of Signature Relating to the Statute for the Permanent Court of International Justice Provided for by Article 14 of the Covenant of the League of Nations, 16 December 1920, [1921] 6 LNTS 379, at art. 38, (1923) 17 AJIL Supp 55, online: United Nations Treaty Collection <<http://treaties.un.org/doc/Publication/UNTS/LON/Volume%206/v6.pdf>>.

⁹⁴Shaw, *supra* note 12 at 66.

⁹⁵Charles De Visscher, “La codification du droit international” (1925) 6 *Rec des Cours* 325 at 339; Paul Heilborn, “Les sources du droit international” (1926) 11 *Rec des Cours* 1 at 20.

⁹⁶Example of this is Lassa Oppenheim’s famous analogy to a stream of water, which has appeared in every subsequent edition of his book: “Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law. And if we want to know whence there rules come, we have to follow the streams upward until we come to their beginning. Where we find that such rules rise into existence, there is the source of them”, Lassa Oppenheim, *International Law: A Treatise*, vol. I (London: Longmans, Green & co., 1905) at para 15, p 21; see also, De Visscher, *ibid* at 345 (“Ni la coutume, ni la convention ne sont, à proprement parler, les bases ou les fondements du droit international: elles ne constituent que les sources formelles du droit positif”); Heilborn, *supra* note 88 at 20 (“[c]omme sources du droit international, c’est-à-dire comme modes de sa formation...”).

⁹⁷*Procès-Verbaux*, *supra* note 87 at 335 (15th Mtg., 3 July 1920).

⁹⁸See, Stephen Hall, “The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism”, [2001] 12 *EJIL* 269 at 284.

and Turkey.⁹⁹ The Court stated that “as ordinarily used, [it] can only mean international law as it is applied between all nations belonging to the community of States”;¹⁰⁰ and then added “it is impossible (...) to construe the expression ‘principles of international law’ otherwise than as meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties.”¹⁰¹ While the interpretation of the expression was adequate for the case *sub judice*, it did little to clarify the meaning of Article 38(c) of the Statute. Many scholars of the time used the *Lotus* judgment to argue that the general principles of law had no independent content.¹⁰²

Another modest contribution to the recognition of general principles of law as a source of international law would occur in 1930. Three years before, the Assembly of the League of Nations had decided to call the First Conference for the Codification of International Law, and to submit three topics for its examinations: nationality, territorial waters and responsibility of States for damage done in their territory to the person or property of foreigners.¹⁰³ The Conference took place in The Hague from 13 March to 12 April 1930. The Committee discussing the third topic, responsibility of States, was soon faced with the need to define the sources of ‘international obligations’ for the purposes of the draft convention.¹⁰⁴ After several meetings a draft article was adopted by a majority vote of 27 to 3, with the following text:

The expression ‘international obligations’ in the present convention means obligations resulting from treaty, as well as those based upon custom or the general principles of law, which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.¹⁰⁵

The Committee would eventually inform the Conference that it “was unable to complete its study of the question of the responsibility of States (...), and accordingly was unable to make any report to the Conference.”¹⁰⁶

In 1929 Professor Alfred Verdross was invited to co-chair with Professor Albert de Lapradelle the twenty-first Commission of the *Institut de Droit International* on *sources du droit des gens*. By suggestion of the Bureau of the *Institut*, the work was

⁹⁹*Treaty of Peace with Turkey Signed at Lausanne*, 24 July 1923, 28 LNTS 11, (1924) 18 AJIL Supp. 4.

¹⁰⁰*The Case of the S.S. “Lotus” (France v. Turkey)* (1927), PCIJ (Ser. A) No. 10 at 16.

¹⁰¹*Ibid* at 17.

¹⁰²Antoine Favre, “Les principes généraux du droit, fonds commun du droit des gens” in *Faculté de Droit de L’Université de Genève*, ed., *Recueil d’études de droit international: en hommage à Paul Guggenheim* (Genève: La tribune de Genève, 1968) 366 at 372.

¹⁰³*Resolution adopted by the Assembly of the League of Nations*, 19 September 1927, 53 OJ Spec Supp 9, (1947) 41 AJIL Supp 106 at 106–107.

¹⁰⁴Edwin M. Borchard, “‘Responsibility of States,’ at The Hague Codification Conference” (1930) 24 AJIL 517 at 520–522.

¹⁰⁵*Ibid* at 530.

¹⁰⁶*United Nations Documents on the Development and Codification of International Law*, U.N. Doc. A/AC.10/5 (29 April 1947), (1947) 41:4 AJIL Supp 29 at 82.

divided between the co-chairs: de Lapradelle was in charge of studying treaties and custom, while Verdross was to study whether the general principles of law existed as a different source of international law. Verdross completed a preliminary paper and a draft resolution in November 1930, in which he concluded that “[l]es rapports internationaux ne sont pas seulement régis par les conventions et la coutume, mais aussi par les principes généraux de droit reconnus par les Nations civilisées...”¹⁰⁷ As a corollary, arbitral tribunals must apply Article 38 of the Statute of the PCIJ whenever the arbitration treaties or the *compromis* were silent about the sources to apply.¹⁰⁸ The committee submitted a final resolution confirming those findings to the 1932 session of the *Institut* in Oslo, but it was not adopted by the plenary. However, Professor Verdross’ work was not in vain. Not long after the Oslo session, he would be invited to teach a course at The Hague Academy of International Law and would choose the topic: *Les principes généraux du droit dans la jurisprudence internationale*. The course would eventually be published in volume 52 of the Academy’s course collection.¹⁰⁹ It must be noted that Professor Maurice Bourquin had already recognised that the general principles of law were a source of international law in his course at The Hague Academy. However, this also entailed a change in the concept of sources itself:

Au regard du droit des gens, elles ne sont pas des sources créatrices. Mais leur coïncidence est tenue pour le signe révélateur d’une norme et constitue ainsi une source du droit des gens, si par source on entend simplement un moyen de constatation.¹¹⁰

With the negotiations that gave birth to the UN, the allied powers formed a committee of experts to study the situation of the PCIJ and its future. In 1944, the committee delivered the Dumbarton Oaks Proposals, which established the guiding principles for the creation of the International Court of Justice.¹¹¹ The proposals departed from the belief that the statute of the ICJ should be either “(a) the Statute of the [PCIJ], continued in force with such modifications as may seem desirable, or (b) a new Statute in the preparation of which the Statute of the [PCIJ] should be used as a basis”.¹¹² Regarding the sources of law to be applied by the new Court, the Committee found that, regardless of the criticism of Article 38 of the Statute of the PCIJ, “any attempt to alter it would cause more difficulties than it would solve”.¹¹³ As a result, Article 38 was slightly modified in the Statute of the ICJ, but

¹⁰⁷Vingt et Unième Commission, *Les principes généraux de droit comme source du droit des gens* (1932) 37 Ann Inst Droit Int’l 283 at 297.

¹⁰⁸Ibid.

¹⁰⁹Verdross, “Les principes généraux”, *supra* note 82.

¹¹⁰Maurice Bourquin, “Règles générales du droit de la paix” (1931) 35 Rec des Cours 1 at 73.

¹¹¹Manley O. Hudson, “The Succession of the International Court of Justice to the Permanent Court of International Justice” (1957) 51:3 AJIL 569 at 570.

¹¹²“Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice: February 10, 1944” (1945) 39:1 AJIL Supp. 1 at 1.

¹¹³Ibid at 20.

maintained the general principles of law as a source of international law applicable to the Court.¹¹⁴

Arguably the discussion was put to an end by the Secretary-General of the UN¹¹⁵ when, in the preparatory work for the first session of the International Law Commission, he stated regarding the sources of international law that:

The codification of this aspect of international law has been successfully accomplished by the definition of the sources of international law as given in article 38 of the Statute of the International Court of Justice. That definition has been repeatedly treated as authoritative by international arbitral tribunals.¹¹⁶

An interesting change that confirmed the relevance of the general principles of law as a source can still be found in the writings of a particular set of authors. The original edition of Lassa Oppenheim's *Treatise in International Law* establishes that there are only two sources of international law: treaties and custom, as they represent, respectively, express and tacit consent of the States.¹¹⁷ This formula was maintained through the various editions by the author himself,¹¹⁸ by Ronald Roxburgh¹¹⁹ and by Lord Arnold D. McNair.¹²⁰ However, the 1948 edition by Sir Hersch Lauterpacht recognises that "although they [treaties and custom] are the principal sources of the Law of Nations, they cannot be regarded as its only sources."¹²¹ A section is devoted to discussing the general principles of law as a source of international law. Their adoption, in Lauterpacht's opinion, is a rejection of both the positivistic and naturalistic approaches to international law.¹²²

As controversial as the inclusion of the general principles of law in the draft-scheme of the PCIJ was, their content remains the object of much debate to this day.¹²³ Lord Phillimore, one of the drafters of the provision, explained during the debates of the Advisory Committee that he interpreted them as those "accepted by all

¹¹⁴*Charter of the United Nations*, 26 June 1945, Can TS 1945 No. 7, at Annex, Art. 38.

¹¹⁵It is widely known that the *Memorandum submitted by the Secretary-General* (*infra* note 116) discussed in this paragraph was actually drafted by Sir Hersch Lauterpacht.

¹¹⁶*International Law Commission, Survey of International Law in Relation to the Work of Codification of the International Law Commission (Memorandum submitted by the Secretary-General)*, 10 February 1949, UN. Doc A/CN.4/1/Rev/1 at 22.

¹¹⁷Oppenheim, *supra* note 96 at 22; for an interesting comparison of Oppenheim's editions, including the issue of sources, see Mark W. Janis, "The New *Oppenheim* and Its Theory of International Law Oppenheim's International Law" (1996) 16:2 *Oxford J Leg Stud* 329.

¹¹⁸Lassa Oppenheim, *International Law: A Treatise*, vol I, 2nd ed (London: Longmans, 1912).

¹¹⁹Lassa Oppenheim, *International Law: A Treatise*, vol I, 3rd ed by Ronald Roxburgh, (London: Longmans Green, 1920).

¹²⁰Lassa Oppenheim, *International Law: A Treatise*, vol I, 4th ed by Arnold Duncan McNair, (London: Longmans Green, 1928).

¹²¹Lassa Oppenheim, *International Law: A Treatise*, vol I, 7th ed by Hersch Lauterpacht, (London: Longmans, 1948) at 27.

¹²²*Ibid* at 29.

¹²³Bin Cheng, "General principles of law as a subject for international codification" (1951) 4 *Curr Legal Probs* 35 at 37.

nations *in foro domestico*”,¹²⁴ which has reinforced the idea that it refers exclusively to the principles of national law which enjoy general—if not universal—recognition.¹²⁵ This view does not deny that international law has principles of its own, but it implies an absolute separation between national and international law. Favouring this view, Herczegh argues that “[t]he general principles international law should therefore be traced in the subject-matter of international treaties and in international customary law.”¹²⁶ The opposing view considers that Article 38.1.c states that the applicable principles are those ‘recognised by civilized nations’, which does not limit such recognition to strict legislative recognition.¹²⁷ But as early as 1934, Frede Castberg pointed out that: “*Il serait par trop irrationnel de permettre à la Cour de rechercher les normes à appliquer dans ses décisions parmi les principes généraux de n’importe quel domaine du droit interne, sans qu’elle pût statuer selon les principes généraux du droit international.*”¹²⁸

My point is that the general principles of law were another normative category which specific content cannot be known *a priori*, and that allows legal actors to use their creativity in order to construct its specific content. As Cheng has pointed out, an integral analysis of the *procès-verbaux* of the PCIJ Statute shows that the members of the Committee “were only giving a name to that part of international law which is not covered by conventions and customs *sensu stricto*”,¹²⁹ a part that has existed under several names to this days.

2.5 Conclusion

“*[Il] a déjà été signalé que le droit international souffre sur bien des points d’un manque d’«objectivation» par rapport à d’autres normativités concurrentes.*”¹³⁰ It has been recognised that comparing the international legal order by analogy to

¹²⁴*Procès-Verbaux*, *supra* note 87 at 335 (15th Mtg., 3 July 1920).

¹²⁵Alfred Verdross, “Les principes généraux du droit dans le système des sources du droit international public” in *Faculté de Droit de L’Université de Genève*, ed., *supra* note 102, 521 at 524.

¹²⁶See e.g., Géza Herczegh, *General principles of law and the international legal order* (Budapest: Akadémiai Kiadó, 1969) at 42–44.

¹²⁷Michel Virally, “Le rôle des “principes” dans le développement du droit international” in *Faculté de Droit de L’Université de Genève*, ed., *supra* note 102, 531 at 542–543.

¹²⁸Frede Castberg, “La méthodologie du droit international public” (1933) 43 *Rec des Cours* 309 at 370.

¹²⁹Bin Cheng, *General principles of law as applied by international courts and tribunals* (Cambridge: Grotius Publications Ltd., 1987) at 19.

¹³⁰Joe Verhoeven, “Considérations sur ce qui est commun: Cours général de droit international public” (2008) 334 *Rec des Cours* 9 at 110.

national legal systems is not helpful to better understand the former.¹³¹ However, the modern international lawyer still seeks for the level of ‘objectification’ only found in national legal systems when it comes to sources.

In the period between the two world wars, the Pan American Union called for several meetings whose main objective was the codification of American international law. One of the results of such attempts is well known: the American Code of Private International Law; also known as the Bustamante Code, in recognition of its main author, Antonio Sánchez de Bustamante. It is less known that in the meeting held in La Habana, when Bustamante submitted his draft on behalf of the American Institute of International Law, Alejandro Álvarez did the same with a draft code on public international law. Álvarez’ draft comprised 30 projects which were meant to be approved as individual treaties. Project number four of the draft code states in its preamble: “Whereas it is proper to determine clearly for the future the fundamental bases of international law, and an end should be put to the uncertainty and the diversity of doctrines existing on this subject...”¹³² The project created a complex system on sources which were to be applied in this order: American treaties, American custom, more or less general practices of the American Republics, the manifestation of the legal consciousness of the New World (understood as un-ratified American treaties), rules of universal international law (both customary and conventional), general principles of international law (drawn from rules in force, especially when recognised by arbitral awards) and the precepts of international justice (understood as *vœux* of international conferences, resolution of recognised scientific institutions or opinions of contemporary publicists of authority).¹³³

Álvarez’ project number four—which, after failing to be adopted in La Habana, was re-submitted to the Rio de Janeiro Meeting in 1927 by the American Institute of International Law as project number one—was never adopted as a treaty. While arguably nobody has gone as far as Álvarez in designing such a comprehensive system, it exemplifies that search for a finite catalogue containing all possible sources of international law. However, it is unavoidable to wonder if the constitutionalisation of international law *à la* Álvarez is possible, useful or even desirable.

As I have demonstrated in the previous pages, the designation of the sources of international law has never been an exact science. As much as scholars try to base international law on an objective and ordered set of sources, the realities of

¹³¹*Report of the International Law Commission: Fifty-eight session*, UNGAOR, 61st Sess., Supp. No. 10, UN Doc A/61/10 (2006) at p 419 (it must be noted that the ILC was speaking specifically about hierarchy in national legal systems).

¹³²“Collaboration of the American Institute of International Law with the Pan American Union” (1926) 20 AJIL Supp. 300 at 304.

¹³³*Ibid.* at. 304–306; International Commission of Jurists, *supra* note 8 at 238–239.

international relations have always imposed a need for a non-objectified element,¹³⁴ a variable in the equation. This exercise of legal history shows, at the very least, that the uncertainty on the topic of sources and the anxieties it raises is anything but recent. The constant reliance on the external, the free, the non-objective is part of the very nature of the international legal system. It always has been. The message is that maybe international legal theory should embrace that uncertainty and work with it. Theory is, after all, the abstract explanation of a complex reality.

As ordered as Alvarez' draft seems to be, it is not free from non-objectified factors. Un-ratified conventions, *voeux* of international conferences and declarations of scientific institutions such as the International Law Association and the *Institut de Droit International*, hardly pass as law by modern standards.¹³⁵ Also, they do not necessarily reflect the views of the State and international organizations.

In any case, the point of this chapter was to recognise the multiplicity of legal manifestations that, throughout the history of international law, had enjoyed recognition as sources while being, by definition, non-objectified. General principles of law, natural law, divine law, soft law, "[w]hatever the current terminology, [they remain] a justification for answers produced by international law, rather than a source for those answers."¹³⁶ In the following chapters, I will deal with the subsequent period, that is, from 1945 to today, making a clear distinction, however, between the treatment of sources in general international law and in international human rights law. Chapter 3 will deal with the former, by analysing the influence that the decisions of the ICJ, restricted as it is by Article 38 of its Statute, have had in the study of the sources of international law.

¹³⁴I am, again, borrowing terms from Alf Ross, who divided the factors that constitute a judicial decision "based on the degree of their objectivity. This is greatest for the formulated rules, least for the spontaneous factors", Ross, *supra* note 13 at 82; as Spiermann explains: "In Ross' view, there were three kinds of sources: (1) 'objective', written sources (treaties); (2) 'partly objective' sources derived from previous practice, whether in courts or among subjects of law (precedent and custom); and (3) '[t]he free, not formulated, not objectified factors spontaneously arising in the judge as the mouthpiece of the community to which he belongs and which he serves", Ole Spiermann, "A National Lawyer Takes Stock: Professor Ross' Textbook and Other Forays into International Law" (2003) 14:4 EJIL 675 at 677–678.

¹³⁵Goldmann notes that among the earliest examples of 'soft law' are the '*voeux*' contained in the Final Acts of the 1899 and 1907 Hague Peace Conferences, Matthias Goldmann, "We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law" (2012) 25:2 Leiden J I L 335 at fn 5.

¹³⁶Spiermann, "Who Attempts Too Much", *supra* note 89.

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