From soft law to ius cogens and back

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Professor Riphagen, a long time colleague of Professor Quentin-Baxter's in the United Nations and especially in the International Law Commission, in this paper tackles basic questions about the character of international law (and incidentally of all law). A simple scale running from non-law through soft law and normal law on to peremptory norms (ius cogens) may be too simple. Professor Riphagen's consideration of major areas of economic order — by reference as well to Professor Quentin-Baxter's work, suggests complex linkages within the international legal system. They arise in part from the differences between the purposes of law, the legal relationships within the system, the methods of giving effect to the law, and the consequences of non-compliance. In some circumstances the apparent scale may approach a circle with soft law running over into peremptory norms.

The terms soft law and *ius cogens* are typically used to refer to the force of legal phenomena and suggest the existence of a scale of force ranging from non-law through soft law and law to *ius cogens*. In itself this physical picture would, a priori, seem to be less than suitable for application to normative phenomena and in particular to those of international law. Indeed in the political arena there is a marked tendency to jump from soft law to *ius cogens,* while in the legal arena one is often inclined to consider non-law or law as the only alternatives though recognising of course that non-law may become law, and vice versa, in the course of history.

Everyone realises that law is not the only rule for human conduct. While in contemporary sociology the idea of laws of nature governing human relations seems to have lost its axiomatic status, the chance-necessity approach to human behaviour, possibly in connection with game theory, is still applied. On the other hand, rules of the game are formed and followed outside the law, as are moral principles which are considered valid irrespective of human say-so. But the typical feature of the law is the interrelationship between ought and is statements and methods of arriving at situations of coincidence of the two. The corresponding system is rather complicated, in particular in the international field; its elements, operations and relationships cannot easily be fitted into the pattern of force and effect. While maintaining the law/non-law alternative there is room for differentiation in the law/fact interaction of ought-to-is. In

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the international field, in particular, the relativity of ought and the relativity of is is the raison d'etre of rules of international law, and determines their technique.

In the final analysis, even the rules of international law and their application cannot, of course, escape the necessities of an equitable balance of interests, a hierarchy of values, and the consideration of some rights and obligations as *omnium erga omnes*. They could lay no claim to the epithet or name law if it was different! But what distinguishes international law from domestic law in technique is the purpose in international law of postponing as long as possible these subjective choices, which are tending towards non-law, in which values are subordinated to interests which are rights for me and obligations for all others.

Consequently, there are three layers or levels of international law. The first level is that of the sovereign equality of states, implying an equal sovereignty of states, which in its turn implies consent as the basis of any phenomenon of international law. On the second level a distinction is made between *ius inter potestates,* regulation of international movement, rules of conflict of laws, and the inter-relationships between those three branches, which inevitably entails some subjective (in the sense in which this adjective is used above) choices. On the third level this third element is integrated with the preceding levels, but still on the basis of turning a conflict into *concursus* through delimitation of fields of applicability: an objective process.

This picture of the international legal system keeps the distinction law/non-law, but opens the way for legal phenomena, elements of the system, to find different places within the system, implying different relationships with, and operations as between, other elements of the system, in short a different relevance in the system. Whether this differentiation in relevance is adequately expressed in the linear sequence non-law/soft law/law/*ius cogens* i.e. in degrees of force, remains to be seen! Actually, all law is *cogens* in the sense that its purpose is to force human conduct. On the other hand all law is soft in the sense that "The Moving Finger writes; and, having writ, Moves on . . .".

The inversion of this thesis brings us to what would seem an inherent characteristic of law as distinguished from non-law, namely a modicum i.e. a limited quantity of duration or stability, which, incidentally, also distinguishes law from rules of the game. For example if Wengler[1] supposes that, within the category of legal phenomena (of international law) a unilateral promise may be the source of legal obligations, and that such unilateral promise may be unilaterally withdrawn with retroactive effect, provided the promise contains an explicit reservation to this effect, he is actually including non-law among legal phenomena. On the other hand a legal phenomenon which is not susceptible to change at all according to the legal system it belongs to, would also fall outside the realm of law, which, of course does not exclude the possibility that it expresses an ought such as moral or religious principles do. Such principles are usually considered as immutable as the laws of nature; in other words they are of infinite validity.

But what about the rules of the game, which also fall outside the realm of law? Though one can, no doubt, find analogies between them and law, the characteristic of

1 *Legal Essays, Festskrift til Frede Castberg* (Universitetstorlaget, Oslo, 1963) 350-351.

games is that they end with winning, losing or a draw, but end nevertheless. This is the same as saying that a game can be played or not played. Actually, not playing a game according to its rules is simply not playing that game, and if the game is ended (or not started) the rules of the game leave no trace whatsoever. Incidentally, there are games[2] which allow changes in the rules during the game; but then an element of chance and/or purely arbitrary limits must be set to end the game (and, for that matter, to start it). Law, on the contrary, is a continuous "necessity", though its content has an element of chance. Actually, chance is the accepted basis of the international legal system both in the sense that it accepts as a starting-point the relativity of ought and is, and in the sense that it more often than not leaves matters as they are or develop in fact. The domestic legal system, on the contrary, makes an a priori dichotomy between legal and illegal, and, though sometimes mitigating this dichotomy, does not accept relativity as a starting-point.

If the above analysis is accepted it is possible to identify some fields in which the phenomena of non-law, soft law, law and *ius cogens* are likely to appear. Indeed there are three fields of modern international law where these phenomena — including controversy about the dividing line between each of the four — play a particularly important role: the "international human rights and fundamental freedoms", the international "law of the environment", and the rules concerning what is called "the New International Economic Order."[3]

At the outset one may apply to modern international law what Andre Warusfel says in the first sentence of this book *Les mathematiques modernes*: "Il n'y a pas de mathematiques modernes". Though almost all in these three fields of law is controversial, nobody wishes to throw away without trace the older tenets of international law. Inevitably then one can — as both Alain Pellet in "Le droit international du developpement" and Seidl-Hohenveldern in the 1979 lectures at the Hague Academy[4] on "International Economic Soft Law" do, albeit with seemingly different conclusions — recognize contradictions between the relevant rules. The same goes for international environmental law and for international law relating to human rights. Suffice it at present to point to the glaring "inconsistency" of principle 21 adopted at the 1972 U.N. Conference on the Human Environment, and to the tendency to create what could be called a fourth generation of international human rights overriding, instead of merely mitigating, the rules of the first and second level of international law mentioned above.

The point however is not so much to recognize these inconsistencies as to find the way to reconcile the relevant rules. Obviously no attempt can be made in the present essay to do so, but perhaps some further analysis of the three fields, in conjunction with some elaboration of the model of the international legal system, as sketched above, may provide some guidance. The starting point-definitely no more than that-is the

2 See Suber's game Nomic in D. Hofstadter. *Metamagical Themas: questing for the essence of mind and pattern* (Basic Books, New York, 1985) 70 et seq.

3 Referred to this article as N.I.E.O.

4 Vol. 163, pp 165-246.

admonition expressed at the end of the 1970 General Assembly "Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States": "In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles". The admonition was repeated in the Helsinki 1975 Final Act in the form: "All the principles set forth above are of primary significance and, accordingly they will be equally and unreservedly applied, each of them being interpreted taking into account the others". Indeed this clause only draws attention to the notion of a legal system. It is a truism to state that the structure of the worldwide international legal system is far removed from the structure of any type of domestic legal system, though few nowadays deny the existence of international law as such.

But is then the door not open for the qualification as law of any statement on what is considered to be a desirable situation in the international field? Of course there are limits. Law cannot exist without fictions and abstractions, both being based on a distinction between relevant and irrelevant facts. Neither can it exist without potential conflict i.e. it requires at least two opposing elements. Finally those elements must be susceptible of being reconciled through *concursus* and such reconciliation must have some duration. These are the four parameters of law's consistency, of its logic.

Turning now to human rights and fundamental freedoms, in international law, the moral basis of such rights, or rather freedoms is immediately recognisable. That does not mean that they cannot be turned into law, even into international law; they can, but such transplantation requires an adaptation of their content. The 1948 Universal Declaration of Human Rights recognizes this. Apart from its qualification of itself as "a common standard of achievement", it proclaims in article 1 that "All human beings ... should act towards one another in a spirit of brotherhood", and article 29(1) states that "Everyone has duties to the community", and there is the self-referential article 30. Clearly then the Universal Declaration could be law; it indicates at least an object and purpose. Indeed it is law, provided and to the extent that it can be fitted into other rules of law.

In this connection one can have doubts as to article 28: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized". Actually this ought statement would seem to overstep the limits of law. There are differences between the various human rights. Some of them are fundamental freedoms, other purport to give a right of participation in collective goods, still others purport to impose an obligation to create collective goods. All of them are subject to limitations, which means that they cannot be "fully realized". To give to everyone additionally an "entitlement" to full realisation either means nothing or brings the statement into the realm of pure morals. In a sense it reminds one of the (tongue-in-cheek) proposal to grant to everyone two additional freedoms: free choice of territory and free choice of government![5]

The Universal Declaration of Human Rights 1948[6] is not a treaty either in form or in

5 J. Gall, *General Systemantics* (led, General Systemantics Press, Ann Arbor, 1973) 8.

6 Referred to in this article as the Universal Declaration.

content. The two 1966 U.N. Conventions on Civil and Political Rights, and on Economic, Social and Cultural Rights, and the Optional Protocol to the former Covenant are separate treaties. Furthermore, fortunately, the human rights technique is also applied in many domestic legal systems, independently of rules of international law.[7] Obviously the question arises as to what is the relationship between those statements. This question involves matters of stability and matters of separability. The Universal Declaration is a General Assembly resolution. As such it can be changed by another resolution, even a non-unanimous one. But just as article 43 (and for that matter article 38) of the Vienna Convention on the Law of Treaties envisages the possibility of a rule set forth in a treaty as being (or becoming) also a "customary rule of international law", it is certainly not impossible that a rule set forth in the Declaration is (or becomes) also a "peremptory norm of general international law (*ius cogens*)" in the sense of article 53 of that Convention. But would such status of a rule of the Declaration permit a rule of the Covenants to be considered void ab initio? The intuitive answer is no! But why not? The answer to this question seems to be that the Covenants fill in part of the, considerable, "grey zones" left in the Declaration. Such grey zones are inevitable in an approach to legal phenomena which purports to establish absolute rights which belong to the human person as such.

Conceptually this approach is equivalent to the approach of sovereignty of states in *ius inter potestates*. Indeed the first limitation of such individual sovereignty is the "due recognition and respect for the rights and freedoms of others".[8] (Article 30 of the Declaration, in so far as it refers to a person, does no more than confirm this sovereign equality.) Fortunately in respect of some human rights there is no inherent conflict between the right of one person and the same right of another person. (However a fortuitous conflict may always arise, and one might wonder whether the necessary limit of the resources of the earth, in the widest sense, really can support the life of all human beings, present and future. Such conflicts — in a concrete situation and as regards the overall situation — in respect of the most fundamental human right without which the other human rights have little sense, are often conveniently forgotten). The situation changes as regards some other human rights which imply communication with other human beings. It may be right — in the words of article 29(1) of the Declaration — that "the free and full development of [the] personality" (!) of a human being is "alone . . . possible" in "the community"; nevertheless this suggestion of a quid pro quo for the limitation of human rights sounds somewhat simplistic. Which "community" is envisaged anyway? Article 29(2) seems to refer to the state, while article 29(3)[9] — couched in the same terms as the self-referential article 30 — envisages the larger community. But, as Bergson has already remarked, ". . . entre la nation, si grande soit-elle, et l'humanite, il y a toute la distance du fini a l'indefini, du clos a l'ouvert."[10] In any case "the purposes and principles of the United Nations" are primarily oriented to

7 As mentioned in article 5(1) of each Covenant.

8 Article 29(2) Universal Declaration.

9 See also article 24(2).

10 H. Bergson *Les deux sources de la morale et de la religion* (Presses Universitaires Françaises, Paris, 1932) 27.

ius inter potestates, to the maintenance of the sovereign equality of states, i.e. to the first level of international law. The Covenants introduce a link with the third level by stipulating the right of self-determination of peoples as a human right, but that right is certainly not independent of the factual link between human beings and a particular territory![11] In other words it presupposes a prevailing centripetal communication between the members of a particular group of human beings. Indeed de Ceccaty notes ". . . cette tension fondamentale qui, des l'origine, s'est instauree au sein du regne animal entre une disposition a l'autonomie et une vocation a la dependance communautaire"[12]

The idea of rights belonging to a human being as such, furthermore, would imply that all human rights stand, in principle, on the same footing, and form together the bundle of individual "sovereignty".[13] Here again, however, the Covenants, in translating the Declaration into treaty form (a form typical for *ius inter potestates*) split up the unity of the Declaration while significantly adding the right of self-determination of peoples to both Covenants. Whereas the Declaration, in most but not all of its provisions, formulates the human rights as *erga omnes* i.e. "regardless of frontiers", the Covenants, in particular the one dealing with economic, social and cultural rights[14] introduces distinctions between the communities within which those rights are enjoyed and to which the person belongs. The right of participation in collective goods, and even more so, the duty to create such collective goods, are apparently not *omnium erga omnes*. Even the freedoms of the individual — civil rights — are not treated on the same footing. Indeed "life" is one thing, "liberty" another — the one being primarily centripetal, the other primarily centrifugal. Expansion and contraction alternate e.g. family (article 16), assembly and association (article 20), nationality (article 15), sometimes but not always creating new "units" with their own "rights", sometimes but not always including freedom not to "associate" and freedom to change the "association".

All this concerns "the development of his personality", his "power" vis-a vis other individuals. The necessity of a material basis, a personal "territory" as it were, is not forgotten: "property", "work" and "creativity" as a means of acquiring "property", all implying communication with other individuals, are also protected.[15] Here "freedom" begins to shade into right of participation in, and obligation to create, collective goods. The "due recognition and respect for the rights and freedoms of others" evidently requires protection of the "weaker party" and of "third parties". At the end of the circle arise "the just requirements of morality, public order, and the general welfare in a democratic society"[16] — all of them notions about the content of which a wide variety of opinions may be held (the more so since they cover both a concrete situation and the overall situation, which is a set of concrete situations). The law (with its fictions and abstractions, its relativity, its conflict resolution, and its modicum of stability) is given

11 By way of contrast, see Gall's two new freedoms mentioned supra n.6.
12 *La vie de la cellule a L'homme.* 42.
13 Article 2 Universal Declaration.
14 Article 4: "provided by the State"!
15 Articles 17, 23(3), 25, 27(2).
16 Article 29(2) of the Universal Declaration.

the task of combining all the elements.[17] The situation is essentially the same under the two Covenants, though here the grey zone is smaller, both as regards the possible limitation of the rights and as regards the obligations of a procedural kind[18] to be fulfilled if such limitation is applied.

As already remarked, a further differentiation of human rights takes place; in particular, in the Covenant on Civil and Political Rights the right to life and its neighbours is distinguished from the right to liberty. Only occasionally a specific point within a previous grey zone — a line segment — is, more or less arbitrarily, indicated.[19] In general the relativity of human rights is emphasised. Indeed the mere fact that there are separate treaties for different human rights as mentioned in the Declaration, is a signal that the concept of the human being being endowed, by the fact of existence alone, with a bundle of rights on the international plane is not law, but rather an imperative dictated by morals or religion. In this connection it should be noted that only the third preambular paragraph of each Covenant links the civil and political rights to the economic, social and cultural rights. It is also significant that within the Covenant on Civil and Political Rights there are procedural provisions[20] which apply only in case of a unilateral declaration to that effect, which declaration "may be withdrawn at any time", and that the right of the individual to bring a case before the International Committee is recognized only in an optional protocol, which may be "denounced at any time".[21] Furthermore the two Covenants, being treaties, are governed by the general rules of international law relating to treaties. Surely, this does not exclude[22] "the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty," but the inherent relativity of the human rights, as formulated in the Universal Declaration, would seem to make it extremely difficult to rely on other sources for specific international obligations of a State in this field.

Legal relationships based on treaties are, since the consent of the states concerned underlies them, by nature "soft". The rules laid down in the Vienna Convention on the Law of Treaties contain several provisions tending to balance this softness. One of those provisions is article 18, another the limitation of the possibility to make reservations, still another the rules on denunciation, and, finally, the rules on amendment and modification of treaties (including those concerning what may be called "implied amendment" through conclusion of a later treaty on the same subject-matter[23]). All those rules of the law of treaties are residual in the sense that the law in treaties may deviate from them.[24] On the other hand, the Vienna Convention recognizes the possibility of *ius cogens* (defined not in terms of its content, but only in terms of the

17 Idem.
18 E.g. art. 14(5).
19 E.g. art. 11, Covenant on Civil and Political Rights.
20 Articles 41 et seq.
21 Article 12.
22 Vienna Convention on the Law of Treaties, art. 43.
23 Article 30.
24 Cp. art. 5 of the Vienna Convention on the Law of Treaties.

procedure of adoption and derogation). It is interesting to note — within the framework of the law in treaties — that the two U.N. Covenants are silent on reservations and denunciation, while the European Convention on Human Rights is not.

The Vienna Convention in all its provisions strengthening rules of law laid down in treaties, attaches, explicitly or implicitly, great importance to the "object and purpose" of the treaty, apparently as something which can be established beyond the terms of the treaty itself and their "context".[25] This "object and purpose" returns in article 18 (treaties *sub. spe. rati.*), article 19 (reservations), and article 41 (modification of multilateral treaties as between certain of the parties only). Somewhat more discreet, the notion of "object and purpose" also seems to underly the provisions of article 56(1)(b) (right of denunciation "implied by the nature of the treaty"), and article 30 ((in-) compatibility between provisions of earlier and later treaties).[26] All these are, so to speak, pre-primary rules; they deal with the creation, interpretation and death of the primary rules.

The relative softness of the law in treaties also appears in the Vienna Convention's provisions relating to fundamental change of circumstances (including supervening impossibility of performance), supervening *ius cogens* i.e. fundamental change in legal opinions, treaties and third states, and the temporal scope of the law in treaties. The provisions relating to the first two topics do not explicitly make the "object and purpose" of the treaty relevant for its application. But it is significant here that the "object and purpose" of the treaty appear indirectly in the guise of several aspects of it: firstly in the exclusion if "the treaty establishes a boundary",[27] secondly, in the objective criterion of 62(1)(b), thirdly in the construction of the scope of the consent given earlier (since, by definition, the fundamental change was not foreseen by the parties, the earlier consent can only be construed as limited to *rebus sic stantibus*), and fourthly the exclusion of "impossibility of performance" or "radical transformation of the extent of obligations still to be performed under the treaty" as a ground for termination of the treaty if it is "the result of a breach by the party invoking it either of an obligation under the treaty *or of any obligation owed to any other party* to the treaty".[28]

This last aspect is particularly interesting since it amounts to a fusion of the objects and purposes of rules and resulting relationships arising from different sources of law, just as the relevance of the object and purpose of a treaty amounts to a fusion of the objects and purposes of the various rules of conduct laid down in that treaty and of the legal relationships arising from it. In respect of multilateral treaties, there is a striking contrast with article 60, which, in its definition of "material breach" does refer to the object and purpose of the treaty, and still makes a distinction between the position of a "party specially affected by the breach" and other parties to the treaty, which, in fact, can only suspend the operation of the treaty under circumstances amounting to a

25 See art. 31(1): general rule of interpretation.

26 See also art. 59(2)(b).

27 Article 62(2)(a).

28 Articles 61(2) and 62(2)(b). Emphasis added. Note "the result" is not necessarily the intended result.

fundamental change of circumstances as a result of the breach. All this only serves to illustrate again the relativity of any rule of conduct.

Articles 60, 61(2), and 62(2)(b) are in reality secondary rules inasmuch as they deal with some of the legal consequences of the breach of a primary obligation. The Vienna Convention rules relating to supervening *ius cogens* also deal with the relationship between a rule and another (i.e. later) rule. The interesting point here is that article 71(2) clearly presupposes that even *ius cogens* may have different degrees of effect. Indeed it gives retroactive effect to the new peremptory norm of general international law only if it so stipulates, or, presumably, if such retroactive effect results from its object and purpose. Further secondary rules are addressed in the draft articles on state responsibility under discussion in the International Law Commission. Here again the relativity of legal relationships and the interaction between rights and obligations is clear, as is the relevance of object and purpose of the rule of conduct. It is to be noted that the whole system of the draft articles is based on the notion of an internationally wrongful act being in the first instance an act of a state not in conformity with what is required of it by an international obligation. The conflict between such an obligation of State A, and a right State A may enjoy, is addressed in some draft articles in Chapter V of Part One, entitled "circumstances precluding wrongfulness." Obviously similar situations as "impossibility of performance" and "fundamental change of circumstances" in treaty law have to be, and are, envisaged here.[29] The treatment of such situations, however, is different here. This can be explained by the difference between validity of a treaty and non-performance of an obligation, even if such obligation results from a treaty. On the other hand, a circumstance precluding wrongfulness is not necessarily meant to exclude a possible liability in regard to compensation for damage caused by that act![30] This double difference of context concentrates the question on the concrete situation. Accordingly, the mere "contribution" of the state wishing to invoke *force majeure* or state of necessity, to the situation excludes such invocation, but nothing is said about a possible "contribution" of the other state to the situation. On the other hand, the object and purpose of the rule which creates the obligation breached, acquires increased importance.[31]

What is the relevance of all those "degrees of force" to the present topic of international human rights? International human rights tend to transplant relationships between an individual human being and other human beings, including human beings acting "in an official capacity", into relationships between states and, inversely, tends to assimilate the fundamental rights of the human being to the sovereignty of the state. Obviously this double operation of expansion and contraction on the third level of the international legal system is bound to proceed by degrees if it wishes to preserve, at least not to destroy completely, the second and first levels of the international legal system. Indeed a mutual rapprochement is required in order to reconcile the sovereignty of the state and that of the individual. In this connection it should be recalled that, while in the

29 e.g. Part One, art. 31 (*force majeure* and fortuitous event); art. 33 (state of necessity).

30 Part One, art. 35.

31 Cp. art. 33(2) under (a) - peremptory norm - and under (b) - implicit exclusion by treaty.

words of article 30 of the Universal Declaration and repeated in article 5(1) of both Covenants there is no right for any state, group or person "to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present [document]", a primary rule, a secondary rule generally giving or admitting a right of the individual to react to such activity or act is — understandably — not foreseen. In other words, to a certain extent the individual human being remains a prisoner of the society to which he or she happens to belong at any time, by "acting" within such society or otherwise.

A counterpart of the expansion, consisting in the transplantation of relationships between individual human beings to the inter-state level, would be the contraction consisting of the so-called "direct effect" within the domestic legal system of the relevant international treaties and other rules of international law in the field of human rights. While several domestic legal systems at present open themselves up to some direct effects, there is no general rule of international law which obliges states to do so. Indeed the relevant treaties, while not excluding such direct effect, only stipulate obligations of the states parties to "respect", to "ensure", or even only to "provide" such human rights within their domestic legal system. Incidentally, the idea that the Covenants would replace the domestic legal systems in regard to human rights, is denied by the article 5(2) of both Covenants — a curious provision necessary only if one would construe the stipulated limitations of individual human rights as rights of others, in particular of the state, with "direct effect"!

Absence of direct effect does not mean that the relevant treaties are not concerned with the legal consequences of the non-respect of human rights. The "secondary" rules of the substitute performance of reparation, the procedural remedies, and the actual *restitutio in integrum*[32] show this, but the details of this development are normally left to the choices of the domestic legal system. In this connection it is interesting to compare article 6 of the European Convention with article 14 of the U.N. Covenant on Civil and Political Rights. Both articles seem to recognize that human rights have an impact on the procedure of "the determination of . . . his rights and obligations in a suit at law" or, as the European Convention puts it, of "the determination of his civil rights and obligations". But an interpretation of this provision as given, in respect of the European Convention, by the European Court of Human Rights in the *Benthem* Case[33] (in which the Dutch administrative appeal procedure against the giving or refusal of a licence by the local authorities, required by the Dutch Nuisance Act of 1952 for the erection of certain installations which may be a source of danger, damage or nuisance to their surroundings, was judged to constitute a violation of article 6, paragraph 1), would not seem likely to be followed on the world-wide plane. Significantly, this judgment limited itself to the declaration that the Dutch procedure was not in conformity with the obligations of the state under the European Convention: it did not give the plaintiff any, other, "just satisfaction" under article 50 of the convention. Obviously, neither the

32 The contraction operation. Cp. art. 2(3) of the U.N. Covenant and Civil and Political Rights.
33 Case 1/1984/73/111 (Judgment of 30 September 1985).

judgment itself, nor, for that matter, the Convention, could create a procedure under domestic law, which, in the opinion of the Court, would conform to the convention.

The direct effect is thus a limited one, even under the European Convention, and even though the Dutch Constitution in principle accepts the direct effect and primacy of treaty rules in respect of the rules of the domestic legal system. There remains, of course, the obligation of the state under the treaty to change its domestic procedure. Given that, under the general rules of international law a state is responsible for the acts and omissions of its organs, including its judicial organs, would the failure to comply entail the legal consequences between states as provided for in those general rules? The fact that in the *Benthem* Case, the party was a Dutch citizen and conducted the business which gave rise to the "dispute" in the Nertherlands is, from a perspective of human rights, obviously irrelevant. Nevertheless, an affirmative answer to the question is certainly not implied in the relevant treaty. In fact, the transplantation of human rights to the level of *ius inter potestates* seems to exclude at least some of the normal consequences of state responsibility without creating the substitute of a right in the individual to react otherwise than as provided for in the actually existing and applicable domestic legal system to a violation of his rights, let alone those of others, the sweeping formulation of the last operative paragraph of the U.N. Covenant on Civil and Political Rights notwithstanding!

The impact of international protection of human rights on other branches of international law[34] than *ius inter potestates* is also generally limited. Though occasionally attempts are made to apply the equality component inherent in human rights to "non-discrimination" in the field of the regulation of international movement and in the field of conflict of laws, the separation[35] of human beings as nationals of a particular state, acting within the territory of a particular state, within the framework of its legal system, is mostly accepted as justifying inequality of some sort between human beings. Sometimes this is already taken care of in the international instruments in the description of the human right itself[36] or by a deliberate *claudicans* formulation such as article 15 of the Universal Declaration which gives everyone the right to a nationality and the right to change nationality but which fails to indicate the corresponding duty of a state, and, indeed of which state. More often it is considered self-evident, particularly in the rules of conflict of laws, that the connecting factors with a particular domestic legal system do not imply discrimination, though, by definition, they determine the outcome of the case.

All the above merely tends to show that the force of a legal phenomenon is nothing than its relationship with other legal phenomena within a legal system composed of subsystems interrelated by other subsystems. A legal phenomenon, accordingly, can have different positions in the legal system. To the extent that its position is not determined, an ought -statement is not yet a legal phenomenon for that system, in other

34 Second level.

35 At a first level.

36 E.g. art. 16 European Convention, arts. 12 and 13 of the UN. Covenant on Civil and Political Rights, art. 2(3) of the U.N. Covenant on Economic, Social and Cultural Rights.

words is non-law. Law is an ought-to-be and, as such, has an intermediate position between the realm of pure ought and that of pure be. The operations of a legal system tend towards a situation of coincidence between what it takes from the two realms and combines in its system. A pure be -statement merely indicating a situation of fact, be it a concrete situation or a set of situations called a state of society, is no more a legal phenomenon than a pure ought -statement, since the legal system has to provide an order which fits both the concrete situation and the set of situations. Soft law and *ius cogens* are, so to speak, the entry-points in the legal system. They are both at the threshhold of law so long as the legal system has not fitted them into a particular place within its machinery for ought/be coincidence, which necessarily transforms both the original ought -statements and the original be -statements in narrowing the gap between them at the same time combining the various ought -statements and be -statements.

This analysis implies, inter alia, that a legal system is self-referential in the sense that it must contain rules on the creation of rules of conduct and rules on the scope of rules of conduct so created; one could call these rules meta-rules: rules about rules. Where the contents of a legal system or subsystem are always subject to the constraints of the non-legal phenomena of reality and morals, the meta-rules of a legal system are perhaps more susceptible to these constraints while, at the same time being perhaps also more subject to the constraints of consistency. In any case, to return to the topic, there is nothing against introducing the notions of *ius cogens* and soft law, provided that their place in the legal system is elaborated, which also means that they are distinguished from the non-legal phenomena. To cite de La Rochefoucauld: "Les vertus se perdent dans l'intérêt comme les fleuves se perdent dans la mer"!

In the light of the above analysis it is not surprising that the Siamese twin soft law-*ius cogens* is encountered not only in the international law field of human rights, but also in that of environmental law and the law of the New International Economic Order. While human rights start from the concept of separation of individual human beings, environmental law has as its starting point a fusion concept — the indivisibility of the human environment — whereas the N.I.E.O. strives for a better distribution of wealth between states.

Significantly environmental law is often developed from the principle expressed in the Roman Law maxim *sic utere tuo ut neminem laedas*. Actually Principle 21 adopted at the U.N. Conference on the Human Environment proclaims in one and the same sentence the sovereign right of all states to exploit their own resources pursuant to their own environmental policies and their responsibility to ensure that activities within their jurisdiction or control "do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction". Both statements do no more than indicate the possibility of conflicting interests and the necessity of balancing those interests. As a purported rule of conduct they are about as useful as Democritus' statement about 2400 years ago — "all that exists in the Universe is the fruit of chance and necessity" — is for the description of the laws of nature. Nevertheless, like Democritus' statement for the laws of nature, they are an entry-point for law, and it does not make much sense to ask whether entry-points are inside or outside! Indeed, while under the general rules of international law the "territories" of states do not normally

overlap, or rather are made by law[37] not to overlap, it is fairly obvious that the environments of states do overlap. *Hinc lacrimae*! But at least an object and purpose is stipulated. This is still a far cry from rules of conduct; soft law indeed. But on the other hand there is an element of *ius cogens* too, as expressed in article 19(3)(d) of Part One of the I.L.C.'s draft articles on state responsibility, qualifying as an international crime of the state "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas". Even direct effect — international criminal responsibility of the individual — is envisaged in the Fourth Report of Mr Doudou Thiam to the I.L.C. on the Draft Code of Offences against the peace and security of mankind.

How to fill the gap in the law, created by the overlap of environments? In his contribution to "Trends in environmental law and policy"[38] the present writer discussed some fairly recent attempts made in the framework of U.N.E.P.[39] Reference may now be made to later instruments, in particular to draft provisions under discussion in the I.L.C. concerning — (1)"international liability for injurious consequences arising out of acts not prohibited by international law", notably the "Schematic Outline", presented by Prof. Quentin-Baxter in 1982, and (2)"the law of non-navigational uses of international watercourses". At the outset it should be noted that there is a sort of mirror analogy between the international regulation of human movement across frontiers (including but not limited to international trade) and the regulation of natural movement across frontiers which is the essence of international environmental law.

What in Grotius' time was called *ius communicationis,* the object and purpose of the international regulation of international movement of goods, services and persons, is "filled up" in treaties concerning (1)entry and exit, (2)non-discriminatory treatment, (3)avoidance of "non-tariff barriers" (in fact a form of exterritoriality — the barrier results from the divergence of national regulations[40]) and (4)common standards of treatment. Similarly, be it in inverse order, in environmental law, ideally (1)common standards of pollution control (internalisation) should correspond to the overlap of environments of states, or failing that a cumulative application of domestic environmental regulations, which in any case would imply (2)application of the standards of environmental protection of the state where the environmental impact would be felt, could be envisaged, and failing that (3)non-discriminatory treatment[41] could be

37 Treaties establishing boundaries.

38 Bothe, 1980.

39 See Yearbook I.L.C. 1982, Vol. II, Part One, 195 et seq. - W.M.O. (weather modification), and O.E.C.D.

40 See e.g. arts. 100 et seq. E.E.C. Treaty.

41 In terms of UNEP Draft principles of conduct in the field of the environment... UN.EP/1G 12/2, "It is necessary for states, when considering, under their domestic environmental policy, the permissibility of domestic activities, to take into account the potential adverse environmental effects arising out of the utilization of shared natural resources, without discrimination as to whether the effects would occur within their jurisdiction or outside it."

prescribed, and, finally (4)some minimum domestic control of pollution, including equal access of affected private parties to procedures and remedies available under the domestic law of the source state, could be provided for.

Not surprisingly, within the framework of the E.E.C. Treaty, it has been claimed that its article 7 which contains the general prohibition of "any discrimination on the basis of nationality" implies at least in member countries the equal access as referred to under (4) above. The logical validity of this claim seems doubtful since article 7 applies only "within the sphere of application of the present treaty"; while it is true that some aspects of environmental law and policy have been dealt with in community regulations under article 100 and following of the E.E.C. Treaty and that article 235[42] of the Treaty gives a general power to the Council, a direct application of article 7 to matters not regulated by Council directives under article 100 and following, would be a quantum leap from regulation of human movement to regulation of natural movement — this particularly in the light of judgments of the European Court[43] which distinguish discrimination and distortion resulting from differences of national regulations of member States!

It is also worth noting that even in the most recent (not yet ratified) treaty of September 1984[44] concerning the relatively small area of the Ems Estuary, where the frontier-line between the territories of the Netherlands and the Federal Republic of Germany is disputed, the environmental aspects of this situation are not completely solved by common standards or even by stipulating equal access, while in treaties of 1960 and 1962 concerning the same area all other aspects (such as navigation, fishing, exploitation of mineral resources) have been regulated by elaborate provisions, which make the actual trace of the frontier-line irrelevant.[45]

Obviously, stipulating an object and purpose creates an entry-point in a legal system but cannot by itself let legal relationships arise within that legal system. On the other hand, the legal system cannot adequately deal with the fact of human conduct by making a simple dichotomy of conduct in conformity with its rules of conduct and conduct not in conformity with those rules. In reality, all rules of conduct leave a grey zone between rights and corresponding obligations (i.e. static legal relationships, in which, so to speak, a "stand-still" point might be indicated), while at the same time they need to define the outer limits of means of filling-up the grey zone on the one hand, and conduct defeating or destroying the object and purpose, on the other hand.[46] In this sense a duty to negotiate or, as it is sometimes more idealistically termed, a duty to co-operate is the inherent counterpart of the determination of an object and purpose. Indeed the two presuppose a knowledge of "the facts", itself composed in environ-

42 "If any action by the Community appears necessary to achieve, in the functioning of the Common Markets, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions."

43 E.g. Case 14/68, Jur. XV (1969) 16-17.

44 Dutch and German texts in *Tractatenblad 1984,* 118.

45 For the way in which this was done, see Riphagen "Some reflections on functional sovereignty" (1975) VI Neth. Yrbk. Int. L. 146-148.

46 Cp. Riphagen in *The Structure and Process of International Law* (Macdonald and Johnston ed., 1983).

mental matters of the factual situation itself and "the state of the art"; mutual information therefore precedes negotiation.

Section 2 of the Schematic Outline[47] rightly stresses this entry-point in the law/fact interaction, culminating in section 2 paragraph 6 in the recommendation of a joint fact-finding machinery, the outcome of which would be "advisory, not binding the states concerned". And even so, according to paragraph 8 of the same section: "Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action". The operative words here are, it would seem, "in itself". In this context, information, consultation and negotiation are "conduct", the absence of which, together with the conduct of the "activity" itself and its adverse consequences for the "activity" of others (in the Schematic Outline called "loss or injury") may well as a whole bring into play at least some of the legal consequences of a breach of an international obligation i.e. responsibility and in particular the duty to make reparation (or, as draft article 35 of Part One of the I.L.C.'s draft articles on state responsibility calls it, "compensation"). Sections 3 and 4 of the Schematic Outline describe the next step in the filling-up of the grey zone: "negotiations . . . with a view to determining whether a regime is necessary and what form it should take"; again, failure to take that step not "in itself" giving rise to any right of action. The establishment of such a regime, presumably by agreement between the states concerned, would seem at first sight to be the end of the road as far as this topic is concerned; the rest would then be determined by the law of treaties and the law on state responsibility. However, the Schematic Outline goes further and purports to give guidance for the content of the regime, and to state rules applicable in the absence of an agreed regime. The combined effect of these two operations comes near to an amalgamation of soft law and *ius cogens*: necessity of a regime on the one hand, wide discretion as to its form on the other hand! In reality, of course the two are interwoven. So are the rights and obligations which result: obligations of prevention and rights of compensation. Their common denominator is economic: costs and benefits. Accordingly section 6 (particularly the "factors" 11(a), 12 and 14) bring in the element of "exchange of performances", the bargaining underlying the establishment of the regime. On the other hand there are "norms": the standards of protection; it is here that the notion of "shared expectations" is introduced[48] being in fact a reference to common standards.[49] Significantly, a certain bias in favor of the standards applied in the affected state is expressed in sections 5(3) and 6(10). No specific mention is made of non-discrimination and equal access to preventive procedures and compensation remedies under the domestic law of the acting state, though these might be a "factor" in judging the "necessity" of a regime under section 3(1), and may be effected under section 7 III. Also significant is the reference in section 6(13) to "the extent to which the adverse effects arise from or affect the use of a shared resource". Indeed, if the law — or the regime — turns the overlapping environments of states into a

47 As well as U.N.E.P. Principles 4, 5, 6, 8 and 9; and Ems Treaty 1984, arts. 3(1), 12, 23(2), 27, 34 and 40(1).

48 Section 4.

49 Cp. s.4 para. 4(b).

shared resource, the perspective changes from mere mutual accommodation of interests into a distribution of uses of that resource.

This directs attention to international waterways and their non-navigational uses.[50] In the latest proposals of the Special Rapporteur, Prof. MacCaffrey, to the I.L.C., the notion of "shared resource" (proposed for international waterways by his predecessor Schwebel and provisionally adopted earlier by the I.L.C.) is dropped. But the Special Rapporteur makes it clear that the main application of the concept of shared resources, namely the entitlement of each "watercourse state" to "a reasonable and equitable share of the uses of the waters of an international waterway" remains the core of his proposals. The similarity of the topic to environmental law is clear. So are the differences: for one thing, the direction of natural movement of waterways is generally fixed in space, and its uses and scarcity are perceived far longer in history. For this reason it is perhaps easier to develop general legal phenomena in this field. Nevertheless the problem of narrowing down the grey zone and determining the outer limit of conduct defeating the object and purpose remains, as does the question of application of the normal rules of treaty law and state responsibility law to the rights and obligations in this field. Characteristically the draft articles on this topic start from the natural unity of the watercourse and its position in separate national territories; hence the notion of "watercourse state".[51] This "status" of a state has the important legal consequence, derogating from the normal rules of the law of treaties, of being entitled to participate in agreements concerning the use of the watercourse. Such agreements are comparable to the regime of environmental law as referred to above. On the other hand, an obligation is attached to this status — the obligation "to refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse states". The Special Rapporteur makes it clear that "cause appreciable harm" equates with "uses or activities . . . that may cause that state to exceed its equitable share or to deprive another watercourse state of its equitable share of the uses and benefits of the watercourse".[52] In this way the emphasis is placed on the distribution of the shared resource rather than on the wrongfulness of acts causing injury. But then the factors to take into account in this distribution and their interrelationship are crucial, not only as guidance for the content of the regime to be established and thus for the "duty to negotiate", but also for the other "outer limit" in the sense given to this term above. Both in this respect and in respect of the deviation from the normal rules of treaty law, indicated above, the amalgamation of soft law and *ius cogens* appears again. Unfortunately, but perhaps unavoidably, those factors are not delimitatively indicated, and no attempt is made to indicate their relative weight. Somewhat surprisingly one of the factors is described as "the attainment of a reasonable and equitable balance between the relevant rights and interests of the watercourse states concerned", which, it would seem, is not a factor at all but rather the object and purpose of the distribution itself.

50 The regulation of navigational uses is concerned with human movement across frontiers.

51 Earlier called "system state".

52 A/CN/399/Add. 2, para. 183.

No special attention has as yet been given in the I.L.C. to the impact of regimes, as provided for in both the environment and the watercourse topics, on the normal rules of state responsibility. Tne latter rules, being in general residual (except for references in them to *ius cogens* and the U.N. system) the states, in establishing the particular regime, may at the same time provide for deviation from those normal rules. In a sense this is anticipated in the latest proposal concerning the determination of reasonable and equitable use of international watercourses where it is stipulated that "If the watercourse states concerned fail to reach agreement by negotiations within a reasonable period of time they shall resort to the peaceful settlement procedures provided for in chapter V of this Convention"; section 8 of the Schematic Outline may be elaborated in the same direction. This aspect concerns rather the implementation of state responsibility.[53] But what about Part Two — the legal consequences of an internationally wrongful act in terms of reparation, reciprocity and reprisal? In general, the concept of "collective interest", as referred to in the proposed articles 8 to 13 of Part Two, seems to correspond to overlapping environments and to international watercourses in so far as multilateral treaties are concerned, but much remains to be clarified in this respect. Thus, for instance, the application of article 6 of Part Two to obligations arising under a regime as envisaged in the Schematic Outline and the watercourse agreement would probably have to be adapted to the particular function of those regimes: the mix of prevention and compensation.

Distribution problems, again, are the reason for the quest for a N.I.E.O. And the discussion comes back to human movement across frontiers. It is interesting to note again that Grotius saw a universal *ius communicationis* as a necessary counterpart to the arbitrary division of the world into sovereign states. But in fact "international economic law" has never quite lost its inter-state bilateral "barter" character. Even within a highly integrated regional system as the E.E.C. the complaint of "I give much more than I get" is raised from time to time by this or that member State, and, what is more, to a certain extent taken care of in community regulations and decisions. *Fraternité* cannot do away with *egalité* and *liberté*! It is therefore not surprising that the quest for a N.I.E.O. is not easily translated into legal phenomena. Nevertheless quite a lot of legal instruments are based upon the idea that "international economic law" must pierce the veil of the state by taking into account the inequality of states and by recognizing that the economy is to a large extent made up by legal relationships between individuals and between individuals and states. Translating those relationships into *ius inter potestates* and, even more so, abstracting those relationships *inter potestates* into norms, and even principles, cannot but create difficulties as to their consistency as well as to their fitting in with other rules of international law.

A recent analytical study concerning "Progressive Development of the Principles and Norms of International Law Relating to the N.I.E.O." prepared by Prof. Abi-Saab[54] amply illustrates those difficulties! One has of course to realize the political constraints to which the publication of such a study by the U.N. is subject. It is possible, however,

53 Part Three of the draft articles.

54 U.N. Doc A/39/504, Add.1, Annex III.

to have sympathy for the ultimate goal, without giving up the testing of the proposed principles and norms on their correspondence to the requirements of legal technique which determine their possible qualification as legal phenomena.

The Summary of the Analytical Study[55] states at the outset that "The study proceeds from the premise that all the relevant principles and norms derive from and revolve around two of the most fundamental principles of contemporary international law: sovereign equality and the duty to co-operate . . .".[56] This does not seem a promising premise, since sovereignty, even equal sovereignty, includes the power not to co-operate with every other state in all circumstances. Using those two principles —neither of them is law — in conjunction rather emphasises, correctly it would seem, the necessity of a compromise solution in order to arrive at law, whether soft, normal or *cogens*. Even a cursory look at the relevant principles and norms confirms this necessity. Their formulation seems to negate this necessity, inasmuch as it is essentially one-sided and consequently leaves nothing but a grey zone. Small wonder then that even the most progressive legal instruments fall short of those principles and rules!

International economic law must penetrate the fiction of equality of states; but it would seem inadequate to replace this fiction by another: the fixed dichotomy of status developed/undeveloped states. In fact international legal practice is far more refined and recognizes differences in economic structure within both groups. Quantitative differentiation is, of course, no absolute obstacle to the formulation of legal rules, but then such rules in order to be translatable into legal relationships are bound to have a negative character in the sense that they correct but do not replace other rules. A typical example of such correction is given by articles 23 and 24 of the draft articles on most-favoured-nation clauses, adopted by the I.L.C. in 1978. Leaving aside for the moment the rather formidable limitation of this correction which results from the requirement of conformity with rules "recognized by the international community of states as a whole"[57] or, for the states members of "a competent international organisation", adopted in accordance with its relevant rules and procedures, the operative words in the present context are "treatment . . . on a non-reciprocal basis" (between developed and developing states) and "preferential treatment" (between developing states). Indeed non-reciprocity in the bilateral relationships and preference in the multilateral relationships are the keys to a N.I..E.O. The analytical study however, starting from the new fiction, referred to above, tends to translate the N.I.E.O. in terms of rights of developing states only, both in enhancing the implications of their internal sovereignty and in adding to their external sovereignty claims for co-operation of, rather than with, other states. On the other hand the analytical study rather neglects the aspect of the economy consisting — as remarked above — to a large extent of relationships between individuals and between individuals and the state, the other window or entry-point of piercing the veil of the state in the third level of international law. Such topics as "permanent sovereignty over natural resources" and

55 Ibid. Annex II.

56 Emphasis added.

57 Cp. the definition of *ius cogens* in art. 53 of the Vienna Convention on the Law of Treaties.

"the right of every state to benefit from science and technology", to take only two examples, are in reality dealing not so much with *ius inter potestates* as with the position of foreign private investments[58] and with what article 27(2) of the Universal Declaration calls the right of everyone "to the protection of the moral and material interests resulting from any scientific . . . production of which he is the author".

One could expect the legal technique applied in the analytical study to be linked to the human rights technique discussed above. Indeed paragraph 212 of the study states:

> The principles here discussed, and the NIEO to which they give legal expression, are generally considered as necessary pre-conditions for the creation of an international economic environment favourable to the development of the less developed countries and can thus be viewed as collectively constituting for these countries a "right to development", parallel, on the economic level, to self-determination on the political plane. Such a right is not just necessary for equitable and harmonious global development and the fulfillment of the ideals of justice and equality of the Charter of the United Nations. More concretely, it is a *conditio sine qua non* for the full realization of the economic, social and cultural rights of the individual, which together with civil and political rights make up what is known as internationally recognized human rights. For without a reasonable level of development, society will not be materially in a position to provide its members with the positive services and to secure for them the minimum economic standards called for by these rights. Moreover, a situation of economic deprivation cannot fail to produce its negative effects on civil and political rights as well.

Here "operation bootstraps" is completed: from equal sovereignty of states to self-determination of peoples, from self-determination of peoples to right to development, from right to development to economic human rights, from there to civil and political freedoms of the individual, and then back to *ius inter potestates*. Article 28 of the Universal Declaration on Human Rights, though not referred in the analytical study, invites such operation, amalgamating soft law and *ius cogens*, and jumping back and forth between societal "obligations" and individual "rights". But the logical requirements of law seem to get lost in the process.

58 Universal Declaration, art. 17.

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