

THE NORMATIVE DILEMMA: WILL AND CONSENT IN INTERNATIONAL LAW-MAKING

ALAIN PELLET*

The rather obscure title of this paper relates to one of the greatest debates in international law jurisprudence, which has recently been raised again by the French Professor, Prosper Weil, in a noteworthy but contentious article published both in the *Revue générale de droit international public* in 1982 and the *American Journal of International Law* in 1983.¹

Put in basic terms, the problem is as follows: is there a "threshold" of international law? That is, a point where "non-law" ends and where law begins?

In fact, the question is a very ancient one, as old as international law itself. Professor Weil, with his usual skilfulness, has but poured new wine in old bottles. He has re-phrased a very traditional question: what is international law? He has shifted, slightly, the traditional emphasis put on the very abstract question of the "basis" or the "foundation" of international law to a more concrete one, by addressing himself to the components of international law (international law norms), rather than international law in general.

This is the main question that this Conference seeks to answer.

We are so deeply impregnated with the voluntarist analysis of international law that our natural reflex is to say that where there is State will, there is international law: no will, no law.

In my view, the voluntarist explanation is a bad answer to a bad question. First, it assumes there is no threshold of law. Secondly, State will is certainly not the test of law, even if we confine ourselves to inter-State law, leaving aside other parts of international law.

Before proceeding any further, it is probably necessary to ask why the voluntarist explanation, weak as it is, has taken such a dominant position in international law jurisprudence.

As is well known, the so-called "founding fathers" of international law, including Grotius, did not share this view. On the contrary, they saw

* Professor at the University of Paris X-Nanterre and the Paris Institute of Political Studies

The author is indebted to Professor Philip Alston and his collaborators in the Centre for International and Public Law, who have kindly reviewed the English text of this paper. They have no responsibility for its content.

1 "Vers une normativité relative en droit international" (1982), RGDI 5-47; "Towards Relative Normativity in International Law?" (1983) AJIL, 413-442.

international law as a means to guide and limit the absolute power of European princes. For Grotius, "the final foundation of *jus gentium* lies in natural law and has its roots in *appetitus societatis*", as President Jimenez de Arechaga aptly demonstrated in a recent colloquium devoted to *International Law and the Grotian Heritage*.²

This view, of course, did not sit well with absolute monarchism and with the ancient European Nation States. To them, the so-called "positivist" jurisprudence, as popularized by Vattel and his followers seemed infinitely more attractive.

Moreover, during the nineteenth century, international law scholars themselves were greatly influenced by the scientific philosophy of Auguste Comte and others, and, trying to win the esteem which attached to pure scientists,³ they had a tendency to invent dogmas that were supposed to explain law in the same way as mathematical postulates or physical "laws" explain mathematics or physics.

In this state of mind, a certain number of supposed equations were set down:

- law = *jus positum*, that is the rules which are formed through certain formal channels; this is the "positivist" approach;
- *jus positum* = *jus voluntarium*, that is the rules which are based on the will of States, and only these rules; this is the "voluntarist" approach;
- *jus positum* = those rules which can be applied by the judges; it can be called the "judiciarist" approach.⁴

This, of course, is a very reductionist view and shows the incurable flaw of positivist voluntarism: the inability of its champions to take into account not only the social, but even the legal reality itself. As the International Court has recalled: "In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception."⁵ Moreover, it is simply not true that all rules of international law are of a State will origin,⁶ and one can certainly not share Weil's view that: "Absent voluntarism, international law would no longer be

2 Jimenez De Arechaga, "The Grotian Heritage and the Concept of a Just World Order" in *International Law and the Grotian Heritage : A Commemorative Colloquium* (1985), p 14; see also Virally, "A propos de la *lex Ferenda*" in *Mélanges offerts à Paul Reuter* (1981), p 519.

3 Cf. Atias, "Quelle positivite? Quelle notion de droit?", *Archives de philosophie du droit*, v.27, "Sources" du droit (1987), pp 211-212.

4 For a detailed and far-reaching analysis, see Ago, "Positive Law and International Law" (1957) *AJIL*, 691-733, and, "Science juridique et droit international", 90 *Recueil des cours* 851-957 (1956 - II).

5 *South West African case*, ICJ Rep 1966, p 46.

6 See below p 39.

performing its functions."⁷ This is a mere affirmation which focuses more on voluntarist expectations than on the functions of law itself.

In fact, as has been put rather strongly by Professor Falk, Weil's famous article is "a slightly hysterical effort to stop the world from changing" – and this can be said globally about the voluntarist analysis. And, still speaking of Weil's article, Professor Falk adds: "I see it as the work of a highly intelligent person who dislikes what is happening in the world and is translating into jurisprudence a kind of ideological nostalgia for an earlier period of certainty and consensus".⁸

Indeed, the objective of voluntarists – at least, their main achievement – is to lock law into an immutable *corpus*. They cut themselves off from values and social realities. Legal rules become aims in themselves and law is not seen as a social tool – which it is – but as a kind of self-sufficient religion whose Tables are its formal sources, as they are defined by Article 38 of the Statute of the International Court. "Such an approach distorts inquiry by conceiving of law-creation exclusively from the perspective of the rules applicable in this once centralized judicial institution."⁹

No matter what is the content of the rules, nor the *ratione legis*, the sole object worthy of study is the way norms are formed. And they are formed, exclusively, by the will of States or, more exactly, they have been created, once and for all, by the will of certain States. Moreover, they cannot be changed – except by the same methods. But voluntarists perfectly know that that is totally impossible in the present international context.

This being said, it must be put to the credit of voluntarist positivism that it has tried to differentiate international law from the other social sciences, thus showing rightly that law has specific characters.

There is no doubt that law is rooted in social reality but it represents an "assimilated", one could even say a "digested", social reality, digested through certain formal channels. Contrary to what voluntarists maintain, law is not *only* a form, it is *also* a form – a form plus a content,¹⁰ and a content into a certain form. Some contemporary doctrinal schools, such as Professor M S McDougal and his colleagues, in an excessive reaction against the traditional approach have neglected to recognise that law is also a form.

In their attempt to reconcile the science of law with reality, the Marxist neo-voluntarists have, in turn, condemned the classical formalism, declaring for example: "The concept of State will is a mere simplification and doesn't mean anything if the underlying concrete factors on which it rests are not fully taken

⁷ Note 1 above at 420.

⁸ Falk R, "To What Extent are International Law and International Lawyers Ideologically Neutral?" in Cassese A and Weiler JHH (eds), *Change and Stability in International Law-Making* (1989), p 137.

⁹ Falk R, *The Status of International Law in International Society* (1970), p 174.

¹⁰ Pinto, "Tendances de l'élaboration des normes écrites du droit international" in S.F.D.I., Colloque de Toulouse, *L'élaboration du droit international* (1975), p 14.

into consideration".¹¹ This is no doubt some progress towards both realism and morality – even if those authors would probably object to the inclusion of morality. But one wonders if they have not thrown the baby out with the bath water: for if there is no more formalism, what differentiates law from other social sciences disappears, and it then becomes more risky to decide what the "real will" of States is or can be.

In fact, other contemporary efforts aiming at reconciling law and social reality, but without assimilating the first to the second, seem much more convincing. This is the case with various sociological objectivist approaches or with Professor Schachter's idea of a "legal development".¹² This notion of "legal development", with which the present writer agrees, has been defined by Professor Douglas Johnston as "the entire" process "by which legal norms, standards, institutions and procedures are, more or less consciously, created, adapted, rationalized, improved and terminated by human agency".¹³ This kind of inquiry, if led with a very open mind and with a view not to make "science", but to take into account the whole social reality, is the only way to proceed.

The main attractions of this "legal development" approach are the following:

1. law does not exist *per se*; it is part of the social reality;
2. it has, nevertheless, specific characteristics, which differentiate law from other social sciences;
3. there is no clear-cut threshold between what is legal and what is not in the international society;
4. rules of law (or legal norms – both expressions are synonymous) are not fixed for ever; they evolve, and this is true for written as well as for customary norms. The time-factor is of predominant importance.¹⁴

The above statements lead us to the inescapable conclusion that, not only is State will not the basis of international law, but that it is a very misleading explanation of how international law actually works. On the other hand, consent, if the word is defined broadly enough and if it is not limited to *state* consent, can be illuminating and might even be a plausible test of law. In fact, contrary to the traditional voluntarist views, there is no strict correspondence, and possibly no

11 "La notion de volonté de l'état étant une simplification a de sens, comme concept, que si l'on tient compte des facteurs sur lesquels elle s'appuie", Chaumont, "Rapport sur l'institution fondamentale de l'accord entre états" in "Les méthodes d'analyse en droit international", *Annales de la Faculté de droit et des sciences économiques de Reims* (1974), p 250.

12 See eg, Schachter, "The Evolving International Law of Development" (1976), *Col. Journal Transnat. L.* 1–16; "International Law in Theory and Practice – General Course in Public International Law", 178 *Recueil des cours* 9 (1982–V); "The Nature and Process of Legal Development in International Society" in Macdonald RStJ and Johnston DM (eds), *The Structure and Process of International Law*, Nijhoff (1983), pp 745–808; etc.

13 Johnston, "The Heritage of Political Thought in International Law", *ibid*, p 196.

14 See eg Schachter, "The Nature ...", note 12 above, p 750.

correspondence at all, between will, obligation, and law. Turning to the problem of threshold, it appears that just as consent is expressed in very varied and graduated ways, there are stages and degrees both in the formation and in the legal force of international rules.¹⁵

Will, Consent and Obligation

According to Professor Rosalyn Higgins, "what one identifies as international law will be closely dependant upon what one believes is the basis of legal obligation".¹⁶

This is partly true and partly erroneous. It is erroneous because it implies that law is only made of "obligations", that is "binding obligations". This is highly debatable. Law is not as simple as that. There is no doubt that binding obligations are part of law, but law also includes permissions, recommendations, incentives, orientations, etc. Professor Higgins' statement is nevertheless partly true since any discussion of the parameters of law and of its definitions is inevitably premised on one taking a position as to what the basis, or "foundations", of law is or are.

In this respect, the classical voluntarists' analysis has been clearly expressed by the Permanent Court in its rather unfortunate judgment in the *Lotus* case:¹⁷

"International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims."

This judgment implies that will would be the basis, the test, and the sign of law at the same time. It may seem superfluous to discuss such an ancient *dictum* as that propounded in the *Lotus* case. But it is difficult to avoid such discussion as it is a frequent departure point of contemporary voluntarist analysis of international law.

15 I have already approached some of these problems, see eg "Le bon droit" et l'ivraie – Plaidoyer pour l'ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)", in *Mélanges offerts à Charles Chaumont* (1984), pp 465–493; "A New International Legal Order – What Legal Tools for What Changes?" in Snyder F and Slinn P (eds), *International Law of Development – Comparative Perspectives* (1987), pp 117–135; and "Contre la tyrannie de la ligne droite – Aspects de la formation des normes au droit international de l'économie et du développement" cours à l'Institut de Droit international et des relations internationales de Thessalonique, 1988 to be published in *Thesaurus Acroasium*, 1990.

16 Higgins, "The Identity of International Law" in Bin Cheng (ed), *International Law – Teaching and Practice* (1982), p 32.

17 PCIJ Rep, ser A, No 10, p 18.

There is, of course, not the slightest doubt that a State can be bound by expressing its will. This is true when the State concludes a treaty,¹⁸ and it is obvious that when a treaty contains obligations – which is not always the case – it is binding on the parties. As the International Court recently stated:¹⁹ "There is no question but that the Headquarters Agreement [of 1947 between the United States and the United Nations] is a treaty in force binding the parties thereto". The very conciseness of this affirmation establishes that there is no dispute on this point. The same holds true for unilateral expressions of will as the Court explained in the *Nuclear Tests* cases.²⁰

Therefore, *pacta sunt servanda* and, more generally, *acta sunt servanda*. But this calls for two qualifications:

- (i) will is not a sufficient explanation, nor, as a matter of fact, an explanation at all, for the binding character of voluntary rules;²¹
- (ii) an expression of will does not always create obligations, and, conversely, States can be bound without any expression of their will.

(ii) *Will Without Obligation: Soft International Law*

If the will of States can create obligations, it can also create less than obligations. *Qui peut le plus, peut le moins*: if its will can obligate the State, it can also create soft law i.e. law which is not binding.

However, although soft law is at the centre of fundamental debates about international law at the end of the twentieth century, there is no agreement among lawyers on what soft law really is. Some authors limit its definition to the formal sources of the rules and not to the rules themselves.²² This does not seem to be justified: law can be soft because it is contained in soft, non-binding instruments; but it can also be soft because of its content. There is a material softness as well as a formal softness. Both phenomena have the same explanations, and both fulfil the same social functions. Therefore, a restrictive definition has no justification.

Any rule is soft in some respect since "All rules of international law are open to interpretation".²³ The question is: to what extent is a rule open to interpretation? A lot of treaties – and, formally, treaties are hard law *par*

18 Cf Art 26 of the 1969 Conventions on the Law of Treaties.

19 *Applicability of the obligation to arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion*, ICJ Rep 1988, p 15.

20 ICJ Rep 1974, p 270.

21 *Id.*

22 See eg Abi-Saab and Caflisch, "La nouvelle Convention sur le droit de la mer en tant qu'accord de produits de base", *Mélanges Georges Perrin* (1984), p 29. *Contra* – Seidl-Hohenveldern, "International Economic Soft Law – General Course of Public International Law", 198 *Recueil des cours* 68 (1986–III).

23 Higgins R, *The Development of International Law through the Political Organs of the United Nations* (1963), p 9.

excellence – are substantially soft in that not only are they open to interpretation, but they are also drafted in order not to impose strict obligations on the parties. States "bind" themselves to "make all possible efforts", "to act in a certain manner", "to examine with sympathy".²⁴ For example, Article 56 of the United Nations Charter itself has been defined as a "duty not to do nothing"²⁵ – which is not much of an obligation!

This technique is used very frequently in international economic law. For example, Mr Oliver Long, a former Director-General of the GATT, points out that the 1974 Multi-fibre Agreement was, very deliberately, drafted in an ambiguous and soft manner.²⁶ Another example is the incredible Section 1 of Article IV of the IMF Statutes, by virtue of which a Member State must "endeavour to orientate its economic and financial policy with a view to encouraging well ordered growth with a reasonable price stability, its particular situation being duly taken into consideration". It would be difficult to be "softer" than that!

The same is also true as regards some formal decisions taken by international organisations. Here again, it is extremely striking in the economic field. The OECD Council is entitled to take formally binding decisions; but when one reads them, it is noticeable how soft they are and how they exhort rather than compel. The cases, for example, of the "trade pledge" adopted in 1975²⁷ and of the Liberation Codes²⁸ illustrate this point.

In addition, there are many means to "soften" formerly hard law: saving clauses, possibilities of re-negotiations, reservations, deliberate ambiguities, "agreement on a disagreement", etc.²⁹ Professor Bruno Simma has criticised this "'infection' of substantive treaty obligations by 'soft law' characteristics".³⁰ Be that as it may, this "infection" is a matter of fact: formal expressions of will by a State can amount to non-obligations.

The idea that State will can produce non-binding rules, in itself certainly does not contradict the voluntarist thesis as such. Professor Weil himself admits that "whether a rule is 'hard' or 'soft' does not, of course, affect its normative

²⁴ See eg – Abi-Saab in IUHEI, Colloque des 20–21 Novembre 1970, *Les résolutions dans la formation du droit international du développement* (1971), p 9; de Lacharrière G, *La politique juridique extérieure* (1983), p 101; Malinverni G, *Le règlement des différends dans les organisations internationales économiques* (1974), p 32; Parry C, *The Sources and Evidence of International Law* (1965), p 45.

²⁵ Van Hoof GJH, *Rethinking the Sources of International Law* (1983), p 243.

²⁶ Long, "La place du droit et ses limites dans le système commercial multilatéral", *Hague Rec* 1983 – IV, vol 192, p 56.

²⁷ See Carreau D, *Droit international* (1986), p 188.

²⁸ See Introductions aux Codes OCDE de libération, OECD Paris, June 1987, p 42.

²⁹ See Simma, "Consent – Strains in the International Treaty System" in Macdonald and Johnston, note 12 above p 490.

³⁰ *Ibid*, p 489.

character".³¹ What voluntarists cannot admit is that *formal* soft law exists and can be created by State will. Here lies one of the "voluntarist dilemmas". They have to choose between two of their basic "equations",³² and to decide whether State will is law (voluntarism) or if law is what can be implemented judicially ("judicialism"). It is clear that these soft instruments – international organisations' resolutions, gentlemen's agreements – cannot, as such, be applied by tribunals – which does not mean that they are judicially irrelevant. They are nevertheless the products of State will – directly for the gentlemen's agreements, indirectly for the recommendations.

For obscure reasons – probably related to political conservatism – there seems to be a quasi-unanimity among the adherents of "positivism" to subject the equation that State will is law to the other equation, and to declare that, because formal soft law cannot be implemented by judges, it is not "real" law. They declare that "sublegal obligations are neither 'soft law' nor 'hard law': they are simply not law at all."³³ In particular, recommendations of the General Assembly of the United Nations are excluded from the category of "sources" of international law,³⁴ and are even said to be "rivals of international law".³⁵

In fact, such an approach is not a reasoned one, for a conclusive and far-reaching reason – which is linked to the very definition of law. It is certainly true that a tribunal cannot enforce a recommendation. But, as Professor Mendelson said: "If you take that stand-point, then all kinds of sources and majorities become relevant. If you look at it from the point of the third-party decision-maker, then you narrow your scope and voluntarism, for example, becomes more important."³⁶ But law is not made for the judges. A legal norm is nothing but a "standard of behaviour",³⁷ a standard of social behaviour.

From this point of view, one may disagree with Professor Schachter who writes that law "is in essence a system based on a set of rules and obligations. They must in some degree be binding, that is, the rules must be accepted as a means of independent control that effectively limits the conduct of the entities

³¹ Weil, note 1 above p 414.

³² Above p 23.

³³ Ibid, p 415.

³⁴ See *ibid*, p 417 and Seidl-Hohenveldern, note 22 above, p 68.

³⁵ Sir Robert Jennings, "The Discipline of International Law", McNair Lecture, ILA Conference, 1976, p 632, cited by Schachter, "International Law ...". note 12 above, p 110.

Curiously enough, these restrictive views are shared by international lawyers who, like President Jimenez de Arechaga, have nothing to do with voluntarism – see "International Law in the Past Third of a Century", 159 *Recueil des cours* 30 (1978–I).

³⁶ Mendelson in Cassese and Weiler (eds), *op cit* n.8, pp 110–111.

³⁷ Van Dijk, "Normative Force and Effectiveness of International Norms", (1987)GYb IL p 12.

subject to the law."³⁸ The word "limits" is debatable since it implies a kind of external coercion. A norm can "limit" if it is binding. But as long as it guides and influences, it is nonetheless a legal norm.

If this can be accepted, there is absolutely no reason why soft instruments would be excluded from the world of legal sources. A source is "any legal process creating general norms intending to govern international relations."³⁹ This definition fits resolutions or gentlemen's agreements as well as treaties or customs. Resolutions, for example, are made by institutions, through a legal – even a legalistic – process, and they are intended to influence States' conduct.⁴⁰ They are, therefore, sources of law.⁴¹ As Professor Georges Abi-Saab put it, "a normative proposition can be legally relevant without being legally binding."⁴²

Besides, it is difficult to see why soft treaties would be sources of law while these instruments would not be. As regards judicial implementation, both have the same status: tribunals cannot implement them. It would be hard work to establish in the International Court that a State does not abide by Section 1 of Article IV of the IMF Statutes,⁴³ (above) just as it is impossible to obtain a judgment on an alleged violation of a resolution or a gentlemen's agreement.

Saying that these instruments are sources of international law certainly does not mean that they are compulsory or binding. They are not, although the contrary has sometimes been asserted. It is true that such assertions are rare.⁴⁴ Usually, authors are more cautious: they do not claim that recommendations or non-conventional concerted acts are compulsory but that, in certain circumstances, when votes are cast with the intent to be bound by a text drafted in apparently hard law terms, the resolution is, in reality, an agreement concluded in a simplified way.⁴⁵ In particular, it has been argued that the fact that some

38 Schachter, "International Law ...", note 12 above, p 25.

39 Dehaussy, "Sources du droit international – Introduction générale", JCIDI fasc 10, No 7 – "... tout processus juridique de créateur de normes générales destinées à régir des rapports internationaux". See also No 9.

40 See Sur, "Quelques observations sur les normes juridiques internationales", (1985) RGDIP 915.

41 See also Bollecker-Stern, "The Legal Character of Emerging Norms Relating to the New International Economic Order" in Hossain K (ed), *Legal Aspects of the New International Economic Order* (1980), p 70; Higgins, note 16 above, p 28; Schachter, "The Evolving Law ...", note 12 above, p 5.

42 Abi-Saab in Cassese and Weiler (eds), note 8 above, p 77.

43 Above p 28.

44 See Elias, "Modern Sources of International Law", in *Transnational Law in a Changing Society* p 46, and, but less neatly, Bedjaoui M, *For a New International Economic Order* (1979), [pp 182 et seq].

45 See, eg Castañeda J, "Le valeur juridique des résolutions des Nations Unies", 129 *Recueil des cours* 302 et seq (1970-I) or Dupuy RJ, "Communauté internationale et disparités de développement", 165 *Recueil des cours* 177 et seq (1979-II).

States express reservations to some resolutions show that these resolutions are held as being legally binding.⁴⁶

This kind of reasoning is not very persuasive. States always have a choice: they can conclude a treaty, thus electing for hard law; or they can choose soft legal tools. Why, then, would their formal choice be changed by the analyst? Dr Aust defines an "informal international instrument" as "an instrument which is not a treaty because the parties to it do not intend it to be legally binding",⁴⁷ but he adds that they can be bound by it if they so intend.⁴⁸ This is not very coherent.

In the same way, it is certainly not correct to assert that when they have voted for a recommendation States are bound by it.⁴⁹ When casting their vote, States know that they are adopting a mere recommendation. As Professor McGibbon has written: "Their votes in this context are not manifestations of either their acceptance (or otherwise) of an obligation to comply or their consent or assent (or otherwise) to the provisions of a resolution as legally binding rules. They are votes for or against a recommendation."⁵⁰ To admit the contrary is not only illogical, but is also completely incompatible with the actual state of international relations and would freeze the international machinery. Strange as it might seem, States, generally speaking, respect their obligations; but they are anxious not to expand them indefinitely. If by voting for a recommendation it is held that States are bound by their vote, they would certainly be very cautious and suspicious, and one can forecast that the legal productivity of the General Assembly would be nil or nearly so.

On the other hand, it is not suggested that soft instruments have no legal effects. They have some and their legal effects are not at all negligible. A recommendation for example:

- must be "examined" *bona fide* by all the Member States or the Organisation that adopted it;

⁴⁶ See eg Virally in IUHEI note 24 above, p 20, and "La deuxième décennie des Nations Unies pour le développement" (1970) AFDI 23.

⁴⁷ Aust, "The Theory and Practice of Informal International Instruments" (1986), ICLQ 787.

⁴⁸ Ibid, 807, *et seq.*

⁴⁹ See eg Higgins in Schwebel SM (ed), *The Effectiveness of International Decisions* (1971), p 398.

⁵⁰ "Means for the Identification of International Law" in Bin Cheng (ed), note 16 above, p 13. See also Seidl-Hohenveldern, note 22 above, p 66 or Van Hoof, note 25 above, p 181.

- narrows the exclusive jurisdiction of the Member States;⁵¹
and may be implemented by them.⁵²

This last consequence is more far-reaching than it looks. It means that, when a State implements a recommendation, its international responsibility is not involved and, in turn, this implies that recommendations are not binding, they are permissive. They do not compel – they permit.

Is it necessary to qualify these assertions? Many international lawyers think so, in that, without denying that recommendations have – or may have – legal value, they suggest that this value depends on several external variables: circumstances of their adoption, voting techniques, importance and consistence of the majority, existence of an implementing or a control machinery, etc.⁵³ This view has been echoed in some judicial or arbitral pronouncements.⁵⁴

These factors are certainly relevant – but not crucial in the present context. They can (and must) be taken into consideration to establish if the rule enunciated in the resolution is an expression of customary law – as the International Court did in the *Nicaragua* case in 1986⁵⁵ – but the reinforced legal value of the norm is not based on the resolution itself but on the custom of which the resolution is either an expression or a constitutive element.⁵⁶

The same is true if a resolution is accepted as law by Member States of the Organisation – or even Non-Members – in some additional Act. This could be by a previous treaty (as was done, for example in the 1947 Peace Treaty with Italy as regard the legal statutes of the Italian colonies), or in public statements made by States, as was done in 1958 by the USA and the USSR, when the General Assembly adopted Resolution 1348 (XIII) on Peaceful Uses of Extra-Atmospheric Space. There is no doubt that, in such cases, the rules embodied in recommendations are compulsory for the States having accepted them; but this binding effect is not due to the recommendation, but to the unilateral declaration(s) of the concerned State(s).⁵⁷

51 See Baxter, "International Law in her Infinite Variety", (1980) ICLQ 565 or Schachter, "The Twilight Existence of Non-Binding International Agreements", (1977) AJIL 304.

52 See Pellet A, "A New International Legal Order ? ...", note 15 above, p 128 or Nguyen QD, Daillier P and Pellet A, *Droit International Public* (1987), pp 347–348.

53 See eg Abi-Saab, "Analytic Study" in UNITAR, *Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order*, UNITAR/DS/4, 5523–24.

54 See eg *Texaco-Catalasiatic v Libya*, Arbitral Award, 19 Jan 1977, 17 ILM 1978 p 1.

55 ICJ Rep 1986, p 100.

56 Below p 35.

57 See eg MacGibbon, *op cit* n.47, p 14.

Conclusions that can be drawn from this brief study are quite simple:

1. law is normative, not positive;⁵⁸
2. it is made of binding *and* non-binding norms;
3. State will can create obligations (binding rules); and
4. it can also create non-binding norms of conduct.

(ii) *Obligation Without Will – "General" International Law*

As well as the fact that there can be State will without obligation, there can also be obligation without will, difficult as this may be for voluntarist doctrine.

International law is similar to other legal systems in that subjects of law, including sovereign States, can be bound without their will and, sometimes, against their express contrary will. This is even true for treaties, although they are considered by classical voluntarist doctrine as paragons of "good" law and, in fact, the only real source of law.⁵⁹

When accepting a treaty – which is a voluntary, supposedly free decision – States buy a "one-way ticket". Take a case like *Wimbledon*.⁶⁰ By its will – whether free or not is debatable, but the Court thought so and the Treaty of Versailles was not subjected to the principle of the prohibition of the use of force in international relations – Germany had entered into an agreement. Obviously, at the time the events which gave rise to the dispute occurred, Germany had changed its will and was no longer willing to apply the treaty – moreover, for valid reasons. Nevertheless, and quite rightly, the Court's answer was: *Pacta sunt servanda*.⁶¹ But this sacrosanct slogan of voluntarism as used here means the very contrary of voluntarism: "whatever its will, a State must abide by the law it entered into."

It would, therefore, seem that will is only an explanation for one part of the process, ie, the entry into a treaty. It does not explain the basis of a State's obligation when that State is no longer willing to implement a treaty. This does not mean, of course, that treaties are established *ne varietur*, and it is necessary to be aware that treaty-law changes and lives as does any part of law, either through an informal evolution (mainly thanks to interpretation), or formally. But it is suggested that there is no symmetry in the evolution: what has been done willingly cannot be changed or terminated only by will.

When it enters into an agreement, a State acts unilaterally. Indeed, except in a very few conceivable cases (in the field of human rights for example), at least two States must express their will to be bound. Nevertheless, they express it

⁵⁸ See Jaillard, "Les Nations Unies et l'élaboration du droit international économique" in SFDI, *Les Nations Unies et le droit international économique* (1986), p 102.

⁵⁹ Once again, it is not contested that, at least apparently, (see below p 35), treaties are based on the will of the parties.

⁶⁰ See PCIJ Rep, Series A, No1.

⁶¹ At 29–30.

unilaterally: ratification, accession, acceptance, signature, etc., are unilateral acts. On the contrary, when they want to terminate the treaty, the parties must act together. "All States" must express the same will (except, of course, if the treaty itself prescribes otherwise). If not, the recalcitrant State will be responsible for its violation of the treaty. This is the clear result of Articles 54 and 56 to 60 of the 1969 Vienna Convention.

It can be maintained that will is not absent from this process. But it is not State will – not even majority will, but communal will, in a very strict sense – the will of each and every party – not of one or a few or even many of them.

However, it can happen that some liberties are taken with apparently strict rules embodied in the Vienna Convention. Thus, the habilitation clause, adopted by the GATT at the end of the Tokyo Round in 1979, undoubtedly amends the General Agreement, and should, therefore, have been voted for unanimously in conformity with Article XXX, Paragraph 1, of the General Agreement; instead, it was adopted by consensus.⁶² In the same way, the famous Smithsonian Institute Agreement, which was instrumental in changing the Bretton Woods monetary system in 1971 was a purely informal agreement, which certainly does not meet the requirements of Article XXVIII of the IMF Statutes.⁶³ In both cases, the initial *pactum* was not respected, it was modified: the communal consent achieved what isolated State wills could not have done.

It is also true that the law of treaties offers an apparent safety net to States. This is in the form of the famous doctrine of the fundamental change of circumstances, to which Article 62 of the Vienna Convention is dedicated.⁶⁴ According to this principle, a treaty can be terminated provided circumstances have changed in a radical way and this change affects the very scope of the treaty.

This well established rule of law⁶⁵ puzzles voluntarists as it is not easy to reconcile with the idea of will. Voluntarists have tried, by claiming that any treaty embodies an implicit clause providing for its termination in case of fundamental changes of circumstances: *clausula rebus sic stantibus*. This problem cannot be discussed here in any detail, but it is clear that the *clausula* is a purely fictitious explanation: "Such clauses, if ever employed, are not now generally employed".⁶⁶ In fact, it is certainly more convincing to root this rule of law – which does exist in all systems of law – in the necessities of social life.

⁶² See Long, note 26 above, p 76.

⁶³ Communiqué of Ministers and Governors of Group of Ten, 18 December 1971, 23 *International Financial New Survey* (1971), pp 417–18.

⁶⁴ See Cahier, "Le changement fondamental de circonstances et la Convention de Vienne de 1969 sur le droit des traités", *International Law at the Time of its Codification – Essays in Honour of Roberto Ago* (1987), pp 167–186 and the cited bibliography, especially in footnote 3, p 164.

⁶⁵ See *Fisheries Jurisdiction* case, ICJ Rep, 1973 p 18.

⁶⁶ Parry, "The Law of Treaties" in Sorensen M (ed), *Manual of Public International Law* (1968), p 234.

The function of legal rules is to meet social needs; when social needs change legal rules lose legitimacy and lose their binding force.

State will is not totally obsolete since it is up to the affected State to endorse the proposed changes or not. But its will is entirely subordinate to the underlying social international environment – the social background is part of the rule itself.

All these considerations hold true, *mutatis mutandis*, regarding not only treaties but also unilateral acts of States. As discussed earlier,⁶⁷ States can bind themselves by unilateral expressions of will. This is compatible with the voluntarist approach. But when such declarations have been made, "the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance of an arbitrary power of reconsideration".⁶⁸ Here again, *acta sunt servanda*. But, once more, the formula is very ambiguous.⁶⁹

Thus it appears that treaties or unilateral commitments, praised as they may be in voluntarist jurisprudence, flow effectively from the will of States; but when they enter into force, they negate the notion of sovereign will. Once a State, by an apparent act of its free will has entered into a treaty or a unilateral commitment, the trap closes; its will is bound and will be freed only through processes in which the will of an individual State will have little or nothing to do.

Moreover, it is not clear that, in the prevailing conditions of modern international life, a formal expression of will is always necessary. The great so-called "codification treaties" which, more often than not, are "progressive development treaties" can, nevertheless, be binding upon all States, even if not in force. At any rate these general treaties certainly provide "general indications" of what law is.⁷⁰ And it can be recalled that in the *Tunisia/Libya Continental Shelf* case, the Court considered that it "would have had *proprio motu* to take account of the progress made by the [Third United Nations Conference on the Law of the Sea] even if the parties had not alluded to it in their Special Agreement".⁷¹

In any case, whatever the role of State will in conventional processes, it is clear that its influence is even less regarding other means of formation of legal rules.

⁶⁷ Above p 27.

⁶⁸ ICJ Rep 1974, p 270.

⁶⁹ On the problem of unilateral acts and their termination, see eg Rubin, "The International Legal Effects of Unilateral Declarations", (1977) AJIL 1–30 or Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", (1979) RGDIP 633–688, especially at 650–656.

⁷⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Rep 1908, p 94.

⁷¹ ICJ Rep 1982, p 38.

In the first place, regarding rules of customary international law, Professor Weil himself has defined them as "the Achilles heel of consensualist outlook".⁷² It will be enough to have a very quick look at the classical theory based on the well-known two "elements" of custom, as enunciated by Article 38 of the ICJ Statute.

First, as far as the so-called "material element", the "general practice", is concerned, in a way, States' behaviour converging towards such a practice can be said to be "voluntary". But State wills are aimed here at *doing* something, not at elaborating a rule of law. If a national court makes a decision on State immunity, its judgment will be part of the general practice. That, however, was not the aim of the court's decision: its only concern was to decide on the precise dispute it had to solve.

Some authors stress a relatively recent evolution: that nowadays the customary process is taken into account much more than it used to be, since its departure point is quite often a resolution – usually named "declaration" adopted in an international organisation – in the UN General Assembly. "Thus, an exogen process gives way to an endogen, centralized, institutionalised, regulated process, deliberately used in order to obtain fixed voluntary results".⁷³ This is Dupuy's "*coutume sauvage*".⁷⁴ There is merit, no doubt, in this analysis, but I think it has more to do with resolutions than with customs, and, in any case, it relates more to the "mental" or "psychological" element of custom than to practice.

This leads to the question of whether the requirement of an *opinio juris* is a confirmation of voluntarist theories. The answer must be in the negative for several reasons which will only be mentioned:

1. both elements are not on the same footing. It is only the practice which is "constitutive"; *opinio juris* can only appear after the event. One cannot "feel that they are conforming to what amounts to a legal obligation", as the International Court expressed it in the *North Sea Continental Shelf* cases,⁷⁵ if this legal obligation does not already exist;

⁷² Weil, note 1 above, p 433. See also Abi-Saab, "La coutume dans tous ses états", *Mélanges Ago*, note 64 above, pp 53–65; D'Amato AA, *The Concept of Custom in International Law* (1971), XVI – p 286; Bos, "The Identification of Custom in International Law, (1982) GYb I L 9–83; Combacau, "La coutume – de la régularité à la règle", (1986) *Droits* 3–10; Sur, "La coutume internationale, savie, son oeuvre", *ibid*, 111–124 and "Sources du droit international – Coutume", *JCIDI*, fasc 13, 1989; Stern, "La coutume au coeur du droit international" in *Le droit international – unité and diversité: Mélanges offerts à Paul Reuter* (1981), pp 479–499.

⁷³ Note 72 above, p 61.

⁷⁴ See Dupuy, "Coutume sage et coutume sauvage", *La communauté internationale – Mélanges offerts à Charles Rousseau* (1974), pp 75–87 or "Droit declaration et droit programmatoire – de la coutume sauvage à la 'soft law'" – in *SFDI, Colloque de Toulouse*, note 10 above, pp 132–148.

⁷⁵ *North Sea Continental Shelf* cases, ICJ Rep 1969, p 44.

2. the wording used by the Court is interesting: a "feeling" that an obligation exists is a very different thing from a will – this could be what Professor d'Amato had in mind when he said that "the rules of international law depend upon consensus of nation-State officials as to what the content of the law is";⁷⁶ and
3. above all, this "feeling", or even "acceptance" – if one sticks to the wording of Article 38 – is, by no means achieved by the expression of will of individual States, but a general, communal acceptance of some more or less openly expressed conviction by States or by international bodies. In its 1984 judgment, the Chamber of the International Court constituted in the *Gulf of Maine* case contented itself with an examination of "the legal conviction ... of all States" ("*de l'ensemble des Etats*" in the original French text).⁷⁷ As President Jimenez De Arechaga has demonstrated, the Court "has not required strict proof of the specific acceptance of the defendant State, thus rejecting the voluntarist conception of custom."⁷⁸

It is, of course, impossible to ignore the "persistent objector" doctrine. But it must be observed that it is, at best, a "contracting out" doctrine and that, perceptive as it might seem, it is largely unrealistic: in most cases, States do not care; practice develops without them being aware of the process. When they "awake", that is, when the time of *opinio juris* has arrived, it is too late – the evil is done and the rule does exist. In its 1986 judgment, in the *Nicaragua* case, the Court noted that, when General Assembly Resolution 2131(XX) was adopted, the United States declared that this resolution – embodying the non-intervention principle – was "only a statement of political intent and not a formulation of law". However, as the US made no analogous statement five years later, when the much less specific 2625(XXV) declaration was adopted, it was, in fact, bound by that rule.⁷⁹

On the contrary, of course, nothing impedes a State from expressly accepting any customary rule. This has, no doubt, important practical effects in facilitating proof both of the existence of the rule in general and of its application to the accepting State. And this is enough to explain why, in concrete cases, courts and tribunals mention, whenever it is practicable, such express acceptances by parties to the dispute. This was done by the International Court in the *Nicaragua* case.⁸⁰ But no theoretical conclusion can be inferred from this: "Acceptance of a rule contributes to its effectiveness",⁸¹ but is not a pre-requisite for its existence.

⁷⁶ D'Amato note 72 above, p 33; see also pp 170 and 269.

⁷⁷ ICJ Rep 1984, p 299.

⁷⁸ Jimenez de Arechaga, "Custom" in Cassese and Weiler (eds), note 8 above pp 3–11.

⁷⁹ ICJ Rep 1986, p 107.

⁸⁰ Ibid.

⁸¹ Gaja in Cassese and Weiler (eds), note 8 above p 16.

Finally, it must be stressed that what has been said about treaties is *a fortiori* true for custom. Whatever role their will plays in the formation of customary rules, once these exist, States are bound – and even more strongly than by treaty. The reason for this is that the generality of customary law makes it nearly impossible for a State or a group of States to repudiate completely an existing custom⁸² which binds other States.

From this very quick overview of custom, it can at least be concluded that State will contributes very little to its formation.

This conclusion is even more obvious regarding general principles of law. They are such a problem for voluntarist authors that most of them deliberately ignore these principles and deny them the quality of an autonomous source of law.⁸³ From a voluntarist point of view, this is a condemnation to death!

This position is quite easy to understand. If, at a pinch, custom can be equated with a tacit agreement – *quod non!* – such a conjuring trick is clearly impossible as regards general principles of law. If paragraph (c) of Article 38.1 of the Court's Statute has an autonomous meaning, those principles can only be general propositions underlying national legal norms, rules applied by States *in foro domestico*. Of course, it is plain that State will has nothing to do with such rules. Most certainly, they do exist in national legal orders; but in no way have they been created to apply at the international level and, in fact, there are cases when they do not apply. This has nothing to do with State will: it depends entirely on the question of whether or not the international society can be compared with national society.⁸⁴

Last but not least, it is necessary to say something about *jus cogens*. It is neither possible nor useful to waste time on this device, so clear is the problem. If such risks exist⁸⁵ – and they do in the present writer's opinion – it is clear that "peremptory norms of general international law", by their very definition – unsatisfactory as this definition is at present time – cannot be reconciled with voluntarist views. This is because:

1. according to Article 53 of the Vienna Convention, they are "accepted and recognized by the international community of States as a whole" – which clearly excludes a State by State acceptance or even recognition;
2. *jus cogens* rules have no determinate form and are only recognizable by their effects: contrary provisions are null and void; this is expressly provided for in Articles 53, 64 and 66 of the Vienna Convention as far

⁸² See Sur, "Sources ...", note 72 above, No 99.

⁸³ See Pellet A, *Recherches sur les principes généraux de droit en droit international*, thèse Paris II (1974), pp 334–338.

⁸⁴ See *ibid*, pp 294–318.

⁸⁵ This is all the more certain that, in the *Nicaragua v U S* case, the ICJ has, for the first time, used the word, even if it was rather cautious in utilising the concept – see – ICJ Rep 1986, p 100.

as treaties are concerned and is probably also true for unilateral acts;⁸⁶ and

3. the solemn ratification of the concept in 1969 was precisely intended to restrict disastrous political effects of voluntarism.

Legal theories are not – at least, not only – innocuous intellectual games. They have concrete consequences and may become political stakes. To make a long story short, *jus cogens* can be said to be the repentance sign of Third World countries, when they became aware that the strict voluntarist posture they took after independence was a dupe. *Jus cogens* was then perceived as an exit from the vicious circle in which these countries had locked themselves in thinking that in sanctifying their sovereign will they would protect themselves against pressure. They quickly realized that it was a very theoretical view and that what could be true for powerful and well-established States was not so for weak and new countries. Hence, the *jus cogens* doctrine appeared as an effort to protect the interests of the weaker against the wills of the stronger.

Perhaps *jus cogens* can be interpreted "as some form of older natural law thinking"; at any rate, it is clearly "an updated denial of positivism".⁸⁷ However, it may not be the sole contemporary reaction against doctrinal positivism.

In a recent and interesting study, Professor MacDonald reviewed "Fundamental Norms in Contemporary International Law"⁸⁸ to show that other concepts perform the same role as *jus cogens*. He suggested as examples *erga omnes* norms, objective legal geographic regimes (and Article 62.2(a) of the Vienna Convention seems to confirm it) and, perhaps, the United Nations Charter as a whole. These may be seen as various elements of a kind of international super-legality, in which individual State wills have not much to do, and which serve to limit and restrain these wills, thus providing international relations with a moral content.

I am not of course suggesting that State will has no impact on international law. Voluntary law is prevalent: in day-to-day practice, international law is what concerned States decide it is. But this voluntary law expands inside a general legal framework which owes nothing or very little to individual State will. If we adopt Hart's famous distinction,⁸⁹ it can be said that international secondary rules have nothing to do with State will,⁹⁰ and that this is also true for some, although rather exceptional, primary rules of fundamental importance. If

86 See Macdonald, "Fundamental Norms in Contemporary International Law", (1987) Canadian Yb I L p 136.

87 Bos, "Will and Order in the Nation-State System: Observation on Positivism and Positive International Law" in Macdonald and Johnston, note 12 above, p 51; see also Dupuy R-J, note 45 above, p 197.

88 See note 86 above, pp 115–149, *passim*.

89 Hart HLA, *The Concept of Law*, 1961.

90 Franck, "Legitimacy in the International System" (1988), AJIL p 759.

there is some merit in such an analysis, then it would confirm Professor MacDonald's forecast of an emerging international constitution.

I would, nevertheless, not go as far as that since I think that speaking of a "constitution" in the international society is ambiguous. However, I would suggest that if this international society is very different from a national society, and if comparisons between both systems of law are cautious, there may be grounds for a comparison. In the same way as, inside the State, contracts express the wills of the parties but within limits determined by general legislation, special international law deriving from State will – that is, treaties and unilateral acts – is expanded and qualified by general international law, which exists independently of State wills.

Will, Consent and Social Heterogeneity

Until now the analysis in this paper has been formal and abstract. This was unavoidable since its aim was to try to refute the fundamental postulates of voluntarism.

The following presentation of legal development as a process will be more concrete. The general idea is the following, and was expressed by Wolfgang Friedmann in the first sentence of his 1969 Hague general course: "All law is an instrument of social order, and therefore closely tied to the structure of the society which it seeks to regulate."⁹¹ Neither *auctoritas* nor *veritas facit legem* but *societas*. *Auctoritas* is the positivist flag. *Veritas* could be the hallmark of natural law. *Societas* is the objectivist alpha and omega.

Kelsen wanted "to clear law from all external elements".⁹² George Scelle echoed that "no social phenomenon is, by nature, external to law".⁹³ Even if one does not share all Scelle's views, this is certainly right.

As Professor Rosalyn Higgins put it, "law and politics are not necessarily inimical".⁹⁴ When one speaks of international law making, the law making process is not "inimical" to politics, but is, in fact, largely, if not exclusively political.⁹⁵ This refutes the absurd accusation of "politicisation" more and more often addressed to international law making processes inside international organisations. To complain that the General Assembly is "politicised" is as irrelevant as finding fault in the "politicisation" of the United States Congress or

⁹¹ "General Course in Public International Law", 127 *Recueil des cours* 47 (1969–II). See also Jenks, "Economic and Social Change and the Law of Nations", 138 *Recueil des cours* 463 (1973–I).

⁹² Kelsen H, *Pure Theory of Law*, p [1].

⁹³ Scelle G, *Précis de droit des gens* (1932), p 83: "rien de ce qui est social n'est par nature indifférent au droit".

⁹⁴ Higgins, note 23 above, p 9.

⁹⁵ See Giraud, "Le droit positif – ses rapports avec la philosophie et la politique", *Hommage d'une génération de juristes au Président Basdevant*, p 234; see also de Lacharrière, note 24 above, p 199.

the Australian parliament. In fact, what is called "politicisation" only shows that the legal system is accepting rules and principles that the critics do not like.

Of course, "law cannot and should not mirror social realities in all its details",⁹⁶ but Fawcett is right when he writes that law "emerges as a fact of life where there are minimum degrees of order, which it must serve to rationalise and extend".⁹⁷ This condition is fulfilled in the international society: international order does exist⁹⁸ even if it is very specific and much less "integrated" than the national one. The relations of power which are hidden inside modern States appear, naked, in the international sphere and this, of course, has an influence on law, or, at least, on the analysis of law. This makes international law a kind of laboratory where legal phenomena can be studied more easily than from within the State.

The exercise of power is more evident and law appears more clearly as a reflection of its consequences in the international sphere. And this leads back to will: for will and power are not easily reconciled. Power implies coercion: coercion limits (or excludes) freedom; and, without freedom, it does not make much sense to speak of "will" because by definition, will is free.

But this is not necessarily the case for consent. Will does not equate with consent: "I don't want this" may represent my *will* but I may still agree to a particular proposal. This is consent, or, at least, what the present writer has in mind when he speaks of consent. The shade in meaning of both words does not seem as clear in English as it is in French. "Consent" in this sense can be an equivalent to what other writers have in mind when they use the word "consensus".⁹⁹ The point here is that, in the same way, States do not want international law or, more exactly such and such a rule of international law, but even if their will is not free, they can consent to a rule not because they want it, but because they have no real choice.

As has been seen in the first part of this paper, will explains nothing in international law. It can be admitted that, for its part, consent, although certainly not the "basis" of international law, is a more convincing principle since it is not incompatible with at least a certain amount of coercion and it explains – partly at least – the importance, already noted¹⁰⁰ of relative normativity in contemporary international law.

⁹⁶ Van Hoof, note 25 above, p 24.

⁹⁷ Fawcett J, *Law and Power in International Relations* (1982), p 119.

⁹⁸ See Dupuy R-J, *La clôture du système international – La cite tenestre* (1989), 159; and, for a very different presentation, Combacau, "Le droit international, bric a brac ou système?", *Archives de philosophie du droit* (1986), pp 85–105 or Sur, "Système juridique international et utopie", *ibid*, pp 35–45.

⁹⁹ See Bulajic, "Legal Aspects of the New International Economic Order" in Hossain K (ed), note 41 above, p 60 or D'Amato, see note 72 above.

¹⁰⁰ Above p 1.

(i) *The Threshold of Admissible Coercion (consent and freedom)*

International law postulates freedom of will – and, anyway, will without freedom is not will at all.¹⁰¹ Thus, the Vienna Convention devotes five articles (48–52) to this problem and several other provisions are related to it. It therefore seems difficult to assume that, when a State concludes a treaty without error or fraud, corruption or coercion in the sense of the Vienna Convention, its will is not free.

This, in fact, is pure hypocrisy. It is not enough to will; it is also necessary to be able to will. And it is quite clear that in the international society, if States are equal, some are "more equal" than the others.

Does this, which is an undebatable reality, affect the existence or the validity of law? As is well known, the problem was controversial during the Vienna Conference. There was no discussion on the principle: a treaty concluded under duress is void.¹⁰²

But what is duress? Certainly, the use of military force – except in the very rare hypothesis where it is still admitted by the United Nations Charter. But what else? Third World countries wished to prohibit all kinds of coercion; Western States thought it was unrealistic and threatening to legal certainty. Hence the painstaking compromise resulting in Article 52 of the Vienna Convention – which does not answer the question – and the joint Declaration which condemns all kinds of coercion "military, political or economic, during the conclusion of a treaty", which either does not mean anything or is highly unrealistic.¹⁰³

Coercion is a component of international society as of any society. In very sophisticated systems, like our modern nation–States, it can be limited, but it is never neutralised.

It is obvious that the "will" of small weak States is "less free" than that of large powerful ones – and this is not only an economic development problem, even if that is a key aspect. Let us take a few examples:

1. Is a developing nationalising State willing to enter a compensation treaty? It is.
2. Was Tanzania willing to accept a stand-by arrangement from the IMF? It did.
3. Are, generally speaking, developing States willing to conclude so called "cooperation agreements" with industrialised countries? They are.

¹⁰¹ Above p 35.

¹⁰² See De Jong, "Coercion in the Conclusion of Treaties", (1984) N Yb I L, pp 209–247.

¹⁰³ See Jimenez de Arechaga, note 35 above, p 61.

Yet, it is obvious in all these cases that it is difficult to speak of a real free will – you can compel a child to say "it is sunny" when it rains but you cannot force him or her to like rain.

Even from a purely procedural point of view, the real equality of States is not secure. Describing the problems met by Third World countries in big multilateral conferences, Ambassador Pinto, writing as an insider, said:¹⁰⁴

"The advanced industrialised countries come to the conference in a much higher state of preparedness than do their developing countries' partners. Years ahead in the relevant technological and scientific knowledge; equipped with facilities and manpower more than adequate to the task of analysis of issues, formulation of options and the planning of strategies, equipped also with the means of rapid communication with policy-makers at the capital, the industrialised countries present a formidable image to the Group of 77.

Most States of the Group of 77, and the exceptions are few, are able to respond only through their representations by high quality diplomatic or legal personnel for whom the conference is just one of many varied assignments."

Things being as they are, and these States being sovereign, why do they conclude such treaties if they do not really want to? The short answer is because they need to. Not only because they need money, technical assistance, urgent food help and so on. But also because they feel very strongly the absolute necessity to "participate". And this holds true not only for treaties but, more generally, for international law, whatever its form. "The new State must belong to the international community."¹⁰⁵ As Professor Thomas Franck writes, "membership confers a desirable status which is manifested when the members have internalised socially functional and status-rooted privileges and duties."¹⁰⁶ And accepting international law is a way to become a member. "Obligation is perceived to be owed to a community of States as a necessary reciprocal incident of membership in the community."¹⁰⁷

Mutatis mutandis, this applies also to big and powerful States. For various reasons their will also is coerced and if they conclude a treaty or vote in favour of a resolution, it might be – and, indeed, it often is – because it fits their perceived

¹⁰⁴ Pinto, "Modern Conference Technique : Insights from Social Psychology and Anthropology" in Macdonald and Johnston (eds), note 12 above, p 315. See also Benchikh M, *Droit international du sous-développement – Le nouvel ordre dans la dépendance* (1983), pp 282 et seq or Bulajic M, *Principles of International Development Law* (1986), p 45.

¹⁰⁵ Bin Cheng, "Custom – The Future of General State Practice in a Divided World", in Macdonald and Johnston (eds), note 12 above, p 519; see also Scelle, note 93 above, p 308; but Scelle assumes, rightly in the present writer's view, that this "belonging" is not free, while Professor Bin Cheng holds for the contrary.

¹⁰⁶ Note 90 above, p 711.

¹⁰⁷ *Ibid*, p 753.

interest. But there are other reasons: because they have to arbitrate between their immediate and their long term interests¹⁰⁸; because they fear ridicule¹⁰⁹ or because they are, in fact, more deeply involved in international relations, and therefore care even more for interdependence.¹¹⁰

No State's will is entirely free. And though it can happen, in some circumstances, that power is well balanced, it is usually not the case and law reflects the actual balance, or imbalance, of power during the period when the rule is adopted. What is true for treaties is also true for custom. Practice is the real test of power, and for its formation "what States do is more important than what they say".¹¹¹ And there is no doubt that the "biggs" are able to do more than the "weaks".

Must it be inferred from this that "unequal" rules of law – that is, rules in force between unequal partners or embodying unequals' wills – are void? That would clearly be absurd and the negation of the very existence of law itself. Moreover, if rules of law could coincide in a perfect balanced way with the interests of all existing States there would be no more need for law.¹¹² As is said in Latin, *cocta voluntas tamen voluntas* (a coerced will is will nevertheless).¹¹³ But if this is no doubt true, it cannot be accepted without qualifications. There must be a threshold of admissible coercion.

In this respect, recent solutions applied on a case by case basis by international courts and tribunals are based on common sense and quite convincing. They can be summed up by saying that non-military coercion invalidates the rule if and only if it is obvious and out of proportion to the usual practices, which cannot be avoided, in an international society strongly marked by an imbalance of power. Thus, in its 1973 judgments in the *Fisheries Jurisdiction* case, the International Court refused to admit that the mere inequality of power between the United Kingdom and the Federal German Republic on the one hand, and Iceland on the other hand, could, in itself, void the relevant fisheries agreements.¹¹⁴ The Arbitral Tribunal which solved the dispute between Kuwait and Aminoil in 1982,¹¹⁵ while accepting that the 1973

¹⁰⁸ Ibid, p 716.

¹⁰⁹ Ibid, p 715.

¹¹⁰ For an example, see Schachter, "International Law in Theory ...", note 12 above, p 106.

¹¹¹ Schwebel, "The Effect of Resolutions in the United Nations General Assembly on Customary International Law", *ASIL Proceedings* 1949, p 302. See also de Lacharrière, note 24 above, p 57.

¹¹² See Chaumont, note 11 above, p 249 or Colin J-P, in *Actes des 2ème et 3ème Rencontres de Reims, Réalité du droit international contemporain* (1976), p 286.

¹¹³ See Bin Cheng, note 105 above, p 519.

¹¹⁴ ICJ Rep, 1973, p 14.

¹¹⁵ Ref Arbitral Award, 24 March 1982, ILM p 976, [JDI], 1982.

agreement between the parties¹¹⁶ had been concluded under economic pressure, concluded that: "in fact, the Corporation made a choice: as unpleasant as certain demands could have been it thought it should accept because it was possible to deal with them. Its whole behaviour shows that this pressure was not of such a nature as to inhibit its freedom".¹¹⁷ Nevertheless the Tribunal took these pressures under consideration in interpreting the agreement,¹¹⁸ and in determining that consents given under economic coercion could not form part of *opinio juris*.¹¹⁹

This is very reasonable and realistic: coercion is a fact of international life. It is absolutely impossible to speak of "free will" in the international society. But this does not impede States in consenting to the rules of international law. Nor does this mean that their consent is legally invalid because of the disadvantageous position in which they might have been placed.

(ii) *A Threshold of Law (consent and relative normativity)*

Inequality of power and tensions between States raise another problem of threshold.

Indeed, the apparent disorganisation of the international society and the complexity of its functioning carry with it a range of processes.¹²⁰ Inside States the existence of a centralised legislator – usually a Parliament – allows a clear distinction between what is, and what is not, or not yet, law.¹²¹ As Professor Falk clearly explained, "in a social system without effective central institutions of government, it is almost always difficult in the absence of formal agreement, to determine that a rule of law *exists*. Normativity is a matter of degree, expressive of expectations by national governments toward what is permissible and impermissible."¹²² In such a situation, there are uncertainties as to the content of law.

The reassuring conformism of voluntarism enables its adherents to give an orderly appearance to this unacceptable (by them) disorder – at least at the level of legal analysis. As has already been said, voluntarists decide that law is all that proceeds from State will. That is the threshold and it has a lot of clear cut effects. To quote Professor Weil again: "the threshold does exist: on one side of the line, there is born a legal obligation that can be relied on before a court or

¹¹⁶ This agreement was a State contract, but the applicable principles can be transposed to the international sphere.

¹¹⁷ See note 115 above.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ See Bos, "The Recognised Manifestations of International Law", (1977) GYbIL, p 19.

¹²¹ Michel Virally points out that national Parliaments can both fix the *lex ferenda* and transform it into *lex lata* note 2 above, p 528.

¹²² Falk, note 9 above, p 178; see also Friedmann, p 142.

arbitrator, the flouting of which constitutes an internationally unlawful act giving rise to international responsibility; on the other side, there is nothing of the kind."¹²³

Because this is simple it can be appealing. But because it is simplistic, it does not fit with reality and does not enable law to fulfil its function – which is not to maintain what exists, nor to meet scholars' taste for order, but to guide social conduct, in the interest, not of all members of the society (for that would be quite idealistic and unrealistic) but of those who hold the most power and influence.

This being said, there is certainly not in this matter any rigid determinism as Marxist orthodoxy declares. No State and no group of States exert an absolute domination on the others, even if there can be no doubt that the "West" (the OECD countries) are largely predominant in contemporary international society. This predominance has certainly been reinforced recently; nevertheless, these States must first co-exist and compromise with one another, and secondly take the existence and relative power of other countries into consideration.

Law is at the centre of gravity of all conflicting social tensions at a given moment and the formula applied to custom by Sir Gerald Fitzmaurice can be extended to law as a whole: It is the normative translation of "mutual tolerations".¹²⁴ This has absolutely no value connotation, it does not imply any kind of "harmony"; it only means that, at a given moment, States recognise a given set of norms as having a legal legitimacy. These rules are not "good" or "bad" – they are seen by States as being legally relevant. But, of course, as Professor Franck has demonstrated, "their perception of legitimacy will vary in degree from rule to rule and time to time."¹²⁵

At periods when a State or a group of States exert an obvious domination, variations will be slow and limited and a threshold of law can be said to exist. This was the case during the long "classical period" of international law – roughly from the end of the Napoleonic wars until World War II. At this time of great stability – in spite of endemic wars – it was legitimate to look for a threshold and not very surprising that scholars thought they had found one, or apparently found one: State will. At the time, scholars did not and could not know that the will of a few dominant States could be imposed on the rest of the world.

Things change when the power of the dominant group is disparaged and challenged. Then the picture becomes confused. A blossoming of soft law reveals both the hopes of the weakest and the capacity for resistance of the dominant. No State or group of States can impose its views, none is fully satisfied, but all resign themselves. They do not will: Rather, they consent.

¹²³ Note 1 above, pp 417–418.

¹²⁴ "The Law and Procedure of the International Court of Justice, 1951–1954: General Principles and Sources of Law", (1952) B Yb I L, p 68.

¹²⁵ Note 90 above, p 706.

Consensus in the technical sense, a "kind of bastard unanimity",¹²⁶ expresses this situation very well.¹²⁷ Far from being an efficiency token,¹²⁸ it is a sign of renouncement.¹²⁹ It indicates at one and the same time that States are not able to reach unanimity and that recourse to the majority principle is unacceptable for various reasons, the main very likely being that the majority needs the minority and that the latter is not strong enough to impose its view and does not want to be isolated.

The same explanation holds true for the use of soft instruments or the inclusion of soft provisions in hard legal instruments.¹³⁰ "The main usefulness of soft law rests in the possibility of thus overcoming a deadlock in relations between States pursuing conflicting ideology and/or economic aims."¹³¹ It is not because resolutions are "better" than treaties that resolutions are adopted; it is much more often because a treaty is an inaccessible goal.¹³² It is not because general principles are "better" than strict rules – although they might sometimes be – that they are "preferred", but because rules cannot be established.¹³³ The "grey zone" between law and "non-law" grows.¹³⁴ The threshold disappears.

In such a period of contests, rivalries and unsteadiness, legal analysts have no choice but to turn to the entire process of law-making. It is not mainly a matter of ideological or doctrinal preference – even if it is also this. It is pure realistic logic: since there is no more threshold, it is impossible to confine oneself to studying "sources" of international law precisely because the analyst cannot apprehend them. When the analyst thinks he or she has seized a rule, it escapes

¹²⁶ Condorelli, in Cassese and Weiler (eds), note 8 above, p 117.

¹²⁷ On the consensus, see eg Bastid S, "Observations sur la pratique du consensus", *Mélanges Wengler*, pp 11–25; Cassan, "Le consensus dans la pratique des Nations Unies" (1968), 9–14; Suy, "Rôle et signification du consensus dans l'élaboration du droit international", *Mélanges Ago*, note 64 above, pp 521–542; or Zemanek, "Majority Rule and Consensus Techniques in Law-Making Diplomacy" in Macdonald and Johnston (eds) note 12 above, pp 857–887.

¹²⁸ See eg Geamanu, "Théorie et pratique des négociations en droit international", 166 *Recueil des cours* 396 (1978–I) or Kohona PTB, *The Regulation of International Economic Relations Through Law* (1985), p 23.

¹²⁹ As an example concerning raw materials agreements, see Eisenmann P–M, *L'organisation internationale du commerce des produits de base* (1982), p 302.

¹³⁰ See eg Bollecker–Stern, note 41 above, p 70 or Virally, "Rapport introductif", in IUHEI, note 24 above, pp 50–52.

¹³¹ Seidl–Hohenveldern, "International Economic 'Soft Law'", 163 *Recueil des cours* 193 (1979–II).

¹³² For an example, see Marchisio S and Di Blase A, supervised by Malintoppi A and Cahier P, *L'Organisation des Nations Unies pour l'Alimentation et l'Agriculture (FAO)* (1986), p 227. The authors show that it is because of the impossibility of concluding raw materials agreements that the FAO has adopted guidelines in this field.

¹³³ See Van Dijk, note 37 above, p 15.

¹³⁴ See eg Condorelli in Cassese and Weiler (eds), note 8 above, p 80, or Virally, note 2 above, p 521.

like an eel, since there are inevitably elements of "softness" in it. Therefore if he or she is honest,¹³⁵ that analyst will be compelled, whether he or she likes it or not, to forsake sources and to study processes – Professor Abi-Saab has called "building blocks".¹³⁶

In this respect Professor Christophe Schreuer was perfectly correct to write:¹³⁷

"A closer look at the realities of international decision-making shows that an attempt to divide the law into neatly separate rules which can be allocated to official types of sources is not satisfactory. Very often it is impossible to base a decision, or even a general prescription, on any one type of source. The process of communication leading to legal expectations and to a conduct corresponding to them, can take place in a variety of forms which are interrelated and often not clearly distinguishable. Even a relatively clear-cut prescription like a treaty provision is in constant interaction with other types of international law, from its drafting up to its application, and can lead a decision-maker through the whole mass of sources of international law, including the resolutions of international institutions.

Each of several relevant elements for a particular decision may not, on its own, be authoritative enough to qualify as a binding rule or to present a sufficient basis for the decision. Their combined effect, however, can be illusive ...

Rather than searching for abstract rules classified by types of sources, it seems more appropriate to examine the entire body of legally significant authority for a particular decision."

As this long quotation shows, a global analysis is particularly indispensable when resolutions are included in the process. As seen previously,¹³⁸ they have legal (not binding but legal) force by themselves. but it would certainly oversimplify legal reality to be satisfied with such a study. A resolution has a legal existence in itself, but it usually forms part of a process as well. "The formal legal statute of the resolution in itself must be distinguished from the legal consequences of its normative content. It follows that – and it is different for a treaty – the legal weight of this normative content is not only the consequence of the legal instrument in which it is inserted; it must also be looked

¹³⁵ Very fortunately, many scholars are! Weil's famous article is, in this respect, exemplary – the author laments over reality, but he describes it very honestly and his study is probably the most acute description of this soft law he is so much horrified by!

¹³⁶ In Cassese and Weiler (eds), note 8 above, p 77.

¹³⁷ Schreuer, "Recommendations and the Traditional Sources of International Law" (1977), G Yb I L 112–113.

¹³⁸ Above p 31.

at outside and beyond this instrument."¹³⁹ The "given" legal value – which has already been evoked¹⁴⁰ – must be studied together with the "added" value.¹⁴¹

Moreover, this idea of "process" must be given a very large meaning. It refers not only to the flowing of time, but also to the present context of the rule or the instrument. As the International Court recalled: "A rule of international law, whether customary or conventional, does not operate in a vacuum, it operates in relation to facts and in the *context of a wider framework* of legal rules of which it forms only a part".¹⁴²

Thus, for example, the General Preferential System contained in the "Concerted Conclusions" adopted in 1970 by the UNCTAD Special Committee on Preferences cannot be apprehended in isolation. They must be analysed together with the long series of resolutions they follow and with the national "preferential schemes" – which are unilateral acts – and, probably, with the GATT as amended by the habilitation clause in 1979.¹⁴³ In the same way, the meaning of the famous Article 2 of Chapter II of the Charter Rights of Economic Rights and Duties of States cannot be understood without a careful study of the whole process of the formation of the rule from at least the beginning of the 1960s and up to the present (and not 1974). This study would have to take into account not only the other relevant General Assembly Resolutions, but also the very many bilateral conventions on international investment which have been concluded during the last ten years.

Interestingly enough, this approach is not a purely academic one. It is the usual way Courts and Tribunals handle the question. Just to cite a few examples, it was on a careful study of a broad law-making process, including a series of General Assembly Resolutions, that the Court based its appraisal of the scope of the right of peoples to self-determination in its 1971¹⁴⁴ and 1975¹⁴⁵ advisory opinions, and of the principles of the prohibition of the use or threat of force and of non-intervention in the *Nicaragua* case.¹⁴⁶ Arbitral Tribunals have done so to appraise the scope of the principle of permanent sovereignty over natural resources.¹⁴⁷

¹³⁹ Abi-Saab, note 53 above, p 20.

¹⁴⁰ Above p 47.

¹⁴¹ See *ibid*, p 26; see also Juillard, note 58 above, pp 120–123 or Van Dijk, note 37 above, p 16.

¹⁴² *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Rep 1980, p 76. Italics added.

¹⁴³ See Borella, "Le nouvel ordre économique international et le formalisme juridique", *Mélanges Chaumont*, note 15 above, p 87.

¹⁴⁴ *Namibia*, ICJ Rep 1971, especially pp 31–32.

¹⁴⁵ *Western Sahara*, ICJ Rep 1975, especially, pp 31–36.

¹⁴⁶ ICJ Rep 1986, especially pp 98–102 and 106–110.

¹⁴⁷ See eg the awards in *Texaco-Calasiatic v Libya*, 1977, 17 ILM [1978 p1], and in *Aminoil v Kuwait*, 1982, ILM p 976.

It must be clear that, at least over a long period, the "legal process" thus defined is not "one-way": at certain stages, law "hardens", during others it "softens". It is very clear if we glance through the great trends in this respect since World War II.

- First stage – the Cold War and the East/West tension; the United States and their Allies used, or tried to use, the United Nations General Assembly as a World Parliament where they had a comfortable majority; the Eastern Bloc opposition – and, to a much lesser extent some Latin American reluctance, did not permit such a radical use of the United Nations; nevertheless "hard" use was made of resolutions (see the "Dean Acheson" episode);¹⁴⁸
- Second stage – the 60s and the inversion of majority; the new Third World majority with the self-seeking support of the East made enormous use of resolutions, but with a number not being backed by a corresponding economic and military weight, the real legal value of resolutions probably declined;
- Third stage – the so-called "crisis" from 1975 to the end of the 80s: the legal production machinery skidded and ran light; it still produced an amazing quantity of instruments but serious business was conducted elsewhere; for example, while the General Assembly adhered to the 1974 doctrine about indemnity in case of nationalisation, the same States which voted in favour in New York concluded a bilateral investments convention proclaiming the "Hull doctrine".¹⁴⁹ It has been said that such a phenomenon witnessed a "mental dissociation",¹⁵⁰ there was no certainty; it witnessed above all the powerlessness of Third World countries.
- Fourth stage – it seems to have begun in 1989 and to be characterised by an ideological disarmament (at least East/West) and, maybe, by a new "hardening" of the United Nations process of legal development, at least in security matters as the reaction of the Security Council to Iraqi aggression in Kuwait could show.

This is certainly not a very scientific analysis, but hopefully it gives a general picture. If it is correct, then one thing is very striking: with very different rates of success the dominating groups (in the United Nations) – the West in the first and last phases, the South during the two intermediate phases – have always tried to make maximum use of United Nations resolutions (maximum does not mean optimum but simply as intensive as was possible). This shows probably that a critical step was taken in 1945. A similar pattern may also be traced during the period of the League of Nations.

¹⁴⁸ Ref

¹⁴⁹ Ref

¹⁵⁰ Juillard, "Les convocations bilatérales d'investissement conclues par la France", (1979) JDI p 276.

It can be suggested that both the prohibition of the use of force (which has been correlative with a strengthening of the need for law in the international society) and the creation of a world-wide, all purpose, institution, available for law making, have reinforced both the need and the possibility of communal consent. Before 1945 (or 1919), it was very difficult for such a phenomenon to happen in the absence of a convenient forum – it was not completely impossible (by way of proof, one can think of the 1899 and 1907 Peace Conferences): it was unlikely. Nowadays the forum exists and its existence is both dissuasive (a refusal to use the forum being perceived as a "contempt of co-operation") and incitative ("what do you risk?"). "As the town meeting of the world, the General Assembly is a centre where States may express their consensus."¹⁵¹

According to Professor Schachter:¹⁵²

"As the central global forum for the international community, with the competence to discuss all questions of international concern, with institutional continuity and a constitutional framework of agreed purposes and principles, the Assembly has become a major instrument of States for articulating their national interests and seeking general support for them. The concept of Assembly resolutions as expressions of common interests and the 'general will' of the international community has been a natural consequence. It also has naturally flowed that in many cases the effort is made to transform the 'general will' thus expressed into law.

This trend is probably all the more deep-seated in that, implicitly, States, public opinion as well as lawyers, refer to the internal model, even if theoretically irrelevant and politically refused. Like Parliaments inside the State, international organizations and, especially, the United Nations General Assembly, represent concretely a framework for law-making."

Naturally enough (and for the same sorts of reasons), resolutions then appear as a kind of law. It is hardly debatable that the analogy is tempting: there is the same material "flavour" (legal texts organized in articles or paragraphs) and comparable procedural process ("parliamentary diplomacy"). Scholars know that these resolutions are not hard law, but diplomats often behave as if they were not aware of this fact (depending on whether their country supports or opposes the text.¹⁵³ Journalists more often than not appear ignorant and public opinion is nearly always so (in a rather schizophrenic way).

For reasons already discussed,¹⁵⁴ there is strong doubt that the General Assembly has a legislative competence or even a "quasi-legislative

¹⁵¹ Jimenez de Arechaga, note 35 above, p 34; see also Van Hoof, note 25 above, p 210.

¹⁵² Schachter, note 12 above, p 111.

¹⁵³ One of the manifestations of this behaviour are reservations made to resolutions. On their effects see eg Flauss, "Les réserves aux résolutions des Nations Unies", (1981) *RGDIP*, 5–37.

¹⁵⁴ Above.

competence".¹⁵⁵ Its resolutions nevertheless appear as "material legislation",¹⁵⁶ and owe their degree of legitimacy to the institution itself, which exerts the role of a validation authority.¹⁵⁷

This has two consequences. In practice, the analyst, whether a judge or a mere observer, will catch hold of a chosen resolution which will be "the starting point for any investigation as to the relevant law".¹⁵⁸ Conceptually, it will have an important role of collective legitimization,¹⁵⁹ not only through their permissive legal value, but also and above all as a repository of shared community expectations, thus crystallizing communal consent in the international society.

Here again, there is consent and not will, since the "international community as a whole", paradoxically, although entitled to "accept and recognize" peremptory norms of general international law, has no law-making power.¹⁶⁰

As early as 1955, Quincy Wright wrote: "The discipline of international law is in a state of crisis. As understood by traditionalists it appears to be obsolete, and as understood by modernists, it appears to be premature."¹⁶¹ *A fortiori* the same could certainly be written today. But it is clear that the crisis cannot lie in the law itself, which is neither in good health nor ill, but simply *is*.¹⁶² In return, it can be in the schools of jurisprudence that try to offer current analysis of what law is and how it works.

In the present writer's view, the evil comes from the incapacity – or unwillingness – of lawyers to accept law as it is – to consent to it, "in her infinite variety".¹⁶³

Of course, any academic scholar must have – and necessarily has – his own decoding system. But the more "open", the better. *Silete theologi in munere*

¹⁵⁵ Falk, note 9 above, pp 174–184 (reproducing "The Quasi-Legislative Competence of the General Assembly", (1966) AJIL 782 et seq).

¹⁵⁶ Bastid, "Observations sur une 'étape' dans le développement progressif et la codification des principes du droit international", *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), p 145.

¹⁵⁷ On the word "authority" see Schachter, "Towards a Theory of International Obligation" (1968), *Vanderbilt ILJ*, pp 309–311 and Franck, note 90 above, p 725.

¹⁵⁸ Macdonald, note 86 above, p 140.

¹⁵⁹ See Van Themaat P, *The Changing Structure of International Economic Law*, (1981), p 30.

¹⁶⁰ On the role the international judge could play in the determination of *jus cogens*, see Dupuy P–M, "Le juge et la règle générale", (1989) *RGDIP*, 569–598, especially 588 et seq.

¹⁶¹ *The Study of International Law* (1955), p 233.

¹⁶² For a much more radical view, see Kennedy, "A New Stream of International Law Scholarship" (1988), *Wisconsin ILJ*, vol 7, no 1 pp 1–49.

¹⁶³ Baxter, note 51 above, pp 549–566.

alieno (Gentilis) ("keep quiet theologians in these matters you know nothing about").

"Legal dogma" could seem acceptable in a slowly evolving society. It can no longer be accepted at the present time of multi-dimensional changes, where legal relativism has become an absolute necessity. "Just as there are no fixed ends, there are no final solutions."¹⁶⁴

Professor Douglas Johnston is thus right in placing "particular emphasis ... on the shift from 'classical' to 'romantic' moulds of legal development".¹⁶⁵ In the same way, the time has now come to give up rigid, narrowing and arid classical analyses and to shift to relativist, open-minded and creative romantic approaches.

¹⁶⁴ Schachter "The Nature and Process ...", note 12 above, p 750.

¹⁶⁵ See note 13 above, p 197.