Positivism, the New Haven School, and the Use of Force in International Law

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It is common knowledge that different interpretations of laws lead to differences on what is regarded appropriate responses to legally relevant circumstances. It is less well known, however, to what extent legal schools of thought differ with regard to more fundamental questions, namely what law actually is and how it is determined. Such methodological divergencies are often irreconcilable as they may rest on the political preferences of the respective proponents. A methodological and practical comparison of Positivism and the New Haven School lays bare the overwhelming importance of these divergencies in general and in the particular case of the use of force in international law. From a descriptive point of view both schools of thought are equally legitimate. Viewed against the background of the basic normative functions and purposes of law, however, New Haven School theorists are found to confuse the legal with the political sphere – with severe implications for their enhanced ability to justify the uses of force in international society.

I. Introduction

The question of how international law is determined can hardly be answered without reference to a distinct methodology of legal argument. In this respect, the choice of methodology is to a large extent dependent on a certain "political preference, including the question of what element of a many faceted 'reality' should be chosen as the starting point of one's analysis." [1] This assumption directly refers to the general relativism of international law. The discipline comprises of several different schools of thought, every one grounding its particular solutions to problems of legal practice on different premises and – as Martti Koskenniemi has found – express these in distinct 'linguistic styles' of legal argumentation. He reveals that the 'reduction' or 'translation' of a factual reality by lawyers into a particular legal language reflects certain preferred values, but omits others which may in turn epitomize the core of a different - possibly competing - tradition of legal thought. In this sense, legal arguments of different methodological origin create their own realities which refer to their own premises. The resulting indeterminacy of law in legal language would thus make different legal styles useful to achieve distinct political ends. [2]

This notion is particularly valuable with respect to Michael Byers' suggestions concerning potentially "shifting foundations of international law". [3] Considering the increased influence of the US legal doctrine in the first decade of the new epoch of one single superpower, Byers contends that this very power shift *may* have altered the answers to questions concerning the foundational aspects of international law. [4] While the practical issues

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[1] KOSKENNIEMI, MARTTI (a): "What Is International Law For". In Evans, Malcolm D. (ed.): *International Law.* Oxford University Press; Oxford 2003. p93

[2] KOSKENNIEMI, MARTTI (b): *"Letter to the Editors of the Symposium"*. In: "Symposium on Method in International Law"; (93) *American Journal of International Law 291 (1999).* p351364

[3] BYERS, MICHAEL (a): "The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq". *(13) European Journal of International Law 21 (2002).*

[4] *Ibid.* p21

under scrutiny are divergent views on the rules on the use of force, he argues that the roots of divergence lie in the debate over the general rules of interpretation of UN Security Council resolutions, international treaties and the rules for the development of customary international law. Going one step further, it may be reasonable to assume that the differing answers to these questions rely on differing premises of legal theories associated with different legal traditions – a phenomenon that has been called the "formative power of theory." [5]

Having said this, it is the aim of this article to examine the highly contentious issue of the international law regarding the use of force from two divergent methodological points of view. This is to demonstrate the dependence of scholars' and governments' conclusions on legal matters on their view on foundational aspects of international law and on the application of a particular methodology. Following the descriptive comparison of the two chosen schools of thought I shall normatively argue that certain core assumptions of what law is and how it is applied are superior to others with respect to the functions of law in (international) society - irrespective of the general nonhierarchical relationship of divergent legal traditions or 'styles'.

The choice of methodological approaches for this article has been made with regard to the most dominant and prevalent school of legal thought, Positivism, and in consideration of the arguably most isolated but nonetheless most powerful approach to the phenomenon of international law, namely the views held by the scholars of the New Haven School. With respect to the latter, Abraham Sofaer rightly asserts that, "while scholars in general have refused to accept this view, the US Government, including every State Department Legal Advisor on record, has done so." [6] Moreover, it is noteworthy that the New Haven School has recently gained considerable influence and authority on the international judicial plane. In February 2006, Judge Rosalyn Higgins, a former student and current admirer of the founding fathers of the New Haven School, took over presidency of the International Court of Justice. Without prejudging the outcome, these facts certainly provide legitimacy for its consideration. [7]

II. Legal Positivism and International Law Regarding the Use of Force

The present section shall provide for the core methodological tenets of legal positivism with reference to international law in general and demonstrate the application of its methods with regard to the use of force in international relations in the past. Keeping the analytical categories 'premises', 'methods', and 'conclusions' in mind, the reader shall be enabled to compare the then following approach of the New Haven School, and evaluate the far-reaching implications of the methodological choice to be made in legal scholarship.

A. The Core Tenets of the Positivistic Approach to International Law

Two methodological streams can be distinguished in reference to the classic legal positivist approach to international law. Voluntarism, on the one hand, relies on the assumption of the factual independence of states. Independent states create norms by reaching consent on the content of particular rules. Therefore, all international norms are deduced from the aggregate, collective will of states. The lawyer's task then is to analyse evidence of the will of states as unitary actors of international law, embodied by e.g. treaties, practice, declarations and statements of state representatives. Objectivism, as a differentiation of

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[5] SCOBBIE, IAIN: *"*Some Common Heresis about International Law*"*. In: Evans, Malcolm D. (ed.): *International Law.* Oxford University Press; Oxford, 2003. p67

[6] SOFAER, ABRAHAM D. (a): "On the Necessity of Preemption". *(14) European Journal of International Law 209 (2003).* p212

[7] HIGGINS, ROSALYN (a): "McDougal as Teacher, Mentor, and Friend". *(108) Yale Law Journal 957 (1998-1999).*

voluntarism, assumes the unity of one entire legal system in contrast to the distinction of domestic and international legal systems. It does so by reference to a, in the end, hypothetical 'basic norm' (Hans Kelsen's *Grundnorm*) from which all legal norms are formally derived. For instance, it has been argued that the norm *pacta sunt servanda* may epitomize the basic norm of the legal system, whereas all other existent norms are hierarchical subordinates as derived from the basic norm, and are only valid in reference to it. A strict formal deduction of norms from their respective superior norm mirrors an objective, describable legal reality which is strictly separated from normative factors. While both approaches rely on slightly different premises – e.g. concerning the dual or unitary character of the legal system – they have in common that they strictly separate the asserted *legal factuality* from *ideological considerations*. Thus, legal science shall limit itself to the description of legal norms but must never engage in contemplations about what the law should be, *lex ferenda*, instead of what it is, *lex lata*, or alter factual law in favour of a preferred state of fact by means of 'interpretation'. In this sense, positivists view all legal rules as norms which are objectively describable through the employment of scientific methods. [8] These methods of interpretation are, however, prescribed by law itself as will be demonstrated subsequently.

The sources of international law are stipulated in Article 38 of the Statute of the International Court of Justice (ICJ), the Statute being an "integral part of" the United Nations Charter (Art.92 UNC). [9] Primary sources of international law are thus international treaties, "establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law" and the general principles of law (Art. 38 ICJ Statute).

Concerning the hierarchy of norms, for example in case that several norms apply to a given situation, two general principles of law determine the rule to be chosen on the one hand: *lex specialis derogat legi* and *lex posterior derogat priori*: "that is to say, the special rule overrides the general rule and the later rule overrides the earlier rule." [10] It has been suggested that "a treaty provision prevails over any conflicting rule of customary international law." [11] It is arguable, that a newly arising customary rule "might be regarded as *lex specialis* in relation to the regime established by the treaty" and therefore prevails. [12] Controversy is obsolete, however, if the customary rule is a peremptory legal norm of *jus cogens* character - "norms from which no derogation by agreement is permitted" (Art. 64 VCLT). [13] For instance, the prohibitions of genocide, torture and slavery embody *jus cogens* norms. Additionally, it has been asserted that the "customary rule prohibiting the use of force, crystallised in the UN Charter, is also widely regarded as having achieved *jus cogens* status." [14]

Moreover, the customary rules for the interpretation of treaties have been codified in the 1969 Vienna Convention on the Law of Treaties. Article 31(1) provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Thus, the interpretation of norms shall be based on the determination of the 'ordinary meaning' of the words forming

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[8] SIMMA, BRUNO AND PAULUS, ANDREAS L.: "The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: A positivist view". In: "Symposium on Method in International Law"; *(93) American Journal of International Law 291 (1999).* p302316

[9] The Charter was agreed upon by all members of the organisation without preservations. The obligations of member states under the Charta prevail in case of conflict with members' "obligations under any other international agreement" (Art.103 UNC) – a fact that underlines the overwhelming legal importance of the Charter.

[10] THIRLWAY, HUGH: "The Sources of International Law*"*. In Evans, Malcolm D. (ed.): *International Law.* Oxford University Press; Oxford, 2003. p136

[11] BYERS, MICHAEL (b): *War Law – International Law and Armed Conflict*. Atlantic Books; London, 2005. p6

[12] THIRLWAY: p137

[13] *Ibid.* p141

[14] BYERS (b): p6

a norm (textual / objective approach), on the subsequent consideration of the context of a norm, e.g. the meaning of a norm in context of an entire treaty or legal order (systematic approach), and on the object and purpose of the treaty (teleological approach). Although no hierarchy exists between the elements of Article 31(1) "they reflect a logical progression". [15] The objective approach, the textual interpretation, is widely recognized to be most important and is the most significant tool for every lawyer determining 'positive law' while the International Law Commission (ICL) – being highly involved in the codification process of the 1969 Vienna Convention – "voiced doubts as to the usefulness of the [object and purpose] criterion" since the latter would be a "vague and ill-defined term" – providing for indeterminacy of the norms to be interpreted. [16] However, as we shall see in the following section, this opinion is not held by all legal scientists and practitioners. All of the named principles and rules are, from a positivist view, subject to the determination and interpretation of the rules governing the use of force in the international society, to which I shall now turn.

B. A Positivistic View on the Use of Force in International Law

States' central obligation in reference to the regime governing the use of force is embodied by Article 2(4) of the United Nations Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." In accordance with the rules of treaty interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties, the ordinary meaning of the Article 2(4) of the Charter is the categorical prohibition of the use of force across borders. Context, object and purpose of the Charter affirm this interpretation. Moreover, the general prohibition of the "use of force" seems to widen the scope of the prohibition in order to include undeclared warfare. [17]

The Charter itself, however, provides for specific exceptions of the general prohibition which are stipulated in Chapter VII concerning "Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression". Furthermore, exceptions to the prohibition may also arise out of the development of customary international law. Some claimed rights, such as self-defence against non-state actors and humanitarian intervention, have been subject of fierce debate in a variety of fora.

Security Council Authorization

Article 39 provides the Security Council – comprised of five permanent members who hold a veto power concerning every action taken by the Council, and ten nonpermanent members – with a broad authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression". Moreover it is left to the Council's discretion to "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." While Article 41 refers to the authorization of non-forceful measures in order "to give effect to its decisions" including economic and diplomatic sanctions against states, Article 42 gives the Security Council the authority to take action by "air, sea, or land forces as may be necessary to maintain or restore international peace and security" if it finds that the measures previously taken in accordance with Article 41 have proven to be "inadequate".

Traditionally, the Security Council has used its discretion to determine the existence of any threat to the peace and security in reference to cases of cross-border conflicts, such as North Korea's invasion of South Korea in 1950 and Iraq's invasion of Kuwait in 1990.

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[15] FITZMAURICE, MALGOSIA: "The Practical Working of the Law of the Treaties". In: In Evans, Malcolm D. (ed.): *International Law*. Oxford University Press; Oxford, 2003. p186

[16] *Ibid.* p189

[17] BYERS (b): p55

Recently, however, the Council has widened the scope of the concept of "threat" to encompass intrastate conflicts, providing a legal response to the experience of civil wars involving genocide and/or grave humanitarian crises. For instance, the Council determined a threat to peace and security in the cases of the civil war and genocide in Bosnia-Herzegovina (1992), civil strife and devastating famine in Somalia (1992), *coup d'état* in Haiti (1993), genocide in Rwanda (1994), the suppressed independence movement in East Timor (1999), atrocities committed against Kosovo Albanians by the military of the Federal Republic of Serbia and against agricultural tribes in Sudan's western region of Darfur committed by the 'Janjaweed' militias armed by Sudan's government. [18] Having – rather less than more successfully - taken measures under Article 41 and/or 42 in all of the above cases, and having clearly expanded the concept of 'threat' to domestic conflicts and humanitarian crises, the Council did not exceed its powers provided for in Article 39 which sets no limits to the term 'threat' to peace, and thus leaves its determination to the discretion of the Council. This view is particularly supported by the 'ordinary meaning' of Article 2(7), which stipulates that the prohibition of the intervention of the United Nations in matters of domestic jurisdiction of any state "shall not prejudice the application of enforcement measures under Chapter VII". Moreover, all measures authorized by the Council concerning the conflicts listed above remained in the scope of the respective Articles 41 and 42; although the latter clearly reflected a broader claim of responsibility on part of the international community to adequately respond to domestic widespread human rights violations and other humanitarian crises.

Debate, however, has arisen several times about whether members of the United Nations have acted in accordance with the scope of actions authorized by Security Council resolutions, or if they in fact violated the prohibition of the use of force embodied by Article 2(4) in absence of Security Council authorizations for their actions. This was particularly the case when the United States, Britain, France, Italy and the Netherlands provided 'safe havens' for the Kurdish minority in northern Iraq justified under UN Security Council Resolution 688. While the Resolution determined a threat to international peace and security imposed by atrocities committed by Iraqi military forces against Kurds as a response to an attempted uprising against the government in Baghdad, it did not expressly authorize the use of force by member states. Nevertheless, the alliance in the end established two 'no-fly zones' north of the 36th parallel and south of 32nd parallel – the latter serving the protection of rebelling Shiites from Saddam's retributions – arguing that it was acting in support of Resolution 688. [19] Another 'precedent' for clearly unauthorized unilateral use of force - due to a lack of expression of will of the Council members - was set by the US led invasion of Iraq in March 2003. Facing a lack of express authorization by the Council, one particular argument advanced by the US, Britain and Australia to justify the invasion, referred to Resolution 678. The latter was "adopted by the UN Security Council following Iraq's invasion of Kuwait in 1990, whereby it authorized UN member states to 'use all necessary means...to restore peace and security to the area'." [20] Although the wording of Resolution 687, which provided for a ceasefire in April 1991, clearly indicated the termination of the authorization of the use of force, the representatives of the three states argued that the Resolution only stipulated a suspension. The authorization "could be reactivated if and when Iraq engaged in a 'material breach' of its ceasefire and disarmament obligations." [21] However, Resolution 1441 of November 8th 2002 did not elaborate on consequences of a potentially determined 'material breach', nor did it expressly authorize the use of force. Moreover, a further resolution drafted by the US and Britain, including such determination and authorization was not put to vote as the veto powers France, Russia and China clearly signalled their opposition. Thus, from a

[18] BYERS (b): p25-39
[19] *Ibid.* p4041
[20] *Ibid.* p43
[21] *Ibid.* p43

positivist point of view, forceful actions taken by the proponents of such arguments must be deemed a breach of their obligations under the Charter.

Self-Defence

Article 51 of the Charter provides member states with the "inherent right" of self-defence in case an armed attack occurs against them "until the Security Council has taken measures necessary to maintain international peace and security." While it is clear that the Charter allows for self-defence measures taken by states individually or collectively in absence of actions authorized or taken by the Security Council, in the case of a cross-border attack which is clearly attributable to a state, it is arguable if the Charter's reference to states' "inherent right" of self-defence allows for an extended customary right of self-defence under more differentiated circumstances. Whether this right exists or not, it is widely recognized as part of customary international law, that self-defence must meet the requirement of 'necessity' and 'proportionality'. In this respect, self-defence must be necessary in order to regain territory or "repel an attack on a State's forces and (...) proportionate to its end." [22]

More divergences arise over the question if states have the right to use force to rescue their citizens on the territory of another state as an act of self-defence. State practice which supports this claim is potentially found in the cases of the US intervention in the Dominican Republic (1965), Grenada (1983) and Panama (1989), the UK's military operations in Suez (1956) and Israel's rescue of Israeli passengers of a civil aircraft seized by pro-Palestinian hijackers in Entebbe, Uganda (1976). While the former instances have been widely rejected to meet the criteria of necessity and proportionality, Israel's highly successful operation on the airport of Entebbe was responded to by sympathy, express support, and acquiescence, but also by general opposition to a right of intervention from the Soviet Union and developing countries. [23] However, it has been suggested that the incident "contributed to a limited extension of the right of self-defence in international affairs to include the protection of nationals abroad." [24] The acknowledgement of such an extension affirms the argument that the right of self-defence provided in the Charter is not exhaustive but is potentially widened by "evidence of a general state practice accepted as law" (Art. 38 ICJ Statute).

The same may account for a right of self-defence against terrorism. Such a right has been claimed referring to the US action against Libya in 1986 following the killing of US military personnel in Berlin; against the Iraqi intelligence service headquarters in Baghdad in 1993 in response to an attempted assassination of former US president George Bush; terrorist training camps in Afghanistan and an alleged chemical weapons factory in Sudan in 1998 in relation with terrorist attacks on US embassies in Kenya and Tanzania; and to Israel's attack on the headquarters of the PLO in Tunis in 1985. [25] However, the development of an extended customary right to self-defence in reference to the listed state practice must be doubted, since each claim was answered mostly by either express opposition or sympathy combined with a lack of acceptance of the practice to become a legal right. [26] Moreover, doubts were expressed about whether the respective actor met the requirement of necessity and proportionality. The response to US military operations in Afghanistan following the attacks on the World Trade Centre on September 11th 2001 was a different one. Without even seeking a Security Council resolution the US solely justified their attacks on Afghanistan by a claimed right to individual or collective self-defence against non-state actors – Osama Bin Laden's al-Qaeda organisation - operating from the territory of a state that is (unable or) unwilling to prevent the latter from

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[22] GRAY, CHRISTINE: "The Use of Force and the International Legal Order". In: Evans, Malcolm D. (ed.): *International Law.* Oxford University Press; Oxford, 2003. p600

[23] *Ibid.* p603

[24] BYERS (b): p58

[25] GRAY: p603

[26] BYERS (b): p6164 ; GRAY: p603

taking actions related to the commitment of terrorist attacks against the self-defending state. In contrast to past self-defence claims, the US' 'Operation Enduring Freedom' was nearly universally supported as an act of self-defence by the vast majority of states while only Iraq and Iran questioned the legality of the operation. [27] Moreover, for the first time, NATO invoked its collective self-defence provision, Article 5 of the North Atlantic Treaty, while the Security Council in its Resolution 1373 of November 14th 2001 expressly affirmed the individual or collective right to self-defence under the circumstances provided by the attacks on Washington D.C. and New York on September 11th. [28] Although it remains highly controversial if 'Operation Enduring Freedom' indeed met the requirements of necessity and proportionality, it shall be concluded that the 'inherent right' to self-defence has been extended to a right of self-defence against terrorism by a newly developed customary rule subject to the conditions named above.

It must be doubted, nevertheless, that the same accounts for a right to an 'anticipatory' or 'preemptive' self-defence, which was claimed by Israel after having bombarded a nuclear reactor under construction at Osirak in Iraq on June 7th, 1981. It was furthermore asserted in a speech given by US President George Bush at Westpoint Military Academy on June 1st 2002 and advanced by the 'US National Security Strategy' released on September 20th, 2002. [29] The Charter's wording requires – according to the ordinary meaning of Article 51 - an 'armed attack' in order to activate a member's right to self-defence. It thereby outlaws military action without a preceding incident to be qualified as such. Those speaking in favour of the claim, however, have frequently referred to state practice and *opinio juris* mirrored by the circumstances surrounding the 'Sinking of the Caroline' on December 9th of 1837. In that case, a vessel was intentionally used by US American citizens and supporters of Canadian rebels against the British rule to attack British soldiers in Canada. The ship was attacked and sunk by the latter on American territory before any harm could be done. The attack was justified by the British government with reference to the "necessity of self-defence and self-preservation". [30] It is asserted by some that a subsequent letter from then Secretary of State Daniel Webster to the Envoy Extraordinary of Great Britain and an alleged agreement on its content by both states created the 'Caroline Criteria' for a customary international right for 'preemptive' or 'anticipatory' self-defence against an 'imminent threat'. The current ICJ President Judge Rosalyn Higgins for instance, alleges that the 'Caroline' case "still has great operational relevance and is an appropriate guide to conduct." [31] The sentence, which is the source of debate, reads as follows: "It will be for that government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." [32] The 'doctrine' is rendered void and inapplicable, however, by the fact that not even the governments involved agreed on the criteria mentioned. Furthermore, the legal consequence of the relation of the provisions on self-defence and potentially established earlier custom clearly reflect the principle *lex posterior derogat priori* – rendering the latter void. [33] In this respect, the fact that "legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat" – as asserted in the US

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[27] GRAY: p604
[28] BYERS (b): p67 ; GRAY: p604
[29] THE WHITE HOUSE: *National Security Strategy of the United States;* published in September 2002; accessible at http://www.whitehouse.gov/nsc/nss/2002/nss5.html; visited 19 March 2006.
[30] SOFAER (a): p214
[31] HIGGINS, ROSALYN (b): *Problems and Process – International Law And How We Use It*. Clarendon Press; Oxford, 1994. p243
[32] Quoted in: OCCELLI, MARIA BENVENUTA: "'Sinking' the Caroline: Why the Caroline Doctrine's Restrictions on Self-Defence should not be regarded as Customary International Law*". (4) San Diego International Law Journal 467 (2003).* p474
[33] BYERS (b): p74

National Security Strategy - lacks a foundational legal basis. [34] A customary international right for preemptory self-defence could thus only be developed by evidence of practice accepted as law in current international affairs. The US government's claim of this very right in justification of its invasion of Iraq in March 2003 was, however, widely rejected and has only been affirmed by India, Israel, Russia and Australia. [35]

Unilateral Humanitarian Intervention

A right of unilateral humanitarian intervention could be defined as "a right to intervene for humanitarian purposes without the authorization of the Security Council." [36] The need for unilateral humanitarian interventions may arise out of a political blockade in the Security Council caused by one or more veto powers. Facing widespread and systematic atrocities in countries plagued by civil war or systematic violent suppression of minorities, including crimes which are subject to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, some governments and scholars have put much effort into advancing arguments in favour of a general right for humanitarian intervention in absence of a Security Council authorization. They seek to justify their infringement upon the sovereignty of states and the use of force in relation with the moral justification of the ends of the intervention. Intervention does not present a legal problem in cases where the government of a 'target' state 'invites' other states to restore peace and security in their country or on parts of their territory. An example of invitation by a host country for external humanitarian intervention was that extended by Indonesia's president B.J. Habibie's 'invitation' to UN peacekeepers for the region of East Timor, which rendered the subsequent Security Council authorization of intervention unnecessary from a legal point of view. It is widely recognized that 'intervention by invitation' does not reflect a breach of Article 2(4) of the Charter. [37] However, this has not always been the case.

Coherently, since the United Nations Charter categorically prohibits the unilateral use of force, a right to unilateral humanitarian intervention without consent of the 'target state' could only exist in case of the development of a customary rule providing for an exception to Article 2(4). Moreover, such a customary rule might have to attain *jus cogens* character as it does not only stand in conflict with Article 2(4) but also with Article 2(7) which establishes the principle of nonintervention of UN member states in "matters which are essentially within the domestic jurisdiction of any state". The development of such peremptory – *jus cogens* - rules frequently supersede any conflicting treaty norms – including provisions of the United Nations Charter according to Article 64 of the Vienna Convention on the Law of Treaties. The development of a *jus cogens* norm, however, would practically require not only evidence of consistent and widespread state practice over a long period of time but also sheer universal acceptance on part of states. States' responses to NATO's long campaign of air strikes on targets in Kosovo and Serbia in 1999 - aimed at the prevention of further atrocities committed by the army of the Federal Republic of Yugoslavia under command of President Slobodan Milosevic against ethnic Albanians – evidenced the contrary. Only two of the participating NATO members – UK and Belgium – justified the campaign according to an asserted legal right of humanitarian intervention. Other participants, such as Germany and France, held that "the decision of NATO [on air strikes against Kosovo] must not become a precedent." [38] Moreover, China, Russia and India strongly opposed the war. Finally, in the

[34] THE WHITE HOUSE: *National Security Strategy of the United States;* published in September 2002.
[35] BYERS (b): p79
[36] *Ibid.* (b): p92
[37] *Ibid.* (b): p35
[38] The German Minister of Foreign Affairs, Dr. Klaus Kinkel, in a speech held in the German Parliament: Deutscher Bundestag, Plenarprotokoll 13/248, October 16th 1998, at 231 29, quoted in: SIMMA, BRUNO: "NATO, the UN and the Use of Force: Legal Aspects". *(10) European Journal of International Law 1 (1999).* p12

aftermath of the intervention, 133 states of the Group of 77 issued declarations "affirming that unilateral humanitarian intervention was illegal under international law." [39] Coherently, a *jus cogens* status of a potential customary right to unilateral humanitarian intervention has not been achieved, nor has a customary norm developed at all, since the evidence of state practice clearly lacks its acceptance as international law. However, as ICJ judge Bruno Simma has argued, "there are hard cases' involving terrible dilemmas in which imperative political and moral considerations leave no choice but to act outside the law." [40]

The previous account of a positivistic point of view on international law regarding the use of force is certainly far from being complete and obviously reflects only one perspective among many other possible differentiations of the issues concerned. Nevertheless, I sought to coherently assemble and present the prevalent standpoints of modern positivists and particularly tried to emphasize their formalistic methodological approach. The latter does not mechanistically provide for one correct answer, but is grounded on precise rules seeking to accurately describe a state of fact considered to be law.

III. The New Haven School and the Use of Force in International Law

It is the aim of this section to provide an account for the core methodological tenets of the New Haven School approach to international law in general and to demonstrate its application to the use of force in international relations in an exemplary manner. With regard to its 'premises', 'methods', and 'conclusions', the major differences in comparison to the positivistic point of view shall become clear in order to enable the reader to focus on the inherent implications of either approach.

A. The Core Tenets of the New Haven School's Approach to International Law

As stated in the introduction, the New Haven School, founded by Myres McDougal and Harold Lasswell at Yale Law School shortly after the Second World War, has exerted significant influence on the making of US foreign policy in the last five decades, and has shaped the minds of prominent former Yale Law School students, such as the recently elected ICJ President Judge Rosalyn Higgins. It generally stands in the tradition of the American Legal Realist School of jurisprudence, which expressly rejects formalist approaches and is associated with norm-scepticism. [41]

In contrast to the arguable moral neutrality of Positivism, the New Haven School's core tenet is traditionally the promotion of a free, democratic (international) society which is grounded on the fundamental value of human dignity – and is therefore expressly value based. [42] As Judge Higgins writes, referring "to 'the correct legal view' or 'rules' [as positivists would] can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law." [43] This very purpose, in turn, would lie in the outcome of "the process through which members of a community seek to clarify and secure their common interest". In this sense, law is defined as "an ongoing process of authoritative and controlling decision." [44] Higgins clearly rejects the

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[39] BYERS (b): p101

[40] SIMMA, BRUNO: "NATO, The UN and the Use of Force: Legal Aspects*". (10) European Journal of International Law 1 (1999).* p1

[41] SCOBBIE: p69

[42] *Ibid.* p69

[43] HIGGINS (b): p5

[44] WIESSNER, SIEGFRIED AND WILLARD, ANDREW R.: "Policy oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*".* In: "Symposium on Method in International Law"; *(93) American Journal of International Law 291 (1999).* p319 ; also: HIGGINS(b): p2

assumption that law – defined as rules – can be objectively identified and applied to a given legal question, since it is inevitable that the decision-maker confronted with the issue would be either consciously or unconsciously informed by his preferred values. Instead of 'disguising' the personal preferences in the decision-making process by creating the illusion of objectively identifying the applicable rules which would lead to the 'correct' legal answer, decision-makers should instead deal with value-dependent policy options openly: "Dealing with them systematically means that all factors are properly considered and weighed, instead of the decision-maker unconsciously narrowing or selecting what he will take into account in order to reach a decision that he has instinctively predetermined is desirable." [45]

It becomes difficult at this point to clearly distinguish law in terms of this value-based approach from other social sciences. Law as an authoritative decision-making process – ideally aiming at the implementation of moral values which the whole community has in common – can hardly be isolated from mere power application through political actors. This is particularly the case in the existing horizontal international legal system of socially unequal states. The notion is even more striking considering the assumption that the determination of what law is, is supposed to "depend on shared patterns of authority among the politically relevant actors." [46] Applied to an international context, law appears to be a redundant elaboration of power determined by 'politically relevant' actors. Through shared patterns of authority the latter decide what law is and what it is not – thereby allegedly reflecting a 'common interest'. Far from asserting a (potentially desirable) autonomy of law from social power or political decision-making, Higgins deems power "an integral part of [law]", since "the authority which characterizes law, exists not in a vacuum (...)." In other words: Law in terms of authoritative decision-making needs to be backed up by power in order to be considered as law at all. To think law as being authoritative in the absence of affirming power is considered to be nothing but "a fantasy." [47]

Clearly, law in this particular construction serves a higher purpose beyond functional social order considerations, and therefore is unrestrained by the ordinary meaning of codified rules. The deviation from traditional legal practice is evidenced by the attempt to derive legal content from codified law by means of purposive interpretation – the third element named in Article 31 VCLT. As mentioned earlier, this teleological approach was widely rejected at the UN conference on the Law of Treaties in Vienna 1968/1969, when suggested by US representative Myres McDougal. [48] It is clear, at least, that the vagueness of treaties' purposes and objectives provides for a wide range of manoeuvre when it comes to the determination of norms – especially in the case that the latter is context-dependent. Michael Reisman's comments on the 1993 US reprisal for an attempted assassination of former president George H. W. Bush in Kuwait illustrate the context-dependent, non-textual 'interpretation' of norms: "If one believes, as I do, that law is not to be found exclusively in formal rules but in the shared expectations of politically relevant actors about what is substantially and procedurally right – which may diverge sharply from the written rules – then a prerequisite for appraisal of the lawfulness and implications of an incident such as the Baghdad raid is an identification of the yardstick of lawfulness actually being used by relevant actors."[49] This is because the determination of law would "vary from context to context" with respect to the uniqueness of social contexts and respective perspectives of politically relevant actors in reference to a given set of more or less narrow defined abstract values. [50]

[45] HIGGINS (b): p5
[46] WIESSNER and WILLARD: p321
[47] HIGGINS (b): p4
[48] FITZMAURICE: p175
[49] REISMAN, MICHAEL (a): "The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*".* *(5) European Journal of International Law 120 (1994).* p122
[50] *Ibid.* p321

Moreover, discussing the conception of customary international law, the threshold for states' behaviour to constitute opposition to the development of custom by practice is set significantly high by New Haven School scholars. Relying on Reisman, John Merriam points out that "words of condemnation alone do not show actual opposition; rather it is the action of international elites that should be used to determine the level of acceptance (...)" because [actions] "require a greater mobilization of resources." [51] Thus, the mere declaration of opposition to a potential rule of custom remains irrelevant for the process of its development. It is almost unnecessary to mention that this solely practice-based approach to the development of customary international law favours those states which are actually able to act in favour or in opposition to the development of a customary rule – namely powerful states. The criticism advanced against Positivism by followers of the so-called New Haven School's 'Policy-Oriented Jurisprudence' shall therefore be evaluated before the background that Positivism is asserted to "provide the counter image to this empirical, dynamic conception of law" since "its common focus on existing rules, solely emanating from entities deemed 'equally' sovereign, does not properly reflect the reality of how law is made, applied and changed." [52] The main argument alleges that positivists would fixate on the past will of former legislators, focusing on the interpretation of words irrespective of the context in which they were written, while seeking to derive a solution to a present legal problem that is subject to now-different circumstances. Accordingly, in reference to the law on the use of force, one scholar argues that "although textually sound, the positivist approach fails to reflect the realities underlying uses of force." [53] In coherence with the contextual interpretative approach favoured by New Haven School students (which must not be confused with the contextual interpretive approach of Article 31 of the VCLT) "every threat or use of force is evaluated on its own merits based upon the context in which it occurs (...)", whereas this is conducted in light of a given set of assumed 'world order' values, ideally reflected by common political objectives. [54] Taking a different angle, Judge Higgins proposes that "if law as rules requires the application of outdated and inappropriate norms, then law as process encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve." [55] In her view, the fortunate side effect of this detachment of norms from its ordinary meaning and their interpretation in light of political context is the fact that the distinction between *lex lata* and *lex ferenda*, being so rigidly defended by positivistic thinkers, would thereby be erased - opening the door to the advancement of norms by authoritative decision-making according to commonly held values.

B. The New Haven School's Approach to the Use of Force in International Law

Moving from legal theory and its implications for legal practice to actual standpoints concerning the law on the use of force in international relations, it is noteworthy that scholars and practitioners who adhere to the basic principles of the New Haven School in general significantly differ in their views on the legality of the use of force in particular. Among their scholars it remains under scrutiny if the deficiencies of the international system (the failures of the United Nations, the violations of the Charter, the massive violations of human rights, the frequent absence of democracy) are "such that the limits on the use of force contained in Article 2(4) and Article 51 should be set aside?" [56] While Higgins suggests that norms, which

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[51] MERRIAM, JOHN J.: "Kosovo and the Law of Humanitarian Intervention*". (33) Case Western Reserve Journal of International Law 111 (2001).* p125
[52] WIESSNER and WILLARD: p320
[53] SCHMITT, M.N.: "Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*". (37) Columbia Journal of Transnational Law 885 (1999).* p901
[54] *Ibid.* p903
[55] HIGGINS (b): p10
[56] *Ibid.* p252

do not serve a common interest anymore, should be changed by interpretation *infra legem* she is "not yet convinced that they [the norms limiting the unilateral use of force] have no useful purpose to perform or that unilateral outcome-directed action without reference to common norms is not dangerous." [57] For Higgins, as she admits, rules – defined as 'trends of past decisions' – "still have an important role to play in the choices to be made." This appears to be viewed differently by some of her colleagues, such as Michael Reisman, as he suggests that "one should not seek a point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, with appropriate regard for the factual constellation in the minds of the drafters." These assumptions lead Reisman to the conclusion that – as the general prohibition of the use of force would not bear desired social outcomes, the rules could no longer be regarded as legally binding. [58]

Another illustrative example of how followers of the New Haven School are able to simply ignore the rules which remain at the core of the international law regarding the use of force is provided by former US State Department legal advisor Abraham D. Sofaer, who, in express reference to the New Haven School approach and in admiration of Myres McDougal, easily manages to justify uses of force as lawful in cases where its unlawfulness is beyond any doubt for positivists. Without hesitation, he asserts that the "Charter prohibits uses of force inconsistent with its purposes, which include moral objectives (...)." [59] Rejecting the positivist "pushbutton approach" to the prohibition of the use of force, Sofaer prefers to determine an act's lawfulness by a process of examining and "weighing of proper and relevant considerations" of a particular context. [60] Thereby, he alleges to analyse if a "standard of reasonableness" of an act is met, thereby determining its legality under international law. There is no need, however, to follow Sofaer's examination point for point. In the end, what counts is that "US statesmen have developed use of force law consistent with the Charter's principles based on practice, rather than adhering to the views of other states with opposing ideologies and objectives, or of international lawyers having no public authority or responsibility to protect US interests." [61] The latter is deemed to advocate "practical idealism in which international law can be read to allow the use of force to prevent bloodshed." [62] Both NATO's humanitarian intervention in the Federal Republic of Yugoslavia and the US 'preemptive' self-defence against Iraq are rendered lawful by Sofaer's listing - rather than weighing - of allegedly relevant contextual factors which range, for example, from Iraq's asserted possession of weapons of mass destruction to CIA psychiatrists' professional opinion about Saddam Hussein's state of mind [63] - giving an enlightening example of the relevance and the working of the New Haven School's approach in practice.

Referring to the primary hypothesis of this article, it should have become clear that the two approaches compared are incompatible with regard to their premises, their methods, and their conclusions. In this sense, it has so far been found accurate to assume that the choice of a particular methodology for the determination of international law has the potential to serve distinct (political) ends. In fact, both traditions presented here are not referring to the same thing when they consider the conception of law. While positivistic lawyers describe international law as a consent based system of legal rules and thereby implicitly demand that states abide by norms which do not necessarily reflect current power relationships among

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[57] *Ibid.* p253
[58] REISMAN, MICHAEL (b): "Criteria for the Lawful Use of Force in International Law*". (10) Yale Journal of International Law (1985).* p283
[59] SOFAER, ABRAHAM D. (b): "International Law and Kosovo*". (36) Stanford Journal of International Law 1 (2000).* p67
[60] *Ibid.* p16
[61] *Ibid.* p12
[62] *Ibid.* p10
[63] SOFAER (a): p220

them, the New Haven School's approach seeks to justify context-dependent, authoritative decision-making by politically relevant actors, ideally underpinned by the promotion of a 'world order of human dignity' and the 'common interest' of the world community. These insights do not *a priori* render one or the other better or worse, superior or inferior. Nevertheless, in practice, the normative choice between the two divergent conceptions of law has to be made. It is a choice of crucial importance with regard to its consequences, and therefore deserves particular attention by legal scholarship.

As we have seen above, the New Haven School has developed in express dissociation from the positivist tradition and extensively provides criticism of alleged positivist deficiencies. The following critique of the New Haven School approach to the discipline of international law shall serve both the process of choice between the two methodologies in general, and the determination of the essence and ends of what has lately been called "Policy Oriented Jurisprudence". [64] It mainly revolves around the issues of 'legitimacy of international legislation', 'relativism of values', the principal of 'legal certainty', and on the distinction of *lex lata* and *lex ferenda*.

C. Critique of the New Haven School's Approach

As outlined above, Judge Rosalyn Higgins presumes the immanent failure of the positivist attempt to objectively identify the applicable rule, from which the correct legal answer to a given question can be deduced. Instead, she suggests that, in light of the social context of the issue at hand, policy factors should be considered, weighed and systematically dealt with. On the basis of a determination of common values and interests, a choice among policy options should be made instead of applying formal rules, which were drafted under the impression of different and not applicable circumstances.

Judge Higgins errs in several respects. First of all, most positivists do not claim to find an objectively correct legal answer deduced from formal rules *in absolute terms*. Positivists do, however, as legal scientists, seek to promote the development of legal 'tools' or 'rules of procedure' to be applied, in order to recognize and apply rules which are stipulated by legitimate legislators. In this sense, legal science's basic task is nothing but the recognition of rules of law. Such 'rules of procedure' are, for instance, epitomized by Article 31 of the Vienna Convention on the Law of Treaties, providing for the means of interpretation, or legal principles such as *lex posteriori derogat priori* or *lex specialis derogat legi*. The decisive difference is that positivists do not 'disguise' the inevitable fact that every human decision-maker is led, perhaps unconsciously, by his personal preferences. But they seek to codify guiding standards and principles for rule interpretation and application, adopted by legitimate legislators - precisely *because* of their very awareness of the influence of personal preferences on the decision-making of individuals. This is not to say that legal rules – if correctly applied - do not leave room for personal preferences of decision-makers. However, it is a fundamental element of the principle of '*the rule of law'* that the influence of personal preferences on decision-making is limited to a minimum, where discretionary decision-making is not expressly provided for by the law itself.

Allowing, in turn, for the systematic, open-ended consideration of 'policy factors' and the 'context' of a legal question bears the consequence that decisions are made on the basis of the entirely arbitrary selection of more or less applicable contexts, and the determination of 'common values'. The moral justification of political decisions, however, is a philosophical and not legal task. This is because any moral standard can never possibly be objective, but is in the end always subject to the choice of the decision-making individual or entity. In the *South West Africa Cases* the Judges Fitzmaurice and Spender have affirmed this view in an exemplary manner by stating that "we are not unmindful of, nor are we insensible to, the

[64] WIESSNER and WILLARD: p291

various considerations of a non-judicial character, social, humanitarian and other (...) but these are matters for the political rather than for the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view." [65] The ICJ furthermore opined that "law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered." [66]

In contrast, the decision-making process envisaged by Higgins, Reisman, and Sofaer, could involve the blunt deviation from legitimately legislated rules of law – based on non-judicial considerations in the traditional sense. Doing so would result in nothing less but the deprivation of legitimate legislators, namely sovereign states, of their exclusive mandate. In contrast, decision-making institutions such as "the Security Council, (...) the International Court of Justice, [and] various international bodies", [67] would be elevated to serve as illegitimate legislators – shaping the law as they see fit.

Moreover, two problematic side effects of the implications of the New Haven School's conception of law have to be considered in more general terms. Firstly, it is and has always been a function of law to preserve social order. This function frequently involves the prescription of behaviour of its subjects. It is the transformative power of law, traditionally embodied by a description of an authoritatively prescribed behavioural standard considered as to be a legal norm, which makes it what it is. In order to function effectively as such, legal norms described by rules ought to be stable and consistent over a longer period of time so that its subjects are able to develop a consciousness of what the laws are, establish shared behavioural expectations and direct their behaviour according to the given legal standard. This necessity of stability and consistence of law over time with regard to its social function is reflected by the principle of 'legal certainty'. Legally binding decisions which "vary from context to context" [68] - notwithstanding codified rules agreed upon by sovereign states as legitimate legislators and subjects of these rules - undermine this very principle. They thereby jeopardize the stabilizing function of states' shared behavioural expectations which frequently converge around the material content of legal rules.

Secondly, it is presumed by Judge Higgins that the more law is viewed as a process of decision-making which "encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve (...) the less important becomes the distinction between *lex lata* and *lex ferenda* – the law as it is and the law as it might be." [69] However, it has been explained above of what crucial importance the distinction between the mandate of legitimate legislators and decision-makers is for the achievement of social order purposes of the law. Simply conflating *what the law is* and *what it should be,* by advancing a theoretical construction in favour of our subjective values and objectives, overlooks the dangerous effect this approach may have – namely jeopardizing the most basic purposes of legal norms as they *are*.

On another note, Judge Higgins rejects the criticism that her [policy science] approach 'can lead to international law being used by states as a device for *post-facto* justifying decisions without really taking international law into account' and that it "simply means whatever the policy-maker wants." [70] However, after considering the arguments advanced by Michael Reisman and Abraham D. Sofaer, one may come to a different conclusion. Moreover, recalling the given definition of law ('authoritative and controlling decision by politically relevant actors') as well as Higgins' assumption that law's autonomy from power

[65] *South West Africa Cases,* ICJ Reports (1962) 466 (joint dissenting opinion of Judges Fitzmaurice and Spender)
[66] South West Africa Cases, ICJ Reports (1966) 6 at para 49
[67] HIGGINS (b): p247
[68] REISMAN (a): p321
[69] HIGGINS (b): p10
[70] *Ibid.* p7

is 'a fantasy', it appears practically impossible to distinguish legal from political decision-making – the latter being a function of the power of political actors to impose their will on others. Law, in this sense, seems to be a redundant elaboration of power relationships among 'politically relevant actors', instead of restraining their behaviour by binding prescriptions. It is the transformative power of codified legal rules which is rendered meaningless in this particular conception of law, as the law is what 'politically relevant actors', whose policy decisions it is supposed to restrain, actually decide it to be. This power affirming rather than restraining conception remains consistent with John Merriam's view of the development of customary international law, which, as we have seen, favours those states which actually hold the power to act and are therefore able to form rules of international custom by practice exclusively.

IV. Conclusion

Judge Rosalyn Higgins – countering the criticism that New Haven School scholars and followers would not actually take international law into account when justifying political decisions – rightly replies that "this simply begs the question of what international law is." [71] Referring to their own premises, as Martti Koskenniemi suggests, conclusions based on a particular methodology of the legal discipline remain consistent within their own framework of reference, and *vice versa*, as long as the methodology itself remains logically consistent. Therefore, legal methodologies, as I have examined in relation to the international law on the use of force, are resistant to fundamental criticism from other schools of thought as this criticism mostly refers to different premises which do not apply to the respective findings. This is why the choice between methodologies is a normative one and can, in the end, only be reasoned by political preferences and reference to desirable or undesirable consequences of their application.

By criticising the New Haven School of legal thought I have sought to point out a number of undesirable consequences of constructing law as a context and value-dependent process of authoritative, controlling decision-making by politically relevant actors. I have also tried to show that this conception favours a legal order which mirrors power relationships of sovereign nation states instead of restraining their behaviour by a legal standard which sovereign states have commonly and expressly agreed upon. It thereby jeopardizes the basic social order functions of an international legal system. Even more severely, it seems that some scholars have developed and some states' governments have adopted this conception of international law as it provides them with a broad flexibility to justify any possible behaviour in order to promote their self-interest without restraints on the international plane. It is precisely this attitude which deconstructs the invaluable, shared behavioural expectations of international actors and endangers a peaceful order of international society. With regard to one's methodological choice it remains one's individual decision, if this is a desirable state of affairs, or not.

[71] *Ibid.* p7

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