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

THE RELATIVITY APOCALYPSE IS NIGH

José E. Alvarez[*]

By all rights, Prosper Weil's 1983 cri de coeur should be one of many best-forgotten law review articles. It targets, after all, concepts that few dispute today (namely *jus cogens* and *erga omnes* obligations, as well as shortcuts to finding universally applicable customary law based on "quasi-universal" treaties). Its other direct target—the distinction between international crimes and delicts—refers to once contentious debates over whether *states* can be charged with ordinary international delicts as well as international crimes. This has since been eclipsed by the International Law Commission's (ILC's) decision to include, in its Articles of State Responsibility, Article 41 (enumerating the consequences of "serious breaches" resulting from the violation of preemptory norms).[1] And insofar as Weil's foil was the premise that international "delicts" can have a "variable geometry," that too has been overtaken by events: neither the ILC's turn to "serious breaches" nor the far older proposition that individuals can be prosecuted for international crimes remains the subject of much controversy today.

Weil's article is also filled with rhetorical flourishes with little substance. His claim that "relative normativity" is "quite beyond the grasp of intellect"[2] or "escapes comprehension"[3] is one example. To the extent Weil's core complaint about "variable legal authority" can be drawn from the "weak" or "soft" law examples that he criticizes, he appears to condemn the premise that international law can evince different degrees of precision, obligatory authority, or enforcement consequences.[4] Those of us who believe that all law demonstrates this variable geometry would not see what all the fuss is about. But neither proponents nor detractors of soft law—including, one suspects, Weil himself—can truly believe that relative normativity is beyond rational understanding. Even Weil has no trouble describing the characteristics of relative normativity, its appeal, and even the likelihood that it may sometimes exert greater impact on state conduct than hard law (as Weil acknowledges[5]). Nor does Weil follow

* *NYU School of Law.*

[1] Article 41 replaced the proposed Article 19 on international crimes. *See* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 344 (2002).

[2] Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 416 (1983).

[3] *Id.* at 430.

[4] *Id.* at 414. Apart from his critique of jus cogens/erga omnes, Weil's other examples of phenomena that will not "help strengthen the international normative system" include: (1) provisions in treaties that are overly vague in application (e.g., the 1963 Moscow Treaty or the WHO-Egypt Agreement as interpreted by the ICJ, *id.* at 414–15); (2) citations to non-binding sources (e.g., "quasi-legal" General Assembly resolutions, *id.* at 416–17, and "universal general law" that ignores actual state consent/dissent, *id.* at 433–40), and (3) reliance on norms that do not trigger state responsibility if breached and cannot "be relied on before a court or arbitrator," *id.* at 417–18.

[5] *Id.* at 415.

through on his claim. If so, he would surely define as irrational the decision to give the ICJ authority to issue normatively ambiguous "advisory" opinions.

Weil's contention that what he is attacking is a modern "pathology" also cannot be taken seriously. There was never some golden age when international legal sources were invariably "hard" in terms of textual precision, binding authority, and certainty of enforcement.[6] As Weil seems to acknowledge, even his "archetypal rule of international law,"[7] namely treaties, usually contain strategic ambiguities along all three lines. The UN Charter, for example, relativizes the old rule that states' domestic jurisdiction is sacrosanct; demands that the organization "promote" vague "human rights"; and urges states to "respect" the equally vague principle of "self-determination."[8] The Charter also fails to delegate to anyone authority to issue binding interpretations of any of these highly ambiguous mandates. Of course, if "soft enforcement" is a pathology, international law has been diseased for quite some time. In recognition of this, Weil distinguishes the weakness of international law's enforcement from his principal target: the conceptual notion of "relative normativity."

But Weil's article is weak on who is to blame for this intellectual sloppiness. Even if one accepts his description of a modern psychosis that is getting worse, Weil suggests that the obvious suspects—states—are not its cause. States, he indicates, know the difference between law and non-law, and states would be the first to protect that boundary line to avoid being held responsible to rules to which they have not given consent.[9] Weil implausibly suggests the fault for this "loose thinking" lies, first, with well-meaning scholars who seek to progressively develop the law in favor of an imagined international community, and second, with ICJ aiders and abettors. These are Weil's intended readers and targets. His article is cast as a warning to academics and jurists to stop "slithering" from *lex ferenda* to *lex lata*. In the end, Weil's article attacks ethereal scholarship for ignoring the fundamental goals of the international legal system—while Weil himself ignores the role of states (and international organizations) in advancing the relative normativity he condemns.

A final reason for doubting the continuing relevance of Weil's article is that his alarm about a looming relativity apocalypse fell on deaf ears. We are living in a post-apocalyptic age where Weil's "pathology" is the norm and legal positivism is more likely to be seen as passé.[10] Many of us have documented how the turn to international organizations (IOs), concerns over including (and affecting) non-state actors, and demands for more dynamic forms of international regulation have challenged the legal positivism that Weil defends.[11] Consider, as just one example, the oldest IO in existence, the International Labour Organization (ILO). Although that organization was established to generate precisely the state-centric treaties that Weil favors, it has gone in directions that would have distressed him greatly. This would include the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, which introduced Weil's "hierarchy of norms" among ILO conventions as well as "universal" fundamental principles deemed applicable to all ILO members irrespective of consent; its recourse to numerous supervisory bodies

[6] *See* Mathias Goldmann, *Relative Normativity*, *in* Concepts for International Law (Jean d'Aspremont & Sabib Singh eds., 2019).

[7] Weil, *supra* note 2, at 438.

[8] *Compare* League of Nations Covenant art. 15 (barring the organization from intervening in disputes that "under international law" intrude on states' domestic jurisdiction), *with* UN Charter art. 2(7) (stating that the United Nations cannot intervene in matters that are "essentially" within a state's domestic jurisdiction (with no mention of international law)). *See also* UN Charter arts. 1(2), 55.

[9] Weil, *supra* note 2, at 417.

[10] *See, e.g.*, Jean d'Aspremont, *International Legal Positivism*, *in* International Legal Theory: Foundations and Frontiers (Jeffrey L. Dunoff & Mark A. Pollack eds., forthcoming 2020) (surveying academic views on positivism, including many who believe that it is dead or empty).

[11] *See, e.g.*, José E. Alvarez, The Impact of International Organizations on International Law (2017) (discussing how IOs have affected the content of traditional sources of international law (treaties, custom and general principles), gone beyond those sources, and expanded the range of actors engaged in juris-generative activities).

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and its labor secretariat for "non-authoritative" legal interpretations that are preferred over binding ones; and its 2006 Maritime Labour Convention (which replaces a substantial number of prior traditional treaties with a governance model embracing vaguer mandates, guidelines, and codes of practice).[12] Indeed, labor scholars describe the ILO's normative agenda today as designed to produce a species of "transnational labor law" that significantly departs from the premises of legal positivism.[13] Rules that Weil would consider to be "relatively normative" dominate many other international regimes, including those charged with food standards, the protection of the environment, civil aviation, international finance, and human rights.[14]

Reliance on soft law is also ubiquitous with respect to those for whom Weil shows special solicitude: judges. Today's national and international adjudicators typically find custom or interpret treaties in ways that, from Weil's perspective, sideline the question of state consent, elevate the significance of one treaty (e.g., an IO's charter) over another, or put at the forefront the views of a speculative "international community."[15] Those courts or tribunals are also citing to sources of ambiguous normative value without ever clarifying (as Weil would presumably demand) whether these are authorized under the tribunal's choice of law clause or were intended to impose obligations on the litigants.[16] Indeed, the sheer proliferation of international courts and tribunals have made entire regimes—international trade, investment, and criminal law, for example—ever more reliant on yet another species of "soft law," namely international case-law or jurisprudence constante.[17]

This is a world that is less willing to accept even the terminology that Weil helped to establish. To Weil, "soft" law is just a synonym for "weak," "fragile," or "flabby" law that cannot be expected to be enforced. Some scholars have accordingly refused to accept this loaded term and have chosen to reframe it as "informal law."[18] Others have refused to embrace Weil's hard/soft binary altogether, choosing to address "international public law," "global governance," or Global Administrative Law.[19] But terminology aside, no one denies that Weil's examples can now be multiplied a hundred fold. And while there is evidence that soft/informal law is popular among the constituencies that Weil would predict—among less developed countries at the UN General Assembly and among non-state actors like human rights NGOs that want to use it to counter the hard law produced by powerful states—there is also considerable evidence that all states, including powerful ones, sometimes turn to "softer" instruments (from the Iran Deal to the Paris Agreement) when these are more likely to further their interests.[20] Soft or informal

[12] *See, e.g.*, Tomi Kohiyama, *Role of International Organizations in Driving Rule-Making: The Example of the International Labour Organization*, 112 ASIL Proc. 278 (2018); Claire L. Hovary, *The ILO's Supervisory Bodies' "Soft Law Jurisprudence"*, *in* Research Handbook on Transnational Labour Law 316 (Adelle Blackett & Anne Trebilcock eds., 2015).

[13] *See, e.g.*, Anne Trebilcock, *Conceptualizing Transnational Labour Law*, *in* Blackett & Trebilcock, *supra* note 12, at 3.

[14] *See, e.g.*, Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance (John J. Kirton & Michael J. Trebilcock eds., 2004); Chris Brummer, Soft Law and the Global Financial System (2012).

[15] *See, e.g.*, Stephen Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, *in* Custom's Future: International Law in a Changing World (Curtis A. Bradley ed., 2016). Indeed, this realization appears to have motivated the ILC's recently concluded effort to remind adjudicators of the positivist elements of custom. Int'l Law Comm'n, Draft Conclusions on Identification of Customary International Law, UN Doc. A/73/10 (2018).

[16] *See, e.g.*, José E. Alvarez, The Boundaries of Investment Arbitration (2018) (describing how investor-state arbitrators use WTO and European human rights case-law).

[17] *See, e.g.*, Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 Chi. J. Int'l L. 515 (2009).

[18] Informal International Lawmaking (Joost Pauwelyn, Ramses A. Wessel & Jan Wouters eds., 2012).

[19] *See, e.g.*, The Exercise of Public Authority by International Institutions (Armin von Bogdandy et al. eds., 2010).

[20] For numerous other examples, see, for example, Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 Minn. L. Rev. 706 (2010).

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law can no longer be described, if it ever plausibly could, as the product of academics and fuzzy headed ICJ judges. Indeed, its popularity in the real world is such that a recent article was devoted to correcting the impression in the "canonical literature" that soft law is nearly always a useful complement to hard law.[21]

But if Weil's article is such a disaster, why it is among the most cited in AJIL's history?

One reason is that Weil correctly intuited that soft law poses a threat to the right of states to differ.[22] Weil critiques overly facile conclusions that a rule trumps all others (*jus cogens*), permits all states to have remedies against other states (*erga omnes*), or obligates all without evidence of consent ("universal" law) because such conclusions threaten the premise that the international legal system is ideologically neutral and protects the rights of less powerful states to disagree with the powers that be.[23] In a world filled with scholars who tell us that soft law is easier and less costly to negotiate, imposes lower sovereignty costs, permits greater flexibility to cope with uncertainty, allows states to be "managed" into deeper compliance over time, copes better with the diversity of states, and enables international law to be more accountable to non-state actors,[24] it is important to hear a warning that it can also be, like much else in international law, a tool that advances power and ideology.

Weil's article reminds us that famous short-cuts to establishing customary law—such as the change in the law of the sea stemming from the Truman Proclamation on the Continental Shelf or the General Assembly's efforts to establish "instant custom" with respect to the law governing outer space—stem, all too often, from initiatives by hegemonic states, including the United States.[25] Weil's insight that the turn to soft law is one way powerful states exercise their power is reflected in much more recent scholarship that depicts these states' capacity to engage in forum-shopping—and to shift a negotiation or a dispute to a "softer" venue—as a tool of empire.[26] Weil's warnings are also reflected in recent work by Greg Shaffer and Mark Pollack demonstrating how state power matters to the uses made of soft law, its role in regime complexes, and the likelihood of its implementation.[27]

But Weil's emphasis on the "fragmentation of normativity" provides a wider lens extending beyond the role of hegemonic states. It suggests that soft law may come at the behest of a powerful multinational enterprise (MNE) at the top of global supply chain that wants to resist binding labor obligations on its contractors, or the Bill and Melinda Gates Foundation, which may have an interest in influencing the World Health Organization's soft law guidelines—and thereby its priorities. Powerful non-state actors, and not just states, may explain why corporate codes of responsibility remain vague, inconsistent or incomplete (and not just "soft") or why the UN Global Compact or its Guiding Principles on Business and Human Rights remain notoriously unenforceable. As has been said of the ILO's 1998 Declaration, instruments that rely on "soft promotionalism" or an "ethos of voluntarism" can be, as Weil suggests, retrograde concessions to realpolitik that weaken human rights and the international rule of law.[28] Similarly, resort to soft law/soft remedies with respect to the duties owed by

[21] *Id.*

[22] Weil, *supra* note 2, at 419.

[23] *Id.* at 420.

[24] *See* Shaffer & Pollack, *supra* note 20, at 719.

[25] For contrasting views of the merits of these initiatives, compare MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE (2013) (praising these as "Grotian moments") to B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AJIL 1 (2018) (viewing both "traditional" and "modern" forms of custom as furthering the interests of global capitalism).

[26] Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

[27] Shaffer & Pollack, *supra* note 20.

[28] *See, e.g.*, Philip Alston, *Labour Rights as Human Rights: The Not So Happy State of the Art*, *in* LABOUR RIGHTS AS HUMAN RIGHTS 1–24 (Philip Alston ed., 2005) (criticizing the 1998 Declaration).

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IOs—the product in part of concerns expressed by the state and non-state financiers of IOs—helps to explain the absence of remedies for those sickened, killed, or raped by UN peacekeepers, for example.[29]

A second reason to continue to pay heed to Weil is his prescience about how the proliferation of soft law could threaten the role and value of lawyers. Weil was not wrong to argue that international lawyers—unlike, say, sociologists—are expected to tell their clients when their actions are lawful or not. He saw, before many others, that if everything is law, nothing may have the characteristics that we associate with law—that is, rules that are accessible, intelligible, clear, predictable, and equally applicable to everyone.[30] Today, when governance scholars classify as either "international public law" or "global administrative law" anything that has constraining effects on states and private parties, when all manner of material—from the indices issued by international financial institutions to reports issued by UN special rapporteurs, whether or not issued by those with formally delegated authority and whether or not intended to be normative—are said to be law, there is serious question about what international law is and what a lawyer can be expected, under relevant codes of professional responsibility, to inform a client. Should a lawyer working for a foreign minister charged with resolving investor-state complaints against her state be expected to keep track of every one of the over seven hundred rulings issued in the course of such disputes because any one of them might be deemed relevant by a future arbitrator? Should a lawyer working for an MNE contemplating an investor-state arbitration against a state be charged with malpractice if she fails to consider the possibility that any one of a plethora of soft law initiatives dealing with corporate accountability might be deemed relevant in the course of that dispute? Or consider the plight of a lawyer for an ILO member or a union organizer or a corporate manager in that same country who is asked whether the ILO's Freedom of Association and Protection of the Right to Organize Convention (No. 87) recognizes the right to strike. While the supervisory bodies of the ILO have consistently opined that the answer is yes, those views were never authoritative, and in the wake of challenges to such views the organization has refused to secure an authoritative ruling from the ICJ or any other tribunal. That crucial matter—which has literally led to life-and-death situations considered by the ILO's supervisory bodies[31]—remains (relatively) unanswered.

For at least these two reasons, Weil's warnings about a coming relativity apocalypse remain timely.

[29] *See, e.g.*, Special Symposium Issue: International Organizations and the Rule of Law: Perils and Promise, 14 New Zealand J. Public Int'l L. 1 (2016).

[30] *See, e.g.*, Tom Bingham, The Rule of Law 37–47, 55–59 (2010).

[31] *See, e.g.*, Complaint Against the Government of China Presented by the International Confederation of Free Trade Unions, ILO Committee on Freedom of Association, Case No. 1500 (1990), 73 ILO Off. Bulletin, Series B, No. 1, at para. 325–33 (criticizing the treatment of labor activists in the immediate wake of Tiananmen).

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