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# ON LEGAL INQUIRY

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## *On Legal Inquiry*

J. E. Viñuales

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### INTRODUCTION

To express admiration for the intellectual work of someone, we sometimes say that he or she has charted what until then was uncharted territory. I would like to take this geographical metaphor quite literally and argue that it very much depicts the way legal inquiry is (and – perhaps – should be) conducted. The work of Professor Pierre-Marie Dupuy offers a wealth of examples of how uncharted territory can become familiar land and thereby be incorporated into the body of legal knowledge. It is, however, not easy to pinpoint what makes good scholarship such. Pierre once told me over lunch that when his father René-Jean was called to the *Collège de France* to what became the *Chaire de droit international*, the eminent Claude Lévy-Strauss was somewhat puzzled by the possibility that one may actually conduct 'legal research'. This comment stayed in my mind and I started to think about what we, as lawyers and/or academics, actually do when we conduct legal research. I would like to outline in this chapter my current thinking on

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this, which, as I shall endeavour to show, can be described as a 'legal cartography'.

The array of diverse materials, such as the beliefs, practices, norms, institutions, treaties, laws and instruments that, together, we understand as constituting the 'law' will be called the *topography* of our field. Legal inquiry seeks to understand this topography highlighting certain accidents and fault lines, which I shall call *features*. The techniques used to highlight particular features of the legal topography are quite diverse, but they are largely a function of two abilities: (i) the ability to set the proper *scale* of the chart by *zooming in* on certain areas of the topography to focus on one or more particular features or, conversely, by *zooming out* in order to capture more general features; (ii) the ability to select, at a given scale, the most appropriate *criteria* to highlight certain features (e.g. looking for 'human rights' will direct our attention to features that will not necessarily be captured when looking for 'primary and secondary norms' or 'peremptory norms'). These two abilities largely define the types of *concepts* that we craft or use to capture and analyse certain features of the topography. The concepts gathered, crafted, transposed and/or used (see [sub-section 2.1. below](#)) to shed light on the topography can be called a *conceptual chart* and the reflection on how to craft such charts a *legal cartography* (i.e. a conceptual chart of conceptual charts used in legal inquiry). Let me now illustrate this preliminary understanding of legal inquiry by reference to one conceptual chart derived from the work of P.-M. Dupuy.

In his general course at The Hague Academy, Professor Dupuy introduces a distinction between 'formal unity' ('*unité formelle*') and 'substantive unity' ('*unité matérielle*') in order to capture certain features of international law that a substantively narrower focus on a given 'branch' would obscure.<sup>1</sup> Formal unity (i.e. the rules of recognition, adjudication and change<sup>2</sup> shared by all the different 'branches' or 'regimes' of international law) and substantial unity (i.e. the common roots of modern international law in the values protected by the United Nations Charter) are, in Dupuy's powerful account, the key features characterising international law as a single legal order. These features could not be captured by an account using as its starting-point a focus on a particular area of international law. Indeed, while looking from the specific angle of trade law, investment law or criminal law one may gather the impression that these are 'self-contained regimes', a broader view encompassing international law (a broader

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<sup>1</sup> P.-M. Dupuy, 'L'unité de l'ordre juridique international: cours général de droit international public (2000)', in *RCADI*, vol. 297 (2002), pp. 9-489.

<sup>2</sup> Dupuy refers in this connection to H. L. A. Hart, see below note 3.

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conceptual chart) unveils features that lie beyond the radar of a narrower inquiry.

I do not intend to open the vast debate on the purported 'fragmentation' of international law here. My goal in referring to this example is only to show how, through a careful tuning of the scale and criteria selected to capture certain features of the topography, certain concepts can be crafted to revisit the findings of other conceptual charts. This is of course not exclusive to legal inquiry. Most other disciplines proceed in a similar manner. What appears as an anomaly under a given conceptual chart (a 'theory') may in fact be predicted or explained by another conceptual chart. Sometimes, a new conceptual chart may explain all the features highlighted by another conceptual chart plus some others that had remained obscure. In other cases, there may be a trade-off between the two, in that a given conceptual chart captures a feature that had so far remained obscure but only at the prize of losing sight of other features highlighted by the previous chart. This raises the question of what type of conceptual charts should we aim at? There is no need to review here the sophisticated contributions made to the philosophy of science or to locate the potential answers that one could derive from some influential theories of law. My goal is more limited. I would like to discuss what types of charts make up the body of what we call legal inquiry and what should we aim at in crafting them.

As such, the following observations can be seen as an attempt to outline a preliminary legal cartography describing the types of conceptual charts that we produce as part of the process of legal inquiry. As an international lawyer, most of the examples I will be referring to concern international law. I will start by surveying some concepts (e.g. 'branch', 'regime', 'primary' and 'secondary' norms, 'principles', 'obligations of conduct and result', etc.) that are so often used by international lawyers that we tend to forget or overlook their nature and implications (I). This brief survey is not intended to provide a comprehensive or even representative survey of concepts nor to assess or criticise such concepts. It only aims to recall the extent to which they act as prisms and shape, sometimes unconsciously, the way we look at the raw legal topography. The second section will be devoted to an analysis of the concepts that we use (II). I will focus on their origin, their relations with the features that they allow or seek to highlight, and their nature. This is the central part of the 'legal cartography' outlined in this chapter. The last section will attempt to generalise and organise the insights gained in the previous two sections (III). I will outline some criteria that, in my view, characterise powerful legal charts.

Before moving on to the substance of this chapter, I would like to request the indulgence of the reader for the approach taken in writing this piece. There are few avenues left in legal publishing where an author is able to

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freely speak his mind, without trying to abide not just by the disciplinary norms (justifiably) imposed by most outlets but also by the (sometimes hard to justify) idiosyncrasies of some outlets that push writers to conform to a style (whether conservative or artificially innovative). The rare magic of writing a piece for a 'mélanges' volume, especially for one in honour of a much admired scholar such as Pierre-Marie Dupuy, is that one can still find the necessary freedom to start a dialogue with the addressee and perhaps also with other readers. I trust Pierre will not hold the exploratory character of this 'legal cartography' against me.

### 1. A SURVEY OF SOME COMMON CONCEPTS

Let us assume, for a moment, that we are unable to tell a norm relating to the protection of the environment from one relating to human rights or trade law or humanitarian law; or, even more drastically, that we are unable to discern in the raw legal topography the overall areas that we call 'branches' or, more recently, 'special regimes'. The exercise is difficult for a lawyer. It would be like asking a French speaker to listen to spoken French without discerning the meaning, focusing only on sounds and intonations, as he or she would when listening to a conversation in a foreign language. It is, however, quite possible for someone not trained in law, who will likely find even the most basic distinctions between civil law and criminal law rather obscure. This exercise of estrangement is sometimes necessary to grasp more fully that 'branches' are to a very large extent conceptual categories used for specific purposes.

These purposes may vary. Most frequently, reference to 'branches' or 'special regimes' is made to define an area of specialisation or to encompass – using a shortcut – a wide array of norms and instruments sharing some common features. But, aside from such descriptive purposes, one may use a concept such as 'environmental law' or 'human rights law' to highlight a 'legal' feature of the topography, such as the type of interpretation techniques that are called for when a tribunal or other similar body applies a norm belonging to such branch. Similarly, reference to 'humanitarian law' could be made to highlight a legally relevant feature such as the speciality (translated by the legal maxim *lex specialis*) and therefore the priority of application of the norms belonging to the 'branch' or 'regime'. Irrespective of the merits of such assertions, which are far from settled, my basic point is that some concepts, such as 'branch' or 'special regime', are often used to highlight some features of the legal topography, whether descriptive or legally relevant.

Now, depending on how such concepts are used they can shed light on certain features of the legal topography or, conversely, obscure some others.

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For instance, asserting that a tribunal has jurisdiction to hear claims relating to trade law or investment law or human rights law clearly misconceives the manner in which jurisdictional scopes are defined in international law. The European Court of Human Rights cannot hear human rights claims for breach of the American Convention on Human Rights. Similarly, an investment tribunal cannot hear investment claims based on an unrelated investment agreement. Conversely, if a jurisdictional clause admits claims for breach of an array of treaties (either specified or unspecified) dealing with different branches, reference to 'branches' will be of little help to assess the scope of jurisdiction of a tribunal based on such clause. Similarly, the 'same kind' (*ejusdem generis*) of advantages that can be imported through the most-favoured-nation clause ('MFN') in an investment and trade treaty cannot be defined simply by reference to the fact that the targeted advantage appears in an instrument belonging to the same 'branch' or 'special regime'. A more fine-grained chart would be necessary to capture the types of advantages that can (and cannot) be imported, and such advantages could potentially be found in instruments belonging to other 'branches' (e.g. a similar but more beneficial preferential treatment clause in an environmental agreement). There is no need to multiply the examples or to assess here which position would better 'fit' positive law. My basic point is only that 'concepts' that may help capture certain features of the legal topography may not be useful to capture certain other features.

Let me now zoom in on 'norms' and, instead of determining the 'branch' or 'regime' to which a norm belongs, focus on other aspects of the content of norms. What I am doing, in fact, is fine-tuning the scale and the criteria defining the conceptual chart in order to capture other features of the topography. An apposite example is provided by the use of the conceptual distinction between 'primary' and 'secondary' rules. This distinction has different meanings. In H. L. A. Hart's *The Concept of Law*,<sup>3</sup> it is used to distinguish between rules that specify a conduct to be followed by a subject ('primary rules of obligation') and rules that perform some essential functions for the existence of a legal order (the so-called rules of recognition, adjudication and change). The concept of a 'primary rule of obligation' would be useful to bring under the same category norms as diverse as the prohibition of the use of force, the prevention principle and the obligation to respect freedom of association. Such norms could then be distinguished from other norms, such as those granting 'universal jurisdiction' to national courts over certain crimes (arguably part of the rule of adjudication) or the constitutional rules allocating legislative powers to a national legislature (an element of the rule of recognition).

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<sup>3</sup> H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

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This distinction is, however, not capable of disentangling different types of 'primary rules of obligation' such as 'principles' and 'rules', nor is it capable of clarifying the situation of certain concepts such as 'sustainable development', 'common heritage of mankind' or 'common concern of mankind'. Moreover, Hartian concepts would also be unsuitable to capture the distinction between 'primary' and 'secondary' rules as they are understood in the law of State responsibility. After all, the obligations of restitution, compensation and/or satisfaction ('secondary' rules in this context) that are triggered by a violation of a norm of conduct (a 'primary' rule in this context) could be characterised as 'primary rules of obligation' in Hartian terms. Conversely, the distinction used in the context of State responsibility would be of little use to shed light on features that the Hartian account is able to capture, such as the differences between law and other normative orders or the similarities shared by all (or virtually all) legal orders.

Also, the distinction used in State responsibility has proved to be unsuitable to understand the differences between 'responsibility' (for breach) and 'liability' based on the sole occurrence of damage caused by a subject. As long as 'secondary' rules are defined as rules governing the effects of a breach of a primary rule, the question arises as to whether damage without breach would also trigger secondary rules. The confusion that characterised the work of the International Law Commission on 'international liability for injurious consequences arising out of acts not prohibited by international law' is largely a result of using an unfit conceptual chart. In order to understand this point, it is useful to refer to another common conceptual chart of a similar 'scale' but using different 'criteria', i.e. the distinction between 'obligations of conduct' and 'obligations of result'. An obligation of conduct is 'breached' when the conduct specified has not been followed. Some obligations of conduct may require that, in addition to not following certain conduct, some consequence has resulted. The customary 'prevention principle' requires both elements, i.e. conduct and damage, to be 'breached'. However, it does not specify the consequences in case these two elements are met. Such consequences are implied in the 'primary' rules, in that one expects that if the rule is breached, some legal effects will ensue. These are specified in 'secondary' rules of State responsibility. So far, the distinction between 'primary' and 'secondary' rules works well to highlight the target features of the topography. The relief of the topography becomes blurred when one uses this distinction to capture another feature, namely the situation of 'obligations of result'. Such obligations (one could think of the 'polluter-pays principle') are not easily accommodated as either a primary or a secondary rule. The polluter-pays principle states that whoever causes damage will have to pay for it. Implicitly, it seeks to prevent damage through

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a deterrence tactic (such as the golden rule, 'an eye for an eye' or the old German criminal rule '*Die Tat tötet den Mann*'). But, technically, it states that, whatever the conduct, in the event of some specific result (harm) a specific consequence will ensue (reparation) or, in other terms, it allocates the cost (reparation) of environmental harm to the one who causes it. Now, the question arises of whether the polluter-pays principle is a 'primary' or a 'secondary' rule. It looks like a bit of both (it implies a required conduct – not to cause damage – and it asserts the consequence – a reparation obligation). Moreover, as the conduct is only implied, one may ask whether reparation follows 'breach'. If 'breach' is defined (as in the 'primary' and 'secondary' rules chart) as not abiding by certain conduct, then there is no breach (or, at best, there is a breach of an implicit conduct). If 'breach' is instead defined, for a rule such as the polluter-pays principle, as the occurrence of a given event (damage), then reparation follows breach, but we are no longer within 'liability for injurious consequences arising out of acts *not prohibited* by international law'.

It would perhaps be easier to fine-tune the conceptual chart and to use the distinction between 'obligations of conduct' (e.g. the prevention principle) and 'obligations of result' (e.g. the polluter-pays principle). But this would require moving away from the distinction between 'primary' and 'secondary' norms (as obligations of result are somewhat in-between) in order to capture other legal features of the topography (liability for damage). There are, of course, alternative courses of action, such as developing a new conceptual chart or re-defining the distinction between 'primary' and 'secondary' rules to capture more accurately these features of the topography. But the point remains the same: depending on the accidents and fault-lines of the topography that one tries to capture, the conceptual chart will have to be different, much in the same way as there are 'political maps', 'physical maps', 'resource maps', 'climate maps', etc., all looking at the same Earth but using different criteria. Conceptual charts are, in J. Searle's terminology, 'intentional'.<sup>4</sup> They necessarily entail (consciously or unconsciously) a target object. They provide tools to capture certain features of the topography. The better the tools, the more can be shown, as in other areas of intellectual inquire. The concepts that we use are therefore important.

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<sup>4</sup> See J. R. Searle, *Making the Social World. The Structure of Human Civilization* (Oxford University Press, 2010), chapters 2 and 3.



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Basic conclusions: (i) variations in conceptual charts are largely a function of the scale and criteria used; (ii) their performance must be assessed in the light of the features that they are capable of unveiling or highlighting; (iii) some conceptual charts may be useful for little more than descriptive purposes (e.g. 'branches') whereas others are capable of capturing legally relevant features of the topography.

## 2. THE CONCEPTS THAT WE USE

In this section, my purpose is to elaborate on the insights gathered in the previous section. I will focus on three questions: (2.1.) what are the sources of the conceptual charts used in legal inquiry; (2.2.) what is the relationship between these charts and the features targeted by the inquiry; and (2.3.) what is the nature of such conceptual charts.

### 2.1. The sources of conceptual charts

The conceptual charts discussed in the previous section stem from different sources. Most of the time, they rely, at least to some extent, on existing legal concepts. In some cases they are newly crafted as part of a legal inquiry. In some other cases they are essentially recalibrated versions of a previous chart. Still, in some other cases, they are borrowed from another area of legal inquiry or even from other disciplines and transplanted into another area of law or into legal inquiry.

Although the distinction made between these four categories has only a descriptive value, it is useful as part of a legal cartography because it highlights four significant characteristics of the conceptual charts we use: (i) legal inquiry uses (but it is not limited to the use of) concepts explicitly introduced in the law; (ii) conceptual breakthroughs are possible (we are not merely limited to restate or comment the law); (iii) as a result, some form of 'progress' in legal inquiry is possible; and (iv) transplants of concepts from other disciplines provide an important entry-point for interdisciplinary approaches in legal inquiry. I will now provide a few examples to illustrate these categories.

#### 2.1.1. *Legal concepts*

Understanding the use of 'legal concepts' in a conceptual chart assumes that we have already made much of the road that will be made in the next sections. It is nevertheless necessary to refer to them here in a preliminary manner relying on what every lawyer intuitively knows about the types of entities appearing in the legal topography. Concepts such as 'trust', 'corporation', 'domicile', 'divorce', 'parental authority', 'contract',

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'injunction', 'award' and so on are all 'legal concepts'. Legal inquiry may use them as a target feature or as part of a conceptual chart.

By way of illustration, when I seek to understand what are the defining traits of a 'trust', I actually apply a more specific chart to capture features such as the extent to which I can specify the beneficiaries, the powers of the trustee over the funds entrusted, and so on. When doing so, I am, in fact, understanding the concept of trust (as opposed to other legal entities) by analysing some more specific features that may be shared or not by trusts and other entities. Now, once defined, the concept of trust may become part of my conceptual chart, if I am trying to identify the features of a different legal concept, e.g. a private foundation. Similarly, one may analyse the concept of 'award' in order to distinguish it from other types of decisions. Once this has been done, the concept of award may be used to assess whether a given decision (e.g. a procedural order from an arbitral tribunal) can indeed be characterised as an award.

This is a frequent task of legal research because characterising a legal entity in certain ways carries legal implications. Legal concepts are *interlinked* in the shared understanding of those operating the array of materials we call the law. Characterising a decision as a 'foreign award' will link it – in the understanding of those operating the system (including, for example, foreign courts) – to some other norms (e.g. the New York Convention<sup>5</sup>) that require judicial institutions to treat such foreign awards in a certain way. This specific link may not be established for 'domestic awards' or some foreign decisions which are not 'awards'. The generation and maintenance (through consistent and stable practice) of these links in the understanding of those who operate the system goes a long way in explaining why legal concepts are different from other concepts.<sup>6</sup> I will revert to this point later in this chapter. For the time being, we only need to keep in mind that we do use legal concepts as part of conceptual charts. These concepts are directly 'gathered', as berries, from the law or the case-law and then used.

### 2.1.2. *Newly crafted charts*

One example of a powerful newly crafted conceptual chart is the account by H. L. A. Hart of law as the union of primary and secondary rules. I have already referred to this account in the previous section. Hart's account was initially intended as an introduction for law students, but it resulted in a

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<sup>5</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38.

<sup>6</sup> See N. Luhmann, *Das Recht der Gesellschaft* (Frankfurt a. M.: Suhrkamp Verlag, 1993), chapter 2.

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major breakthrough in the understanding of the structure and features of law as compared to other normative practices. Irrespective of whether one agrees or not with this account, its conceptual contribution is unquestionable. Indeed, as Kelsen's *Reine Rechtslehre*,<sup>7</sup> Hart's account has become a sort of intellectual horizon against which new accounts have been compared and measured. Another example, which I discussed in the introduction, is the account by P.-M. Dupuy of the unity of the international legal order captured through the lens of his conceptual distinction between 'formal unity' and 'substantive unity', which is often considered as the most articulate alternative to claims on the 'fragmentation' of international law.

Newly crafted conceptual charts do not need to be as encompassing as the two examples mentioned. Georges Abi-Saab's *essai de déconstruction* of the sources of international law<sup>8</sup> provide a conceptual chart focusing on the metaphors or images that best describe each type of source of international law. Similarly, Duncan Kennedy's 'theory of adjudication' provides an analytical grid to read the process of judicial decision-making in a manner that captures features of the topography (laws, social influence, and preferences, as freedoms and constraints affecting judicial decision-making) that more formalistic approaches tend to overlook.<sup>9</sup>

More generally, doctoral research normally involves (or should involve) developing a conceptual chart targeted at some specific features of the topography, such as the specificities of some investment or environmental treaties as compared to other such treaties, the features of an uncharted body of treaties (e.g. bilateral energy treaties), or the actionable implications of a broad concept, such as good faith, '*effectivité*', sustainable development or even sovereignty.

While there must necessarily be a relationship between the conceptual chart and the targeted feature of the topography (as noted above, charts are 'intentional'), there is no necessary relation between the type of target feature and newly crafted conceptual charts. In some cases, it may be more appropriate to recalibrate an existing conceptual chart or to transpose a conceptual chart from another area of law or another discipline.

### 2.1.3. *Recalibrated charts*

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<sup>7</sup> H. Kelsen, *Reine Rechtslehre : Einleitung in die rechtswissenschaftliche Problematik* (Leipzig/Wien: F. Deuticke, 1934).

<sup>8</sup> G. Abi-Saab, 'Les sources du droit international: un essai de déconstruction', in *Le droit international dans un monde en mutation: Liber Amicorum en hommage au Professeur Eduardo Jiménez de Aréchaga* (Montevideo: Fundación de Cultura Universitaria, 1994), pp. 29-49.

<sup>9</sup> D. Kennedy, 'Freedom & Constraint in Adjudication: A Critical Phenomenology' (1986) 36 *Journal of Legal Education* 518.

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Resort to recalibrated versions of a previous conceptual chart is pervasive in legal scholarship, and justifiably so, as there is little sense in reinventing the wheel and neglecting the merit of those whose insights have shed new light on our understanding of the topography. The 'schools' devoted to test and refine conceptual charts such as those developed by H. Kelsen, H. L. A. Hart and many others are but a few illustrations of such recalibrations. In some cases (whether acknowledged or represented as 'new') there has been little conceptual adjustment, the charts being simply applied to explain certain features of the topography. But in other cases recalibration efforts have allowed a conceptual chart to overcome important objections. By looking at some examples of recalibrated conceptual charts, my purpose is to highlight that some form of accumulation of conceptual knowledge is possible in legal inquiry (in addition to the more familiar 'commentary' of the law) and that such knowledge can be put to empirical test.

A first example of a recalibrated chart that is still very influential today is R. Alexy's account of 'proportionality' as the key characteristic defining how 'principles' are applied.<sup>10</sup> Alexy's work provides an important tool for highlighting a 'feature' of the topography, namely the operation of principles, that other conceptual charts (e.g. Hart's) cannot adequately capture. It has, however, come under criticism because it grants courts applying such principles great discretion. One important objection is that political or administrative branches of government may be better positioned than courts to decide factual trade-offs because they have better means to understand the factual implications of a case. To what extent, then, should these decisions be second-guessed by courts? Also, when a case presents significant factual uncertainties (e.g. what is the probability for a foreigner to be tortured if extradited?) to what extent should courts exercise empirical discretion? These two issues are addressed in an article by Klatt and Schmidt where they propose some fine-tuning of Alexy's 'Weight Formula'.<sup>11</sup> This is typically an attempt (and – may I add – a successful one) at recalibrating an existing conceptual chart.

A second example concerns the distinction, discussed in the first section, between 'primary' and 'secondary' rules in the law of State responsibility and, more specifically, whether it is apt to capture the operation of the so-called 'circumstances precluding wrongfulness' (consent, self-defence, countermeasures, force majeure, distress and necessity). Indeed, some commentators noted during the codification process that, if such circumstances were to be considered as technically precluding the

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<sup>10</sup> R. Alexy, *Theorie der Grundrechte* (Frankfurt am Main: Suhrkamp, 1986).

<sup>11</sup> M. Klatt, J. Schmidt, 'Epistemic discretion in constitutional law' (2012) 10 *International Journal of Constitutional Law* 69.

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

wrongfulness of an act, they would be part of the definition of the 'primary' rule in question (e.g. self-defence would be part of the definition of the rule prohibiting the use of force) and should not be placed among 'secondary' rules.<sup>12</sup> Vaughan Lowe suggested one adjustment, namely to consider these circumstances as 'excuses', which instead of precluding the wrongfulness of an act would justify the 'breach'.<sup>13</sup> Lowe's point was that, as a matter of policy, considering an act as 'wrongful but excused' was better than saying 'wrongful but not wrongful' because it highlighted the fact that respecting international law is not exclusively a bilateral matter between two States but that there is an interest in preserving some objectivity in the normative pull of norms. This is a subtle social feature that the less fine-grained conceptual chart proposed by the ILC in 1996 could not capture. In the final 2001 version, the ILC Articles partially recalibrated the initial conception. Circumstances precluding wrongfulness remained so but article 27(b) can arguably capture the subtle differences between 'not wrongful' and 'wrongful but excused'. Reparation of an act covered by a circumstance precluding wrongfulness is not ruled out, which brings 'not wrongful' closer to 'wrongful but excused'. Thus, at least some circumstances precluding wrongfulness (one may think of *détresse* or necessity) may be treated like excuses thereby falling more neatly under the concept of secondary rule.

#### 2.1.4. *Transposed charts*

The fourth source of conceptual charts is to be found in concepts transposed from other areas of law or from other disciplines. Again, examples abound. For present purposes, the key consideration lies in how concepts developed in other areas or disciplines can be transposed into legal inquiry to highlight certain features of the topography.

F. C. von Savigny's study of Roman law led him to restructure the manner in which domestic legal systems interact with each other.<sup>14</sup> Instead of using a territorial or personal logic across the board to determine the applicable law, Savigny's system sought to apply to different types of 'legal relationships' (e.g. contractual obligations, torts, family relationships, property, etc.) the law where the relationship had its 'seat'. Such 'seats' could in turn be determined by reference to 'contacts' (e.g. *situs* for property, place of conclusion or performance for contracts, domicile for family relationships, etc.). One may agree or not on the usefulness of this

<sup>12</sup> See E. David, 'Primary and Secondary Rules', in J. Crawford, A. Pellet, S. Olleson, K. Parlett (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), pp. 27-33.

<sup>13</sup> V. Lowe, 'Precluding Wrongfulness or Responsibility? A Plea for Excuses' (1999) 10 *European Journal of International Law* 405.

<sup>14</sup> F. K. von Savigny, *System des heutigen römischen Rechts* (Berlin, Band 8, 1849).

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

conceptual reconfiguration of how the applicable law is determined or whether a better conceptual chart can be found, but it is hardly questionable that it represented a conceptual breakthrough. Savigny's conceptual chart deeply influenced legislation and practice over the twentieth century.

Another example is M. Virally's use of the concept of 'function', borrowed from the political science of his time, to understand the operation of international organisations, both from a political and a strictly legal point of view. Indeed, according to Virally, determining the 'function' of an international organisation was necessary to look at the reality of this phenomenon in its actual operation, beyond the mere array of norms laid out in constitutive instruments and *droit dérivé* (as suggested by Kelsen's normativistic approach). In turn, this more sociological perspective was capable of informing strictly legal aspects, such as an organisation's legal scope of action under the principle of speciality and the implied powers doctrine.<sup>15</sup> Thus, Virally's conceptual chart had the rare ability of illuminating the social functioning of international organisations while, at the same time, serving as the point of reference to draw strictly legal conclusions as to their specific powers.

These are but two examples in which concepts developed in other areas of law (Roman law or history of law) or in other disciplines (political science) can shed light on some features of the legal topography. There are, in fact, plenty of other examples illustrating the use of concepts, methodologies or even entire theoretical approaches to shed light on some features of the legal topography. Some intellectual movements in contemporary legal inquiry, such as law and economics or the various approaches to critical legal studies, are essentially efforts at understanding law through the conceptual lenses used in other disciplines. Thus, law and economic approaches borrow concepts from economics or sociology, such as 'utility' (maximisation) or the related 'rational choice model', to shed light on the operation of some treaties and on design features that could improve their effectiveness. Critical approaches seek instead to unveil other features of the operation of law, by resorting to the deconstructionist approaches developed by some French philosophers of the second half of the twentieth century. I am less concerned here with the specific conceptual charts developed by this or that author than with the *modus operandi*. Certain features of the legal topography are captured by using concepts developed in other areas of law or in other disciplines.

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<sup>15</sup> See M. Virally, 'La notion de fonction dans la théorie de l'organisation internationale', in *Mélanges offerts à Charles Rousseau* (Paris: Pédone, 1974), pp. 277-300, at 281-288; M. Virally, 'L'O.N.U. devant le droit' (1972) 99 *Journal du droit international* 501; M. Virally, *L'Organisation mondiale* (Paris: Armand Colin, 1972).

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

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Basic conclusions: (i) conceptual charts can be gathered from the law, be newly created, be the result of a recalibration of an existing chart, or be the result of a transposition of concepts from an area of law into another area or from another discipline into law; (ii) spelling out the origins of the concepts that we use is not a merely descriptive exercise as it helps understand that legal inquiry is not limited to repeating and commenting the legal concepts explicitly introduced in the law but it may also achieve 'progress', i.e. through conceptual breakthroughs capable of capturing new, neglected or misunderstood features of the topography and accumulation through recalibration (or paradigm shifts as a result of new conceptual breakthroughs); (iii) spelling out the origins of conceptual charts also helps understand an important entry point for interdisciplinary analysis.

I mentioned earlier that there is always a relationship between the conceptual chart and a target object (conceptual charts are 'intentional'). In the next section I zoom in on this relationship in order to clarify its different aspects. This clarification is necessary to understand the nature of the concepts that we use, which, in turn, will inform us as to what is a good conceptual chart in legal inquiry.

## **2.2. The relationship between conceptual charts and their target features**

Conceptual charts are instruments oriented towards an object (features of the legal topography). Using certain concepts will highlight some features of the topography but it may also obscure others. In this regard, two sub-questions arise. First, in order to craft or select appropriate conceptual charts we need to understand the relationship between such charts and the features they target (2.2.1). Second, the types of relationship between a conceptual chart and certain features may differ depending on the observer's intention or purpose (2.2.2).

### *2.2.1. Charts–relationships–features: types of 'relationships'*

What types of relationships can a conceptual chart entertain with the features that it seeks to capture? To answer this question it is first necessary to make a preliminary point on the nature of the legal topography. The legal topography must be understood as an array of what J. Searle calls 'institutional facts', namely a reality with an objective existence but which depends upon a common understanding by humans. The 'law' does not exist

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in the same way as a lake exists but it cannot be denied that there is a law, that there are places and people we call courts, lawyers, etc. These are institutional facts that, in order to exist, need a meeting of minds, a shared understanding or 'convention' or, in more technical terms, the creation and maintenance of an inter-subjective reality through a myriad of human acts. The implications of the need for a subjective component must not be misunderstood.

When we speak about the law there are statements that are epistemologically 'objective' (e.g. that the International Court of Justice ('ICJ') exists is not a matter of opinion but of fact, although the ICJ does not 'exist' in the same manner as a volcano) and statements that are epistemologically 'subjective' (e.g. that the European Convention of Human Rights is beautifully drafted is a matter of opinion). Now, what about statements such as: 'article 38 of the ICJ Statute is international law's rule of recognition'; 'the case-law of the European Court of Human Rights is more open to environmental considerations than that of the Inter-American Court of Human Rights'; 'treaties with (A) characteristics are more effective than treaties with (B) characteristics to achieve goal (C)'; 'the use of force by the US and the UK against Iraq in 2003 was illegal'; 'clause (R) in the River Uruguay Statute is a referral clause'?

These statements are not 'true' or 'false' in the same way as 'the ICJ is older than the Permanent Court of Arbitration (or vice versa)' would be, nor are they a matter of subjective appreciation such as 'the European Convention is more beautifully drafted than the American Convention'. They are 'true' or 'false' as a matter of argument. For them to be 'true' or 'false' the *conditions for the success of the argument* (e.g. the criteria that, if met, will count as making the assertion true) *must be clarified and persuasively* so. If I define 'rule of recognition' as a single provision that lists most of the formal sources of international law my assertion above will be true, but it will not necessarily be persuasive. This said, if I broaden the concept of 'rule of recognition' so much that the objective existence of a provision listing most of the formal sources of international law is neglected, then my conclusion may also be unpersuasive. Persuasiveness in this context means another meeting of minds, this time not at the level of the entire human society (as for the existence of the law), but at the level of a narrower target society that I want to influence with my statement (e.g. in the above example the audience would be primarily legal philosophers, academics, international lawyers, etc.). This society will typically share some common knowledge (about an array of institutional facts) and it will be able to evaluate the way I have defined the conditions of success for a given purpose. This evaluation does not reintroduce epistemic subjectivity because the existence of some institutional facts cannot be simply ignored (e.g. the



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existence of an article listing most of the formal sources of international law may be given a different weight, but ignoring or neglecting it would make the argument less persuasive).

Importantly, the *type of conditions of success* (as well as their level of clarification and persuasiveness) *will depend on the point one is trying to make* or, in other words, on the features of the legal topography one is trying to capture. If I want to prove that the ECtHR is more open to environmental considerations than the ICtHR, I will need to specify a few concepts such as 'openness', 'environmental considerations', as well as the 'materials' where these features will be sought, such as the case-law of the ECtHR and the ICtHR. If any of these concepts is unclearly and/or unpersuasively defined then my point may be true but unpersuasive. But the same inquiry may be capable of making a true and persuasive narrower point. For instance, let me assume that I define openness to environmental considerations as 'acceptance of the precautionary approach'. I then look at all the case-law of the ECtHR and find a trend of decisions that incorporate this approach. Next, I turn to only a few decisions of the ICtHR and find that, in these decisions, the precautionary approach is not mentioned or only peripherally mentioned. On these premises, I cannot conclude that the ECtHR is more open to environmental considerations than the ICtHR. There may be cases decided by the ICtHR that I have not seen which incorporate the precautionary approach. Moreover, the ICtHR may be more receptive to other 'environmental considerations' (e.g. the protection of the entitlements of indigenous peoples over the natural resources located in their traditional lands, etc.) than the ECtHR. But is my legal inquiry doomed? Not necessarily. Although thus defined it is not capable of capturing certain features, it may be able to capture some others. For instance, the research may conclude that 'the ECtHR is receptive to the precautionary approach' or that 'there is some preliminary evidence that the ECtHR is more open, in some respects, to environmental considerations than the ICtHR'. Thus, the features targeted impose some requirements on the design of the conceptual chart. A conceptual chart which is well adapted for some features may not be so for other features. *The more general the features targeted the broader the conceptual chart will need to be and vice-versa*. This is not a rule but simply a descriptive observation of a type of relationship between a chart and the features it targets. There may be cases where this observation obscures the understanding of conceptual charts. But the conceptual chart of conceptual charts that I present here is no exception to the description of conceptual charts that it provides.

A second type of relationship can be analysed by reference to two other statements mentioned earlier in this section. If I argue that 'treaties with (A) characteristics are more effective than treaties with (B) characteristics to

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achieve goal (C)', the conditions of success of my argument will be different than if I argue that 'the use of force by the US and the UK against Iraq in 2003 was illegal'. In both cases I will have to take into account, in defining the conditions of success, the aforementioned relationship between the scope of the chart and the scope of the targeted features. But there is something else. In the first statement, the conditions of success concern an empirical relationship. I will (clearly and persuasively) define what it means for a treaty to achieve its goal (performance) and then I will compare the performance of treaties with (A) and (B) characteristics. The relationship between (A) (or (B)) and a given performance can be 'tested' in a similar manner as the relationship between an increase in the monetary base and a change in the interest rates. I may be entirely wrong about the legal understanding of characteristics (A) or (B) (e.g. I may wrongly believe that a treaty in force contains no 'binding' obligations or that it contains '*erga omnes* obligations' or that it contains a clause that makes it prevail over other treaties in case of conflict, which are all statements that depend on legal analysis) and, still, my argument that treaties with (A) characteristics are better at (C) than treaties with (B) characteristics may be successful.

However, a caveat must be introduced here. As soon as I try to make a step further and argue that treaties with (A) are better at (C) because, say, they contain '*erga omnes* obligations' (a 'legal concept'), I will have to explain the latter assertion. This explanation is not an empirical matter but one of legal analysis. Specifically, to say that 'treaties with *erga omnes* obligations (Y) are better at (C) than treaties with synallagmatic obligations (X)' would be both an empirical and a legal claim. If, empirically, all the treaties containing a clause of the form (Y) are better at (C) than treaties containing a clause of the form (X), then I have established my empirical claim. Yet, I still have to show that this is because clauses (Y) and (X) are what lawyers understand, respectively, as '*erga omnes* obligations' or 'synallagmatic obligations'. These concepts are characterised both by a number of more specific features including – and this is key – linkages to an array of other legal concepts (see sub-section 2.3.). In order to make my legal point, I will have to define (clearly and persuasively in the eyes of the community of lawyers past – mostly laid in written materials – and present) the concepts of '*erga omnes* obligations' and 'synallagmatic obligations' and then compare them with clauses (Y) and (X) to see if there is a match. If there is a match, I will have proven my point empirically and legally. If there is no match, my point that clauses of the form (Y) improve the performance of a treaty as compared with clauses of the form (X) may still hold, but I will not be able to explain it by reference to the operation of *erga omnes* obligations or synallagmatic obligations.

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In some other cases, a statement may have to be proved only legally, with limited empirical input. In the statement 'the use of force by the US and the UK against Iraq in 2003 was illegal', the conditions of success do not concern an empirical relationship but only a legal one. As with the assessment of clauses (Y) and (X) in the light of the concepts of '*erga omnes* obligations' and 'synallagmatic obligations', I will have to assess the conduct of the US and the UK in the light of what lawyers understand as 'self-defence' or 'an authorised use of force under Chapter VII of the UN Charter'. There are of course some caveats. The conduct of the US and the UK is a composite entity far more difficult to pin down than five lines of written text in a treaty. That may create some empirical problems but the solution will not lie in an empirical argument. Indeed, if I am unable to clearly and persuasively establish the act to be assessed, my argument that the use of force was illegal may fail, but not because I inaccurately asserted a causal relationship between two facts (as in the first statement); it will fail because there is no match between the fact that I was able to establish and the legal concept used as standard (e.g. act (Z) does not amount to a use of force in breach of article 2(4) of the UN Charter or the customary norm with the same content). The conditions of success of my argument lie in whether there is a match between a given act and a given concept. I have to define both, but once both are defined, I can make a 'true' or 'false' argument without analysing, as in the first statement, the empirical relationship between a set of treaty characteristics and a given performance.

A clearer example of pure legal analysis is given by the last statement introduced at the beginning of this section, namely 'clause (R) of the River Uruguay Statute is a referral clause'. In this case, the conditions of success of my argument will lie in an assessment of a five-line paragraph (clause (R)) in the light of a legal concept (referral clause). The exercise will be similar to the one conducted in connection with clauses (Y)/(X) and the concepts of '*erga omnes* obligations' and 'synallagmatic obligations'. This simpler example may be useful to look in some more detail into what it means to find that there is a match. In fact, what we do is to develop a fine-grained chart that seeks to capture the core elements for a clause to be considered as a referral clause (and therefore perform its effects) and then we look for such core elements in clause (R). To do so, we first try to clarify what is the shared understanding of the community of lawyers as to what it means for a clause to be a referral clause. Normally, we will seek examples of clauses that are widely considered to be referral clauses. This exercise can be conducted by looking at prior decisions from courts, the works of commentators, codifications efforts, and the like. It could also be conducted more speculatively if such traces of the community's shared understanding are not available. This more detached analysis may also be necessary to distil

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the core elements of referral clauses, if no specific guidance is provided in this regard by the materials consulted. There may be significant fluctuations in this process depending on the materials and our own ability to derive or craft a more fine-grained conceptual chart. Once we have the chart, we will look into clause (R) to see if the argument that it is a referral clause can be made clearly and persuasively. Clause (R) may have all the elements, some of them or none of them. In the first and last cases, the decision is simple (at least legally). But what if clause (R) has, say, two out of four elements in our detailed conceptual chart? In that case, we will zoom in even more (designing an even more detailed chart) or change the criteria used in order to introduce a substantive differentiation among the elements and determine whether the presence of one of them is decisive. In the latter case, if this element is present, then (R) is a referral clause. Otherwise it is not. In conducting this scale and criteria adjustments, lawyers thus rely on a reservoir of knowledge and apply (and comply with) certain techniques of reasoning that non-lawyers do not necessarily know or master. As I will discuss further in [sub-section 2.3.](#), *legal analysis* is precisely this: the ability to rely on a common pool of concepts known to lawyers and a variety of admissible rules of framing, induction, deduction, analogy, contrasting, etc., which borrow a great deal from logic but are also constrained by legal concepts. Law is a language that can be learned and spoken with different degrees of fluency. A legal argument may be flawed, in the same way as one may wrongly apply the grammar in a sentence we utter in a foreign language. Conversely, a legal argument may be extremely subtle, making a point without breaching the rules governing legal argumentation, as one may play with words when speaking or writing, or improvise when playing an instrument while staying within the parameters set by harmonic scales. But an argument may also cease to be a legal argument, when the language is not used or is abused, either by non-lawyers or by lawyers.

The foregoing observations are intended to clarify a second type of relationship between a conceptual chart and the target features. *A conceptual chart may target empirical features, legal features, or both. In order to capture these different features, the concepts used in a chart will differ in nature.* A chart using the analytical concept 'regime' may be able to capture both the arrangements in a treaty and certain practices that have no legal nature, but it will do so only empirically or, in other words, the concept 'regime' will not be capable of capturing the differences between a binding (treaty or customary) norm and a mere practice. A chart using the concept of 'treaty' or 'custom' will be able to capture the preceding differences but it may experience difficulties capturing the practical influence of certain non-binding instruments. If both of these features are targeted, then the chart will have to include concepts capable of capturing both features.

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Basic conclusions: (i) conceptual charts are developed to make certain statements; (ii) such statements target different features of the legal topography; (iii) the fact that the legal topography depends on shared understandings or 'convention' to exist does not mean that true or false statements cannot be made about its features; (iv) for a statement about such features to be true or false, the conditions of success of the statement must be spelled out clearly and persuasively; (v) the clarity and persuasiveness of the conditions of success of a statement must take into account the features that the chart seeks to capture; (vi) statements about general features tend to call for broad-scale conceptual charts (zoom out), whereas statements about specific features tend to call for narrow-scale conceptual charts (zoom in); (vii) the conditions of success of statements about empirical relationships are different from the conditions of success of statements about legal relationships; (viii) statements about empirical features call for analytical concepts (often transposed from other disciplines) whereas statements about legal features require the use of other concepts, either legal or analytical but capable of capturing legal features; (ix) a conceptual chart may use both types of concepts in order to capture different features of the topography.

The relationships between conceptual charts and target features may also be analysed from a different perspective. Instead of focusing on the type of features that a chart may (or may not) be capable of capturing, one may look at the purpose behind the design of such charts.

### *2.2.2. Intentional charts as purposeful charts*

Looking at purpose as part of a legal cartography is important in order to analyse two additional aspects of conceptual charts. The first aspect concerns the purpose pursued by a chart. The second aspect concerns a potential deconstructionist objection according to which there are no features of the legal topography, only those that we construct by crafting or selecting a conceptual chart and then bring to our own reading of the topography. Let me deal with these two aspects in turn.

*Conceptual charts are not only intentional, they are purposeful.* Practicing lawyers often experience the need to present their arguments in a certain way so as to highlight some features of the topography while deliberately obscuring others. By way of illustration, if two potentially applicable norms or relevant precedents point to different solutions, lawyers will seek to design their argumentation so as to make the one more prejudicial to their interests look less important or relevant. Similarly, a

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practicing international lawyer may formulate a claim in different terms in order to benefit from a more receptive forum or to gain jurisdiction to bring a claim *tout court*. Purpose, in this sense, means *instrumentality*. A conceptual chart is designed with a specific advantage in mind that will be reached if certain features of the topography are conveniently highlighted whereas others are conveniently obscured. Now, instrumentality raises at least two difficulties. *One concerns the scope of the 'playground'*. It is not surprising that with enough twist and turn one can go from any point to any other point. Legal realism and its account of open-textured norms have led some commentators to believe that there were no limits to this twist and turn. Yet, not only are there rules governing permissible legal reasoning but, more generally, one should not underestimate the costs of twisting-and-turning in terms of persuasiveness. There may be a form of asserting the legality of the use of force against Iraq in 2003, but eight out of ten international lawyers would likely be unpersuaded. *Another difficulty* relates to whether there are 'good' and 'bad' purposes. A skilful practitioner may develop a conceptual chart in order to facilitate a money laundering operation or to allow the prosecution of a former dictator for heinous crimes. A judge may take certain decisions to abide by the official line of the government or an arbitrator may take a given stance to seek re-appointment, but judges or arbitrators may also seek to create a loophole to enhance the protection of human rights. An academic may push for the development of a far-fetched or futile concept for self-promotion reasons but he or she may also do so to positively influence policy-makers or tribunals. Much can be said about such purposeful charts but I will limit myself to one fairly obvious comment. There is always value in attempting an 'objective' or 'impartial' conceptual chart to illuminate certain features. Even if one considers that it is psychologically impossible to be 'objective' or 'impartial', there is still value in a good faith effort at being so, particularly through a clear and persuasive spelling out of the conditions of success of one's arguments. Irrespective of one's stance as to the need for instrumental legal inquiry in some cases ('advocacy' is sometimes desirable), the bottom line is that there is always value in attempting a good faith account.

A deeper question that may arise in this connection is whether *any conceptual chart is by definition bound to construct the answers to its own questions*. As I mentioned in earlier sections, there is indeed a necessary bond between charts and their objects, as charts are 'intentional'. This is a very well-known concept in philosophy that, in basic terms, expresses the idea that there is no perception without an object of perception. By extension, there is no perception tool (such as a conceptual chart) without some object that it sets out to capture (such as certain features of the legal topography). A common deconstructionist critique would advance that the 'object of

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perception' or the target 'features' influence the development of the chart (consciously or unconsciously) to such an extent that whatever we find in the topography is something we, in fact, have put there. There are different ways to address this question and, again, my aim is merely to describe as precisely as possible how we lawyers conduct legal inquiry. One consideration in this respect is that there is no Kantian 'noumenon' or '*Ding an sich*' (the thing as it exists irrespective of our perception) to be pursued in legal inquiry. The topography is not just the material expressions of law (books, cases, codes, treaties, etc.) but the complex array of such materials as the expression of a common understanding by humans at different levels. Unlike lakes, planets or sub-atomic particles, where the question of knowing the noumenon may have some relevance, legal inquiry is only concerned with what we understand (or have understood in the past and then instituted) about the law. We are aware that what we want to know is 'artificial' because we have created it. Creation does not mean here a conscious single moment when we deliberately established the whole legal system. It only means that law is a human construct. In this regard, it is hardly news that we constructed the material that provides the answers to the questions we ask in legal inquiry. Yet, what we constructed is not entirely docile or malleable. Once created, the array of 'institutional facts' we call the law has an objective existence based on our shared understanding of the law and the many material steps taken to institute this understanding such as drafting constitutions, laws, treaties or setting up courts, law faculties, law firms, legislatures, etc. What we study through our conceptual charts are the relatively stable and recognisable features of this shared understanding and its manifestations. The use of a given chart may highlight some features and obscure others. In this regard, one may argue that the features captured are in some sense placed in the topography by our chart. But this view cannot be taken too far. The features of the topography may resist the conclusions of the statements that we make about the law. Such arguments may be advanced nevertheless and less demanding conditions of success may be selected, but the institutional facts of the topography will be there to confirm or undermine the accuracy and persuasiveness of the argument.

Some illustrations will help clarify this point: one may argue that there is no rule of recognition in international law, but if I simply ignore the existence of article 38 of the Statute of the International Court of Justice the persuasiveness of my argumentation will be undermined; one may argue that the case-law of the ECtHR is more open to environmental considerations than that of the ICtHR or vice-versa, but the jurisprudence of these two bodies will still be there, quite factually, to confirm or infirm my conclusion; one may argue that treaties with (A) characteristics are more effective than treaties with (B) characteristics to achieve goal (C), but the texts of the

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

treaties and their common understanding will be out there to confirm or infirm the classification of different treaties as will the performance of each treaty in terms of (C); one may argue that the use of force by the US and the UK against Iraq in 2003 was legal, but article 2(4) of the United Nations Charter, General Assembly Resolution 2625 (XXV), the Nicaragua judgment of the ICJ<sup>16</sup> and other legal materials will all be there to confirm or undermine the conclusion; one may argue that clause (R) in the River Uruguay Statute is a referral clause, but the wording of clause (R), that of certain clauses widely considered as 'referral clauses' (comparators), and the *Pulp Mills* decision,<sup>17</sup> cannot simply be ignored if I want my argument to be persuasive.

In short, our shared understandings about the law – because they are shared by a large community and they have been materialised in different forms that gives them permanence – are not entirely docile and offer some resistance to manipulation. They have some objectivity or, to put it in simpler terms, they are somewhat more 'stubborn' than many believe; perhaps as 'stubborn' as the community who generates and maintains them. Thus, our conceptual charts can influence our understanding of the topography, but the topography has its own accidents and features that can only be ignored at the prize of forsaking persuasiveness and therefore influence. As constructs, the features of the topography are built, but once there, they have an objective existence.

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Basic conclusions: (i) conceptual charts are not only intentional but also purposeful, in that some features of the topography may be deliberately highlighted while others obscured; (ii) the prize of taking purpose too far is felt in terms of persuasiveness; (iii) injecting some specific purpose into legal inquiry may be a good or bad thing, and it may even be impossible to do otherwise, but as far as legal inquiry is concerned there is always value in good faith efforts at objectivity; (iv) the legal topography is constructed by humans but, once built, it has some objectivity and permanence that can be analyzed through the use of conceptual charts.

The latter point brings legal inquiry so close to social science inquiry that some may be (dis)comforted. The conceptual charts that we developed to understand certain features of the topography are similar to those developed

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<sup>16</sup> Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, *C.I.J. Recueil 1986*, p. 14.

<sup>17</sup> Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, *C.I.J. Recueil 2010*, p.14.



J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

in other disciplines targeting institutional facts. A political scientist may analyze the relationship between establishing a given voting system and the structure of political parties.<sup>18</sup> Underlying such an analysis, there are some assumptions about how people understand some more specific institutional facts (e.g. election laws, the operation of a political party, competition among parties, political offices, and so on) as well as their relations to one another. Thus, presidential systems (as institutions granting a person selected by a majority of votes access to a powerful political office) may push people to re-organise themselves in two large political parties. The pattern discerned by political inquiry is therefore about how certain shared understandings will combine to produce certain actions. This is not fundamentally different from lawyers assessing: whether a case is 'good' or 'bad' (on the basis of their own understanding of the law and of the way in which the courts will react on the basis of their own understanding); or whether an action is legal or illegal under international law (on the basis of how the community of lawyers will evaluate an act in the light of the shared understanding as to the applicable rules) or, still, whether the case-law of this or that court is moving into the direction of more openness towards environmental considerations (based on the understanding of the legal implications of certain arguments admitted by the court). The key difference is that, in legal inquiry, the analysis cannot be conducted without being fluent in a specific shared understanding that will make the community of lawyers or some individuals within it act in certain ways or take certain stances. This takes me to the nature of the concepts that a conceptual chart may have to mobilize to capture different features.

### **2.3. The nature of the concepts that we use**

In order to clarify the nature of the concepts that we use, it is useful to recall some of the conclusions arrived at in the two preceding sub-sections, namely that conceptual charts may seek to capture different types of features and that such features have an objective existence. The question to be addressed in this sub-section is: what is the nature of the concepts used to capture these different objective features of the topography? I have already referred in previous sub-sections to 'legal' and 'analytical' concepts as well as to the ability of concepts to capture 'legal' or 'empirical' features. The type of features a concept may be able to capture does not necessarily define its nature. Some analytical concepts are indeed capable of capturing legal

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<sup>18</sup> This is the relationship famously studied by Maurice Duverger in a number of studies during the 1950s. See M. Duverger, *Les parties politiques* (Paris: Armand Colin, 1951). More recently, see A. Lijphart, *Patterns of Democracy* (New Haven: Yale University Press, 1999).

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

features. The task I will undertake here is to clarify the nature of conceptual charts by specifying the concepts that they are made of. As I will try to show, the conceptual charts used in legal inquiry are characterised by their 'sensitivity' to both 'legal' and 'empirical features' or, in other words, by the ability to shed light on such features. In what follows, I will first characterise what I understand by the 'legal-sensitivity' of conceptual charts (2.3.1.). I will then endeavour to clarify the 'empirical-sensitivity' of conceptual charts (2.3.2.). These two characterisations will spell out the nature of the concepts that we use, which, in turn, will lay the foundations of the subsequent analysis of what makes a good conceptual chart in legal inquiry.

### 2.3.1. *The 'legal sensitivity' of conceptual charts*

Earlier in this chapter (see *supra* 2.1.1.), I referred to the common understanding shared by lawyers of the term 'legal concept' and noted that I had to come back to this concept to further clarify its meaning within a legal cartography. A concept is 'legal' if it is capable of evoking in the shared understanding of the community of lawyers to a relatively stable array of legal norms. Thus, a 'trust', a 'corporation', 'parental authority', an 'award', etc., are all concepts that refer, in the minds of the community of lawyers, to a relatively stable (or readily recognisable) array of norms defining their implications (their connections with other norms). Legality is (as it has been shown by several authors<sup>19</sup>) a result of interconnection or mutual reference within the shared understanding of the community of lawyers. How are we to understand this interconnection? It can be captured at three levels.

First, the prescriptive statements that we call norms (command, prohibition or authorisation) will be considered as 'legal' norms if they entertain certain types of relationships with other similar norms. This appears to be a tautology (legal norms are defined by their relationship with other legal norms) but the third level will show that it is not. The *relationships between norms may be explicit or implicit*. By way of illustration, a domestic norm (D) stating that 'a court has jurisdiction to prosecute the crime of torture as defined in treaty (T) irrespective of whether they were committed' explicitly refers *inter alia* to the norm(s) in treaty (T) defining torture. In turn, the norm defining the crime of torture in treaty (T) (e.g. art. 1 of the Convention against torture<sup>20</sup>) is implicitly linked to (D), even if the drafters of (T) had no knowledge of the existence of (D). Each norm is thus interlinked with many other norms both explicitly and

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<sup>19</sup> See Hart, above n. 3; Luhmann, above n. 6; M. Virally, 'Le phénomène juridique' (1966) 82 *Revue du droit public et de la science politique en France et à l'étranger* 5.

<sup>20</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

implicitly (depending on the link). While a norm may not always be formulated in such a way as to explicitly define its link to another norm, all norms entail implicit links. Explicit links are, as a rule, easier to establish both in their reach and limitations. Conversely, implicit links will be more prone to ambiguity and controversy.

This leads me to the second level. *In order to be legal, norms must entertain certain types of relationships with other norms.* Not every type of relationship will be relevant to determine whether two norms are legally related or whether a norm is legal and the other is not. By way of illustration, the fact that two norms relate to the protection of the environment does not necessarily create a relationship which is relevant from a legal standpoint (as opposed to the merely descriptive standpoint<sup>21</sup>). Similarly, a moral and a legal norm may share some of their contents (e.g. the religious and the legal prohibition of murder) but this relationship will not give legal character to the former (e.g. suicide or killing in self-defence may remain condemned by the moral norm whereas the legal norm while see these situations as authorised). The types of relationships that are relevant from a legal standpoint are those governed by certain other norms that perform a regulative function (this is probably what Hart had in mind when he referred to secondary rules, although one could refer to a broader spectrum of norms). There are indeed *norms that will influence the conformity of different competing statements about an implicit (or explicit) link.* These include rules of interpretation, rules governing the general application of certain norms in space and time, rules governing priority as a matter of specialty or importance, etc. For the purpose of our legal cartography, it will suffice to note that these norms cannot be ignored in legal reasoning. In other words, legal reasoning is not just logical reasoning; it is logical reasoning within certain parameters. This point was briefly mentioned when discussing the types of relationships between conceptual charts and target features of the topography. As a general matter, these parameters have become stricter over the centuries (e.g. the increasing share of deliberate law – statute or treaty law – as compared to less calculated law – customary law or generalisation of precedents), and an entire history of law (or international law) could be written by focusing on the changing demands of these parameters.

At a third level one may inquire as to what is the 'medium' where such relationships can be observed. A short answer to this question is that they appear in the written instruments expressing the law (whether treaties, laws, cases or books). Yet, this is only partially accurate. Let me assume, for a

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<sup>21</sup> See J. E. Viñuales, 'Cartographies imaginaires : Observations sur la portée juridique du concept de 'régime spécial' en droit international' (2013) 140 *Journal du droit international*, forthcoming.

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

moment, that humans suddenly disappear from the face of the Earth leaving behind a variety of writings such as codes, treaties, laws, judgments, etc. Whereas an abstract intelligence looking at such materials may find logical connections among them, the 'explicit' and 'implicit' links and the rules influencing their ascertainment are no longer there. In other words, *these links are but a body of shared understandings among a certain group*. Defining the group in a water-proof manner would be impossible (and futile). But it can indeed be characterised by reference to those who operate the system: those whose task is to look at the norms, establish their connections, and perform some material acts in accordance with their understanding of what these norms command, prohibit or authorise. The fact that legality is but a shared understanding does not mean that it is entirely transient or volatile. The written instruments mentioned earlier give this understanding a more permanent form and introduce constraints on how legality may be determined. Even when such written instruments are absent (one could think of customary law or the law of some severely underdeveloped countries where written traces of the law have been destroyed and not yet reconstituted) there are shared understandings on who will have authority (or even the supreme authority) to express the content of norms (this would bring Hart's rules of recognition and adjudication under the same shared understanding). In short, the shared understanding regarding legality is not easily changed. It has an objective existence which is not easily neglected. It may be manipulated in some cases, but it cannot simply be ignored.

The shared understanding of the community of lawyers as to the interconnection among stable arrays of norms characterise a 'legal concept'. These interconnections are what I call 'legal features' of the topography. Importantly, some concepts may be capable of capturing legal features, including some unnoticed or previously unseen interconnections. Such other concepts will not be called 'legal concepts' (as the array of legal norms to which they refer does not have a sufficiently stable or immediately recognisable character in the shared understanding of the relevant community) but 'legally-sensitive analytical concepts'. Legally-sensitive analytical concepts play a major role in the conceptual charts that we use to conduct legal inquiry. Their development, whether it results from a conceptual breakthrough, a recalibration of an existing concept, or a transposition from a different area of law or discipline (see [sub-section 2.1.](#)), is the cornerstone legal inquiry.

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J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

Basic conclusions: (i) legal concepts are stable (readily recognised) arrays of interconnected norms the relationships of which are governed by specific regulative norms; (ii) legal concepts and their components exist as a shared understanding within the community of lawyers backed by some written and physical support; (iii) viewed from the perspective of a conceptual chart, legal concepts and their components are called 'legal features'; (iv) legal sensitivity is the ability for a concept to capture legal features; (v) 'legally-sensitive analytical concepts' are concepts capable of capturing legal features but they differ from 'legal concepts' in that they do not capture a stable array of interconnected norms, i.e. an array directly and readily associated, in the minds of the relevant community, with a legal concept; (vi) the development of 'legally-sensitive analytical concepts' (resulting from a conceptual breakthrough, a recalibration or a transposition) is the cornerstone of legal inquiry.

### 2.3.2. *The 'empirical sensitivity' of conceptual charts*

Conceptual charts may look beyond pure legal features (the interconnections of legal norms defined by certain relationships governed by other regulative legal norms) and seek to capture aspects of the social reality. It is important to be precise in this respect to avoid potential misunderstandings. Law, as an array of institutional facts, is a part of social reality, so 'legal concepts' and 'legally-sensitive analytical concepts' refer, of course, to a portion of social reality. But conceptual charts may go beyond this portion of social reality and look at 'empirical features'. The empirical sensitivity of a conceptual chart may be characterised at three levels.

At a first level, *a conceptual chart may seek to capture an empirical relationship* of the type (already discussed) 'treaties with (A) characteristics at better at objective (C) than treaties with (B) characteristics'. The conceptual charts developed to capture such features have little need to use legally-sensitive analytical concepts. As already noted, an empirical relationship may be established without addressing the types of interconnections between norms that I called legal features. Some of these conceptual charts may be powerful tools to understand the performance of a treaty<sup>22</sup> and, yet, neglect or inaccurately characterise legal features. It is only when the explanation of the empirical relationship mobilises legal features (e.g. treaties with binding dispute settlement clauses are more effective than treaties without such clauses) that the conceptual chart will need to capture at least some legal features (e.g. whether a clause can be considered, in the light of the general understanding of international lawyers, as 'binding

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<sup>22</sup> See e.g. S. Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford University Press, 2003).

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

dispute settlement clause'). This first level is useful to make a distinction between conceptual charts requiring 'legally-sensitive analytical concepts' and conceptual charts resorting only to 'analytical concepts' (which are not capable of – or interested in – capturing legal features). A significant part of the conceptual charts developed in the political science literature on international regimes or on the interactions between international law and international relations theory is only concerned with empirical relations and consists only of 'analytical concepts'.<sup>23</sup> In some cases, such analytical concepts are even referred to with the same word used to characterise legal concepts. Thus, a classic account of international regimes uses the terms 'norms' and 'rules' without limiting their meaning to legally binding norms or rules.<sup>24</sup>

But there is also *a second level at which conceptual charts may need to be empirically-sensitive*. As noted by J. Searle, any statement implicitly entails a commitment to reality.<sup>25</sup> This is particularly the case in the type of statements made in law and legal inquiry which, in Searle's terminology, can be characterised as 'declarations'. Whether we state that 'there shall be an international court of justice' or we utter a command, prohibition or permission, we introduce a connection with the social reality that is targeted. Thus, the statement that 'States shall have the inherent right to self-defence against armed attack' assumes that there are social realities called 'States' and that, legally, the status of 'State' entails some consequences such as the 'right to self-defence' in case of 'armed attack'. Similarly, 'legally-sensitive analytical concepts' (e.g. the concept of 'function' in the theory of international organisation) and 'analytical concepts' (e.g. the concept of 'regime' or 'regime complex') assume that there is a portion of the social reality that can be aptly synthesised and captured by the use of such a term. They provide a terminological cut which implies that something called international organisation or a certain array of relationships exist as a recognisable portion of social reality. This may change over time, formulating a conceptual chart in terms of international organisations would have been as empirically inaccurate in the XVIII century as a conceptual chart referring to a world empire or a president of the world would be today. Of course, terms can be 'assigned' meaning by the very act of a 'declaration', but the act of assigning meaning is not totally unrestrained. It must take into account not only the regular meaning of the words used but also the shared understandings that we call social reality. Let me take two short examples. First, the normativistic account provided by Kelsen of the international

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<sup>23</sup> See B. Simmons, R. Steinberg (eds.), *International Law and International Relations : An International Organization Reader* (Cambridge University Press, 2006).

<sup>24</sup> See S. Krasner (ed.), *International Regimes* (Ithaca N.Y. : Cornell University Press, 1983).

<sup>25</sup> Searle, above n. 4, pp. 80ff.

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

organisation phenomenon was unable to capture certain empirical features of the functioning of international organisations. Similarly, some contemporary theories of world government or of the post-national State may not be taking sufficiently into account the empirical relevance of the concentration of factual power associated with the existence of States. In both cases, a conceptual chart displaying insufficient empirical-sensitivity in this sense may appear unclear, unpersuasive or even irrelevant to those whose shared understanding is shaped by the existence of social realities such as international organisations or the State.

There is also a third level at which empirical sensitivity must be analysed. *Legal concepts and their components (norms) do not always seek to reflect reality accurately.* It is in the very function of law to seek to govern or 'norm' reality. The difficulty lies in identifying when a disconnection between the norm and the reality governed is the result of a will to 'norm' or, rather, of inadequacy or even 'obsolescence'. Some examples will help illustrate this point. The use of force is prohibited despite the fact that it is factually frequent. In this case, the norm deliberately departs from reality in order to 'norm' or 'evaluate' conduct. There may be different political reasons underlying the stance taken by a norm, but the disconnection with reality is neither unforeseen nor (even if unforeseen) unregulated. There are, however, other cases where the disconnection is not the result of normative stance but one of obsolescence. By way of illustration, the disconnection between articles 106 and 107 of the United Nations Charter (relating to transitional security arrangements) and the regulated reality is the result of obsolescence and not of a normative stance. But the tension between normativity and obsolescence is often far more difficult to solve. In some cases, the empirical disconnection of one or more norms has been addressed by way of interpretation. Such is the case of the protection of the environment under some human rights treaties (e.g. through article 8 of the ECHR). In such a case, the gap between law and reality has been seen as an unforeseen and undesired disconnection and partial obsolescence has been averted through the extension of the scope of certain human rights provisions. In other cases, such an extension is far more controversial. For instance, it is controversial whether the right of self-defence may cover the pre-emptive use of force or the use of force against non-State actors despite the fact that this is recurrent in practice. Most international lawyers would likely consider that this disconnection results from a normative stance on the scope of self-defence in international law but this has been challenged by some other international lawyers. For present purposes, the tension between normativity and obsolescence is relevant in order to understand the type of empirical sensitivity that a conceptual chart may need to capture. Because this tension involves reference to legal features, only those conceptual charts including

J. E. Viñuales, 'On Legal Inquiry', in D. Alland, V. Chetail, O. de Frouville, J. E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy / Unité et diversité du droit international. Mélanges en l'honneur du professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, forthcoming 2013).

(but not limited to) legal concepts and legally-sensitive analytical concepts will be capable of capturing such features. This said, pure analytical concepts may be a necessary addition to provide empirical reasons for or against an extension of the scope of a norm.

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Basic conclusions: (i) a conceptual chart may capture an empirical relationship with or without reference to legal features; (ii) 'analytical concepts' differ from 'legally-sensitive analytical concepts' in that the former are not capable of capturing legal features; (iii) 'legal concepts', 'legally-sensitive analytical concepts' and 'analytical concepts' must display a sufficient fit with the social reality they target; (iv) the empirical sensitivity of legal concepts and their components raises a tension between the normative purpose of norms (normativity) and their practical relevance (obsolescence).

### 3. WHAT IS A GOOD CONCEPTUAL CHART?

The purpose of this last section is to draw upon the language of the 'legal cartography' introduced in the foregoing sections in order to characterise what makes a good conceptual chart in legal inquiry. The positions taken in the next paragraphs are by no means intended to imply that legal inquiry that proceeds in a different manner has lesser value. They are merely intended to generalise some characteristics often found in what I see as illuminating legal scholarship.

#### **3.1. Combination of concepts**

Good conceptual charts tend to combine different types of concepts. In order to capture the legal and empirical features of the topography, the conceptual charts used in legal inquiry will often need to use a combination of 'legal concepts', 'legally-sensitive analytical concepts' and/or 'analytical concepts'.

Conceptual charts with a strong emphasis on purely analytical concepts may provide powerful accounts of some empirical features of the topography, but such emphasis will come at the prize of neglecting legal features. Analysing contracts, laws, treaties, customary norms and the like with concepts that are not well adapted to capture legal features (specifically regulated interconnections among norms) would amount in fact to conduct social science research (political science, economics, sociology, history) on legal structures (often called 'institutions' in the social science terminology). This is a legitimate and indeed necessary line of inquiry but, as pure social



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science research, it must be subject to the appropriate methodological rules of the discipline mobilised. As no legal analysis proper is conducted, such an inquiry could not be characterised as either legal inquiry or interdisciplinary research (involving law and another discipline). The main implication of this position is that focusing on 'institutions' (on law as an object instead of, say, the 'stickiness' of prices, electoral behaviour, etc.) is no excuse, whether for lawyers or non-lawyers, to lower the methodological standards applied in the relevant discipline. Such a research remains disciplinary in nature, even in those disciplines where law is an uncommon object.

Conversely, conceptual charts with a strong emphasis on legal concepts may provide detailed commentary on the readily recognised components of such concepts, but such emphasis will come at the prize of neglecting empirical features or underexplored legal implications of the concepts analysed. Thus, a normativistic approach to international organisations focusing on a detailed commentary of provisions will provide only a limited contribution to the understanding of international organisation if it does not take into account the relevant empirical features (not only the 'practice' but also the political implications of different options). Such more positivistic or commentary-like line of inquiry falls plainly within legal inquiry, as it focuses on clarifying specifically regulated interconnections among norms. It will, however, leave little room for interdisciplinary research or even for a broader legal inquiry seeking to identify normative interconnections that are less readily recognisable.

This is why legally-sensitive analytical concepts are important to add a stronger theoretical dimension to commentary-like inquiries without losing sight of legal features, as in purely social science inquiries. The development of 'legally-sensitive analytical concepts' through conceptual breakthroughs (sub-section 2.1.2.), the recalibration of existing conceptual charts (sub-section 2.1.3.), and the transposition of concepts from other contexts (sub-section 2.1.4.) is a critical step in legal inquiry. It is perhaps the best entry point for genuine interdisciplinary research as well as the main proof that scientific progress is possible in legal inquiry proper. The quality of 'legally-sensitive analytical concepts' will depend on their relationships to the legal and empirical features they target.

### **3.2. Setting the appropriate scale and criteria**

For a conceptual chart (particularly for its legally-sensitive analytical concepts) to be adequate to capture its target features, the scale and criteria of the chart must be appropriately set.

Broad conceptual charts are normally unable to capture with sufficient accuracy specific features (e.g. the concept of 'primary norms' cannot adequately capture differences between principles and rules, obligations of

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conduct and obligations of result, procedural and substantive obligations, etc.) whereas narrow conceptual charts may be inadequate to capture broader features (e.g. focusing on 'self-contained regimes' may not adequately capture the shared formal and substantive unity of international law, as highlighted by P.-M. Dupuy). These examples also illustrate the need to fine-tune the criteria to which a conceptual chart will be sensitive. Depending on the targeted features, one may need to use analytical concepts sensitive to different legal features (e.g. using a distinction between primary and secondary rules may be less adequate than a distinction between obligations of conduct and result for the analysis of the legal consequences of environmental damage).

The basic position that can be derived from this discussion is that good conceptual charts are premised on a sufficiently clear identification of the features that the chart seeks to unveil or clarify and they do not lose sight of them (sub-section 2.2.1). Zooming in or out to capture some features entails a choice of target. The prize of clarifying some features may be to lose sight of others or even to obscure them. Of course, the more a conceptual chart is versatile (the more features it is capable of capturing without obscuring others) the better. But, as in other disciplines, some features will normally escape scrutiny and, eventually, may put to test those conceptual charts that aspire to comprehensiveness (e.g. Kelsen's pure theory). In legal inquiry, trade-offs between highlighting some features and obscuring others may be expected to be rather frequent. This is not, as such, a problem, provided that the conditions of success of the arguments that the conceptual chart seeks to advance are clearly and persuasively spelled out.

### **3.3. Clearly and persuasively defined conditions of success**

Another conclusion arising from the relationships between conceptual charts and their target features is the need to clearly and persuasively define the conditions of success of the arguments advanced in the light of the chart (sub-section 2.2.1). Legal inquiry aims at making certain types of statements about the legal topography.

Even in those cases where the scale and criteria defining the conceptual chart have been properly set to capture certain target features, good conceptual charts spell out as clearly as possible the conditions of success of the arguments (the 'theses' or 'points') they make. This is because the types of statements that we make in legal inquiry are 'true' or 'false' as a matter of argument. An argument is better made when its assumptions are made explicit than when they remain implicit.

It is, of course, not sufficient to spell out the conditions for the success of the argument. One also needs to do it persuasively in the eyes of the relevant community (the community of lawyers). This is important in two respects.

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First, certain conditions of success may be unpersuasive to make certain arguments and persuasive to make certain other arguments. If I want to make an argument about the relative openness of different regional human rights courts to environmental considerations, setting the room granted to the precautionary principle as the condition of success may be too limitative an indicator to make my point persuasively. Yet, this same condition of success would provide a persuasive test for a different argument, e.g. the reception of the precautionary principle in such courts. Second, when the conditions of success of an argument are unpersuasive, one may be tempted not to spell them out too clearly, so as to draw a veil on the soundness of the argument. This is a problem and it leads me to the question of purpose.

### 3.4. Setting the purpose

There is always value in a legal inquiry that is conducted in good faith. In the hypothesis mentioned in the foregoing paragraph, there would be more value in spelling out insufficient (or unpersuasive) conditions of success of an argument and then reducing the ambition of the point made, than in keeping the initial argument and trying to hide its shaky basis by blurring the conditions of success.

The main difficulty presented by this position is whether in some cases an activist or deliberately biased conceptual chart may be justified in order to make progress in the protection of certain values (the fight against impunity, human rights or environmental protection, etc.). I would not exclude the desirability of such *modus operandi* in an advocacy context but, as far as legal inquiry is concerned, my own view is that a good faith and persuasive effort at highlighting some legal or empirical features, even modest, is more valuable than a biased effort at highlighting a more ambitious set of features.

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I would like to return now to the question identified at the beginning of this chapter: what do we do when we, as lawyers and/or academics, conduct a legal inquiry? Well, as in many other disciplines, we develop conceptual charts in order to capture (through a fine-tuning of the scale and criteria of such charts) certain features of the topography. Our conceptual charts are peculiar in that they are called to capture certain specifically regulated interconnections among norms, but we are not prisoners of well-established legal concepts. Quite to the contrary, conceptual innovation (typically in the form of conceptual charts including 'legally-sensitive analytical concepts') is possible and desirable. It is perhaps the best entry point for interdisciplinary research as well as the best proof of the possibility of making genuine

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progress in legal inquiry. In this context, a good conceptual chart is simply one which: (i) captures both legal and empirical features, (ii) through the use of 'legally-sensitive analytical concepts', (iii) appropriately fined-tune in terms of scale and criteria to capture well-defined target features, (iv) in order make some statements whose conditions of success are clearly and persuasively spelled out and, last but not least, (v) as part of a good faith effort.