

Relative Normativity in International Law

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Introduction

In a well-known article published ten years ago,¹ Prosper Weil spoke out against several developments in the theory and practice of international law which aim at a gradual differentiation of the normativity of international legal norms: (i) the emergence of soft law, culminating in a fierce debate on the legal effects of certain resolutions of the UN General Assembly;² (ii) the distinction made by the ILC between international crimes and international delicts, based on the further distinction between

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1 P. Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413 et seq. (enlarged English version of: 'Vers une normativité relative en droit international?', 86 *RGDIP* [1982] 5 et seq.).

2 The concept of 'soft law', as employed in the following, denotes instruments which do not belong to the formal sources of international law. On the concept of soft law in general and on its various meanings: R.R. Baxter, 'International Law in "Her Infinite Variety"', 29 *ICLQ* (1980) 549 et seq.; R. Ida, 'Formation des normes internationales dans un monde en mutation: Critique de la notion de soft law', in *Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally* (1991) 333 et seq. With particular regard to resolutions of the UN General Assembly, cf. B. Sloan, 'General Assembly Resolutions Revisited, (Forty Years After)', 58 *BYIL* (1987) 39 et seq.

obligations *erga omnes* and obligations which are owed only to individual States;³ as well as (iii) the recognition of *ius cogens* as confirmed in Articles 53 and 64 of both the 1969 and the 1986 Vienna Conventions on the Law of Treaties.⁴ Professor Weil regarded these developments as pathological; they are to cause concern to the lawyer in his role as a 'system builder by vocation'. According to him, international law would no longer be capable of fulfilling its function – the ordering of international relations in a heterogeneous, pluralist world – were the existence of rights or obligations to be determined through the importation of material criteria into the law. That would be to give uncertain weight to such rights and obligations and to abandon a neutral evaluation to be effected through the application of formal legal criteria.⁵

Other observers,⁶ approaching these developments from different theoretical frameworks, did not understand the stir caused by Professor Weil's article. In their view, relative normativity in international law is unavoidable. It is a simple reflection of fact. In the following, I will demonstrate that the second view is correct, even from the standpoint of the type of positivism championed by Professor Weil, which, in reliance on the terminology of German methodological literature, I will call legal positivism (*Gesetzespositivismus*) (I). I will then demonstrate that relative normativity of international law appearing within this theory correlates with such relative normativity to be found on the basis of other theories of law (II). Finally, I will draw attention to the fact that the coexistence of different theories gives rise to a further relativization of the normativity of international legal norms (III).

I. Relative Normativity in Legal Positivism

A. Forms of Positivism Applied to Law

Legal Positivism is a form of positivism. The latter is, in general philosophical terms, based on the idea that, logic and mathematics apart, only phenomena which can be recognized by the senses are amenable to scientific knowledge. Thus, science is restricted to observable events and regularities or to a purely structural methodology devoid of content. Applied to the field of law, this premise of positivism has the consequence that jurisprudence may only concern itself with (i) internal or (ii) external behaviour of human beings, (iii) with the material embodiment of law in legal texts, judgements, etc., or alternatively, (iv) that it must disregard the content of rules and view itself as a general theory of law, taking note only of fundamental concepts which are necessary for all legal thinking.

3 Art. 19 of the ILC Draft on State Responsibility, YILC 1976/II/2, at 95 et seq.

4 1155 UNTS 331, respectively 25 ILM (1986) 543.

5 See *supra* note 1, at 416, 418 et seq., 440.

6 E.g., R.A. Falk, 'To What Extent are International Law and International Lawyers Ideologically Neutral?', in A. Cassese, J.H.H. Weiler (eds), *Change and Stability in International Law-Making* (1988) 137.

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Common to all positivist doctrines is a view of the law as an objectively given fact. Views vary, however, according to the different focus of their observations: thus, voluntarism concentrates on the will of law-makers; sociological jurisprudence on regularly repeated types of behaviour; legal realism on legal decisions (supposedly based upon a legal consciousness which itself is inaccessible to scientific knowledge); legal positivism on legal texts (particularly statutes). Finally, logical positivism, in terms of Kelsen's Pure Theory of Law, tries to establish legal science as a purely formalist approach to law.

Of these positivist conceptions, only legal positivism and logical positivism, often interconnected with each other, attempt to deny the relative normativity of legal norms. Although it is generally recognized today that the premises of these two conceptions cannot be sustained,⁷ it is still necessary to examine them more closely in order to show how gradual relativization of normativity can be encountered at all levels of the hierarchical structure of the legal order established by these theories: on the level of interpretation of legal rules (*infra* B.2.(a)), on that of the identification and formulation of customary rules and general principles (B.2.(b)) as well as on that of the validity of legal norms (B.2.(c)).

B. Legal Positivism

1. Conception

(a) The validity of legal propositions (*Rechtssätze*)

Legal positivism identifies law with legal propositions (*Rechtssätze*), i.e. the wording of positive rules, which come about as the product of a legislative or other law-creating process, as well as with the meaning of these texts which is to be determined by purely semantic operations. Whereas the text of rules is fixed at the end of the law-creating process, its normative content has a dynamic of its own since the meaning of words is to a certain degree indeterminate and may change over time.

At the core of legal positivism lies the concept of validity (*Geltung*). It only refers to legal propositions (*Rechtssätze*), i.e. the verbally-fixed products of a law-creating process, without affecting normative content. Legal validity, based either upon another legal proposition (*Rechtssatz*) superior in rank (corresponding to H.L.A. Hart's secondary rules⁸) or upon acceptance by the legal community, is decisive as to whether a legal proposition (*Rechtssatz*) forms part of the legal system or not. No further differentiations are possible. A legal proposition (*Rechtssatz*) cannot be valid to a greater or a lesser extent and thus constitute more or less law. The question as to the validity of a legal proposition (*Rechtssatz*) can only be answered with yes or no.

⁷ For a comprehensive treatment see U. Fastenrath, *Lücken im Völkerrecht: Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts* (1991) 60-64.

⁸ H.L.A. Hart, *The Concept of Law* (1961) 79.

From the viewpoint of the Pure Theory of Law only texts which can be deduced from a legal constitution, or, at the extreme, from a single basic norm,⁹ are to be considered as legal propositions (*Rechtssätze*). They must have been generated by means of a law-creating process provided for in the constitution, or have been incorporated in the legal order in some other constitutional manner.¹⁰ Thus a legal rule is characterized by its *constitutional* validity.¹¹ Any contradictions between individual legal propositions (*Rechtssätze*) are to be solved through the application of conflict rules such as the *lex posterior*-, *lex specialis*- or *lex superior*-rule. By applying these rules, one of two contradicting legal propositions (*Rechtssätze*) is deprived of the legal validity which it had only supposedly and provisionally achieved through a law-creating procedure. For the positivist dogma to be maintained, the primacy of the legal proposition (*Rechtssatz*) that is winning out in this process must be ascertained with reference to such external criteria as, for example, the date of its promulgation, or the fact of its generation in a higher-ranking legislative process, as is the case with the generation or amendment of domestic constitutions. The model developed by the Vienna School, of the hierarchical structure of the legal order, does not lead to a gradual differentiation in the validity of legal propositions (*Rechtssätze*). Rather, the hierarchy built into legal orders is relevant only for the application of the *lex superior*-rule. Thus, Professor Weil's critique of Articles 53 and 64 of the Vienna Conventions on the Law of Treaties does not concern the higher status of some norms as such, but is aimed at the fact that *ius cogens* cannot be identified on the basis of formal criteria.¹²

In contrast to the Vienna School, H.L.A. Hart regards the existence of a constitution as a luxury. International law which, in his opinion, is primitive requires only individual recognition of each norm as a legal norm.¹³ Gidon Gottlieb¹⁴ and Friedrich V. Kratochwil¹⁵ find evidence of such acceptance in the fact that international actors feel bound by such norms or have recourse to them without questioning them or giving reasons for their validity.

9 In particular, H. Kelsen, *Reine Rechtslehre* (2nd ed., 1960) 196 et seq.; P. Guggenheim, *Traité de droit international public*, I (2nd ed., 1967) 37 et seq.

10 The procedure of norm-creation or incorporation may also be established – indirectly – by a norm which has come into being in accordance with the constitution. An example of this is the law of international organizations, the enactment of which is regulated in the constitutional instruments of these organizations, i.e. in international treaties.

11 Cf. e.g., R. Ago, 'Begriff des positiven Rechts', 6 *ArchVR* (1956/57) 257, at 263 et seq.; P. Guggenheim, 'Was ist positives Völkerrecht?', VIII *ASDI* (1951) 31 et seq.; Kelsen, *supra* note 9, at 199 et seq. Following Hart, *supra* note 8, we might also regard the 'constitution' as not regulating the law-creating processes, but as deciding which norms are to belong to the law, cf. B. J. Combacau, 'Le droit international: bric-à-brac ou système?', 31 *Archives de philosophie du droit* (1986) 85, 90 et seq.

12 Weil, *supra* note 1, at 423 et seq.

13 Hart, *supra* note 8, at 229.

14 'The Nature of International Law: Towards a Second Concept of Law', in C.E. Black, R.A. Falk (eds), *The Future of the International Legal Order*, IV (1972) 365.

15 'Is International Law "Proper" Law?', LXIX *Archiv für Rechts- und Sozialphilosophie* (1983) 13, at 38 et seq.

The juridical quality of a legal proposition (*Rechtssatz*) need not, however, merely depend upon the behaviour of actors in the stage of its application. One can also take into consideration the conduct of the actors during the creation of a legal proposition (*Rechtssatz*). In this context, Nicholas Onuf¹⁶ relies on the 'speech act' theory developed by Austin, Searle and Habermas. According to this theory, language does not merely convey content, it is thus not simply to be understood as a locutionary act. The speaker also performs an action in saying something. He/she may, for instance, express a warning or issue an order. Action of this kind, which determines the communicative function of the content uttered, is termed an illocutionary act. In the case of a legal proposition (*Rechtssatz*), the illocutionary act consists in the creation of legal rights and duties, while the locutionary act provides information as to the content of these rights or duties. It is obvious that, since speech act theory regards understanding, and hence the understanding of norms, as the result of a process of communication, the speaker (in the legal sphere: the creator of norms) is not the only person who decides upon the illocutionary role of a legal proposition (*Rechtssatz*). He/she can only intend such a role. For the speech act to be successful, the addressees of the offer embodied in it will have to understand this intention and accept the intended illocutionary role. This second element, acceptance, is vital for the obligatory effect of norms. A legal proposition (*Rechtssatz*) may thus be defined as a speech act whose illocutionary role has been successfully carried out and in this sense has attained legal normativity.¹⁷

(b) The meaning of legal propositions (*Rechtssätze*)

In order to sustain its pure positivist concept, legal positivism must base itself on the premise that the enactment of a legal proposition (*Rechtssatz*) carries with it the description of a precise normative content which only needs to be disclosed by those who then apply the law. This perception has a long tradition. It lies at the basis of Montesquieu's ideal of the separation of powers, under which a judge was to act only as a 'bouche qui prononce les paroles de la loi'.¹⁸ Similarly, it was the guiding inspiration of the codification movement on the European continent in the closing years of the 18th century.¹⁹ In general philosophy, attempts to bind words to an exact meaning range from Plato's famous shadows on the wall to Wittgenstein's *Tractatus Logico-Philosophicus*.²⁰ It is not by accident that the latter had its roots in the positivist philosophy prevalent in Vienna at the turn of the century.

16 N. Onuf, 'Do Rules Say What They Do? From Ordinary Language to International Law', 26 *Harvard Int'l L.J.* (1985) 385 et seq.

17 *Ibid.*, at 408.

18 Cf. de Montesquieu, *De l'esprit des lois* (1748), Ch. 6.

19 Cf. H. Coing, *Epochen der Rechtsgeschichte* (1967) Ch. 3.

20 L. Wittgenstein, *Schriften*, 1 (1963) Ch. 3.

2. *The Openness of the Legal-Positivist System*

(a) At the level of interpretation

Already Kelsen had recognized that words used in legal texts have no determinate meaning. His conclusion was that, where different interpretations were possible, the appliers of law were free to choose between these various – equally valid – meanings.²¹ This solution of the problem of the openness of meaning saved Kelsen's positivist position at the high cost of excluding any questions as to the actual content of the law. To borrow a term from cybernetics, the decision-maker acts as a 'black-box' (as was also the view of legal realism). In the course of my enquiry I will demonstrate that Kelsen, in setting limits to meanings, demanded more of legal texts than they could provide. On the other hand, the followers of legal realism, of the German Free Law movement (*Freirechtslehre*), of the policy-oriented jurisprudence of McDougal *et al.*, of the Topics school, and finally, of the Critical Legal Studies movement, go a step too far.²² The common denominator of these views is a strong tendency to disregard the wording of laws and international treaties because of their definitional openness. Instead, these views focus directly on normative content. However, such methods cannot explain the great importance attached to the wording in legislation or treaty-making. Rather, I believe that analytical linguistics and hermeneutics offer satisfactory means to truly reflect the role granted to the text of the law in practice, and, at the same time, avoid the futile attempt to give an exhaustive and finite meaning to the content of such text.

In their essence, the arguments that follow apply to all types of legal propositions (*Rechtssätze*), irrespective of the source through which they are created. Since, however, as far as international law is concerned, an authentic wording of rules only exists in the case of treaties, I shall mainly examine such written instruments.

(i) The indeterminacy of concepts

Colloquial languages, upon which the technical language of international law is based, constitute universal communication systems. As such they must enable the speakers to express verbally every aspect of the material with which they work. Obviously this does not mean that language must – or at least must possess the capacity to – reflect fully the infinite number of ways in which the world may be classified.²³ Restrictions of vocabulary and limits to the calculable capacity of linguistic conventions make this impossible. Both common language and technical legal language make distinctions

21 Kelsen, *supra* note 9, at 346-352.

22 On these different legal theories cf. Fastenrath, *supra* note 7, at 33, 63, 73 et seq., 78 et seq.; M.S. McDougal, M.W. Reisman, 'International Law in Policy-Oriented Perspective', in R.St.J. Macdonald, D.M. Johnston (eds), *The Structure and Process of International Law* (1983) 103 et seq.; M. Koskenniemi, 'The Politics of International Law', 1 *EJIL* (1990) 4 et seq.

23 J. Lyons, *Introduction to Theoretical Linguistics* (1969) 45, 426; N. Oksaar, 'Sprache als Problem und Werkzeug des Juristen', 53 *Archiv für Rechts- und Sozialphilosophie* (1967) 91, at 116.

only in so far as ordinary situations require. A large number of possible distinctions remain disregarded. If the precept is to be sustained that it must be possible to verbally describe everything in the world, words may not, however, simply delimit only one particular class of characteristics. Instead, language must, to a certain degree, remain indeterminate, so that those wishing to communicate but possessing only a limited vocabulary may make themselves understood in further and as yet unidentified classifications. It is only through the indeterminacy of the 'referential boundaries' of lexical items that language can adjust itself to the changing experiences of the speech-community and is able to reflect new physical elements as well as changes in social and cultural perspectives. Thus, while remaining constant in form, the vagueness in content of living languages is indispensable.

Such vagueness is a necessity in the case of multilingual international legal texts, which, as a consequence of the use of different national languages, may remain deeply rooted in national legal terminology. Where concepts have no natural, predetermined existence but rather arise in response to the requirements of normal life, different languages may develop divergent semantic fields, that is, impose different categorizations upon the world.²⁴ This is common in the face of different living conditions and, in particular, as a result of different cultural perceptions. For it is language and its classification that enables individuals to create their own world along the lines of their cultural perception;²⁵ the world we experience is no more than the reflection of what we have made of it for ourselves. The greater the degree of cultural diversity the less likely it is that concepts will have a common meaning. This is particularly true for legal language, since each national legal system can be regarded as the 'property' of the nation concerned. In Europe alone, many different legal cultures have developed their own divergent legal institutions, often without counterparts in the other systems. To comprehend the legal framework of even more distant cultures within the categories of our domestic legal systems is all the more impossible. Divergent semantic fields in different languages and the creation of different legal institutions within various legal systems not only lead to extreme difficulties of translation,²⁶ they also demand openness in the use of language. It is only in such a way that, despite a plurality of authentic texts in various languages, treaties may retain a common meaning, as presumed in Article 33(3) of the Vienna Convention on the Law of Treaties.

24 M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (1973) 20 et seq.; Lyons, *supra* note 23, at 426, 429, 457; Oksaar, *supra* note 23, at 103.

25 A. Kaufmann, *Beiträge zur juristischen Hermeneutik* (1984) at 103; similarly, H.-G. Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik* (3rd ed., 1972) 415 et seq.; Lyons, *supra* note 23, at 432 et seq.; Oksaar, *supra* note 23, at 103.

26 J. Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 37 *BYIL* (1961) 72 et seq.; Hilf, *supra* note 24, at 23 et seq.; Lyons, *supra* note 23, at 429; Oksaar, *supra* note 23, at 127 et seq.; A. Ostrower, *Language, Law and Diplomacy - A Study of Linguistic Diversity in Official International Relations and International Law* (1965) 479 et seq.

(ii) Linguistic conventions

According to the legal methodology now codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the starting-point for the interpretation of legal terms is their ordinary meaning. Referral to the ordinary meaning of a term does not, however, imply referral to a certain definition. Contrary to the assumptions of legal positivism, the conclusion of a treaty does not constitute the end of the process of law-creation. Treaty provisions are not 'finished products',²⁷ requiring only implementation and nothing else. On the other hand, in spite of their indefiniteness, treaty provisions are not meaningless either, and thus normativity remains possible on their basis. The conveyance of meaning from the speaker (the writer, the law-maker) to the listener (the reader, the law-applier) does not consist in the 'handing over' of what is indicated by the words of a treaty, which would imply that an exact definition of what is indicated constitutes a precondition for successful communication. The whole process can be much better explained if it is accepted that the speakers of a particular language agree upon the 'use' of the words (i.e. what these words refer to and what they imply), to a degree sufficient to exclude misunderstandings in most instances.²⁸ Such 'use' of words is determined by commonly experienced, habitually used, or even agreed-upon linguistic conventions. However, these conventions are neither completely clear nor fully homogeneous and may also change over time.

Linguistic conventions can be identified as definitions which lay down a concept extensionally or intensionally. Extensional definitions involve the listing of all objects to which a word may refer. Intensional definitions clarify the characteristics common to all objects to which a word may refer, and distinguish them from other objects. Linguistic conventions within a mother tongue evolve with that language and are internalised as it is learned. Subsequently, they are (largely subconsciously) adjusted through the use of the language. The same holds true for linguistic conventions governing the use of a technical language. Compared to those applying to the mother tongue, conventions on the use of technical language have the advantage of being more clearly defined and therefore leading to a more precise use of language. In this regard the potentialities of legal terminology – at least insofar as it is manifested in laws – are limited. Because of its function in influencing social behaviour, legal terminology must never entirely divorce itself from common language.²⁹

As law affects society, (technical) language employed in legal propositions (*Rechtssätze*) must stand the test of daily social usage. In this context, individual acts

27 M. Bos, *A Methodology of International Law* (1984) 22 et seq.

28 Lyons, *supra* note 23, at 412.

29 Kaufmann, *supra* note 25, at 115; Oksaar, *supra* note 23, at 95. Cf. also, Hegel's *Philosophy of Right* (translated with notes by T.M. Knox) (Reprint 1965), sec. 215: 'To hang the laws so high that no citizen could read them (as Dionysius the Tyrant did) is injustice of one and the same kind as to bury them in row upon row of learned tomes, collections of dissenting judgements and opinions, records of customs, &c., and in a dead language too, so that knowledge of the law of the land is accessible only to those who have made it their professional study.'

of application may be seen as continuous *extensional definitions* of the terms embodied in the text of the treaty. It is in this sense that one of the Special Rapporteurs of the ILC on the law of treaties, Sir Humphrey Waldock, saw in subsequent practice 'an authentic interpretation comparable to interpretative agreement'.³⁰ Also, the commentary of the ILC on Article 27 of its final draft on this subject-matter states that subsequent practice 'constitutes objective evidence of the understanding of the parties as to the meaning of the Treaty'.³¹ It is with good reason, therefore, that Article 31(3)(b) of the Vienna Convention identifies such practice as a legitimate tool for the interpretation of treaties. A similar function may be ascribed to decisions of international courts and to statements made by individual States, by organs of international organizations, as well as by scholars of international law. Thus, through the evaluation of the (il)legality of individual acts and through the provision of, at least, interpretational suggestions for the relevant legal propositions (*Rechtssätze*), the process of concept-building continues.

Occasionally, *intensional definitions* gain the status of legal definitions by way of their inclusion in treaties.³² They are, however, more frequently found in informal definitional agreements of the type foreseen by Article 31(3)(a) of the Vienna Convention, in interpretative explanations, in the *ratio decidendi* of judgements, in the resolutions of the *Institut de Droit international*, in the drafts elaborated by the ILC or in the general comments of the Human Rights Committee and other treaty bodies.³³ Academic exchanges between scholars also lessen the divergence between concepts to an extent that should not be underestimated. Obviously, such exchanges cannot give rise to concepts that are identical world-wide, since any communication will itself require interpretation. Further, it must be recognized that the limited human capacity to 'handle data', as well as limited linguistic abilities interfere with the development of a global, direct communication network composed of the entire community of international lawyers. Moreover, it is unavoidable that these jurists remain anchored in their own domestic legal thought. This problem notwithstanding, Article 38(1)(d) of the ICJ Statute rightly cites (the most widely read) teachings of the most highly qualified publicists as a subsidiary source of international law, which is to be regarded as much more than a mere *source d'information*.³⁴ These teachings are influential through the determination and homogenization of legal concepts which they effect.³⁵ Paramount importance in this context must, however, be attached to 'soft law' instruments such as

30 Sixth Report on the Law of Treaties, by Sir H. Waldock, *YILC* 1966 II, at 98 para. 18.

31 *Ibid.* 221 para. 15.

32 Cf. Art. 1 of the Convention relating to the Status of Refugees of 28 July 1951, 189 UNTS 150.

33 Cf., e.g. Art. 40(4) of the International Covenant on Civil and Political Rights, of 19 December 1966.

34 But, cf. F. Gihl, 'Lacunes de droit international', 3 *Acta Scandinavica Juris Gentium* (1932) 37, at 48.

In a similar vein, Ricci-Busatti, member of the Judicial Committee for the Preparation of the Statute of the Permanent Court of International Justice, *Procès-Verbaux*, 336: 'Doctrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should only serve as elucidation.'

35 In this sense, cf. P. Allott, 'Language, Method and the Nature of International Law', 45 *BYIL* (1971) 79, at 118.

resolutions of the UN General Assembly and instruments adopted by intergovernmental conferences. Such instruments can rapidly generate a wide-ranging consensus on international definitions, by either explicitly laying down a concept³⁶ or by developing legal standards³⁷ which may then be effected through an extensive or restrictive application of already established legal rules.³⁸ An effect similar to that of resolutions may be attributed to certain multilateral treaties which are not yet in force, and to (even unsuccessful) codification conferences.³⁹

The importance of such informal instruments in the development of law *intra legem* has frequently been confirmed by judicial decisions and doctrine. For instance, the US Court of Appeal for the Second Circuit stated in *Filartiga v. Pena Irala*⁴⁰ that '[These] UN declarations are significant because they specify with great precision the obligations of Member States under the Charter. Since their adoption, members can no longer contend that they do not know what human rights they promised in the Charter to promote.' Judge Jiménez de Aréchaga took an analogous view in his separate opinion in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case: '... even if a new accepted trend does not yet qualify as a rule of customary law, it may still have a bearing on the decision of the Court, not as part of applicable law, but as an element in the existing rules or an indication of the direction in which such rules should be interpreted'.⁴¹ In legal literature, Daniel Thürer has declared soft law to be 'an orientational aid to interpretation'⁴² while Alfred Verdross and Bruno Simma claim that certain resolutions of the General Assembly lay down 'the perimeters for future arguments as to the applicable law'.⁴³

36 E.g. G.A. Res. 3314 (XXIX).

37 Cf. e.g., G.A. Res. 2131 (XX) (Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty), and 2625 (XXV) (Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the UN Charter), as well as the CSCE Final Act.

38 Cf. A. Bleckmann, *Grundprobleme und Methoden des Völkerrechts* (1982) 340; similarly, N. Quoc Dinh, in *id.*, P. Dallier, A. Pellet (eds), *Droit international public* (1987) 347 et seq.; D. Thürer, "'Soft Law" – eine neue Form vom Völkerrecht', 104 *Zeitschrift für schweizerisches Recht* (1985) 429, at 445 et seq.; in relation to codes of conduct, cf., H. W. Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises', 22 *GYIL* (1979) 11, at 34 et seq.; cf. also, C. Schreuer, 'Recommendations and the Traditional Sources of International Law', 20 *GYIL* (1977) 103, at 112 et seq.

39 R. Y. Jennings, 'Law-making and Package Deal', in *Mélanges offerts à Paul Reuter* (1981) 348; T. Schweisfurth, 'Influence of the Third United Nations Conference on the Law of the Sea', 43 *ZaöRV* (1983) 566, at 580 et seq.; I. M. Sinclair, 'The Impact of the Unratified Codification Convention', in *Realism in Law-making: Essays on International Law in Honour of Willem Riphagen* (1986) 211 et seq.

40 19 *ILM* (1980) 973. On the influence of behavioural standards, developed through soft law, on 'open' legal concepts, cf. also E. Riedel, 'Standards and Sources: Farewell to the Exclusivity of the Sources Triad in International Law?', 2 *EJIL* (1991) 58 et seq., and *id.*, *Theorie der Menschenrechtsstandards* (1986).

41 ICJ Reports 1982, 108 et seq., para. 33.

42 Thürer, *supra* note 38, at 446.

43 A. Verdross, B. Simma, *Universelles Völkerrecht* (3rd ed. 1984) sec. 636; similarly, Riedel, 'Standards and Sources', *supra* note 40, at 66 et seq.

Linguistic conventions, in whatever way they were developed, are not legally binding, with the exception of legal definitions embodied in treaty provisions and, according to some views (based on discussions at the founding conference in San Francisco⁴⁴), with the exception of generally accepted definitions of terms contained in the UN Charter and adopted by UN organs. Such conventions do, however, have an impact on the development of international legal discourse by leading to a common understanding of certain terms. Hence, one function of soft law is the clarification of our understanding of hard law and thus its closer definition. For instance, the Friendly Relations Declaration⁴⁵ has undoubtedly provided a clearer (though not conclusive) determination of what is meant by the rather vague term 'force' used in Article 2 (4) of the UN Charter. Similarly, Resolution 3314 (XXIX) provides a clearer definition of the term 'aggression' found in Article 39 of the Charter. It will be very difficult for any State to resist the application of such definitions, irrespective of whether it had not participated in their elaboration or had even actively opposed them. Thus, States will be well advised to accommodate themselves to the understanding of legal terms embodied in these resolutions.

Meta-legal linguistic conventions (to which even legal positivism must have recourse if it is to ensure that legal propositions (*Rechtssätze*) have any meaning at all) may have different degrees of authority. They receive different levels of acceptance from different States, also at different points of time. In addition, they are always subject to adjustments, themselves of varying degrees of authority. Thus, legal positivism is unavoidably forced to accept a gradation of normativity at the level of content. Since such variations in the use of language will mostly be of minor significance they will, as a rule, only affect the periphery of a concept. In some cases, however, these differences can have an impact on the very core of a concept. The liberal versus the Marxist-Leninist concept of 'freedom' in the understanding of human rights constituted a classic example. In such instances, the delimitation of a concept, and with this the clarification of the scope of the legal proposition (*Rechtssatz*) concerned, will depend upon the degree of authority and acceptance ascribed to the linguistic conventions in question.

(iii) Diachronic openness: dynamic interpretation

If, as a result of the indeterminacy of legal language, the meaning of legal propositions (*Rechtssätze*) can never be determinate, law will always remain diachronically amenable to development. The content of a legal proposition (*Rechtssatz*) is never 'finite'. Thus, the ICJ was right in asserting in its 1971 advisory opinion on *Namibia* (South West Africa) that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, ... the *corpus*

44 Cf. Sloan, *supra* note 2, at 59.

45 G.A. Res. 2625 (XXV).

iuris gentium has been considerably enriched and this the Court, if it is faithful to discharge its functions, may not ignore'.⁴⁶ The Court confirmed this view in its decision in the *Aegean Sea Continental Shelf* case, where it was held in relation to a Greek reservation of 1931 to the General Act⁴⁷ that disputes relating to the territorial status of Greece 'must be interpreted in accordance with the rules of international law as they exist today, and not as they existed in 1931. It follows that in interpreting and applying reservation (b) with respect to the present dispute, the Court has to take account of the evolution which has occurred in the rules of international law'.⁴⁸

Furthermore, informal instruments may play a role in the process of changing linguistic conventions. In the *Continental Shelf (Tunisia/Libya)* case, the ICJ, although refusing to base its judgement upon 'new trends' which had become apparent during the ongoing UN Conference on the Law of the Sea, nevertheless considered them as 'factors of interpretation'.⁴⁹ What may appear to be a back-door attempt to change the law for supporters of static interpretation thus turns out to be an attempt at establishing new linguistic conventions through soft law. By virtue of linguistic openness, legal positivism even in its purest form is never immune to such changes in meaning and to the consequent informal development of law.

(b) At the level of norm-generation

In contrast to international treaties, both international customary law and general principles of law as defined in Article 38(1)(c) of the Statute of the ICJ, lack an authentic wording. Instead, such rules are formulated by international and national judges, organs of States and international organizations, or in scholarly writings through induction on the basis of State practice, of enunciated legal opinions, or through comparison of domestic law. Legal positivism would only be able to maintain its (purely positivist) approach if it were possible to draw unambiguous legal propositions (*Rechtssätze*) from this factual substratum. However, the simple fact that lawyers differ in their formulation of rules of customary law and general principles proves this to be impossible.

(i) The formulation of customary law

The divergence just referred to does not arise as a result of incorrect evaluation of empirical data. Rather, it results from the fact that norms and their linguistic

46 ICJ Reports 1971, 16, at 31 et seq.

47 93 LNTS 343.

48 ICJ Reports 1978, 1, at 33 et seq., para. 80. Cf. further, the decision of the European Court for Human Rights in the *Tyrer* case, *ECHR* (1978) Series A, No. 26, 4, at 15 et seq.: The European Convention on Human Rights 'is a living instrument, which ... must be interpreted in the light of present-day conditions' ...; it is 'influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe.'

49 ICJ Reports 1982, 18 at 37, et seq. paras. 23 et seq.

objectifications cannot be induced from such data alone.⁵⁰ The individual instances of practice from which customary law is derived are never identical, as is often presupposed implicitly. Practice not only differs with time and space but also in relation to the actors involved. In addition, the circumstances surrounding the practice may vary to a greater or lesser degree. Thus, practice is only identical in relation to particular criteria. Which events may – despite their differing characteristics – be considered to belong to the same class of acts and therefore constitute ‘uniform’ practice, is nowhere laid down *a priori*. There is simply no such natural classification. Rather, we always need an authoritative decision which establishes legal equivalence by abstracting from factual divergence. In effect, legal equality is authoritative disregarding factual difference.⁵¹

A judgement of the German Constitutional Court⁵² may serve as an illustration. The question before the Court was whether attachment of an embassy bank account would be prohibited by customary international law or by a general principle of law in the sense of Article 38(1)(c) of the ICJ Statute. First, the Court attempted to verify a customary rule of very narrow substantive scope, namely regarding the treatment of embassy bank accounts specifically with a view to attachment. In so proceeding, neither sufficient precedents nor domestic rules on the subject were found. Consequently, this approach was relinquished. The Court then had recourse to the highly abstract principle *ne impediatur legatio*. Obviously it was easy to find sufficient practice in support of such an abstract rule. What this shows is that the more concrete a norm will be formulated, the fewer cases may be found to fall under it and the more difficult it will be to identify that norm as a rule of customary law. Conversely, if a higher degree of abstraction is applied, the range of actions encompassed by the rule will grow. However, it will be as difficult to establish the concrete circumstances under which such a highly abstract rule may be applied as it will be to prove the existence of a rule with a very narrow substantive scope.

Abstraction is not the only means to select relevant practice. The use of concepts expressing a certain value judgement provides an alternative. To furnish an example: Despite the great divergences in the actual uses of international water-courses, Friedrich Berber was able to formulate the following rule in this respect: ‘[E]very riparian, in all actions which could have an effect on the use of water by other riparians, must have due regard to the interests of other riparians’.⁵³ The addition of the ‘value’

50 Thus Guggenheim’s attempt to derive customary law from practice alone was doomed to fail, cf. P. Guggenheim ‘Les deux éléments de la coutume en droit international’, in Ch. Rousseau (ed.), *Etudes en l’honneur de G. Scelle* (1950), 275 et seq. He later revised his opinion, cf. *id.*, *supra* note 9, 103 et seq.

51 Comprehensively, Fastenrath, *supra* note 7, at 203-206; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) 419 et seq.; similarly, Bos, *supra* note 27, at 228.

52 German Constitutional Court, *Entscheidungssammlung* Vol. 46, 342; on this decision, cf. R. Geiger, ‘Zur Lehre vom Völkergewohnheitsrecht in der Rechtsprechung des Bundesverfassungsgerichts’, 103 *Archiv des öffentlichen Rechts* (1978) 382, at 390 et seq.

53 F. Berber, *Rivers in International Law* (1959) 254.

concept of 'due regard' provides flexible means whereby to conduct the selection of precedential cases.

A third means employed in the choice of precedents will be the identification of the characteristics under which they are grouped.⁵⁴ A vivid example is furnished by the law of State succession in respect of treaties, particularly in the case of the uniting of States. From a mere formal point of view, two possible outcomes of such unification may be identified. The first involves the creation of a new State out of two or more predecessors (fusion). In the second, one of the original States expands to incorporate one or more other States (incorporation).⁵⁵ There are a large number of precedents to the effect that the extinction of incorporated States leads to the expiry of their treaty obligations as well⁵⁶ (with the exception of obligations arising from treaties which run with the land). But these precedents largely stem from cases of annexation which occurred at the end of the last and the beginning of this century. If one joins with the call of the ILC for a 'modern international law',⁵⁷ these annexations – which would have to be considered illegal today, but not so at the time of their occurrence – ought to be disregarded in the search for relevant precedents today. Instead, the focus should be on instances of State practice where the parties have come together of their own free will.⁵⁸ Following this approach, 'a little more than a general tendency towards treaty survival'⁵⁹ becomes readily apparent and, as a result, the rules contained in Article 31 of the Vienna Convention on State Succession in Respect of Treaties⁶⁰ will present themselves as a codification of customary law.

Proving the existence of customary law successfully is thus heavily dependent upon the choice of characteristics under which precedents will be classified, the degree of abstraction and the precision employed in the formulation of such customary rules. International law contains no prescriptions on how this is to be done. In this regard, apart from treaties,⁶¹ informal instruments such as diplomatic notes, political

54 Cf. also, Allott, *supra* note 35, at 90 et seq., who identifies 'theories' as being responsible for the classification of practice. However, while it is correct that 'theories' influence the identification of the 'fundamental characteristics', those 'fundamental characteristics' employed in the classification of state practice are not always found in a 'theory'.

55 On the distinction between fusion and incorporation, cf. U. Fastenrath, 'States, Extinction', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 10 (1987), 465 et seq.

56 Cf. U. Fastenrath, 'Der deutsche Einigungsvertrag im Lichte des Rechts der Staatennachfolge', 44 *AJPIL* (1992) 1, at 22-25.

57 Commentary on Arts. 30-32 on the Draft on the Succession of States in Respect of Treaties, *YILC* 1974/II/1, 259 para. 28.

58 Cf. the examples found in the commentary on the ILC Draft, *ibid.* 253 et seq.

59 D.P. O'Connell, 'State Succession and the Effect upon Treaties of Entry into a Composite Relationship', XXXIX *BYIL* (1963) 54, 129; similarly, cf. Z. Mériboute, *La codification de la succession d'états aux traités* (1984) 198.

60 17 *ILM* (1978) 1488 et seq.

61 On the influence of treaties on customary law, cf. *Military and Paramilitary Activities in and against Nicaragua (Merits)* ICJ Reports 1986, 14, at 100 para. 189, 104 et seq. paras. 196-198. In the literature, comprehensively, R.R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 41 *BYIL* (1965-66) 275 et seq.; J. Kirchner, *Völkergewohnheitsrecht aus der Sicht der Rechtsanwendung: Möglichkeiten und Grenzen der Ermittlung völkergewohnheitsrechtlicher Nor-*

statements, resolutions of international organizations,⁶² legal writings and judgements of international courts, play a large role in the identification of types of conduct as well as in the formulation of customary law.⁶³ Usually a particular act is not simply ruled legal or illegal. Instead it is also evaluated in terms of its susceptibility to generalization. Through this procedure certain types of behaviour are crystallized, which may lead to the formulation of a rule of customary law.

However, neither informal instruments nor linguistic conventions will ever be able to fully assimilate presuppositions and thus provide complete agreement on the classification of practice. True, the formulation of customary rules based on long-standing tradition may be relatively uncontroversial and the behavioural pattern which they describe may seem an almost 'natural' type of conduct. The same may hold true for customary law derived from those resolutions of the UN General Assembly which reflect a wide international consensus on both the criteria that are to be considered when specifying a certain conduct and on the formulation of a corresponding customary rule.⁶⁴ However, the authority of long-standing usage and of (almost) consensual will is merely at the top of a sliding scale. At the bottom one might find the opinion of an individual international lawyer on how a customary rule should be formulated. Informal instruments influence the formulation of custom in proportion to their authority. Since such authority will differ greatly, legal propositions (*Rechtsätze*) of customary law and their scope of application will always remain unclear to some extent, particularly in borderline cases.⁶⁵

men (1989) 163 et seq.; M. E. Villiger, *Customary International Law and Treaties* (1985) 117 et seq.; E. Jiménez de Aréchaga, 'The Work and the Jurisprudence of the International Court of Justice 1947-1986', LVIII *BYIL* (1987) 32 et seq.. Cf. also, Art. 38 Vienna Convention on the Law of Treaties.

- 62 On resolutions, cf. *Military and Paramilitary Activities in and against Nicaragua (Merits)* ICJ Reports 1986 14, at 101 et seq. paras. 191-195; Conclusion 19 of the results of the Commission of the *Institut de Droit International*, studying the normative effectiveness of non-Treaty instruments, 62 II *Annuaire de l'Institut de Droit International* (1987) 111; Sloan, *supra* note 2, at 61 et seq.; Kirchner, *supra* note 61, at 174 et seq.
- 63 Cf., on all aspects of this problem, A. Bleckmann, 'Die Praxis des Völkergewohnheitsrechts als konsekutive Rechtsetzung', in *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler* (1983) 89, at 96; *id.*, 'Völkergewohnheitsrecht trotz widersprüchlicher Praxis?', 36 *ZaöRV* (1976) 374, at 383, 398; A. Cassese, *International Law in a Divided World* (1986) 183 et seq.; A. D'Amato, *The Concept of Custom in International Law* (1971) 85 et seq.; T. L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard Int' Law Journal* (1985) 457, at 464 et seq.; for a different viewpoint, cf. G.J.H. van Hoof, *Rethinking the Sources of International Law* (1983) 93 et seq.
- 64 Abi-Saab takes this too far, by stating in relation to customary law arising out of the resolutions of the General Assembly, which he describes as a 'nouvelle coutume': 'Ce contenu est déjà préparé avec le plus grand soin et dans les plus petits détails avant que la coutume n'entre en scène.' 'La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté', in *Etudes en l'honneur de Roberto Ago*, Vol. I (1987) 61. Such a view not only ignores the differences of the formulations employed in various resolutions but also overemphasizes the possibility of delimiting the content of a regulation through linguistic means.
- 65 Cf. R. Y. Jennings, 'What is International Law?', XXXVII *ASDI* (1981) 67 et seq.: 'the whole exercise of identifying general customary law has become immensely complex, and correspondingly

Due to the openness of customary law it may also evolve over time. Once this is recognized, the controversial question as to whether customary law can only be changed by a practice in violation of it⁶⁶ may be answered easily. Where the extent of the relevant type of conduct and the formulation and interpretation of a customary rule is dependent upon presuppositions which are influenced, among other things, by informal instruments, a change in these presuppositions will prompt a peaceful change in customary law, as practice will follow an altered expression of the presuppositions in question. Such changes will proceed faster and more smoothly the less the customary rule undergoing these changes was grounded on clearly defined, traditional concepts and presuppositions, and the more volitive elements it contains (for example: customary law arising from resolutions of the UN General Assembly). A rule of customary law which is essentially based on will may be easily changed by the same.⁶⁷

(ii) General principles

General principles in the sense of Article 38(1)(c) of the ICJ Statute can be identified no better with a purely positivist approach. A comparison of national laws cannot consist solely of extracting various individual norms from legal systems. This would amount to mere 'playing with curiosities'.⁶⁸ Equally it is not a matter of the specific scope of national rules.⁶⁹ Instead it is the leading idea that must be drawn from national laws, and then transferred to the international level. As in customary law the degree of abstraction then becomes a major problem. Were one to be satisfied that any leading idea which may be identified as underlying positive national law might find its place in international law, all legal ideas including the concepts of equity and justice, as well as their inherent contradictions, would be valid as general principles. The ICJ in fact assumed this in the *Continental Shelf (Tunisia/Libya)* case.⁷⁰ Thus all actions which do

uncertain; and in so many areas it is not just a question of enquiry but also of a policy-choice': cf. further, P.-M. Dupuy, 'Le juge et la règle générale', 93 *RGDIP* (1989) 569, at 576-588.

66 Cf. Weiler, in A. Cassese, J. H. H. Weiler (eds), *Change and Stability in International Law-Making* (1988) 8 et seq.

67 On this, cf. Stein, *supra* note 63, at 463 et seq. who sees the volitive element predominant in contemporary customary law. Cf. also, R.J. Dupuy, 'Declaratory Law and Programmatic Law: From Revolutionary Custom to "Soft Law"', in R. J. Akkermann, P. J. van Krieken, Ch. O. Pannenberg (eds), *Declarations on Principles. A Quest for Universal Peace: Liber Amicorum Discipulorumque Prof. Dr. Bert V.A. Röling* (1977) 250.

68 R. Thurnwald, *Die menschliche Gesellschaft in ihren ethno-soziologischen Grundlagen, Band V: Werden, Wandel und Gestaltung des Rechts* (1934), 8 (author's translation).

69 Cf., Judge McNair in his dissenting opinion in the Judgement *International Status of South West Africa*, ICJ Reports (1950) 148: 'The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready made and fully equipped with a set of rules.'; H. Mosler, 'Völkerrecht als Rechtsordnung', 36 *ZaöRV* (1976) 6, at 43 et seq.; Verdross, Simma, *supra* note 43, at sec. 604.

70 ICJ Reports 1982, 18, at 60: '... the legal concept of equity is a general principle directly applicable as law'.

not require a purely technical response may be legally evaluated even independently of positive rules.⁷¹

At the same time, however, law is made receptive to subjective influences once again of varying authority, thereby leading to relative normativity. This occurs because positive law always seeks a balance between fundamental ideas. This balance, however, may vary from time to time and from one legal system to another. In recognition of this, the ICJ stated in the *Gulf of Maine* case that there exist no rules of equity proper but only 'equitable criteria'.⁷² Exactly how, and with what content, general principles are to be extracted from the individual norms and underlying principles of national legal systems depends largely on individual preference. Once again, soft law and the subsidiary sources of international law in the sense of Article 38(1)(d) of the Statute of the ICJ, help prevent the choice from becoming completely random. They reflect international agreement upon the acceptable degrees of abstraction, concrete formulations and the desired balance between legal principles. Here, hard law which truly earns its pre-fix 'hard', may owe its very existence to soft law.

Bearing this in mind, it is possible to reconcile the view of Alfred Verdross and Bruno Simma, according to which general principles may also arise out of UN resolutions,⁷³ with traditional approaches to their creation. Rules contained in resolutions are then to be regarded as concretizations of legal ideas, also to be found in national systems, such as equity, human dignity, etc. These concretizing rules then appear as a concrete variety of legal principles to be found in domestic legal orders which may be applied in specific – possibly purely international – cases.

(c) At the constitutional level

(i) Pre-requisites for the creation of customary law and general principles.

Legal positivism is faced with the further problem (in its view a constitutional one) that the qualitative and quantitative preconditions for the generation of customary law and general principles are not at all clear. There is a great deal of controversy as to just how many examples of the practice must be found, as to whether or not domestic law or the voting on resolutions of the General Assembly may be treated as practice, and as to what extent the *opinio iuris* must be evidenced. Reference in this context is made to the

71 Cf. also, Sir H. Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law', in *Symbolae Verzijl* (1958) 196, at 205.

72 ICJ Reports 1984, 246, at 278, 290.

73 Cf. A. Verdross, 'Les principes généraux de droit dans le système des sources du droit international public', in *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968) 325 et seq.; Verdross, Simma, *supra* note 43, sec. 606, 639; cf. for a somewhat more restrictive approach, G. Dahm, J. Delbrück, R. Wolfrum, *Völkerrecht* *VI*, 2nd ed. (1989) 66.

theory of 'instant customary law',⁷⁴ which tends to disregard practice altogether, and to the concept of acquiescence, according to which a State finds itself bound by a rule of customary law even if it had never before taken a position on the existence of such a rule.⁷⁵ Thus, a decision on the existence of customary rules or general principles cannot be based upon fixed rules on the creation of such norms.⁷⁶ Within the coordinates of legal positivism, the preconditions laid down in various doctrinal writings are nothing but speculative arguments. Thus in legal positivism, the validity, and with this the normativity of legal propositions (*Rechtssätze*), is not certain but remains dependent upon the relative authority of such arguments.

(ii) *A numerus clausus* of sources of international law?

The unwritten constitution of international law still does not clarify which formal sources of international law actually exist. Although Article 38(1) of the Statute of the ICJ identifies treaty law, customary law and general principles as largely uncontested sources of international law, this does not make clear on the basis of which criteria these law-creating procedures, and possibly only these, are to be regarded as belonging to the international constitution. In the context of legal positivism, rules would be necessary to address this issue. As these are lacking in international law – with the exception of rules on decision-making by international organizations – reference must be made to other concepts in order to determine the formal sources of international law. One may refer, for instance, to factors like general acceptance, the will of States or general practice in order to establish what counts as a source.⁷⁷ This, however, leads to the observation that in legal positivism the validity of a legal proposition (*Rechtssatz*) and thus of the imperative embodied in it, is always (i.e. not only in the case of customary rules and general principles) dependent upon contestable claims of varying degrees of authority. Thus, even at the level of the validity of norms legal positivism is unable to succeed in its attempt to exclude relative normativity from international law.

(iii) *Ius cogens*

A problem inherent in the 'constitution' of international law is that of the hierarchical structure of the legal order. Both Vienna Conventions on the Law of Treaties recognize *ius cogens*. According to their provisions, treaties violating *ius cogens* are null and void. However, in contrast to national law, superordinated norms cannot be identified through particular legislative procedures. Instead, Article 53 of the Vienna

74 B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 *IJIL* (1965) 23 et seq.

75 Cf. for a more detailed examination, Fastenrath, *supra* note 7, at 95-100.

76 I. Dettler refuses even to discuss customary law as a result of the lack of clarity in the requirements for its creation: *The Concept of International Law* (1987) 112-120.

77 For more detail, cf. Fastenrath, *supra* note 7, at 88-91.

Conventions gives priority to a norm which is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character'. Such a formulation may leave a lot to be desired.⁷⁸ International law does not, however, thereby surrender itself to an incalculable and uncontrollable subjective process. The criterion of general acceptance bars any attempt to make recourse to an unverifiable form of natural law. On the contrary, to the largest possible extent, a positivist, and thus verifiable, definition of *ius cogens* was chosen⁷⁹. Here, once again, soft law fulfils a useful function in that it provides generally accepted manifestations of widespread and established views as to what is to be regarded as legal and just.⁸⁰

The supporters of legal positivism will hardly find this convincing. They must, however, acknowledge that the international community used the Vienna Conventions to state explicitly that positivist conceptions were not sufficient and that material conceptions of legal validity were required.⁸¹ Legal positivism is thus faced with the choice to either surrender its own premises by ignoring treaty provisions, or to accept these provisions and disclaim the omnipotence of positivist premises.

The problem of hierarchy of norms is not, however, of great practical importance in the international arena. Rather, the debate focuses on the material content of rules. As a result of the indeterminate contents of both *ius cogens* and treaties which may conflict with *ius cogens*, there is much room for manoeuvre in decision-making, rendering it easy to avoid the problem of hierarchy altogether. To date the problem has not arisen in practical terms.⁸²

3. Résumé

It has been proven that legal positivism cannot have recourse exclusively to existing rules. Rather, those involved in the interpretation of rules, in the identification and

78 On the controversy concerning the definition of *ius cogens*, cf. M. Danilenko, 'International *ius cogens*: Issues of Law-Making', 2 *EJIL* (1991) 42, at 44-55.

79 *Id.* at 46; A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986) 1.

80 Similarly, C. M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *ICLQ* (1989) 850, at 861, 865; Dupuy, *supra* note 65, at 592 et seq.; for a different view, Danilenko, *supra* note 78, at 62-63.

81 Even if one follows Danilenko, *supra* note 78, in stating that *ius cogens* can only arise, especially in universally binding treaties, with the express consent of all states thus bound, one is unable to identify a positivist argument for its continuing binding nature as regards later treaties.

82 Danilenko's two examples, *supra* note 78, at 57-61, of the United Nations Conference on the Law of the Sea and the Vienna Convention on the Succession of States in Respect of States Property, Archives and Debts, do not prove the contrary. In these instances the nations of the Third World only attempted to strengthen their bargaining position with the *ius cogens* argument. Quite independently of the legal status of the principles of the common heritage of mankind and the permanent sovereignty over natural resources, the Conferences only addressed the concrete expression of these rights in the conventions under discussion.

formulation of customary law and general principles, and in the proof of validity of norms cannot but pay regard to social conventions and understandings made among those to whom a norm is addressed or even within the entire legal community. Soft law plays an eminent role in the creation of such conventions and in the pursuit of commonly acceptable understandings. It is therefore time for legal positivism to free soft law and other informal instruments from the negative odium of necessarily softening hard law. Soft law is an instrument which provides, in as positivist a way as possible, understandings on the existence of rules, their formulation and interpretation. Without it, the law would founder on the rocks of divergent legal concepts and modes of interpretation. Of course, soft law instruments have varying success and leave many problems unsolved. However, these problems do not remain unsolved because soft law instruments come into play. Rather, they are rooted in the heterogeneous nature of the world, with its different global perceptions and ways of understanding. The different degrees to which such divergent global views and modes of understanding may assert themselves are in fact nothing else but relative normativity, which thus permeates legal positivism to the same degree as it does other legal theories.

II. Relative Normativity in Other Legal Theories

A distinction is commonly made between positivist and natural law theories.⁸³ There is no need here to relate all their facets and the mutual interlinking of their fundamental concepts. In the present context, it suffices to examine them only to the extent needed to show whether or not different degrees of normativity are inherent in them.

A. Positivist Legal Theories

1. Voluntarism

Voluntarism follows in the tradition of Hobbes: '*auctoritas, non veritas facit legem*'.⁸⁴ Law is equated with the will of the law-maker, who decides upon the content and legal character of a norm. Along these lines the PCIJ stated in its judgement in the *Lotus* case: 'International law proceeds from their [i.e. the States'] own free will'.⁸⁵

83 Cf., however, R. St. J. McDonald, D. M. Johnston, 'International Legal Theory: New Frontiers of the Discipline', in MacDonald, Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 5, which introduce 'instrumentalist' conceptions as a further distinction.

84 Th. Hobbes, *Leviathan*, Ch. 26; cf. also, the Digest 1, 4, 1.: 'quod principi placuit, legis habet vigorem'.

85 PCIJ (1927) Series A, No. 10, 18.

The primary weakness of voluntarism is that it refers to an internal process which is not perceptible from the outside. The precise will of a law-maker may only be imputed from various clues, which are discernible to a greater or lesser degree and thus possess only relative persuasiveness. The intentions of a law-maker cannot simply be deduced from a legal text. There are many gradations of imperfection in expressions before these expressions can be said to have reached the point of incorrectness.⁸⁶ Furthermore, one has to bear in mind that human will arises only in relation to concrete circumstances, and thus the legislative will of a person can only relate to scenarios envisaged by that person. A general imputation to the effect that the law-maker desires the application of law irrespective of his/her incomplete powers of imagination abandons the very foundations of voluntarism. Instead she/he normally intends to regulate behaviour only in situations concretely or abstractly envisaged by her/him. Even if only situations actually considered at the time of the legislative act were taken into account, problems remain: it is impossible – given the sheer bulk of the legislation necessary – to describe all conceivable situations in their divergent constellations with the degree of comprehensiveness and precision that would render it feasible always to specify under which precise conditions a norm is to be applied. Here, too it will only be possible to give more or less plausible suggestions as to what the law-maker desires. In regard to whether a legal norm is to be applied in partly or completely unforeseen circumstances, presumptions will be feasible at best.

Even where the will of the law-maker can be verified (which requires a decision as to whose will is to be verified, since generally more than one person is involved in the generation of law: the treaty negotiators, the signatories, the ratifying Head of State, the parliamentarians who agree to the treaty) relative normativity is possible in voluntarism. The legislative will of the law-maker may vary in strength depending on the instrument she/he chooses. Thus a 'constitutional' will may carry more weight in the mind of the law-maker than – say – an 'ordinance' will. Furthermore, a single legal system may be home to more than one law-maker, each invested with a different degree of legislative authority.

The difficulties are even greater in customary law. Although its existence rests upon an *opinio iuris*, explicit declarations, from which a discernible statement of law-creating intent may be ascertained, are by no means common. Such ascertainment is largely a matter of imputation. In this process, in cases where a factual will cannot be proven and may not even exist, consent inferred from silence, that is, the inference that

86 On this basis the Greek delegation to the Sixth Committee of the UN General Assembly was, in the course of the deliberations on what was to become the Vienna Convention of the Law of Treaties, quite justified in refusing restrictions within the methods of interpretation: 'It is difficult to agree that priorities should be established among the various means of interpreting a treaty. Since a treaty was nothing more than an expression of the common intention of the parties, there was only one basic rule of interpretation: to ascertain the intention of the parties by every possible means, in every possible way.' (GA Off. Rec., 20th Sess. 6th Committee, 845th Meeting, para. 42); similarly the Kenyan delegation (*ibid.*, 850th Meeting, para. 40).

a State is legally bound by virtue of having made no persistent objection,⁸⁷ is only the extreme end of the scale.

Similarly, a law-creating will is absent in the case of general principles as far as they are deduced from domestic rules. The decisive factor here is the homogeneity of national legal systems and the transferability of legal solutions found there to the international level.

Voluntarism thus has to have recourse to fictions and imputations. By doing so, this school not only leaves its positivist foundations behind. Recourse to imputations also implies relative normativity because imputations can only be convincing to a greater or lesser degree but are never cogent. Even where a legislative will may be reliably discerned, relative normativity can persist insofar as different law-makers may be vested with varying legislative authority.

2. Legal Realism

According to this variant of positivism the application of law is determined neither by legal rules nor by precedents. The judicial decision is considered as an intuitive, irrational act. The judge has recourse to her/his own perception of justice. Thus, law is experienced as a direct revelation of justice in a particular context.⁸⁸ Although this point of departure affords an infinite capacity to renew law in response to any new problems, the law pays dearly with the introduction of introspection and subjective factors. The impact of such a subjective decision upon society is then dependent upon the powers of the individual decision-maker, which can vary greatly, leading once again to a relative normativity between the decisions taken. This holds true especially in international law, where judges are not vested with coercive powers. International law is then either 'nothing but the crudest policy of force',⁸⁹ because normativity is proportional to the strength of the subjects of international law reading the law after their own fashion, or – as A. D'Amato has formulated – only that which 'all of the nations of the world believe it to be, or in other words their *consensus*'.⁹⁰ This view would reduce international law to a minimum and deprive it of much of its normativity.

87 Cf. Stein, *supra* note 63, at 457 et seq.

88 A. Ross, *Lehrbuch des Völkerrechts* (1951) 51 et seq.; id., *On Law and Justice* (1958) 59 et seq.; B. Mulder, 'Les lacunes du droit international public', VII *Revue de droit international et de législation comparée* (1926) 555 et seq. Similarly, R. Ago bases his 'diritto spontaneo' on the legal consciousness of States: 'Science juridique et droit international', 90 *RdC* (1956 II) 857, at 935.

89 A. V. Lundstedt, *Superstition or Rationality in Action for Peace?* (1925) 205.

90 A. D'Amato, 'What "Counts" as Law?', in N. Onuf, *Law Making in the Global Community* (1982) 100 No. 39. In order not to do D'Amato an injustice, it should be noted that he has since stated his definition of international law to be unfortunate and has broken with it. Cf. A. D'Amato, 'Is International Law really "Law"?' , *Northwestern Univ LR* (1984/85) 1293 et seq.

3. Sociological Jurisprudence

Sociological jurisprudence concentrates on external events. According to this school, law is the order that is experienced. It cannot, however, be simply equated with ordinary human activity, which would deny its normativity. Rather, what matters is the reaction of society to behaviour which deviates from the norm. The extent of reaction then acts as an indicator determining whether a norm forms part of law, of morality, of courtesy, etc.⁹¹ As these reactions will always move on a sliding scale and as one cannot confine 'law' only to those acts that prompt the most extreme reactions, different degrees of normativity are inherent also to sociological jurisprudence.

The policy-oriented jurisprudence of McDougal and his followers may be ranked amongst the theories of sociological jurisprudence, if one disregards the natural law components of the human dignity concept.⁹² However, McDougal does not concentrate on reactions following a contravention, but instead focuses on the preventive function of law in its impact on behaviour. This approach evaluates the myriad of behavioural expectations and demands present in a society, which influence the comprehensive political decision-making process.⁹³ As such demands and expectations command different degrees of authority, normativity is once again subject to relativization.

As the authority of behavioural demands and expectations is dependent upon the number of people who will support their application, it is correct, from the viewpoint of sociological jurisprudence to afford *erga omnes* duties a greater normativity.⁹⁴

B. Natural Law Conceptions

The linchpin of all natural law theories is justice. Ancient philosophy deduced its content from an all-embracing world order; Augustine found it in the will of God; Thomas of Aquinas in the order inherited from God. Attempts have been made since the Enlightenment to develop maxims and rules of justice from reason.⁹⁵ The inclusion of justice in law occurs in two ways.

91 E. Ehrlich, *Grundlegung der Soziologie des Rechts* (3rd ed., 1967) 132.

92 On this cf. Allott, *supra* note 35, at 122-125; E. McWhinney, *The International Court of Justice and the Western Tradition of International Law* (1987) 49-51; J. Stone, *Visions of World Order* (1984) 53-55.

93 For a more detailed presentation, cf. McDougal, Reisman, *supra* note 22, at 103 et seq.

94 On this point Weil, *supra* note 1, at 431 et seq.

95 Cf., for more detail Fastenrath, *supra* note 7, at 36-37.

1. Justice as the Source of Law

Up until the Enlightenment, entire legal systems were derived from nature and reason. Both the confidence of cognitive certainty and the belief in a natural social order have since lost their potency. Today, justice and its constituent part, equity, at most play a role complementary to law. Thus the ICJ stated in the *Continental Shelf (Tunisia/Libya)* case:

Equity as a legal concept is a direct emanation of the idea of justice. The court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle applicable as law.⁹⁶

The ICJ had made similar recourse, in the *Corfu Channel* case, to 'certain general and well recognized principles, namely: elementary considerations of humanity'.⁹⁷ The Manila Declaration on the Peaceful Settlement of International Disputes⁹⁸ also demands that international conflicts are to be settled 'in conformity with the principles of justice and international law'. What we witness here is a return to the position taken by Descamps, Chairman of the Committee of Jurists established for the preparation of the Statute of the PCIJ According to his proposal on the formulation of Article 38(1)(c) of the Statute the court was to apply, apart from treaties and custom 'the rules of international law as recognized by the legal conscience of civilized nations'. By these he understood 'the fundamental law of justice and injustice deeply engraved on the heart of every being.'⁹⁹ According to this concept equity and justice form part of international law. Preference should, however, be given to positive norms. Legal principles and equitable criteria are only to be used to fill in the lacunae in positive law.

Today, it is universally accepted that no accurate, 'operational' results may be ascertained purely through the application of rules of equity and justice, as was once held by an Anglo-American Court of Arbitration in *Eastern Extension, Australasia and China Telegraph Co.* which stated:

International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find – exactly as in the mathematical

96 ICJ Reports 1982, 60; reaffirmed in *Continental Shelf (Libya/Malta)*, ICJ Reports 1985, 39; similarly, the American Law Institute, *Restatement of the Law: Foreign Relations Law of the United States* 1 (1987) 29; cf. also R. Bermejo, 'Place et rôle de l'équité dans le droit international nouveau', 36 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1985/86) 219 et seq.; M.E. Villiger, 'Die Billigkeit im Völkerrecht', 25 *ArchVR* (1987) 174 et seq.

97 ICJ Reports 1949, 4, at 22.

98 G.A. Res. 37/10 of 15 November 1982.

99 *Procès-Verbaux*, 306, 310 et seq.

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sciences – the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations between States as well as between private individuals.¹⁰⁰

The ICJ correctly refuted this view when it spoke of principles of equity and justice and not of rules. Even though principles or criteria are occasionally designated as 'rules', only the former are applied by weighing them up against each other before a decision is taken.

2. Justice as a Goal of the Law

Hence, modern day supporters of natural law also presuppose a positive law which is no longer understood as a reflection of justice. Rather, it is now conceived as an order 'whose meaning is essentially committed to the value of justice'.¹⁰¹ This conceptual linkage justifies the power of the law to impose duties and, also, creates a pattern of meaning which, through the identification of the (ultimate) object and purpose of all norms, influences positive law (cf. Art. 31(1) of the Vienna Convention on the Law of Treaties). The ICJ made explicit reference to this role in the *Continental Shelf (Tunisia/Libya)* case:

... when applying positive international law, the court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be the closest to the requirements of justice.¹⁰²

3. Justice as a Parameter of Law

Since it is the linkage between positive law and justice which establishes the power of the law to impose duties, the reverse is also true, to the effect that an unjust norm has no claim to legal validity. Thus, in addition to its functions as an interpretational aid and filler of lacunae, natural law sets limits to positive law.¹⁰³

4. Relative Normativity in Natural Law

The social effectiveness of norms deduced from principles of justice or equity, as well as the persuasive power of acts of interpretation founded upon such principles, is adversely affected by the large degree of variance in perceptions of justice. In the face

¹⁰⁰ VI RIAA 112, at 114.

¹⁰¹ A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) 3: 'grundsätzlich auf den Gerechtigkeitswert hin sinnbezogen'; in the same vein *id.*, *Völkerrecht* 5th ed., (1964) at 16; *id.*, 'Die Wertgrundlagen des Völkerrechts', 4 *ArchVR* (1953) 129, at 139; G. Radbruch, *Rechtsphilosophie* (8th ed., 1973) 123, 328, 346.

¹⁰² ICJ Reports 1982, 18, at 60; reaffirmed in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1985 13, at 39.

¹⁰³ In the same vein, E. Borel in his report for the Institut de Droit International, 38 *Annuaire de l'Institut de droit international* (1934) 251, at 274 et seq.; Sir H. Lauterpacht, *International Law: Collected Papers* Vol. I (1970) 86.

of principles with little content, such as 'do good' or '*sum cuique*', unanimity may indeed arise. However, as soon as attempts are made to flesh out these principles, differences in political-philosophical conceptions will become apparent. In the words of P. Reuter, there will always be '*plusieurs équités*'.¹⁰⁴ In earlier times the various natural law theories disavowed each other's contradictory deductions and thus mutually undermined each other's claims to normativity. As certainty of cognition has disappeared and pluralism is now reigning, one is forced, in recognizing the validity of other perceptions of social life, to admit the limited extent of one's own-perceptions. M. Koskenniemi designates these perceptions as visions of utopia¹⁰⁵ which according to D. Kennedy, convince only those who already believe.¹⁰⁶

Relative normativity in natural law concepts does not, however, arise solely as a result of divergent beliefs. It also arises within each natural law concept. The modern world, in contrast to antiquity or the middle ages, no longer sees each social system as being a closed value system which would allow the deduction of results with mathematical certainty, as was still suggested in the *Eastern Extension, Australasia and China Telegraph Co* case.¹⁰⁷ Instead, where the scope of values and principles and the deductions stemming from them are not predetermined, but rather their individual weight and relation to one another are laid down in response to each individual case as it arises, the normative strength of each value or principle will necessarily vary. Such an open value system necessarily presupposes relative normativity.

Consequently, norms and their interpretations are of relative normativity within the natural law framework. Norms are given preference according to the degree of value ascribed to them. Interpretations are dominant, or are to be set aside, once again by virtue of their relative value. Since the value of norms and interpretations may vary in each individual case of application, their relative weight cannot even be generalized. The situation gains more complexity still because different persons will have different perceptions of legal value. These different perceptions will lead to differing judgements as to the scope and validity of a rule. As value judgements will not be generally shared, their impact on the social order will vary.

III. International Law as an Order of Graduated Normativity

As demonstrated in the sections above, each legal concept necessarily exhibits a degree of relative normativity at the level of content. It was also shown that relative normativity also operates at the level of the rules pertaining to the procedures of law-

104 P. Reuter, 'Quelques réflexions sur l'équité en droit international', XV *RBDI* (1980) 165, at 179.

105 Koskenniemi, *supra* note 51, at 131 et seq.; *id.*, *supra* note 22, at 9.

106 D. Kennedy, 'Theses about International Law Discourse', 23 *GYL* (1980) 353, at 376; in agreement Koskenniemi, *supra* note 51, at 137.

107 *Supra* note 100.

creation, and thereby, third, at the level of creation and validity of individual legal norms as well. Due to the coexistence of the divergent concepts of law the normative contentions of the aforementioned theories are relativized even further. The starting-point of this thesis is the presumption that legal concepts do not operate in a self-referential world with no connection to other concepts, which would imply that legal discourse lacks a common subject of conversation, and would thus from its inception be 'a conversation without content'.¹⁰⁸ Instead, legal theories may be linked together in two ways: on the one hand, through their common point of reference, their influence on human behaviour (*infra* A.), on the other, through their inclusion in an all-embracing legal system (*infra* B.). In both cases the authority of the normative contentions of the competing theories may have a cumulative effect or may counteract each other.

The point of departure for the following discussion is the understanding that a verifiable, 'true', concept of law does not exist.¹⁰⁹ 'The term "law" has no inherent claim, arising out of some conceptual myth, to "mean" something well-defined and nothing else. What law should mean is a question of definition and definitions are only crutches for cognition.'¹¹⁰ Thus, all legal theories as well as the norms derived from them are nothing but claims. Legal science is not to be understood as a method which seeks to reconcile law with truth. It is instead a method of operation, whose effectiveness is to be judged by its results.¹¹¹ As law is given the general task of influencing human behaviour, legal theories must be judged according to how effectively they fulfil this task. In this context, limited effectiveness of a legal theory implies limited normativity.

A. Legal Theories as Parts of the International Political System

International actors are linked together in a worldwide social system which concerns itself with the division of resources, with averting dangers and with controlling social interaction, etc. This system forms the basis of international law or – to be more precise –: the basis for different conceptions of international law which, on their part, effect this system.¹¹² Individual theories of international law can have effect only to the extent that they have prevailed in the global society. The normative strength of a legal theory is thus proportionate to the number of its supporters and their ability to give effect to it.

¹⁰⁸ Kennedy, *supra* note 106, at 376; in agreement, Koskenniemi, *supra* note 51, at 137.

¹⁰⁹ For more detail, cf. Fastenrath, *supra* note 7, at 32-83; Koskenniemi, *supra* note 51, at 131-191.

¹¹⁰ Th. Geiger, *Vorstudien zu einer Soziologie des Rechts* (2nd ed., 1970) 126 (author's translation); cf. also, W. Fikentscher, *Methoden des Rechts in vergleichender Darstellung I* (1975) 1, 13 et seq., 340.

¹¹¹ Carty, *supra* note 79, at 109.

¹¹² In this sense, M. S. McDougal, *Studies in World Public Order* (1960) 987: 'What we have instead is rather a variety of "international" laws and an anarchy of diverse, contending orders proclaiming and embodying the values of human dignity in very different degrees, and aspiring to application and completion of many different scales of international, regional, and global compass.'

Individual legal theories, however, cannot be viewed in isolation from one another: actors place requirements upon the behaviour of others, based upon their own understanding of law, irrespective of the legal theories of others. In a particular case, one actor may thus perceive a set of demands and expectations which may be derived from a completely different set of assumptions and expectations (though these might not necessarily differ from each other in content). The actor, on her/his part, will react on the basis of her/his own legal understanding, leading to interaction and the meeting of different legal perceptions in the particular case. In each such case the normativity of each set of expectations may, depending on the degree to which their contents correspond to or deviate from one another, have a cumulative effect or counteract each other.

In such a context the gradation of normativity appears as an extra-legal dimension where normative standing is quantitatively apportioned in accordance with the degree to which human behaviour is influenced by particular behavioural requirements. The relativity of normativity is thus to be understood as a category of sociology of law.

B. Different Legal Theories as Parts of an All-embracing System of International Law

The discussion takes on a different appearance when the various legal concepts are gathered under the umbrella of an overall system of international law, and the effectiveness of each theory analysed within this system. The gradation in the normativity of demands brought about by the coexistence of the various legal theories is then a matter internal to law. Law thus becomes a system of parallel or even divergent forces. In the context of the present article, this concept cannot be expounded in detail, some rough outlines will have to suffice.

1. Outlines of an Overall System of International Law

If one acknowledges the possibility of embracing the various legal theories in one overall system one has to suppose the following: (i) law is not a pre-existing system, only in need to be identified; (ii) law is not necessarily a homogeneous system, free from contradictions; (iii) the various legal theories do not exclude each other. Although the first two premises are not simply proven by the foundationlessness of the divergent legal theories, the openness of language and with this, the openness of the concept of law, allows us to accept them. In respect of the third premise I must confine myself to the observation that none of the theories of law which I have presented is self-sufficient and that the various theories are interconnected. For example, legal positivism is obliged to descend from its pure semantic level. In order to clarify the meaning of a norm, legal positivism, too, has to follow Articles 31 and 32 of the Vienna Convention on the Law of Treaties and include a pragmatic dimension by

referring to the will of the parties to a treaty, to subsequent practice, to the object and purpose of a norm and to the circumstances of its creation. In so doing, legal positivism relies on determinants drawn from other legal theories. On the other hand, approaches that are based upon the material content of law cannot dispense with linguistic elements. The law-maker can only express her/his will to the addressees of law through language; divergent practice is 'made the same' by linguistic categories, and our legal perceptions or reflections on justice must be expressed through these conceptual categories, to be identified by particular verbal expressions. Language is thus not only necessary for articulation, but is much rather a prerequisite for any orderly intellectual examination.

However, the linkage between the various legal theories is even closer. It has already been suggested that natural law concepts may no longer be understood as comprehensive systems of norms. Instead, they are to be seen as presupposing the existence of positive law, and through their aiming at justice, yielding significant interpretative arguments. Criteria of justice and equity are, at most, employed to supplement legal norms and in extreme cases may be used to annul them. On the other hand, law-makers will pay due regard to the dominant perceptions of justice in society, since any legal order, if it is to survive, must be based on general acceptance. In their turn perceptions of justice are being shaped through existing legal norms. Furthermore, these perceptions are influenced by social practice which is taken into consideration by law-makers as well, whilst practice similarly pays regard to perceptions of justice and to binding law. Perceptions of justice, law-making and practice do not spring up from the void. Rather, they are intertwined in manifold ways.

The mutual interlocking of legal theories, however, does not lead to their convergence, nor even to a consensus on their content. Instead, since each legal theory interprets a legal proposition (*Rechtssatz*) within its own intellectual context, different understandings of the same norm are simply unvoidable. If one proceeds from the notion that legal propositions (*Rechtssätze*) have no verifiable and determinate content and, hence, certain interpretations cannot be 'proven' to be true, one must be ready to accept this result. This allows the conclusion that a legal proposition (*Rechtssatz*) may have various 'admitted' interpretations, which may well be contradictory. Consequently, the international legal system can no longer be seen to be free from internal contradictions. Such contradictions are not merely restricted to the level of interpretation. They extend to the formulation and validity of norms since the various theories of law also have effect on the concept of sources and the identification of customary law and general principles. The call for law to be free from contradiction, however, is only raised in national legal systems where citizens must indeed be protected from contradictory commands which they would be unable to satisfy. But the role of law is not limited to that of commanding.¹¹³ Law also functions as a means for the preventive channelling of human behaviour. Here, the individual, subjective

113 On the functions of law, Fastenrath, *supra* note 7, at 252-268.

interpretation by the addressees will be decisive. In most cases such an interpretation will not be uniform among all addressees. This is especially true in international law where there is no general obligation to submit oneself to the jurisdiction of international courts and tribunals. Even where States have accepted such jurisdiction, this avenue is rarely used in practice. Therefore, conflicts among legal perceptions are as unavoidable in international law as they are in all legal systems. However, such conflicts do not prevent these perceptions from having an impact on state behaviour.

Nonetheless, the interconnections between the different theories of law seem to be so intensive, and agreement on concrete content of legal propositions (*Rechtssätze*) so far-reaching, that it seems to be feasible to unite them in a single comprehensive system. This already occurs, at least in the minds of practitioners, who generally do not care about eventual conflicts between the various schools of thought and instead operate in an eclectic manner, choosing their arguments from wherever they can be found, irrespective of any theoretical starting points. I believe, however, that enough congruity exists also with respect to the content of the different theories so as to justify the assumption of one comprehensive system. Divergence in the understanding of norms seems to be the exception rather than the rule, although lawyers are, of course, mostly concerned with such differences. In such 'hard' cases the legal system is simply not able to provide a certain result. Rather, differing contentions will be made. Equal validity may, however, be attributed to these contentions only in a 'rationalist' system like the one designed by M. Koskenniemi.¹¹⁴ In a communicative approach, as favoured by the policy-oriented jurisprudence of McDougal and his followers,¹¹⁵ differing legal perceptions will receive varying degrees of support and hence be of varying normativity.

2. *The Authority of Normative Contentions*

If the various legal theories constitute mere contentions, then the norms derived from them can also be but contentions which must first prove their claim to observance. The capacity of a normative contention to assert itself will not only depend upon its content but will have to rely upon external factors also, in particular on the power of the actor or entity who proposes it. With regard to this, methodology makes a distinction between three types of interpretation that refer to authority: authentic, authoritative and non-authentic/non-authoritative interpretation.¹¹⁶

114 *From Apology to Utopia*, *supra* note 51, at 490 et seq.

115 Cf. M.W. Reisman, 'International Lawmaking: A Process of Communication', 75 *Proceedings of the American Society of Int'l Law* (1981) 101, at 105 et seq.

116 Fastenrath, *supra* note 7, at 194-199; Karl, 'Vertragsauslegung – Vertragsänderung', in C. Schreuer (ed.), *Autorität und internationale Ordnung* (1979) at 11 et seq.

The widest-ranging competence to interpret a treaty is held by the parties to that treaty themselves. On the basis of the principle *cuius est interpretari cuius condere*, they are able, in their collectivity, to agree upon a determinate meaning (authentic interpretation).¹¹⁷ Such interpretation will assert itself even in cases where it comes about not through the conclusion of an agreement to that end but through unilateral but concordant pronouncements, irrespective of whether it goes beyond the ordinary meaning of the text. The limits to treaty alteration are fluid. Barriers to authentic interpretation can arise only on constitutional grounds¹¹⁸ or as a result of the law of treaties. Thus, an interpretation must not, for example, impose burdens on third States or contravene *ius cogens*. Finally, only interpretations which are more or less in accordance with the text of the treaty will be accepted by UN organs, in particular the ICJ. Otherwise, Article 102 of the UN Charter which is designed to provide certainty as to the law, would be undermined.¹¹⁹

An act of interpretation is called authoritative when it is effected by an international organ empowered to do so by an express authorization. Such authorization must provide that the decision of the organ – for instance, of a court of arbitration or the plenary body of an international organization – will be generally binding.¹²⁰ As a rule, however, the judgements of courts are not authoritative in the sense just indicated because they relate only to a particular case. The same is valid for resolutions adopted by organs of international organizations. In order for it to assert itself, an act of authoritative interpretation must be acceptable to the subjects of international law affected by it; otherwise these subjects will oppose its application and will not feel bound by it. For this reason, organs rendering an interpretation of this kind will be well-advised to keep it closer to the text than in instances of authentic interpretation.

117 Cf. Commentary of the ILC on Art. 27 of its draft convention on the law of treaties, *YILC* 1966 II, 177, at 221 para. 14: '... an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation'. On authentic interpretations in general cf. I. Voicu, *De l'interprétation authentique des traités internationaux* (1968).

118 The organs of a state exercising the function of representing that state in external affairs are often restricted in their actions by other state organs. Thus, for example, the executive is not free to make, by means of practice or interpretation any changes it wishes to a treaty which had been subjected to parliamentary approval.

119 Thus caution is called for in dealing with 'free' authentic interpretations. R. Ago's statement: 'If the parties agreed to interpret the treaty in another way, there was nothing to prevent them from doing so' (*YILC* 1964, I/1, 280), seems to go too far. On the other hand, it is correct to state that authentic interpretation, as a result of its volitive character, is not bound by rules of interpretation: R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge insbesondere in der Rechtsprechung internationaler Gerichte* (1963) 45; Karl, *supra* note 116, at 24; Verdross, *YILC* 1964 I/1, 279; Verdross, Simma, *supra* note 43, sec. 775.

120 Thus, in accordance with Art. 29 of the Agreement of the International Monetary Fund any question of interpretation of the provisions of that agreement arising between any member and the Fund or between any members of the Fund are submitted to the Executive Board for its decision; similar provisions are found in Art. 9 of the Agreement of the International Bank for Reconstruction and Development, Art. 8 of the Agreement of the International Finance Corporation, Art. 10 of the Agreement of the International Development Association.

This leads us to non-authentic/non-authoritative acts of interpretation. These bear the closest relation to the wording of a legal proposition (*Rechtssatz*). The capacity of such acts of interpretation to assert themselves is heavily dependent on their proximity to general or technical use of language, since they have no other institutional framework to rely on. This is equally true on the basis of all legal theories, even though only legal positivism ascribes binding authority to words while the other legal theories regard words as being purely incidental, in the sense that such words may reflect the intention of the law-creators only to a certain degree or may only approximate the underlying perceptions of justice, values or patterns of behaviour. As has been demonstrated above (1.), however, even these theories, have to proceed from an assumption that the words employed in a legal text conform to linguistic usage if the law is to fulfil its function. In this sense the following statement of the ICJ in the *Legal Status of Eastern Greenland* case is generally valid: 'If it is alleged by one of the parties that some unusual or exceptional meaning is to be attributed to it [the term 'Greenland'], it lies on that party to establish its contention.'¹²¹ The greater the deviation from the general linguistic convention, the greater will be the degree of authority required to ensure its acceptance.

The extent to which acts of interpretation which deviate from the normal use of words or which try to attach a specific meaning to a legal proposition (*Rechtssatz*) determine the behaviour of the subjects of international law concerned, is dependent, first, upon the status, reputation, or factual power base of their authors. Thus, the judgements of courts and arbitral tribunals are binding upon the parties to a conflict (cf. Art. 59 of the ICJ Statute). At the same time, however, such judgements, in their role as 'subsidiary means for the determination of rules of international law' in accordance with Article 38(1)(d) of the Statute, have a general persuasive effect. In the same manner, this provision places the opinions of scholars which are most highly recognized worldwide in a better position than other legal writings. The impact of a court decision or doctrinal interpretation will also depend on the reputation of those involved. In contrast, unilateral acts of interpretation on the part of States will always be influenced by elements of power, whether military, economic or political.

Second, the capacity of an act of interpretation to assert itself is determined by the degree of authority flowing from its own merits. A non-exhaustive list of factors influencing such authority might include: the circumstances under which the interpretation has taken place, its degree of abstraction, its claim to authority, its compatibility with commonly accepted values and goals, the degree to which it has been made known, its confirmation by other acts of interpretation, its compatibility with public opinion and the degree to which attention is paid to it.¹²² An act of

¹²¹ PCIJ (1933), Series A/B, No. 53, 49.

¹²² This catalogue relies on that elaborated by H. Miehsler in respect of resolutions of international organisations ('Zur Autorität von Beschlüssen internationaler Institutionen', in C. Schreuer (ed.), *Autorität und internationale Ordnung* (1979) 35 et seq.), cf. also O. Schachter, 'Towards a Theory of

interpretation whose acceptance has been effected by strong pressure, will thus have authority only as long as that pressure is carried on. A well-argued act of interpretation will have more authority than an instance of interpretation in vague and dubious terms. The views of a well-known international jurist will have greater resonance, simply because he is read more widely. Further, an act of interpretation is more readily accepted when it satisfies the needs of those addressed by the norm, if it is compatible with the values and goals sought after, and if it coincides with public opinion. Finally, an often-repeated interpretation as well as the consistent application of a legal proposition (*Rechtssatz*) in a particular sense, will reduce the chances of a divergent interpretation being accepted.

This shows that the different legal theories only abstract particular aspects out of the comprehensive system of law here presented. Thus, the rationalist system applied by the Critical Legal Studies movement confines itself to the discourse of international lawyers and courts, which have, above all, recourse to the power of their arguments.¹²³ Such arguments must be convincing or they will be powerless. State organs, on the contrary, mostly 'convince' through their 'might'. In the courts, conciliation of conflicting interests might play a role.

What is true for the interpretation of treaties is also true for the formulation of customary law and general principles, for claims as to the existence of supplementary sources of law beyond those codified in Article 38(1) of the ICJ Statute, and of *ius cogens*. Insofar as such norms are championed by States capable of ensuring their enforcement, general acceptance is more likely to follow.¹²⁴ Other international actors will do well to seek proof for their normative contentions in the practice of States, their compatibility with the interests of those addressed by the norms and with wide spread value perceptions. In practice, well-proven rules of customary law having a narrow field of application and being endowed with a strong *opinio iuris*, will go largely unchallenged. On the other hand, a customary rule will be the more contestable the fewer precedents can be established,¹²⁵ the more practice diverges and the weaker the

International Obligation', 8 *Va.J.Int'l.L.* (1968) 300 et seq.; R. Higgins, 'Compliance with United Nations Decisions on Peace and Security and Human Rights Questions', in S. M. Schwebel (ed.), *The Effectiveness of International Decisions* (1971) 32 et seq.; Dupuy, *supra* note 67, at 254 et seq.; Ida, *supra* note 2, at 337; C. Schreuer, 'The Authority of International Judicial Practice in Domestic Courts', *ICLQ* (1974) 681, at 694 et seq.; id., 'Wechselwirkungen zwischen Völkerrecht und Verfassung bei der Auslegung völkerrechtlicher Verträge', 23 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1982) 61, at 76 et seq.

123 F. V. Kratochwil, *Rules, Norms and Decisions* (1989) 225.

124 Bin Cheng, however, goes too far when he states, *supra* note 74, at 37: 'If States consider themselves bound by a given rule of international law, it is difficult to see why it should not be treated as such in so far as these states are concerned...'; similarly A. D'Amato, 'On Consensus', *CanYIL* (1970) 104, at 121: 'When all states without exception believe that X is a rule of law, then X is in fact a rule of law'. The ICJ refused, in *Military and Paramilitary Activities in and Against Nicaragua (Merits)*, to base its decision on the unanimous recognition of certain rules by states involved, without reference to the formal process of creation of customary law, Reports 1986, 14, at 97 et seq. para. 184.

125 At the extreme end will be the creation of customary law on the basis of one single action, cf. Akehurst, 'Custom as a Source of International Law', 47 *BYIL* (1974/75) 1, at 13. 'Instant Customary Law'

opinio iuris is expressed. This does not necessarily mean, however, that a contended customary norm could not eventually assert itself, since 'weaknesses' in its subjective or objective element might be compensated by the 'strength' of the respective other.¹²⁶

Consequently, a normative contention will be best capable to assert itself if it is generated through a generally accepted source of law, and if it closely reflects the will and the practice of the States, as well as common perceptions of justice. If these conditions are fulfilled, the existence of theoretical divergencies does not necessarily weaken individual normative contentions based upon such concepts. Provided that these contentions display conformity as to substance, they may in effect strengthen each other.¹²⁷ Where, on the other hand, contentions are contradictory they might paralyse each other. But even this result need not lead to the legal aporia so impressively described by M. Koskenniemi.¹²⁸ Instead, it will give rise to a struggle of rivalling legal contentions for dominance. Contrary to the epistemological approach of M. Koskenniemi, the authority of such contentions, and thus their strength and their capacity to assert themselves, need not be equal. After all, nobody is required to side with the powerful battalions. The 'weaker' contention is also a legal one and may, over time, even win out over the other. The question of which contention to support is a political one and the prevalence of a legal contention thus the result of a political process. As a result of calculations of legal policy, those involved in the process of the creation and application of international law will frequently be prepared to accommodate themselves with other normative contentions, even if these cannot be founded upon finite justifications.¹²⁹

Final Remarks

Gradation in the normativity of the law has proven to be unavoidable in all legal theories. Legal propositions (*Rechtssätze*) and the legal concepts employed in them only give an appearance of certainty. With the extension of international law beyond the boundaries of the fairly homogeneous Western State system, uncertainty has even increased.¹³⁰ The use of language and the intellectual background of comprehension, which form the basis for the interpretation of legal norms, are never identical. Rather, with increasing cultural diversity, they will deviate more and more from one another. The more heterogeneous the world becomes, the more importance must be attached to the formulation of common goals and criteria for the balancing of interests and to the

would go even further, eventually disregarding practice altogether, cf. Cheng, *supra* note 74, at 23 et seq.

126 Kirgis, 'Custom on a Sliding Scale', 81 *AJIL* (1987) 146, at 149.

127 Simma, 'Geltungsgrund', in I. Seidl-Hohenveldern (ed.), *Wörterbuch des Völkerrechts* (1985) 95, at 96.

128 Koskenniemi, *supra* note 51, at 13-31.

129 Allott, *supra* note 35, at 128-129.

130 Cf. Allott, *supra* note 35, at 95-97.

establishment of all-encompassing linguistic conventions. In the face of conflicting interests and divergent goals, stemming from different cultures, clarity in the formulation and comprehension of legal propositions (*Rechtssätze*) can only be preserved in this manner, narrowing the room for possible interpretations and thus ensuring that the behaviour of all actors may remain predictable. Here, the much-maligned phenomenon of soft law performs an invaluable function. It enables worldwide agreement on the content of hard law, in that it limits the scope of acceptable subjective auto-determination. Thus, soft law constitutes a 'positivized' text, even though an extra-legal one in the eyes of legal positivism, which saves this very theory from extinction in a pluralist world.¹³¹ The fact that this function has been largely ignored is frequently due to the assumption that one's own method of legal comprehension is the only correct one.

The tendency inherent in soft law, to become a new form of law-making, cannot be denied. This observation is due to cause unrest in the orderly circles of classical international law, which is based on the sovereignty of States. However, a change of direction has already taken place both in and by means of international organizations. The tendency now is to view certain international issues as matters of concern to the international community as a whole.¹³² The most obvious expression of this can be found in Chapter VII and in Article 2(6) of the UN Charter, where the authority to preserve world peace is claimed quite independently of whether the States involved in a conflict are members of the UN or not. The fact that such claims to universal authority have, in the past, been realized only to a limited extent, indicates that the respective provisions of the Charter were premature. However, a change appears to have occurred in recent years, following the end of the super-power conflict and, particularly, the joint action against Iraq to counter its annexation of Kuwait.¹³³

Another expression of this movement towards a global society may be seen in the recognition of some fundamental duties as constituting obligations *erga omnes*. In this context, however, the final building-stone for a global society has yet to be put in place. Enforcement of such duties by a form of *actio pro socio* must by necessity lead to dangers of its own, since such enforcement may easily be abused to serve other purposes. What is needed are duties *erga societatem*, along with institutions of the

131 With this I do not wish to say that the content of hard law should be determined as thoroughly as possible and that soft law should be the vehicle for that purpose. Law should remain flexible and must be able to accommodate socio-political realities (cf. Reisman, 'A Hard Look at Soft Law', 82 *Proceedings of the American Society of Int'l Law* (1988) 373, at 375 et seq.; Fastenrath, *supra* note 7, at 253-265). However, soft law is capable of accommodating more quickly to these requirements of the international political system.

132 Similarly, Ph. Allott, *Eunomia: New Order for a New World* (1990) 321 et seq., sees in soft law a sign of the creation of a true international society.

133 See the articles in the 'Agora' of 85 *AJIL* (1991) on 'the Gulf Crisis in International and Foreign Relations Law'; Schachter, 'United Nations Law in the Gulf Conflict', 85 *AJIL* (1991) 452 et seq.

global society which will – as does the Security Council in its field – enforce those duties themselves or authorize such enforcement.¹³⁴

Finally, the concept of *ius cogens* is another indication of an emerging global society. Through this instrument, worldwide perceptions of justice may be expressed. Whereas such perceptions have to date been crude and inconsistent, this merely points to the fact that we are but at the beginning of a process which has hitherto led us from the law of coexistence to the law of cooperation; the path to a true constitution of the global society remains open and untrodden before us. What we ought to do today is not to obstruct this path but to equip ourselves with the necessary instruments to tread it. In particular, we ought to incorporate soft law instruments into our existing legal methodology.

134 Cf., B. Simma, 'International Crimes: Injury and Countermeasures. Comments on Part 2 of the ILC Work on State Responsibility', in A. Cassese, J.H.H. Weiler (eds.), *International Crimes of State* (1989) 283; id., 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *erga omnes*?', in J. Delbrück (ed.), *The Future of International Law Enforcement: New Scenarios – New Law?* (1993) 125.