

BOOK REVIEWS

International Law and its Sources: Liber Amicorum
Maarten Bos. Ed. Wybo P. Heere. The Hague:
T.M.C. Asser Instituut by Kluwer Law and
Taxation Publishers. 1989. XXIII, 196 pp. DF1. 94,
UK £ 30, US \$52.

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“If there is any ‘universality’ at all attaching to our discipline, it should be a universality of method on the basis of which international lawyers all over the world are able to communicate.” These words spoken by Professor Maarten Bos at the 25th anniversary of the Utrecht Institute of Public International Law are quoted in Wybo Heere’s introductory biography of Bos in his new *Liber Amicorum: International Law and its Sources*. (p. xv). Bos’ idea of “universality of method”, more fully fashioned in his 1984 work, *A Methodology of International Law*, is nicely complimented by the ten contributions in the *Liber Amicorum*, most of which reflect on problems of generating international rules.

Several contributions directly concern what most would call the sources of international law. Professor van Dijk writes on “Equity: A Recognized Manifestation of International Law?”, a topic which is an outgrowth of his study of the role of equity in international economic law. (p.1). He provides an interesting review of the deliberations of the Advisory Committee of Jurists and of the League of Nations in 1920 as they formulated the Permanent Court’s choice of law article, Article 38 of the Statute. (pp. 3-13). Helpfully, Professor van Dijk reminds us that the question of the proper discretion of the Court was very much on the minds of the Court’s founders, as they wondered how much power the Court should have to legislate as well as to apply rules. In the Advisory Committee, De Lapradelle and Root clashed, the former arguing that the Court must have the competence to supplement and even to correct conventional and

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customary international law (*aequitas praeter legem* and *aequitas contra legem*), the latter contending that the Court should apply only settled law. (p. 5). Although the record is not too clear, Professor van Dijk concludes that something of a compromise was reached: no express reference to equity was made, but many believed that equity might fall under general principles of law. (p. 11). In any case, the *ex aequo et bono* provision of Article 38 added by the League of Nations only supplemented and did not restrict the application of equity as an element of general principles. (pp. 11-13). In his review of the case law of the International Court, Professor van Dijk remains true to this theme. (pp. 13-17). He concludes that judges may use equity in applying the law (*aequitas intra legem*) and supplementing the law, but may not contradict the law without explicit state authorization. (pp. 17-22).

It is interesting to contrast the intimate negotiations leading to Article 38 with the gargantuan proceedings leading to the 1982 United Nations Law of the Sea Convention which are described in "The Third United Nations Conference on the Law of the Sea—Some Remarks on Its Contribution Towards the Making of International Law" by Professor Albert W. Koers. As Professor Koers concludes, "It may even be said that in some respects its negotiating and decision-making techniques have more resemblance to a legislative process at the national level than to the traditional process of multilateral negotiations." (p. 35). Although he is pessimistic about the future of the new Convention (pp. 38-46), Koers stresses how important the Conference was in developing new negotiating techniques, especially the "consensus" technique, i.e., the gentleman's agreement that the Conference "should make every effort to reach agreement on substantive matters by way of consensus." (pp. 27-28).

Other source-searching chapters include Mr. C.G. Roelofsen's meticulous historical chapter on "The Sources of *Mare Liberum*: The Contested Origins of the Doctrine of the Freedom of the Seas", Professor Georg Schwarzenberger's "State Bankruptcy and International Law", concerning the term state bankruptcy in municipal and international law, Professor A.M. Stuyt's "Human Rights Sources—An Outline", that divides human rights into municipal and international legal categories, and Mr. Nicolas Valticos' "The Sources of International Labour Law: Recent Trends", which looks principally at the conventions and recommendations generated via the International Labour Organization. Especially interesting is "Hierarchy of the Norms Applicable to International Investments" by Professor Ignaz Seidl-Hohenveldern. The chapter is a vigorously written rebuttal

of Third World claims for the emergence of a law establishing a New International Economic Order. Professor Seidl-Hohenveldern is particularly scornful of claims based on U.N. General Assembly resolutions, "the bottom of the scale", (pp. 148-150) and *jus cogens* (pp. 162-163).

Three other chapters treat some central issues of modern international law. Professor R.St.J. Macdonald writes on "Nuclear Weapon-Free Zones and Principles of International Law." He reviews the basic principles of such zones (pp. 48-50), proposed zones such as in the Balkans, Central Europe and Scandinavia (pp. 50-56), and existing zones set up by the Treaty of Tlatelolco for Latin America and by the Treaty of Rarotonga for the South Pacific. (pp. 56-66). Most interestingly, he analyzes the question of whether nuclear weapon-free zones can bind third states. (pp. 67-76). He notes the transition from the classic law of nations presumption of universality, to 19th century notions of European supremacy, to the 20th century's stress on state sovereignty. The last concept, of course, makes it very difficult to "impose obligations on third states without the latter's consent." (pp. 67-68). Professor Macdonald concludes with the observation that international law must be understood as an interconnected whole because "things are what they are mainly by virtue of their relationships to other things." (p. 75).

The idea of the interconnection of things is taken further in Professor Michael Reisman's "International Politics and International Law-Making—Reflections on the so-called 'Politicization' of the International Court." Professor Reisman views "the public denunciations in the United States of the so-called politicization of the International Court of Justice with a certain bemusement." (p. 78). He feels that the real problem is that "lawyers are not trained to acknowledge and explicitly address the political functions they perform and to refine the skills and concepts necessary to discharge them." (p. 92). Specifically, he recommends a six-point plan for "formal agencies of application" like the International Court: (1) study the relevant "power process", (2) identify power process "coalitions", (3) choose an alternative decision high in "values of human dignity", (4) maximize support, (5) avoid unwinnable confrontations, and (6) when "the power process is against you, use obscurantist techniques." (p. 88).

Professor Shabtai Rosenne also recognizes that international law operates in a political context, but his "International Law as it Stands at the End of the Twentieth Century" more plainly differentiates legal from political processes. Professor Rosenne believes that "the

conduct-regulating role of international law" will be more influential when the political order is better settled. (pp. 125-126). His insightful chapter describes the important role that non-intergovernmental international organizations play in world politics and laments that international law has kept up neither with this reality nor with the need to examine "the largely unexplored avenues of the sociology of international relations." (pp. 131-133). He stresses how necessary it is nowadays to create new law and how large a role non-official as well as official bodies now play in that creation (pp. 134-135). Professor Rosenne concludes by stressing the "consolidating role" international law has to play in the modern world, a theme, I think, not dissimilar in its emphasis from the methodology of Professor Bos, who, of course, inspired this fine collection of essays.