Chapter VI  The Material Source of International Law: Manifestations of the Universal Juridical Conscience

I. Introduction: Insufficiencies of the Formal “Sources” and the Relevance of the Material “Source” of International Law

The attitude, adopted in the last decades, by part of the international legal doctrine, of limiting itself, as from an essentially positivist outlook, to consider only the formal “sources” of International Law, has deprived the consideration of the matter from an in-depth examination of the legal foundations, and, ultimately, of the validity itself, of the norms of International Law. It has excluded from the examination of the formation of International Law the substratum of legal norms: the beliefs, values, ethics, ideas, and human aspirations. Not surprisingly, such attitude has rendered the study of the matter rather arid, uninspiring, circumscribed to the modes or procedures whereby international norms are formally created. ¹ Such posture has reduced the outlook of International Law to that of a merely formal legal order. This reductionist outlook, conducive to unsatisfactory results, has, however, persisted along the last decades, and has had, in my view, harmful consequences, among which the perpetuation of the hermetic outlook of the positivist conception, and the emptying of an international legal order insensible to values, and its incapacity to fulfil social needs.

By the late sixties, for example, J.H.W. Verzijl, after duly distinguishing between the formal and material “sources” of Public International Law, pondered that it was not possible to examine the “sources” of Public International Law without recognizing the importance of natural law for the law of nations (droit des gens), irrespective of whether the content of natural law has an “objective” existence or emanates from human conscience. ² However, somewhat surprisingly, he suddenly interrupted this line of reasoning to affirm that only the “formal”

¹ For example, Michel Virally openly stated that what was designated as material “source” would not be of “interest” to the study of International Law; M. Virally, “Panorama du Droit international contemporain – Cours général de Droit international public”, 183 Recueil des Cours de l’Académie de Droit International de La Haye [RCADI] (1983) p. 167.

sources, as procedures of “creation” adopted to that end by a given legal system, ought to be regarded as “sources” of Public International Law.\(^3\)

Years earlier, the same posture of mental reservation had already manifested itself in legal doctrine. Contrary to what was affirmed, e.g., by Hans Kelsen, that it was not possible to reconcile the legal order with the moral order,\(^4\) it is my view that human experience throughout the XXth century, – marked by so many advances in the scientific-technological domain accompanied by unprecedented atrocities, – demonstrates that it is not possible to conceive the legal order making abstraction of the moral order.

The assertion by Kelsen was made in his evaluation of a classic study by J.L. Brierly, who, like him, sought to examine the basis of validity of the norms of International Law. Brierly came to affirm, in his study, that the connection between Law and moral was much more fundamental than its distinction, and that the ultimate basis of an international obligation rested on its ethical content;\(^5\) however, further on, Brierly himself confessed not to know how to conciliate the individual belief to act in conformity with Law with the “imperative” character of this latter.\(^6\)

In my understanding, there is not, in fact, how to dissociate the formation of International Law from the aspects pertaining to its own foundations. The tipically positivist feature of approaching the formation of International Law as from the outlook of the formal “sources” of International Law (listed in Article 38 of the ICJ Statute) with emphasis on evidence of State consent, – as followed for years in the case-law of the PCIJ and the ICJ, – appears increasingly open to challenge. It is the posture resulting from the analytical positivism of the XIXth century, grounded on legal formalism (including its list of “sources”), and making abstraction of the multifaceted, vast and complex process of formation of contemporary International Law,\(^7\) aiming at facing the new challenges with which

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3 In refusing to take into account the principles which transcend the norms of positive law, – irrespective of their being captured by doctrine, or by reason, or by human conscience, or formed “spontaneously” (as propounded by the “historical school” – *ibid.*, pp. 7-8), – he yielded to the hermetic outlook of legal positivism.


6 Cf. *ibid.*, pp. 66-67, and cf. also pp. 68-80. And, in his *Law of Nations*, he limited himself, in a rather unsatisfactory way, to say, *tout court*, that the answer to this question was to be found outside the legal order, it being incumbent upon the philosophy of Law to provide it. He thus withheld himself in the middle of the road... Cf. J.L. Brierly, *The Law of Nations*, 6th. ed., Oxford, Clarendon Press, 1963, p. 54.

7 E.g., the “law-making activity” of some U.N. organs (for the realization of U.N. purposes), – mainly certain resolutions of the General Assembly, – with a bearing on the evolving *opinio juris* of the international community; D.P. Verma, “Rethinking