


Matthias Lippold

The Interrelationship of the Sources of Public International Law



Nomos

<https://doi.org/10.5771/9783748937579-1>, am 18.10.2024, 05:30:52
Open Access –  – <https://www.nomos-elibrary.de/agb>

Beiträge zum
ausländischen öffentlichen Recht und Völkerrecht

Edited by
the Max Planck Society
for the Advancement of Science
represented by Prof. Dr. Armin von Bogdandy
and Prof. Dr. Anne Peters

Volume 323

Matthias Lippold

The Interrelationship of the Sources of Public International Law



Nomos

Open Access funding provided by Niedersachsen-Konsortium.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Göttingen, Univ., Diss., 2020

ISBN 978-3-7560-0234-4 (Print)
978-3-7489-3757-9 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-7560-0234-4 (Print)
978-3-7489-3757-9 (ePDF)

Library of Congress Cataloging-in-Publication Data

Lippold, Matthias

The Interrelationship of the Sources of Public International Law

Matthias Lippold

843 pp.

Includes bibliographic references and index.

ISBN 978-3-7560-0234-4 (Print)
978-3-7489-3757-9 (ePDF)

1st Edition 2024

© Matthias Lippold

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-0234-4 (Print)
ISBN 978-3-7489-3757-9 (ePDF)
DOI <https://doi.org/10.5771/9783748937579>



Online Version
Nomos eLibrary



This work is licensed under the Creative Commons Attribution 4.0 International License.

Preface

This book is a revised and updated version of my doctoral thesis which I defended at the Faculty of Law of the University of Göttingen in October 2020.

I would like to thank my academic teacher and the supervisor of this thesis, Professor Andreas Paulus, former Justice of the Federal Constitutional Court, for his constant support, encouragement and academic guidance. He has influenced my thinking about international law in many ways. He also directed my attention to the topic of this thesis.

I would like to thank Professor Peter-Tobias Stoll for providing the second review and Professor Frank Schorkopf for chairing the oral examination. I am grateful for the insightful comments and suggestions I received in the two written reviews and during the defense of the thesis.

I am also grateful to the whole community at the Göttingen Institute of International and European Law for creating a great atmosphere and an inspiring research environment; in particular, I thank the team of the Institute's library.

Outside Göttingen, I am grateful for stimulating discussions on international legal scholarship with my classmates and professors during my LL.M. year at New York University. I thank Professor Georg Nolte, now Judge at the International Court of Justice, for accepting me as an intern during the sixty-sixth ILC session and for the insights into the work of the ILC. I thank Professor Mads Andenæs for inviting me to participate in workshops in Geneva and Paris dedicated to the sources of international law and in particular general principles of law. I thank the participants of both workshops and the organizers and participants of the 2016 ESIL Research Forum in Istanbul. I am grateful for all the comments, feedback, inspirations and for the exchange of views on international law and its sources.

Professor Armin von Bogdandy and Professor Anne Peters accepted this book into the prestigious *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* series of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, for which I am much obliged.

I gratefully acknowledge the financial support received for my doctoral research from the *Studienstiftung des deutschen Volkes*. The *Niedersachsen-Konsortium* generously supported the publication of this book. The doctoral

dissertation underlying this book received the Faculty Prize of the Juristische Gesellschaft zu Kassel in the winter term 2020/2021.

Finally, I would like to thank my friends and I would like to thank my family. My deepest gratitude goes to my parents for their patience and their continuous, unconditional and generous support.

Göttingen, September 2023

Contents

List of Abbreviations	19
-----------------------	----

A. Introduction

Chapter 1: Setting the Scene	25
A. The conceptual framework	26
I. The plurality of sources and the architecture of public international law	27
1. The General Law of Treaties	28
a. Different codification approaches	29
b. The rules of treaty interpretation and their relationship with customary international law	32
2. The law of international responsibility	36
II. Traditional approaches to the relationship of sources	41
1. The relationship between sources	41
2. The relationship between the norms of different sources	44
3. The relationship between formal sources and material sources	45
III. The Politics as to the sources: Source preferences in the international community	47
1. Source preferences and the spirit of the time	49
2. Source preferences and the changed composition of the legal community	50
3. Source preferences and the substantive expansion and diversification of international law	53
IV. The Concept of interrelationship of sources and the scope of this study	56
1. The interrelationship of sources	56
2. Benefits of a focus on the interrelationship of sources in international practice	60
3. Contribution of an analysis of the interrelationship of sources to the doctrine relating to each source	62
a. Customary international law	62

b. General principles of law	65
c. Treaties	70
V. Situating the present study	72
1. The work of the ILC	73
2. Sociological perspectives: the proliferation of norms and socializing states	78
B. Structure of this study	86
I. Comparative-historical perspectives	86
II. Institutional perspectives	90
III. Perspectives on different normative contexts	91
IV. Doctrinal perspectives: revisiting the doctrine of sources	93

B. Comparative and historical perspectives

Chapter 2: Comparative Perspectives	97
A. Introduction: The interrelationship of sources in comparative legal thought	97
B. Example: The common law and the interrelationship of unwritten and written law	103
I. The Historic discourse of the relationship between the common law and the written law in the United Kingdom	105
1. Different law preferences: William Blackstone and Jeremy Bentham	106
2. John Austin and the will of the sovereign as source of all law	109
3. Subsequent perspectives in UK legal theory: Thomas Holland, H.L.A. Hart and Brian Simpson	111
II. The historic discussion of the relationship between unwritten law and the written law in the United States of America	113
1. Roscoe Pound	115
2. Benjamin Cardozo	117
3. Lon Fuller	118
III. A new interest in the interplay between common law and statutory law in the recent UK jurisprudence	120
1. Common law as human rights law	121
2. Common law in light of human rights	123
3. Concluding Observations	125
C. Example: German law and the interrelationship of sources	126

I.	The historical school	127
1.	Friedrich Carl von Savigny	128
2.	Georg Friedrich Puchta	129
II.	The declining relevance of custom	131
1.	Rudolf von Jhering's critique and the codification of civil law	131
2.	Approaches prior to the Basic Law	133
3.	Approaches under the Basic law	137
D.	Characteristics of general principles of law from a comparative historical perspective	138
I.	General principles in legal theory: an overview	140
II.	Conceptualizations of legal validity and different degrees of normativity of general principles	144
1.	Reflections on the scholarship of Josef Esser and Hans Kelsen's response	144
2.	Conceptualizations of legal validity and different degrees of normativity of general principles	147
III.	Assessment: recognizing the multifaceted character of general principles	151
E.	Concluding Observations	154
	Chapter 3: Historical Perspectives on article 38 PCIJ Statute	157
A.	Introduction	157
B.	The positivist climate: the doctrinal interest in treaties and general conceptions of law	157
C.	Institutional Background: The Hague Conferences of 1899 and 1907	164
I.	The background of the conferences	165
II.	The provisions on applicable law and the recognition of three sources	166
D.	The drafting of article 38	170
I.	Triad of sources in the preparatory work	170
II.	The discussion in the Advisory Committee of Jurists	171
1.	General principles of law	171
2.	The discussion of the interrelationship of sources	174
E.	Constructing the Interrelationship in the interwar period	178
I.	The PCIJ	178
II.	The 1930 Codification Conference and the discussion of the sources	182

III. The inter-war scholarship on the interrelationship of sources	186
1. Overview	186
2. Dionisio Anzilotti	189
3. Georges Scelle	192
4. Hans Kelsen	195
a. Legal-theoretical overview	196
b. The interrelationship of sources within the <i>Stufenbau</i>	198
aa. Customary international law	199
bb. Treaties as a product of the international community	200
cc. General principles of law	202
5. Alfred Verdross	203
6. Hersch Lauterpacht	207
F. Concluding Observations	211
Chapter 4: Concluding observations on the comparative and historical perspectives	215

C. Institutional Perspectives

Chapter 5: The International Court of Justice	221
A. Introduction	221
B. Third-party intervention and the interrelationship of sources	223
I. The general regime: Articles 59, 62, 63 and 66 ICJ Statute	224
II. The Court's practice to interventions under article 62 ICJ Statute: from a restrictive to a more inclusive approach?	226
1. The development of the restrictive approach	227
2. Tendencies of a more inclusive approach	229
3. A paradigm shift? Interventions in matters of customary international law - The <i>Jurisdictional Immunities</i> case	231
III. Evaluation	233
C. Jurisdiction and the interrelationship of sources	235
I. Jurisdiction clauses and their impact on the interrelationship of sources	236
II. The application of general international law as general part in relation to a specific rule	240
1. The uncontroversial cases: validity, interpretation, responsibility	240

2. A controversial case? Succession to responsibility	242
III. The relationship between jurisdictional clauses and "substantive" law	245
1. The relationship between applicable law and interpretation	247
a. The <i>Oil Platforms</i> case	247
b. The <i>Pulp Mills</i> case and the environmental impact assessment under general international law	249
2. From deconventionalization to reconventionalization? The prohibition of genocide and the distinctiveness of sources for the purposes of jurisdiction	252
IV. Recent Confirmations and Concluding Observations: distinctiveness for jurisdictional purposes	255
D. The normative environment in the jurisprudence of the ICJ	258
I. Varying degrees of generality of customary international law	260
II. Interpretative Decisions	266
1. Default positions, starting points and the normative context	267
a. The <i>Asylum</i> case	268
b. The <i>Nottebohm</i> case and the genuine link requirement	269
c. The significance of the normative context	274
2. "Scoping" and tailoring of the legal analysis	275
3. Shaping the rule by acknowledging an exception	277
III. The relationship between customary international law and treaty law	278
1. The <i>Morocco</i> case	279
2. The <i>North Sea Continental Shelf</i> judgment	280
3. Convergence between the Charter and customary international law into common principles	285
a. Self-determination	285
b. The prohibition of the use of force	289
4. Convergence of functionally equivalent rules in the law of the sea	290
a. From a focus on the distinctiveness to a convergence of functionally equivalent rules	291
b. Reasons for convergence: the vagueness of rules and judicial pragmatism informed by the normative environment	294
c. UNCLOS and its impact on customary international law	300

d. Concluding observations	303
IV. General Principles and the normative environment	305
1. The rare recourse to municipal law analogies	306
2. General principles and the international legal order	310
E. Concluding observations	313
Chapter 6: The International Law Commission	317
A. Introduction	317
I. Codification and the interrelationship of sources	317
II. The institutionalization of codification and the difficult distinction between progressive development and codification	319
III. The significance of the normative environment	325
1. The "blending of customary international law with the new order established by the United Nations"	325
2. The early consideration of principles expressed in treaties	327
3. Reconciling the normative environment and state practice: The recent controversy over immunity of State officials from foreign criminal jurisdiction	330
B. The form of codification and progressive development and its implications	338
I. The form of the ILC product	339
1. The form and the risk of "decodification"	340
2. The question of form and the respective spirit of the time	341
3. <i>Codification light</i> as joint enterprise of several actors	348
II. The substantive form: the codification choice between openness and closedness	350
III. Concluding Observations on Form and Substance	353
C. The interrelationship of sources in selected projects	354
I. The law of treaties	355
1. The scope of the topic	355
2. The interrelationship within the law of treaties	359
a. From intertemporality to a means of interpretation	360
b. Codification policies on the relationship with other principles and rules of international law	363
II. Responsibility of States for Internationally Wrongful Acts	364
1. The work of García-Amador	364
2. The focus on the rules of responsibility as secondary rules	367
III. Fragmentation of international law: difficulties arising from the diversification and expansion of international law	368

IV. The identification of customary international law	372
1. The role of normative considerations in the identification of customary international law	373
a. The scoping of the topic by the Special Rapporteur	373
b. The adopted draft conclusions	374
aa. The recognition of normative considerations	374
bb. The relationship between customary international law and treaties	376
2. Concluding observations: normative considerations addressed with caution	377
V. Peremptory norms of general international law (<i>Jus cogens</i>)	378
VI. General Principles of Law	384
1. General Principles of Law in the progressive development and codification	384
2. The new topic of General Principles of Law	386
a. Overview of the draft conclusions	386
b. Comments and reflections on the draft conclusions	388
D. Concluding Observations	395
Chapter 7: Concluding observations on the institutional perspectives	399

D. Perspectives in different fields of international law

Chapter 8: The European Convention on Human Rights	403
A. Introduction	403
B. The interpretation of the ECHR	406
I. The European Court's approach to interpretation	408
II. Relating the European Court's practice to the general rules of interpretation	414
III. Recourse to other rules and principles of international law for content-determination	418
C. Interpretative decisions in establishing the interrelationship	424
I. The construction of establishing a relation between the European Convention and other principles and rules of international law	425
1. Incorporation by proportionality analysis	425
2. Proportionality analysis and customary international law	426
a. Two different constructions	426

b. The operation of proportionality analysis	429
aa. The <i>Al-Adsani</i> judgment	429
bb. The <i>Jones</i> judgment	430
c. Repercussion of the construction: the focus on the individual case	432
d. Evaluation	434
3. Proportionality analysis and treaty law	436
4. Reconciliation on the basis of general principles	438
a. The prohibition of arbitrariness and international humanitarian law	438
b. Security Council Resolutions	441
II. Concluding observations	442
D. The relationship between the ECHR and the law of international responsibility	443
I. "Jurisdiction" and the relationship between article 1 ECHR and general international law	443
II. The role of attribution in relation to the ECHR	446
III. Two notions of "control" in relation to jurisdiction and to attribution	448
IV. A treaty-based functional equivalent to attribution under general international law?	451
V. Attribution in the context of international organizations	456
1. The development of normative criteria for the delimitation of responsibilities	456
2. The United Nations as a special case	458
E. Concluding Observations	460
Chapter 9: International Criminal Law	463
A. Introduction	463
B. The recognition of individual's responsibility for violations of international law	463
I. From the interwar period to the Military Tribunals in Nuremberg and Tokyo	464
II. The reception in the UNGA and treaty-making practice of states	469
III. The road towards an international criminal court	473
C. The interrelationship of sources and the International Criminal Tribunals	476
I. The preference for customary international law	476

1. Customary international law and individual responsibility for war crimes in non-international armed conflicts	477
2. Source preferences: customary international law and alternative avenues	479
II. Interpretative decisions and normative considerations in the identification of customary international law and general principles of law	485
1. The problem of appreciating practice in armed conflicts	485
2. General principles as a bridge between customary international law and the normative environment	487
a. Recognizing the interrelationship and distinctiveness of sources: normative inspirations and functional specificities	487
b. The risk to disregard the functional specificities	491
c. The role of domestic Law	493
3. The significance of the legal craft	497
a. Default positions	497
b. The determination of the scope of the rule	499
aa. An absolute prohibition of civilian reprisals?	499
bb. The conceptual alternative to an absolute prohibition: regulation by stringent criteria	501
III. Preliminary evaluation: the stabilizing effect of normative considerations and their limits	502
D. The Interrelationship of Sources and the Rome Statute	507
I. The legal regime	507
II. The interrelationship between the general rules of interpretation and the Rome Statute	515
1. Article 21 Rome Statute and the general rules of interpretation	515
2. The crimes of the Rome Statute and customary international law	517
3. Further development of treaty-based approaches or alignment with customary international law?	522
III. A conflict of sources? Between JCE, control theory and indirect perpetratorship	526
1. The construction of JCE and its three distinct categories	528
a. Indirect perpetratorship as conceptual alternative	531
b. Attempts of reconciliation	532

2. Rome and the move towards a new paradigm	534
3. Evaluation: institutional and conceptual competition instead of conflict of sources	538
IV. (No) Immunities under customary international law	546
1. The legal regime	547
2. The <i>Al-Bashir</i> case	548
3. The decision of the ICC Appeals Chamber	551
E. Concluding Observations	554
Chapter 10: International Investment Law	557
A. Introduction	557
B. From the interwar period to the modern investment regime	558
I. The historical connection between responsibility and the protection of aliens	558
II. The importance of unwritten law	562
1. The minimum standard and its contestation	564
2. The internationalization of contracts by general principles of law	571
a. The emergence of this doctrine in the interwar period	571
b. The continuation of this doctrine after the second world war	574
III. The development of the modern investment regime after WW II	577
1. Failed multilateral attempts	578
2. Ongoing contestation in the General Assembly	578
3. Preference for BITs	579
C. The interrelationship of sources in a bilateralist structure and the quest for general law	582
I. The relationship between treaty obligations and customary international law	583
1. The relationship between functionally equivalent rules	585
a. The jurisprudence of investment tribunals	585
b. The treaty-making practice of states	590
2. Reasons for the preference for convergence	592
II. The interrelationship of sources in the scholarly debate	595
1. Customary International Law	595
2. <i>Jurisprudence Constante</i>	597
3. Multilateralization <i>qua</i> interpretation and the rise of general principles	599

4. Examples of tribunals' recourses to principles	600
III. Evaluation	604
1. General principles and the development of the law	604
2. The promotion of paradigms by recourse to principles	607
3. A remaining role for customary international law as community mindset?	609
D. The significance of constructions	610
I. Competing constructions	610
1. Alignment between the BIT and necessity under customary international law	612
2. Differences between the BIT and necessity under customary international law	613
II. Revisiting the distinction between primary and secondary rules	616
1. The distinction in the law of state responsibility	617
2. The distinction in the case-law of the ICJ	619
3. The distinction and the relationship between the general law of treaties and the law of state responsibility	621
III. Concluding remarks as to the distinction between primary rules and secondary rules	624
E. Concluding Observations	625
Chapter 11: Concluding observations on the perspectives	629

E. Doctrinal Perspectives and Conclusions

Chapter 12: Doctrinal perspectives on and discussions of the interrelationship of sources	635
A. Introduction	635
B. Shifting research interests in specific sources	635
I. The early interest in general principles of law prior to the rise of codification conventions	635
II. Different approaches to new norms	639
1. Roberto Ago's spontaneous law	639
2. Bin Cheng and Karl Zemanek	642
III. Codification studies: the interrelationship between treaties and custom	645
1. Richard Baxter's paradox	645

Contents

2. Anthony d’Amato and the formation of custom by treaties	648
3. Hugh Thirlway	649
C. The interrelationship in a value-laden legal order	651
I. The continuing interest in customary international law in light of the <i>Nicaragua</i> judgments and skepticism	651
II. The interrelationship of sources in the international community	656
D. Recent legal positivist perspectives	667
I. Jörg Kammerhofer	667
II. Jean d’Aspremont	672
E. Concluding Observations	677
Chapter 13: Concluding observations	679
A. Reflections on the interrelationship of sources	679
I. The interrelationship of sources as a focus of research	679
II. Forms of interplay and convergences	681
III. The institutionalization and the interrelationship	683
IV. Customary international law	686
V. Treaties	689
VI. General principles	691
VII. The distinctiveness of sources and their interrelations	694
VIII. The politics in relation to the interrelationship of sources	697
IX. The interrelationship of sources and general international law	701
B. Conclusions	704
Bibliography	707
Index	841