SYbIL | Spanish Yearbook of International Law

José María BENEYTO y Carlos JIMÉNEZ PIERNAS (dirs.), *Concepto y fuentes del Derecho internacional* (Valencia, Tirant, 2022), 678 pp.

In a quite recent paper published by the *European Journal of International Law* – a journal initially bi-lingual, even multilingual –, its author warned about 'language bias' when exploring how English influences international law researchers: "It constrains the search for research topics, restricts the way problems are framed, influences citation practices, excludes alternative approaches and influences how issues are eventually solved. In international legal scholarship, English language bias leads to an incomplete account of state practice. In other words, language bias contradicts the most fundamental objectives of (international) legal research."[1] I fully agree, as I do with another recent opinion published in the blog *Opinio juris* where its authors reminded that "[c]ultural peculiarities such as these create important communication gaps that are not the result of lack of fluency in English, but nevertheless affect the presence of peripheral scholars in international law. Journals are not only vehicles or repositories for scholarly work. They also embody and, in many ways, reproduce the mainstream culture and communication tools of their scientific community. A scientific community can only exist and function if its members are able to communicate with each other. And communication is not just about producing grammatically correct sentences or using the same legal terms and principles; it also comes down to *how* you communicate."[2] Our French colleagues – who have seen how their mother tongue has enormously lost its presence elsewhere – have also warned about this trend. For them, as systems of representation, languages induce a way of perceiving and understanding the world and, as such, guide the action of individuals. The predominance of a language consequently leads to major social and political effects, which can also stem from a perfectly conscious logic of power. It also favours individuals who master the dominant idiom, especially when it comes to their native language. Questions about justice, in the axiological sense, cannot therefore do without the linguistic dimension.[3] All this was advanced by the hypothesis of Sapir-Worth, explaining the intimate relationship between habits of thinking and habits of wording, and how language builds reasonings in a certain way, which will affect the mode you see the world.

These are the points: we think with words; and our words are the way we communicate our ideas. The art of legal writing canvases more than simple words since, depending on your legal culture, some words, expressions, phrases or the order you write them do not simply *mean* something; they may also something, often understood if you master to navigate in that particular legal culture only.

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1 Odile Amman, 'Language Bias in International Legal Scholarship: Symptoms, Explanations, Implications and Remedies', 20 *EJIL* (2022) 1–30, at 19 [https://doi.org/10.1093/ejil/chac044]

2 Alonso Gurmendi and Paula Baldini Miranda da Cruz, "Writing in International Law and Cultural Barriers", at <http://opiniojuris.org/2020/08/07/writing-in-international-law-and-cultural-barriers-part-i/>.

3 Isabelle Pingel and Jean-Christophe Barbato (dir.), *La langue du procès international: questions de justice linguistique* (Paris, Pedone, 2022).

Legal mainstream today is to write in English, particularly in international law. Most well-known doctrinal communities in other scientific languages – let's say Spanish, German, Polish or Italian, just to mention some European examples – have decided to edit their respective *Yearbooks of International Law* in English.[4] Most published books on international law – good and bad – are published in English;[5] and what is worse: too often, they do not include works written in other languages in their bibliography, thus neglecting excellent legal productions written in these languages.[6] Some of these legal writings are fundamental to understanding current international law and its theory, sometimes different methodologically and conceptually from notions commonly used and expressed in English.

This is the case of the doctrinal collection initiated with the volume here under review: the *Concepto y Fuentes* volume, the first of a forthcoming saga on public international law under the direction of professors Beneyto and Jiménez Piernas. It deserves to be included in any international law practitioner bibliography because it explains how a large number of authors writing in Spanish understand international law. And I have said "writing in Spanish" because the authors are not all Spaniards but coming from a college of international lawyers who teach and serve international law both in Hispanic America and Spain. This volume, for example, includes a contribution by an Argentinean and a Mexican colleague. And this is, under my point of view, one of the best contributions of this collection: across the Atlantic, Spanish language and legal culture have been shared and cross fertilised for centuries.[7]

This first volume, dedicated to the concept and sources of international law, addresses general concepts on the basics of our discipline, including the historic, sociological and systemic background of international law, its concept and epistemologies, as well as the place to be given to imperative law dispositive law, to the different formal sources: principles (structural and general), custom, unilateral acts, and doctrine and jurisprudence as auxiliary means. To all these questions this volume dedicates a different chapter.

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A general and long introduction on the history of international law (pp.17-102), written by José M. Beneyto[8], offers a review of the theoretical approaches and contributions of different authors and schools of thought in international law, and how they progressively shaped international institutions and rules. Perhaps too centred in Western legal history

4 At this point – *helas!* – I must admit my own "fault", as I have been editor-in-chief of the *Spanish Yearbook of International Law* for eight years.

5 Needless to say that IA already "authoring" scientific papers like *ChatGPT* – a question generating deep discussions among editors, researchers and publishers – also "writes" in English. See Ch. Stokel-Walker, "ChatGPT listed as author on research papers: many scientists disapprove", *Nature*, 18 January 2023, available at <https://www.nature.com/articles/d41586-023-00107-z>.

6 To be indulgent enough, most of our common law companions simply (and voluntarily) ignore other languages.

7 All chapters include a bibliography that lists general references (aside numerous works cited and/or quoted in footnotes) in different languages: in Spanish but also French, German, Italian and, of course, English.

8 José María Beneyto is Professor of Public international law, EU law and International relations at the Universidad San Pablo CEU, Madrid.

(a limit that the author underlines and accepts), the chapter traces the changes produced from the Peace of Westphalia until present day[9], serving as a good introduction to the two subsequent chapters that discuss the international system.

The first, written by Esther Barbé (pp. 105-164),[10] describes in three different sections a general approach to the theory of international relations and how the international system operates,[11] assuming the theory of international systems as a method of analysis of international relations, and leaving the third section to the current crisis that the 21st century international system is experiencing, with a particular emphasis on the crisis the multilateral system is suffering. Barbé warned however that, as an instrument of analysis, the international system is a model (a simplified representation of reality) that makes it possible to address confusing reality with clear ideas, at the risk, of course, of simplifying in some cases the complexity of international society. In any case, for the author it is clear that the international structure results from the interaction of three interdependent forces: power, institutions and ideas.

The crisis mentioned above as a sort of deep mutation is also present in the second chapter addressing the current contours of the international system, particularly in its normative dimension. Zlata Drnas de Clément (pp. 165-215)[12] discusses how, faced with the rationalist theses based on logic and argumentation that conceive law as a set of rules and principles, a normative and institutional order with its premises of justice, legal certainty and human rights , other visions like radical pluralists, sociological, critical, or postmodern schools discuss that international law is not an instrument that reflects reality as such, nor is it an instrument that can ensure social cohesion or guarantee peaceful coexistence, but is another component of the set of understandings of the multiple regimes and non-dispositive systems of global space.[13]

Next chapter (pp. 217-272) is written by Carlos Jiménez Piernas,[14] who summarises his well-known approach to the basis and concept of Public international law: departing from a consensual normative vision of international law rules and principles, he moves beyond the classical normativism and proposes a systemic approach to international law. Jiménez Piernas' chapter deals with the core title of the volume the concept of international law , discussing the legal basis of this law as an acceptable and coercible set of rules. Far from deduction, an inductive approach of State practice and international courts' decisions (particularly the ICJ) helps Jiménez Piernas to sustain consensus as the foundation of international law, understood as a general expectation

9 Beneyto argues that he believes that the origin of international law may be found in the writings of Francisco de Vitoria, which originated around the discovery of America. However, he voluntarily reduces the historic scope of the chapter for the sake of brevity, although warning about the too classical approach to the subject.

10 Ester Barbé is Professor of International relations at the Universitat Autónoma de Barcelona, Spain.

11 Barbé defines an international system as a set of interactions between the different international actors (p. 118).

12 Zlata Drnas de Clément is Professor of Public international law at the Universidad Nacional de Córdoba, and of International Relations at the Universidad Católica de Córdoba, both in Argentina

13 The author criticises these excessively relativistic visions and subscribes to the necessary existence of a set of clearly formulated and enforceable rules.

14 Jiménez Piernas is Professor of Public international law and International relations at the Universidad de Alcalá, Spain.

of application of behavioural guidelines, and arguing with Max Weber that the foundation of the validity of the international order depends on the probability of its effectiveness and efficiency under a general social agreement. The author does not neglect (sometimes gross) inconsistencies, but put them under their relative value, even today that main principles of international law are under siege. Departing from that theoretical background, Jiménez Piernas defines international law as a system of principles and norms that regulates relations of coexistence and cooperation, frequently institutionalised, in addition to certain relations with a communitarian vocation, between States endowed with different degrees of socioeconomic development and power, and culturally diverse (p. 244).

Chapter five (pp. 273-240), written by Rafael Casado,[15] address the place to be given to subjective and objective consequences of the emergence of an international *community* (instead of a mere international *society*): those derived from the existence of general obligations beyond the express will of States and those that protect essential interests of such international community.[16] The definition, interoperability, opposability, jurisdictionality, legal extent and consequences of the existence of obligations *erga omnes* and *jus cogens rules* are discussed in this chapter. Casado review these questions canonically, addressing all these questions in theory and practice, using authoritative jurisprudence and doctrine (particularly that of the ICJ and ILC, respectively) and proposes different answers to sound questions in international law such as normative hierarchy, conflict of law, nullity of treaties and effect on reservations of *jus cogens*, international responsibility and consequences of what was originally labelled as international crimes, or the subjective situation of States not directly affected by these gross violations of imperative law.

Ángel Rodrigo authors the next chapter,[17] discussing the "science of international law" (pp. 341-409). Although the last part of this review will make a critical evaluation of the volume, it has to be said here that, under present author's view, this chapter should have been proposed just before Jiménez Piernas' chapter on the concept of international law.[18] Being said this, the complete, thoughtful, clearly resumed and well organised analysis performed by Rodrigo (an specialist in the subject) drives the reader through three main questions, each of them meticulously discussed: the origin of the science of international law, the explanation of the legal validity of international law as a function of that science, and the *praxis* of international law. While the first question gives room to scrutinise how international law has historically moved from a natural to a positivist perspective, and how science of international law has its own, specific contours, the second question that on the validity offers a comparative and interlocutory analysis

15 Rafael Casado Raigón is Professor of Public international law at the Universidad de Córdoba, Spain.

16 In his Chapter, Casado reminds that current international law still is a dispositive legal order, in the sense that the will of States (express or tacit) still is the material source of that legal order. However, he addresses the relevant normative change incorporated during the XX century: that of the progressive acceptance by States of essential interests of the international community protected by special rules *avec normativité renforcée* .

17 Ángel Rodrigo is Associate Professor of Public international law at the Universitat Pompeu-Fabra, Barcelona, Spain.

18 However, as Julio Cortazar's, *Rayuela* this volume can be read without a necessary order among chapters since most of them I am afraid to say: unfortunately are "self-contained regimes".

of different theories and their authors: Jellinek, Triepel and Anzilotti, Kelsen, Ago, Hart and, more recently, Klabbers, Brunnée or Toope. Rodrigo's last point of analysis, abandon the theoretical level and moves to the *praxis*, where he discusses not only the methodology of international law which needs complementarity among other disciplines and different methods , but a good usage and access of different *material* sources (both primary and secondary) and *instrumental* sources (particularly new sources of knowledge provided by social networks). Rodrigo ends his insightful analysis with a mention of different "professions" of and around international law, with a reference to academics, legal advisors and judges.

Then, and again, this *Concepto y Fuentes* volume disorderly arranges next chapters: two of them (no. 7 and no. 9) are devoted to principles in international law: Xavier Pons chapter on the "structural" principles (pp. 411-483) and Santiago Ripol chapter on "general" principles (pp. 551-586); and a third one chapter 10 written by Rosario Huesa discusses international custom (pp. 586-645). But in between, without any methodological explanation, is inserted chapter 8 on jurisprudence and doctrine (pp. 485-550), written by Manuel Becerra. Despite this peculiar sequence, each chapter is worth reading.[19]

Xavier Pons[20] makes a complete *tour d'horizon* of what he labels as "structural, basic, fundamental, essential or constitutional" principles of international law (p. 411), and defined as principles protecting fundamental values and interests of the international community. Along Pons' pages these principles are seen as systemic, historic and necessary to the mere existence of that community,[21] distinct from "the general principles of law recognized by civilised nations" mentioned in Article 38(1)(c) of the ICJ Statute (p. 416), to which chapter 9 of the *Concepto y Fuentes* volume refers. Pons also discusses the interplay of these principles with germane notions such as *jus cogens* and obligations *erga omnes*. Then, he "essays" to classify structural principles in three different types: the principles inherent to the very existence of international law (sovereign equality, good faith, non-intervention); the principles emanating from the recent transformations of international law and its progressive institutionalisation (prohibition of the use of force, peaceful solution of controversies, equality of rights and free determination of peoples, cooperation among States); and the principles derived from the progressive humanization of international law and related to other global public commons (principle of humanity, protection and promotion of human rights, democracy and the rule of law, protection of the environment and sustainable development).

Santiago Ripol[22] discusses the evolution, notion and operability of the general principles of law having in mind the normative origin of these principles and their

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19 For the sake of continuity, chapters on principles and custom will be reviewed here one after another, leaving the chapter on subsidiary means (jurisprudence and doctrine) at the end of those chapters.

20 Xavier Pons Rafols is Professor of Public international law at the Universitat de Barcelona, Spain.

21 Its characterization as principles of the evolving notion of international community gives these principles its historic character (pp. 414-416), as well as their relevance and declaration by main treaties and declarations (including the UN Charter and several UNGA resolutions, beginning with 2625 (XXV) resolution adopted in 1970 and ending with 70/1 resolution adopted in 2015) give them the label of "constitutional" (pp. 418-419).

22 Santiago Ripol Carulla is Professor of Public international law at the Universitat Pompeu-Fabra, Barcelona, Spain.

incorporation in the PCIJ Statute and their application by The Hague court (as well as the recent doctrinal discussion at the ILC), thus shedding light on the concept and usage of these principles. In his analysis, Ripol confronts the general principles of law referred to in Article 38(1)(c) of the ICJ Statute with positivism and social values,[23] but also assesses how these principles interplay as a judicial interpretative instrument — like justice or fairness — and require their universalism as "general" (beyond the discussion about the term "civilised nations"). After this theoretical introduction, Ripol discusses the use (and content) of general principles of international law by the PCIJ and the ICJ: as principles on the jurisdiction of international courts, as interpretative principles, as principles defining State international personality, or as principles governing reparation of damages. After this, the chapter analyses the "origin" of these principles — from domestic systems to principles genuinely international — but also its specialisation (*aka* "sectorisation"), its operability and its interaction with other sources of international law.

Chapter 10, written by Rosario Huesa,[24] discusses international custom in a classical and orderly manner, thus making its reading ease and complete. After explaining the methodology applied in the chapter, Huesa goes through the two main questions on custom: its creation and its application, keeping in mind how international adjudicative bodies (but also doctrine[25]) have "found", determined and applied *in casu* customary law. The author points how the intervention of written instruments is decisive, to the detriment of the "pureness" of the classic and strictly customary non-written process, thus giving a (re)new stand to the interaction of treaties and IO resolutions in the generation (and crystallisation) of a customary rule.[26] Thus, in this process of formation of the customary norm, the general, constant and uniform reiteration of the *expression* — the *revelation* (often written) — of the intention of the authors of such kind of norms acquire a great relevance. In any case, following international practice, three core elements in the formation of custom are undeniable: a normative intention, a representative participation, and a collective consensus. Huesa seems to adhere to the idea that the new custom is the result of an orderly, conscious process, as opposed to the wild and spontaneous process of formation of the traditional custom. But this orderly process is a two-way route: to construct and to terminate the customary rule.[27] As a dynamic process, *violators* of the rule may be pioneering a new rule, or not. Cases of the EEZ or State immunities may exemplify both instances, as Huesa reminds; and this may be also applicable to the always complex distinction (and legal effects) between subsequent practice related to treaties and a new customary rule. Beyond this, the chapter also analyses different problems posed by the application of customary rules *ratione loci* (universal regional/local custom), *ratione temporis* (from crystallisation to desuetude), (applicability and opposability), and *ratione materiæ* (discussing the place

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23 Social values that are revisited by the author when discussing "new" values — human rights, environment — in current international law embodied in the principles as well (pp. 583-585).

24 Rosario Huesa Vinaixa is Professor of Public international law at the Universitat de les Illes Balears, Spain.

25 Particularly, last decade's ILC works on the "Identification of customary international law", available at <https://legal.un.org/ilc/guide/1_13.shtml>.

26 Likewise — as Huesa underlines (p. 596) —, is remarkable the incidence of other instruments belonging to the ambiguous category of *soft* law on the process of formation and consolidation of customary norms.

27 I will not use the term "de-construct" to avoid terminological misunderstandings.

of *lex specialis*). Through all these questions, *ratione personæ* proof of custom — both as a material process and as a procedural matter — remains one of the most controversial points, still under discussion as the author explains.

To help such a process of identification and application of rules, auxiliary means are indispensable. If Huesa underlines it when referring to customary rules, the chapter written by Manuel Becerra[28] offers an insight on jurisprudence and doctrine in the general framework of the sources of international law. In his chapter, Becerra dedicates most of his analysis to jurisprudence, leaving a few last pages to doctrine.[29] He addresses several questions regarding jurisprudence:[30] from the different challenges posed by interim measures to the execution of judicial decisions, from the relationship between international and domestic judicial decisions to the place to be given to advisory opinions, from the interaction of jurisprudence with different sources of international law to the effect of jurisprudence on the "fragmentation" of international law. However, under my point of view, the most interesting point is — as it was when drafting current Article 38(1)(d) of the ICJ Statute — the place to be given to judicial decisions and judicial function amid the sources of international law. That is, the value to be given to the judicial precedent between legal certainty and creation of law; and how judicial coherence but also the bench's theoretical background may influence the weigh to be given to past decisions by international courts and tribunals.

Last chapter of the collective book is written by María Isabel Torres[31] and discusses unilateral acts in the general framework of the sources of international law (pp. 647-687). After a somehow "melancholic" critique to the absence of unilateral acts among the sources cited by Article 38(1) of the ICJ Statute, Torres analyses the work made by the ILC a the need of codification of the always complex concept of unilateral acts and the problems found, which can be traced through the different elements of these acts discussed thereupon: authority, informality, publicity, normative intention, and limits (particularly those poses by *jus cogens*) in the unilateral conduct of a State. Advancing a possible classification of unilateral acts, Torres leaves the end of her chapter to evaluate the incidence new technologies — including social networks — may have in the statement, notification, public knowledge and consequences of unilateral acts; and, on a different

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[29] However, in these few pages, Becerra has the chance not only to recall the scarce use of doctrinal opinions by international courts (particularly the ICJ) but to underline — aside the relevance to be given to *institutional doctrine* (including IDI, ILA or the ILC) —, first, how the close relationship existing between international *authors* and States' legal *advisors* (too often the same person) may influence the arguments discussed before and sometimes adopted by these courts; and, second, how the mainstream of English-written academic writings are sometimes overestimated and influenced by the fact that most high level policy- and judicial-makers are educated in Anglo-Saxon academic environments. May I here forward the reader to my comments upon statistics on the election of ICJ judges in "Article 2", in Zimmermann, A. and Tams, Ch. (eds), *The Statute of the International Court of Justice. A commentary* (3rd. ed., Oxford: OUP, 2019) 288-306 (with Eleni Methymaki).

[30] Including the analysis of some decisions by international criminal courts and tribunals, referring to post-war tribunals at Nuremberg and Tokyo and their legacy in more recent international criminal courts, such as those created for Yugoslavia, Rwanda or Sierra Leone and the ICC.

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vein, the question of revocation of unilateral acts and the effects such revocation may provoke.[32]

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"Someone once said that nothing said before the word *but* really counts."[33] This author has a *but* on this collective book, but all said before this *but* does really count.

Under present author's view, this volume lacks a fundamental question: an epistemological and methodological explanation. Main gap is a general introduction explaining the general purpose of the collection,[34] including an elucidation on how the different approaches by authors — because there are different approaches — are to be read and, therefore, why have been selected as explanatory complements of the main chapter of this volume: that on the concept of international law (because there is not an *actual* chapter on the sources of international law, this core question to be induced form several different chapters).[35]

This gap has a logical consequence on the methodology followed — again: without explanation by the editors — in the different chapters (apparently decided by each author) and through the volume as well. As it has been mentioned several times through this review, some chapters are probably misplaced, or perhaps deserve to be listed differently.

Knowing the editors, we can expect that in the next edition (or re-print) of this volume or within the forthcoming volume, these gaps will be filled in. It would also help future invited authors and readers to know what they can expect from this collection which shall be, without hesitation, an indispensable reference for these scholars and practitioners of international law who want to learn about the international legal order as seen by the Hispanic college of international lawyers.

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[32] Submitted to the editors before the last controversial unilateral declaration on the Western Sahara by the current Spanish government, Torres' chapter had no chance to include a comment on the effects of a possible — and plausible — revocation on that declaration by the future Spanish government, if any (for those interested, some of these aspects may be seen in 74/2 *Revista Española de Derecho Internacional* (2022) 427-480).

[33] Jon Snow, *Game of Thrones*, sometime, elsewhere.

[34] Actually, this author knows the existence of the collection once attending a public presentation in Madrid by the editors and some authors in September 2022; and a book flap cannot substitute an appropriate introduction to the volume and the entire collection.

[35] There is no explanation on the absence of a chapter on treaties or on IO decisions either, despite the volume being devoted to the concept and *sources* of international law.