

## Complementarity of International Treaty Law, Customary Law, and Non-Contractual Law-Making

*Comment by Alain Pellet*

Professor D'Amato starts his stimulating paper by quoting the late Robert Nozick: "Everything appears complex until a good theory of it has been developed." I suggest that, more often than not, the reverse is true – and theory might obscure things, which, standing by themselves, are not that complex... Or, on the contrary, theory might over-simplify things which are too evolutionary, changing, diversified to be locked in any satisfactory theory. As the French poet Jean Cocteau put it: "*Ces mystères nous dépassent, feignons d'en être les organisateurs*" ("This mystery is beyond me; let me feign organizing it"). I'm afraid that theoreticians find themselves in Cocteau's position when they address the rather large topic we have been assigned.

This being said, I will not venture in discussing Professor D'Amato's presentation of "International Law as an Autopoietic System": this would be beyond my time and is, in any case, beyond my capacity. I'll then jump immediately to the end of his paper where he sketches out a discussion on the "robustness" of the system and on the respective roles of custom, general principles and *jus cogens*.

But I wish to make first a more general point. I have some hesitation in accepting Professor D'Amato's "personification" of the International Law System – "ILS" as he calls it. Indeed, rules and principles, whether from the first, second or third levels, can be deduced from "the system". But exactly as the Nuremberg Tribunal found that, at the end of

the day, human beings, not States, do commit crimes,<sup>1</sup> similarly, legal rules and principles may only be enunciated and applied by men. The system can only be a conceptual framework, an “aid to rules’ finding”.

For example, I have doubts that “it is the ILS, and not the states, that gives rise to norms of customary international law”.<sup>2</sup> Professor D’Amato accepts that these ILS created norms are “based on the interactions of states in the real world.” But this is not enough; as is well known, these interactions must either result, or have their origin (or source?), in the conviction that states are conforming to an obligation – this is the famous *opinio juris* element, which, again can only stem from human (subjective) analysis, with reference to a (subjective again) conception of the international law system. This only means that, from my point of view, the ILS does not create legal rules, it just permits to determine whether a rule has acquired a legal status; and it does not do so in an objective, clear-cut way.

In fact “the system” sometimes tells different stories to different persons or to the same persons at a different time. Just to take an example: in a previous version of his written paper Professor D’Amato had asserted that “the detention without trial of alleged terrorists at the Guantanamo base by the United States would probably not be coded by the ILS at the present time as illegal.” I do not know what “the ILS” does – but I certainly would (and do) “code” this detention as clearly illegal; this view is shared not only by many lawyers, but by States as well. And it must be admitted that, if the “autopoietic” approach were to lead to such controversial views, there must be something wrong with it... The very fact that, in the final version of his article, Professor D’Amato has omitted this example shows that “the ILS”, by itself, tells nothing of the kind: it must necessarily be *interpreted* within a specific context at a given time.

In other cases, the “system” is mute. Just recall in this respect the 1996 ICJ Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*. At paragraph 97, the Court throws in the sponge: “in view of the present state of international law viewed as a whole ... the Court is

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<sup>1</sup> “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced” – Text on the Avalon Project’s website (Yale Law School) (<http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm>).

<sup>2</sup> See above in the present book, at p. 390.

led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.”<sup>3</sup>

This Advisory Opinion is an interesting one for our purpose which is, if I may recall, to discuss “The complementarity of international treaty law, customary law and non-contractual law-making”.

In that precise case, the Court had examined with great care successively the relevant treaty-law, the customary rules and principles and various non-conventional instruments including unilateral declarations by states and a variety of resolutions of the General Assembly. This careful examination came nevertheless to a deadlock – which leads me to a first proposition: in certain cases, the combination of the various sources of international law does not provide a solution of international problems. Indeed, as Christian Tomuschat has recalled,<sup>4</sup> in many instances, international customary law fills in the gaps left by treaties, but, as the 1996 Opinion shows, this will not always be the case.

Now, as Judge Vereshchetin put it in his separate opinion joined to the 1996 Advisory Opinion, the Court’s position would probably have been untenable had the case been a litigation between States.<sup>5</sup> It is therefore interesting to wonder what legal tools the Court could have used in such a circumstance. The easy way would be to have recourse to a permissive or prohibitive general principle: all that is not forbidden is permitted (the *Lotus* principle to put it abruptly) or, on the contrary, States may only act if and when they are entitled to act. The problem is that, in spite of the Permanent Court’s *dictum*,<sup>6</sup> neither one nor the other principle is entirely acceptable in contemporary international law (even if the second is probably less debatable than the first). The only solution then is to discuss the facts and to come to a concrete conclusion without generalizing rules or principles – an exercise which is illustrated by the Court’s rather legally surprising Judgment of 6 November 2003 in the *Oil Platforms* case between Iran and the United States. It then appears that law (whether contractual or customary) may be absorbed or hidden by the facts.

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<sup>3</sup> *ICJ Reports* 1996, p. 263.

<sup>4</sup> Above, at p. 403.

<sup>5</sup> *ICJ Reports* 1996, p. 279.

<sup>6</sup> PCIJ, Judgment of 7 September 1927, A, No. 10, p. 19.

Let me now come to the interaction between the different law-making processes which, after all, is our supposed topic. As aptly explained by Professor Rüdiger Wolfrum,<sup>7</sup> there are cases where customary law or other non-conventional law-making processes are seen as better answers to the needs of the international society than treaties. However, I would not put all those non-treaty law-making processes at the same level.

Indeed, custom is usually seen as having the advantages of flexibility and adaptability. But, as Christian Tomuschat has recalled,<sup>8</sup> it also has the inconveniences of uncertainty and, paradoxically, of rigidity. If the customary process is taken seriously, it implies time, repetition, spatiality – all conditions which are hardly compatible with efficient and rapid answers to new needs. In this respect, custom can hardly be seen as an efficient alternative to treaties: after all, it is much easier, efficient and rapid to amend or modify a treaty than to invent a new custom – except if one accepts the idea of “instant custom”, which I don’t.

I don’t – but I recognize that the contemporary international system has forged other rather efficient substitutes which offer possibilities to bypass the constraints of the express will of the States imposed by treaty-making without falling into the strict requirements of the customary process. Leaving aside well known “soft instruments” like gentlemen’s agreements, non-binding resolutions adopted by international organisations (recommendations) including “Declarations”, or “Codes of conduct or of ethics”, I will only mention two examples.

Without surprise, the first example which comes to my mind is the ILC codification/progressive development process (both aspects being indissociable). When topics are suitable (and all are not), there is no doubt that an ILC draft may have a real influence on States’ and other international actors’ behaviour. It is of course true when the draft is transformed into a largely ratified Convention – who would deny that the 1961 Convention on Diplomatic Relations, or the 1969 Convention on the Law of Treaties have definitely shaped the applicable law in their fields? Whether or not they originally codified (*stricto sensu*) the respective rules or “progressively developed” them, they, for the most part if not entirely, *are* the law and, if they do not necessarily express customary rules their provisions certainly are strong presumptions in

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<sup>7</sup> Above, at p. 1 et seq.

<sup>8</sup> Above, at p. 403 et seq.

this respect and it would be imprudent for a State or a Legal Adviser to depart from their application without strong reflection.

But this is not the end of the question. *First*, even when an ILC draft has become a convention, the preparatory work remains a reference for its interpretation: who, among us, as an academic, when writing an article, or as a practitioner, when preparing a pleading or a legal opinion, has not referred to the ILC commentaries or to the Special Rapporteurs' reports – maybe even to the ILC debates?

*Second*, there is not always a need for a convention. In several cases – and very strikingly in the *Gabcikovo-Nagymaros* case – the ICJ has heavily leant on the ILC draft on State responsibility,<sup>9</sup> even before it has been finalized; and nobody could deny that Ago's views have deeply modified the general approach of the very concept of States responsibility. Moreover, as Professor Wolfrum has recalled,<sup>10</sup> the ILC has not urged the General Assembly to transform its second reading Draft into a Convention.<sup>11</sup> I was among the (in fact rare) members who, like the Special Rapporteur James Crawford,<sup>12</sup> were not in favour of this further step: I am convinced that a handful of powerful States would empty this carefully balanced text of its rare but not insignificant "progressive" provisions. These States have less negative influence on the Articles as such – all the more so that the General Assembly has annexed them to Resolution 56/83 of 12 December 2002. To be quite frank, I prefer to let time decide rather than the United States, France and the U.K. (or, for that matter, Israel)... In the same spirit, the ILC has decided from the very beginning that the Articles on Reservations to Treaties would not be conceived as a first step to treaty-law, but that a "Guide to Practice" in this matter would be a self-sufficient document.<sup>13</sup>

Second example: the ICJ itself. Of course, officially, the function of the World Court is "to decide in accordance with international law such

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<sup>9</sup> Judgment of 25 September 1997, *ICJ Reports* 1997; see e.g. pp. 38-39, para. 47; pp. 39-41, paras. 50-53; p. 46, para. 58, pp. 55-56, para. 83.

<sup>10</sup> Above, at p. 4.

<sup>11</sup> See ILC Report to the General Assembly, 2001, GAOR, A/56/10, para. 72-73.

<sup>12</sup> See *James Crawford, The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge UP 2002, pp. 58-60.

<sup>13</sup> See *ILC Yearbook*, 1995, vol. II, Part 2, p. 108.

disputes as are submitted to it”<sup>14</sup> or to advise the UN and other international organisations on legal questions. But this is only the visible part of the iceberg. From my point of view, the invisible part is at least as important. It consists of the Court’s law-making responsibility.

Indeed, this hidden mission can be masked by saying that the ICJ applies the rules and does not create them. But this is pure fiction: the Court did not apply the rules applicable to reservations in its (rightly) celebrated Advisory Opinion of 1951; it clearly invented new rules – and for good reasons: the former ones were in total discrepancy with the needs of the international society in the post-war context.<sup>15</sup> Similarly, it is not serious to claim that in its 1969 Judgment on the *North Sea Continental Shelf*, the Court purely and simply applied the then existing rules; it clearly posed new (and, in this precise case very debatable) principles of delimitation<sup>16</sup> which have resulted in what I consider most unfortunate rules – but hard law nevertheless, both customary and conventional through the Law of the Sea Convention. I add in passing that these last years the Court performance in this respect unfortunately is rather disappointing in that the motivation of its Judgments tends to be strictly limited to the minimum necessary for the solution of the dispute without much elaboration on the scope of the rules applied.

We arrive then at a paradox: in an international society where, as Professor D’Amato has rightly said, “[t]he vast majority of international controversies do not involve courtroom litigation”,<sup>17</sup> the most efficient, the most respected, and the most influential “legislator” is ... the international Judge and, first of all, the World Court. There is nothing wrong with this phenomenon: in a highly decentralized society, the ICJ might not be in a position to render justice abundantly; but, through the influence of its rare Judgments and Advisory Opinions, it is probably in the unique position to adapt international law to the evolving needs of the international community by using and combining, prudently, the great many variety of legal tools now existing together with a certain amount of common sense and political adroitness – as the

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<sup>14</sup> Statute of the ICJ, Article 38(1).

<sup>15</sup> See e.g., A. Pellet, “La C.I.J. et les réserves aux traités – Remarques cursives sur une révolution jurisprudentielle”, *Liber Amicorum Judge Shigeru Oda*, Kluwer, La Haye 2002, pp. 481-514.

<sup>16</sup> Judgment of 20 February 1969, *ICJ Reports* 1969, p. 4, see e.g.: p. 47, para. 85 and p. 53, para. 101.C.

<sup>17</sup> Above, at p. 359.

Court (as a body) has shown again in its last Judgment in the *Oil Platforms* case.<sup>18</sup>

Before ending, let me say a very few words on our recurrent debate since yesterday morning: soft law. I think that, in his yesterday's presentation Mr. Polakiewicz has very aptly shown that soft law – non-binding law if you prefer – has a function in the international society.<sup>19</sup> It complements not only existing conventions, but, more generally the existing “hard law”; it constitutes a precious experimentation ground for future “hard” legal rules (or candidates to that statute); it is a practical, flexible and easily adaptable test for hard law. Indeed, the breach of these “soft obligations” does not entail the responsibility of the wrongdoer in the classical sense: no possibility of counter-measures ensues from it and it opens no right to reparation within the meaning of Part II of the ILC Articles for example; but it probably gives rise to some kind of “soft responsibility”.

This being said, it is not, and must not be, an all purposes concept. Soft law can, in certain circumstances, be a forerunner for hard rules, but, as Professor von Bogdandy rightly explained,<sup>20</sup> there are cases where it is a red light for the customary process. And, even more important, soft law has no imperialistic vocation: law (including soft law), has no vocation to embrace the whole social life, including at the international level. There is no doubt that there are good old legal rules, strictly binding, those rules that classical international lawyers favour; but on the other side of the spectrum, there are norms of behaviour which clearly do not belong to law. This is why I have difficulties with Professor Michael Reisman's “media-law”: it comes before or besides the law, but I would hesitate to accept that it passes the test of “real law”, even a flexible test. But, in between there is the grey zone, a gradation of rules, “more or less binding”, but “legal” in that they produce an impact (or, better, diversified impacts, in the plural) on the law – here is the soft law; call it law *de facto* or butterfly or honeymoon: it exists as a legal phenomenon. Whether traditional lawyers like it or not: there is no threshold. We must accept law “in her infinite variety”<sup>21</sup>....

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<sup>18</sup> Judgment of 6 November 2003.

<sup>19</sup> See above, pp. 247- 254.

<sup>20</sup> Above, at p. 172.

<sup>21</sup> *R.R. Baxter*, International Law in ‘Her Infinite Variety’, I.C.L.Q. 1980, p. 549-566.

Rüdiger Wolfrum · Volker Röben (eds.)

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