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TOWARDS RELATIVE NORMATIVITY IN INTERNATIONAL LAW?

By Prosper Weil*

1. The purpose of this article is to examine, even at the risk of magnifying them somewhat for clarity, the potential dangers that some recent developments usually studied from other angles—the *jus cogens* theory, the distinction between international crimes and international delicts, the concept of a rule of general international law, the notion of obligation *erga omnes*—bring in their wake for the future of international law as a normative system intended to perform certain functions.

I. PATHOLOGY OF THE INTERNATIONAL NORMATIVE SYSTEM

2. As an uncontroversial starting point, let us take the statement that “public international law is the aggregate of the legal norms governing international relations.”¹ This shows that the concept of international law is defined by both its nature and its functions. Its nature is to be an “*aggregate of the legal norms*” that dictate what its subjects must do (prescriptive norms), must not do (prohibitive norms), or may do (permissive norms) and constitute for them a source of legal rights and obligations. Its functions lie in “*governing international relations*.” International law is therefore at once a “normative order” and a “factor of social organization.”² These two facets are obviously interdependent. Thus, while the emergence of international law as a “normative order” is due to the need to fulfill certain functions, it will not be capable of actually fulfilling them unless it constitutes a normative order of good quality. In other words, the capacity of the international legal order to attain the objectives it was set up for will largely depend on the quality of its constituent norms. There can therefore be no indifference in regard to anything affecting international legal norms, since without norms of good quality international law would become a defective tool.

The Structural Weaknesses

3. As everyone knows, the international normative system, given the specific structure of the society it is called on to govern, is less elaborate and more rudimentary than domestic legal orders—which, of course, does not mean that it is their inferior or less “legal” than they: it is just different.

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¹ I P. GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 1 (2d ed. 1967): “le droit international public est l'ensemble des normes juridiques qui règlent les relations internationales.”

² I C. ROUSSEAU, DROIT INTERNATIONAL PUBLIC 25–26 (1971).

Some of its structural weaknesses are too familiar to require lengthy treatment here: not only the inadequacy of its sanction mechanisms, but also the mediocrity of many of its norms. In regard to certain points, international law knows no norm at all, but a lacuna. As for others, the substance of the rule is still too controversial for it effectively to govern the conduct of states. On yet other points, the norm has remained at the stage of abstract general standards on which only the—necessarily slow—development of international law can confer concrete substance and precise meaning.

For some time, however, writers have been apt to point out a further weakness: alongside “hard law,” made up of the norms creating precise legal rights and obligations, the normative system of international law comprises, they note, more and more norms whose substance is so vague, so un compelling, that A’s obligation and B’s right all but elude the mind. One does not have to look far for examples of this “fragile,” “weak,” or “soft law,” as it is dubbed at times:³ the 1963 Moscow Treaty banning certain nuclear weapon tests, Article IV of which provides, *inter alia*, that “each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country”;⁴ the numerous treaty provisions whereby the parties undertake merely to consult together, to open negotiations, to settle certain problems by subsequent agreement; and the purely hortatory or exhortatory provisions whereby they undertake to “seek to,” “make efforts to,” “promote,” “avoid,” “examine with understanding,” “act as swiftly as possible,” “take all due steps with a view to,” etc. While particularly common in economic matters,⁵ these “precarious” norms are similarly encountered in the political field, as witness, apart from the above-quoted Moscow Treaty provision, a recent Advisory Opinion of the International Court of Justice including obligations “to co-operate in good faith” and “to consult together” among the “legal principles and rules” governing the relations between an international organization and a host country.⁶ Whether a rule is “hard” or “soft” does not, of course, affect its normative character. A rule of treaty or customary law may be vague, “soft”; but, as the above examples show, it does not thereby cease to be a legal norm. In contrast, however definite the substance of a non-normative provision—certain clauses of the Helsinki Final Act, say, or of the Charter of Economic Rights and Duties of States—that will not turn it into a legal norm.⁷ Yet the fact remains that the proliferation of “soft” norms, of what some also call “hortatory” or

³ See Baxter, *International Law in “Her Infinite Variety,”* 29 INT’L & COMP. L.Q. 549 *et seq.* (1980).

⁴ 14 UST 1313, TIAS No. 5433, 480 UNTS 43.

⁵ Weil, *Le Droit international économique: mythe ou réalité?*, in ASPECTS DU DROIT INTERNATIONAL ÉCONOMIQUE 1 (1972).

⁶ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 ICJ REP. 73, 95 (Advisory Opinion of Dec. 20).

⁷ The term “soft law” is not used solely to express the vague and therefore, in practice, un compelling character of a legal norm but is also used at times to convey the sublegal value of some non-normative acts, such as certain resolutions of international organizations, the Helsinki Final Act, and the Stockholm Declaration on the Environment (in addition to Baxter, note 3 *supra*, see the 1973 Hague Academy symposium on THE PROTECTION OF THE ENVIRONMENT AND INTERNATIONAL LAW (1975), esp. the contributions of Goldie, at 513 and 530, and Castañeda, at

“programmatory” law, does not help strengthen the international normative system.

The Conceptual Weaknesses

4. Alongside those structural weaknesses—which a jurist may observe but is powerless to modify—the international normative system also suffers from failings that must rather be ascribed to a certain slackness in intellectual grasp. This time, it is not a question of inherent flaws but of conceptual weaknesses that jurists can strive to remove. One is already familiar and need not be dwelt upon, namely, the lack of rigor too often shown nowadays in handling the distinction between the non-normative and the normative. The other is more recent, and to it we shall devote our attention: it is the conception of variable normativity for which certain theories now in process of elaboration are paving the way.

The Blurring of the Normativity Threshold. 5. The acts accomplished by subjects of international law are so diverse in character that it is no simple matter for a jurist to determine what may be called the normativity threshold: *i.e.*, the line of transition between the nonlegal and the legal, between what does not constitute a norm and what does. At what point does a “nonbinding agreement” turn into an international agreement, a promise into a unilateral act, fact into custom? Of course, this problem of the transition from nonlaw to law occurs in all legal systems, in particular under the guise of the distinction between moral and legal obligation. But the multiplicity of the forms of action secreted by the needs of international intercourse has rendered it more acute in that field than in any other, since in the international order neither pre-normative nor normative acts are as clearly differentiated in their effects as in municipal systems. While prenormative acts do not create rights or obligations on which reliance may be placed before an international court of justice or of arbitration, and failure to live up to them does not give rise to international responsibility, they do create expectations and exert on the conduct of states an influence that in certain cases may be greater than that of rules of treaty or customary law. Conversely, the sanction visited upon the breach of a legal obligation is sometimes less real than that imposed for failure to honor a purely moral or political obligation.⁸

534 *et seq.*; R.-J. Dupuy, *Droit déclaratoire et droit programmatoire: de la coutume sauvage à la soft law*, in *L'ELABORATION DU DROIT INTERNATIONAL PUBLIC* 132 (1975), translated in *DECLARATIONS ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE* 237 (R. J. Akkerman, P. J. van Krieken, & C. O. Pannenberg eds. 1977)). It would seem better to reserve the term “soft law” for rules that are imprecise and not really compelling, since sublegal obligations are neither “soft law” nor “hard law”: they are simply not law at all. Two basically different categories are involved here; for while there are, on the one hand, legal norms that are not in practice compelling, because too vague, there are also, on the other hand, provisions that are precise, yet remain at the pre- or subnormative stage. To discuss both of these categories in terms of “soft law” or “hard law” is to foster confusion.

⁸ For some recent studies of this problem, see, *inter alia*, Baxter, note 3 *supra*; Schachter, *The Twilight Existence of Non-Binding Agreements*, 71 *AJIL* 296 (1977); and Bothe, *Legal and Non-Legal Norms: A Meaningful Distinction in International Relations?*, 9 *NETH. Y.B. INT'L L.* 65 *et seq.* (1980). The question of “the distinction between international texts with a legal bearing and international texts without legal bearing (with the exception of texts emanating from international organizations)” is at present being studied by the Institute of International Law (rapporteur, M. Virally).

If there is one field pervaded by this problem, it is surely that of the resolutions of international organizations. Today, the distinction between decisions, as creative of legal rights and obligations, and recommendations, as not creative of any "legal obligation to comply with them,"⁹ has been rejected by some in favor of a more flexible conception: without crossing the normativity threshold, certain resolutions, it is said, nevertheless possess a "certain legal value" that may vary not only from one resolution to another but, within the same resolution, from clause to clause. Henceforth, "there are no tangible, clear, juridical criteria that demarcate with precision the zones of binding force"; there are only "hazy, intermediate, transitional, embryonic, inchoate situations." Even if resolutions do not attain full normative stature, they nevertheless constitute "embryonic norms" of "nascent legal force," or "quasi-legal rules."¹⁰ In other words, there is no longer any straightforward either/or answer to the problem of the normative force of the acts of international organizations; it is all a matter of degree.¹¹

6. It is beyond question that we are faced here with a pathological phenomenon of international normativity.

This is so in the first place because the concrete content of this partial or attenuated normativity, said to characterize certain acts, is quite beyond the grasp of intellect. Even recourse to the notion of "soft law"—in a different sense, this time¹²—to summon up the picture of a rule not yet hardened into full normativity, leaves it no less elusive. Some writers have sought to narrow the problem by propounding the notion of "permissive" or "abrogatory" force: without creating any obligation, a resolution is supposed at least to have entitling effects, so that any state acting in conformity with it could not thereby be committing an internationally unlawful act. While powerless to create new norms, the resolution would at least have the power to abrogate existing ones, which would leave states free to cease abiding by them.¹³ But this is playing with words, for a permissive norm is a norm like any other norm, and only one norm can abrogate another. Thus, to ascribe permissive or abrogatory force to certain resolutions is tantamount to attributing normative force to them, full and undiluted.

Second, we are faced with a pathological phenomenon because the approach in question is based on a misconception. Nobody would deny that certain

⁹ Judge Lauterpacht in *South West Africa: Voting Procedure*, 1955 ICJ REP. 67, 115 (Advisory Opinion of June 7) (sep. op. Lauterpacht, J.).

¹⁰ These expressions (also to be found, with variants, in the writings of several contemporaries) are borrowed from J. CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* 176 (1969); cf. his *La Valeur juridique des résolutions des Nations Unies*, 129 RECUEIL DES COURS 205, 320 (1970 I).

¹¹ Cf. award in *Texaco/Calasiatic v. Libya*: UN resolutions "have varying legal value"; "while it is now possible to recognize that resolutions of the United Nations have a certain legal value, this legal value differs considerably." 17 ILM 28-29, paras. 83 and 86 (1978) (emphasis added).

¹² See *supra* note 7.

¹³ R.-J. Dupuy, *supra* note 7, at 146-47. See also NGUYEN QUOC DINH, P. DAILLIER, & A. PELLET, *DROIT INTERNATIONAL PUBLIC* 338 (2d ed. 1980); A. PELLET, *LE DROIT DU DÉVELOPPEMENT* 63 (1978). Judge Lauterpacht proposed a different analysis: states are under an obligation to examine the resolutions in good faith and, if they decide to ignore them, to give the reasons for their decision. 1955 ICJ REP. at 119.

resolutions serve to prepare, even accelerate, the abrogation of existing norms or the formation of new ones; and it is understandable that states not desiring change in the existing law should oppose the adoption of such resolutions or attach reservations to them, exactly as one might oppose the voting of a resolution or motion by a learned society in the hope of blocking or delaying some development one wished to avert. Resolutions, as the sociological and political expression of trends, intentions, wishes, may well constitute an important *stage* in the process of elaborating international norms; in themselves, however, they do not constitute the formal *source* of new norms. That does not mean, of course, that the jurist should ignore them; but between showing due interest in them and integrating them into the normative system under the cover of a sliding scale of normativity, there is a gap that can be bridged only at the cost of denying the specific nature of the legal phenomenon. Unlike national legislatures, international organizations, though capable of defining the "desired law," do not possess what would be the truly legislative power of themselves transforming it into "established law"; thus, normative force cannot be attributed to resolutions without overriding the distinction between *lex lata* and *lex ferenda*.¹⁴ It is inadmissible within, say, "development law" or "environmental law," to give equal status to conventional or customary rules, on the one hand, and non-normative resolutions, on the other. Neither is there any warrant for considering that, by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect: the accumulation of nonlaw or prelaw is no more sufficient to create law than is thrice nothing to make something.

Finally, we are faced with a pathological phenomenon because, however much some writers deny the difference between norms and non-norms, states continue clearly to perceive that difference. Otherwise, what explanation could there be for the way they hammer home the fact that they are not legally bound by this or that resolution, declaration, or final act of a conference? When they subscribe to such instruments (or refrain from opposing them), governments neither intend to commit themselves *legally* nor feel they are doing so: "they don't mean it."¹⁵

7. True, it is not always easy to draw the frontier between the prelegal and the legal. This is a problem that recurs every time law resorts to the technique of the threshold: between the reasonable and the nonreasonable, the equitable and the nonequitable, the essential and the nonessential, the appurtenant and the nonappurtenant.¹⁶ "I know it when I see it": this celebrated formula of a Justice of the United States Supreme Court aptly illustrates this difficulty. It is nonetheless true that the threshold does exist: on one side of the line, there is born a legal obligation that can be relied on before a court or arbitrator, the flouting of which constitutes an internationally unlawful act giving

¹⁴ Virally, *A propos de la lex ferenda*, in *MÉLANGES REUTER* 519 (1981).

¹⁵ Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 137 *RECUEIL DES COURS* 419, 431 (1972 II). See also Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 *ASIL PROC.* 301, 302 (1979).

¹⁶ Cf. de Mérode, *World Bank Admin. Trib. Judgment No. 1*, para. 43 (1981).

rise to international responsibility; on the other side, there is nothing of the kind.

Variable normativity. 8. And so the international norm is becoming a singularly evasive quarry—or rather one so ubiquitous that it cannot be pinned down. But, as if this hide-and-seek were not frustration enough, recent years have seen a development that attacks the very substance of the norm. All norms are affected, the “hard” no less than the “soft.” This time it is no longer a question of determining where the legal norm begins or ends: it is the very nature of the international normative system that is challenged and, by the same token, the functions for which it was created, which are its *raison d’être*.

9. To appreciate the scale of the problem, it may be useful here briefly to recall, even at the risk of triteness, the content of that “social organization” function alluded to above. The question is, in a word: what is international law *for*?

Long before the modern state arrived on the scene, a *jus inter gentes* had emerged to organize the coexistence and interrelations of heterogeneous national collectivities within what we would nowadays call a pluralistic international community: as Roberto Ago has demonstrated, this phenomenon, whose beginnings are lost in the mists of time, developed markedly throughout the Middle Ages.¹⁷ From the outset, what was eventually to become international law bore the stamp of an end that has never changed: to ensure the coexistence—in peace, if possible; in war, if necessary—and the cooperation of basically disparate entities composing a fundamentally pluralistic society.

Alongside the heterogeneity already existing as between the Romano-Germanic and Byzantine Christendoms and the world of Islam, the collapse in western Europe at the end of the Middle Ages of all higher authority—be it Pope or emperor—resulted in a further heterogeneity as between the new state entities that made their appearance in the Christian world. From there modern international law, with its specifically interstate character, was to take its rise, though without losing the essential features it owed to its remotest prestate origins. The new international society was horizontal like its predecessors, and continued to feature, as they did, a decentralization of political power.

The emergence of legal rules intended to temper this condition of “anarchy,” in the proper sense of the term, was stimulated—as it always had been—by a twofold necessity: first, to enable these heterogeneous and equal states to live side by side, and to that end to establish orderly and, as far as possible, peaceful relations among them; second, to cater to the common interests that did not take long to surface over and above the diversity of states. Such have always been the twin roots of international law, and such from the beginning have always been its two essential functions: on the one hand, to reduce anarchy through the elaboration of norms of conduct enabling

¹⁷ Ago, *Pluralism and the Origins of the International Community*, 3 ITAL. Y.B. INT’L L. 3 *et seq.* (1977); and his *The First International Communities in the Mediterranean World*, 53 BRIT. Y.B. INT’L L. 213 *et seq.* (1982). Cf. Weil, *Le Judaïsme et le développement du droit international*, 151 RECUEIL DES COURS 253 (1975 III).

orderly relations to be established among sovereign and equal states (as Max Huber put it in a now famous formulation: international law “has the object of assuring the co-existence of different interests which are worthy of legal protection”¹⁸); on the other hand, to serve the common aims of members of the international community. Coexistence and common aims: this dual function of classic international law—inherited from the *jus inter gentes* of prestate times—was to find expression in the *Lotus* dictum: “International law governs relations between independent States . . . in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.”¹⁹

Despite the profound transformations that international society has undergone, especially since the end of the Second World War, the functions of international law have remained what they have always been since the outset, and there could be no greater error than to contrast “modern” or “present-day” international law with “classic” international law in this respect.

For, more than ever, international society remains at bottom a society of juxtaposition, founded on the “sovereign equality of States,” whose “fundamental importance” is emphasized by the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations²⁰—a revealing expression of “modern” international law if ever there was one. But, while they remain equal, states also remain, more than ever, different from each other, whether in size, political or economic system, ideology, or level of development. Furthermore, the heterogeneity of the components of international society is no longer a mere fact: the right to differ is now proclaimed as one of the attributes inherent in the very notion of sovereignty.²¹

In an international society rendered more diverse than ever by the emergence of a hundred new states, the traditional dual function of international law turns out to be more vital than ever. The 1970 declaration provides telling evidence of this continuity between the functions of “classic” international law and those of “new” international law.²² Today as yesterday—and the day before—it is the key concepts of “relations” and “coexistence” (now called respectively “friendly” and “peaceful”), on the one hand, and “common aims” (now translated into “cooperation”) on the other, that define the functions of international law as an instrument for the regulation of a pluralistic, het-

¹⁸ *Island of Palmas* (Neth. v. U.S.), 2 R. Int'l Arb. Awards 831, 870 (Perm. Ct. Arb. 1928); cf. D. ANZILOTTI, CORSO DE DIRITTO INTERNAZIONALE 39 *et seq.* (4th ed. 1955).

¹⁹ 1927 PCIJ, ser. A, No. 10, at 18.

²⁰ Annex to UNGA Res. 2625 (XXV) (1970), reprinted in 65 AJIL 243 (1971), 9 ILM 1292 (1970).

²¹ “Each State has the right freely to choose and develop its political, social, economic and cultural systems.” *Ibid.*; cf. Art. 1 of both 1966 Covenants on Human Rights, Annex to UNGA Res. 2200 (XXI) (1966).

²² “[T]he importance of . . . developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development”; “States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems . . .” (emphasis added). The very title of the declaration centers on the concepts of “relations” and “co-operation.”

erogeneous society. The *Case concerning United States Diplomatic and Consular Staff in Tehran* enabled the International Court of Justice to highlight and forcefully underline the permanence of this traditional dialectic between difference, on the one hand, and relations and cooperation, on the other: the terms it employed in 1979 and 1980 were a significant echo of the Permanent Court's formulae.²³

10. If the functions of international law have not changed, the essential features it has acquired over the centuries for the purpose of being able to perform them must be safeguarded in the international law of today.

In the first place, *voluntarism*, as expressed in the celebrated *Lotus* passage: "The rules of law binding upon States . . . emanate from their own free will."²⁴ This means that states are at once the creators and the addressees of the norms of international law and that there can be no question today, any more than yesterday, of some "international democracy" in which a majority or representative proportion of states is considered to speak in the name of all and thus be entitled to impose its will on other states. Absent voluntarism, international law would no longer be performing its functions.

Furthermore, if the heterogeneity of the components of international society, far from being an obstacle to the formation of international law, is on the contrary its *conditio sine qua non*, it follows that international law will be unable to carry out its function of coordination unless it is *neutral*. This certainly holds true for religious neutrality. As Vattel pointed out so many years ago: "Nations treat with one another as bodies of men and not as Christians or Mohammedans."²⁵ Closer to our own times, Paul Guggenheim observed that international law is "lay, secularized of necessity; it cannot be otherwise, considering the variety of moral and religious conceptions featured by the different societies making up the international community."²⁶ But ideological neutrality is also necessary to guarantee the coexistence of heterogeneous entities in a pluralistic society. Both religious and ideological neutrality are inherent in the basic concept of international law.

²³ The rules of diplomacy, the Court held, had proved "essential for the maintenance of peaceful relations between States" and were "accepted throughout the world by nations of all creeds, cultures and political complexions." 1980 ICJ REP. 3, 24, 42 (Judgment of May 24) (emphasis added). The institution of diplomacy had proved to be "an instrument essential for effective co-operation . . . enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding"; the obligations thus laid upon states "are of cardinal importance for the maintenance of good relations . . . in the interdependent world of today . . . for the security and well-being of the . . . international community . . . , to which it is *more essential than ever* that the rules developed to ensure the *ordered progress of relations* between its members should be . . . respected." 1979 ICJ REP. 7, 19 (Order of Dec. 15); 1980 ICJ REP. at 42, 43 (emphasis added).

²⁴ 1927 PCIJ, ser. A, No. 10, at 18.

²⁵ LE DROIT DES GENS, bk. II, ch. XII, §162 (Carnegie ed. 1916, trans. of 1758 ed.), original quoted in Marek, *Criminalizing State Responsibility*, 14 REV. BELGE DROIT INT'L 460, 484 (1978-79): "Les peuples traitent ensemble en qualité d'hommes et non en qualité de chrétiens ou de musulmans."

²⁶ P. GUGGENHEIM, *supra* note 1, at 41: "fatalement un droit sécularisé et laïque; il ne peut en être autrement si l'on tient compte de la variété des conceptions morales et religieuses qui sont celles des différentes sociétés constituant la communauté internationale"; cf. his *Les Principes de droit international public*, 80 RECUEIL DES COURS 1, 32-33 (1952 I).

There is, finally, a third feature, which is a corollary of the first two: *positivism*. This term, of course, is not meant to imply that it should be regarded as an essential characteristic of international law that all its norms be "posited" by "formal sources" or result from precise normative facts without ever being the fruit of "spontaneous" formation.²⁷ No, it is simply intended to emphasize the necessity of envisaging international law as positive law, *i.e.*, as *lex lata*.²⁸ This means that (as already suggested) the distinction between *lex lata* and *lex ferenda* must be maintained with no abatement of either its scope or its rigor. It also means that, notwithstanding the fact that neither the basis nor the ultimate justification of international law is to be found in the normative system as such, it is still necessary for that system to be perceived as a self-contained, self-sufficient world. Without this positivistic approach, the neutrality so essential to international law *qua* coordinator between equal, but disparate, entities would remain in continual jeopardy.

11. It is these essential features of international law that recent developments have tended to challenge, and have thus threatened to compromise the very functions of the international normative system.

There is now a trend towards the replacement of the monolithically conceived normativity of the past by graduated normativity. While it has always been difficult to locate the threshold beyond which a legal norm existed, at least there used to be no problem once the threshold could be pronounced crossed: the norm created legal rights and obligations; it was binding, its violation sanctioned with international responsibility. There was no distinction on that score to be made between one legal norm and another. But the theory of *jus cogens*, with its distinction between peremptory and merely binding norms, and the theory of international crimes and delicts, with its distinction between norms creating obligations essential for the preservation of fundamental interests and norms creating obligations of a less essential kind, are both leading to the fission of this unity. Normativity is becoming a question of "more or less": some norms are now held to be of greater specific gravity than others, to be more binding than others. Thus, the scale of normativity is reemerging in a new guise, its gradations no longer plotted merely between norms and non-norms, but also among those norms most undeniably situated on the positive side of the normativity threshold. Having taken its rise in the subnormative domain, the scale of normativity has now been projected and protracted into the normative domain itself, so that, henceforth, there are "norms and norms."

²⁷ See, in particular, the criticisms by Ago in *Science juridique et droit international*, 90 RECUEIL DES COURS 851 (1956 II); and *Droit positif et droit international*, 1957 ANNUAIRE FRANÇAIS DROIT INT'L 14.

²⁸ Though not utterly opposed to use of the term "positive law" (*droit positif*) to cover the whole of the law in force, whether *posé* (*i.e.*, enacted) or *spontané*, Ago would rather it were reserved, in accordance with its etymology, for *jus positivum*. *Science juridique*, *supra* note 27, at 60–61. However, the use of "positive law" in the broad sense of *lex lata* seems to have become an accepted commonplace. It is in this sense, for example, that the International Court of Justice, in *North Sea Continental Shelf* (FRG/Den.; FRG/Neth.), referred to the Truman Proclamation as "the starting point of the *positive law* on the subject." 1969 ICJ REP. 3, 32–33, para. 47 (Judgment of Feb. 20) (emphasis added); *cf. id.* at 37, para. 60.

At the same time, normativity is also tending towards dilution. Traditionally, every international norm has had clearly specifiable passive and active subjects: it creates obligations incumbent upon certain subjects of international law, and rights for the benefit of others. The principles governing the relative effect of treaties, the opposability of customary rules, and the capacity to present international claims reflect this individualization of those owing an obligation and those owed a right. But at present both these categories are tending to become indefinite. Where those enjoying rights are concerned, this trend is exemplified by the concept of obligations *erga omnes*. The same development is less perceptible where those with obligations are concerned; however, the profound transformations that for some time now have been affecting the substance of the sources of law, and more particularly the theory of custom and the interrelation of conventional and customary rules, have been gradually fostering the idea that there are certain obligations that are incumbent on every state without distinction. We are nowadays witnessing the appearance, alongside obligations *erga omnes*, of what one is tempted to call obligations *omnium*.

In brief, after international personality, it is now international normativity that is undergoing relativization.

12. Without question, this development is a factor of progress in many respects. By placing the emphasis on "legal conscience," it helps to ensure the primacy of ethics over the aridity of positive law.²⁹ Without higher moral "values," international law is but a soulless contrivance: that, more or less, is the essential message of these new theories.³⁰ By thrusting the concept of "international community" into the foreground, they reflect the awareness of increased solidarity and the aspiration to a greater unity overspanning ideological and economic differences; they also impart the frustration of a Third World that has long felt itself powerless and aspires to place its new majority position within international organizations at the service of what it sees as a fight for justice. In view of the multiplication of states and their increasing diversity, this will to transcend the traditional international society made up of juxtaposed egoisms, and to forge an international community animated by the quest for the "common good" and common "values," is all the more precious.³¹ One could even see in it an unexpected return to the

²⁹ Such terms as "legal conscience of states," "awakening of conscience," "universal conscience," "common good of mankind" recur like a leitmotiv on practically every page of the International Law Commission's work on the theories of *jus cogens* and international crimes.

³⁰ In fact, even before the Second World War, concern to deny states the right to infringe—even by common accord—certain moral rules regarded as superior had led some writers to canvas the concept of peremptory norms or rules of *jus cogens* (for detailed background, see Suy, *The Concept of Jus Cogens in Public International Law*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, 2 PAPERS & PROC. 17 (1967)). If the idea of rules standing "in a higher category" (A. McNAIR, *THE LAW OF TREATIES* 214 (1961)) is thus not entirely new, it used to occupy merely a marginal place in doctrinal writings and, in the minds of its small number of advocates, was intended to be limited to the absolutely unchallenged rules of morality constituting, in Verdross's words, "the ethical minimum recognized by all the states of the international community" (*Forbidden Treaties in International Law*, 31 AJIL 571, 574 (1937)). But it is more than a mere difference of degree that separates the modern theory of *jus cogens* from those first faint adumbrations.

³¹ On all these trends, see R.-J. Dupuy, *Communauté internationale et disparités de développement*, 165 RECUEIL DES COURS 11 (1979 IV).

historic sources of international law: to "irreducible natural law," no doubt,³² but also to that fundamental unity of the human race expressed in the 16th century by Vitoria's famous "*Totus orbis, qui aliquo modo est una res publica*," of which the "international community of States as a whole" is, after all, simply a modernized version.

Accordingly, the potential negative consequences of the relativization of international normativity must at worst be regarded as secondary effects of changes that in themselves are beneficial. Vigilance, however, is imperative, lest too high a price be paid for the progress of international law towards greater moral substance and greater solidarity. At a time when international society needs more than ever a normative order capable of ensuring the peaceful coexistence, and cooperation in diversity, of equal and equally sovereign entities, the waning of voluntarism in favor of the ascendancy of some, neutrality in favor of ideology, positivity in favor of ill-defined values might well destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.

II. NORMATIVITY GRADUATED

"*Jus cogens*" and International Crimes

13. The international normative system has traditionally been characterized by its unity: whatever their formal origins (custom or conventions, for example), whatever their object or importance, all norms are placed on the same plane, their interrelations ungoverned by any hierarchy, their breach giving rise to an international responsibility subject to one uniform regime.

This unity of the normative regime is shattered by the *jus cogens* theory and the distinction between international crimes and international delicts, which introduce what Roberto Ago, as rapporteur of the International Law Commission, called "a 'normative differentiation' between two kinds of rules, and hence, of legal obligations."³³

To establish the nullity of treaties enshrining norms contrary to others held to be superior, the *jus cogens* theory trends fundamentally towards isolating, within the whole range of international norms, certain norms whose applicability cannot be set aside by particular agreements; *i.e.*, to the "distinction, among the general rules of international law, of the particular category of rules of '*jus cogens*'."³⁴ In other words, we have a few "peremptory" norms at the summit (elite norms, as it were) of enhanced normativity—"highest ranking" norms,³⁵ worth a "quality label";³⁶ then, below them, the great mass

³² See C. De Visscher, *Positivism et "jus cogens"*, 75 REV. GÉNÉRALE DROIT INT'L PUBLIC 5 (1971).

³³ Ago, Fifth report on State responsibility [hereinafter cited as Ago Report], [1976] 2 Y.B. INT'L L. COMM'N, pt. 1, at 3, 32, UN Doc. A/CN.4/SER.A/1976/Add.1 (pt. 1). Cf. the Commission's Commentary, Draft articles on State responsibility, in Report of the International Law Commission on the work of its 28th session [hereinafter cited as ILC 1976 Report], *id.*, pt. 2, at 1, 97, 102, UN Doc. A/CN.4/SER.A/1976/Add.1 (pt. 2).

³⁴ ILC 1976 Report, *supra* note 33, at 102. ³⁵ C. De Visscher, *supra* note 32, at 9.

³⁶ P. De Visscher, *Cours général de droit international public*, 136 RECUEIL DES COURS 1, 107 (1972 II).

of merely binding norms, which the International Law Commission eloquently styles "ordinary customary or conventional rules."³⁷

In a parallel movement, to establish a differentiation between regimes of international responsibility, the theory of crimes and delicts put forward by the Commission in draft Article 19 of its proposed set of rules on the responsibility of states serves basically to distinguish between, on the one hand, a small number of international obligations so essential to the protection of the international community's fundamental interests that their violation should be sanctioned as an international crime; and, on the other hand, all other international obligations, whose violation would merely constitute an international delict. Here again, international norms are divided into two categories: at the summit, the few that create obligations "the observance of which is of fundamental importance to the international community as a whole"; then, below them, the great mass of norms that create obligations "of lesser and less general importance."³⁸

If, as the Commission's work seems to presage, the normative differentiation resulting from these two theories should prove not to be limited to two tiers,³⁹ we would be witnessing not just a dualization of normativity but a multiplication of intermediate steps, corresponding to different degrees of normative intensity.⁴⁰

14. While this normative differentiation is certainly inspired by unimpeachable moral concerns, it also carries, in both its criterion and its content, some germs of alarming portent for the future of the international normative system.

The Criterion of Differentiation

15. The touchstone of the differentiation is definitely neither formal nor organic.

This is something the International Law Commission has stressed in explaining the distinction between the essential obligations it is a crime to breach and those whose violation is merely a delict: today, as always, "[t]he origin of the international obligation breached by a State does not affect the international responsibility. . . ."⁴¹ And so nothing has changed on this score: the regime of responsibility is established regardless of the origin of the violated norm—convention or custom, lawmaking treaty or contractual treaty, it is all

³⁷ ILC 1976 Report, *supra* note 33, at 92. ³⁸ *Id.* at 97.

³⁹ The Commission dismissed the idea "that there is one uniform régime of responsibility for the more serious internationally wrongful acts, on the one hand, and another uniform régime for the remaining wrongful acts, on the other." *Id.* at 117. It is not certain that mere bipolarity is any longer likely to remain a feature of the distinction between norms: thus, one member of the Commission referred to the existence of "more or less important peremptory rules." [1976] 1 Y.B. INT'L L. COMM'N 71, UN Doc. A/CN.4/SER.A/1976.

⁴⁰ Hence, in the Commission's work, such expressions as the following: some rules, "already existing, have acquired new vigour and more marked significance" (ILC 1976 Report, *supra* note 33, at 102); "the re-evaluation of rules that had existed since far earlier times" (Ago Report, *supra* note 33, at 53).

⁴¹ Draft articles on State responsibility, ILC 1976 Report, *supra* note 33, Art. 17, at 79, and Commentary, esp. at 80–87.

one. Even the Charter of the United Nations cannot be regarded as giving rise to "essential" norms as such, for the international legal order does not comprise any source specially destined to create so-called constitutional or fundamental principles. The Charter is not a "kind of higher formal source of law"; it is only a treaty, and the norms it enshrines are, from the viewpoint of origin, nothing other than conventional rules.⁴²

No more than the distinction between crimes and delicts does the distinction between peremptory norms and ordinary norms derive from any formal or organic considerations. It is acknowledged that peremptory norms may originate in any of the formal sources of international law: conventions, custom, general principles of law—some even say, resolutions of international organizations (which, by some alchemy, would magically transmute non-normative acts into supernormative acts). For the same reasons as for responsibility, the Charter cannot be regarded as an automatic source of superlegality, a "sort of generalized *jus cogens*."⁴³

16. Consequently, the differentiation of norms has to be effected in accordance with an exclusively substantive criterion. "It is not the form of a general rule of international law," wrote the International Law Commission, "but the particular nature of the subject-matter with which it deals that may . . . give it the character of *jus cogens*"; "pre-eminence of [certain] obligations over others is determined by their content, not by the process by which they were created."⁴⁴ More precisely, it is recognition of a rule's importance by the international community of states that is the touchstone as between peremptory and ordinary rules, as also between rules whose violation is a crime and those whose violation is a mere delict.

This gives rise to uncertainties and difficulties.

17. The first problem: by what mechanism does a rule graduate from the status of an ordinary norm—which is the general case—to that of a norm of higher grade, which must needs remain the exception?⁴⁵

⁴² *Id.* at 86.

⁴³ H. THIERRY, J. COMBACAU, C. SUR, & C. VALLÉE, *DRIT INTERNATIONAL PUBLIC* 151 (3d ed. 1981).

⁴⁴ Reports of the International Law Commission on the second part of its 17th session and on its 18th session [hereinafter cited as ILC 1966 Reports], [1966] 2 Y.B. INT'L L. COMM'N 169, 248, UN Doc. A/CN.4/SER.A/1966/Add.1; and ILC 1976 Report, *supra* note 33, at 85. Hence, if certain rules in the Charter (not all, as we have seen) belong to the higher grade norms, that is due, not to their inclusion in an instrument supposed formally to be of superior normative status, but to their actual subject matter. Thus, the fact that Article 52 of the Vienna Convention on the Law of Treaties speaks of the threat or use of force "in violation of the principles of the Charter of the United Nations" (and not "in violation of the Charter of the United Nations") derives partly from an intention to make the point that the prohibition of coercion is a rule of general international law whose peremptory character and even normativity are independent of its formal inclusion in the Charter. ILC 1966 Reports, *supra*, at 246–47.

⁴⁵ "[T]he majority of the general rules of international law do not have that [peremptory] character." ILC 1966 Reports, *supra* note 44, at 248. "[*Jus dispositivum* remains the principle, *jus cogens* the exception. . . . The existence of a peremptory norm of general international law cannot be presumed." Virally, *Réflexions sur le "jus cogens,"* 1966 ANNUAIRE FRANÇAIS DROIT INT'L 5, 25. "The concept of international crime must be restrictive." Ago Report, *supra* note 33, at 90. "[I]t cannot be concluded that an international crime exists unless . . . two conditions are met." ILC 1976 Report, *supra* note 33, at 120.

Central to this norm-mutation process, as we have just seen, is the "international community of states as a whole"; but who or what is this community?

Over the past few years, of course, there have been various telltale signs of a tendency to vague personification of the international community.⁴⁶ The international community "accepts and recognizes" the ascent of an ordinary norm to the rank of peremptory norm.⁴⁷ It "recognizes" that an international obligation is essential to the protection of its "fundamental interests,"⁴⁸ which seems to imply that the community as such possesses such interests. The International Court of Justice considers that a state has obligations to the international community and can enter into commitments towards it;⁴⁹ one Member of the Court has even spoken of rules of law that are the "common property of the international community."⁵⁰ Perhaps this community may be viewed as identical to the "mankind" whose "common heritage" or "province" is nowadays considered to be the use of outer space, the moon, and the seabed beyond the limits of national jurisdiction.⁵¹ However, for want of adequate organic representation, this community seems impossible to identify separately from its members; but those members—and here the International Law Commission has been quite unequivocal—can only be states, to the exclusion even of international organizations, which the Commission regards as simply "the creation of those States."⁵² In brief, the international community means states. But all states, or merely some, and, if so, which? There lies the rub. The answer given by the Commission is well known: a reference to recognition by "the international community as a whole . . . certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each State an inconceivable right of veto"; what is required is recognition "not only by some particular group of States,

⁴⁶ P. REUTER, *LA CONVENTION DE VIENNE SUR LE DROIT DES TRAITÉS* 21 (1970).

⁴⁷ Vienna Convention on the Law of Treaties, Art. 53, UN Doc. A/CONF.39/27 (1969), *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

⁴⁸ Draft articles on State responsibility, ILC 1976 Report, *supra* note 33, Art. 19, at 75.

⁴⁹ See *infra* para. 25.

⁵⁰ Judge Lachs in U.S. Diplomatic and Consular Staff in Tehran, 1980 ICJ REP. at 48 (sep. op. Lachs, J.).

⁵¹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (1967), 18 UST, TIAS No. 6347, 610 UNTS 205, Art. 1; Agreement Governing the Activities of States on the Moon and other Celestial Bodies, UNGA Res. 34/68, Annex (1979), *reprinted in* 18 ILM 1434 (1979), Arts. 4 and 11; Convention on the Law of the Sea, UN Doc. A/CONF.62/122 and Corrs. 3 and 8 (1982), Art. 136, *reprinted in* 21 ILM 1261 (1982).

⁵² Report of the International Law Commission on the work of its 31st session [hereinafter cited as ILC 1979 Report], [1979] 2 Y.B. INT'L L. COMM'N, pt. 2, at 1, 156, UN Doc. A/CN.4/SER.A/1979/Add.1 (pt. 2). Coming 30 years as it did after the hesitance of the *Reparations* Opinion to allow international organizations full international personality, the Commission's reluctance "needlessly" to place "organizations on the same footing as States" (*ibid.*) seems all the more telling in the light of the fact that the Court itself has since made a point of emphatically reiterating the impossibility of regarding an international organization as some sort of "super-State." Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 ICJ REP. at 89. Cf. de Mérode, World Bank Admin. Trib. Judgment No. 1, para. 28 (1981): "the differences between one organization and another are so obvious that the notion of a common law of international organizations must be subject to numerous and sometimes significant qualifications."

even if it constitutes a majority, but by all the essential components of the international community.”⁵³

Thus, a rule acquires superior normative density once its preeminence is accepted and recognized by “all the essential components of the international community.” But since a state’s membership in this club of “essential components” is not made conspicuous by any particular distinguishing marks—be they geographical, ideological, economic, or whatever—what must happen in the end is that a number of states (not necessarily in the majority) will usurp an exclusive right of membership and bar entry to the others, who will find themselves not only blackballed but forced to accept the supernormativity of rules they were perhaps not even prepared to recognize as ordinary norms.

18. And here is a second object of disquiet: if recognition by the international community is to constitute not merely the mechanism whereby an ordinary norm becomes a supernorm but also (as we shall see) the mechanism whereby even ordinary rules of general international law are made, there will be virtually nothing to prevent an irresistible tide of rules of general international law from swelling, one after another, the category of high-grade norms, which in principle was to remain limited and exceptional.⁵⁴ There is a danger that the category of ordinary norms will turn out to represent a mere transition stage pending promotion: scarcely is the scale of normativity established than it proves inherently unstable.⁵⁵ When one considers the tendency to allow “a certain normative force” to prenormative acts, it even appears that any *subnorm* of general international law might be coaxed upward, in a stealthy rise from nonlaw to superlaw. This process is already becoming difficult to contain.⁵⁶ Of course, the risks arising from such indeterminacy would be diminished if, as some had intended, it were left not to the individual states but to the International Court of Justice to appraise the applicability of *jus cogens* in concrete instances.⁵⁷ The provisions of Article 66(a) of the Vienna Convention on the Law of Treaties provide a glimmer of hope in this respect, but the way they seem to be construed by certain states gives little ground for real optimism.⁵⁸

19. This destined proliferation of supernorms is bound to give rise to a delicate problem where codification conventions are concerned. Everybody knows how difficult, yet at the same time how necessary, it is to distinguish within such a convention between, on the one hand, what is declaratory of

⁵³ ILC 1976 Report, *supra* note 33, at 119. ⁵⁴ Cf. *supra* para. 17 and note 45.

⁵⁵ The more so in that the concepts of *jus cogens* and international crime are themselves conceived of as essentially evolving. On *jus cogens*, see Vienna Convention, *supra* note 47, Art. 64, and ILC 1966 Reports, *supra* note 44, at 247–49; on international crime, see ILC 1976 Report, *supra* note 33, at 119.

⁵⁶ See the example given *infra* note 68.

⁵⁷ See, e.g., H. Lauterpacht, *Règles générales du droit de la paix*, 62 RECUEIL DES COURS 95, 308 (1937 IV). Lauterpacht repeated the idea in his 1953 report to the International Law Commission, [1953] 2 Y.B. INT’L L. COMM’N 90, 154 *et seq.*, UN Doc. A/CN.4/SER.A/1953/Add.1. Cf. Sir Francis Vallat’s statement on behalf of the United Kingdom at the Vienna Conference on the Law of Treaties, OFFICIAL RECORDS OF THE FIRST SESSION 420, para. 25, UN Doc. A/CONF.39/11 (1968).

⁵⁸ See R.-J. Dupuy, *Les Débats de Vienne sur les procédures du règlement*, 1969 ANNUAIRE FRANÇAIS DROIT INT’L 70, 87–88.

an already formed customary rule or crystallizes a customary rule that had been in process of formation, and, on the other hand, what constitutes a development of the law, *i.e.*, a new norm. It is difficult because the two categories are often closely intermingled; necessary, because, in the first case, provisions are involved expressive of rules opposable to all states, even those not parties to the convention, whereas in the second case only the parties are bound. With normativity split into rules on several tiers, it has now become necessary to distinguish, within each codifying convention, among the purely conventional rules, the ordinary rules of general international law, and the peremptory rules of general international law. This raises, *inter alia*, the problem of derogation through particular agreements from the provisions of such conventions⁵⁹ and the problem of reservations. The recent Convention on the Law of the Sea will certainly give rise to difficulties of this kind. One may similarly ask with regard to the provisions on *jus cogens* in Articles 53 and 64 of the Vienna Convention on the Law of Treaties: are they purely conventional rules that are binding solely on states parties to the Convention? are they ordinary rules of customary law, so that states may derogate from them by particular agreements—which would be a denial of the very concept of peremptory norms? or are they *themselves* the expression of norms of *jus cogens*, so that no state is entitled to reject the concept of peremptory norms? The question is not as academic as it might appear.⁶⁰

20. The fundamental instability of normative differentiation explains why the greatest uncertainty prevails when it comes to singling out the norms belonging to the elite in comparison with ordinary norms. This aspect of the problem requires little demonstration here, given the extent to which writers have already dealt with it. In fact, setting aside a core of “innocuous examples, of interest to nobody,”⁶¹ we find ourselves adrift in ever-widening circles of increasing uncertainty:⁶² *i.e.*, in an area still featuring, in Roberto Ago’s telltale phrase, a “certain unity of views,”⁶³ encircled by a shadowy margin about whose content opinions differ in the extreme.⁶⁴

⁵⁹ Regarding its draft articles on responsibility, the International Law Commission wrote: “In principle, derogations from all the rules in the present draft articles may be made by special agreement, subject to the existence of any rules of *jus cogens*.” ILC 1976 Report, *supra* note 33, at 93. Any reader applying this to the articles one by one will certainly have no easy task of evaluation.

⁶⁰ It is precisely because it did not accept the provisions of Articles 53 and 64 that France refused to sign the Vienna Convention on the Law of Treaties. *La Convention de Vienne sur le droit des traités*, LA DOCUMENTATION FRANÇAISE, NOTES ET ÉTUDES DOCUMENTAIRES, No. 3622, at 10 (1969); cf. Deleau, *Les Positions françaises à la Conférence de Vienne sur le droit des traités*, 1969 ANNUAIRE FRANÇAIS DROIT INT’L 23. Yet can these provisions nevertheless be opposed to it, either *qua* ordinary norms or *qua* peremptory norms of general international law?

⁶¹ P. REUTER, *supra* note 46, at 20.

⁶² This image corresponds to the Commission’s own presentation in its 1966 report: “Examples suggested included . . . ; . . . other possible examples.” ILC 1966 Reports, *supra* note 44, at 248.

⁶³ Ago, *Introduction au droit des traités à la lumière de la Convention de Vienne*, 134 RECUEIL DES COURS 297, 324 (1971 III).

⁶⁴ For some the norms of higher rank include the rules on countering terrorism and hostage

A particularly sensitive problem is posed by the interrelations of the two normative series: that is to say, on the one hand, peremptory and ordinary norms; on the other, essential and less essential obligations. The International Law Commission has preferred not to tackle this problem head-on but to refer to a certain "parallelism": in certain cases, it has indicated, the two distinctions may diverge, but "normally" they coincide.⁶⁵ As an initial approximation, therefore, they will be considered here as virtually synonymous, which is after all normal, since they both spring from a common ethical preoccupation and make recognition by the "international community" a paramount factor.⁶⁶

Content of the Differentiation

21. These uncertainties would not be too serious if it were at least possible to define the precise substantive import of the normative differentiation: in other words, if it were possible to ascertain how the legal regime of international norms varies in accordance with the place of each on the normativity scale.

Whatever their rank, all norms produce legal effects, all are binding, and the breach of any one, no matter which, constitutes an internationally wrongful act. What, then, is the point of distinguishing among them?

The hard-and-fast element of the regime of supernormativity has two sides to it: on one, the limitation placed upon the contractual freedom of states by the introduction of a hierarchy of norms according to subject matter, and the absolute nullity of international treaties containing a clause incompatible with a norm of superior rank; on the other, the applicability of penal sanctions—the content of which remains to be determined—in the event of the breach of any such supernorm.

If the consequences of supernormativity had remained within these bounds, there would be little cause for alarm. It appears, however, that this is not the case, for the assignment of a norm to the upper category, like the actions of

taking (Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 *id.* at 1, 64 (1978 I)), sovereignty over natural resources (I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 513 (3d ed. 1979)), diplomatic inviolability (Ago, [1976] 1 Y.B. INT'L L. COMM'N 74). On the other hand, while the Commission had mentioned in this connection the principle of self-determination (ILC 1966 Reports, *supra* note 44, at 248), Ago did not refer to it in the lectures cited above (note 63). The Commission has made no secret of the fact that the categories of peremptory norms and essential obligations are both surrounded by uncertainties of many kinds (ILC 1976 Report, *supra* note 33, at 108–09; and 1979 *id.*, *supra* note 52, at 115).

⁶⁵ ILC 1976 Report, *supra* note 33, at 119–20. The opinions expressed hereon by the rapporteur (Ago Report, *supra* note 33, at 53; [1976] 1 Y.B. INT'L L. COMM'N 19, 57, 74, 89–90) and various other members of the Commission (*id.* at 67–68, 71) featured certain qualifications.

⁶⁶ Thus, I. BROWNIE, *supra* note 64, at 512, 612; NGUYEN QUOC DINH, P. DAILLIER, & A. PELLET, *supra* note 13, at 690; P.-M. Dupuy, *Observations sur le "crime international de l'Etat,"* 84 REV. GÉNÉRALE DROIT INT'L PUBLIC 449, 461 (1980); and his *Action publique et crime international de l'Etat*, 1979 ANNUAIRE FRANÇAIS DROIT INT'L 539, 551, 553; cf. Marek, *supra* note 25, at 468.

the sorcerer's apprentice, seems to provoke a chain reaction that may get out of control.

There is thus, as we shall see, a growing tendency (in no way imposed by Article 53 of the Vienna Convention) to consider that peremptory norms create obligations for all states, and that each state has legal standing to call for those obligations to be fulfilled and to assert the responsibility of any other state that fails to observe them. So this enhanced normativity supposedly generates obligations *erga omnes* and, thereby, an *actio popularis*, which would signify in practice that the nullity prescribed by Article 53 of the Vienna Convention could be invoked by any state. It is with this in mind that the dictum of the *Barcelona Traction* Judgment, which does indeed refer to obligations *erga omnes*, is cited in connection with peremptory norms and norms whose violation constitutes a crime.

Going yet farther, it seems to be assumed that supernorms, once recognized and accepted as such by the "essential components of the international community," will *ipso jure* be opposable to all states, including even those who were against that recognition. At the Vienna Conference on the Law of Treaties, the French delegation had prepared an amendment to the effect that a peremptory norm "shall not be opposable to a State able to prove that it has not expressly accepted it as such," but as it seemed doomed in advance to failure, it was not even tabled.⁶⁷ Although a state cannot have invoked against it an ordinary customary rule that it has rejected from the outset, there seems to be no way whatever for it to evade the peremptory character of a norm it has not accepted as such. So what would happen if the "essential components of the international community" saw fit to recognize the supernormativity of a rule that a given state did not even accept as an ordinary norm?⁶⁸

22. One can scarcely overemphasize the uncertainties inflicted on the international normative system by the fragmentation of normativity that the theories of *jus cogens* and international crimes have brought in their wake. A normativity subject to unlimited gradation is one doomed to flabbiness, one that in the end will be reduced to a convenient term of art, covering a great variety of realities difficult to grasp. Like the "variable legal authority" of subnormative acts, the graduated normativity of normative acts is a notion so elusive as to escape comprehension.

III. NORMATIVITY DILUTED

23. Once the legally binding character of a rule is established, its full definition still requires that the personal subjects of the rights and obligations it creates be determined. Concurrently with the vertical diversification of normativity, however, a trend towards its lateral dilution has appeared, in that the subjects of rights and obligations have been growing ever more indeter-

⁶⁷ Deleau, *supra* note 60, at 19.

⁶⁸ As, for example, the provisions of General Assembly Resolution 1514 (XV) on decolonization, which the "international community" appears to regard as peremptory rules, whereas France refuses even to see them as ordinary rules of law. *Id.* at 17 and 19.

minate. So much so, that it is growing increasingly difficult to determine not only what a norm consists of, but whom it binds, and in favor of whom.

Obligations Erga Omnes

24. For a state to enjoy a right implies its possession of legal standing to claim performance of the corresponding obligation and, in default, to bring to book the person or persons owing that obligation. In the *Reparations* case, the International Court of Justice stated that "only the party to whom an international obligation is due can bring a claim in respect of its breach."⁶⁹ In the *Barcelona Traction* case, the problem was posed in similar terms: "it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity."⁷⁰ Thus, not just any state may be regarded as possessing a "legal interest," i.e., a right, in the observance of any international obligation by the state or states on which it is incumbent; in other words, there is no legal obligation whose fulfillment can be demanded by all states, without distinction, as possessors of a corresponding right. While any state has a right to have an international norm adhered to *erga ipsum*, it has no right to the observance *in the absolute* of the whole corpus of international law and the obligations therein enshrined.⁷¹ In sum, no international obligations *erga omnes*, traditionally, exist: it is up to each state to protect its own rights; it is up to none to champion the rights of others. This principle, as has been said, is "characteristic of a general situation of juxtaposition of sovereignties, since it encloses international responsibility within a bilateral relationship opposing the obligation of one state to the personal right of the other."⁷²

25. This every-man-for-himself doctrine has not been proof against recent aspirations towards the supremacy of ethical values and oneness of the international community. It is in this setting that one has to view the famous passage from the 1970 *Barcelona Traction* Judgment mentioning that certain obligations exist "towards the international community as a whole." "In view of the importance of the rights involved," the Court declared, "all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."⁷³ This dictum the International Law Commission interpreted as meaning that "there are in fact a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are—unlike the others—obligations in whose fulfillment all States have a legal interest." It follows, according to the Commission,

that the responsibility engaged by the breach of these obligations is engaged not only in regard to the State which was the direct victim of the

⁶⁹ Reparation for injuries suffered in the service of the United Nations, 1949 ICJ REP. 174, 181–82 (Advisory Opinion of Apr. 11).

⁷⁰ *Barcelona Traction, Light & Power Co. Ltd.*, 1970 ICJ REP. 3, 33 (Judgment of Feb. 5).

⁷¹ See B. BOLLECKER-STERN, *LE PRÉJUDICE DANS LA THÉORIE DE LA RESPONSABILITÉ INTERNATIONALE* 50 *et seq.* (1973).

⁷² P.-M. Dupuy, *Action publique*, *supra* note 66, at 543: "caractéristique d'une situation générale de juxtaposition des souverainetés, puisqu'il enferme la responsabilité internationale dans un rapport bilatéral opposant l'obligation de l'un au droit subjectif de l'autre."

⁷³ 1970 ICJ REP. at 32.

breach: it is also engaged in regard to all the other members of the international community, so that, in the event of a breach of these obligations, every State must be considered justified in invoking—probably through judicial channels—the responsibility of the State committing the internationally wrongful act.⁷⁴

A few years later, in the *Nuclear Tests* cases, the Court was to analyze certain unilateral statements by French authorities as having been made “*erga omnes*.” Those statements, the Court said, were not “addressed to a particular State” but “to the international community as a whole,” and therefore entailed on the part of the French Government an “undertaking to the international community to which [its] words were addressed.”⁷⁵

26. The intention behind the *erga omnes* theory, as thus conceived, is to sound the death knell of narrow bilateralism and sanctified egoism for the sake of the universal protection of certain fundamental norms relating, in particular, to human rights. Like the *jus cogens* doctrine and the theory of international crimes, it is inspired by highly respectable ethical considerations. Yet, here too, subjects of doubt and perplexity come crowding in.

This is so, in the first place, because it is no easier, of course, to identify obligations *erga omnes* than peremptory norms or essential obligations. Even if the number of obligations *erga omnes* is in principle to remain small, the examples given by the Court⁷⁶ are still mere examples, and we are once more faced with a category capable of an expansion all too likely to get out of hand. One member of the International Law Commission has even referred to “the current rules of the law of the sea” as “obligations *erga omnes*”⁷⁷—which, if words mean anything, can only imply that any State *A* would have a sufficient “legal interest” to take State *B* to task for impeding the innocent passage through *B*’s territorial waters of a vessel flying the flag of State *C*.

But the prime source of perplexity lies in the ambiguity surrounding the precise identity of the *omnes* to whom the obligations are owed. Have the corresponding rights become vested in the “international community as a whole,” or in each of its component states *ut singuli*? The first alternative would imply the possession by the international community of some organic representation capable of taking legal action for the protection of its rights, which is certainly not the case. The second would signify that any state, acting separately and on its own behalf, could claim the fulfillment of an obligation *erga omnes* and invoke the international responsibility of any other state committing a breach of it. But then more questions arise. Is it contemplated that there should be some reparation of the classic type? If so, it is hard to see what injury would have been sustained by the applicant or what, apart from a

⁷⁴ ILC 1976 Report, *supra* note 33, at 99.

⁷⁵ *Nuclear Tests* (Austl. v. Fr.), 1974 ICJ REP. 253, 269–70 (Judgment of Dec. 20).

⁷⁶ “[O]utlawing of acts of aggression, and of genocide, as also . . . principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” 1970 ICJ REP. at 32. Later in the same *Barcelona Traction* Judgment, however, the Court pointed out that “the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality.” *Id.* at 47. This passage is not easy to reconcile with the earlier one.

⁷⁷ [1976] 1 Y.B. INT’L L. COMM’N 71.

declaratory judgment, an individual constituent of the *omnes* could claim. Is punishment envisaged? In the absence of any judicial channels organized to that end, that would mean that any state, in the name of higher values as determined by itself, could appoint itself the avenger of the international community. Thus, under the banner of law, chaos and violence would come to reign among states, and international law would turn on and rend itself with the loftiest of intentions.

Obligations Omnium

27. Where those owing international obligations are concerned, we find that the normativity drift, though less blatant than in the case of obligations *erga omnes*, is fraught with even heavier consequences.

According to the familiar classic doctrine expressed in the *Lotus* Judgment, the source and test of a rule's opposability to a given state lie in that state's intention, as "expressed in conventions or by usages generally accepted as expressing principles of law."⁷⁸ Where conventional rules are concerned, the formality that presides over the conclusion of treaties and the principle of relative effect have enabled consensualism to be established without ambiguity or restriction: whether a state is committed by a treaty, and as from when, can be precisely ascertained. Matters have never been so clear as regards customary rules: it has always been difficult to determine whether a given state is bound by a rule of that kind and, if so, as from what moment. Nevertheless, thanks to a subtle interplay of tacit intention and nonopposability, acceptance never ceased to be a linchpin of the classic theory of custom. Hence it remained possible for any state unwilling to be bound by a norm, whether of customary or conventional origin, not to be bound by it, and for the states owing this or that international obligation to be as easily identifiable as, conversely, those possessing this or that right.

This situation is changing before our very eyes. Customary rules are now being described as general rules, and general rules are being analyzed as universal rules that are binding on all states without distinction, regardless of individual consent. As for that bastion of voluntarism, the conventional rules, a process is at work of absorbing them into the body of customary rules so as to subject them also to dilution.

The Evolution of the Customary Rule. 28. It was the customary rule, the Achilles' heel of the consensualist outlook, that was most readily to lend itself to the indeterminacy of the subjects of international obligations.

The classic theory of custom depends on a delicate, indeed precarious, equilibrium between two opposite concerns: on the one hand, to permit customary rules to emerge without demanding the individual consent of every state; on the other hand, to permit individual states to escape being bound by any rule they do not recognize as such.

To meet the first of these concerns, the classic theory narrows down the individual participation of each state to each of the two factors it regards as

⁷⁸ 1927 PCIJ, ser. A, No. 10, at 18.

indispensable to the formation of a customary rule. The practice that constitutes the corpus of the customary rule is defined as "general," "consistent," "settled," "constant and uniform," "both extensive and virtually uniform"—but never as "unanimous" or "universal." As far back as 1925, Charles De Visscher pointed out that "to rely on a customary rule against a state, it is not always necessary to be able to prove that that state, by its personal actions, contributed to the establishment of the international practice from which the rule derived," and he referred in illustration to customary rules that had come into being on the basis of practices accepted by maritime nations but in whose elaboration the landlocked states had taken no part.⁷⁹ Similarly, it is not required that each state, individually and personally, should have had the feeling of "conforming to what amounts to a legal obligation,"⁸⁰ which constitutes *opinio juris*, the second traditional condition for the existence of custom.

But while it is possible for a customary rule to coalesce without the *consensus omnium*, the classic theory nevertheless permits a state to escape its application by making known its refusal of it in time: the *Asylum* and *Fisheries* Judgments make this point in categorical terms.⁸¹ It is this opportunity for each individual state to opt out of a customary rule that constitutes the acid test of custom's voluntarist nature.⁸²

To put the matter another way: while a customary rule may indeed be formed on the basis of consent that, though general, does not have to be universal, the scope of the normativity attributable to it once formed will likewise be, though general, not necessarily universal. This both facilitates the formation of customary rules and avoids the domination of the minority by the majority.

It is this equilibrium that is threatened today. For the past several years, the degree of generality required of a practice, to enable it to serve as the basis of a customary rule, has been steadily diminished, while, on the contrary, the binding character of such a rule once formed is being conceived of as increasingly general in scope. The result is a danger of imposing more and more customary rules on more and more states, even against their clearly expressed will.

29. The fact of ever-decreasing fastidiousness about the degree of generality demanded of practice is evident from the novel and, in some regards, rather obscure theory of "quasi-universal treaties."

It has never been denied that a provision in a convention, though binding as such only on states parties thereto, could play a role in the formation of a customary rule that would also be binding on third states (provided they had not manifested any objection to it). Even so, it would still be necessary for that provision to have been corroborated by state practice, whether before or after its enactment. In other words, while a provision of treaty law might

⁷⁹ De Visscher, *La Codification du droit international*, 6 RECUEIL DES COURS 325, 361–62 (1925 I).

⁸⁰ North Sea Continental Shelf, 1969 ICJ REP. at 44.

⁸¹ Colombian-Peruvian asylum, 1950 ICJ REP. 266, 278 (Judgment of Nov. 20); Fisheries (UK v. Nor.), 1951 ICJ REP. 116, 131 (Judgment of Dec. 18).

⁸² Cf. 1 C. ROUSSEAU, *supra* note 2, at 320; Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 24 (1974–75); Jiménez de Aréchaga, *supra* note 64, at 30.

find a place in the formation of a customary rule, in which the essential element was the conduct of states, it could never, on its own, be any substitute for that conduct.

Nowadays, there is a tendency to accept that a conventional provision can stand in for the "general" practice, provided the clause in question has been adopted by a sufficient number of states, and in particular by the states whose interests can be regarded as the most nearly affected. In that way a treaty clause can give birth to "instant custom"—or so says the theory of quasi-universal treaties: instruments embodying rules that, simply because they have been accepted *qua* conventional by a large number of states, are supposed to be binding *qua* customary on the others. This is no mere acceleration of the custom-formation process, but a veritable revolution in the theory of custom.

30. To bolster this new view of things, reliance has been placed on that famous passage in the *North Sea Continental Shelf* Judgment where the Court, envisaging the transformation of a conventional rule into a rule of general international law, explains how "it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."⁸³ Since the Court indicates elsewhere in the same Judgment that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule,"⁸⁴ nothing more was needed to prompt the conclusion that, in the eyes of the Court, a provision of treaty law adopted by enough sufficiently representative states could undergo instantaneous transmutation into a rule of customary international law. A few months later, in the *Barcelona Traction* case, the Court was explicitly to mention "international instruments of a universal or quasi-universal character."⁸⁵

31. In truth, it is by no means sure that these dicta of the Court bear the construction thus placed upon them.⁸⁶ But however frail its jurisprudential underpinning, the theory of quasi-universal treaties has certainly gained ground. According to some, a customary rule prohibiting certain nuclear tests has emerged from the 1963 Moscow Treaty. At least in this case, as in that of the 1958 Continental Shelf Convention, the treaty involved is one already in force. But the apparently all-conquering élan of "instant custom" does not stop there: why, after all, should a treaty not yet in force not also give birth *per se* to new customary rules, thanks to the magic of "instant custom"? Thus, it has been asserted that the Additional Protocol to the Geneva Conventions of August 12, 1949 on the Protection of the Victims of International Armed Conflicts, adopted in 1977 by the Diplomatic Conference on Humanitarian

⁸³ 1969 ICJ REP. at 42.

⁸⁴ *Id.* at 43.

⁸⁵ 1970 ICJ REP. at 32.

⁸⁶ When the passages quoted from the *North Sea Continental Shelf* Judgment are reinserted in context, it will be seen that the Court by no means discounts the actual conduct of states, to which it in fact attaches, as it has always attached, decisive importance. Cf. 1969 ICJ REP. at 41 and 43. As for that quoted from the *Barcelona Traction* Judgment, it refers to the possibility of claiming observance of a rule embodied in a quasi-universal treaty, and not to the possibility of creating, by such a treaty, obligations binding on all states.

Law, has, even before entry into force, established rules which "reflect . . . the universal, or almost universal *opinio juris* on what should henceforth be considered as governing any international armed conflict."⁸⁷ Tomorrow we may encounter the application of the same reasoning to this or that provision of the new Convention on the Law of the Sea, even before its entry into force—and a fortiori after. But why stop there? Why should "instant customs" not spring from mere resolutions of international organizations, considering that they are acknowledged to possess a "certain legal value"?

32. There is scarcely any need to emphasize the ambiguities inherent in this theory of quasi-universal treaties. At what point can the participation in a convention be regarded as sufficiently "widespread and representative"? Are only states having ratified or acceded to the convention to be counted, or are all signatories to be included? Are the "states whose interests were specially affected" to be identified by geographic, economic, ideological tests? We have come a long way from the representativity of the maritime states that have created customary norms in the law of the sea, and from the representativity of the founding states of an international organization whose objective international personality, according to the *Reparations* Opinion, becomes opposable to all, thanks to the participation of states "representing the vast majority of the members of the international community."⁸⁸

33. While, under the influence of this development, the generality of practice has been reduced to a minimal requirement, the generality of the normative effects of customary rules has been undergoing the reverse process of constant expansion.

Central to this process is the concept "rule of general international law,"⁸⁹ which is both the key to it and the instrument of its advance. This term was not much employed in classic international law, where it denoted a rule applicable except in the event of a particular derogation, more especially of a regional kind: for instance, general—also called universal—international law was contrasted with American international law;⁹⁰ and reference was also made to particular historical situations embodying derogations from common or general international law.⁹¹ While continuing sometimes to be taken in that sense,⁹² the expression "rule of general international law" is nowadays being increasingly used as a synonym of "customary rule." Thus, in the *North Sea Continental Shelf* Judgment the Court speaks indiscriminately of "customary

⁸⁷ Nahlik, *Droit dit "de Genève" et droit dit "de La Haye": unicité ou dualité?*, 1978 ANNUAIRE FRANÇAIS DROIT INT'L 27.

⁸⁸ 1949 ICJ REP. at 185.

⁸⁹ Manin, *Le Juge international et la règle générale*, 80 REV. GÉNÉRALE DROIT INT'L PUBLIC 7 (1976).

⁹⁰ Cf. Judge Alvarez in *Asylum*, 1950 ICJ REP. at 293–94 (diss. op. Alvarez, J.).

⁹¹ See, e.g., *Fisheries Judgment*, 1951 ICJ REP. at 30.

⁹² In 1976 the International Law Commission was still in certain places contrasting "general" international law to the "particular" international law concluded between two or more states, e.g., its 1976 Report, *supra* note 33, at 92; elsewhere, however, it used the term "general international law" to denote customary, as opposed to conventional, rules, e.g., *id.* at 80–81. Similarly, the expression "peremptory norm of general international law" in Article 53 of the Vienna Convention on the Law of Treaties is mostly construed as referring to rules of universal application, as opposed to rules of regional or bilateral scope. See, e.g., Virally, *supra* note 45, at 15.

international law,"⁹³ "general international law,"⁹⁴ "general or customary international law,"⁹⁵ or even (more rarely) "general rule of international law" or "general rule of law."⁹⁶ The idea behind this terminological permutation is clear: to establish a contrast between the conventional rule, which only binds states parties to a treaty, and the rule of customary international law, which is more "generally" binding on a less strictly delineated number of states. Above, we have pointed out that a customary rule used not to be opposable to any state that had personally objected to it in appropriate circumstances: generality suffered exceptions. But now the very generality of a rule of customary international law is held to make it binding on all states without distinction. Thus, what used to be *merely* general tends nowadays to be viewed as impervious to individual derogations, as—in a word—universal.

34. This slithering from the customary rule to the general rule, then from the general rule to the universal rule, is strikingly illustrated by that very same Judgment in the *North Sea Continental Shelf* cases, since in it the Court also considered the question whether the equidistance principle of the 1958 Convention, though "not in the nature of a merely conventional obligation" undertaken by the Federal Republic of Germany, might not be opposable to it as "a rule that is part of the *corpus* of general international law," which, "like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter."⁹⁷ In fact, the Court gave a negative answer to that question; however, the implication was that the equidistance rule *could* otherwise have been imposed upon the Federal Republic even though it had expressly opposed that rule, and even though it was that very opposition which had lain behind its refusal to ratify the Convention.

35. The opposability of custom was admittedly, hitherto, a presumption, but one that could be overturned by a state in its own particular case. Henceforth, custom is opposable to all, with no possibility of escape. Explicit acceptance of a customary rule has never been required; from now on, even explicit rejection is ineffective. The transition has been made from presumptive acceptance to imposed acceptance.⁹⁸ A decreasingly generalized practice—re-

⁹³ 1969 ICJ REP. at 28, 37, 39, 40, 41, 43, 45.

⁹⁴ *Id.* at 24, 28, 41.

⁹⁵ *Id.* at 28, 38.

⁹⁶ *Id.* at 42. The decision of June 30, 1977 of the court of arbitration in *Delimitation of the Continental Shelf* (France/United Kingdom) (CMND. 7438 (1978), reprinted in 18 ILM 397 (1979)) [hereinafter cited as 1977 Decision] also, though less frequently, uses the term "general international law" to indicate customary law (*e.g.*, in para. 62).

⁹⁷ 1969 ICJ REP. at 28; *cf.* p. 41. Sometimes the same significance is read into the passage where the Court refers to "general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour." *Id.* at 38–39. It is clear, however, that this passage is solely aimed at precluding reservations to provisions that, though conventional as to form, are customary as to substance (*cf. infra* para. 39), and is therefore not concerned with the universally binding character of general rules as such.

⁹⁸ *Cf.* Marek, *Le Problème des sources du droit international dans l'arrêt sur le plateau continental de la mer du Nord*, 6 REV. BELGE DROIT INT'L 44, 54 (1970); Manin, *supra* note 89, at 44 *et seq.*; Jiménez de Aréchaga, *supra* note 64, at 28. Admittedly, in the *Barcelona Traction* Judgment, the Court, referring to the evolution of foreign investment protection law, was to observe: "Here as elsewhere, a body of rules could only have developed with the consent of those concerned" (1970

ducible in some cases to a convention signed by the states “specially affected,” or even to a resolution by an international organization—may give birth to a norm of customary law, which, under the pretense of its generality, will be universally imposed on all states, including its opponents. This quite upsets the delicate balance on which the classic theory of custom was based, since *opinio juris* is by the same token dissolved in an ill-defined majority consent and more or less reduced to a vague “consensus.”⁹⁹

Rarely can so immense an upheaval have taken place under the cloak of a mere terminological mutation.

The Evolution of the Conventional Rule. 36. As one might well expect, the conventional norm has put up greater resistance to this process of increasing indeterminacy of the subjects of international obligations: treaty-conclusion procedures comprise too many tangible signs, and the principle of relative effect is too respectably entrenched, for the distinction between parties and third persons to be easily overcome. Hence, the conventional norm has not been frontally assaulted but cunningly outflanked. The principle remains that an international treaty binds only the states that have become parties to it, and cannot create obligations incumbent upon third states. Yet behind the mask of classicism thus retained there has been a change of substance: in reality, the conventional norm itself may now create obligations incumbent upon all states, including those not parties to the convention in question.

37. What was needed in order to reach this point was, in the first place, to erode the autonomy of the conventional rule vis-à-vis the customary rule. Admittedly, these two categories have never been divided by an insuperable barrier, and it has always been accepted that a treaty could codify or contribute to the formation of a customary norm.¹⁰⁰ But these once exceptional phenomena are now of such frequent occurrence and far-reaching scope as to have become intrinsically altered. Treaty clauses that are declaratory of pre-existent customary norms, or crystallize customary norms in process of formation, or attract concordant practice “like iron filings to a magnet”:¹⁰¹ these three variant erasers of the frontier between conventional and customary norms have been too often discussed to require further comment here.

The relationship between the conventional rule and the customary rule goes much farther, however, than the mere “interaction” or “interpenetration” described by writers.¹⁰² The conventional norm—once regarded as the archetypal rule of international law because the purest expression of classic consensualism—is now considered to be a minor variety unable to attain full

ICJ REP. at 47); however, Jiménez de Aréchaga sees this, not as the reintroduction of some form of voluntarism into the theory of custom, but as merely a reference “to aggregate consent” (*supra* note 64, at 29).

⁹⁹ Stern, *La Coutume au coeur du droit international: quelques réflexions*, in MÉLANGES REUTER, *supra* note 14, at 479. Cf. Jiménez de Aréchaga, *supra* note 64, at 29.

¹⁰⁰ As far back as the *S.S. Wimbledon* case, J. Basdevant spoke of a rule possessing “the dual quality of being both a conventional rule and a customary rule.” 1923 PCIJ, ser. C, No. 3-1, at 182.

¹⁰¹ Baxter, *Treaties and Customs*, 129 RECUEIL DES COURS 25, 73 (1970 I).

¹⁰² Marek, *supra* note 98, at 72; Jiménez de Aréchaga, *supra* note 64, at 23, 27.

stature until, ceasing to be “purely conventional or contractual,” it has “passed into the general *corpus* of international law.”¹⁰³ The decision of the court of arbitration on the *Delimitation of the Continental Shelf between France and the United Kingdom* bears witness to this tendency towards outright identification of the conventional norm (*in casu*, Article 6 of the Geneva Convention on the Continental Shelf) with the general (understood: customary) norm, since the court regards the former as the “particular expression” of the latter.¹⁰⁴ An even more striking illustration of the premium placed on rules of customary law, held to be of superior quality, was given by the International Court of Justice in the *Case concerning United States Diplomatic and Consular Staff in Tehran*, where it pointed out that the obligations violated by Iran “are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.”¹⁰⁵ Time was when no call would have been felt to stray outside the *terra firma* of the conventional norms that bound the parties; here, apparently, the Court did not regard it as sufficient to take that ground but felt it necessary, in order to underscore the normative character of the rules breached by Iran, to point out that those rules had passed into the general corpus of international law—or, in other words, that they were also rules of customary law. And so we find a veritable de-conventionalization of conventional rules taking place on every hand.

38. Once the conventional norm had been absorbed into the customary norm and deprived of its specificity, all that remained to be done, in the second place, was to submit it to that increasing indeterminacy of the subjects of international obligations which we have seen affecting the customary norm. Thus, through the relay of the customary norm—itsself qualified as a general rule or rule of general international law—the conventional norm, too, comes to be imposed on all states, including those who never became parties to the convention in question or never even signed it.

39. From this turmoil the law of treaties is emerging profoundly altered. Once hallowed by the prestige of consensualism, now fallen victim to the fascination exerted by the general rule, the conventional norm is being not only devalued against the other sources of law but forced to abandon what hitherto have been the characteristic features of its legal regime. While it is true that the Vienna Convention has confirmed both the classic procedures for the conclusion of treaties and the principle of their relative effect, this confirmation is reduced to an empty shell if a formally conventional provision can be analyzed as being substantively customary, and thus be submitted to the vagaries of a customary rule that, in turn, has become a rule of general international law. In such a situation there is virtually no difference any longer between a state that is a party to the Convention and a state that is not: the norm in question will be applicable to both. Neither will there be any difference between a convention that has entered into force and a convention that has not: did not the International Court of Justice and arbitral tribunals apply

¹⁰³ 1969 ICJ REP. at 41.

¹⁰⁴ 1977 Decision, *supra* note 96, para. 70.

¹⁰⁵ 1980 ICJ REP. at 31 (emphasis added); *cf.* pp. 24 and 44; *see also* 1979 ICJ REP. 7, 10, 20 (Order of Dec. 15). In its 1951 Advisory Opinion on *Reservations to the Genocide Convention*, the Court had already made a similar observation. 1951 ICJ REP. 15, 23 (Advisory Opinion of May 28).

provisions of the Vienna Convention on the Law of Treaties many a time before it came into force, and do so in regard to states that had not ratified it, or did not intend to ratify it in future?¹⁰⁶ Whether that Convention is in force or not vis-à-vis a given state is after all, it seems, not so important. Not only that: if it is now possible for a customary rule to spring not merely from an actually adopted convention but even from the "general assent" manifested at an international conference, there no longer remains much difference between "near-agreements" and agreements actually achieved.¹⁰⁷ Many other fundamental aspects of the law of treaties are also being eroded: it is surely out of the question to enter reservations to a treaty provision that has been construed to be a rule of general international law, or to denounce a treaty enshrining such provisions. Besides, what useful purpose would such a denunciation serve, considering that the provisions would continue to be binding on the denouncer as general rules of international law?

In sum, the intention manifested by a state in regard to a given convention is henceforth of little account: whether it signs it or not, becomes party to it or not, enters reservations to such and such a clause or not, it will in any case be bound by any provisions of the convention that are recognized to possess the character of rules of customary or general international law. Thus, while nearly all the distinctions established by the classic law of treaties have finally been more or less blurred, it has at the same time become necessary to differentiate, within each conventional instrument, between those provisions which are subject to the diluted regime of the customary norm and those remaining subject to the strict traditional discipline of classic conventional norms. One shudders to think of the controversies that may lie in wait over the opposability, to states not parties, of certain provisions of the Convention on the Law of the Sea.

IV. CONCLUSION

40. A system builder by vocation, the jurist cannot dispense with a minimum of conceptual scaffolding. It is impossible, therefore, for him not to feel disturbed by a development that—whatever its merits from other viewpoints—subjects normativity to gradations of strength while at the same time extending its scope *ratione personae* beyond all discernible bounds. Furthermore, the relationships between the various concepts involved raise problems whose solution is far from easy. Do obligations *erga omnes* and obligations *omnium* wholly, or at least partly, overlap, like "peremptory" and "essential" norms? Are the "high-grade" norms precisely those which are also valid *erga omnes* or binding on every state? To succumb to the heady enticements of oversubtlety and loose thinking is to risk launching the normative system of

¹⁰⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 ICJ REP. 16, 47 (Advisory Opinion of June 21); Fisheries Jurisdiction (UK v. Iceland), Jurisdiction of the Court, 1973 ICJ REP. 3, 14 (Judgment of Feb. 2); Aegean Sea Continental Shelf (Greece v. Turkey), 1978 ICJ REP. 3, 39 (Judgment of Dec. 19); Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 ICJ REP. at 92, 95. Cf. awards in Beagle Channel, 17 ILM 645 (1978), para. 7, and German External Debts, 19 ILM 1370 (1980), para. 16.

¹⁰⁷ Cf. Fisheries Jurisdiction (UK v. Iceland), Merits, 1974 ICJ REP. 3, 23 (Judgment of July 25).

international law on an inexorable drift towards the relative and the random. It is one thing for the sociologist to note down and allow for the infinite gradations of social phenomena. It is quite another thing for his example to be followed by the man of law, to whom a simplifying rigor is essential.

41. But even that is not the most serious aspect. What is yet more disquieting in this relativization of normativity is that it may eventually disable international law from fulfilling what have always been its proper functions.

The rules of general international law tend no longer to be elaborated, at present, by the states *ut singuli* to which they are addressed, but by the international community of states as a whole. It is also this community which raises certain rules from the rank of "ordinary" to that of "peremptory" or "essential" rules, thus becoming the central agent of both the formation of the rules and their situation on the normativity scale. However, as the international community still remains an imprecise entity, the normative power nominally vested in it is in fact entrusted to a directorate of this community, a *de facto* oligarchy. There is a danger of the implantation in international society of a legislative power enabling certain states—the most powerful or numerous—to promulgate norms that will be imposed on the others. The fundamental distinction between *lex lata* and *lex ferenda* will be blurred, since the "law desired" by certain states will immediately become the "law established" for all, including the others.

The consequences of such an upheaval are all too obvious. The sovereign equality of states is in danger of becoming an empty catch phrase: for now some states are more equal than others. Those privileged to partake of that legislative power are in a position to make sure that their own hierarchy of values prevails and to arrogate the right of requiring others to observe it. In this way the concepts of "legal conscience" and "international community" may become code words, lending themselves to all kinds of manipulation, under whose cloak certain states may strive to implant an ideological system of law that would be a negation of the inherent pluralism of international society.

42. The shifting of the axis of international law away from states towards the international community would undoubtedly represent a decisive step forward if it corresponded to any real transformation in international relations. If such were the case, there would surely be cause for rejoicing, both on account of the dream-come-true of the unification of the human race, and because of the no less yearned-for victory of the ethical values common to all mankind over the centrifugal forces that had kept nations apart. But, for the time being, it has to be acknowledged that the international community "is an order *in posse* in the minds of men; in the realities of the international scene it is still groping towards existence; it does not represent an actually established order."¹⁰⁸ Regret it as one may, the international scene today is still made up of the juxtaposition of equally sovereign states seeking, irrespective of their differences, to ensure their peaceful coexistence and cooperation. Undeniably,

¹⁰⁸ C. De Visscher, *supra* note 32, at 8: "est un ordre en puissance dans l'esprit des hommes; dans les réalités de la vie internationale elle en est encore à se chercher, elle ne correspond pas à un ordre effectivement établi." On the international community as a "historical" reality and as a "mythical value," see R.-J. DUPUY, *LEÇON INAUGURALE* (Paris: Collège de France, 1980).

the present trends must command assent insofar as they represent the expression of an *aspiration* towards some more clearly envisioned solidarity, some more assertive legal conscience. But it is impossible to approve them insofar as they are aiming to set up here and now a normative system that the present structures of international society are not ready to accommodate.

By seeking to create today the law of tomorrow's international society, one runs the risk of cutting a key that will not fit the lock it will have to open. By projecting on today's international society the concepts appropriate to a different society, the present trends are indulging in the pleasures of anticipation in ways that, at best, are naively altruistic; at worst, amount to the hijacking of man's "better feelings" for the ends of power or ideology.

43. Adorned with the trappings of modernism, the legal fashions here denounced tend to lull new states—weak and underdeveloped as they often are—into illusions heightened by deceptive rhetoric. Yet, here as elsewhere, it is law with its rigor—not to be confused with rigidity—that comes between the weak and the mighty to protect and deliver. Of course, classic international law has not discharged its functions to perfection—very far from it, since it has failed to prevent wars and has lent itself to being manipulated to the advantage of certain interests of political power. But the reflection that classic international law has been too open to rough handling in the past cannot mitigate the present and future seriousness of any abandonment of its intrinsically positive aspects.

44. Admittedly, all is not yet lost. The theory of international crimes still remains at the teething stage, and, more than a dozen years after the signature of the Vienna Convention on the Law of Treaties, the theory of *jus cogens* has not yet been put to any practical test. Thus, while in the *Case concerning United States Diplomatic and Consular Staff in Tehran* the International Court of Justice stressed the "fundamental character" and "cardinal importance" of the rules governing diplomacy as an institution and pointed to the "universal recognition" they enjoyed, it did not consider it necessary to describe them as rules of *jus cogens* or to define the responsibility of the state that had violated them other than in terms of ordinary responsibility giving rise to a traditional obligation to make reparation. This was a fine opportunity to give concrete shape to the concept of superior norms, but the Court did not take it.¹⁰⁹ As for the obligation *omnium erga omnes*, this likewise has not yet moved on from the stage of the potential to the regime of positive law. There is still some way to go before the dislocation of the normative structure of international law and the perversion of its functions become irreversible facts. There is still time for jurists to react.

¹⁰⁹ Admittedly, it might be possible to place another construction on the silence of the Court. Perhaps it considered that the rules of diplomatic inviolability could validly be set aside or modified by two states in the context of their bilateral relations and that they comprise their own system of sanctions. If so, it would have been for reasons peculiar to the case at hand that the Court regarded it as inappropriate to mention *jus cogens* and international crimes, and not because of any reluctance to accept the actual principle of these theories.