

RETHINKING THE SOURCES OF INTERNATIONAL LAW, By G. J. H. Van Hoof, book review by Leo Gross and Anthony D'Amato, 78 *American Journal of International Law* 937 (1984) (BR2-84)

One has to admire a young scholar who begins his career in international law by thinking seriously about the sources of international law. Too often, writers plunge into substantive essays without working through the constitutive elements of the very arguments they put forth.

That much said, Dr. G. H. J. van Hoof's book is a long-winded and meandering essay that reaches simplistic conclusions. There is very little here that justifies the title "rethinking." The author builds his thesis about sources on the bedrock of consent. Several untoward consequences follow: the author has to abandon the generally accepted distinction between general custom and special custom, he has to allow that "international law does not entail the same rights and duties for all its subjects" (p. 97), and he must argue that new states are not bound by preexisting rules of international law until they have accepted specific rules. He also fails to see the interaction between *opinio juris* and usage, finding the latter superfluous if one begins with *opinio juris* (but not specifying how one can begin with just *opinio juris*) (p. 98). While conceding that rules in treaties can give rise to rules of customary law, van Hoof's failure to distinguish between general and special custom leads to a fundamental misreading of the North Sea Continental Shelf cases. [FN1] In general, he disparages the jurisprudence of the World Court (p. 87 n.320) and thus misses an opportunity to analyze and learn from its leading cases.

In addition to custom, the author takes up the topics of treaties, general principles, *jus cogens*, judicial decisions, the teachings of publicists and (very briefly) General Assembly resolutions. While demonstrating a good knowledge of the relevant literature, the author again says little that is new.

The last part of the book shows the author attempting to stake out an original approach. He deals with what might constitute evidence of the consent of states to rules of international law. The first type, "abstract statements" by the states (for example, during a meeting of the United Nations), is hardly concrete enough to satisfy the author's quest for "consent," and moreover nothing stops a state from subsequently acting contrary to its statements. The second is statements made during *travaux préparatoires*; the author apparently would like to infer some sort of consent here, but he acknowledges that "lawyers" usually make such statements and could have added that the *938 statements are often made for bargaining purposes and not to declare or acknowledge rules. The third is consensus within rule-making procedures; however, the author adds nothing to the many writings on this subject. The fourth category is the text of an agreement itself. Here van Hoof struggles arduously and rather well with complex agreements, attempting to tease out of their language an answer to the question whether the agreement is legally binding. His labors with respect to the Helsinki Final Act are inconclusive, which indicates perhaps that his textual approach needs to be supplemented by broader approaches. Yet his limited focus on "consent" as an organizing theoretical principle here tends to constrict his vision and limit the range of his imagination. Finally, a fifth catchall category is labeled "follow-up." Here the author conflates enforcement of law with the question of sources, something he took pains to distinguish earlier in his book.

This book tends to confirm the old observation that if you don't have a good idea to begin with, it's easier to write a book than an article. Nevertheless, the author exhibits good familiarity with the jurisprudential and international literature, a nice willingness to confront difficult issues and an obvious sincerity of purpose. I would be willing to bet that his subsequent writings will be markedly better.

[FN1]. For a more extensive discussion of this point, see D'Amato, *The Concept of Human Rights in International Law*, 82 *COLUM. L. REV.* 1110, 1140-44 (1982).