

## INTRODUCTION TO THE SYMPOSIUM ON PROSPER WEIL, “TOWARDS RELATIVE NORMATIVITY IN INTERNATIONAL LAW?”

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Published in the *American Journal of International Law* in 1983, “Towards Relative Normativity in International Law?”<sup>1</sup> remains a reference point for scholars writing about sources of international law, international organizations, positivism, formalism, pluralism, authority, the international community, values, power relations, and even disillusionment—to list just some of the subjects on which it has been cited in 2019 alone.<sup>2</sup> Described as the sounding of an alarm<sup>3</sup> or a warning of the apocalypse,<sup>4</sup> this article by the esteemed French international lawyer Prosper Weil (1926–2018) sets out with the precision of cut crystal what he saw as the potential dangers of relativizing normativity. For Weil, the risk was not only that international law as a normative order would be launched “on an inexorable drift toward the relative and the random,” but that it would become disabled from serving the functions that international law should serve.<sup>5</sup> “Towards Relative Normativity?” is a classic, to be sure—it is the second most cited article in *AJIL*’s history.<sup>6</sup> Does it also speak to international law today? Or is the secret of its allure that “Weil’s piece vindicating spotless normativity appears almost like a unicorn offering an improbable remedy against the poisonous power of politics,” as Mónica García-Salmones Rovira puts it?<sup>7</sup> In honour of the first anniversary of Weil’s death,<sup>8</sup> this symposium brings together six authors from three continents to reflect on the contemporary significance of his famous article. This introduction previews four of the topics winding through the essays: relative normativity, positivism, power and values, and whistleblowing and unmasking.

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<sup>1</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, 77 *AJIL* 413 (1983).

<sup>2</sup> See, e.g., José E. Alvarez, *Frameworks for Understanding the International Labor Organization and Its Impact*, in ILO:100: LAW FOR SOCIAL JUSTICE (forthcoming); Susan Block-Lieb, *Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law*, 40 *MICH. J. INT’L L.* 433 (2019); Lorenzo Gradoni, *Un-Procedural Customary Law*, 10 *J. INT’L DISPUTE SETTLEMENT* 175 (2019); MATTHIAS LINDHOF, *INTERNATIONALE GEMEINSCHAFT: ZUR POLITISCHEN BEDEUTUNG EINES WIRKMÄCHTIGEN BEGRIFFS* (2019); Umut Özsü, *Legal Form*, in CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 624 (Jean d’Aspremont & Sahib Singh eds., 2019); Alain Pellet, *Values and Power Relations – The “Disillusionment” of International Law?* (KFG Working Paper Series, No. 34, Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?,” May 2019); Mark D. Retter, *Before and After Legal Positivity: Peremptory Norms from Global and Transnational Social Practice*, in *LEGAL POSITIVISM IN A GLOBAL AND TRANSNATIONAL AGE* 179 (Luca Siliquini-Cinelli ed., 2019); TIM STAAL, *AUTHORITY AND LEGITIMACY OF ENVIRONMENTAL POST-TREATY RULES* (2019).

<sup>3</sup> Özsü, *supra* note 2, at 627 n.11.

<sup>4</sup> José E. Alvarez, *The Relativity Apocalypse Is Nigh*, 114 *AJIL UNBOUND* 77 (2020).

<sup>5</sup> Weil, *supra* note 1, at 440–41, 413.

<sup>6</sup> @nyuillj, *Tweet* (Nov. 15, 2018). On the most cited article, see *Symposium on Thomas Franck’s “Emerging Right to Democratic Governance” at 25*, 112 *AJIL UNBOUND* 64 (2018).

<sup>7</sup> Mónica García-Salmones Rovira, *What Is Positivism Today?*, 114 *AJIL UNBOUND* 87, 87–8 (2020).

<sup>8</sup> See Alain Pellet, *Décès de Prosper Weil*, *SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL* (Oct. 14, 2018).

### *Towards Relative Normativity*

By relative normativity in international law, Weil meant first the phenomenon of blurring the threshold between legal and non-legal norms, particularly by attributing a certain normative force to the acts of international organizations. The majority of his article targets a second phenomenon—at the time a more recent trend—that he regarded as another conceptual weakness: the variable normativity that follows from creating a hierarchy among legal norms through notions such as *jus cogens*, and from diluting normativity through *erga omnes* obligations and other forms of legal expansion that make it increasingly difficult to determine who is bound and in favor of whom.

In his symposium essay, Pierre-Marie Dupuy (Graduate Institute of International and Development Studies (Geneva)) explains the intellectual context for Weil's thorough-going opposition to what he saw as relative normativity's erosion of clarity, predictability, intelligibility, and other criteria of legality.<sup>9</sup> Dupuy, a student and later a colleague of Weil at University Paris 2, notes that Weil's critique was well within the bounds of the dominant French tradition of legal positivism. Indeed, Weil's piece occasioned less debate when published in the *Revue Générale de Droit International Public*<sup>10</sup> in 1982 than when it appeared in translation in *AJIL* the following year.<sup>11</sup> It is also worth recalling that the “nebulousness” of *jus cogens* is the main reason that France did not become a party to the Vienna Convention on the Law of Treaties in 1969 and still remains outside the Convention.<sup>12</sup>

Weil's concern with threats to legal certainty in international law was heightened, Dupuy suggests, by his initial specialization in French administrative law, which revolved around the principle of legality, and by his high-level experience as a practitioner of international law. It is not surprising, then, that one of the lasting messages of Weil's article, José Alvarez (NYU School of Law) argues in his essay, is the threat that the proliferation of soft law poses for the role and value of lawyers in global governance: “He saw, before many others, that if everything is law, nothing may have the characteristics that we associate with law.”<sup>13</sup> How can lawyers advise their clients responsibly when the extent of the material they are expected to consider is becoming ever more uncertain?

Even in France, however, Weil was unusually uncompromising in refusing to countenance that the post-Second World War rise of international organizations had changed the character of the international legal order.<sup>14</sup> Dupuy recalls his own long-standing criticism of Weil in this regard and also of Weil's dismissal of the existence of an international community as a mere fiction. Here, Dupuy takes Weil to task for contradicting the assumptions of his own positivism: if international law is created by the will of states, then they can consent, and have consented, to the creation of an international community in law, whether or not that community exists sociologically or politically.<sup>15</sup>

<sup>9</sup> Pierre-Marie Dupuy, *Prosper Weil's Article: A Stimulating Warning*, 114 *AJIL UNBOUND* 72, 72–3 (2020).

<sup>10</sup> Prosper Weil, *Vers une normativité relative en droit international?*, 86 *REV. GÉNÉRALE DROIT INT'L PUBLIC* 5 (1982).

<sup>11</sup> Dupuy, *supra* note 9, at 72. Among critical alternatives in this period, Dupuy cites the work of Pierre Legendre as having demonstrated the virtues of “deconstruction” in law. In international law, see also, for example, Monique Chemillier-Gendreau, *Contribution of the Reims School to the Debate on the Critical Analysis of International Law: Assessment and Limits*, 22 *EJIL* 649 (2011) (discussing the French movement known as *Critique du droit* and particularly the work of the Reims Colloquia under Charles Chaumont in the 1970s); Emmanuelle Jouannet, *La pensée juridique de Charles Chaumont*, 37 *REV. BELGE DROIT INT'L PUBLIC* 259 (2004) (lamenting the marginalization of the Rheims school).

<sup>12</sup> *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations* (1986), Volume I (Summary Records), UN Doc. A/CONF.129/16 (Vol. I), UN Sales No. E.94.V.5, p. 8.

<sup>13</sup> Alvarez, *supra* note 4, at 81.

<sup>14</sup> Dupuy points to Michel Virally, René-Jean Dupuy, and Georges Abi-Saab.

<sup>15</sup> See also García-Salmones Rovira, *supra* note 7, at 89–90.

Fast forwarding to the present, a number of contributors observe that Weil's article has been bypassed by developments in international law. Weil was writing when the manifestations of relative normativity he deplored were not yet established or tested doctrines.<sup>16</sup> But this is no longer the case—if indeed it ever was the case that international law was free of relative normativity.<sup>17</sup> Alvarez and other scholars of international organizations have demonstrated how international organizations have affected the content of international law's traditional sources and gone beyond them. And Dupuy documents that *jus cogens* and *erga omnes* are more firmly entrenched than in 1983.<sup>18</sup> Writing on international criminal law, a field not envisaged in Weil's article, Paola Gaeta (Graduate Institute of International and Development Studies (Geneva)) highlights in her symposium essay how much the development of international criminal law is based on the international community paradigm that Weil criticized so severely.<sup>19</sup> In short, whatever the merits of his rejection of relative normativity, the clock cannot be turned back.

### *Away from Positivism*

Weil's attack on relative normativity was based on his view that voluntarism, neutrality, and positivism were essential for international law to fulfill its functions. For Weil, these functions were to ensure coexistence and cooperation among states in a heterogeneous international society rendered even more diverse by decolonization.<sup>20</sup> As Alvarez points out in his essay, however, positivism no longer enjoys the authority that it once did in international law. In her contribution to the symposium, historian of positivism in international law Mónica García-Salmones Rovira (University of Helsinki) argues that even within that tradition, the understanding of positivism today is not the same as in Weil's time. For her, "the late twentieth century positivism articulated in 'Towards Relative Normativity?' belongs in a museum, where the tools used to do science in the past are preserved."<sup>21</sup> She elaborates with respect to Weil's claim that "religious and ideological neutrality are inherent in the basic concept of international law"<sup>22</sup>—a position that most would find implausible now and that even then, García-Salmones Rovira argues, only held sway for a brief period before the end of the Cold War among a group of well-positioned, mostly European international lawyers. She demonstrates also how Weil's critique of the ideal of the unity of the international community has not survived globalization. "On the contrary," she writes, "what now feels difficult, even sometimes burdensome, is the impossibility of evading the reality that the international community exists, and the potential responsibility towards it: consider Lampedusa, the Mexican border, the Antarctic, the 'failed states' and their populations."<sup>23</sup>

Whereas García-Salmones Rovira emphasizes how the critical and historical turns taken in the discipline of international law have discredited Weil's ideas, international legal philosopher John Tasioulas (King's College London) in his symposium essay argues that Weil's positivism deserves serious engagement.<sup>24</sup> We may not

<sup>16</sup> See Weil, *supra* note 1, at 442.

<sup>17</sup> See Matthias Goldmann, *Relative Normativity*, in CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 740 (Jean d'Aspremont & Sahib Singh eds., 2019).

<sup>18</sup> Even states like Turkey that opposed the concept of *jus cogens* at the time of the Vienna Convention on the Law of Treaties do not now object to it as such. See Kirsten Schmalenbach, *Article 53*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 965, 972–73, 989 (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018).

<sup>19</sup> Paola Gaeta, *The Super-Normativity of International Criminal Law*, 114 AJIL UNBOUND 82 (2020).

<sup>20</sup> See Weil, *supra* note 1, at 418–21.

<sup>21</sup> García-Salmones Rovira, *supra* note 7, at 88.

<sup>22</sup> Weil, *supra* note 1, at 420.

<sup>23</sup> García-Salmones Rovira, *supra* note 7, at 90.

<sup>24</sup> John Tasioulas, *Prosper Weil and the Mask of Classicism*, 114 AJIL UNBOUND 92, 92–3 (2020).

agree with the limited goals Weil set for the international legal system, and we may not agree that voluntarism, neutrality, and positivism are the most effective way to achieve those goals. Nevertheless, Weil's identification of this teleological framework means that his positivism consists of more than state consent as a justification for international law and cannot be dismissed simply by pointing to the well-known inadequacies of consent as a full justification. Tasioulas thus calls for an "ongoing, deep-level engagement" with Weil's arguments.<sup>25</sup> In this vein, Gaeta takes on Weil's functionalist argument in her essay. On the one hand, she offers reasons why the risks he identified have not materialized—international law continues to operate "with its usual failures and successes."<sup>26</sup> On the other hand, she demonstrates why the development of "super-normativity" in international criminal law makes Weil's warnings apt for that particular field.

### *Power and Values*

Whereas developments in international law and international legal thought may have overtaken Weil's opposition to relative normativity and his adherence to true classical positivism, as Dupuy puts it,<sup>27</sup> his theme of power and values emerges in the symposium as one reason that "Towards Relative Normativity?" remains current. Weil feared what would happen if the axis of international lawmaking shifted away from states toward the international community as a whole, as with, for example, the General Assembly's efforts to establish "instant custom" and the international community's authority to elevate a rule from ordinary to "peremptory." Because the international community remained "an imprecise entity," investing it notionally with normative power would lead to the exercise of that power by "a de facto oligarchy." Certain states, whether the most powerful or the most numerous, would be in a position to impose their own hierarchy of values.<sup>28</sup> In his essay, Alvarez updates and amplifies "Weil's insight that the turn to soft law is one way powerful states exercise their power"—for Alvarez, a principal reason why Weil's article is still relevant.<sup>29</sup>

Whereas Alvarez's concern is with the behavior of hegemonic states, Weil's focus was arguably on the Third World. Dupuy situates "Towards Relative Normativity?" in the context of pressure by developing countries on the General Assembly to use formally non-binding resolutions to adopt a series of principles that could then be reclassified by new theories of international lawmaking along a spectrum of bindingness. In these theories of normativity, Weil saw reflected not only "the awareness of increased solidarity and the aspiration to a greater unity overspanning ideological and economic differences," but also "the frustration of a Third World that has long felt itself powerless and aspires to place its new majority position within international organizations at the service of what it sees as a fight for justice."<sup>30</sup> And he somewhat paternalistically regarded postcolonial states as deceived by such theorizers: "Adorned with the trappings of modernism, the legal fashions here denounced tend to lull new states—weak and underdeveloped as they often are—into illusions."<sup>31</sup>

Richard Falk in the 1980s wrote sharply that Weil's article struck him as "translating into jurisprudence a kind of ideological nostalgia for an earlier period of certainty and consensus" and reflecting a dislike of "the problems of

<sup>25</sup> *Id.* at 93.

<sup>26</sup> Gaeta, *supra* note 19, at 82.

<sup>27</sup> Dupuy, *supra* note 9, at 72.

<sup>28</sup> Weil, *supra* note 1, at 441.

<sup>29</sup> Alvarez, *supra* note 4, at 80.

<sup>30</sup> Weil, *supra* note 1, at 422. *But see* B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AJIL 1, 12–14 (arguing that "while flexible approaches came to be articulated by both western and third world scholars, they were for divergent purposes").

<sup>31</sup> Weil, *supra* note 1, at 442.

tension and diversity that exist in the world.”<sup>32</sup> However, a case can be made that, at least in places, Weil is a pragmatist rather than a nostalgist.<sup>33</sup> In his symposium essay,<sup>34</sup> Sienho Yee (China Foreign Affairs University) quotes Weil's assertion that “the potential negative consequences of the relativization of international normativity must at worst be regarded as secondary effects of changes that in themselves are beneficial.”<sup>35</sup> For Yee, the problems that Weil associated with relative normativity can be addressed through an approach to international law that is, contrary to Weil's, explicitly oriented toward progress. In earlier work,<sup>36</sup> Yee developed the idea of an “international law of co-progressiveness” as a descriptive and normative successor to a Cold War international law characterized by the interplay of coexistence and cooperation. Yee here shows how this approach might respond to the problems that Weil identified.

### *Whistleblowing and Unmasking*

Finally, there is an aesthetic register to Weil's article that goes beyond the genre of a critique or a doomsaying: the impression of exposing a secret. The piece seems to perform an uncloaking as well as to argue for it. Dupuy describes “Towards Relative Normativity?” as the work of a “brilliant whistleblower.”<sup>37</sup> And Tasioulas focuses on Weil's pronouncement that “behind the mask of classicism . . . there has been a change of substance.”<sup>38</sup> Tasioulas argues that to guard against the risks of relative normativity that Weil anticipated, international lawyers cannot, knowingly or unknowingly, hide their relativism behind a positivist façade, but must defend it head on. He uses the International Law Commission's work on the identification of customary international law to illustrate this “mask of classicism” problem.

The aesthetic impression that Weil's article created may have been partly a cross-cultural effect and may now also be partly an intertemporal effect. As Dupuy notes, the article did not cause a particular stir in France at the time. And, García-Salmones Rovira speculates, its current allure may be a function of its unsulliedness. But the sensation of whistleblowing or unmasking inspires even some radicals who profoundly disagree with his piece and are not charmed by sighting the unicorn of spotless normativity. Mathias Goldmann groups Weil with two other schools of thought skeptical of what lurks beneath relative normativity—rational choice and critical legal scholarship—both of which arguably also have this frisson.<sup>39</sup> It may ultimately be the feeling of boldness that gives “Towards Relative Normativity?” its particular appeal.

<sup>32</sup> Richard Falk, *To What Extent Are International Law and International Lawyers Ideologically Neutral?*, in *CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING* 137, 137 (Antonio Cassese & Joseph H. H. Weiler eds., 1988).

<sup>33</sup> See John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEGAL STUD. 85, 123–27 (1996).

<sup>34</sup> Sienho Yee, *The International Law of Co-Progressiveness as a Response to the Problems Associated with “Relative Normativity,”* 114 AJIL UNBOUND 97 (2020).

<sup>35</sup> Weil, *supra* note 1, at 423.

<sup>36</sup> See, e.g., Sienho Yee, *The International Law of Co-Progressiveness: The Descriptive Observation, the Normative Position and Some Core Principles*, 13 CHINESE J. INT'L L. 485 (2014).

<sup>37</sup> Dupuy, *supra* note 9, at 76.

<sup>38</sup> Weil, *supra* note 1, at 438.

<sup>39</sup> Goldmann, *supra* note 17, at 753–54.