THE SOURCES
OF INTERNATIONAL LAW

AN INTRODUCTION

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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

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

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[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

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[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

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[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

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[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

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[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

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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 there-with—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

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[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

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[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

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[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 argu-ably 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 inter-national 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 cri-teria for the sources of international law, and especially the way in which the cri-teria to distinguish law and non-law are to be deployed, are the object of relentless

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[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

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[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 prod-uce novel and thought-provoking chapters.

Among many others, four main sets of perspectives have been chosen as back-bone 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 out-side 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 import-ant 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 choos-ing 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 instruct-ive 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.aristote-liansociety.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.