

## Symposium: The Changing Structure of International Law Revisited (Part 2)

*The essays published in these pages form part of an ongoing symposium. The Institut des Hautes Études Internationales and the European Journal of International Law convened a conference on 'The Changing Structure of International Law Revisited' in March 1997, bringing together a group of European and American scholars, to discuss the current state of international law in the light of changes that have occurred, both on doctrinal and practical levels, in recent decades. The symposium identified four areas of investigation: The state between fragmentation and globalization; Is there a hierarchy of norms in international law?; Is international law moving towards criminalization?; Where does the international community stand? Papers on the first theme, with an avant propos by Charles Leben, appeared in EJIL volume 8, number 3. The remaining parts will be published in the next two issues of the journal.*

### The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?

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#### **Prologue: Prisms and Perspectives**

This article is the outcome of our reflections on the Question – Is there a hierarchy of norms in international law? – put to us by the organizers of a European-American symposium on Wolfgang Friedmann's celebrated book, *The Changing Structure of International Law*, three decades after its publication. The invitation to this symposium and the formulation of its various themes offer, intentionally or otherwise, a rich, and not always transparent, set of subtleties and even provocations.

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*Trois ans avant la fin du siècle*, write the organizers in their lucidly stated *raison d'être* in their invitation, *il a paru intéressant à l'Institut des Hautes Études Internationales d'organiser un symposium euro-américain pour confronter les vues des uns et des autres sur la permanence et les mutations qu'a effectivement illustrées la pratique du droit international depuis les analyses prospectives du maître de Columbia*[Wolfgang Friedmann].<sup>1</sup>

Based on his analysis of the international system of his time as supplementing the classical law of coexistence by a law of cooperation, Friedmann's main theme was not centred on hierarchies but on the expansion of international law to new areas beyond the scope of classical international law.<sup>2</sup> But even though the hierarchies that interested him were principally those between international law and municipal law he still predicted that '[i]n due course the international legal order will no doubt either have to be equipped with a more clearly established hierarchy of norms, and more powerful sanctions, or decline and perish. The present is an era of either dawn or twilight.'<sup>3</sup>

Friedmann, thus, may not have been so surprised to observe the extent to which '... a more clearly established hierarchy of norms' has emerged in the international legal system since the publication of his book in the nascent and not so nascent doctrines of, say, *jus cogens*, obligations *erga omnes*, crimes of state, custom and treaty, norm and consequence, and the other staples of the hierarchy discourse.

By tracing the contours of these various doctrines and by confronting amicably two views – one allegedly American and one allegedly European – our understanding of the theme is rendered richer and more profound. Such an approach, of course, necessarily presupposes the existence (and the cultivation?) of the distinct views to be confronted. This seems a clear premise of the symposium.

Let us state clearly: it is not our intention to do much of this in our essay. There are analyses aplenty on all aspects of *jus cogens*, crimes of state, and their related doctrines. To be sure, that debate is not exhausted and many interesting issues remain obscure or debatable. But engaging in an American-European comparative doctrinal analysis would not touch upon what, in our view, are the most interesting developments in the last three decades. How so?

It is even less clear today than it was in 1964 that Europe and America – as such – offer truly distinct doctrinal '*vues*' which can be 'confronted', thereby offering a meaningful prism with which to examine the various themes of the symposium.

1 'Three years before the end of the century', write the organizers in their lucidly stated *raison d'être* in their invitation, 'it seemed interesting to us at the *Institut des Hautes Études Internationales* to organize a Euro-American symposium to compare views on the continuity and changes demonstrated in the practice of international law since the forward-looking analyses of [Wolfgang Friedmann], the eminent professor from Columbia.'

2 See W. Friedmann, *The Changing Structure of International Law* (1964), at 67 *et seq.*, 152 *et seq.* (for new areas covered by international law), 297 *et seq.* (for his analysis of the cultural and ideological background); *Idem*, 'General Course in Public International Law', 127 *RdC* (1969-II) 47, at 48.

3 Friedmann, *Changing Structure*, *supra* note 2, at 88.

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sium. And, as a hint of things to come, it is at least as tricky today as it was when Wolfgang Friedmann published *The Changing Structure of International Law* to find authentic spokesmen for these alleged Euro-American 'vues' which have to be confronted.

In his published introduction to the symposium,<sup>4</sup> Charles Leben brings out the exquisite irony in the choice of Friedmann, of all persons, as an icon for a symposium designed to confront European and American views.

It was perhaps, indeed certainly, this man of culture that primarily interested the students we were: opening his *General Theory of Law*, translated into French in 1965, and discovering an author equally at ease in the French school of exegesis, the German school of public law, or in British and American legal scholarship, exercised great fascination over the students. Similarly, his *The Changing Structure of International Law*, where George Scelle is cited and discussed just as much as Jessup, Lauterpacht as well as Kelsen, Brierly and Geny, and where judgments of the *Conseil d'Etat* are referred to as often as those of the United States Supreme Court or the House of Lords, offered a model of an internationalist who, to paraphrase Dworkin, took the adjective 'international' in the expression 'international law' seriously.

It was from a feeling that this international legal culture had become less 'plural', less diversified, less truly 'international' than in Friedmann's time that the idea arose to invite a group of 'trans-Atlantic' authors to participate in a Symposium on the current state of international law, with the aim of strengthening the still too loose links between people and schools of thought on both sides of the ocean.

Hence the idea of setting out from a reconsideration of the themes of Friedmann's undoubtedly best-known work, *The Changing Structure of International Law*. We felt this book typified one current of thought in international law (which might be called a current of institutionalist thought) that marked the 1960s.

We doubt, whether today (or ever) 'European' and 'American' or, indeed, any binary polarity have sufficiently sharp edges and cultural and professional bite to explain those changes which have occurred in our field over the last thirty-five years or to offer insight regarding the current-day divergences in and of the field as regards change and stability in international law.

But 'Euro-American' can be viewed as a surrogate for something else – a surrogate for the importance of perspective itself and a far greater willingness to give weight (for good and/or for bad) to divergent perspectives – epistemological and ontological, cultural and biographical, ideological and functional – as determining international legal descriptive and normative perceptions.

If this is so, among the most interesting developments over the last generation has not, perhaps, been the changing structure of international law itself in the sense of the emergence of new institutions, norms, organizational frameworks and the theoretical debates about the extent and significance of such developments, but in the emergence of a debate about the debate. A debate about the very discourse of international law. Friedmann may, as we stated, not have been so surprised to observe the extent to which '... a more clearly established hierarchy of norms' has

4 Leben, 'By Way of Introduction', 8 *EJIL* (1997) 399.

emerged in the international legal system since the publication of his book in the nascent and not so nascent doctrines of, say, *jus cogens*, obligations *erga omnes*, and all the rest. He could rightly claim that he had, in some sense, predicted these changes. But, in our view, he would have been both surprised and maybe even shocked by an even bigger change whereby the ontological (what it is) and epistemological (how we know about it) bases of international legal scholarship have fractured into much more than American and European '*vues*' in the last three decades.

But even if this is so, could it not be argued that there is, after all, a sharp European-American cleavage in relation to the willingness or otherwise to accord cardinal weight to perspective? To the importance or otherwise which is attached to 'discourse about discourse', the very terminological ugliness of which – and the rejection thereof – become a 'sign' for a newly emerging dichotomy between a 'classical' European '*vue*' and a modernist or post-modernist 'American' one? There may be some truth to this, and often it is an ugly truth. When they do not simply pass each other like trains in the night, there is between these different '*vues*' incomprehension and even plain and simple ignorance. At times there is worse. In the writing of some of the modernists and post-modernists there is not infrequently an ill-concealed dismissal, even contempt, of more classical doctrinal discourse. Sometimes, in corridor talk, it is dubbed 'old fashioned' and 'European'. Equally, the very notion of, say, feminist international law is met with hoots of derision and dubbed, in one of the more milder expressions, as an 'American hang up'. The ease with which intellectual and even political disagreement revert to national and national-like characterization has its own less than exquisite irony.

Appropriately, we put Friedmann on a pedestal for a 1960s book in which 'George Scelle is cited and discussed just as much as Jessup, Lauterpacht as well as Kelsen, Brierly and Geny, and where judgments of the *Conseil d'Etat* are referred to as often as those of the United States Supreme Court or the House of Lords'. But is the only lesson that Friedmann took internationalism seriously? Leben gives a tantalizing hint in his allusion to Friedmann as the man of culture. Is there not, then, another more profound lesson, for which the late Isaiah Berlin, rather than Dworkin should be the inspiration? Is it not for cultural openness, rejection of insularity and a commitment to pluralism that Friedmann should be looked to, for his willingness to consider seriously and respectfully – if not necessarily accepting and at times firmly rejecting – what in his time were the different (national) '*vues*'?

Be that as it may, as will emerge,<sup>5</sup> we doubt whether there is really a dichotomy rather than a graduation of views and we certainly reject the Atlantic as defining the fault line. In some respects, there are more profound differences on all these issues as one travels – in different periods – the short distance up the Hudson River Valley from Manhattan to New Haven and then further north to the Boston Bay than there

5 In some measure, the footnotes will tell the tale concerning the coincidence of Continental origin with a legal 'world-view'.

are across the Ocean. And some of the world-views which inform the debate have travelled faster from Paris to Princeton than they have from, say, the *Collège de France* to the IHEI.

We divide our essay into three parts.

In the first and most important – even if hardly original – part we pick up the Question *Is there a hierarchy of norms in international law?* and analyse its ontological and epistemological premises. Through this analysis we present five ‘*vues*’: the New Haven *vue*, the ‘Critical’ *vue*, the Feminist *vue*, the *vue* of international relations and, with a certain measure of *Chutzpah*, a Panthéon *vue*. Nobody likes to be labelled. And, naturally, these categories are approximate – some more than others – and contain within each much diversity. Yet, even if the label ‘Christian’ contains Catholics, Lutherans, other Protestants, not to mention Greek Orthodox, it is useful when juxtaposed with, say, Muslims. Thus, there are major differences between, say, a Carty and a Koskenniemi, but we still found it useful to group them together under the Critical School. The Panthéon *vue* represents the richly classical position of, say, a Prosper Weil in his famous Double Normativity article.<sup>6</sup> We readily acknowledge that it, too, is a very loose umbrella.

In the second part of this essay we illustrate briefly how these different schools view the question of Hierarchy. In the third part we offer some final reflections on how, in the light of the new world order, the politics of the debate about hierarchy may be changing.

## I. Is There a Hierarchy of Norms in International Law? – The Question

If the task is to trace evolution over the last thirty years, no answer we can give to the theme of ‘hierarchy’ would be as interesting, provocative and illuminating as the Question itself. In this case, there is nothing subtle in its formulation, but, rather, a no less exquisitely defiant, surely tongue-in-cheek, challenge; an unrepentant ‘*prise de position*’, most clearly designed to provoke not in what it asks but in how it asks.

### A. *Is There a Hierarchy of Norms in International Law?*

First there is the *is* as in *Is there a hierarchy of norms in international law?* Three elements stand out in this formulation: one element suggests an appropriate province of inquiry. The others relate to epistemology and ontology.

a. This formulation of the Question conveys a confident Hume-like positivism which clearly privileges ‘is’ over ‘ought’ as the appropriate object of ‘scientific inquiry’. Note that we are not asked whether ‘... there should be a hierarchy of norms?’ In the

6 Weil, ‘Towards Relative Normativity in International Law?’, 77 *AJIL* (1983) 413.

vocabulary of our field, the Question makes it its business to remind us of the priority of existing *lex lata* over the wishful thinking of *de lege ferenda* and, supposedly, of the primary task of an international lawyer to answer the question 'What is the Law?', rather than, say, 'What should the law be?'. The first question is law, the other one, interesting and important as it may be, is not.<sup>7</sup>

b. There is, too, the Cartesian dimension of positivism: on its surface the Question is interested in establishing through an examination of the field the doctrinal developments of concepts such as *jus cogens*, crimes of state, obligations *erga omnes* in the last generation. Below the surface we find what appears as a thrilling epistemological and ontological certainty, a seemingly uncomplicated confidence in our ability through reason and application of sound disciplinary method to answer the question about the existence and content of legal doctrines.

c. And finally, existence itself – or manifestations of it – seems to be binary: there is or there is not. *Ils existent ou ils n'existent pas*. To be or not to be!

The debates in the last generation about the premises of the *Question* have been as interesting to the understanding of the structure of the discipline as the debates concerning the possible *answers*.

One famous challenge to the Is-Ought dichotomy emanates from the New Haven school.<sup>8</sup> This work is so famous that it requires no elaboration. The integration of the 'ought' into international legal discourse is one of the hallmarks of this influential school. Thus:

The alleged 'neutrality' of law was (and remains) a destructive myth; and the concern of some major frames of jurisprudence exclusively for identifying the causes and consequences of rules or decisions was not enough. The contemporary exigencies of humankind required the conscious, deliberate use of law as an instrument of policy.<sup>9</sup>

Instrumentality for what? What is the underlying non-neutral value of law-as-instrumentality? Famously,

The fundamental goal which we postulate for the world constitutive process of authoritative decision, as for all public order, is that of human dignity: the inherent and equal value of every human being. The core test of constitutive and public order decision at any level of interaction is its immediate and prospective contribution to the realization of human dignity in a world commonwealth, sufficiently strong to protect the common interest and sufficiently flexible to permit the widest range of diversity to flourish.<sup>10</sup>

7 Similarly the former ICJ President Jennings, 'Closing Address', in C. Brölmann, R. Lefebvre and M. Zieck (eds.), *Peoples and Minorities in International Law* (1993) 341, at 344 *et seq.*

8 Some of the most important works of the New Haven School are assembled in M.S. McDougal and W.M. Reisman, *International Law Essays. A Supplement to International Law in Contemporary Perspective* (1981). See also H.D. Lasswell and M.S. McDougal, *Jurisprudence for a Free Society* (1992), at xxi *et seq.* for further references.

9 Lasswell and McDougal, *supra* note 8, at xxii.

10 McDougal, Lasswell and Reisman, 'The World Constitutive Process of Authoritative Decision', in McDougal and Reisman, *supra* note 8, 191, at 201. For a further elaboration, see *ibid.*, at 201 *et seq.*; Lasswell and McDougal, *supra* note 8, at 725 *et seq.* Cf. also McDougal, Lasswell and Reisman, 'Theories About International Law: Prologue to a Configurative Jurisprudence', 8 *Virginia*

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The work of the legal scholar is therefore goal- and policy-oriented; it aims at the realization of community values, not at the slavish repetition of past examples.

Even if the New Haven school trashes the alleged myth of neutrality, it does not, by contrast, suffer from any epistemological or ontological scepticism. To help the decision-making process, scholars have to fulfil the task 'of identifying and clarifying for the different participants in community process the common interests which they themselves may not have been able to perceive'.<sup>11</sup> What the Yale school does not doubt is the possibility of scholars to analyse and put forward these goals by employing an 'objective', scientific method. Quite the contrary: writings of the New Haven school affirm their belief in the capacities of legal and social science to provide decision-makers with the authoritative tools for the realization of human dignity.

To others, chiefly 'critical' scholars, the possibility of objective finding and application of norms by actors or observers is as big a myth as is the neutrality of law a myth to the New Haven school.<sup>12</sup> To each his own myth. The roots of the challenge go back in many cases to French structuralist and post-structuralist philosophy, one strand of which crossed the Atlantic to departments of literature, from there to law schools and is now slowly making its way back to Europe.<sup>13</sup> Two critiques are combined in this approach: an internal one, which unveils the internal inconsistency of premises and propositions of 'mainstream' international law, and an external one, pointing at the ideological bias of the legal approach. The source of the epistemological challenge is grounded in the claim of indeterminacy of international norms – like that of all other norms – which precludes a neutral or objective or definitive interpretation of legal language. Treaties need to refer to the process of rule-application for the determination of content; and custom is created by the lawyer

*Journal of International Law* (1968) 188 (reprinted in McDougal and Reisman, *supra* note 8, at 43), at 206. 'The comprehensive set of goal values which, because of many heritages, the present writers recommend for clarification and implementation are ... those which are today commonly characterized as the basic values of human dignity, or of a free society. These are the values bequeathed to us by all the great democratic movements of mankind and being ever more insistently expressed in the rising common demands and expectations of peoples everywhere.'

11 McDougal, Lasswell and Reisman, 'Theories', *supra* note 10, at 200.

12 See A. Carty, *The Decay of International Law?* (1986); *Idem*, 'Critical International Law: Recent Trends in the Theory of International Law', 2 *EJIL* (1991) 66, at 67; Kennedy, 'Theses about International Law Discourse', 23 *German Yearbook of International Law* (1980) 353, at 386, 387; M. Koskenniemi, *From Apology to Utopia* (1989), at XIII *et seq.* See also Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-house of Language', 26 *Harv. Int'l L.J.* (1985) 327, at 358: Scholars 'think that they are merely describing something ... when in fact they are putting forward a profoundly political set of arguments'. The 'critical' movement is in – or creates the impression of – a process of permanent transformation, symbolized by the change of labels: from 'critical legal studies' to 'new stream' and 'New Approaches to International Law' (NAIL). See Kennedy, 'A New Stream of International Legal Scholarship', 7 *Wisconsin International Law Journal* (1988) 1; Koskenniemi, 'Preface', 65 *Nordic Journal of International Law* (1996) 337. 'NAIL' has been completed at a recent conference at Harvard Law School under the title: 'Fin de NAIL: A Celebration'. For a description of recent works of this approach, see Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', 65 *Nordic Journal of International Law* (1996) 341. See also Kennedy and Tennant, 'New Approaches to International Law: A Bibliography', 35 *Harvard Int'l L.J.* (1994) 417.

13 See, e. g., 'Editorial' (B. Simma) 3 *EJIL* (1992) 215.

rather than found in actual practice. 'The variety of references among these discursive areas [sources, process, and substance] always shrewdly locates the moment of authority and the application in practice elsewhere.'<sup>14</sup> An external critique discovers the ideological character of the application of these, allegedly neutral, legal norms as grounded in the cultural and political background of the lawyer, shaped in a 'peculiarly Western concept of law' which disregards the 'partial, multilayered and fragmented nature of international society'.<sup>15</sup>

As these two citations suggest, while this approach calls into question epistemological certainty, it cannot escape a normative (ought) Archimedean point. And there is an evident tension between the claim of the emptiness of legal norms and the claim of their ideological bias.

Another challenge to classical epistemology, which is related to, but nevertheless distinct from, 'critical' work, comes from radical feminism, which wants to expose 'the gender bias of apparently neutral systems of rules'.<sup>16</sup> The understanding of norms and their effect on the situation of women is not possible by a neutral, distant, 'scientific' assessment, but depends on a 'lived knowing': 'Feminist method as practiced in consciousness raising, taken as a theory of knowing about social being, pursues another epistemology. Women are presumed able to have access to society and its structure because they live in it and have been formed by it, not in spite of those facts.'<sup>17</sup> 'Consciousness raising', 'practical reasoning' and 'experiential analysis' are distinct feminist methods of analysis, which shall help women to express their concrete experience of suppression and male dominance.<sup>18</sup> The basic concepts of international law, such as state sovereignty,<sup>19</sup> *jus co-*

14 D. Kennedy, *International Legal Structures* (1987), at 293.

15 Carty, 'Critical International Law', *supra* note 12, at 68; Riles, 'Note: Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture', 106 *Harvard Law Review* (1993) 723. For a similar analysis, which, however, openly advocates 'Western' values see R.-J. Dupuy, 'Les ambiguïtés de l'universalisme', in *Mélanges Virally* (1991), at 273 *et seq.* 'Critical' scholars frequently describe the allegedly erroneous belief in the neutrality of international law as the result of a process of 'reification', of 'thing-ifying': 'Reification means simply to consider or to make an abstract idea or concept real or concrete. ...[A] variant of liberal political theory was put into legal language by international lawyers, and then treated as having been actually accepted as valid and legitimate by states in their relations with one another. Carty, *ibid.*, at 67, note 1. Cf. Boyle, *supra* note 12, at 329 *et passim*. For a refutation of this theory see Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law', 4 *EJIL* (1993) 1, at 6.

16 Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law', 85 *AJIL* (1991) 613. For 'liberal' critiques see D'Amato, 'Book Review', 89 *AJIL* (1995) 840; Tesón, 'Feminism and International Law: A Reply', 33 *Virginia Journal of International Law* (1993) 647. Cf. Charlesworth's answer, 'Cries and Whispers: Responses to Feminist Scholarship in International Law', 65 *Nordic Journal of International Law* (1996) 557.

17 C.A. MacKinnon, *Toward a Feminist Theory of the State* (1989), at 98, *see also* 95 *et seq.*, 106 *et seq.*

18 See Bartlett, 'Feminist Legal Methods', 103 *Harvard Law Review* (1990) 829; MacKinnon, *supra* note 17, at 83 *et seq.* and 239 *et seq.* (distinguishing between the dominant male and a female ontology).

19 See Charlesworth, "Alienating Oscar". *Feminist Analysis of International Law*, in D.G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (1993) 1, at 8 *et seq.*; Knop, 'Re/Statement: Feminism and State Sovereignty in International Law', 3 *Transnational Law & Contemporary Problems* (1993) 293.

*gens*,<sup>20</sup> self-determination,<sup>21</sup> human and women's rights,<sup>22</sup> are unveiled as an expression of a gendered, distinctively male world view. This is particularly visible in the distinction between a public sphere, which is dominated by men and subject to international legal norms, and a private sphere, to which women are mostly confined and which is free from international interference for the protection of women's rights. '[T]he definition of certain principles of international law rests on and reproduces the public/private distinction. It thus privileges the male world view and supports male dominance in the international legal order.'<sup>23</sup>

Like the 'Crits', therefore, feminists emphasize the contextuality of norm interpretation, which depends on 'the political, economic, historical and cultural context in which people live'.<sup>24</sup> Whereas the 'crits', however, argue that legal norms as such lack any content distinct from the cultural predisposition of the lawyer, radical feminists understand them as powerful tools for the preservation of male dominance.<sup>25</sup>

As to ontological certainty, students of modern communication theory<sup>26</sup> emphasize the gradation both of the determinacy of norms and of their influence on behaviour. On the one hand, the meaning of norms is not completely determined at the time of their creation. It is in the nature of language that it clarifies in part and in part obscures. Some words clarify, others obscure. 'No Vehicles in the Park' clarifies the situation *vis-à-vis* automobiles but is obscuring as regards skateboards. Clarification often takes place by the actors in a continuous process of communication in the process of its application. The formation of law can therefore not be clearly distinguished from its application, and its determinacy is subject to a con-

20 Charlesworth and Chinkin, 'The Gender of *Jus Cogens*', 15 *Human Rights Quarterly* (1993) 63; for a more detailed description, see *infra* notes 63 *et seq.* and accompanying text.

21 Charlesworth, Chinkin and Wright, *supra* note 16, at 642, 643.

22 *Ibid.*, at 627 *et seq.* (prohibition of torture, Convention on the Elimination of Discrimination against Women), 638 *et seq.* (right to development); Charlesworth, 'The Public/Private Distinction and the Right to Development in International Law', 12 *Australian Year Book of International Law* (1992) 190; for a critical analysis of feminism and human rights see Higgins, 'Anti-Essentialism, Relativism, and Human Rights', 19 *Harvard Women's Law Journal* (1996) 89, at 98 *et seq.*

23 Charlesworth, Chinkin and Wright, *supra* note 16, at 627; see also 623 *et seq.*, 638 *et seq.* But see also the critique by Engle, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights', in Dallmeyer, *supra* note 19, at 146 *et seq.* There is, however, not one single feminist attitude. 'Postmodern', 'critical' feminists stress the lack of a single 'feminist' perspective in the clashes of different cultural, economic and political conditions, especially between women in the First and Third Worlds, but argue for 'contextual' judgments on the effect of law on 'gender disparities in power, status, and economic security'. See Rohde, 'Feminist Critical Theories', 42 *Stanford Law Review* (1990) 617, at 625, for an extensive analysis see also at 622 *et seq.*, 637, 638. See also Higgins, *supra* note 22. In response, radical feminists emphasize the common experience of male dominance in all its forms as basis for a distinct, 'feminist' world view. Cf. Charlesworth, Chinkin and Wright, *supra* note 16, at 613, 614, 637 *et seq.*; Charlesworth, *supra* note 19, at 4 *et seq.*; more moderately, *Idem*, *supra* note 16, at 566.

24 Charlesworth, Chinkin and Wright, *supra* note 16, at 613.

25 Cf., *ibid.*, at 614, 615, 621 *et seq.*; MacKinnon, *supra* note 17, at 137. For an analysis of the relationship between critical legal studies and feminism see Rohde, *supra* note 23, with extensive references. For a feminist critique of the crits, see Charlesworth, *supra* note 16, at 567, 568.

26 See, e.g., J. Habermas, *Theorie des kommunikativen Handelns* (1981); J. Searle, *Speech Acts* (1969).

tinuous process of redefinition and refinement.<sup>27</sup> Likewise, when actors confront 'the Law' it surely influences their behaviour; it may constrain them, it may modify what they do. But there is often legal space to 'negotiate'. One's behaviour is *influenced* by the law, not determined by it. This view entails a deformalization of rules, of the very distinction between law and non-law, in favour of informal sources of law, such as 'soft law'.<sup>28</sup> In the Law-Non Law paradigm, there is black and white, but there is also plenty of grey.

### B. Is There a Hierarchy of Norms in International Law?

Equally evocative is the insistence of the Question on *norms* – a rule-based conception of international law. In this view, the core of international law is a set of norms or rules commanding the behaviour of actors. When we talk about hierarchy of norms in this sense, the focus is shifted to the normative content of rules, since in this way we would learn operationally which rules 'trump' others and which values are more or less important on the normative hierarchical scale.

But to leave the question at this level masks so much – operationally and normatively. Should we not also be thinking of international law as process rather than, or as well as, norms? Operationally, does the image of the lawyer determining the content of norms and actors behaving or misbehaving accordingly really capture international legal process? Normatively, is the hierarchy of norms going to tell the true story of what is important and what is unimportant in international law rather than, say, the hierarchy of actors or of institutions?

These questions inform New Haven's critique of a rule-centred approach to international law: McDougal and associates do not scoff at rules, but they scoff at a static conception of them. '[T]he traditional concept of rules seeks, at one and the same time to describe what decisionmakers have done in the past, to predict what they will do in the future, and to prescribe what they ought to do.'<sup>29</sup> The New Haven scholars have focused instead on the decision-making process itself: they have described international law as a process of authoritative decisions, resulting in claims and counter-claims of actors regarding the legality of their actions. 'International law is a process by which the peoples of the world clarify and implement their common interests in the shaping and sharing of values.'<sup>30</sup> Law describes what decision-makers do or are expected to do, consisting of the clarification of community

27 Fastenrath, 'Relative Normativity in International Law', 4 *EJIL* (1993) 305, at 310 *et seq.*

28 *Ibid.*, at 330 *et seq.*; similarly F. Kratochwil, *Rules, Norms and Decisions* (1989), at 186, 202 *et passim.*

29 Lasswell and McDougal, *supra* note 8, at xxii; cf. M.S. McDougal and W.M. Reisman, *International Law in Contemporary Perspective* (1981), at 6; McDougal, Lasswell and Reisman, 'Theories', *supra* note 10, at 254 *et seq.*; McDougal, Lasswell and Reisman, 'World Constitutive Process', *supra* note 10, at 197 *et seq.*, 275.

30 See extensively McDougal, Lasswell and Reisman, 'World Constitutive Process', *supra* note 10, at 191, and esp. at 267 *et seq.*; the quotation is at 205. See also Lasswell and McDougal, *supra* note 8, at xxii; McDougal, Lasswell and Reisman, 'Theories', *supra* note 10, at 192 *et seq.*

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policies, the analysis of factors affecting decision, the description of past and the projection of future trends in decision, and the invention and evaluation of policy alternatives.<sup>31</sup>

'Critical' scholars go one step further. Liberated from the necessity of conforming themselves to ready-made rules, lawyers are not confined to the preferences and values of their society, but can put forward their own agendas as 'conscious social agents'.<sup>32</sup> Renouncing the normative requirement of generalizability and abstraction, lawyers can at last *openly* take the cultural, historical and political context into consideration rather than do it subconsciously or in the closet. The task of the professional lawyer consists in the proposal of solutions to particular cases:

[The character of normative problem-solution ... [is] a *practice* of attempting to reach the most acceptable solution in the particular circumstances of the case. It is not the application of ready-made, general rules or principles but a conversation about what to do, here and now.<sup>33</sup>

In the face of these approaches, the Panthéon's defiant insistence on *norms* in the Question may appear to some as staid, but to others it may seem appealingly refreshing and maybe even a newly found Galilean modernism: *And yet . . . it moves!* he said. *And yet ... Law is Norms!*

### C. Is There a Hierarchy of Norms in *International Law*?

Finally, the usage of 'international law' is equally evocative in its defiance, for it insists on disciplinary independence and purity. It is a rejection of the view which situates international law firmly in, or as part of, say, international relations and in the academic investigation of international law as part of political science. The critique of the background position of our Question has so far remained within the realm of what traditionally counts as the function of law: to provide guidance in the solution of problems or the taking of decisions. Only the criteria were in question. Looking for hierarchies of actors or institutions instead of rules, we leave, however, as it seems, the traditional realm of law and reach out to other pastures: political and social sciences.

31 For a more detailed description see McDougal, Lasswell and Reisman, 'Theories', *supra* note 10, at 204 *et seq.*; McDougal and Reisman, 'The Prescribing Function in the World Constitutive Process', in McDougal and Reisman, *supra* note 8, at 368 *et seq.*

32 See Koskenniemi, *supra* note 12, at 490 *et seq.* On the 'political' character of this enterprise see *ibid.*, at 50. Cf. Carty, *Decay*, *supra* note 12, at 113 *et seq.*; *Idem*, 'Critical International Law', *supra* note 12, at 68 *et seq.*; Charlesworth and Chinkin, *supra* note 20, at 63 *et seq.*

33 Koskenniemi, *supra* note 12, at 486, emphasis in the original. See also at 490 *et seq.* Cf., however, the critique by Kennedy, 'Book Review', 31 *Harv. Int'l L. J.* (1990) 385, at 388: Koskenniemi 'attempts a fully objective analysis, placing the weight of his subjective belief in the methodological resuscitation of the "international lawyer"'. Cf. also Kennedy, 'Receiving the International', 10 *Connecticut Journal of International Law* (1994) 1, at 25, 26: 'There is no general problem, and no general solution. ... Neither international nor national, neither public nor private will be sure routes. Perhaps instead we will become interested in a particular redistributive struggle and strategize together about what to do.'

We have taken the New Haven approach and several strands of the Critical approaches as icons with which to confront that of the Panthéon. In relation to the previous two issues, the Panthéon was in splendid isolation. On this issue, it engages in an '*Entente cordiale*' with the Crits, for the defence of the purity of legal discourse.<sup>34</sup>

For proponents of the multidisciplinary approach, which challenges any sharp line between international law and social sciences, international lawyers admit that law is only 'one small part of international communications'.<sup>35</sup> But if legal rules play a minor role in 'international society', why do we not discuss more 'relevant' questions? If law is only a result of the international power structure, should we not rather ask for 'hierarchies of states' or, more generally, for all hierarchies in the international system?<sup>36</sup>

Some theories of international relations have been developed in explicit opposition to international law. Remember the resounding fanfare of Hans Morgenthau's refutation of international law: 'Grandiose legalistic schemes purporting to solve the ills of the world have replaced the less spectacular, painstaking search for the actual laws and the facts underlying them.'<sup>37</sup> Are we not in a similar situation today, wanting to describe 'hierarchies of norms' in a world which Samuel Huntington has described as standing before a 'clash of civilizations'.<sup>38</sup> What role, then, for international law as such, not mentioning its eventual hierarchies?

Relief comes from a somewhat unexpected quarter. Having tried to establish a theory of the international system with little, if any, regard to international law, some of the 'realists' came to the conclusion that the analysis of power capabilities alone was not sufficient to explain areas of cooperation between states. Conspicuously avoiding anything too close to international law, they have described these areas as 'regimes'. One of the most prominent scholars defines regimes 'as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'.<sup>39</sup> That sounds amazingly similar to the description of law by a legal realist. Note,

34 Cf. the sharp critique of all sorts of policy approaches by Korhonen, 'Liberalism and International Law: A Centre Projecting a Periphery', 65 *Nordic Journal of International Law* (1996) 481, at 483, 495 *et passim*.

35 A. D'Amato, *The Concept of Custom in International Law* (1971), at 22.

36 For attempts in this direction, see I. Clark, *The Hierarchy of States* (1989); K. Waltz, *Theory of International Politics* (1979), at 111 *et seq.* For a description of an 'international law of power' see G. Schwarzenberger, *The Frontiers of International Law* (1962), at 25 *et seq.*

37 Morgenthau, 'Positivism, Functionalism, and International Law', 34 *AJIL* (1940) 260, at 283; but cf. his more measured stand in *Politics among Nations: The Struggle for Power and Peace* (5th. rev. ed., 1978), at 279 *et seq.* See also G.F. Kennan, *American Diplomacy* (1985 ed.), at 95-103, but cf. the 1985 'Foreword', at vii; E.H. Carr, *The Twenty Years' Crisis 1919-1939* (1946), at 177 *et seq.*

38 S. Huntington, 'The Clash of Civilizations?', 72 *Foreign Affairs* (1993) 22; *Idem*, *The Clash of Civilizations and the Remaking of World Order* (1996).

39 Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in S. Krasner (ed.), *International Regimes* (1983) 1, at 2.

however, that principles, norms and procedures in Krasner's sense are independent of any formal source.<sup>40</sup>

The most important distinction between the perspectives of the two disciplines, however, seems to regard the limitation of regimes to 'a given area of international relations'. Whereas the international lawyer tends to think of a unified system of international law – which includes, of course, the possibility of more specific, regional or bilateral law – regime theorists regard regimes as a sort of rule-governed isle in the sea of international power struggles. Regimes are not established by the drafting of a rule-book, but as a result and function of power relations, depending on gains of cooperation for the participating egoist states.<sup>41</sup> Whether institutions or regimes have an impact of their own belongs to the most contested topics of the discipline.<sup>42</sup> If any, international law plays the role of a servant of a struggle for power, for the individual advantage of states.

The attention of international lawyers to the analysis of international relations is by no means a recent phenomenon. It is a commonplace of international legal theory that law and international society are related to each other.<sup>43</sup> International lawyers have thus positively responded to the recent attention by international relations theory to institutions governed by rules.<sup>44</sup> Characteristically, one of the responses has

40 See also the definition of principles, norms and procedures, respectively: 'Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.', *ibid.* The 'wooliness' of these definitions is criticized by Strange, 'Cave! hic dragones', in Krasner, *supra* note 39, at 337 *et seq.*

41 Cf. Stein, 'Coordination and Collaboration: Regimes in an Anarchic World', in Krasner, *supra* note 39, at 140: 'The existence of regimes is fully consistent with a realist view of international politics, in which states are seen as sovereign and self-reliant. Yet it is the very autonomy of states and their self-interests that lead them to create regimes when confronting dilemmas.' Keohane has described the role of regimes as the result of declining US-American power in international economic relations since 1945, R.O. Keohane, *After Hegemony* (1984), at 243 *et seq.*

42 See Krasner, *supra* note 39, at 5 *et seq.*; Young, 'The Effectiveness of International Institutions: Hard Cases and Critical Variables', in J. Rosenau and E.-O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics* (1992) 160.

43 For earlier writings by political scientists, see H. Bull, *The Anarchical Society* (1977), at 122 *et seq.*; K.W. Deutsch and S. Hoffmann (eds.), *The Relevance of International Law. Essays in Honour of Leo Gross* (1968); Hoffmann, 'International Systems and International Law', in K. Knorr and S. Verba (eds.), *The International System* (1961), at 205; Kaplan and Katzenbach, 'Law in the International Community', in R.A. Falk and S.H. Mendlovitz (eds.), *The Strategy of World Order*, vol. 2 (1965), at 19. For an analysis of the 'international community' from the viewpoint of international lawyers, see A. Cassese, *International Law in a Divided World* (1986), at 1-163; Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994-VI) 217, at 243 *et seq.*, paras 13 *et seq.*; Tomuschat, 'Obligations Arising for States without or against Their Will', 241 *RdC* (1993-IV) 195, at 216 *et seq.*, with further references. For earlier writing see P.E. Corbett, *Law and Society in the Relations of States* (1955); M. Huber, *Die soziologischen Grundlagen des Völkerrechts* (1928). For a critical account of the relationship between law and international society, see Kennedy, *supra* note 12, at 384 *et seq.*

44 See Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale Journal of International Law* (1989) 336; Beck, 'International Law and International Relations: The Prospect for Interdisciplinary Collaboration', in R.J. Beck, A.C. Arend and R. Vander Lugt (eds.), *International Rules* (1996). Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205. See also the contributions by Abbott, Ke-

consisted in the introduction of a special 'regime' for so-called 'liberal States'.<sup>45</sup> On the other hand, the 'billiard ball' view of international society, according to which the student of international relations is primarily concerned with the anarchical structure of international relations and the power capabilities of states, and may largely disregard ideologies, the domestic policy of states or non-state actors,<sup>46</sup> comes under growing criticism both from within international relations theory,<sup>47</sup> as from international lawyers.<sup>48</sup> And the analysis of 'international regimes' has to take account of the necessary legal foundations for regulating, managing and maintaining regimes.

With these qualifications in mind, the views of international lawyers and scholars of international relations seem to converge: international lawyers cannot limit their attention to the rule-book, and have to analyse law in the context of power relations. International relations cannot be properly understood without regard to the contribution of international law to stabilization and peaceful change. The borderline between the disciplines seems much more blurred than positivists of both sides are ready to acknowledge.

And yet, here too, is there not something 'Galilean' in insisting – as does our Question – that international law, despite everything, is international *law*?

## II. The Five *Vues* and the Question of Hierarchy

What do the five approaches we introduced above have to say on the main element of our Question: a *hierarchy* in international law?

For the mainstream approach there must be a clear answer to the existence of hierarchies in international law – they do exist or they do not. In fact, both answers are given by different proponents of the classical view. At first glance, the 'existence' of a hierarchy of international law cannot be put into question – at least since the intro-

ohane, Slaughter (formerly Burley) and Young, in *International Law and International Relations Theory: Building Bridges*, 86 *ASIL Proceedings* (1992) 167.

45 See Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503.

46 For a sophisticated version of this view see K. Waltz, *Theory of International Politics* (1979), at 88 *et seq.*

47 The notion is taken from Krasner, 'Regimes and the Limits of Realism', in *Idem, supra note 39*, at 355. Critical already Strange, *supra note 40*, at 337 *et seq.* at 349. For more recent critical voices, see, e.g., the contributions in R. Keohane (ed.), *Neorealism and Its Critics* (1986) and in Rosenau and Czempel, *supra note 42*; Koslowski and Kratochwil, 'Understanding Change in International Politics: The Soviet Empire's Demise and the International System', 48 *International Organization* (1994) 215; Lebow, 'The Long Peace, the End of the Cold War, and the Failure of Realism', 48 *International Organization* (1994) 249; Risse-Kappen, 'Ideas Do Not Float Freely', 48 *International Organization* (1994) 185. For a critical analysis of the role of 'anarchy' in international relations theory see Milner, 'The Assumption of Anarchy in International Relations Theory: A Critique', in D.A. Baldwin (ed.), *Neorealism and Neoliberalism* (1993), at 143 *et seq.*, with further references.

48 See Slaughter, *supra note 45*, at 5 *et seq.* Cf. Tesón, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992) 52.

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duction of the concept of *jus cogens* into Article 53 of the Vienna Convention on the Law of Treaties.<sup>49</sup> And, of course, there is Article 103 of the UN Charter which gives Charter obligations precedence over more 'ordinary' commitments.

But we can also discern problems of this, apparently easy and indisputable, positivist confirmation of international law hierarchies. There is, firstly, the indeterminate contents of *jus cogens* – which gives rise to the suspicion that either *jus cogens* norms are so indisputable that codification adds nothing to their quality, or so disputed that they never meet the criteria for their creation, namely the acceptance and recognition as peremptory norms 'by the international community of States as a whole'.<sup>50</sup> And, secondly, the treaty mode of the creation of such norms leaves the question open of whether they are binding on those who resist them and have not become parties to the relevant Convention – France and the United States, for instance, in relation to the Vienna Convention, Switzerland for the UN Charter.<sup>51</sup> And when we look to customary law or general principles, we will find the same consensualist puzzle in the question of the applicability of the persistent objector-rule to *jus cogens*.<sup>52</sup> The assertion of hierarchies in international law challenges the very foundations of a classical, positivist account of international law – sovereign equality and consent – and revives thereby the ancient debate between naturalists and positivists.<sup>53</sup>

For the policy-oriented New Haven approach, formal distinctions between different kinds of rules are largely to be disregarded. But not all policies are of the same importance for decision-making. 'Basic community policies', 'constitutive principles' for the realization of human dignity, override ordinary 'shared expectations' of the parties.<sup>54</sup> The distinctions 'between constitutive and other decisions, are

49 See Simma, *supra* note 43, at 289 *et seq.*, paras 46 *et seq.*; Tomuschat, *supra* note 43, at 306 with further references.

50 Art. 53 of the Vienna Convention.

51 See G.M. Danilenko, *Law-Making in the International Community* (1993), at 236 *et seq.* (analysing this question from a positivist standpoint).

52 For contextual analysis of the persistent objector-rule see, e. g., P.-M. Dupuy, 'A propos de l'opposabilité de la coutume générale – enquête brève sur l'«objecteur persistant»', in *Mélanges Virally* (1991) 257, at 270-272; Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harv. Int'l L.J.* (1985), at 457 *et seq.*; for the relationship between *jus cogens* and the persistent objector-rule, see Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 *BYIL* (1985) 1, at 14 note 81; Danilenko, *supra* note 51, at 234 (arguing in favour of persistent objection even for *jus cogens* norms); Simma, *supra* note 43, at 289 *et seq.*, paras. 51, 52; Tomuschat, *supra* note 43, at 284 *et seq.* (both arguing against the application of the rule in case of *jus cogens*); Weil, *supra* note 6, at 425 (emphasizing the treaty character of the Charter), 429 (hailing the persistent objector rule) *et passim*.

53 See Weil, *supra* note 6, at 413 for a positivist opponent of *jus cogens*; Schwarzenberger, 'International Jus Cogens?', 43 *Texas Law Review* (1965) 455, at 476 *et seq.* See also G. Schwarzenberger, *International Law and Order* (1971), at 54 (emphasizing the freedom not to ratify the Vienna Convention). For an analysis of the allegedly anti-positivist, 'naturalist' character of *jus cogens* see de Visscher, 'Positivism et 'Jus Cogens'', 75 *RGDIP* (1971) 5. Cf. the discussion by Danilenko, *supra* note 51, at 212 *et seq.* and Koskeniemi, *supra* note 12, at 281 *et seq.*

54 See, e.g., M.S. McDougal, H.D. Lasswell and J.C. Miller, *The Interpretation of International Agreements and World Public Order* (1994), at 105 *et seq.*; see also the distinction between constitu-

matters of relative emphasis, not exclusion'.<sup>55</sup> Nevertheless, it is the very importance of these constitutive prescriptions which brings form into play:

Certain constitutive prescriptions are held with greater intensity than others. The prescriptions that are expected and demanded with greatest intensity are generally deemed to be terminable only by formal inclusive procedures. Norms of this category enjoy such doctrinal appellations as *jus cogens*, peremptory norms or principles intensely demanded by all.<sup>56</sup>

For communication theorists, however, formalistic distinctions between different hierarchical categories of law do not capture the graduated authority of law over the decision-maker.<sup>57</sup> *Jus cogens*, Charter rules, 'ordinary norms' and 'soft law' are related to and informed by each other. The influence of legal (and non-legal) considerations on decisions will be determined in every singular case with the help of all of these concepts. Even if there is no clear hierarchy, however, graduation of norms is a necessary feature of any legal system which makes norm interpretation and application possible.<sup>58</sup>

With their emphasis on actual power relations, scholars of the dominant schools of international relations are less concerned with intra-legal hierarchies. In fact, they postulate another kind of hierarchy – that between power as the main concern of international actors and as the constituent element of the international system, and law as its servant. 'In a society in which power is the overriding consideration, the primary function of law is to assist in maintaining the supremacy of force and the hierarchies established on the basis of power and to give such an overriding system the respectability and sanctity of law.'<sup>59</sup> Accordingly, there is a profound distinction between domestic law, which is hierarchical like the order it represents, and international law as the legal or quasi-legal system of international anarchy. In response, lawyers have developed a 'second concept of law', a 'law without sanctions', a 'horizontal conception' of law.<sup>60</sup> In this respect, scholars of the new 'liberal' school of international relations go even further: they challenge the very hierarchy between states (as main actors of the international system) and non-state actors which has been the base of classical international law since the Peace of Westphalia, and postulate a new 'negarchy' within a world of so-called liberal states.<sup>61</sup>

tive and 'public order' decisions, McDougal, Lasswell and Reisman, 'World Constitutive Process', *supra* note 10, at 192, 206, 238; McDougal and Reisman, *supra* note 31, at 370.

55 McDougal, Lasswell and Reisman, 'World Constitutive Process', *supra* note 10, at 192.

56 *Ibid.*, at 241.

57 Cf. Kratochwil, *supra* note 28, at 41; similarly already Kaplan and Katzenbach, *supra* note 43, at 35 *et seq.*

58 Fastenrath, *supra* note 27, at 332 *et seq.*

59 Schwarzenberger, *supra* note 36, at 25.

60 M. Barkun, *Law without Sanctions* (1968), at 150 *et seq. et passim*; Falk, 'Horizontal and Vertical Conceptions of Legal Order', 32 *Temple Law Quarterly* (1959) 295; Gottlieb, 'The Nature of International Law: Toward a Second Concept of Law', in C.E. Black and R.A. Falk (eds.), *The Future of the International Legal Order*, vol. 4 (1972), 331. Cf. also H.L.A. Hart, *The Concept of Law* (1961, 2nd. ed. 1994), at 234 *et seq.*

61 See Slaughter, *supra* note 45, at 514 *et seq.*, 536 (for the notion of 'negarchy') *et passim*.

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In his contribution to the symposium, Martti Koskenniemi has presented the position of an internal critique to hierarchies.<sup>62</sup> In this view, fixed hierarchies would grossly underemphasize and distort the basic disagreements on the content and aspiration of international law and the basic contradictions within the international legal discourse: between apology and utopia, between realism and idealism, between subjectivity and objectivity, between sovereignty and community. Hierarchy presupposes the very agreement on the foundations of international law which is missing according to a 'critical' internal analysis of its coherence. Instead, international law is characterized by a process of continuous reversal of hierarchies. Whether one can speak of 'hierarchy' in the absence of the very stability which this notion suggests is another matter.

Those proponents of 'new approaches' with a proactive agenda are less concerned with the integrity and coherence of international law than with the actual content of norms of a 'higher' character. Radical Feminists understand hierarchies in international law as the result of male dominance. This is exemplified by the issue areas of *jus cogens*. Women's concerns have not been elevated to this rank:

The search for universal, abstract, hierarchical standards is often associated with masculine modes of thinking. ... The very abstract and formal development of the *jus cogens* doctrine indicates its gendered origins. What is more important, however, is that the privileged status of its norms is reserved for a very limited, male centered, category. *Jus cogens* norms reflect a male perspective of what is fundamental to international society that may not be shared by women or supported by women's experience of life.<sup>63</sup>

Nevertheless, feminists argue for the inclusion of women's concerns in the elevated normativity of *jus cogens*, such as a duty of states to protect women against violence. '[I]f women's lives contributed to the designation of international fundamental values, the category would be transformed in a radical way.'<sup>64</sup> In addition, feminists may use the controversy on the conditions for the creation of *jus cogens* for a transformation of international law: the 'symbolic', 'promotional and aspirational character' of *jus cogens* is said to require the accommodation of 'rights that are fundamental to the existence and dignity of half the world's population'.<sup>65</sup> As a matter of strategy, therefore, *jus cogens* constitutes a useful tool for the realization of a feminist political agenda. The apparent contradiction between the rejection of law as male and its use for women's concerns can be dissolved by pointing to a strategical understanding of the role of law which may be typical for legal activism: if law is one of the tools for the political transformation of society, not an 'objective' expression of societal concepts for correct behaviour, legal con-

62 See this volume, at 695. Cf. also *Idem*, *supra* note 12, at 281 *et seq.* (*jus cogens*), 392 *et seq.* (*custom et passim*).

63 Charlesworth and Chinkin, *supra* note 20, at 67.

64 *Ibid.*, at 67, 68.

65 *Ibid.*, at 67, 75.

cepts such as a hierarchy of norms are political tools for the promotion of a substantial end.<sup>66</sup>

These different 'takes' on Hierarchy should not come as a surprise. As the question touches the most basic principles and rules of international law, it can only be expected that it will be profoundly shaped by differing ontological and epistemological premises.

### III. Is There a Hierarchy of Norms in International Law – A Changing Politics

We have, of course, no intention of giving a doctrinal answer – important as it is – or indeed any answer, to the Question. But we wish to conclude with a brief and tentative consideration and speculation on the evolving debate.

One core aspect of the Hierarchy Debate has related to 'super-norms' – *jus cogens*, obligations *erga omnes* and crimes of state. The drive behind them and the opposition to them employed different rhetorics.

One rhetoric was pragmatic and concerned the principled need, or otherwise, of an ever more complex legal system to have – as a functional necessity – graduated norms and a hierarchy to resolve conflicts among them. That was the animus behind Friedmann's own prescription.

There was a second debate about the content of such norms. Often times opposition to the content spilled over to the principle of graduation and hierarchy: by raising norms the contents of which suited one's interests in norms of a higher value and by side-stepping thereby the traditional consensual norm-creation machinery, one could hope to transform international law without assuring universal consent for the change of every single norm.<sup>67</sup>

Finally, the hierarchy debate became part of a broader discussion which concerned the very *telos* of the international system. Should it be conceived – in a liberal tradition of the polity – as a system of coordination among sovereign states pursuing their national interest in a broad zone of liberty protected by international law<sup>68</sup> or, should it be conceived – in a more communitarian tradition – as a community of states with certain collective goals and values transcending the individual or even aggregate national interest of its (principal) members?<sup>69</sup> Since the notions of obligations *erga omnes*, *jus cogens* and crimes of state – employing a rhetoric such

66 Cf. David Kennedy's remarks on the 'new international enthusiasts': *Idem*, 'A New World Order: Yesterday, Today, and Tomorrow', 4:2 *Transnational Law & Contemporary Problems* (1994) 329.

67 Cf. the description of Third and Second World attitudes by Cassese, *supra* note 43, at para. 96 and 68 *et seq.* See also G. M. Danilenko, *supra* note 51, at 212.

68 In this sense Weil, *supra* note 6, at 414 *et seq.*

69 See T. Franck, *The Power of Legitimacy among Nations* (1990), at 192 *et seq.*; *Idem*, *Fairness in International Law and Institutions* (1995), at 4 *et seq.* (combining communitarian and complexity arguments); Simma, *supra* note 43, at 233 *et seq.*, paras. 6 *et seq.* with further references.

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as 'international community as a whole' – were associated with the second, communitarian, conception, they were supported or opposed accordingly.<sup>70</sup>

The lines drawn typically pitted the 'Old West' – principally the United States which was mostly sceptical or even hostile to graduation – against 'progressive' forces, typically the Second and Third Worlds which supported graduation.<sup>71</sup> The reasons used in opposition concerned all three issues. On the systemic level, graduation of norms, it was feared, would dilute certainty and, most importantly, since the system did not have adequate mechanisms to match the consequences with the breach (to make a Crime really count as a Crime) it was thought that graduation would actually cheapen the values it sought to privilege or would lead to instability. As regards content and the conception of the system, the opposition was principally political, however masked in legal rhetoric. Since the Second and Third World states and some others who supported them vastly outnumbered the 'Old West', and since they were perceived to be hostile to America, the United States always feared that it would end up being dubbed the Criminal. Graduation and hierarchy of norms were a sharp, if banal, example of Cold War wrangling in the arena of international legal process.

Today, in the post Cold War era, we may expect to find the tables turned. We may expect the old 'Third World' to be much less enamoured with graduation/hierarchy and much more attached to coexisting, 'multicultural' legal universes. We would not be surprised if the United States – enjoying an unprecedented political hegemony – would discover the virtues of graduation and hierarchy, given her ability both to influence as never before the content of norms and especially to control the consequences of breach.<sup>72</sup> It may be a telling sign that the United States, formerly an opponent to any 'criminalization' of international law, has changed heart and is now advocating individual 'criminal' responsibility before international bodies.<sup>73</sup>

In the New International Legal Order, what would a revised version of Antonio Cassese's celebrated *International Law in a Divided World* look like, and how would the debate on hierarchies fit into an up-to-date version?

70 See the ferocious attack led by Prosper Weil in his famous article, *supra* note 6, and the contributions in J.H.H. Weiler, A. Cassese, M. Spinedi (eds.), *International Crimes of State* (1989).

71 But see Weiler, 'On Prophets and Judges. Some Personal Reflections on State Responsibility and Crimes of State', in *ibid.*, 319. Cf. Cassese, *supra* note 43, at para. 96, cf. also paras. 60 *et seq.*

72 Cf. Hans Morgenthau's characterization of US foreign policy and international law: 'The international legal order appropriate to the globalism of American foreign policy would be monistic and absolutistic rather than pluralistic and relativistic. For American globalism assumes the existence of one valid legal order whose content is defined by the United States and which reflects the objectives of American foreign policy. Thus, American globalism of necessity culminates in a *pax Americana* or American *imperium* in which the political interests and legal values of the United States are identified with universal ones.' *Idem*, 'Emergent Problems of United States Foreign Policy', in K.W. Deutsch and S. Hoffmann (eds.), *The Relevance of International Law* (1968) 47, at 55, 56.

73 This is at least the case as long as the Security Council has created such international tribunals.

Two visions of the future world order have been developed in this decade – both in the United States and both, as it seems, not very popular in the Old world.

One would require a change of title – *International Law in an Undivided World*. That is the vision of Francis Fukuyama in his ‘The End of History?’.<sup>74</sup> In this view, hierarchy triumphs and there are no doubts about his hierarchical order: at the top, we find the gods of Western – viz. American – liberal ideology. Fukuyama, combining Hegelianism and American-style liberalism, sees ‘the end of history’ at the horizon. His view captures a certain triumphalist *esprit* barely concealed even in Europe after the fall of the Berlin Wall. The ideological controversies of the past have given way to a general agreement on the basic values of human rights, democracy and market economy. Only terrorists, some uncorrectable chauvinists and a few ‘rogue states’ – and certainly some lonely intellectuals, too<sup>75</sup> – evade the new consensus. In such an order, we expect, if not strong international institutions, so at least clear hierarchies – of values, institutions, laws. The marginalized outsiders confirm rather than contest this interpretation.<sup>76</sup>

The persistence of war and genocide in such distant places as Europe and Africa have led another American scholar to an opposite sensibility. The title of Cassese’s gem would change to *International Law in a Culturally Divided World* and the colour of the dust jacket would change from an optimistic olive-branch green to an apocalyptic black. This is Samuel Huntington’s vision of a ‘clash of civilizations’.<sup>77</sup> This view represents a prognosis of repeated challenges to any universally accepted ordering hierarchy. Accordingly, ‘[t]he great divisions among humankind and the dominating source of conflict [in the future] will be cultural’.<sup>78</sup>

Forget for a second Huntington’s apocalyptic nightmare – which has widely determined the public debate and prevented a serious discussion just as Fukuyama’s descriptions of the liberal paradise have prevented a discussion on his line of argument. It seems to us that in both visions there are elements that should be taken seriously. And, in fact, they resemble the criticism which sees in contemporary law a disguised expression of ‘Western’, transatlantic values and interests. One should not be surprised if in a world which is no longer cut ideologically but culturally, the Aristotelian idea of Hierarchy as a condition for unity will be found offensive and inimical to a new conception of a multicultural world order in which conflicting values would have to coexist rather than be ordered in a hierarchy of norms.

74 Fukuyama, ‘The End of History’, 16 *National Interest* (1989) 3. Cf. F. Fukuyama, *The End of History and the Last Man* (1992).

75 Cf. Fukuyama’s search for ‘some isolated true believers’ in Marxism-Leninism ‘in places like Managua, Pyongyang, or Cambridge, Massachusetts’, ‘The End of History’, *supra* note 74, at 18.

76 Strands of this can even be found in Thomas Franck’s most recent masterpiece. See T. Franck, *Fairness in International Law*, *supra* note 69, at 4 *et seq.*; cf. *Idem*, ‘The Emerging Rights to Democratic Governance’, 86 *AJIL* (1992) 46, at 89 *et seq. et passim*.

77 See *supra* note 38.

78 ‘Clash of Civilizations’, *supra* note 38, at 22. Not surprisingly, Huntington is a strong critic of Fukuyama, see Huntington, *The Clash of Civilizations*, *supra* note 38, at 31; *Idem*, ‘No Exit – The Errors of Endism’, 17 *National Interest* (1989) 3.

### The Structure of Change in International Law

To be sure, both 'visions' – at least in their vulgar perception by the public – are oversimplified and overreaching. Both seem to undervalue the structural constraints of a world which is still largely dominated by more or less sovereign states.<sup>79</sup> But we believe both Fukuyama and Huntington describe pretty well the poles of current problems and debates on the role of hierarchies in international law.

The more diverse civilizations, traditions, attitudes there are in the world, the stronger the claim for 'second degree' law, which does not purport to resolve deep value conflicts but to make coexistence of radically opposed value systems possible. And, yet, the more the future world comes to rely or depend for its material and spiritual future well-being on common values such as sustained development, human rights, free human and material exchange, the more the 'world community' will require a unitary, hierarchized international law.

It seems as if the issue is to remain in flux. Always there, always changing.

<sup>79</sup> This was one central argument of Huntington's initial critique of Fukuyama, see 'No Exit', *supra* note 78, at 4 *et seq.*