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SYMPOSIUM ON PROSPER WEIL, "TOWARDS RELATIVE NORMATIVITY IN INTERNATIONAL LAW?"

PROSPER WEIL'S ARTICLE: A STIMULATING WARNING

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Prosper Weil's article in the *American Journal of International Law* first appeared in 1982 in French in the *Revue Générale de Droit International Public*.[1] In France, it has probably generated less debate than in the United States. Indeed, the positions taken by this stimulating, agile, and well-written article generally accord with the doctrinal tradition that largely predominates in the land of Jean Bodin, René Descartes, and Auguste Comte, namely, legal positivism. According to this tradition, legal scholars must first focus on the technical analysis of legal norms as they are set out and, above all, *practiced* by the various actors in legal relations, which on the international level are states and the international judge or arbitrator. After setting out the contexts of Weil's article, I shall state two reservations to its content and then turn to its contemporary relevance.

The Contexts of Weil's Article

Prosper Weil was a true classical positivist. He was even more so because he first specialized in domestic public law. For the "agrégation," the competitive examination giving access to the status of professor of law in France, Weil had written his thesis on administrative law. In fact, he had quickly become one of the recognized masters of this discipline, admired for the clarity and rigor of his analyses of the case law of the *Conseil d'Etat* (the French administrative supreme court).[2] Due to the principle of legality precisely forged by this case law,[3] French administrative law is dominated by the prerogatives of the public power counterweighed by the careful and demanding protection of the individual's rights and freedoms against the administration. Thus, for Weil, initially a public law specialist, it was fundamental to know what the criteria of this legality were. Faced with a normative prescription, how can we know whether it is binding, and on whom?

However, particularly between the 1960s and 1985, under pressure from developing countries, the UN General Assembly became accustomed to having states use formally non-binding resolutions to adopt a whole series of principles that those same states, in particular, then affirmed as normative and legally binding. Weil could hardly accept, in particular, the notion of *soft law*, noting that either the law is "hard," i.e., mandatory, or else it does not

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[1] Prosper Weil, *Vers une normativité relative en droit international?*, RGDIP 1982, 5–47.

[2] The first edition of his famous *Droit administratif* was published in 1964, and re-published since then.

[3] *See* Prosper Weil et al., Les Grands Arrêts de la Jurisprudence Administrative (1st ed. 1956).

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exist at all! In his view, the recognition of an intermediate stage would seriously undermine legal certainty, which is as important in international law as in any other field of law.[4]

Weil's attachment to legal positivism was also nourished by his practical experience. Prosper Weil was not only a recognized scholar. He early on also became a successful legal practitioner, first as a state counsel before the International Court of Justice in a number of cases, and then as an arbitrator in arbitrations between states and foreign private investors. One can therefore understand Weil's passionate crusade for maintaining precise, stable, and easily identifiable criteria to identify the binding or non-binding nature of a given rule or "principle" that some affirmed was already part of positive law, while others still denounced as purely programmatic in nature.

Prosper Weil's analysis was particularly challenging for several reasons. It pointed to a certain drift in the use of legal terms, if not also in legal reasoning, towards relative normativity. At the same time, it insisted on the possible implications—both theoretical and practical—of a normative strategy deployed by newly independent states within the UN General Assembly at the time endowed with an unprecedented prestige and political influence. By affirming a certain conception of law, Weil's article raised the question of whether the modes of production of international law had changed since 1945 with the creation and development of the major permanent international organizations, beginning with the United Nations itself. It focused this question in particular on the mode of the formation of international customs. Unlike contemporaneous authors such as Michel Virally,[5] René-Jean Dupuy,[6] or Georges Abi-Saab[7] in Europe, not to mention Wolfgang Friedmann[8] or Oscar Schachter[9] in the United States, Weil seemed not to admit that the phenomenon of international institutions had radically changed the characteristics of international law as a legal order.[10]

Two Reservations

However, beyond the keen interest aroused by the words of Prosper Weil (who had also been my teacher, and a great one), this position has always raised rather serious reservations for me.[11] While I share part of the French positivist tradition, I also criticize some of classical positivism's assertions, including its insufficient attention to non-legal actors at the international level and the illusion that legal positivism itself would be independent of any ideological assumption.[12] At the same time, in France since the 1960s, Roland Barthes, Jacques Derrida, and Michel Foucault and, as regards legal discourse, Pierre Legendre had, at least for me, demonstrated the virtues of "deconstruction." Therefore, many of the trends and positions expressed in international law by the Critical

[4] *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 415–17 (1983).

[5] Michel Virally, L'Organisation Mondiale (1972).

[6] *See* Pierre-Marie Dupuy, *A Transatlantic Friendship: René-Jean Dupuy and Wolfgang Friedmann*, 22 EJIL 401–06 (2011); Rene-Jean Dupuy, *Droit déclaratoire et droit programmatoire: de la coutume sauvage à la* soft law, *in* L'Elaboration du Droit International (1975), *translated in* Declarations and Principles: A Quest for Universal Peace 237 (R.J. Akkerman et al. eds., 1977).

[7] Georges Abi-Saab, *L'éloge du "droit assourdi", Quelques réflexions sur le rôle de la soft law en droit international contemporain*, *in* Nouveaux Itinéraires en Droit, Essays in Honor of Francois Rigaux 59 (1993).

[8] Wolfgang Friedmann, The Changing Structure of International Law (1964).

[9] Oscar Schachter, *International Law in Theory and Practice: General Course of International Law*, 178 Recueil des Cours (1982), in particular 110–32.

[10] *See* Prosper Weil, *Le droit international en quête de son identité: cours général de droit international public*, 237 R.C.A.D.I. (1992-VI).

[11] *See* Pierre-Marie Dupuy, Précis de Droit International (14th ed. 2018).

[12] *See* Pierre-Marie Dupuy, *L'unité de l'ordre juridique international: Cours général de droit international public, Hague Academy of International Law*, 287 R.C.A.D.I. (2002).

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Legal Studies movement in the years following the appearance of Weil's article did not strike me as particularly revolutionary.[13]

A first reservation to Weil's analysis is that he did not want to acknowledge that since 1945, the process of customary law formation can take place within international institutions, starting with the United Nations, in which the delegations of practically *all* existing states may participate in normative discussions. When this happens, it allows an accelerated confrontation of legal opinions (or *opiniones juris* in the classical sense of the general theory of customary international law) with regard to a proposed new legal rule or principle. This acceleration can often be considerable since the dialogue among government delegations may take place within one or several sessions of the relevant plenary body. This phenomenon was all the more remarkable in the period of so-called "peaceful coexistence" (1963-1990). New topics, such as the management of the seabed or of outer space, or the exercise of permanent sovereignty over natural resources in the context of the then-called "new economic order," to give just three examples, were proposed for discussion by Member States within the UN General Assembly. In fact, due to the very number of delegations present and their active participation, the plenary debates were inspired by certain domestic parliamentary procedures. The United Nations thus played, and could still play if the political conditions were met again, the role of normative catalyzer.

Without necessarily going as far as some scholars, such as Bin Cheng, who saw the emergence of an "instant custom" in the way that the 1963 Declaration on the Use of Outer Space had been adopted,[14] it could be observed that the multilateral diplomacy developing in the General Assembly produced in some cases, and under certain conditions,[15] a real catalyst for the formation of new customary rules. In such a context, which is not anywhere near as frequent today, the term *soft law* could refer to normative statements that were not yet certain to reach the stage of mandatory rules but were designed by their promoters to achieve such a status. However, this intermediate phase has long been recognized in the customary process in general. During this period, in the absence of a sufficiently convincing expression of a significant number of assents, the rule in question is located somewhere in an uncertain transit between *lex lata* and *lex ferenda*, i.e., between the law as it still exists and the law as it will or should exist. What the pseudo-parliamentarization of the normative negotiations in the General Assembly brought is an accentuation and acceleration of the process.

A distinction must nevertheless be made here between resolutions that *as such* remain legal instruments without intrinsic binding force, even if endowed with political importance (think, for instance, of resolution 2749 (XXV) incorporating the UN Declaration on the Seabed), and the fact that the same text quickly became an explicit benchmark for the affirmation that this zone was constitutive of the common heritage of Mankind and thus manifested the consent of a large majority of UN member states. In practice, the rapid increase in the number of references to this Declaration meant that, even before it became one of the objects of the Third UN Conference on the Law of the Sea, the legal characterization of the sea bed, if not yet its legal status, had been accepted under international customary law within only a few years.

In fact, what made Prosper Weil's thesis most questionable, despite its brilliant exposition, is that he wanted to stop the clock of history in 1927 with the *Lotus* case. In his article, he explicitly states that, basically, international society and the aims of its law have not changed since then.[16] For Weil, the new phase that his contemporary

[13] *See* Pierre-Marie Dupuy, *Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Marti Koskenniemi*, 16 EJIL 131 (2005).

[14] *See* Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, *in* The Structure and Process of International Law 515 (Ronald St. J. MacDonald & Douglas Johnston eds., 1983).

[15] *See* Jorge Castaneda, Legal Effects of UN Resolutions (1970).

[16] Weil, *supra* note 4, at 414.

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Wolfgang Friedmann saw as driven by "the law of cooperation" (in contrast to the law of coexistence)[17] simply did not exist or, in any case, has not succeeded in bringing about a fundamental evolution of international law.

A second reservation about Weil's analysis relates to why he did not believe in the existence of an international community, which he described in his general course at the Hague Academy of International Law as a mere "fiction." In so doing, he contradicted himself as a proponent of the most classical type of legal positivism, which remains based on voluntarism (i.e., the primacy of the will of states). In reality, and here I must refer to my own *general course* at the Hague Academy,[18] which was in large measure an answer to Prosper Weil's theses, the question is not an empirical one. That is, the question is not sociologically or politically whether there is sufficient cohesion and solidarity in international relations between states to be able to say that they form a community in the sense of a *Gemeinschaft*.[19] Rather, the question is a *legal* one, as a voluntarist positivist should have remembered. It so happens that in international law, quite a large number of treaties—starting, of course, with the famous Article 53 of the Vienna Convention on the Law of Treaties—set out that such an "international community" does exist. In Article 53, this community is even the legal entity that determines the content of the category of peremptory norms of international law (*jus cogens*). In accordance with the view of positive international law as the expression of the will of states, Weil should have accepted the evidence: at the time that he wrote his article, states already wanted to create a legal entity endowed with such an eminent normative power, whatever its sociological precariousness.

Weil was right to call the notion of the international community a fiction, but he forgot in passing the true nature of that fiction, which is legal. Creating in law what is not necessarily verified in fact is a well-known legal technique. This technique, the "legal fiction," is commonly used in public international law[20]: to say that all states are equally sovereign *is* a legal fiction, and even a *constituent* one, fundamental to the legal order that claims it. It is true that Tanzania is not in fact the political or economic equal of the United States, but it is indisputably an equal as a matter of law. Weil refused to admit that the international society had changed, even if only because it was affirmed in law as an international community. As a result, he could accept neither the concept of everyone's obligations towards all (*erga omnes* obligations) nor that of *jus cogens*, that is, peremptory international obligations determined by that same international community, despite the explicit acknowledgment in Article 53.

Weil's Article and International Law Today

Now, what is the current state of Prosper Weil's doctrinal statements, however rich and stimulating they remain? Perhaps he was right: at a time when the President of the United States praises patriotism and nationalism over multilateralism whenever he speaks at the UN General Assembly, it may be that the "international community" no longer exists, because the gap has indeed become too wide between its legal affirmation and its political negation. At the time of the awakening of the most stubborn egoisms, should we not agree that, decidedly, the dream of an international law of cooperation that Wolfgang Friedmann and some others had in the 1960s, was finally nothing more than a dream, as, in another field, Martin Luther King had one in the same era? Although he did not share the retrograde ideology of those most narrow-minded populists who deny the virtues of multilateralism, had Prosper Weil not simply demonstrated what realism means?

Faced with the obvious erosion of the authority of international obligations in the eyes of some governments, we cannot overlook this question in contemporary times. Nevertheless, international society can no longer be reduced to the individualized expression of the will of juxtaposed sovereigns. On the contrary, the irreversible rise of

[17] *See supra* note 8.

[18] *See supra* note 12, at 265–314.

[19] *See* Ferdinand Tönnies, Gemeinschaft und Gesellschaft (1887).

[20] *See supra* note 11; *see also* Jean Salmond, *The Device of Fiction in Public International Law*, 4 Ga. J. Int'l & Comp. L. 251–77 (1974).

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globalization suggests that the *Lotus* has definitely sunk. Moreover, the truly global challenges affecting the entire international community, in both its social and legal sense, will encourage it to strengthen its cooperation, whatever the current blindness of some governments. The purpose of international law is, of course, always to organize the coexistence of sovereign states, but one cannot limit it to that single purpose. In particular, as demonstrated by practice, this system of law, which is also a legal *order* in the sense of Hans Kelsen, H.L.A. Hart, Georges Scelle, and Santi Romano,[21] is also characterized by the affirmation of a set of rules and principles with a *universal* dimension, some of which are of such importance to all that they cannot be denied by anyone.

As regards positive law, the International Court of Justice—even though it waited until 2006 to do so[22]—has explicitly recognized the existence of *jus cogens*, which it subsequently reaffirmed several times. The Court had long before recognized the importance of the "elementary considerations of humanity"[23] or "cardinal principles of humanitarian law,"[24] which it would describe in 1996 as "intransgressible,"[25] all qualifiers that contribute to the identification of a good part of peremptory law. The same applies to the recognition of *erga omnes* obligations. The Court similarly made noteworthy use of the notion of the international community in its 1980 judgment in the case of *Diplomatic and Consular Staff in Tehran*, precisely to stress the impossibility of derogating from certain principles governing diplomatic relations between states.[26]

Moreover, Weil's concerns about international law that is sick of its norms have not, on the whole, been borne out. The criteria by which the mandatory or non-binding nature of a legal norm can be identified have fundamentally remained the same, including with regard to international custom even if, as pointed out earlier, the whole process of custom creation has been accelerated by the combination of collective declarations, state practice, and international case law. The field of the international law of the environment provides an example: Consider the "no harm" principle according to which no state should make use of its territory in a way that damages the international environment. After having been adopted from the 1949 *Corfu Channel* ICJ Case by the Stockholm Declaration on the Human Environment in 1972, it was set out again several times in "soft law" resolutions, including the 1992 Rio Declaration on Sustainable Development, before being stated again as a principle of customary international law by the ICJ in the *Pulp Mills Case*[27] and recognized as such by a great majority of states—an evolution that even more singles out the current practice of Bolsonaro's government in the Amazon as blatantly in breach of Brazil's international obligations.

Whatever the case may be, Prosper Weil was indeed a very stimulating and brilliant whistleblower. His testimony remains as an invitation to maintain sufficient intellectual vigilance so that legal analysis does not lose its inherent rigor.

[21] *See* Dupuy, *supra* note 12, at 59–66.

[22] Armed Activities on the Territory of Congo (New Application 2002) (Dem. Rep. Congo v. Uganda), 2006 ICJ Rep. 6, paras. 64 and 125 (Feb. 3).

[23] Corfu Channel (U.K. v. Alb.), Merits, 1949 ICJ Rep. 22 (Apr. 9).

[24] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 14, para. 215 (June 27).

[25] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, para. 77 (July 8).

[26] In the words of the Court, to disregard these obligations would be "to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected." Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Questions of Jurisdiction and/or Admissibility, 1980 ICJ Rep. 3, para. 92 (May 24).

[27] Pulp Mills on the River Uruguay (Arg. v. Uru.), Merits, 2010 ICJ Rep. 14, para. 193 (Apr. 20).

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