Standards and Sources.
Farewell to the Exclusivity of the Sources Triad in International Law?

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The traditional sources of international law are frequently attacked as being too narrow, backward-looking, and at any rate, incapable of coping with the modern problems of international relations.** As a result, due to the expansion of communication amongst states and the proliferation of international organizations, new candidates for international law sources are being tendered. In a world that, according to Wolfgang Friedmann, is moving from coexistence to cooperation and even to forms of integration,1 it is alleged that treaties, custom, and general principles of law no longer suffice to fully shed light on processes of norm creation in the international community. Consequently, writers proffer new candidates as sources,2 foremost

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** I wish to thank Anne E. O'Malley and Bruno Simma for valuable editorial assistance.

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amongst them resolutions and declarations of international organizations. Quasi-legislative acts of the United Nations, in particular, and legally non-binding, yet highly persuasive codes of conduct are being advocated, topped off by the notion of *ius cogens* as a roof upon the house of sources, providing ethical foundations for state obligations. The notion of 'soft law' was invented for some of the supposedly legally relevant pronouncements formulated in international organizations and amongst states, and a fierce controversy between 'hard law' proponents and 'soft law' advocates has raged for many years.

The object of this article is not to add yet another voice to the full chorus of this particular debate, nor to discuss the utility of 'soft law' as such, but instead to examine whether standards of international law, as a legal category, might resolve some of the doctrinal controversies in this field, and to demonstrate that a considerable number of the attendant problems can indeed be clarified in terms of standards and combination standards alongside the traditional sources. To this end, the changing structure of sources will be examined, followed by an analysis of international law norm varieties, after which the nature, utility, scope, and limits of standards as sources will be assessed.

The thesis proposed here centres around the assumption that standards can better explain some of the more recent processes of norm creation than did the traditional sources. In discussing the nature of legal standards some space will have to be devoted to showing that although the term is frequently used by many authors, it often suffers from ambiguity and definitional looseness, many times simply serving as a


synonym for 'legal rule' or 'legal principle'. The argument pursued here is that this should be avoided and that alongside the traditional sources of international law there is a distinct and important role that standards in their own right can and do play.\(^7\)

I. The Changing Structure of Sources

During the last forty years there has been an intensive discussion about the sources of international law. The Statute of the Permanent Court of International Justice as amended in 1945, in delineating sources for the purpose of providing clear guidelines for the future work of the World Court, categorically states in Article 38(1):

The court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The framers of the Statute clearly intended to codify the generally accepted rules of international law pertaining to sources prevailing at the time. They worked on the assumption that the sources enumerated in Article 38 represented the totality of applicable norm categories. Despite the fact that the old European balance of power had foundered on the rocks of World War I, there clearly remained widespread acceptance of these basic rules on the sources of international law in their Eurocentric orientation.

Article 38(1)(c) of the Court’s Statute reflects this by referring to ‘civilized nations’, a term that applied to the European powers and that might have been hair-raising if invented after World War II, but was readily accepted in 1920 as part of a compromise in exchange for the recognition of the category of general principles as a formula to bridge positivist and natural law controversies.\(^8\)

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\(^7\) The substance of this article is based on the author’s habilitation thesis ‘Theorie der Menschenrechtsstandards’, 1986. For fuller discussion, see in particular Chapters 3 and 7 of that study.

\(^8\) Cf. Advisory Committee of Jurists. Procès-verbaux of the Proceedings of the Committee, Den Haag 1920, 306 et seq., 344 (Root): ‘les principes généraux de droit reconnus par les peuples civilisés’, and 335 (Lord Phillimore), referring to the principles of law accepted by all nations in foro doméstico.
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Although states by no means wished to subscribe to idealistic norm conceptions, they did, in fact, wish to lay down clear guidelines for the new World Court set up at The Hague. Henceforth, until well after World War II, the canon of sources delineated in 1920 remained unchallenged, even with the advent of over 100 new states since 1945. And yet, the declining use of the World Court, until very recently, increasingly rendered this conception of sources questionable, even if treaties, custom, and general principles of law continued to be the backbone of the international legal process.

With the explosion of activities of international organizations, foremost amongst them the League's successor, the United Nations, and the multifarious means of communication between states and other subjects of international law, and with the full realization that the uniform value system underlying the international community in fact no longer existed, the norm-creating processes of international law became much more complicated, reflecting the heterogeneity of states. Henceforth, norms could no longer simply be presumed or deduced from common concepts of law and equity, historically rooted in the European value scheme of the Pax Christiana, but needed careful justification, in order to be acceptable to over 100 new states, many of whom promoted the establishment of new 'world orders', replacing the old order of pre-war times.  

It was only natural then, that these new states, once independent, were sceptical of the International Court of Justice (ICJ), apprehensive that the ICJ might entrench the old legal concepts, as the Court was composed mostly of European and American judges, or of judges educated in that legal tradition. After the second South West-Africa decision of the ICJ, the newly independent states severely criticized the Court and preferred to seek remedies instead through the political organs of the UN. The case load of the ICJ between 1966 and 1980 declined drastically, particularly in contentious matters; and thus most international law issues were settled by other means of dispute settlement, such as bilateral or multilateral negotiation, enquiry, mediation, conciliation or arbitration, as enumerated in Article 33 of the UN Charter. Power politics, and policy options with only vague legal relevance, or the practice of paying lip service to legal arguments as justification for political action, became the order of the day in a divided world; a world

11 The optimistic assessment by Lord McNair in the preface to O'Connell supra note 2 of the development of international law through the cases clearly reflects the common law approach, but cannot deny the fact that most international law issues these days are not settled in courts and tribunals - important as they undoubtedly are - but by other means of dispute settlement.
full of cultural, political, economic and social differences. Rules of international law therefore, needed to have very strong underpinnings to be acceptable to all. The vast increase in treaty law after 1945 is not only due to the increased number of states, but as a trend also reflects the inherent lack of faith of new states, which preferred to subscribe to international law rules only if they had played a part in their formulation.

On the other hand, when those new states discovered that political independence did not automatically entail full socio-economic freedom, and that development strategies were needed to bring about the equality of states promised in the UN Charter, and when they subsequently saw that political strategies for overcoming underdevelopment hardly changed their predicament, the norm-creating process of international law was rediscovered, and imbued with new meaning. In many international organizations attempts were made by overwhelming majorities to upgrade resolutions and declarations to quasi-legislative acts of those bodies, binding upon member states. And as nearly all states were members of the UN, these norm formulations of international organizations were proposed as a new source of international law. In their reactions to this development many authors took the trouble at least to distinguish between those resolutions/declarations which were merely directed at the internal functioning of the organizational organs, and those which served as organizational decisions, recommendations or goal formulations without the intention of having a directly binding legal effect. Others categorized these utterances as constituting evidence of state practice in general; or of organizational practice with relevance to international law; or as evidence of a general opinio iuris sive necessitatis; or even as 'pressure-cooked' instant customary law in those spheres where there was an urgent social need for legal regulation and, consequently, no time for the gradual formation of state practice.

But even those who did not participate in that fierce debate had to acknowledge that the work of the World Organization did have a profound effect on the actual behaviour of states: they no longer could act as they pleased – not even the superpowers – but instead had to reckon with the communis opinio enunciated by the General Assembly of the UN and by other international fora. They could, of course, ignore the approval or disapproval by those fora of world public opinion, but such an attitude greatly interfered with the political manoeuvring space left to them. States, on

12 For a fuller discussion, exemplified by the advocacy of 'basic needs', see Riedel, supra note 5, Chapter 5.

13 B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 JIL (1965) 23 et seq.; see generally Dicke, supra note 4, at 219 et seq.; Verdross, Simma, supra note 2, § 566.
the whole, have learned that breaking elementary rules of international law entails being ostracized at the UN, and while undoubtedly it can be maintained for some time, such defiance tends to be very costly in the end, as the Union of South Africa, Southern Rhodesia and Saddam Hussein of Iraq have had to find out. In any event, the period from 1945 to this day has seen the affirmation of old and the production of new general principles, not just of law, but specifically of international law; foremost amongst them the so-called UN Charter principles laid down in Articles 1 and 2, which Georg Schwarzenberger\textsuperscript{14} once called the pillars upon which the world organization rests, such as sovereignty, equality of states, non-intervention, renunciation of the threat or use of force as a means of dispute settlement, to name but some of those fundamental principles that have no direct counterparts at the national level. They are general principles \textit{sui generis}, and yet no one would deny their legal relevance, either as world constitutional principles, or simply as treaty obligations under the UN Charter, or as generalizations of rules of customary international law.

Since most of these newer principles relate to political activities of states acting as members of the UN and of its specialized agencies, it matters little whether or not they fall into one of the traditional sources marked out for the ICJ.

These developments taken together - distrust of the ICJ by the Third World; distrust of the quasi-legislative activities of UN bodies by Western states; rejection of any extension of traditional sources if it meant giving up one's own fundamental views about legal norms, together with the greater political significance of international organizations - made it abundantly clear that alongside the traditional sources of international law new methods for formulating norms were developed that simply did not fit naturally into the sources triad of the World Court. Regarding them as subsidiary sources within the meaning of Article 38(1)(d) of the ICJ Statute, although also tried, did not work either. These norm formulations cannot be regarded as auxiliary evidence of international law like judicial pronouncements or 'teachings of the most highly qualified publicists of the various nations', geared to interpret treaties, custom or general principles of law, because they may have their own distinct role to play. In fact, some resolutions, declarations, or codes of conduct can be subsidiary sources in the sense described. Their content is declaratory of treaties, custom or general principles. If, however, they are constitutive of new norms of international law, they do not fit into this picture. As Alfred Verdross and Bruno Simma cogently pointed out, contrary to national law, international law does not know a

\textsuperscript{14} Schwarzenberger, 'The Fundamental Principles of International Law', \textit{RdC} I (1955) 195 et seq.
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numerus clausus of modes of law creation.\textsuperscript{15} Christian Tomuschat summarized this as follows:

(The traditional categorization of sources) merely describes the external forms to which the legal will of the community of states so far has been limited. These formalities are merely indicators for the existence of a genuine legal will which at any time can take on a completely different appearance.\textsuperscript{16}

Or, as Verdross and Simma put it: 'Norm creation thus is not limited to particular kinds of sources but finds itself in a state of liquid aggregation',\textsuperscript{17} whereby states rather than purely relying on Article 38(1) of the ICJ Statute utilize more direct means of norm creation, by means of recognition, toleration, simple acceptance, the dispute of claims and situations, in a 'process of continuous interaction, of continuous demand and response'.\textsuperscript{18}

Thus far, most writers on international law will agree. All will concede that something new has emerged from within the UN, but great dissent exists as to the categorization of these new politico-legal phenomena. To assess the impact of these new phenomena, a word needs to be said about the interrelation of international law and international relations.\textsuperscript{19} While the discipline of international law is concerned with the normative framework of the international community as a legal order, the discipline of international relations analyses the modes of action and the practice of actors in a political context. A juxtaposition of these scientific disciplines, irrespective of marked differences of approaches, suffers from a fundamental flaw: Norms do not merely belong to the realm of oughtness but may also be analysed as facts.

Traditional international lawyers of the positivist school tried to reduce legal discourse to the pure discussion of relations between norms and questions of legal validity, to a pure exercise in systematization of ought-propositions by means of syllogistic analysis.\textsuperscript{20} By contrast, a wider conception of law will embrace relevant factual bases of norms as an empirical basis of a social and political nature, thereby taking into purview the reality of the international community. Factual parameters will thus also be assessed in a normative context, so that state practice can be ana-

\begin{itemize}
\item \textsuperscript{15} Verdross, Simma, \textit{supra} note 2, § 518.
\item \textsuperscript{16} C. Tomuschat, \textit{Verfassungsgewohnheitsrecht?} (1972) 111 (translation).
\item \textsuperscript{17} Verdross, Simma, \textit{supra} note 2, § 518, (translation) with further references.
\item \textsuperscript{19} Cf. the pertinent remarks by Simma, 'Völkerrechtswissenschaft und Lehre von den internationalen Beziehungen, Erste Überlegungen zur Interdependenz zweier Disziplinen', 23 \textit{ÖZSR} (1972) 293 et seq.
\item \textsuperscript{20} Cf. H. Kelsen, \textit{Reine Rechtslehre} (2nd ed., 1960) 78.
\end{itemize}
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lysed by international law categories, even if the practice does not amount to legal but rather to political or ethical norms of action. This broader conception of the reach of international law, transcending pure 'ought-analysis', has much to recommend itself, for when one looks at the international legal process one finds that the stage of final decisions binding upon the parties concerned is reached only in a very few isolated instances. Usually the application of the law stops far short of that and remains at the stage of more or less divergent individual self-assessments of rights and duties under international law. Recent demonstrations in point are the Afghanistan and Grenada interventions, or the bombardment of Libyan targets in the Gulf of Libya by the United States.

It is suggested here that some of the newer policy parameters of international relations can best be labelled 'standards'. But before these standards are examined more closely, a little more needs to be said about normative varieties of international law, and their actual relationship with the factual bases of international relations.

II. Norm Varieties in International Law

Part of the preoccupation with the traditional sources triad stems from the fact that international legal discourse is largely a product of writers which are influenced by their own national legal traditions. Pre-world War I lawyers, including teachers of public international law, could not envisage the variegated forms of political action in international relations after 1945 that the tremendous increase in and means of world communication eventually brought about. Their own ideas about world society essentially meant the transposition of concepts of domestic law onto the plane of international law, in as far as that was possible. International law treaties at the turn of the century followed the traditional patterns of treaty law which in turn copied the modes of contract law found at the national level. Further, the Statute of the World Court in 1920, although the League of Nations was indeed geared towards a completely new regime of international organization, codified the legal abstractions prevalent before World War I, and these certainly were not universalistic from a contemporary point of view. The traditional national approach to legal norms – to this very day – follows the positivistic legal pattern of conditional programme, consequence, and conclusion, supplemented by sanctions or at least the threat of sanctions for breach of those legal obligations. This pattern clearly fits many developments in international law, but not all of them. It works well with the law of treaties, because

21 See generally Simma, supra note 19, at 303.
there the analogy to national private law is obvious. But although treaty-law in international relations plays a most important role in times of multiple dissent amongst states by pinpointing common denominators, it certainly is not suited for all types of state action. There are many instances where states, for one reason or another, do not wish to bind themselves by treaty, sometimes because of internal legal reasons such as avoiding parliamentary ratification procedures, as has been the case with the foreign affairs power in the United States of America. Instead, other forms of international political modes of action are sought and applied. It is for these reasons that international law after 1945 had to develop several categories of different degrees of norm density.

Basically, these diverse norms fall into two categories: rules of 'hard' positive law and transpositive norm programmes of 'soft' law. This categorization is reminiscent of John Austin's limiting definition of strict positivism, of 'laws properly so-called' and 'laws improperly so-called'. Both spheres are strictly delineated, and the lawyer is only entitled to analyse 'laws properly so-called'. This distinction is not, however, meant here. Instead, the characterization of hard and soft law is merely intended to focus attention on the fact that on the one hand some state obligations are created by treaties binding states objectively or benefiting individuals as substantive rights, as is the case with human rights norms (clearly designed as rules of hard law), while on the other hand, there exist a whole range of international rules which are derived from legally non-binding instruments but undoubtedly express normative claims, such as norms of imperfect obligation. An example of a norm of this category is furnished by international prescription of a right to work. Such a right is even accepted by Western states that generally feel unable to accord it the same status as civil and political rights, owing to the fear that they might not be able to fulfil such rights in times of economic difficulties unless one opted for a model of socialist planned economy. The merits of that argument will not be pursued here. Suffice it to say that norms such as the right to work can nevertheless be accepted as representing norms of imperfect obligation, yardsticks or standards, meant to serve as incentives at the national level. Such standards are parameters which are brought to bear upon the national legal order and which may be – but need not necessarily be – applied fully in the decision-making process of legislative, executive, or judicial bodies, unless these standards are turned into a hard obligation by means of domestic law. More will be said about these standards shortly.

23 Cf. Riedel, *supra* note 5, Chapter 1 and 2.
Apart from these standards, other types of transpositive norm programmes exist, such as those formulating promotional obligations. These obligations which amount to outlining specific promotional activities such as seminars, expert-meetings, educational programmes and providing general public relations measures, are placed on states ratifying respective treaties, in the hope of attracting attention to particular norm programmes. Resort to standards is meant to arouse awareness for economic, social, and cultural rights and to create stronger internal pressure which will supplement a relatively weak international pressure, in the hope that this will ultimately induce legislative or executive agencies to translate these norm programmes into binding rules of national law.

Another type of norm visualizing goals or aims considered desirable, may be described as norms of aspiration. These serve as pointers or landmarks for the direction of programmatic aims in longer-term projection and often stress the necessity of stronger respect for human rights in finding solutions to economic or social questions.

Transpositive norm programmes also include norms which do not properly belong to the legal sphere, but are rooted in religious, natural law, anthropological, contractualist or consent-based concepts. Although they may look like legal norms, they are derived from different sources. Amidst these extra-legal norms we also find norms of non-legal societal influence, such as recognized usages and practices of states, which fall short of legal norms and often have no other basis than psychological and sociological preferences or simply usages or habits of obedience. Yet, non-legal as these norms may be, they often influence state behaviour as if non-compliance with such usage or practice might actually entail sanctions. In a descending order of obligation such norm programmes become less and less law-like.

While it is thus possible to distinguish these various types of norm categories found in international law, the intrinsic value of the differentiation becomes evident when one looks at the practice of states in those areas of the law where the proper consent basis is slender, and yet the need for concerted international action is felt strongly, as seen for example, in the Helsinki process of the CSCE. Undoubtedly,
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the Final Act of that Conference, while clearly representing a document relevant to international law, did not amount to 'hard law' in the classical sense. The array of programmatic goal or aspiration norms, rules of conduct, declarations of state intent and practical recommendations found in that document may nevertheless steer state action and practice quite in the same way as would the traditional sources triad.

Critics of this view regard such documents as an upgrading of 'soft law' sneaking in through the backdoor. To say that a sharp delineation of law and non-law would not do justice to modern international relations — as this author also believes — or that undertakings which are found in the Final Act of the CSCE, (such as quasi contracts of a moral, pre-legal or extra-legal nature) produce new 'soft law', does not seem helpful. For in cases of conflict, the only germane question would seek to discover the concrete legal consequences that could be deduced from a specific declaration or a particular conduct. Both points of view fall rather short of the mark as being too one-dimensional. They infer the existence of an international law norm equivalent to a norm equipped with sanctions at the national level. The importance of these composite norms without fully binding effect, however, lies in their underlying rationale (Begründungszusammenhang), and in the interplay of clearly identifiable hard law norms with non-binding norms. Only if the interaction of these various norms — despite their differing degrees of hardness — is seen, can a useful function be assigned to these interlaced norms, which may be termed combination norms or combination standards. As Jochen Frowein convincingly argued in reference to the freedom of information in the context of the CSCE, if one is prepared to accept these premises it even seems possible to allocate an estoppel function — and thus certainly a hard law effect — to such legally non-binding CSCE norms. The principle of estoppel as a general principle of law in the sense of Article 38(1)(c) of the ICJ Statute, and, therefore, of unquestionably 'hard law' quality, is thereby coupled with a stricto sensu non-binding norm of aspiration emanating from the CSCE. The ensuing mixture of binding and non-binding rules carries with it the danger of upgrading non-binding norms, by treating them just like hard law norms, although that is by no means an unavoidable consequence. As far as the validity of norms is concerned, it is quite possible to distinguish matters that were combined at the level of norm appli-

27 See Riedel, supra note 5, at 154 f; and authors in supra note 26.
28 Haibronner, supra note 56, at 22.
29 Frowein, 'Das Problem des grenzüberschreitenden Informationsflusses und des "domaine réservé"', 19 Ber DGVR (1979) 22.
30 Verdross, Simma, supra note 2, § 657; see also Jabloner and Okresek, "Theoretische und praktische Anmerkungen zu Phänomenen des "soft law"", 34 ÖZARVR (1983), 229 et seq.; Schreuer, "Die innenstaatliche Anwendung von internationalem "soft law" aus rechtsvergleichender Sicht", 34 ÖZARVR (1983) 243 et seq.
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cation. Thus, the concrete case decision will be borne by the 'hard law' elements of the combination standard, while the non-binding elements of the standard serve as propositions of reasoning, bolstering up the often slender hard law foundation of the decision. Ultimately, the coalition or co-existence of norms of varying degrees of normative 'density' should not be seen as a sign of the primitive nature of international law, but rather of its maturity, since it was able to develop an adequate and realistic array of cooperative instruments where effective sanctions are lacking.

In this combination role, programmatic norms can also fulfil harmonization and multiplication functions. Thus, the Universal Declaration of Human Rights (UDHR) of 1948, while clearly non-binding as a declaration of the UN General Assembly, has been incorporated in many constitutions of newly-independent states, and has served as an aspiration model for the European Convention on Human Rights, as well as for other Human Rights documents. Aspiration norms can also be found in the UDHR: it recognized the right to own property, which was later dropped from the UN Covenant of Civil and Political Rights owing to dissent about the extent of limitations, not of substance as such. Today, the UDHR is universally recognized as a high-ranking document of political and ethical value, containing norms of aspiration which in many ways can become the crystallization point for future legal developments at both the national constitutional level and the international level, as the numerous examples of domestic and international codification illustrate.

As an extra-legal or non-legal ethical construct contained within existing international normative programmes, the right to own property, for instance, has only limited significance. However, it can still serve, for instance, to legitimize the concept of 'smaller ownership', i.e. property rights limited to subsistence guarantees of individuals, but it could not be utilized as a justification for large-scale capital accumulation. At this point it becomes quite clear that by this usage of a norm, the existing ideological barriers between various world regions may, in fact, have a destabilizing effect on human rights realization. All that remains to be done in such a situation is to climb down the ladder of norms of international law from the universal to the regional or even to the sub-regional level where more homogeneous conceptions about

32 Riedel, supra note 5, at 156 et seq.
the contents of these norms may exist. In the West European framework, the fundamental character of the property guarantee may thus serve as an additional argument when determining the common legal convictions of all member states of the Council of Europe about the need for protecting property.

These few illustrations may suffice to demonstrate the utility of employing combination standards in international law, particularly in those areas of international law where hard law rules do not abound, but where, as in environmental law, or economic, social, and cultural human rights law, the need for concerted action is evident to all. In these areas, political scientists, sociologists, and scientists of related disciplines generally shy away from norm analyses, and when international lawyers restrict their norm analysis to classical 'hard law' formulations, a gap is left that should definitely be bridged. For this practical reason alone, such inchoate norms should be regarded as an integral part of international law, not just as part of the discipline of international relations. For the focus of that discipline will generally be on mechanisms of interaction of political systems and of political actors, thereby belittling the factual importance of the legal standards outlined.

If one looks at another social human right, the right to work, one finds that its universal acceptance in the UDHR and in Article 6 of the UN Covenant on Economic, Social, and Cultural Rights of 1966 has been underpinned and concretized by more than 100 ILO conventions. And these conventions openly utilize the 'standard-setting' procedures, whereby universal norm formulation is joined with national law modes of implementation and regular references and controls in ILO expert fora. At least 70 ILO conventions cover aspects of the right to work or of the rights in work/employment, even embracing on-site inspections. Another point to

35 Cf. L. Sohn, T. Buergenthal, International Protection of Human Rights (1973) preface, vi: 'Apart from their individual legal significance, each of these acts is a complementary element of a single law-making or institution-building process which derives its authoritative character from the legal consequences that attach to the cumulative effect or interaction of these acts'; see also Dillard, 'Some Aspects of Law and Diplomacy', RDC II (1957) 449 et seq., at 497; Randelzhofer, 'Völkerrecht und internationale Beziehungen', 58 Friedens-Warte (1975) 252 et seq.; Kimminich, 'Teaching International Law in an Interdisciplinary Context', 24 AVR (1986) 143 et seq.
37 Riedel, supra note 5, Chapter 7.
bear in mind is the fact that many states have altered their substantive law even without ratifying specific ILO conventions. The objective norms in such cases thus serve as motivators for the development of internal law, and may even function as warning lights for the legislators when debating bills, or when the 'essentials' of such international human rights standards are in danger of being overlooked or neglected. If another metaphor is permitted to demonstrate the functioning of those combination standards, they may be compared to the accumulation of sand at breakwaters in land accretion measures by the seaside. Every norm by itself will have little or no effect, and will be swept out to sea again, so to speak. Only the correlation and combination of norms of differing nature, the interplay of breakwaters, groynes, sand, dry periods between two tides, and salt-resistant seaweeds gradually leads to land accretion and, by analogy, to a gradual solidification of such human rights norms. It is the presence of norms of varying degrees of legal obligation that mutually reinforce each other, and establish new forms of implementation which bring about significant changes of human rights realization within individual states and at the international level.

A review of these various types of norms shows that despite their clearly distinguishable functions they are, in practice, closely intertwined, correlative and co-variant in the sense that the reinforcement of one norm category also affects the other norm types of that combination standard. Thus, the rights to work and to own property are themselves bound into groups of other human rights, and are correlative in that respect, too. Property in relation to work as 'work ownership' may receive special protection, and conversely, the right to work may represent the property surrogate rooted in the common aspect of subsistence guarantees. 38

The co-variation of such norms may be illustrated by an aetiological model of a norm relating to the right to work. Initially, only non-binding parameters or yardsticks are postulated as human rights standards that may or may not be applied, because sovereign states as yet are not prepared to accept stronger obligations. Through promotional obligations and other norms of aspiration, aided by a general climate friendly to human rights issues and the recognition of pertinent ethical values, and perhaps also by a sufficient number of norms of societal influence (habitual acceptance, the specific value selection of a particular legal community, and support by public opinion) pressure on an individual state legislator may become so strong that a legislator may even be forced to ratify human rights treaties of higher norm den-

38 See, as regards this problem which cannot be pursued here, Riedel, supra note 5, at 163; Hübner, 'Arbeit als sozialrechtlich vermitteltes Eigentum im Sinne des Art. 14 GG', in Mitteilungen der Landversicherungsanstalt Oberfranken und Mittelfranken (1982) 483 et seq. and response by W. Röhrer, ibid., 486 et seq.
This process can be observed, for example, in the United States of America, where the difficulty of securing Senate majorities so far has prevented ratification of the UN Covenants on Human Rights. However, the mere existence of the pressures mentioned above is responsible for the continuing discussion on the ratification of the human rights covenants as well as for acceptance of at least a few of the more specialized human rights treaties. Although such promotional functions of standards can be observed in state practice, their actual use is certainly not a foregone conclusion. The value of such a model of norm co-variance lies solely in demonstrating that norms of different legal concreteness may interact co-variantly, and that sometimes, when political interest is aroused in questions such as the New International Economic Order, such norms may produce a sort of legislative ‘cascade’ effect. Frequently, particularly if world public opinion is silent or indifferent to the issue in point, standards will only represent relatively isolated attempts at norm creation. In state practice, a norm cascade may occur quite frequently, as in the ‘Universal Bill of Rights’, which was triggered off by the UDHR of 1948 and subsequently found its hard law formulation in the UN Covenants of 1966. Another case in point would be the series of resolutions and declarations about the New International Economic Order in the 1970s. Usually, attempts at norm setting begin at an isolated point of the ‘cascade’, as a mere focus of opinion, resolution, recommendation, promotional obligation, or similar transpositive norm, in times hostile or indifferent to human rights realization. The movement may be from promotional obligations to lesser degrees of obligation, and ultimately even to a dilution or total extinction of the protecting effect of the initial stage of the cascade. By contrast, if states are favourably inclined, even the most loosely framed transpositive norm may trigger new political orientations, as the development of so-called third generation rights has shown. One last example may illustrate this cascade model. The human rights catalogues – ‘nonsense upon stilts’ in the terminology of Jeremy Bentham – at the end of the eighteenth century, could only be regarded as ethical norms of aspiration at the international law level until 1948; only at the national level did they achieve some significance. And yet, they had a profound influence on the substance of the UDHR of 1948, and even on the contents of the UN Covenants of 1966.

The purpose of this norm analysis in international law was to show that international law, if restricted to analyses of positive hard law norms will uncover only

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39 Riedel, supra note 31, at 9 et seq., and same author, supra note 5, Chapter 6.
40 J. Bentham, *Anarchical Fallacies*, Works Vol. II, (1843) 489 et seq., at 502: 'Natural Rights is simple nonsense: natural and imprescriptible rights (an American phrase) rhetorical nonsense, nonsense upon stilts ... nature has given no such right to anybody ... what is every man's right is no man's right, as that which is every man's business is no man's business*.
minimalistic legal structures which produce a distorted and incomplete picture, revealing only pointillistic or partial aspects of norm regulation in the community of states. Consequently, if one adopts such a positivistic approach, only very few phenomena of state intercourse can be explained. The plea for decisionism in the sense of power politics would be an almost natural consequence. And, to follow the argument even further, such positivistic reductionism of a complex norm context would inhibit processes of change which only analysts trained in legal categories could adequately evaluate. Moreover, the insight would be lost that all positive and transpositive norm programmes are only elements of the process of substantial peaceful change. Each in its own way, every such norm seeks to strengthen political or societal processes geared towards renunciation of the use of force, which states abandoned in favour of strategies aimed at improving living conditions as a precondition for lasting peace and for material justice.41

III. The Nature of Standards

After what has been said so far, the nature of some standards has become clear. The discussion of standards in law is, however, not uniform and at present is conducted on three different levels. Part of the literature discusses standards as understood in Anglo-American law and contrasts it with the system approach of the European civil law tradition (A). Another line of arguments develops standards from the discussion of ‘topics’ (B), and last, but not least, standards are being discussed at an international law level (C).

A. Standards at Common Law

In Anglo-American common law legal standards play a significant role in the law of torts, in particular in the field of negligence. They refer to parameters of liability attached to the social conduct of those engaged in a contractual relationship. Standards in this sense are factually-based yardsticks of standard social behaviour; typical of

this approach is the reference to the average conduct of a reasonable man, which must be complied with in order to avoid liability.\textsuperscript{42} Josef Esser cogently rooted these standards in common sense, and in the conduct of typical, normal social intercourse.\textsuperscript{43} Marcel Stati has named this standard-type behaviour, type moyen de conduite sociale correcte,\textsuperscript{44} factually assessing types of conduct, then charging that conduct normatively and thus raising it to the level of a legal norm. Another example of that type of standard is the duty of care which a reasonable man owes: This 'reasonable man' is not only reasonable but also prudent, fair, careful, meticulous, and weighs alternatives sensibly before acting.

That 'man on the Clapham omnibus'\textsuperscript{45} is neither particularly anxious, nor fearful, nor excessively happy-go-lucky; yet he is not a 'paragon of circumspection', as Lord Reid once put it,\textsuperscript{46} but a man on the street who at home reads newspapers and mows the lawn with his sleeves rolled up. Roscoe Pound in his famous Yale lectures of 1923 has outlined the importance of standards in judicial law-making and in a few words managed to differentiate standards from other legal terms.\textsuperscript{47} First, he renounced rigid system thinking: clear-cut, simple legal rules, built up to create a closed legal system, in his view, could only be regarded as sufficient in primitive societies of limited cultural development. To impose such a one-dimensional legal network on the modern state, as legal positivism would have us do, would be highly misleading. As soon as differentiations of societal organization become visible, more general principles of judicial and dogmatic arguments would develop alongside legal rules or norms stricto sensu. Later still, the terminological spectrum would be broadened further to embrace legal ideas and conceptions, and parallel to it, legal standards of conduct. Pound and Esser contrasted standards with legal principles. Both terms have in common that they operate on a higher level of abstraction than concrete legal rules. The main difference between principles and standards according to this view is that principles rest in themselves and do not name specific yardsticks of conduct, while standards describe a yardstick that has to be filled out by judicial discretion with in vivo acquired views concerning values, duties, and care considera-

\textsuperscript{42} See, instead of many, Pound, "The Administrative Application of Legal Standards", \textit{American Bar Association Reports} XLVI (1919) 445-463, particularly at 456; Riedel, \textit{supra} note 5, at 261 et seq., with further references.
\textsuperscript{44} M.O. Stati, \textit{Le standard juridique}, Doctoral dissertation (Paris 1927) 54.
\textsuperscript{45} Lord Justice Greer, in \textit{Hall v. Brooklands Auto Racing Club} (1933), 1 K.B. 205, at 224.
\textsuperscript{46} Lord Justice Reid, in \textit{Billings \\& Sons v. Riden} (1958), A.C. 240, at 255.
\textsuperscript{47} R. Pound, \textit{An Introduction to the Philosophy of Law} (1923); by the same, 'Hierarchy of Sources and Forms in Different Systems of Law', \textit{7 Tulane Law Review} (1933) 475 et seq., at 482.
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The legal standard, conceived as a rule of judicial discretion, as an aid for case by case reasoning, covers such notions as good faith, fair behaviour of trustees, reasonable and conscientious conduct of the 'reasonable, prudent man', in short, yardsticks of normality for factual social conduct. Pound then charges these standards with other structural components: (1) criteria like fairness, care, adequacy or conscientiousness always embrace a moral dimension; (2) furthermore, all standards pick up criteria of practical reason, experience, or intuition: they must all stand the test of 'common sense', 'trained intuition', or practice; and finally; (3), Pound declares openness of standards to be of primary importance. As opposed to the closed, static unchangeable principle - or indeed the legal rule - the standard proves to be a flexible, 'open' instrument for the concretization of legal norms for application in individual cases. Pound then analyses the 'social engineers' operating these standards, and has much to say about this which could be utilized for the theory of international relations, but this argument cannot be pursued here.

For some reason, standards thinking subsided in the inter-war years, only to be resurrected in the famous Hart-Dworkin controversy at the beginning of the seventies. Dworkin rejected the limited analysis of Kelsen's pure theory, and of Hart's rendering of that theory (the division into primary and secondary rules), and instead distinguished legal rules and legal principles, policies, and standards, and stressed the ethical foundations of many of them. A shortcoming of Dworkin's approach lies in the fact that he neither defines precisely the term 'standard', nor gives examples of it. He often uses principles and standards as synonyms. That may be acceptable as long as standards function as genuine generic terms above rules, but nowhere does Dworkin outline when and where standards of lesser levels of abstraction are to be applied, thereby blurring the clear distinctions that Pound had worked out 50 years earlier. In recent literature, principles and standards are more clearly delineated. Standards turn out to be guidelines, piloting paths of argumentation, and closely fact-related concepts of equity, such as 'nobody may benefit from his wrongdoing' or 'he who comes to equity must come with clean hands'. The similarity of those standards with general principles of law is evident. However, unlike general principles which must be applied if relevant, standards may be, but need not be applied. As standards, they constitute yardsticks for evaluation which the judicial decision-maker may apply in suitable cases, while relevant legal principles, in the

48 Eser, supra note 42, at 96 f.
49 For details of this approach cf. Riedel, supra note 5, at 263.
50 Riedel, supra note 5, at 268 with further references.
Eibe Riedel

absence of specific legal norms to the contrary, must of necessity be applied without further ado.

Another set of standards found in common law thinking may be defined as 'Meta-standards'. In this function standards govern the interplay of legal rules, principles, and individual standards. Additionally, they may serve as evaluation yardsticks when a particular canon of interpretation is sought.\textsuperscript{52} Meta-standards will be consulted in various circumstances for fundamental questions of any legal order, for example, whether, how, and to what extent Parliament can bind future parliaments, or what weight should be given to interpretation maxims in practice. Meta-standards also address the question as to the placement that should be assigned to general clauses with a high degree of abstraction, or to public policy exceptions, and how the \textit{ratio decidendi} should be distilled from precedents. If these standards are considered as extra-legal, their application depends on a discretionary determination by the decision-maker, usually a judge, who may utilize standards as reasoning sets to be incorporated into the line of arguments justifying a particular decision. Since any legal operation involves value judgments concerning whether an 'is' proposition should be aligned with an 'ought' proposition, there is ample application for standards, and it matters little whether for doctrinal reasons they are applied from the inside or outside of the legal structure. There is good reason to place them within the system, if the concept of law is broadened. Standards will always relate to yardsticks of practical reason, of average social conduct, thus mustering much practical support.

B. Standards in the German 'Topics' Debate

In this context only few parameters of an involved philosophical discussion will be mentioned.\textsuperscript{53} The German debate starts from the premise that there is no room for standards where clear-cut norms and simple factual norm bases exist. Only where doubt and controversy rages about the actual norm contents or where there are gaps in the law, where 'problem thinking' begins, can standards play a useful role. Thus, problem thinking is the common feature of 'topics' and standards.

Problem thinking usually arises in three distinct situations. First, in the search for premises, i.e. for pre-judgments, finding a rational foundation for discussion paving the way for subsequent decisions. The actual decision is not part of that process of deliberation. Secondly, Topics discussion also tries to elucidate the premises for decision-making by analysing individual \textit{topoi}, relevant aspects. The aim of this

\textsuperscript{52} Cf. Eckhoff, \textit{supra} note 50, at 207; Sundby, \textit{supra} note 50, at 190 et seq.
\textsuperscript{53} For details see Riedel, \textit{supra} note 5, Chapter 7, 272 et seq.
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process is to influence the shaping of opinions and to allocate places for particular arguments. Whole ‘topoi catalogues’ have been developed in this process, serving as reasoning patterns, such as ‘the impossible shall not be required of anyone’. The central aim of topics is to pave the way for consent about reasonable practical truths proposed by experts or by participants in the process of reasoning. Topics are determined by *endoxa*, which in the Aristotelian sense mean:

what all consider to be true, or most of them, or the wise, and amongst these the majority or the most renowned, or what an expert in his field ... but also what he with whom one engages in discussion, or he who judges, consider to be true.54

Thus, the Topics school of thought adheres to a certain sense of professionalism and as only competent persons are allowed to join in the debate, consent tends to be found more easily than amongst laymen. *Topoi* by their nature create parameters for comparison, avoiding categorical classification. Reasoning thus is comparative, not axiomatic-deductive.

In the third situation Topics focuses on the application of these parameters. As a theory of reasoning, it embraces all relevant considerations and leaves decisions to be controlled by the development of discussion.

Critics of the problems approach, while not denying some usefulness for that theory, mainly attack its claim of exclusiveness which, they argue, leaves too minor a role to traditional dogmatics, jurisprudence of the courts, interpretation and application of legislation. Critics will also point out that no precise definition of topical discussion is offered, and that the relevance of arguments should rest entirely on the value of reasoning as such. Consent reached would be dispositive and thus open to frequent change. *Topoi* would, therefore, be unsuitable as delimiting and legitimizing criteria. Seen, however, as methodology, as preparatory tools for the development of plausibility strategies, topics discussion would appear to constitute a useful addition to the deductive legal system-thinking. In stressing the essential openness of *topoi*, Topics may reflect the dynamic components of law, in contrast to static definitions of law.

Another advantage of Topics is its capacity to mediate between fixed definitions and real life facts by means of standards, themselves rooted in normal prototype conduct. Topics shares this method of comparison with general hermeneutics as a pre-

condition for the legal process of subsuming norms and facts. Standards may thus serve as a *tertium comparationis*.

In this process, standards will be used where rules and principles are unclear in scope, where the law and social reality are in a process of change. Further, these standards will operate from within and from without the legal system: within the system they serve as typical parameters of conduct rooted in facts, often even incorporated into the text of a specific legal rule such as, for example, 'the reasonable salesman', 'common usages of trade', 'fairness of competition', or the 'conscientious civil servant'. Other examples of standards operating from within the legal system are the abstract, open norms such as 'good faith', or constitutional law standards inherent in constitutional law principles, such as 'proportionality', 'adequacy', 'the least harmful and least intensive incursion into individual rights', or even such principles as predictability or clarity of norms. The binding character of such constitutional law standards stems from their status as general principles of law upon which actual decisions will ultimately rest. Extra-legal standards, such as the Meta-standards of interpretation mentioned above, cover such maxims as *lex posterior derogat legi priori* or the *favor legitimationis* in cases of alleged illegitimacy.

All these standards share three components: they concern principles of practical reason, of 'common sense', and of intuition and experience. Furthermore, they embrace general value orientations and ethical precepts, such as 'conscientiousness', 'proportionality' or 'fairness'; and all of them are open parameters which can only be made concrete in individual cases. A comparison of common law standards and topics-standards thus reveals great similarities.

C. Standards in International Law

As can be expected, the many-faceted discussion about legal standards has ramifications at the international law level as well. The terminology employed is, however, much looser. Frequently, standards figure only as synonyms for fully binding norms of international law, such as rules or general principles of law, and are invoked usually only when the policy aspects of these norms are discussed, i.e., their programmatic steering functions. This undifferentiated terminology will be discarded in the ensuing remarks, since it blurs the distinct relevance of standards. In state practice, quite a number of specific standards have been developed in very different fields of international law, in particular in international economic law, international labour law, environment law and human rights law.
In international economic law standards favourable to developing trade and commerce have been in use for centuries. The ‘most favoured nation’ – clause and the principle of equality following from reciprocity date back as far as Magna Carta Libertatum\(^\text{56}\) which in Article 41 stipulated that foreign traders, even in times of war, should be accorded the right to free commerce, if reciprocity was assured. Many such standards are to be found in bilateral treaties of friendship, commerce and navigation, and eventually built up the customary triad of ‘life, liberty, property’ as a minimum standard of alien rights, particularly as regards \textit{locus standi} before national courts. Georg Schwarzenberger\(^\text{57}\) has analysed and distinguished seven kinds of economic standards: the minimum standard for alien traders; preferential treatment; the most favoured nation treatment; the standard of national treatment; equality of treatment; the standard of the ‘open door’, whereby equal chances in trading with third states would be guaranteed; and the standard of equitable treatment, assuring fairness and individual case-by-case equity. This last standard might also be used in conjunction with any of the other economic standards because all represent yardsticks for conduct patterns, model solutions and model clauses for treaties and contracts to secure special rights in international trade. With the exception of the international minimum standard which belongs to the category of customary international law, all are usually contained in operative bilateral or multilateral treaties.

With the expansion of international economic transactions, new economic standards emerged which clearly transcend the existing sources. These standards may be termed standards of conduct or codes of conduct. They are not formulated as fully obligatory norms, nor do they postulate effective modalities of implementation; they aim at being applied on a voluntary basis. They operate well because states have recourse to them, or because individuals or groups participating in international trade actually bind themselves voluntarily, thus producing factual compliance even in the absence of strict legal obligations. Such standards of conduct will be resorted to whenever there is a pressing economic need for legal regulation and no definitive text of a convention can be agreed upon owing to the vastly divergent interests involved.


In the context of attempts to build up a New International Economic Order a whole series of codes of conduct have been prepared by UN organs, such as the Restrictive Business Practices Code (1980), the International Code of Marketing of Breast-milk Substitutes (Infant Formula Code) (1981); the Transfer of Technology Code ("TOT Code"); and the code of conduct concerning transnational corporations ("TNC Code"), to name but a few.

Similar codes of conduct have been developed outside the UN, such as the OECD Guidelines for transnational enterprises and the EEC code for South Africa ("Anti-Apartheid code"). Although the latter, strictly speaking, is non-binding, in practice firms are under strong pressure to abide by its terms, since chambers of commerce may inform foreign ministries of any violation, and these, in turn, may show their disapproval when it comes to allocating trade subsidies or giving export insurance guarantees. Thus, indirect sanctions may be attached to such informal codes of conduct. In sum, minimum economic treatment standards, standard or model clauses for treaties, and codes of conduct, are the types of standards operating in international economic law alongside the existing sources triad, and it matters little in practice that these norms are legally 'non-binding'. A closer analysis would also reveal that the cascade model of norms outlined earlier also applies here. Some of these standard formulations barely transcend mere programmatic norms of aspiration, or tentative resolutions of an advisory nature only, and yet they may pave the way for future development.

Another area, where standards of international law have long existed, is international labour law. The most prominent examples are encountered in ILO conven-

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tions, which in important aspects differ from other international treaties. These conventions are elaborated by a special procedure, then submitted for comments to governments and other international organizations, and subsequently scrutinized by a meeting of independent experts before they are finally submitted for approval to the ILO Conference. It is worth noting that the institutional participation of non-governmental representatives in this body bestows real supranationality on the ILO. Additional factors rendering ILO standards different from other treaty formulations are a simplified method of treaty ratification, the general exclusion of reservations, and frequent use of so-called 'flexibility clauses', allowing differences of application in various world regions.61 As far as the effect of ILO standards are concerned, a great variety exists. States may commit themselves to enact statutes that apply or closely retrace these standards. If the standard is already met at the national level, the convention can act to further support them, or to guarantee their future application, and to prevent future abrogation. Sometimes, though, such ILO standards merely outline policy.62 Another distinguishing feature of these conventions is that they need only a few ratifications - usually only two - and that all member states are required to submit the Convention text to parliament within one year, at the latest 18 months after the end of the relevant ILO Conference, even if the whole delegation voted against the convention in the first place. Strong political-moral pressure to accept draft conventions is thereby generated, even if the legislature refuses ratification in the end. This example of the working of standards at the ILO level may suffice to illustrate some of the points made above. One could also mention ILO recommendations, resolutions and declarations, which in the descending order of the standards cascade model, represent norms of aspiration or of programmatic intent only.63 Recommendations in that context often serve as lois modèles, much in the same way as the economic law model clauses mentioned previously. In all, more than 150 conventions and an equal number of recommendations in the ILO context prove the utility of standards as a separate source of law.

61 For example, the standards concerning the prohibition of night work, and prohibiting rest periods of less than eleven hours, as provided in the relevant ILO standard, may appear to be sensible in the Northern hemisphere with mild climate zones, but in hot areas of the world strict adherence to this standard would hardly be realistic. Therefore, shorter rest periods are allowed in hot climates if additional rest periods are provided at other times of the day.

62 Riedel, supra note 5, at 293; for example Art. 19(66) of the ILO Constitution; Fried, supra note 36, at 151 et seq.; Valiticos, supra note 36, at 50 et seq.; Wolf, 'ILO Experience in the Implementation of Human Rights', 10 The Journal of International Law and Economics (1975), 599 et seq., at 605; in addition a relatively strict reporting obligation exists, even about non-ratified treaties and recommendations, see Beitzke, 'Verwirklichung sozialer Menschenrechte durch internationale Kontrolle', VN (1981) 149 et seq.

63 See generally Riedel, supra note 5, at 294 et seq.
Another area of the law where standards are found is in the field of human rights. Binding and non-binding norms, such as the right to work or to own property, as part of a 'Universal Bill of Rights', where non-binding elements *stricto sensu*, such as the Universal Declaration of Human Rights of 1948, are combined with the binding obligations under the two UN Human Rights Covenants of 1966. For states that have ratified these treaties, the relevant standards become binding: however for other states, they are but standards with all their attendant elements. A characteristic of human rights standards is the combination of various norms. Thus, the standard of freedom of coalition is composed of several intertwined elements: it is rooted in the (non-binding) UDHR 1948, and in the UN economic rights covenant of 1966, as well as in a special ILO convention. Resolutions and declarations of international organizations of programmatic intent may be added. All these combination standards, whether fully binding in law, or only binding in parts, or not binding at all, perform a significant function in developing future legal norms of the traditional sources triad type. The 70-year experience of standard-setting at the ILO, but also similar experiences at the UNESCO and WHO, to name but two further examples, have gradually built up new types of legal norms; the 'zebra codes', which aggregate binding and non-binding norms in one single combination standard. In applying the 'zebra code', decision-makers will have to bear in mind the different degrees of normative density of the component parts of it, and the ultimate decision will usually be based on the hard law component of the combination standard. The other components serve as interpretative tools for the binding, yet highly open-ended and abstract hard law elements of the standard.

Close analysis reveals that no sphere of international law is immune from such standard-thinking and reasoning. Thus, in environmental law, where the need to quickly generate new obligations, preventive measures, and duties of cooperation is most obvious, hard law norms are far and few between. Where they do exist, they are general and vaguely phrased. They tend to contain few binding rules and escape clauses are frequent. Customary law rules are equally scarce and general principles of law exist only in the most rudimentary forms, borrowed from domestic principles of...
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good neighbourliness. In this area of law, then, combination standards utilizing the few hard law 'buoys' in a sea of non-regulation, are the only available means of obligating states in the absence of fully binding treaties or other sources. Thus, in practice, the Helsinki Rules or the Stockholm Declaration may have greater significance than a treaty that only few states have ratified. As a standard or combination standard, environmental parameters may be generally accepted in practice, long before treaty consent can be mustered. States will accept the combination standard without strict obligation, and when it comes to deciding individual cases, will be free to apply or not to apply the standard to particular decisions, if the standard consists of non-binding elements. If, however, it contains but one hard law rule, the standard will have to be applied, even if some parts of it, strictly speaking, do not share that compulsory force of the hard law component.

IV. Conclusion: The Utility and Limits of Standards

As has been discussed above, standards fulfil many functions. Foremost amongst them are their roles as tools of interpretation, and guidelines or yardsticks of reasoning for existing but open hard law rules and principles. Standards may also be employed to bridge gaps in the law conceptually, paving the way for future legal developments, as promised under the heading 'progressive development of international law' in Article 13 of the UN Charter. Standards also serve as mere orientation marks, or as model clauses in non-codified legal orders, and frequently will appear in the shape of 'zebras', containing obligatory and non-obligatory norm components concurrently. It is submitted that standards in all these functions have an increasing role to play and explain, better than the traditional sources triad, processes of international law-making and legal application wherever binding and non-binding norms coalesce.


68 When Lang, supra note 67, at 153, criticizes those who allegedly mistake environment desiderata with the lex lata and suggests that treaty law should be the primary source, he overstates his case. He does, however, acknowledge that 'soft law' has an important political and educational function to play in this context, absent fully binding and implemented treaty obligations.
Useful as standards may be, a word of warning about their scope and limits seems warranted. They are useful, when ‘zebra’ situations are at issue, when the complementary nature of ‘hard’ and ‘soft’ norms, or better, of norms of different degrees of hardness, is relevant. They are dangerous if meant to replace hard law-sources. The sources triad of Article 38(1) of the ICJ Statute always has predominance as far as it goes. But the point made here is that large areas of international law concern precisely fields which are not covered, or are only partially covered by rules emanating from the sources triad. Another danger would be to attribute the binding character of one standard component to the non-binding parts of it: the individual legal relevance of each component should always be borne in mind. To avoid incorrect inference, the ‘hard law’ – ‘soft law’ dichotomy certainly is not resolved by utilizing the concept of standards and combination standards. And yet, the value of these standards lies in channeling future developments, outlining programmatic intentions, stressing aspirations, and generally providing a penumbra of shadows around the hard norm core.

In individual disputes, courts and tribunals and other decision-makers in international law can use these standards, while faithfully abiding by the existing sources delineated in Article 38(1) of the ICJ Statute. Standards, thus, are signposts, landmarks, buoys in the open sea. Actors other than the ICJ are ultimately much freer in international law to develop and apply standards, and may utilize them in specific instances, but may also ignore them, if they feel so inclined. From a systematic point of view standards are a definite new source, and certainly more than subsidiary means for the determination of the traditional sources triad. They have a useful role to play in their own right, and should be seen in that light.

69 And it matters little then, if only isolated decisions of tribunals and diplomatic incidents can be mustered; contra, see Lang, supra note 67, at 154.