GERMAN YEARBOOK OF INTERNATIONAL LAW

VOLUME 30 · 1987

DUNCKER & HUMBLOT · BERLIN

GERMAN YEARBOOK OF INTERNATIONAL LAW

Volume 30 · 1987

GERMAN YEARBOOK OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 30 · 1987

founded by

RUDOLF LAUN · HERMANN VON MANGOLDT

Editors:
Jost Delbrück · Wilhelm A. Kewenig · Rüdiger Wolfrum
Assistant Editor: Ursula Heinz

Institut für Internationales Recht an der Universität Kiel

DUNCKER & HUMBLOT · BERLIN

The Editors and the Institut für Internationales Recht do not make themselves in any way responsible for the views expressed by contributors

This Yearbook may be cited:

GYIL 30 (1987)

Communications should be addressed to:

The Editors
German Yearbook of International Law
Institut für Internationales Recht
an der Universität Kiel
Olshausenstrasse 40/60
D-2300 Kiel 1

Printed by Werner Hildebrand, Berlin 65

ISBN 3-428-06482-8

Contents

Articles

Notes and Comments

Reports

Book Reviews

ARTICLES

Normative Force and Effectiveness of International Norms

By Pieter van Dijk

I. Introduction

A norm is more than a mere reflection of behaviour; it can also guide behaviour.[1] A norm contains a more or less detailed prescription on which the members of society should base their behaviour. At the same time it functions as a criterion for the evaluation of that behaviour.

A norm is not confined to stating that which *is*, but determines what *ought to be:* norms "formulate shared or community expectations as to how those to whom a norm is addressed will behave"[2]. By its normative force a norm contributes to the realization of what ought to be. If the norm succeeds in this, one speaks of the effectiveness of (the normative force of) the norm. This does not mean that what *ought to be* normatively and what *is* actually differ from each other by necessity. Such a Kantian antithesis would disregard that norms take shape within the social process.[3] Indeed, the normative-objective dimension of the social process cannot be reduced to norms which are *a priori*, formulated in a social vacuum. Those norms are generally *a posteriori*; they depart from "persistent and pervasive patterns of behaviour on the part of a large proportion of the population to which they apply"[4]. But that normative-objective dimension does not merge altogether into the actual process, but has a "transcendental" character in the sense that it transcends what can be described empirically and from there can indicate the anti-normative.[5]

---

[1] *M. Bothe*, Legal and Non-Legal Norms — A Meaningful Distinction in International Relations?, in: Netherlands Yearbook of International Law XI (1980), 65-95 (65-66); see also *G. C. Christie*, Law, Norms & Authority, London 1982, 2.

[2] *Bothe* (note 1), 66.

[3] *H. E. S. Woldring*, Mensenrechten en vrede (Human rights and peace), inaugural address, Free University of Amsterdam 1987.

[4] *J. Raz*, The Concept of a Legal System, Oxford 1970, 150.

[5] *C. A. van Peursen*, Relativism, Specificity and Universals, in: *B. Barnes et al.* (eds.), Cognitive Relativism and Social Science, Utrecht 1986, 191-206 (200-203); see also *Christie* (note 1), 5-6.

These are not purely legal issues. The question as to what should be is, even if the answer can be given in reference to an existing legal norm, a preliminary question which must be answered not from law but from social necessity, ethics or religion. The lawyer, too, will have his views about what should be, and will take these views into account when formulating or interpreting legal norms, but it is only in that formulation and interpretation that he is acting as a lawyer, not in the determination of what should be. And also the question in what way the law may contribute to a peaceful ordering of society, and whether a particular norm actually makes that contribution and is therefore effective in its normative force, does not fall exclusively or specifically under the legal discipline, but equally under that of the political and social sciences.

Still, the contribution which the lawyer, too, may make to answering this question must not be underestimated.[6] What is at issue here is, after all, the objective and effect of the law, and therefore we are at least also in the province of the lawyer. The latter will view that objective and effect primarily from the perspective of the "law" with its specific features and impediments, while the political scientist and the sociologist will approach that objective and effect primarily from the prevailing circumstances and demands of the society at which that objective and effect are directed. But for a correct determination of the contribution of the lawyer, this is still too limited a representation of the matter and too much a black-and-white picture. In fact, legal discipline and legal practice entail that the lawyer is not — at least ought not to be — obsessed by the abstract norm, quite apart from the reality of the social context within which that norm functions, or at least is meant to function. It is a matter of course that, in general, the lawyer by profession has a fairly adequate insight into social reality, while for the political scientist or the sociologist this is much less obvious with respect to the role and effect of the law.

This is not stated here out of arrogance or complacency, but by way of reaction to recent tendencies within political-science and social-science circles to disparage or even ignore the role and relevance of law and legal science because of their presumed abstraction *vis-à-vis* social reality.[7] Some lawyers are too apt to be intimidated by this and force themselves to try to speak the language of the political scientist or sociologist and to disregard their own discipline.[8] Here, too, one should

[6] See *O. Schachter*, Towards a Theory of International Obligation, in: *S. M. Schwebel* (ed.), The Effectiveness of International Decisions, Leyden/Dobbs Ferry, N. Y. 1971, 9-31 (26): "The international lawyer need not be unduly modest as to his contribution. In a number of situations, especially in international adjudication, we can find that the data as to perceptions (expressed often in terms of consensus, implied consent, acquiescence, *etc.*) have been put forward with a high degree of relevance and disciplined reasoning".

[7] This is recognized by *Wesley L. Gould* and *Michael Barkun* in the Preface to their book: International Law and Social Sciences, Princeton 1970, xi; see also *op. cit.*, 10-11 and 48.

[8] An outstanding example of a lawyer who from his own discipline entered areas which also belong to those of the social sciences and who by doing so has built a stable bridge, was

adopt a realistic middle course. In particular the speciality of legal sociology may help to trace that course and make it practicable both for the students of law and for practising lawyers. In this context *Stone* speaks about "the lawyers' extraversion" and defines the sociology of law as

> the orientation of the lawyer's own interests to those factors of social and political life and evironment which determine stability and change in the form and contents of law, or are thereby determined. So understood, it [*viz.* the sociology of law, *v. D.*] is concerned with the relationship between the law and the social, political, economic and psychological facts which are relevant to an understanding of its origins, and stability, change and breakdown in its development — what we may call compendiously its 'sociological substratum'. . . . Concern with this sociological substratum of law is a necessary adjunct to a lawyer's duties of understanding, preserving, and fostering law. For, in the performance of these duties he constantly finds himself confronted not only with technical concepts, principles and rules of law which make up the system viewed statically, but also with their change or breakdown, in whole or in part, and the rise or others to replace them.[9]

All this applies equally for the international lawyer, and perhaps to an increased degree from sheer necessity, for owing to its numerous imperfections, international law as a "legal order" is even less a system in itself than is national law, but is constantly influenced and, to a certain extent, even conditioned by external factors in its formation, adaptation, and implementation. The international lawyer is thus by necessity highly extrovert, society-oriented, and this should be adequately reflected in the international law discipline. *Charles de Visscher* therefore states: »Une étude vraiment scientifique du droit international exigerait, à n'en pas douter, une introduction de sociologie internationale«.[10] With the issues of normative force and effectiveness, the lawyer quite explicitly turns into the direction of sociology of law and strongly appeals to his ability of "extraversion". But at the same time these are issues which touch upon the relevance of his own field of activity — the law —so substantially that he simply cannot avoid them, even though they are not often made into an explicit and separate subject of study.

The present study is intended to do this, although the author is aware that he is thus going to skate on thin ice, and inexperienced as he is on that ice, will not get much further than some stumbling and sliding. Nevertheless, he hopes to bring up some useful material — largely derived from other authors — for a conceptual

---

Julius Stone; see, *inter alia*, his Problems confronting Sociological Enquiries concerning International Law, in: Recueil des Cours de l'Académie de Droit International (RdC) 89 (1956-I), 61-180. He was, of course, preceded by several others, among whom *Max Huber* was one of the most prominent; see his: Die soziologischen Grundlagen des Völkerrechts, Berlin 1928. For other examples, see *Gould/Barkun* (note 7), 7-13.

[9] *Stone* (note 8), 65-66.

[10] *Ch. de Visscher*, Théories et Réalités en Droit International Public, Paris 1954, 433; see also *P. E. Gorbett*, Social Basis of a Law of Nations, in: RdC 85 (1954-I), 471-544 (486), and *Harold D. Lasswel* in his Introduction, in: *Gould/Barkun* (note 7), xvii-xviii.