



Law and Politics  
in the  
World  
Community

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Pure Theory and Related Problems  
in International Law  
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## What Is Positive International Law?

THE ESSENCE and possible content of international law has been the object of passionate discussions in legal science and political theory ever since the beginning of international relations. The question remains unsolved to this day as to whether international law—as maintained by the doctrine of natural international law—realizes, just as any legal order, an absolute legal value—whether it be at all worth while to explore a possible content of the legal order beyond the individual norm of the not yet executed judgment.<sup>1</sup> Both the natural law doctrine and the sociological theory of international law leave in the last analysis no room for the existence of positive law. According to the first doctrine, the legal norm created in the procedure determined by international law derived its validity from its agreement with the presupposed norm of natural law. According to the other theory it is not possible, in view of the fact that the general norm is not recognized, to present in a scientific system those typical elements, which are characteristic of positive law. Hence the doctrine of positive law must completely overcome the objections which arise from this double front against it.

### I

1. Let us first look at the position of natural law. It does not confront positive international law in that clear-cut combat position, corresponding to the basic view of natural law, which has for its goal always the realization of an absolute legal value, in spite of the differences in conception among its adherents.<sup>2</sup> In our time it fights only in a more disguised form the claim to total validity of positive international law. It sets out to prove that a large number of rules of international law appears incomprehensible without a natural-law basis and that they must therefore be considered component parts of natural inter-

national law. Furthermore, this position seeks to prove that the coercive order of positive law must be complemented by moral, natural-legal principles of law, and that only with natural-law support could the execution of the general norms of general international law be secured, the latter not being based on any national system of sanctions.<sup>3</sup> If this is the case, positive law loses its autonomy and independence.

2. The doctrine that positive international law is unable, without the support of natural law, to secure its own legal sphere, i.e., the creation and execution of the actually valid and effective legal rules, is expressed in various statements. They all limit themselves to a proof that certain legal norms were not originally created as norms of positive international law but have only become part of the positive international legal order by reception. They often do not deny that the incorporation of such metapositive legal norms leads by necessity to their dissolution as nonpositive legal rules. However, they are not concerned with this objection, as it is not their intention to doubt the juridico-logical totality claim of positive law but rather to prove the original validity of positive legal norms as nonpositive legal norms.<sup>4</sup>

Some examples may further clarify this contention. The case is relatively simple when international tribunals admit legal rules from other spheres (municipal law, Roman law, feudal law), which until their admittance are not considered as part of the content of positive international law. International law concerning international delicts moves the international tribunals and courts to such an attitude, particularly in the settlement of reparation claims, because the latter are not stipulated in autonomous international legal norms.<sup>5</sup> Thus for instance, Federal President Lachenal, in his arbitration between France and Venezuela (in the Fabiani case) employed certain principles of the Roman law of liability for the establishment of direct and indirect damages.<sup>6</sup> When the invasion of German troops into the neutral Portuguese colonies of Mozambique and Angola during World War I was judged by National Councilor de Meuron and Federal Judges Guex and Fazy, the question, among others, of the causal relationship between the damaging act and the incurred damage had to be investigated.<sup>7</sup> The principle of adequate causation, as it has been developed by the Swiss Federal (Supreme) Court in the law of liability, was applied.<sup>8</sup> This doctrine has now also been taken over by the International Court in its legal opinion "Reparation des dommages subis au service des Nations Unies."<sup>9</sup>

These arbitral decisions contain, despite contrary opinion in the literature, no admission of doctrines of natural law. The reason for

validity of the legal norm concerned is, formally, not a rule of natural law. The basis for decision is the discretion awarded to the arbiter by the arbitral compromise to apply that norm which to him appears suitable. The Roman law of liability or that norm corresponding to the judicial decisions of the federal courts does not, therefore, have its reason for validity in natural law but in the law creating power of the international arbiter and judge, which is recognized within certain limits. Moreover, the question in the judicial deliberations is not one of the admission of a legal norm corresponding to an absolute legal value, but one of juridico-political principles which have already found their expression in various municipal laws. In no case can they claim, to a higher degree than other positive legal norms, to embody *the* idea of law, *the* absolute value of law, *the* legal ethic, *the* idea of justice.

3. The international judge often applies positive international law principally independent of an arbitral compromise. Thus is the case for instance, according to Article 38, paragraph 1 of the Hague court statute. The judge here carries out the general substantive norms (*Sachnormen*) relative to the facts of the case. It is possible that he applies a rule of law which until that date cannot be shown to be either a substantive norm of international law or of national law. This is how the Permanent Court of International Justice proceeded in its famous opinion on Mosul (*Series B, No. 12*), when it had to answer the question as to whether the votes of the disputants in the League Council should be counted in order to determine if this area should be allotted to Iraq or Turkey. It stated that the votes of the disputants could not be considered for the reason that nobody could be judge in his own case. This answer took note of the fact that the League Covenant had not regulated the problem of the "arbitral" activity of the League Council. It was therefore the task of the judge to fill in the gap.

Is it possible to consider the discretion accorded to the judge to fill in gaps as the application of natural law? This would indeed be the case if the judge arrived at his decision on the basis of an absolute legal value. In the Mosul opinion he executed only a juridico-political postulate established in municipal law. Only in this way could he avoid a *non-liquet* decision prohibited to him. If he had recognized the material right of the disputants to participate in the decision of the League Council he would have recognized a veto right and thus prevented a valid decision that might have disposed of the dispute. Therefore, the Permanent Court of International Justice had no other course than to apply the principle that no one can be judge in his own case. This decision of course presupposes that it had recognized the arbitral func-

tion of the Council of the League. But the opinion in the Mosul dispute has as little to do with natural law as the decision in the Fabiani case.

The same applies to the filling in of gaps in other cases. Thus, for instance, Article 21, paragraph 2, of the statute of the International Court of Justice contains no detailed provisions for the election of the registrar. It says nothing about the election procedure or the required majority for his election. But the court which is filling in this gap does not apply a rule of natural law but acts simply within the discretion accorded to it by positive law when it abolishes the intentional or unintentional vagueness of the general norm. The action is of course not limited to one that attempts to come to individual decision based exclusively on the content of the general norm. As usual in the interpretation of rules of law, we have here a juridico-political problem. The judge or arbiter, however, lacking one of those rare, clear rules of law from which only one single possibility of individualization can be derived, manages with the usual principles concerning recourse to previous decisions or the presumed intention of the party.<sup>10</sup>

4. The arbitral compromise may however *expressly* refer, with respect to the law to be applied, to norms which are not based on positive law; that is to say, the judge or arbiter may be authorized to apply a norm not having the character of positive law. Thus for instance Article 5, paragraph 2, of the Swiss-German Arbitration and Conciliation Treaty of December 3, 1921, following Article 1 of the Swiss Civil Law Code, provides as follows: "If in a particular case the legal bases mentioned above (treaties, custom, general principles of law) are inadequate, the Tribunal shall give an award in accordance with the principles of law which, in its opinion, should govern international law. For this purpose it shall be guided by decisions sanctioned by legal authorities and by jurisprudence." This rule of law has to this date not been applied. On the other hand, the not identical but largely corresponding Article 72 of the April 9, 1941, resolution of the Federal Council on navigation on the high seas under the flag of Switzerland was applied by the Federal Court. According to this resolution the generally recognized principles of maritime law apply if no rules for the decision of a civil-law case can be obtained from the Federal laws and international agreements. If such principles are lacking, the court shall decide the case according to that rule which it would make as a legislator, whereby it has to take account of legislation, custom, science, and the practice of the courts.

In the only known case in which the Federal Court has made use of its power as legislator, the principle of analogy was applied. The

Federal Court states in volume 73, part iii, that Swiss law contains a gap with respect to the procedure to be followed in case of attachment of foreign ships. Therefore, in applying Article 72, the court shall take into consideration the provisions of the Swiss navigation registration law on the distraint of ships registered in Switzerland. The reference to a norm of positive law excludes the application of natural law. Rather, a procedure of finding the law is applied, which corresponds to the traditional doctrine of the interpretation of positive law. This view coincides with that of the Federal Court, which has made the following statement: "It is not up to the court to complement the agreement or to seek solutions for non-regulated problems. Rather, it has to limit itself to the statement that the agreement provides no regulation for this case. . . ." (Decisions of the Federal Court, vol. 62, part i, p. 98).

5. Apart from the norms of contractual and customary law, international law recognizes three other kinds of norms from which judicial and arbitral decisions may be derived: first, those general principles, recognized by civilized nations (Article 38, section 1, paragraph 3 of the statute of the International Court of Justice), second, the clause permitting states to ask the International Court to decide "*ex aequo et bono*," (Article 38, paragraph 2, of the Hague court statute) and, finally, those numerous arbitral compromises that, particularly in the nineteenth century but also in more recent times, direct the arbiter to decide on the basis of justice and equity.<sup>11</sup> Even a summary investigation will permit the statement that the arbitral tribunals and courts are far from deviating too much from positive law, even within the foregoing discretion.

a. Particularly Article 38, paragraph 2, of the court statute has been applied very cautiously by the Hague court. Thus it stated, for instance, in the dispute between Switzerland and France concerning freezones, as is well known, that the judge could not—even if the disputants so desired—award a settlement between them which would have been contrary to the judgment made in the same case.<sup>12</sup> No further attempts have so far been made to carry out Article 38, paragraph 2. But the new revision of the court statute, made after the International Court of Justice was placed under the United Nations, has attempted further to limit the *ex aequo et bono* rule of Article 38, paragraph 2. It is now stipulated expressly in Article 38, paragraph 1, of the court statute that it is the task of the court to decide disputes submitted to it "in accordance with international law." This new norm makes it easier for the court to reject the decision of disputes where the bases of decision lie

outside the norms of international law, without formally excluding a settlement based on equity.<sup>13</sup>

b. Also, the general principles of law, mentioned in Article 38, paragraph 1c, of the Hague court statute, which lead to a significant extension of the sources of law in international law, do not have as their purpose—as is often maintained<sup>14</sup>—a reference to natural law. The principles of law recognized by civilized nations are applied in the practice of the International Court of Justice and other courts and tribunals first of all in cases where the norms of international law fail, and also in cases where the International Court—if it should not consider them—would come to the unsatisfactory result that there is in international law no obligation imposed upon the delinquent.<sup>15</sup> The Administrative Court of the League of Nations could—referring to the general principles of law—apply the *condictio indebiti*.<sup>16</sup>

c. Even a perusal of the older practice of arbitral tribunals, authorized by the arbitral compromise to judge on the basis of “justice and equity,” reveals no new aspects of the problem we are discussing. The tribunals either limited themselves to the pronouncing of judgment according to positive international law, or they tried to impose upon the parties an obligatory proposal of conciliation by which the conflict was settled, not according to the requirement of the law, but according to the interest.<sup>17</sup>

6. Finally, there is the possibility that the tribunal or court is being charged with the task of giving a *law-creating judgment* (*Gestaltungs-urteil*), independent of the ascertainment of a delict, and of the awarding of reparation to the party which has been damaged. Such a function has a legislative character. It is a judicial function in the specific sense of the term; for in the judicial process one party appears as having done a wrong, the other as having suffered a wrong. In the practice of states, international courts and tribunals are authorized to render judgments of a legislative character, especially for the settlement of territorial disputes, e.g., the Permanent Court of Justice in the Jaworzina case and the Council of the League of Nations in the already mentioned Mosul case. The Swiss-Italian arbitration decision of 1874 concerning the Alp Cravairola may also be mentioned in this connection.

But the decision is not always within the free discretion of the law-making judge or arbiter. It is, of course, also permissible to achieve a solution of the dispute on the basis of general norms of positive law, as, for instance, by recognizing the theory of contiguity,<sup>18</sup> or by applying older treaties. The judgment, not creating but only ascertaining existing law, as rendered by Professor Max Huber concerning the allotment

of the island of Palmas in 1927, appears as a typical example. The values motivating the judging authority can not, or only incompletely, be derived from positive law so far as the deciding organ expresses partly or exclusively a politically willed decision. Such were, for example, the decisions of the conference of ambassadors on the partition of Upper Silesia in 1922 and that of the Council of the League of Nations concerning the allotment of Mosul to Iraq in 1925. Giving reasons for the judgment, reference was made to the nationality principle, the religious affinity with the inhabitants of the claimed territory, the economic connection, the strategic necessity, and the so-called “historical right.” Without denying the significance of such law-creating factors, none of them possesses such a general conviction of right as to have an exclusively motivating force. If one of them did, then the principle recognized as binding would belong to the inventory of positive international law. The report of the Commission of Jurists of the League of Nations on the allotment of the Åland Islands expressed its opinion correctly in this way.<sup>19</sup>

7. The preceding survey of the creation of law in international law is limited to those cases bringing up the problem of natural law in which the international judge and law giver is not in a position to derive the concretization of the individual legal norm from the content of the conditioning general norm of the higher level. But the result of our investigation shows that even in these cases the general legal norm applied in the concrete case does not rest on natural law or absolute legal values. If the international law giver and judge were not in a position to create international law exclusively by way of positive law, if he were bound to a natural legal order, a consequence would be the rendering null and void of those of his decisions not in conformity with natural law.<sup>20</sup> Such a claim must be rejected, not because the question as to the existence of a “natural” law seems unjustified, but because the principle “natural law abrogates positive law,” does not or cannot correspond in any way to the systematic connection of norms within the positive legal order.<sup>21</sup>

8. The fight of the adherents of the natural-law doctrine against those adhering to the doctrine of legal positivism is, however, not exhausted in the attempt to reduce the content of the general norm conditioning the act creating the individual legal norm to absolute pre-positive values. They have recently also attacked the fundamental position of legal positivism. The latter, as is known, considers the law as a normative coercive order. That means that a legal order is valid under the condition that the delict, i.e., the violation of a norm created in

conformity with the legal order, is made the condition of a coercive act or a sanction. If, for instance, a state does not fulfill its obligation in a treaty of settlement, the state which obtained a right in this treaty may proceed with sanctions. Reprisals may be taken in the case of reparations demanded but not granted. To this it is objected that legal positivism overlooks the fact that not all legal norms possess this structure.<sup>22</sup> It is said that in all legal systems the norms of the highest level, to be executed by the highest organs, are not sanctioned. The illegal administration of a constitution by a legislative organ for instance—so far as this legislative act is not subjected to the revision of a constitutional court—has no sanction as a consequence. The same is said to be true with respect to the “illegal” decisions of the highest courts. The application of the rules of law through the highest organs, the so-called *Grenzorgane*—in international law, for instance, the application of rules of international law through the state organs, as far as the legality of the acts of these organ cannot be examined by courts or arbitral tribunals—is therefore not guaranteed by the threat of coercion. Hence an appeal to the conscience of these organs, an appeal or moral character, is necessary. It is directed at the organ concerned with the request for administration of the rule of law to the best of its judgment. Then the organ is thought to apply the rule of law, which is not sanctioned, and only “because of respect for the norm.”

9. This view is the expression of the primitive juristic theory which erroneously assumes that the sanction is simply attached to the delicts. It proceeds from the incorrect opinion that there are “facts in themselves.” The individualization of a general rule of law could be qualified as either legal or illegal, independent of a decision by an organ. It is, however, overlooked here that all facts of legal significance are established in a legal *procedure*. The execution of the general norm—whether by a higher or by a lower authority—is always done by an organ applying the general norm, by an organ which in its individualization realizes the values recognized by it. To the extent that the decision has the force of law (*Rechtskraft*) it appears as the authentic interpretation of the general rule of law by the law giver and cannot be shaken by any revision. It is therefore quite incorrect to think that an organ, when it individualizes the general rule of law by an act which assumes the force of law, can violate the law—that an act having the force of law can be incorrect, illegal.

This view corresponds also with the prevalent doctrine on acts of state organs. This doctrine refuses to interpret them as delicts because their content is to be considered as part of the legal order even if it is

denied that they conform with the content of the general norm, which they are presumed to individualize.<sup>23</sup> Therefore, the norms contained in a general rule of law cannot be designated as the content of the positive law. The positive legal norm is created only when there is an authentic interpretation of the general rule in a decision of the organ carrying out the general rule by an act having the force of law. The law published in the law gazette in municipal law, therefore, is not considered the *final* expression of positive law; the latter appears only in the interpretation given by a judicial or administrative organ when administering the norm by an act having the force of law. There is an irrefutable assumption of the legality of this act in view of the impossibility of annulling it.

10. In municipal law, an effective guarantee is given for an individualization of the general norm corresponding to the feeling of justice and the prevalent political ideas through the introduction of controlling authorities. But in positive international law there is no such guarantee because of the primitive character of this legal order. The individualization of the general legal norms, due to the nonexistence of the principle of division of labor, is being performed by the same subjects of law that participated in their creation. The subject of law is therefore at the same time a law-creating, a judicial, and an administrative organ.<sup>24</sup> Therefore contradictory qualifications of the acts by which general norms are individualized are possible. State A may claim an action by state B to be a violation of neutrality, while state B sees in it an individualization corresponding completely to a general rule of law. Only the feeling of justice expressed in world public opinion, the view of third subjects of law not involved in the conflict, and the retroactive recognition of a violation of law by the violator point the way to the correct interpretation of the individualized rule of law.<sup>25</sup> With the exception of a retroactive recognition of a violation of the law by the violator, a judgment concerning the legality of a situation, whether the judgment is made in accordance with a general feeling of justice or by third states, not involved in the situation, has never the character of a legally binding decision.

11. The incorrect doctrine according to which highest organs cannot individualize the general norms of the highest level by acts having the force of law without moral reinforcement proceeds from the incorrect presupposition that the lower organs could not commit delicts because their acts are subject to control by higher organs, before assuming the force of law.<sup>26</sup> If they are illegal they are abolished and replaced by legal acts. This conception is incorrect because, as far as acts of lower

organs which do not assume the force of law are concerned, the question as to whether the individualization of a general norm is legal or illegal does not arise at all. In view of the possibility of their annulment in a legal procedure, it is not their legality or illegality, but validity or nullity which is in question.<sup>27</sup> Therefore no problem of the legal or illegal individualization of the general rule of law exists. Should, however, the act of the lower organ not be contested and should there be, therefore, no review of the act by which the general rule of law is individualized, the act is to be considered as if it were the act of the highest organ having the force of law. Its quality as an act of positive law cannot be denied. No legal system can establish any guarantee of an individualization corresponding to the general rule of law, outside of a procedure for the revision of a contested act. Even the application of natural law cannot change the imperfection of the legal apparatus which, in the last analysis, is connected with the impossibility of a complete objectivization and with the contradictory interests of the human being functioning as organs competent to execute the law.

12. One last statement seems necessary in this connection to avoid misunderstandings. Positive law is realized — as already explained — through the activity of the law-creating and law-applying organs. They individualize the general norms in the process of concretizing the legal order and at the very end take care of the administration of the individual norm at the lowest law-creating level. Thus, for instance, a double-taxation agreement, arrived at by two states on the basis of their competence to conclude international treaties, is “applied” by the finance administration of both states. They have to clarify the obligations imposed by this treaty upon individuals and juristic persons. Of course the interpretation of rules of law can for the most part not be undertaken apart from the values motivating the administration of the norm. The only exception is the rule of law designated by the Permanent Court of International Justice as a *clear* norm, because its content can be determined in such a way that no obstacles can come into the way of its immediate administration. The “clear” rule of law, therefore, needs no “interpretation,” that is, no “addition.”<sup>28</sup> All those metalegal values, which by no means accidentally fight for predominance in the doctrine of interpretation of the rule of law, come further to the foreground the larger the free discretion of the organ individualizing the general norm. They are, as metalegal motives of the law creator, by virtue of their content in no way parts of positive law. On the other hand, they cannot be called absolute values of law or natural law. They can only be explained within the frame of a very complex,

psychic and sociological process. To explore it is not the task of legal science in a more narrow sense. However, it would be incorrect to suppose that the organs which create and apply the law on the different levels realize the metalegal values in different ways, especially that the acts of the highest administrative and judicial organs, which cannot be repealed, are performed on the basis of principles of interpretation different from those that determine the annulable acts of the lower organs. The feeling of justice, which to a great extent is the same among civilized nations, insures to a considerable degree the uniformity of the metalegal aspect which are instrumental in the individualization of the general rules of law. In addition, the way in which the individuals functioning as law-creating and law-applying organs are selected and their education, at least among the western states, from the precondition for similar juristic working methods.<sup>29</sup> Political factors may, however, impair these methods, as for instance the terror exercised in totalitarian states against the judiciary.

## II

1. While natural law is trying to realize an absolute legal value and thereby enters into an indissoluble conflict with the autonomy of the legal-positive method of creating law, the sociological conception of international law leads to a negation of the existence of general norms. This concept can be characterized in its different variants as seeing in law and consequently in international law an actual process going on in time and space, a fact to be perceived with the senses that can be casually explained and understood. No normative parallel phenomenon can be found with the extreme representatives of legal sociology.<sup>30</sup> Legal science is in this view not a science different from natural science, because the causal laws determining natural science are also being applied to law. According to it, a certain behavior not in conformity with the will of those possessing power in a certain society leads to a coercive act against the persons or group of persons concerned. Traditional legal science, in the sociological view, attributes to the will of those wielding power an objective value. This, however, is nothing but an ideological, even metaphysical, justification of political power. Legal sociology demands, for this reason, an analysis of the exclusively social-psychological phenomenon of the obligatory force of so-called legal norms.<sup>31</sup> Such a view is inclined to consider only the individual legal act and the norm determining the judge's decision in a socio-psychological investigation and to recognize it as the “reality.” Legal sociology sees the task of legal science in a narrow sense, often in the prediction of



the individual decisions the courts will render. Typical is Benjamin Cardozo's famous statement: "Psychologically law is a science of prediction par excellence." It is no accident that this statement was made by a jurist trained in the system of common law, who had at his disposition a system of obligatory court decisions, rendered for numerous individual cases; a system which therefore particularly in earlier times consciously neglected the general legal norms created by legislative acts—the statute law—as a source of law. It is true that in certain cases, on the basis of precedents, such a possibility of prediction is given also in international law.<sup>32</sup> But it appears still necessary to ask why the courts in a concrete case decide this way and not another.

If the problem is presented in this way, then the question as to the conformity or nonconformity of the individual legal norm with the general legal norm appears immediately and clearly, for it is not possible to make the prediction without taking into consideration the general legal norm. Also, if the possibility of prediction is not given then the law-creating organ does not have to individualize a preëxistent general legal norm, but has to create, as legislative organ, the general norm, or, as administrative organ, an individual norm within its free discretion, or as judge to decide a case *ex aequo et bono*.

2. The necessity of taking into consideration the normative meaning of law (or the law as a normative order) appears also in another way. The sociological jurisprudence reduces the meaning of a legal obligation—as already mentioned—to the statement that in the event of certain human behavior—contradictory to the will of those wielding power—the one or the other consequence will probably follow, for instance the administration of a punishment or another coercive measure. To disregard the qualification presented by the normative theory of such a behavior as an illegal act, leads necessarily to the identification of the validity of the law with the *efficacy* of the commands given by the ruler. In this way, however, the specific meaning of the law is abandoned. According to this view *every* command that can be executed is a valid command. The valid command does not have to be given within the frame of competence of the commanding organ, derived from a general norm. The fact that it can be enforced is the only criterion for its validity. In this way law and power are equated. Contrary to the normative theory of law no transformation of power into law takes place according to sociological jurisprudence. The normative theory sees the reason for validity of the legal order in the legally regulated, not arbitrarily exercised, power. Hence general norms have to be created to establish the criterion for the legality or illegality of human behavior,

unless every arbitrary act of rulers should lay claim to legal validity.

3. The answer to the question as to *why* human beings subjected to a power (in the normative doctrine of law: the persons subjected to the legal order) actually obey the commands of the rulers (in the normative doctrine of law: carry out the norms of the legal order) is neither a problem of the descriptive sociology of law nor of the normative doctrine of law. It is one of social psychology and ethics.<sup>33</sup> The scientifically useful results of these disciplines are rather scanty as far as they refer to the reason for the obligatory force of law.<sup>34</sup>

4. But this is not to deny the necessity for a functional investigation of the content of law. To explain the natural phenomena parallel to the content of the legal norms is of the greatest importance for political theory and the politics of law. The answer to the question, for instance, as to which were the motives for the United Nations intervention in the Korean conflict and its decisions directed against the delicts committed in this case is at least as important, if not more important, than the interpretation of the decisions of the General Assembly and the Security Council, including the investigation of their legality. But the first mentioned problem is as little of a juristic nature as the attempt to clarify the political effects of those decisions.

5. The sociology of law, to which belongs also the doctrine of international relations, presupposes a knowledge of the content of positive law. The starting point of sociological jurisprudence are legal phenomena as determined by normative jurisprudence, and not vice versa. It investigates the causes and effects of legally valid acts. It takes, therefore, its material from the positive legal order and works with the concepts of the normative theory of law. If it investigates, for instance, the effects of the exclusive jurisdiction of a state in the international organization, it employs the definition of *domaine réservé*, formed by the normative theory of law. It has also been observed in this connection that even in such essential concepts as "state" or "international organization," from which the sociological theory of law proceeds, the definition is not autonomously formed by it but adopted from the normative doctrine of positive national and international law. The concepts of the sociology of law have therefore a "secondary" character.<sup>35</sup>

### III

1. After the autonomous character of positive law and its independence of natural law and the difference between the normative theory and the sociology of law have been shown, the structure of the law has to be

viewed more closely. Positive law is created by the real, imperfect human society and for this reason is a part of reality. Both its basic pillars, therefore, the claim to validity and efficacy, are directed toward the reality of social life. The process of individualizing the general norms of law, which is an expression of the hierarchical structure of the legal order, is terminated in the *effective* acts executing the law. The individual legal norms which are to be created on the basis of general norms and to be executed immediately in legal reality must therefore correspond to an effective normative idea. The rule which provides for peaceful passage through territorial waters of the merchant men and warships of the states living in peace with the littoral state is only then a valid norm when generally complied with by those to whom the norm is directed. If the efficacy falls below a minimum level, e.g., if the delicts—the violations of the norms—are neither annulled nor repaired, then not only the nonexecuted individual norm of the lowest level becomes obsolete, but the superior norm, from which it derives its validity, becomes also invalid. It ceases to be a valid legal norm. The treaty of the Holy Alliance of September 19 to 26, 1815, for example, which was never formally abolished, is invalid, because its claim to validity after a certain period of time proved to be ineffective when its individualization was attempted.

The inquiry directed toward the cognition of the norms of positive law must, therefore, first find out those violable rules of behavior which within a social group are usually complied with, but followed by a sanction if—by exception—violated. The compilation of the effective legal norms—that is, those which are effective so far as the sanctions provided are carried out—is therefore the first task of positive legal science. It must be ascertained, for instance, whether the obligation to free certain persons from taxation, stipulated in a double-taxation agreement, can be carried out, and if it is not carried out, whether it proves to be a norm providing for sanctions and whether these sanctions are actually applied. If this is so, the question enters into the scope of the inquiry directed toward cognition of the positive law: why can the effective norms of the lowest level of the legal order claim validity?

2. The effective, immediately executable norm is valid if it is created by an organ which is regarded competent to create it because authorized by a superior general rule of law. The validity of the general legal norm which institutes the organs for its individualization manifests itself in the fact that the individual norm created on the basis of the general norm is effective. It is, however, possible that the validity of the general legal norms—within the process of individualization—is disputed and

that this dispute is settled, in municipal law through control procedures, but such procedures take place only exceptionally in international law. It is therefore possible to annul created but not yet valid legal norms and the acts by which they are created. Positive law is, of course, only the norm which has the force of law and not a norm which can be abolished or annihilated through a process of seeking legal remedy. A court decision, not yet having the force of law but liable to be abolished by another court, can therefore not be qualified as a “positive legal norm.” A law created through legal procedure on the basis of the constitution, however, can be so qualified, although it can only be carried out in legal reality by an ordinance issued on its basis.

3. It is not easy, particularly in international law, to make an inventory of the effective individual and superior general norms, in view of the often disputed claim of validity and efficacy of the norms. That is true above all for the rules of law not directly created by the states. These are the norms of customary international law created not through conscious purpose and in a decentralized way.<sup>36</sup> Their claim to validity and efficacy would be subject of justified controversies to a much lesser degree if an attempt to bring about agreement as to their validity and efficacy were successful. This is only possible through a universally recognized and obligatory adjudication. Such adjudication alone can overcome controversies in regard to the content of international law, which are due to contradictory interests, and thus prepare the codification of international law. Its premature codification, therefore—before the achievement of an all-inclusive adjudication, overcoming contrary interests—is doomed to fail. It can at this time only be successful in the form of so-called restatements, e.g., the attempt to formulate rules of positive law without obligatory force. The codification work of the Harvard Law School undertaken between the world wars is valuable. It deserves to be resumed on the basis of an extensive, systematic program.<sup>37</sup>

4. The scientific theory of positive law stands in a systematic, not polemic, opposition to the metaphysical doctrine of natural law and the pseudonatural scientific, sociological doctrine of law. It does not deny the possibility of natural law and the necessity of a sociological doctrine of law, but it maintains that the knowledge gained through these theories is without any real significance for a theory directed at the autonomous structure of the positive law. Its doctrine of interpretation permits the solution, within its own framework, of those problems which also occupy natural law doctrines and the sociology of law, but from different aspects and as another object of inquiry.

The recognition of the autonomy of positive law in no way leads to a dissolution of the concept of legal norms, but only to the statement that all creation and execution of legal norms is the work of human beings and hence imperfect; and that it appears impossible to comprehend the content of the positive legal order completely and without gaps. Norm creator and norm executor have the task, within a legally ordered power, to realize those values which the norm to be executed leaves to their creative freedom, in a constantly renewed process.<sup>38</sup> For the further development of international law the recognition of a juridico-political postulate arises, that only those rules of law can gain universal recognition whose content does not meet the resistance of special legal ideologies in individual legal civilizations, those which realize universally recognized values and interests. Positive international law is therefore by necessity secularized, religiously neutral law, in view of the manifold religious and ethical legal communities which constitute the society of nations.<sup>39</sup> All attempts to dissolve its secular character and to replace it with a legal order conforming to a *fixed* religious ideal are therefore directed against the stability of the valid and effective international legal order.