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NORMATIVE HIERARCHY IN INTERNATIONAL LAW

*By Dinah Shelton**

Systems of law usually establish a hierarchy of norms based on the particular source from which the norms derive. In national legal systems, it is commonplace for the fundamental values of society to be given constitutional status and afforded precedence in the event of a conflict with norms enacted by legislation or adopted by administrative regulation; administrative rules themselves must conform to legislative mandates, while written law usually takes precedence over unwritten law and legal norms prevail over nonlegal (political or moral) rules. Norms of equal status must be balanced and reconciled to the extent possible. The mode of legal reasoning applied in practice is thus naturally hierarchical, establishing relationships and order between normative statements and levels of authority.[1]

In the international legal system, the question of hierarchy of norms involves the fundamental nature and structure of international law and the rules of recognition by which law is distinguished from norms that are not legally binding. Scholars in recent years have debated this issue more frequently than their predecessors did during the first decades of the twentieth century, when participants in the international legal system, the matters of international concern and international institutions were far fewer in number. Alfred Verdross wrote of *jus cogens* in 1937, but the notion of a more general "relative normativity" was first discussed and vigorously criticized by Prosper Weil in a landmark article published in the *American Journal of International Law* (*AJIL*) in 1983.[2] Pierre-Marie Dupuy has also argued, on the basis of the Statute of the International Court of Justice (ICJ) and the sovereign equality of states, that there is no hierarchy and that logically there can be none: international rules are equivalent, sources are equivalent, and procedures are equivalent, all deriving from the will of states.[3] In contrast, some authors point to the concept of the "community of states as a whole," mentioned in Article 53 of the Vienna Convention on the Law of Treaties (VCLT),[4] as an emerging force for determining fundamental rules based on public policy,[5] values, or public order (*ordre public*),[6] while

* Of the Board of Editors.

[1] Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT'L L. 566 (1997).

[2] Prosper Weil, *Towards Relative Normativity in International Law?* 77 AJIL 413 (1983).

[3] PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 14–16 (1995).

[4] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 53, 1155 UNTS 331 *reprinted in* 8 ILM 679 (1969) [hereinafter VCLT].

[5] Michael Byers, *Conceptualising the Relationship Between* Jus Cogens *and* Erga Omnes *Rules*, 66 NORDIC J. INT'L L. 211 (1997), posits that *jus cogens* rules are constitutional rules that

> limit the ability of States to create or change rules of international law, and prevent States from violating fundamental rules of international public policy, when the resulting rules or violations of rules would be seriously detrimental to the international legal system and how that system, and the society it serves, define themselves

Id. at 212.

[6] *See* JOSÉ HUMBERTO CASTRO VILLALOBOS, LA NORMA DE JUS COGENS EN EL DERECHO INTERNACIONAL

States and other actors adopt nonbinding normative instruments for a variety of reasons. In some cases that is all they can do in the given setting. International organizations in which much of the modern standard setting takes place generally do not have the power to adopt binding texts. In addition, nonstate actors can sign on, participate, and be targets of regulation, which is much more difficult to do with treaties. Nonbinding instruments are faster to adopt, easier to change, and more useful for technical matters that may need rapid or repeated revision. These attributes are particularly important when the subject matter may not be ripe for treaty action because of scientific uncertainty or lack of political consensus. Finally, nonbinding texts serve to avoid domestic political battles because they do not need ratification.

The considerable recourse to and compliance with nonbinding norms may represent a maturing of the international system. The ongoing relationships between states and other actors, deepening and changing with globalization, create a climate that may diminish the felt need to include all expectations between states in formal legal instruments. Not all arrangements in business, neighborhoods, or families are formalized, but are often governed by informal social norms and voluntary, noncontractual understandings. Nonbinding norms and informal social norms can be effective and offer a flexible and efficient way to order responses to common problems. They are not law and they do not need to be in order to influence conduct in the desired manner.

V. Conclusion

The growing complexity of the international legal system is reflected in the increasing variety of forms of commitment adopted to regulate state behavior in regard to an ever-growing number of transnational problems. The various international actors create and implement a range of international commitments, some of which are in legal form, some of which are claimed to have supremacy over other norms, and some of which are contained in nonbinding instruments.

In practice, conflicts between norms and their interpretation are probably inevitable in the present, largely decentralized international legal system where each state is entitled initially and equally to interpret for itself the scope of its obligations and the implementation those obligations require. The interpretations or determinations of applicable rules may vary considerably, making all international law somewhat relative, in the absence of institutions competent to render authoritative interpretations binding on all states.

There are also dangers of relative normativity alluded to by Professor Weil in 1983 and other hazards that have surfaced since that time. Many authors and litigators have exhibited a pronounced inflationary tendency: nonlaw becomes soft law, soft law becomes hard law, and various customary and treaty norms become *jus cogens*. It is even possible, according to some, that nonbinding instruments, such as General Assembly resolutions, can identify the supreme norms of *jus cogens*. As Weil put it, there has been a "blurring of the normativity threshold," a "slithering from the customary rule to the general rule, then from the general rule to the universal rule."[189] Resolutions of international organizations are treated in a variable manner, depending more on their content than on their form and process of adoption. At the other end of the spectrum, the notion of *jus cogens* has been invoked to such a point in publications and

jus cogens. Fortunately, this misconstruction of the term "law of nations the United States Supreme Court in *Sosa v. Alvarez-Machain*.[190]

Yet, in looking forward, Jonathan Charney convincingly wrote that tl munity "faces an expanding need to develop universal norms to addres Universal norms are a matter of necessity: certain problems threaten the and must be addressed by law that is binding on all states "regardless of sition."[192] Professor Charney noted that peremptory norms of internati treaty-making will of states as well as persistent objections. Indeed, *jus c* from ordinary international law because it is based on natural law prop all legal systems, all persons, or the system of international law."[193] He id for articulation of these norms in multilateral forums such as the General devise, launch, refine, and promote general international law to deal w to the earth and humanity as a whole. He thus saw a role for soft-law tex sensus and crystallizing new rules that may be rapidly absorbed into in becoming "universal" law.

The extent to which the system has moved, and may still move, tow global public policy on nonconsenting states remains highly debated, b on states' freedom of action seems to be increasingly recognized. Inter ments and doctrine now often refer to the "common interest of huma concern of mankind" to identify broad concerns that could form part o policy. References are also more frequently made to "the international co or authority of collective action.[195] In addition, multilateral agreement provisions that affect nonparty states, either by providing incentives to or by allowing parties to take coercive measures that in practice require of states that do not adhere to the treaty. The UN Charter itself contains principles[196] and in Article 2(6) asserts that these may be imposed on n to ensure international peace and security. Perhaps the most significant trend toward normative hierarchy is its reaffirmation of the link betwe which law is one means to achieve the fundamental values of an internatio to be determined, however, who will identify the fundamental values a

[190] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[191] Charney, *supra* note 7, at 529.
[192] *Id.* at 530.
[193] *Id.* at 541.
[194] *See* LOS Convention, *supra* note 16, Art. 137(2); Treaty on Principles Governing the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bod para. 2, 18 UST 2410, 610 UNTS 205.
[195] *See, e.g.*, VCLT, *supra* note 4, Art. 53; LOS Convention, *supra* note 16, Arts. 13
[196] UN Charter Art. 2.

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INTERNATIONAL ORGANIZATIONS: THEN AND NOW

*By José E. Alvarez**

International organizations (or IOs)—intergovernmental entities established by treaty, usually composed of permanent secretariats, plenary assemblies involving all member states, and executive organs with more limited participation—are a twentieth-century phenomenon having little in common with earlier forms of institutionalized cooperation, including those in the ancient world.[1] The story of how, shortly after the turn of the last century, the Euro-American lawyers that dominated the field of international law sought to transcend the chaos of war by "moving to institutions" has been told elsewhere and needs no repeating here. David Kennedy, Martti Koskenniemi, and David Bederman, among others, have described the disparate individuals, separated by nationality, juridical philosophy, and competing "idealist"/"realist" schools of thought, who nevertheless shared a messianic, quasi-religious, and coherent "internationalist sensibility" that sought to institutionalize multilateral diplomacy with a view to promoting civilization and progress.[2] Kennedy locates the move to international organization in turn-of-the-century reformist aspirations for parliamentary, administrative, and judicial mechanisms that, in the Victorian language of the day, would convert "passion into reason."[3] By the time this *Journal* was established, the Congress of Vienna's concert system had provided a model for an incipient (albeit only periodic) pseudo-parliament; diverse public administrative unions and river commissions suggested the possibilities for international administration and even the interstate pooling of funds; and the Permanent Court of Arbitration presaged an international judiciary.[4]

The decisive move to institutionalize what heretofore had been only fitful attempts to codify discrete areas of international law, jointly administer the global commons (such as with respect to certain rivers and postal services), and peacefully settle interstate disputes, came, of course, in 1919, when the Covenant establishing the League of Nations was concluded. This was the break with prior practice that transformed ad hoc practice into more integrated institutions.

* Of the Board of Editors.

[1] *See, e.g.*, A. E. R. Boak, *Greek Interstate Associations and the League of Nations*, 15 AJIL 375 (1921); *see also* Josiah Ober, *Classical Greek Times*, *in* THE LAW OF WAR (Michael Howard et al. eds., 1994) (discussing, among other things, the Amphictyonic League, an organization of Greek peoples that regulated the affairs of Delphi); Steve Sheppard, *The Laws of War in the Pre-Dawn Light: Institutions and Obligations in Thucydides' Peloponnesian War*, 43 COLUM. J. TRANSNAT'L L. 905 (2005) (semble). But Boak, who points out that the Greek leagues "were only created and held together under the leadership of one state more powerful than the rest," concludes his article with a prescient query: he wonders whether the nascent League of Nations would fail for lack of a comparably powerful state or group of states capable of coercive enforcement. Boak, *supra*, at 383.

[2] *See, e.g.*, MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870–1960 (2002); David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987); David J. Bederman, *Appraising a Century of Scholarship in the* American Journal of International Law, 100 AJIL 20 (2006); *see also* Michael Barnett & Martha Finnemore, *The Power of Liberal International Organizations*, *in* POWER IN GLOBAL GOVERNANCE 161, 163–71 (Michael Barnett & Raymond Duvall eds., 2005) (describing the prevailing liberalism dominating IO thinking in scholarly and policy circles).

[3] Kennedy, *supra* note 2, at 848, 859.

[4] *Id.* at 858; *see also* D. W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 1–9 (4th ed. 1982).

(such as binding adjudication).[83] It directs attention to "bottom-up" processes for encouraging compliance, as well as the "top-down" processes traditionally associated with international law and organization. It also suggests that when states do engage in institutionalized international adjudication, as they increasingly do in several regimes, the normative ripples may extend, thanks to the legitimacy conferred on multilateral dispute settlers, beyond solving the dispute at hand and, for example, may "socialize" national judges into greater acceptance of international rules.[84]

IV. IO SCHOLARSHIP TODAY

Most of today's international lawyers continue to be engaged in the "progressive" Grotian tradition. For a motley group that includes neopositivists, liberal institutionalists, and even some neorealists, the turn to institutions remains a worthy objective, and the goal of policymakers and scholars remains the same as it was when the League of Nations was created: establishing yet more institutional forms for governing the world without world government. Theirs is the continuation of a century-old effort to perfect a more integrated, or at least more coherent, system of institutions that, as John Jackson puts it (no longer in Lauterpacht's Victorian terms), will transform "power-oriented" diplomacy, based on balance of power, to "rule-oriented" adjudication, based on the rule of law.[85]

Accordingly, many international lawyers remain hard at work proposing new IOs or proposing institutional reforms to correct the "birth defects" of the IOs that we now have. The ever more porous nature of national borders leads lawyers to assume that there is more need than ever for yet deeper or more evolved forms of institutionalized international governance.[86] Like those who began the move to institutions, today's contributors to specialized journals like *Global Governance* continue to believe that "only with global governance will states and peoples be able to cooperate on economic, environmental, security, and political issues, settle their disputes in a nonviolent manner, and advance their common interests and values" and that "[a]bsent an adequate supply of global governance, states are likely to retreat behind protective barriers and re-create the conditions for enduring conflict."[87]

Like those who pinned their faith on scientific progress through the League of Nations,[88] the majority of international lawyers and fellow travelers in international relations rarely see an

[83] *See, e.g., id.* at 292 ("interactional law generates self-bindingness and adherence to norms, even in the absence of material incentives or sanctioning mechanisms").

[84] *See, e.g.*, SLAUGHTER, *supra* note 63, at 65–103; Paul Schiff Berman, *Judges as Cosmopolitan Transnational Actors*, 12 TULSA J. COMP. & INT'L L. 109 (2004).

[85] JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 254 (4th ed. 2002); *see also* Jackson, *supra* note 7; *cf.* Kennedy, *supra* note 2, at 982 (noting how the League of Nations proponents sought to decontextualize wars by turning them into "disputes").

[86] *See, e.g.*, REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBORHOOD (1995); Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the UN Dispute Settlement System?* 31 N.Y.U. J. INT'L L. & POL. 753 (1999). For a more limited proposal to expand the domain of the WTO, see Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002).

[87] Michael Barnett & Raymond Duvall, *Power in Global Governance*, *in* POWER IN GLOBAL GOVERNANCE, *supra* note 2, at 1, 1.

[88] There is a clear and unmistakable connection between today's self-identified "progressive" developers of international law and early advocates of international organization in this *Journal*. *See, e.g.*, Albert Kocourek, *Some Reflections on the Problem of a Society of Nations*, 12 AJIL 508 (1918); John Bassett Moore, *International Law: Its Present and Future*, 1 AJIL 12 (1907); Paul S. Reinsch, *International Unions and Their Administration*, 1 AJIL 604.