Hierarchy in International Law: A Sketch

*Martti Koskenniemi**

Geometry is the archetype of modern mind. The grid is its ruling trope ... Taxonomy, classification, inventory, catalogue and statistics are paramount strategies of modern practice. Modern mastery is the power to divide, classify and allocate – in thought, in practice, in the practice of thought and in the thought of practice. Paradoxically, it is for this reason that ambivalence is the main affliction of modernity and the most worrying of its concerns.[1]

Legal reason is a hierarchical form of reason, establishing relationships of inferiority and superiority between units and levels of legal discourse.[2] Sometimes law's hierarchical character is elaborated as an essential aspect thereof. Classical and modern naturalisms, for instance, often conceptualize the law in terms of systemic *derivations* that assume the existence of relationships of entailment between normative units and levels. St Thomas Aquinas posits a many-layered structure of behavioural norms deriving from other norms, existing at progressively higher hierarchical levels.[3] The naturalism of an argument in this respect (i.e., in respect of superior norms), however, is not dependent on its being an explicit part of naturalist theory. The concept of 'fundamental', used in human rights law, as well as the ideas of *jus cogens* or imperative norms and rules valid in an *erga omnes* way each presuppose relationships of normative hierarchy that implicate some form of moral naturalism.[4]

Law's hierarchical character is by no means, however, only a naturalist credo. It is shared equally by its two main contestants, formalism and the social concept of law. The best-known example of the former is, of course, Hans Kelsen's *Pure Theory of Law*. For Kelsen, what is specific to legal norms is that they enjoy a

* Professor of International Law, Department of Public Law, 00014, University of Helsinki, Finland.

1 Z. Bauman, *Modernity and Ambivalence* (1991), at 15.

2 A *unit* (or topos) of legal discourse is any distinguishable entity of legal meaning; a *level* is a group of *topoi* identifiable by a common property. To speak of levels instead of groups is to highlight the hierarchical character of the principles of identification. Thus, regular treaty provisions constitute *topoi* that are normally situated at a level different from the *topoi* of legislative purpose or principle underlying the treaty. This paper deals with the reversibility of the hierarchical relationships between such levels.

3 Cf. H. Tolonen, *Nature and Justification. Modes of Derivation According to the Aristotelian Tradition in Natural Law* (in Finnish, with English Summary, 1984).

4 Recourse to Latin is an interesting compliment that modern scepticism makes to its naturalist heritage.

8 EJIL (1997) 566–582

'validity' (in contrast to moral goodness or social effectiveness), which they receive by delegation from norms assumed to exist (or to be valid) at hierarchically higher levels. These latter norms, again, receive their validity in a similar way from norms at even higher levels ... and so on until we reach the basic norm whose validity can no longer be derived from normative delegation, but is a transcendental (or perhaps cultural) presupposition that must be made in order for what we know of the validity of other legal norms to be true.[5]

Social concepts of law ('realism') employ less articulate conceptions of hierarchy.[6] They build upon a priority of a sociological (often economic, but equally psychological or biological) base to a normative (legal, moral, institutional) superstructure. A basic level, often called 'reality' (or the 'will of the sovereign' or 'basic social needs'), is installed in a hierarchically controlling position *vis-à-vis* other, ephemeral aspects, such as law. Frequently, the relationship is portrayed in an *instrumental* way. The determining base has recourse to the superstructural element in order to better fulfil its internal dynamism. If turning Hegelian hierarchies on their head was the Marxian battle-call for social revolution, the same turn and the same hierarchy is used by neoliberal politics to buttress the foundational position of the market for social reconstruction. The language of 'levels', 'reflexions' and 'determination' betrays a rigorously hierarchical structure of thought behind the social conception.

Whatever difference there is between naturalism, formalism and realism, each portrays law in a hierarchical light. While the systemic aspects of hierarchy are highly elaborated in formalism, but less so in naturalism or realism, each understands the law as a working out, or a making express, of normative superior/inferior relations, conceptualized in terms of what is good (right) and what is bad (wrong), what is valid and what is not, or what works and what does not.[7]

* * *

In this paper I shall draw a rapid sketch of the role of hierarchy in international legal thought and practice. My argument is developed in three parts. The first part sets out a (non-exhaustive) typology of hierarchies employed by jurists when dealing with international law topics. The second part presents a (deconstructive) challenge to the typology and the modes of juristic discourse operating it by arguing that each superior/inferior relationship can always be reversed to produce its contrary by the use of impeccable legal argument. The third part looks beyond deconstruction and outlines a way of thinking about international law that respects the principle of reversibility but sees law as nonetheless a meaningful social practice.

5 Cf. H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934), at 66-67 (§ 29).

6 On 'social concepts of law', cf. my 'The Normative Force of Habit: International Custom and Social Theory', 1 *FYBIL* (1990), at 77 *et seq.*

7 Hierarchy, in other words, means difference in a normative light. There is no such thing as a non-normative hierarchy.

One caveat is in order. The following presentation is a violent schematization. Within the confines of this paper, it is not possible to deal with the very large number of argumentative strategies used by lawyers to constantly challenge and re-establish threatened hierarchies, deal with hard or boundary cases in innovative ways and break the rules of the game so as to ensure its continued, subtle success. Also, it may be possible to outline many more modes, theories, or argumentative and hierarchical structures than I have been able to canvas. The scheme has no pretension of being a grand theory – not even 'the' postmodern theory – of international law. I have simply tried to provide a scaffolding, as it were, or a summary, of certain critiques that have been presented and responses given in an attempt to 'reconceive' or 'reimagine' international law since neither the ideal of a stable and structured legal reason nor the prevalent intuitionist pragmatism seem able to reflect upon themselves without embarrassment.

I

Hierarchical relationships are employed in each of the three modes of juristic discourse, distinguished from the more concrete towards the more abstract as the modes of control, exegesis and philosophy.

The mode of *control* is directed at behaviour, seeking to describe it by reference to a binary normative code of 'lawful'/'unlawful' in all its innumerable transformations (right/duty; conformity/violation; permitted/prohibited).[8] The mode of control appears in at least three different contexts of juristic practice.

In *dispute-settlement*, parties present contrasting and normally incompatible theses about whether a particular behaviour should be seen as 'permitted' or 'prohibited'. It is the judge's function to fix the place of the contested behaviour within the relation. Apart from a substantive qualification, dispute-settlement always also involves the reaffirmation of the hierarchical position of the judge, or the third party *vis-à-vis* the litigants, or public power *vis-à-vis* political passion.

In *diplomatic discourse* as well, contestants seek to qualify behaviour in binary terms. However, unlike in dispute-settlement, no authoritative resolution need necessarily be forthcoming. On the contrary, diplomatic discourse often leaves the final determination suspended and instead moves for a procedural reconciliation. Whether through agreement or procedural displacement, the process involves a re-entrenchment of the authority of the disputants over the subject-matter, or sovereignty over law.

Legislative discourse seeks to control future behaviour by producing generic statements about the lawfulness (illegality) of particular types of behaviour. *Ideal hierarchies* (good/bad) inform legislators' moral beliefs and institutional objectives.

8 For a taxonomy of some such relations, cf. W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1978).

They also provide the basis from which *legislative hierarchies* are inferred, which in turn appear as more or less successful reproductions of the former in terms of legal permissions or prohibitions, law over sovereignty.

The mode of control is directed towards the qualification of social behaviour. Two types of hierarchy are implicated. One is a hierarchy between forms of behaviour, the other is a hierarchy of controlling authorities. The two hierarchies are ambiguously linked. On the one hand, controlling authority is itself assumed to be controlled by requirements of substantive legality; on the other hand, substantive legality is derived from controlling authority. The relationship between the two has been a perpetual puzzle within the mode of control: does law defer to authority or vice versa?

Hierarchical thought is not exclusively directed at behaviour but equally at the law itself. Employing the mode of *legal exegesis*, lawyers grapple with problems of the content of the law and its systematization.[9] The outcome of exegesis is not the qualification of particular behaviour but the abstract elucidation of what norms say and how they are linked into systemic wholes. In interpretation, exegesis seeks to establish the better of two contested meanings of legal norms as linguistic (for example, treaty text) or behavioural units (for instance, customary behaviour). Systematization aims to make explicit the origin and relationships of norms so as to answer questions about normative authority and to solve problems of normative conflict.[10] International law exegesis breaks down into two doctrines that have their own *problematique*.

Sources doctrine grapples with the origin and binding force of international norms. It deals with treaties, customs and general principles of law, attempting to link ambiguous or contested meanings to something outside those sources themselves, most frequently to ideas about party consent and international justice, so as to resolve their meaning.

Sovereignty doctrine grapples with the opposition between effectiveness and legitimacy. It deals with sovereign rights, competence of international and national bodies, jurisdiction, territory and immunity, and hopes to justify a contested allocation of power either by reference to sociological realities or normative ideas about them.

Sources and sovereignty constitute opposing openings into the legal substance. Although they seem initially incompatible (law/power), exegetic manoeuvres constantly reduce them into each other. From the perspective of sources doctrine, 'sovereignty' has no independent normative sense but is just a pale shadow of results

9 For these two functions of legal 'doctrine', cf., e.g., A. Aarnio, *Denkweisen der Rechtwissenschaft* (1979).

10 Systematization takes place normally by abstracting general principles from individual rules or deriving rules from general principles. These two strategies reverse the hierarchical relationships between two levels: either rules are normatively determining and principles only descriptive consequences thereof or vice versa. Cf. my 'General Principles: Reflexions on Constructivist Thought in International Law', XVIII *Oikeustiede-Jurisprudentia* (1985) 117.

received within it: jurisdiction (for example) is what treaties, customs or general principles say it is. From the perspective of sovereignty doctrines, again, the meaning of legal sources is merely to describe whatever sovereignty in particular relationships means and what sovereigns have decided. This structure provides a perpetual movement for exegesis, while ensuring that its horizon is never lifted from what it is that can be seen from its two alternative openings: a uniform and stable 'law' and a uniform and stable 'sovereignty'.

Finally, the *mode of philosophy* poses directly the question of the nature and possibility as well as the limits of the knowledge of the law. The mode of philosophy is expressed normally in terms of various theories that are often borrowed from outside the legal discipline and seeks to grapple with the ontological and epistemological issues of legal control and exegesis.

Theories of the *nature of law* seek to describe the law either in terms of social processes or in terms of normative standards or, briefly, 'facts' and 'ideas'. They appear not only as grand theories but as implications of the methodological or historical accounts of international law's growth as a social practice and a scientific discipline. They employ distinctions such as positivism/naturalism; formalism/realism; Western/Third World approaches.

Theories of the *limits of law* seek to establish the relationship between law and neighbouring fields of discourse, such as politics, history, diplomacy, literature, and the corresponding academic factions of sociology, political theory, anthropology. The relevant hierarchies are constituted from arguments about whether law is prior to or derived from such disciplines.

Theories about nature and limits are also interconnected. If law indeed seems like a matter of behavioural regularities, then sociology becomes its foundational discipline; if critique is what we wish to do, then law can only exist as a political Utopia.

The three modes are not independent from each other but normally set themselves again in hierarchical relationships. For example, a practitioner or a diplomat might consider *control* as prior and exegesis and (*a fortiori*) philosophy as secondary and (if at all necessary) perhaps in an instrumental relationship to it. A university professor might believe *exegesis* to be the superior mode; control would then become its derivation and philosophy its auxiliary. A legal theorist might view both exegesis and control as inferences (of first and second degree) from resolutions attained within the mode of *philosophy*. And so on.

II

Hierarchy is not only a principle of rational thought but also of social organization – or better, being a principle of rational thought, it necessarily implicates the way we think of social structure. Legal hierarchy – even conceptual legal hierarchy –

articulates and consolidates a particular distribution of wealth and power. The opposite of hierarchy is anarchy, the complete absence of (any) hierarchy; indeed a rare situation in social life and certainly a mistaken metaphor by international relations studies to describe the social normality of nations. While revolution is the opposite of a particular hierarchy, it is not contradictory to the principle of hierarchy as such. To the contrary, its usual objective is the setting up of a new hierarchy to replace the old one.

Because hierarchy also implies a structure of social power, much is at stake in establishing or transforming it. The legal hierarchies surveyed above are not immune to revolution either. 'Under the dictatorship of the proletariat the relationship between legality and illegality undergoes a change in function, for now what was formerly legal becomes illegal and vice versa.'[11] In times of social or political tension the development of the modes of legal discourse is disturbed and grey zones and anomalous situations appear. The stable structures of 'lawful'/'unlawful' that organize so much of social control are blurred and possibly reversed: property becomes theft, theft property. Violence of the mob starts to appear as just punishment, while organized punishment by the state begins to look like naked violence. Intervention in internal affairs becomes support of sovereignty; the exercise of sovereignty is felt and criticized as intervention.[12] Law is the complete opportunist: while it sustains hierarchy, it has equally the resources to reverse it.

Nor is exegesis invulnerable to such challenges, and alternates between times of relative stability and violent *Methodenstreit*. Sometimes interpretations seem fixed and judges and administrators connect unclear legislative texts with unproblematic drafter intent, equity appears as an enlightened sense of justice and the application of imperative norms a necessary reference from positive law to morality. In periods of revolution (whether in Lenin's or Thomas Kuhn's sense) appeals to 'founding fathers' are ridiculed as a contrived rationalization of power,[13] equity looks like administrative arbitrariness and the application of imperative norms erodes 'ordinary' law's protective shield.[14]

Such reversals are reflected in transformations of legal world-views. The concept of law as an encapsulation of principles of ideal justice reveals itself as a flexible facade for tyrannical rule; its demise will inaugurate philosophies basing the law on the 'will of the people', the 'actual living conditions of populations', or some other such communal idea.[15] Conversely, a law claiming to base itself on the objective interests of the people, the trends of history, reveals itself as unable to fulfil ideas of natural justice, fundamental rights, and so on. The concept of law as 'rules', the

11 G. Lukács, *History and Class Consciousness. Studies in Marxist Dialectics* (1971), at 267.

12 For the interdependence of intervention and sovereignty, cf. C. Weber, *Simulating Sovereignty. Intervention, the State and Symbolic Exchange* (1995).

13 And interpretations stressing the will of the parties yield to 'dynamic interpretations', as in the *Namibia* case, ICJ Reports (1971), at 30-32 (paras. 51-53).

14 For a famous critique, cf. Prosper Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413, esp. 427 *et seq.* 441-442.

15 Cf. J.-J. Rousseau, *The Social Contract* (Transl. and intr. by M. Cranston, 1986), at 51 and *passim*.

normal stuff of law-appliers, is condemned as backward-looking; and demands are heard for law to be thought of as dynamic, future-oriented processes.[16] Conversely, goal-oriented directives are chided as shorthand for the convenience of administrators who cannot take rights seriously. And so on.

While law articulates social hierarchies, it never fully exorcises its 'other'; what it pushes into the realm of the 'illegal' will remain in abeyance and like a suppressed memory come to haunt legal normality at some unexpected moment. The use of force by states has been condemned a thousand times since Briand-Kellogg; yet today we grapple with how to make it possible to use effective force so as to prevent or limit yet another Mogadishu, Srebrenica, Kigali ... European Community lawyers may feel that the old international law problem of the relationship between international and municipal law was resolved by the Luxembourg Court's principles of direct effect and supremacy.[17] Clearly, this reversal of a traditional legal hierarchy implied a transformation in social power as well. Yet, statal sovereignty – that 'repressed supplement' of European law – will raise its head as soon as the question is no longer about conditions of commercial competition but, say, territorial control, national prestige or conceptions of democracy,[18] not about how to administer a social normality but 'who shall decide on the exception'.[19]

The classical attempt to establish a hierarchy between sovereignty and the law does enable partial, temporary resolutions of particular conflicts, but it never disposes of the underlying tension. The view of sovereignty as a 'bundle of rights' allocated to the state by a legal order may be an adequate portrait of some normality. Yet it fails to capture sovereignty's ability to determine what those rights are. The meaning of the body of human rights law is, in this sense, profoundly ambiguous. On the one hand, it seems a dramatic restriction of state sovereignty (conceived as freedom of action); on the other hand, its existence seems completely dependent on decisions by states that define, limit and enable the realization of those rights 'in practice'. The argument incessantly repeated in international jurisprudence that state obligations are not limitations of sovereignty but emanations thereof is the best evidence of the law's constant oscillation between holding the law as hierarchically superior to statehood and *vice versa*.

Critique often fails to accomplish a full reversal but leads into more nuanced and complex ways to integrate contradictory ideas into the legal system: new interpretations are proposed, new exceptions are added to old rules, presumptions are reversed, special regimes that deviate from general principles are set up, increasing recourse is had to soft law and equity. Social power may be shaken, and new questions about its character or legitimacy may arise, but no overall transformation takes place.

16 For a recent version, cf. R. Higgins, *Problems and Process. International Law and How we Use It* (1994), at 1-12.
17 Cf. Case 26/62, *Van Gend en Loos*, [1964] ECR 1; Case 6/64, *Costa v. Enel*, [1964] ECR 586.
18 Cf. the ruling by the German *Bundesverfassungsgericht* of 12 October 1993, 2 BvR 2134/92 and 2159/92, partly reprinted in English, e.g. in 31 *CMLRev* (1994) 251 especially the argument at 255-258.
19 Cf. C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (1985).

Let me provide some examples of this dynamism of reversal in international law by reference to the three modes elaborated above.

In the first place, it frequently appears that no behaviour can permanently be qualified as simply 'lawful' or 'unlawful'. In a recent opinion, the ICJ sought to examine whether the threat or use of nuclear weapons might be prohibited 'in all circumstances'.[20] Here, if anywhere, there seemed to exist a social need for a clear-cut determination of the status of a particular form of behaviour. The Court examined the question by reference to the rules concerning the right to life, the prohibition of genocide or of causing massive pollution and by reference to humanitarian law and the law of the use of force. In each legal field, however, it was unable to fix the normative status of the activity under scrutiny, demonstrating the law's reluctance to set up determinate hierarchies concerning abstract forms of behaviour, its constant reference to an appreciation of circumstances.

True, the use of nuclear weapons would infringe the right to life under Article 6 of the Covenant on Civil and Political Rights. However, the Article was never meant as absolute: all war involves the taking of lives without this raising the issue of a violation. The provision prohibits only the 'arbitrary' taking of lives and it could not be assumed *a priori* that the use of nuclear weapons motivated by military necessity would be any more arbitrary than other forms of accepted collateral damage.[21] Nor could it be assumed that such use would automatically involve genocide or massive pollution of the atmosphere; all this depends on the situation.[22]

For similar reasons, the Court was not in a position to declare that the use or threat of use of nuclear weapons would automatically violate humanitarian law or the prohibition against the use or threat of use of force in Article 2(4) of the UN Charter. Humanitarian law allowed the taking of lives. Its rules could be summarized in terms of a principle of proportionality. Whether the use of nuclear weapons was a proportionate military manoeuvre depended on the types of weapons and targets employed, whether it was a question of first use or use in retaliation as well as the consequences of possible non-use and other such contextual criteria on which experts disagreed. The point is not the technical one of whether nuclear weapons can or cannot be used in a 'proportionate' way, but that *if* they can so be used, then they cannot be held prohibited by principles of humanitarian law.[23]

Finally, the non-use of force principle contains, naturally, an exception concerning the inherent right of self-defence. Now whether or not the use of nuclear weapons might be allowed in self-defence depends on considerations quite similar to those involved in the assessment of its status under humanitarian law. Again,

20 Cf. in more detail my 'Faith, Identity and the Killing of the Innocent. International Lawyers and Nuclear Weapons', *Leiden Journal of International Law* (1997) 137.

21 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, at paras. 24-25.

22 *Id.*, at paras. 26, 27-33.

23 *Id.*, at paras. 90-95.

considerations of proportionality govern the law in a way that refers to an assessment of the individual case.[24]

In this way, the rule/exception scheme and the reason that links hard rules with soft equity (arbitrariness, proportionality) undermines determination of the hierarchical status of particular forms of behaviour. This is an incident of the general *dilemma of rules and standards* that infects the whole of the mode of control. 'Rules' govern in an on/off way. But precisely because they do, their application often seems unwarranted. Rules are *overdetermining* in that they will cover some cases that were not intended to be covered by them. To use equidistance in the delimitation of maritime boundaries, for instance, is easy and always possible. Nonetheless, its application would also cover cases that nobody in fact would want to cover: the special curvature of the North Sea in front of the German coastline. Hence, it needs to be accompanied by soft standards – equitable principles or special circumstances – that allow deviation from it. Opening the door to equity, however, devours the rule altogether: if equity should be the 'result' of the operation, the rule is reduced to a presumption of equity and we lose any reason to apply it independently of an examination of whether or not its application realizes 'equity' in the circumstances.

On the other hand, rules are *underdetermining* in that they fail to cover some cases that we would want to cover. For instance, Article 39 of the UN Charter, which provides the criteria for collective action, makes no mention of grave but purely internal humanitarian disasters. Yet, it would seem inconceivable that the UN would not react to massive humanitarian problems even if they did not involve formal armies marching across boundaries. Therefore, the criterion of 'threat to international peace and security' is interpreted so as include such problems.[25] But here as well, there is no end to such nuancing: terrorism, too, may be a threat to international peace and security, and so can economic and ecological crises. In the end, nothing is left of the rule: reason is all.[26]

Rules fail to respond to the complexity of the social world. Hence, they are accompanied by exceptions, interpretive principles or broad standards that enable problems of overdetermination and underdetermination to be overcome. However, there are no rules on when to apply the rule and when the exception, the interpretive principle or the standard. As we have seen, not only in maritime delimitation but in, say, the law of state succession,[27] international liability,[28] non-navigational uses of

24 *Id.*, at paras. 41-50, 96-97.
25 Cf., e.g., SC Res. 794 (1992); SC Res. 929 (1994); SC Res. 940 (1994).
26 Cf. Statement by the President of the Security Council, S/23500.
27 Cf. Oeter, 'State Succession and the Struggle over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States', *GYIL* (1995) 73.
28 For the status of the work on Draft Articles on International Liability for Injurious Consequences of Acts Not Prohibited by International Law, cf. *Report of the ILC on the Work of its 48th Session* (1996), UN Doc. A/51/10, at 178-182.

international watercourses,[29] extraterritorial jurisdiction[30] and a number of other fields, the principle of equity (or proportionality), once introduced as a supplement to the rules, has tended to devour them.[31]

The dilemma of rules and standards undermines the ability of the mode of control to establish behavioural hierarchies by reference to the 'lawful'/'illegal' scheme. It pits 'law' against 'justice' in a fashion that reverses the hierarchy between the two. We can no longer assume that we find social justice by applying the law. We now seem able to find the law only by applying justice. This, however, seems fatal to the legal project altogether. We have recourse to law in the control of social behaviour precisely to avoid reference to principles of justice that we assume to be subjective, undemonstrable and open to misuse by those in power. If now we are required to know justice before we can know the law, then we must either give up the ideal of control or assume that justice is not so subjective and undemonstrable after all. Though more appealing, the latter alternative, however, deprives the point in knowing the law: we are already able to set up the perfect society!

Now the rules/standards dilemma seems particularly problematic in the international world where rules enjoy no hierarchical priority to the reasons for which they were enacted. In domestic societies, rules are applied automatically and even if their application sometimes creates an unjust result this creates no threat to the legal system because of a general belief in its overall justice or because of fear of sanction that is able to check general non-obedience. None of these reasons is present in the international scene. There is no belief in the *a priori* justice of the system, there are few generalized forms of behaviour, and there is no reason to fear the inconvenience of a sanction. With good reason, states assume that deviation will be normally accepted by their peers once they are informed of the compelling justifications that led to it. In such case, deviation simply enacts a reasonable exception to the rule.

The problems encountered within the mode of control in setting up 'lawful'/'illegal' hierarchies would not be too serious if the mode of exegesis provided methods of interpretation and systematization that enabled the fixing of the normative sense of particular rules or forms of behaviour. However, exegesis is equally unable to construct irreversible hierarchies. Interpretation refers to contested and conflicting principles, none of which can be held superior to the others in a general way. There are no rules on when to apply a literal and when a dynamic interpretation, when to have recourse to party will and when to the instrument's object and purpose. Take a simple case of treaty interpretation. States A and B dispute over whether the norm (N) as contained in a bilateral treaty should be held binding. A argues it should, B that it should not. They bring the case to an arbitrator.

29 Draft Articles on the Law of Non-Navigational Uses of International Watercourses, UN Doc. A/CN.4/L. 492 (17 June 1994), esp. Articles 5-7.

30 Cf., e.g., Lowe, 'Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution', 34 *ICLQ* (1985) 724.

31 Cf. my 'The Politics of International Law', 1 *EJIL* (1990) 27.

Their argument is put forward in two steps during which both parties assume contradictory hierarchies of interpretative principles that, however, turn out to be the same. The arbitrator can resolve the dispute only by leaving the ground of legal interpretation altogether.[32]

Level 1: A argues that B is bound because N is what was agreed. States are bound by their will as expressed in the agreement. B retorts that it is not bound as circumstances have changed and it would be unjust to hold it bound by an anachronistic provision: states are bound inasmuch as that is just.

The arbitrator is now put in a position where she should decide whether treaties bind inasmuch as and to the extent that they encapsulate party will or the particular justice of the case. These are the two theories of the binding force treaties: the theory of intent and the theory of justice (or good faith, estoppel, *Vertrauensschutz*, etc.). Surely it is hard to believe that the arbitrator would be able to solve this exegetic controversy. But the point is that even if she could, she would be unable to decide the case because both parties are compelled by the logic of legal argument to rely on both theories.

Level 2: The parties know that if *that* were all they argued, each would have a weak case: the theories of will and justice provide devastating criticisms of each other. So each moves to occupy the ground that the other had initially taken. A argues that it is not the justice of changed circumstances but the justice of *pacta sunt servanda* that should be applied. B too shifts position and answers A's initial point that N – as interpreted by A – was not at all what B had intended when entering the agreement (or that B's will contained an implied reference to non-application in changed circumstances).

Both parties argue now in terms of will and in terms of justice so that even if the arbitrator had (miraculously) been able to establish a hierarchy between the two theories of treaty law, she would still not be able to solve the case as *both parties occupy both positions*. What she seems really requested to do is either to decide:

(i) which of the principles of (non-consensual) justice invoked (*pacta sunt servanda / rebus sic stantibus*) is the better one; or
(ii) what the parties had *really* intended.

However, neither question can be answered within the law. To assume that the judge *knows* justice and is called upon to apply her knowledge of it is to undermine the law's melancholy justification in our inability to know justice in a reliable way. But neither can it really be assumed that the arbitrator can *know* the real intent of the parties and impose it over a deviating report by the parties themselves of what their intent has been. To believe otherwise would be to assume that we do not really need contracts or, indeed, electoral mechanisms to exercise social control because authorities know what people will independently of what they say they will – a

32 Cf. further my *From Apology to Utopia. The Structure of International Legal Argument* (1989), at 291-302.

Leninist recipe for tyranny – while being compelled to rely on the parties' own reports would do away with the law's binding force.

So it is impossible to maintain a consistent hierarchy between consent and justice in treaty law. The same is true of the various hierarchies of norms developed by exegesis for the solution of normative conflicts. For example, time is a notoriously unreliable indicator of a rule's pedigree. It is often assumed that the older the norm, the more valuable it is, or that the further in history a behaviour may be traced, the more deference should be paid to it. Hence the ICJ's decision to overrule present UN policy by reference to original meaning of the League mandates in the 1966 *South West Africa* case. However, the rule's modernity and the law's contextual responsiveness are no worse arguments employed in the Court's 1971 *Namibia* opinion, effectively reversing the Court's previous view. The point is not that the law should make up its mind whether to prefer what is old or what is new but that it is impossible to set up such a general hierarchy. The law is for stability but equally for change, and which of its contradictory aspects is stressed cannot be determined from within the law itself.

The relationship between general principles and specific rules works in a similar way. Exegesis often assumes that legal principles dwell at a level superior to (mere) individual rules. They express important values, whereas rules merely regulate matters of coordinative convenience. Therefore, rules should yield to principles. However, rules are by definition clearer and more certain in application than general principles. Therefore, it is equally often claimed that *lex specialis derogat lex generali*. But neither can this be upheld in a determinate way. Surely there must be some imperative or 'fundamental' principles that cannot be overridden by an individual rule, however specific and enacted in a formally correct fashion – the rule about killing all blue-eyed three-year-olds, for instance. Surely if the principle of self-determination is to have the *jus cogens* character attributed to it by the ICJ, for instance, it must override Article 34 of the 1978 Vienna Convention on the Succession of States in the Matter of Treaties, according to which a new state inherits all its predecessor's obligations.

An analogous problem concerns the relationship between parts and wholes, transformed often into the opposition between universal and local. In the classical liberal image of a world community without friction ('harmony of interests') universality is assumed to prevail over local values. This romantic imageis always countered by reference to the apparently tragic reality of incompatible goods: that a general priority of the universal over the local is totalitarian. The relationship between local and general custom, or the validity of a special agreement to deviate from a treaty are incidents of the general problem. Which local habits should be accepted and even endorsed as exotic exceptions to the grey monotony of what people generally do or think? And which should be condemned as unacceptable deviations from the universal norm? Again there is no given hierarchy between universal and local but which is to prevail is always relative to a measure outside the dichotomy, a measure whose validity is equally relative to what one isolates as the significant elements of the individual instance.

Exegesis is constantly faced with the problem of the law's self-reference, which involves the phenomenon of 'tangled hierarchies', i.e. 'the phenomenon whereby the highest level in a hierarchy "loops into" the lowest one' so that '[i]n the last analysis, the final arbiter of divine law is the triviality of procedural norms'.[33] In other words, however 'fundamental' we might believe a norm is, we can know it only through the procedure that enables us to recognize it as such.

Because such self-referentiality and the resulting indeterminacy seem threatening, exegesis seeks closure by looking outside itself into the mode of philosophy. Only philosophy seems able to tell whether a norm should be preferred because it encapsulates justice or it encapsulates consent; because it is old or new; or because it is general or specific. Yet philosophy proves just as disappointing as control and exegesis, and just as unable to set up definitive hierarchies between contradictory ideas about the nature or the limits of law.

The classic attempt to fix a priority between views that derive the law from positive human enactments and those that link it to normative ideas of justice flounders famously at the dilemma that both actually need each other in order to look acceptable. A theory that bases the law on what somebody 'willed' assumes the correctness of a moral axiom that says 'will' is to have such an effect. A realism according to which 'facts' create law relies on an extreme naturalism that, as Lauterpacht once wrote, fails to account for the process whereby facts are constructed in the act of cognition by the human mind.[34]

On the other hand, theories that hope to ground law on justice, equity, social necessity, development trends of history, and so forth are always vulnerable to the charges of being ideological, unable to demonstrate their correctness in a non-circular fashion and framed in such general language that it is impossible to draw conclusions from them. Conceptions that view law in terms of ideas (rules, principles, justice) always seem too remote from reality, while conceptions of law as process, fact, behaviour tend to legitimize whatever actually takes place. Whichever track one chooses, the further one advances it, the more vulnerable it becomes to criticism from its opposite; the more the lower levels of hierarchy seem needed to support the higher ones – until the highest ones become completely dependent on the lowest.

All this explains law's reluctant move into other fields where one thinks of law's problems as already resolved: international relations, sociology, psychology, literature. Yet only relative ignorance can sustain faith in the exotic. The deeper one probes in them, the more aware one becomes of the degree to which traditional hierarchies within those disciplines are just as fragile, just as reversible as one's own, the more one may feel inclined to agree with Marx, as re-interpreted by Marshall Berman, that 'all that is solid melts into air'.[35]

33 G. Teubner, *Law as an Autopoietic System* (1993), at 3.
34 H. Lauterpacht, *Recognition in International Law* (1947), at 41-51.
35 Cf. M. Berman, *All That is Solid Melts into Air. The Experience of Modernity* (1982).

III

There is no escape from circularity and fragmentation, the ambivalence that the motto of this article claimed as the most worrying of modernity's concerns. Law continues to set up hierarchies and provide the resources for reversing them. This does not lead into an arbitrary 'anything goes' legal practice or jurisprudence, however. The hermeneutics of texts, and of the practice of judging, provides sophisticated matrices for understanding interpretation as a practice of communal or intertextual exchange; never fully determined by the context (or the text) but never completely free from it either. Yet I doubt the ability of hermeneutics to provide more than a superficially consoling and potentially conservative external perspective on law. A dynamic legal practice and doctrine would not only be concerned over the difficulties in attaining a 'fusion of horizons' that would allow a non-threatening reproduction of legislative hierarchies in other contexts. It would focus directly on the mechanisms of producing and reversing hierarchies in the fields of legal discourse – control, exegesis and philosophy – and articulate the way particular argumentative strategies are linked with political assumptions and professional roles. To what extent do the practices of multilateral diplomacy, for instance, rely on abstract ideas about fundamental values and essentializing histories that are produced by and rely upon these practices themselves? What is the relationship between arguments about legal sources and the material and documents available to people endowed with the professional assignment of participating in such debates? How do 'high' and 'low' depend on and reproduce each other: what aspects of the normative world are being left unarticulated so that such hierarchical zig-zag can stabilize itself in the form of particular professional and political practices?

A critical approach would put to question the identification of the units of discourse (*topoi*) as well as the levels being compared together with the principle of comparison, not of course to do away with reversibility – that would indeed be impossible – but so as to reveal the complex strategies whereby social practices 'take on' an apparently natural and stable outlook. More specifically, it would engage in what could be called the *strategy of splitting topoi and displacing hierarchies*. Let me finish by briefly and schematically looking at examples of this strategy.

1. It has been notoriously difficult to pin down criteria for 'statehood' in international law. The relevant principle of identification may have been received from the existence of a common government, people, constitutional order, history, ideology, even enemy (colonialism).[36] By breaking statehood down into the principles upon which it is constructed, a better grasp can be had of normative problems that otherwise seem to implicate a uniform concept of statehood – for

36 Cf. A. James, *Sovereign Statehood* (1986).

instance of the dilemma of why it is that statehood seems both a protective shield over and a mortal threat to human communities.[37]

The fate of the international obligations in the former USSR and Yugoslavia has been dealt with by assuming a distinction between the continuation of statehood and the transfer of sovereignty. In the former case, it is argued, there is no succession and obligations remain; in the latter case, there is a break and obligations continue only to the extent provided by the law of state succession. This approach fails, however, to explain the variances of state practice: continuity of statehood (by the Russian Federation or the Baltic states) has been accompanied by much more change at the level of obligations than the distinction would allow, while undisputed transfers of sovereignty and the emergence of new states may have been accompanied by practically universal continuity at the level of obligations (for instance, the creation of the Czech and Slovak Republics).[38]

The simple dichotomy of continuity/succession is unable to deal with the problems of political transformation involved. Much depends on what kinds of obligations (how important? owed to whom?) one deals with and whether the justice of changed circumstances or the justice of stable expectations should be deferred to.[39] As a result, an entity might be held the 'same' in some respects (for instance, in respect of the continued validity of state contracts and foreign debts) and 'different' in other respects (for instance, in regard to political or military alliances or membership in international organizations). In this way, statehood appears not as an abstract, uniform status, but as a generalization from conclusions regarding particular normative relationships.[40]

2. The lawfulness of self-defence could be looked at in the same way. The attempt to fix the relationship between the prohibition of the use of force and the 'inherent' right of self-defence has always been vulnerable to the problems of under- and overdetermination. But this need not be the end of the matter. A state's 'self' – like its statehood – consists of projections about its 'idea', institutions and physical base.[41] Depending on whatever we see as the principle underlying the state's identity

37 Cf., e.g., Knop, 'Re/Statements: Feminism and State Sovereignty in International Law', 3 *Transnational Law & Contemporary Problems* (1993) 294.

38 Out of a wealth of recent literature, cf., e.g., Müllerson, 'Law and Politics in Succession of States: International Law on Succession of States', in B. Stern (ed.), *Dissolution, continuation et succession en Europe de l'est* (1992), 18; and Koskenniemi and Lehto, 'La succesion d'états en l'ex URSS, en ce qui concerne particulièrement les relations avec la Finlande', XXXVIII *AFDI* (1992) 183 (on the position as 'continuators' of the Russian Federation and the Baltic states).

39 Hence the tendency to distinguish the 'automatic succession' to human rights treaties from the general principles of treaty succession. Cf., e.g., Report of the UN Human Rights Committee, UN Doc. A/49/40 (1994), paras. 48 and 49; UN Doc. A/51/40 (1996) Annex I.E. ('the people within the territory of a State – which constituted part of a former State party to the Covenant – continue to be entitled to the guarantees enunciated in the Covenant').

40 As pointed out by a professional diplomat at the Austrian Foreign Ministry, '... identity is not a simple fact that can be assessed objectively, but, rather, the grant of a special status by the other members of the international community', Tichy, 'Two Recent Cases of State Succession – The Austrian Perspective', 44 *AJPIL* (1992) 120.

41 Cf. B. Buzan, *People, States and Fear* (2nd ed., 1991), at 57-107.

determines for us whether we see permitted self-defence or prohibited aggression. Breaking down the dichotomy of use of force/self-defence into the principles that construct national 'selfhood', it is possible to approach critically the justifications that states give about the violence in which they engage.

3. Another set of legal hierarchies affected by such analysis concerns the competence of international organizations. As is well known, the Maastricht Treaty establishes a Common Foreign and Security Policy (CFSP) for the European Union, which, however, is situated within intergovernmental competences. Accordingly, the European Court of Justice is deprived from jurisdiction to deal with disputes in this field.[42] The provisions appear to reaffirm the hierarchical superiority of the core of sovereignty over integration. The application of this hierarchy is, however, completely dependent on a prior understanding of what 'foreign and security policy' means and what its limits are. In a recent case, the European Court held that whether or not the economic or financial measures taken by a Member State are motivated by foreign or security policy concerns, they need to be in accordance with the common commercial policy under Article 113.[43] The Court interpreted foreign and security policy narrowly, basing its own jurisdiction on the nature of the measures taken and not on their alleged foreign policy motivation. By this means, the Court was able to displace the hierarchy set up by the Maastricht Treaty and to redefine Member State sovereignty (by holding that foreign or security policy measures needed to yield to the rules of common commercial policy) *vis-à-vis* Union competence so as to subsume the former under the latter in the controversial issue of economic boycotts. Many kinds of hierarchies are implicit in this *problematique*; ideas about the Union's powers being derived from member sovereignty; about what is crucial and what marginal for such sovereignty; about the character of the Union, and so on. A doctrinal approach that relies on Member State precedence over Union competence fails to reach the argumentative mechanism that may switch the terms of the debate from 'foreign policy' to 'commercial policy' so as to reverse that precedence.

4. Traditional law of the sea doctrine has described its central *problematique* in terms of a continued controversy between universalism and the right of national appropriation. The 1982 UN Convention on the Law of the Sea has been hailed as a milestone in establishing the superiority of the former over the latter. However, the developments that led to the *de facto* revision of the seabed provisions of the 1982 Convention by an 'Implementation Agreement' in July 1994 by reference to market principles took place without a revision of – indeed expressly affirming – the key universalist principle of the Convention, namely the common heritage of mankind.[44]

42 Maastricht Treaty, Article L.

43 Case C-124/95, *Centro-Com*, [1997] ECR-1 124 ('...even where measures such as those in issue in the main proceedings have been adopted in the exercise of national competence in matters of foreign and security policy, they must respect the Community rules under the common commercial policy').

44 Cf. *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, 28 July 1994, Second Preambular Paragraph ('*Reaffirming* that the seabed and ocean floor and subsoil thereof ... as well as the resources of the Area, are the common heritage of mankind'), XXXIII *ILM* (1994) 1313.

In this way, the North/South controversy that dominated the drafting of the Convention and of the Implementation Agreement turned out not to be a controversy about universality versus sovereignty after all (as it was always described by the protagonists of both sides, accusing their opponents of attempts at national appropriation), but about *different interpretations of universality*. The South advocated universal powers to the International Seabed Authority; the North supported universal norms enshrining market principles. A dynamic legal analysis would replace the traditional framework of universalism/nationalism by the markets/regulation dichotomy so as to attain a better interpretative grasp of the political values that informed the resulting seabed regime.[45]

5. Finally, the debate over the universality of human rights versus cultural relativism tends to be associated with the North/South opposition in a way that undermines the degree to which 'universal human rights' are subject to conflicting interpretations and differing views in the North as well as in the South. Official Western values are thus raised to the level of 'universality', while non-Western values are relegated to the realm of exotic cultures. Behind the attempt to set up a hierarchy between 'human rights' and 'cultural values' lies an inability to conceive of human rights in 'cultural' terms and cultural practices as regimes of human rights. The general terms of the debate portray both 'North' and 'South' in a homogeneous light, undermining the alliances that persist across that divide by reference to competing principles of differentiation ('rich'/'poor'; or 'men'/'women') and entrenching the *de facto* hierarchy of the North over the South.[46]

* * *

The strategy of splitting *topoi* and displacing hierarchies focuses directly on the social construction of selfhood and otherness, principles of communal identification and separateness, within the different modes of international law. It is an analytic device for examining the functioning of such mechanisms, revealing hidden priorities and principles of political value. But while the strategy sharpens the mode of control, increases the scientific rigour of exegesis and expands the range of philosophy, it does not by itself lead to better decisions. In fact, it accepts that the making of legal decisions is not, strictly speaking, a rule-governed activity at all. But it does not consider this a great tragedy. Were the law merely an application of past hierarchies to present events it would undermine the individuality of cases and impose homogeneity over difference, enshrining a bureaucratic culture of blind obedience. That there is no closure to the reversal of hierarchies is a liberating experience; and just possibly the only way in which law can be an art of the just.[47]

45 In more detail, cf. Koskenniemi and Lehto, 'The Privilege of Universality. International Law, Economic Ideology and Seabed Resources', 65 *Nordic Journal of International Law* (1996) 533, esp. 552-3.

46 On this theme, cf., e.g., Engle, 'Female Subjects of Public International Law. Human Rights and the Exotic Other Female', in D. Danielsen and K. Engle, *After Identity: A Reader in Law and Culture* (1995), 210.

47 As suggested famously by Derrida in 'Force of Law: The "Mystical Foundation of Authority"', in D. Carlson, D. Cornell and M. Rosenfeld (eds.), *Deconstruction and the Possibility of Justice* (1992), at 27-29.