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INTERNATIONAL LAW: THE TESTING GROUND OF THEORY

Whether law and morality can be separated in the sharp Austinian way when we consider the nature of international law is the chief question I want to consider in this essay.¹ There is, of course, rather general agreement that law contains a moral element. The question, however, is not whether law contains a moral element "here and there," but whether the very concept of law contains a moral element.

The present evolution of international law affords a good testing ground for any theoretical account of the nature of law. Certain familiar theories and definitions of law are plausible when applied to a particular system of law, but encounter difficulties when considered in the international sphere. These theoretical difficulties stem from the ambiguous status of the moral element in the phenomenon of law. The moral element in law tends to be obscured by a preoccupation with (1) economic factors (in Soviet legal theory), (2) the functioning of the courts (in legal realism), and (3) the activity of the sovereign (in the imperative theory of law). I shall consider each of these theories in the context of international law.

I. SOVIET CONCEPTIONS OF INTERNATIONAL LAW

The Theoretical Marxist Stage. — The first attempt of the Soviet jurists to formulate a theory of international law raised difficult problems because the Marxist principles from which they started did not fit the facts of international relations. Marxist theory had held that law is the will of the economically dominant class, that it was a weapon of domination, that it was the product of a state, and that it was the ideological superstructure of a particular arrangement of the factors of economic production. But not one of these elements was present in the international scene. At the very beginning, at least, the revolution was supposed to have destroyed the state — without a state there could be no law, and without a super-state over all the nations, there could surely be no international law. Moreover, the nations of the world were not related to each other in the same way as classes are within a state, and there could be no "will of the economically dominant class." There was no uniform mode of production and distribution throughout the world. But without such a uniform economic structure there would have to be as many legal systems as there are economic orders which produce them. Even more destructive of the Marxist theory was

1. Some of the *loci classici* of the Austinian approach are JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 127 (Hart ed., 1954) and THOMAS HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 35 (5th ed., 1890). Cf. also AXEL HÄGERSTRÖM, *INQUIRIES INTO THE NATURE OF LAW AND MORALS* 9 (Olivecrona ed., 1953), where he distinguishes between moral and legal duty: "We may exclude the duties involved in international law, since the distinction between them and moral duties is not so definite as that which holds for duties within a state."

the fact that international law was a system of rules by which sovereign and equal nations were attempting to remain sovereign and equal. The law sought to protect rather than dominate, and to the extent that Soviet Russia was willing to be bound by international law, she sought the protection of her rights, sovereignty and independence. Finally, as Pashukanis wrote, ". . . if we take the proposition of Lenin, 'Law is nothing without a mechanism capable of compelling the observance of legal norms,' international law must then be regarded as nothing . . ."2

If this failure to account for international law in theory seems to be only a *logical* difficulty, it must be remembered that the Soviet jurists, as well as the leaders of the nation, had from the beginning tried to fashion the closest bond between Marxist theory and Soviet practice. Had not Pashukanis argued that "bolshevism requires unswerving logic in political ideas," and that "everything that works to the detriment of logic causes detriment thereby to the cause of the proletarian revolution, and must be pitilessly anatomized and swept away"?3 It was Mirkine-Guetzevitch who pointed out that "a state involved itself in contradictions if it claimed to be recognised as a state by others, but interpreted itself as a mere class-organisation engaged in a life-and-death struggle with the class-organisations constituted by the other States."4 The only way out of this contradiction was either to change the theory or take it literally and follow its logic wherever it led, and in the first phase the Soviet jurists drew the obvious conclusion that "from the point of view of the Marxian definition of the law, so-called international law is no law at all."5

Behind this strictly logical difficulty, Soviet thought represents a fundamental break in the continuity of the kind of European thought which produced the broad principles upon which the classical theories of international law had been built. By its own design Soviet thought declares itself alien to this common fund of Western ideas which give rise to the structure of international order. It is for this deeper ideological, and not only logical, reason that Soviet jurists in this first stage denied the existence of international law. They wished to say that they did not recognize as in any way binding upon them those rules of behavior for states which were simply the expression of bourgeois social ideas.

The inevitable involvement of the Soviet Union in the affairs of nations, stemming most immediately from the need for economic relations with capitalist states, forced the development of a more realistic attitude concerning international law.

The Realistic Stage: The Doctrine of Sovereignty and the Use of Treaties. —

This new, realistic attitude is best expressed in the candid words of Korovin: "It is impossible to reject international law by simply denying its existence and to dispatch the entire set of international legal norms of the present time [1924]

2. E. B. Pashukanis, *The Soviet State and the Revolution in Law*, SOVIET LEGAL PHILOSOPHY 244 (Babb transl., 1951).

3. *Id.* at 242.

4. Quoted in Rudolf Schlesinger, *Recent Developments in Soviet Legal Theory*, 6 THE MODERN LAW REVIEW 21, at 34 n. 49 (1942).

5. HANS Kelsen, THE COMMUNIST THEORY OF LAW 150 (1955). Cf. also Stoyanovich, *The Reality of International Law*, JOURNAL DU DROIT INTERNATIONAL 39 (1959).

as a bourgeois remainder by a stroke of the pen."⁶ Korovin injected into Soviet theory the notion of sovereignty developed by such writers as Jellinek who held that a state has the power to determine exclusively by its own will the legal relations under which it will live.⁷

The effect of this shift in theory was to say that international law is the product of agreement between sovereigns as expressed in international treaties. The Soviet jurists still attempted to retain the earlier distinction between the *material* and the *formal* sources of law. If it was no longer possible to argue the Marxist theory literally, it could nevertheless be held that the "real foundations" of law among nations must be found in the facts of "struggle, co-existence and competition."⁸ But to explain law in this fashion is to say much more than that law is the reflex of economic relations, for this new explanation focuses upon the fact of conflict between peoples as the source of law. The attempt to resolve these conflicts leads to the formation of legal rules. Thus, international law becomes the mechanism by which peoples seek to establish order and harmony rather than an instrument of domination.

At this stage there was still the severe Marxist mistrust, if not outright rejection, of "moral laws and the laws of human conscience"⁹ as the source of law or of international obligation. Moral laws, said Troianovski, were too subtle and lacked precision and could not, therefore, be taken seriously as a basis for international order. What was needed was "something more positive, more concrete and definitive," and this could be found in "very precise international treaties duly signed" and based on "exact formulas and determined obligations."¹⁰

The Idealistic Stage.— In spite of its moral relativism, Soviet thought attempted to find broader sources of law. Thus, in 1940 Kozhevnikov suggested that custom be recognized as a source.¹¹ After World War II, emphasis began to be placed upon certain "basic principles and concepts" of international law.¹² These principles were the criteria for testing the "justice" of acts and treaties. In 1957 Shurshalov defined these principles as follows:

6. YEVGENI A. KOROVIN, *MEZHDUNARODNOE PRAVO PEREKHODNOGO VREMENI* [International Law of the Transitional Period] 2 (1924), quoted in KELSEN, *op. cit. supra* note 5, at 156.

7. Compare V. M. Shurshalov's insistence that "contemporary international law is basically treaty law." SHURSHALOV, *OSNOVANIYA DEISTVITEL'NOSTI MEZHDUNARODNYKH DOGOVOROV* [Bases of the Validity of International Treaties] 130-31 (1957), quoted in Jan F. Triska and Robert M. Slusser, *Treaties and Other Sources of Order in International Relations: The Soviet View*, 52 *THE AMERICAN JOURNAL OF INTERNATIONAL LAW* 699, at 717 (1958).

8. Triska and Slusser, *op. cit. supra* note 7, at 724-25.

9. Address of Aleksandr A. Troianovski, 1934 PROCEEDINGS, AMERICAN SOCIETY OF INTERNATIONAL LAW 195, at 196 (1934).

10. *Ibid.* Korovin had expressed rejection of morality as a source of law in clear and forceful terms when he argued that "*the theory of natural law* merits rejection not only for reasons associated with its origin but chiefly because from the Marxist standpoint it is inconceivable to speak of the existence of any ideal law common to all mankind which stands above classes." In the same vein, he said that "we must equally reject the arguments of the *idealistic school*. Neither the moral nature of man as an individual (an ethical variant) nor his intuitive-legal experiences (the psychological variant) can be considered a source of international law . . ." KOROVIN, *op. cit. supra* note 6, at 25-26, quoted in Triska and Slusser, *op. cit. supra* note 7, at 702.

11. See treatment of Kozhevnikov in Triska and Slusser, *op. cit. supra* note 7, at 708, 723.

12. SHURSHALOV, as cited in Triska and Slusser, *op. cit. supra* note 7, at 717.

(1) universal peace and the security of nations; (2) respect for the sovereignty and territorial integrity of nations which are members of the international community; (3) non-interference in the internal affairs of states; (4) equality and mutual benefit as between nations; and (5) the rigorous fulfillment of obligations assumed under treaties — *pacta sunt servanda*.¹³

Any treaty which proves to be incompatible with these principles, Shurshalov argued, is not valid.

As these principles seek ostensibly to channel the conduct of nations along moral lines, it could be said that Soviet theory on international law has to that extent moved to a moral basis. With this moral element Marxist and realist elements continued to coexist so that it would be incorrect to suppose that there had been a clear progression from one stage of theory to the next. There is a large admixture of political motives with theory. It must be noted, moreover, that the terms used by the Soviet writers may not have the content and significance of the same terms as used in the West.¹⁴ Yet, even with a different content, heavily charged with political intent, these more general principles and concepts would seem to reflect an attempt to put international law on a basis which could be considered "moral," at least in distinction to an international law resting merely on the will of sovereign states. There is a recognition of certain basic human desires and aims. If Soviet theory of international law is to be developed further, it would appear to lead to explicit recognition of the moral basis of legal obligation. The course of development to date suggests that only a theory which is neither followed logically nor employed in actual practice can separate the concerns of law and morals.

II. INTERNATIONAL LAW AND THE JUDICIAL PROCESS

The approach to the law which emphasizes that it is "what the courts do" is undoubtedly helpful when one considers the practical intent behind this definition. But what strikes one about this theory is that it could only have been developed, as it was by Holmes and Gray and earlier by Bishop Hoadley, in a highly developed society with a settled judiciary.¹⁵ A brief glance at the status of the World Court, however, quickly indicates that the Court, far from "making" law, must look to specifically designated "sources" for the "law" which it will apply. What we are observing today in the development of the international court is that the Court can have no power or jurisdiction until the nations of the world are fully satisfied that it will *not* be the case that the law is "what the Court does."¹⁶ It is precisely the suspicion in many quarters that the Court may decide cases either in political terms or according to the subjective opinions of the judges which has hindered the development of international law. The

13. Triska and Slusser, *op. cit. supra* note 7, at 717-18 (paraphrasing SHURSHALOV, *op. cit. supra* note 7, at 140-44).

14. Triska and Slusser, *op. cit. supra* note 7, at 723.

15. Cf. S. E. Stumpf, *The Moral Element in Supreme Court Decisions*, 6 VANDERBILT LAW REVIEW 41 (1952).

16. The statute creating the Court attempts as much as possible to create an independent judicial body and to reduce its political complexion. STAT. INT'L CT. JUST.

deep conviction which lies behind this suspicion is that the function of a court must be to *administer* the law — the court must not be the *creator* of the law and thereby usurp the role of the legislature.¹⁷ The nations of the world rightly refuse to accept the notion that law is simply what the courts do, “and nothing more pretentious.”

It is not enough simply to have a court, even one which has a determinate structure, in order to have law. The United States Supreme Court is effective not merely because of the rules of its organization, but particularly because in addition it has available a fairly definite guide to the legal terrain, a creative articulation of the fundamental law of the land, the Constitution. Moreover, the formulation of an effective constitution or basic instrument of law must be more than the pronouncement of an effective sovereign. The weakness of international law is not due solely to the absence of a superior coercive force, for the emergence of law is neither the activity of the courts nor the will of powerful entities. We are again faced with the problem of discovering how the nations of the world can agree to be bound responsibly to certain rules of behavior. The Court must not expect to have its jurisdiction established simply through the development of some superior force to administer sanctions. Indeed, the whole concept of power as the basis of law becomes untenable when one considers what such a force would have to be to deal effectively with our most powerful nations; the use of force here would result in nothing less than war — precisely the condition the law is trying to alleviate. Besides, the concept of power is incapable of solving the problem of the grounds of obligation. The Court is ineffective, not because it does not have the backing of sanctioning power, but because there is no sufficient agreement among the nations upon the rules by which they should be bound.

17. Judicial caution is an attitude of mind resulting . . . from the fact that courts have to *apply* the law and that they have to apply the *law in force*. They have to apply—and no more than that—the law. It is not within their province to speculate on the law or to explore the possibilities of its development. . . . It is not their function deliberately to change the law so as to make it conform with their own views of justice and expediency. This does not mean that they do not in fact shape or even alter the law. But they do it without admitting it . . . The same considerations apply to the administration of international justice. Moreover, there exist in this sphere additional reasons for the exercise of restraint. These include, in the first instance, the importance of the subject-matter on which the courts have to decide. They cannot experiment or innovate as easily in matters in which States have an interest . . . [Also there is] the fact of the voluntary nature of the jurisdiction of international tribunals. An international court which yields conspicuously to the urge to modify the existing law—even if such action can be brought within the four corners of a major legal principle—may bring about a drastic curtailment of its activity. Governments may refuse to submit disputes to it or to renew obligations of compulsory judicial settlement already in existence. HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 75-76 (1958).

Cf. his reasons for the use of precedent, at 14:

The Court follows its own decisions for the same reasons for which all courts—whether bound by the doctrine of precedent or not—do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; *because they embody what the Court has considered in the past to be good law*; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and . . . because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong. (Emphasis added)

The problem of obligation in international law is fundamentally a moral one, because it is impossible to separate the question of obligation in law from the question of obligation in general.¹⁸ The Court will become a vital institution only after the moral sentiment of men has been sufficiently crystallized to articulate general principles by which men are willing to be bound in their conduct and which they propose as the rules of others' conduct as well. The Court cannot come into being without this broad conviction in the international community that there are certain principles of right by which controversies are to be considered and judged. And even where a court is established by common agreement, as is the World Court, it does not possess the power to proceed without some specification of the rules it will enforce and which will govern its judicial reasoning. Thus, although the Court renders a final decision, this decision is not the "source" of the law, except in the sense of being the immediate or "proximate" source. The sources to which the Court must turn are expressly listed in the Statute of the Court, and these are the true sources of law in the field of international law.¹⁹

A careful examination of these sources indicates that to a very great extent they are moral.

The First Source: Treaties.— One class of treaties in particular may be considered a major source of law; these are the treaties entered into by a substantial number of nations to declare their understanding of the law on a particular problem, and, perhaps, to lay down a general rule for future conduct or the creation of some new institution. These treaties are the closest approximations to legislation, although even these "law-making" treaties are generally limited to those nations participating in their creation and are generally not binding upon those who are not parties to them.²⁰ These treaties result in conventional law, for they are the product of an agreement. But the conventional character of treaty law does not mean that nations can agree to do just about anything they want, as though the word "conventional" were construed to mean that agreements between nations are not subject to moral rules. A first requisite of a treaty is that it must contemplate a purpose which is defensible in the councils of the international community.

This source of law, where a case involves a treaty, leaves the least amount of room for the Court's independent reasoning; for the treaty, not the Court's decision, is the source of the law.

18. Cf. CHARLES DE VISSCHER, *THEORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 126-27 (1953).

19. These are set forth in STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38:

- a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognized by civilized nations;
- d. Subject to the provisions of Article 59 [which provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case"], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

20. Note that the United Nations Charter binds nations which are not parties to it, "so far as may be necessary for the maintenance of international peace and security." U.N. CHARTER art. 2, para. 6.

The Second Source: Custom. — That custom should be a source of law which the Court must consider can be explained only on the assumption that the rules of conduct which custom creates are more in accord with the moral sentiments of mankind than rules which are simply habitual modes of behavior or the edict of a sovereign. If the element which differentiates custom from habit is the conscious recognition that the custom has obligatory force, then a custom is transformed into a law by the rational process which ascribes to certain rules of behavior the attribute of "right" or "just." There are customs, of course, whose effect is to destroy human freedom, integrity, and self-respect. It could not, therefore, be argued without serious qualification, that a custom becomes law through its moral element — not every custom is "moral." Nevertheless, when a mode of behavior represents more than just a habitual way of acting — when, that is, people consent to be bound by a rule — then such a custom springs from the moral consensus of the community. A customary rule which becomes law is not an eternal or perfect rule, but it frequently exhausts the powers of rational discernment of right for the time being; and until some higher perspective is reached, this rule may very well be the fullest expression of right and justice available. Even the notion of natural law contains this mode of relativism. The Court thus has available a source of law which lies as close as possible to those who will be bound by it. When this customary rule is ambiguous, a larger scope for judicial discretion and interpretation opens up where the judges take the fragmentary tissues of the custom and weave it into a whole concept.²¹ In this process, the Court participates with the community in the law-creating process, being led by the consensus of the community. The Court is surely engaging in a creative process here, but the true source of the law is found not in the Court but in the moral discernments of the community.

The Third Source: General Principles of Law. — Nowhere is the creative function of the Court made more possible than in the authorization to employ the general principles of law in arriving at its decisions. The only qualification made by Article 38 is that the Court must use only those principles of law which are "recognized by civilized nations."²²

21. Judge Altamira pointed out this aspect of the judicial process when he wrote in the *Lotus* case that often in this process

there are moments in time in which the rule implicitly discernible has not as yet taken shape in the eyes of the world, but which is so forcibly suggested by precedent that it would be rendering good service to the cause of justice and law to assist its appearance in the form in which it will have all the force rightly belonging to rules of positive law.

Case of the Steamship "Lotus," Permanent Court of International Justice, series A, No. 10 (1927) (dissenting opinion).

22. STAT. INT'L CT. JUST. art. 38, *supra* note 19. Since it is chiefly civilized nations which have achieved the stage of articulated principles of law, there is nothing particularly restrictive about this provision of the Statute. Cf. treatment in LAUTERPACHT, *op. cit. supra* note 17, at 165. It does, however, raise difficulties in the modern world which has seen the inclusion of nations of various levels of development into the community of nations. It is sometimes the case that the principles of law prevailing among the majority of civilized nations is invoked even though one of the parties to a dispute may not have heard of it. Lord Asquith highlighted this issue in the Arbitration Between Petroleum Development (Trucial Coast), Ltd. and the Sheikh of Abu Dhabi (1951), reprinted in 1 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 247, at 250-51 (1952):

Some jurists suppose that these general principles are to be drawn from some ideal view of obligation; others hold that it is the actual principles in use in living systems of law to which reference is here made, such as that promises should be kept, or *res judicata*. The full force of this provision is to reject the notion that only statute law is law. At the same time, this does not mean that the *judge* is hereby set free to develop *his* principles of law; these principles are drawn from the fund of juristic wisdom which represents the fusion of long practical experience and intellectual reflection.²³

In a decision rendered by a tribunal which was set up by an agreement between the United States and Great Britain, the status of general principles was referred to in this manner:

[E]ven assuming that there was . . . no specific rule of international law formulated as the expression of a universally recognised rule governing the case . . . it can not be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find . . . the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.²⁴

When we look back upon the activities of the Court, we find that only in a very narrow sense can it be said that international law is "what the court does." If any single and distinctive contribution of the Court emerges from this analysis, it is that besides applying the settled law, the Court is the channel and the instrument by which morals (not the morals of the judges but of the community) enter the law.

This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.

The arbitrator, relying on the terms of the contract, also ruled out any other system of municipal law as proper law and found that the contract prescribed the "application of the principles rooted in the good sense and common practice of the generality of civilized nations — a sort of 'modern law of nature.'" *Id.* at 251.

23. Early writers on international law were in the habit of drawing on the Roman law; such a practice continues and is justified on the ground that principles which are found to be generally accepted by civilized legal systems can well be assumed to be so reasonable that they can be relied upon to maintain justice in any system. And it is inevitable that the Court should find it necessary to turn to such general principles in the course of its work; otherwise, it would have to say, in those controversies where there is no specific statute or "law," that the issue "is not clear," that there is no way of resolving the case.

24. Eastern Extension, Australasia and China Telegraph Co. (Great Britain v. United States), American and British Claims Arbitration, NIELSEN'S REPORT '73, 75 quoted in J. L. BRIERLY, *THE LAW OF NATIONS* 67-68 (5th ed., 1955).

III. SOVEREIGNTY AND THE NATURE OF LAW

The entities we call nations have deep historical roots and are intimately related to the social, economic, and even psychological security of individuals. Hence, such entities have developed an extraordinary sense of individualism and independence. This individualism expresses itself in a peculiarly forceful way through the notion of sovereignty, for it is in the name of sovereignty that nations resist the application of such rules as are traditionally called international law. Why should the doctrine of sovereignty have such a destructive effect upon the rule of law among nations? There can be no simple answer to such a difficult question, but to a considerable extent this outcome is the consequence of the conceptual apparatus which supports the doctrine of sovereignty.

The modern theory of sovereignty is largely the product of the imaginative philosophy of Hobbes. Whenever one asks why states are sovereign, invariably some of the mythology of Hobbes is given in the answer: Savage individual men, to secure their survival, irrevocably surrender their right of self-determination to the sovereign. The sovereign is absolute, as his power is absolute. Just as individuals lived in a state of "war of all against all," so nations are in a "perpetual posture of war." Each sovereign state has a right to do whatever is necessary to its survival.²⁵

During the nineteenth century and to a great extent even today, this picture drawn by Hobbes has been the prevailing view of the sovereign state. If we look behind the doctrine of sovereignty we find nothing more profound than this fundamentally egotistical view of man and nations. The self-interest of individuals and of nations is raised to the rank of the law of nature. To take the doctrine of sovereignty either literally or strictly is to destroy the possibility of an international law.

There have been, however, attempts to derive a basis for international law without rejecting the doctrine of sovereignty, and this approach is to be found particularly in the theory of *consent*. The premise of this theory is that there is nothing necessarily contradictory between the existence of sovereign states and international law, since the latter is the product of the consent of nations. This means that there is no reason why a sovereign nation cannot limit itself through an agreement with another nation.²⁶

Undoubtedly, it is entirely consistent to say that a sovereign can consent to be bound. States do not, however, expressly consent to all the rules by which they find themselves bound when they become states. When a new state is formed, it becomes bound by many rules which it did not create and even with which it may not have been expressly familiar. It is, of course, possible to argue

25. Kings, and Persons of Sovereign authority, because of their Independency, are in continual jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdoms; and continual Spys upon their neighbors; which is a posture of War. But because they uphold thereby, the Industry of their Subjects; there does not follow from it, that misery, which accompanies the Liberty of particular men. . . . HOBBS, LEVIATHAN ch. 13.

26. GEORG JELLINEK, ALLGEMEINE RECHTSLEHRE (1905). Cf. WOLFGANG FRIEDMANN, LEGAL THEORY 417 (3rd ed., 1953).

via a legal fiction that each state "tacitly" consents to the prevailing rules of conduct to which membership in an international community binds it, but this notion of a tacit consent is clearly only an attempt to repair a defect in the consensual theory.²⁷

A far more important objection to the consensual theory of limitation is that it does not achieve an adequate basis for international law because it does not explain how or why a state should be bound by a rule of international law. Can a self-imposed limitation be a true limitation? For example, if a nation agrees to be bound by its promise, can it really be bound if the only reason for obligation is consent to be bound? Cannot a sovereign "take back" its consent? The theory of consent does not account adequately for the binding nature of agreements; behind any particular promise is the fundamental rule that promises ought to be kept, and *this* rule is not the product of anybody's consent. Although it would appear that individuals limit themselves in their behavior when they observe the moral law, what is of paramount importance here is that individuals do not *create* the moral law. The moral law has an unconditional and imperative quality and is addressed to an individual who senses an obligation to it; he believes in the objective existence of the rule and wills to conform to a rule he did not create.²⁸

There is an additional objection to the consensual theory: the doctrine of sovereignty and consent turn to a fictional entity for an explanation of obligation, namely, the state. Of course, the law frequently deals with fictions, such as the corporation. But the state or nation does not possess the attributes of personality; and therefore it is almost impossible to derive from the doctrine of the state the foundations of the rule of law, for law in its clearest sense is a matter of reason and is addressed to rational and conscious beings.

The doctrine of sovereignty is too abstract to stand by itself; it needs the kind of support which the concept of law requires, namely, the personal entity. With the rise of the sovereign state, however, the personality of the state was raised above that of its members and given a life of its own. For international law this meant that the subjects of international law were not human beings but states. Even if an individual was injured by another state, his government was the subject of the controversy — he could neither have access to any tribunal for restitution nor even receive damages if they were paid.²⁹

27. Criticisms of the Austinian concept of sovereignty similar to this and what is contained in the following paragraph are made by H. L. A. HART, *THE CONCEPT OF LAW* 215-21 (1961).

28. This is substantially the same argument used at the Nuremberg trials when Robert Jackson argued that even if there were no specific positive consent on the part of nations to be bound by certain rules of behavior, to indulge in such acts as genocide and torture is clearly a violation of rules to which nations are obligated to conform. Cf. Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 *HARVARD LAW REVIEW* 396 (1946).

29. QUINCY WRIGHT, *CONTEMPORARY INTERNATIONAL LAW* 20 (1955). "Sovereignty was omnipotent — the state could treat its nationals unjustly or even barbarously; it could deny them fair trials or execute them without a trial; it could permit discrimination, starvation, or massacre and violate no rule of international law." (*Id.* at 19)

What made it possible up to our day for such acts as these to be immune from the rule of law is the preponderant view that it is not sufficient that an act be morally iniquitous in order to make it contrary to law. Even more disastrous was Hobbes's view that where there is no law there is no morality, for law and morality are born together. Thus, in a

But today the state is increasingly regarded as the agency for the protection of actual persons. The movement toward this latter view in recent years is a recognition of the fictional character of the state as a person and an expansion of the conviction that concrete persons are the subjects of international law. Persons become the subjects of international law chiefly because it is from human values and relations that the law takes its shape. The shift from the notion that a state exists for itself to the newer view that it is the agent for human beings was affected by a series of events which in our day is most dramatically expressed in the Universal Declaration of Human Rights. This document was the culmination of earlier attempts to put human beings instead of states into the role of subjects of the law.³⁰ There were several treaties which set forth the rights of aborigines, of minorities, of workers, of women, of children and of other classes of persons who were in danger of oppression.³¹ The United Nations Charter represents a major move to put individuals in the forefront as subjects of the law, and this means not only a recognition of human rights but also its corollary, namely, personal responsibilities. The Charter calls for "international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."³² This trend of separating the fictional state from the concrete person was reflected in the trial and sentencing of the leaders of the aggressive nations after the Second World War. If individuals have rights, then it is individuals too who are accountable for the violation of those rights.

The development of international law has thus required the gradual modification of the theory of sovereignty, for such a doctrine does not fit the facts of the nature of law. The law emerges from the consciousness of living persons and is addressed to concrete persons; its function and purpose is to order the

state of nature in the international scene, it was assumed that each nation could do whatever it wished to its own citizens, and the assumption was that there could not be even a moral criticism of such acts, for by definition such a moral criticism would invoke a principle of conduct superior to the will of the sovereign. But such a limitation of sovereignty would destroy the essence of sovereignty. Even during the Nuremberg trials one line of defense taken by some of the Nazi officials was that the "crimes" for which they were being tried were not crimes at all because there had been no specific law designating their acts as crimes; in addition, these officials said they acted on behalf of and in the name of their sovereign state and were therefore accountable to no one else. (Glueck, *op. cit. supra* note 28, at 436).

30. Cf. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953):

The theory of abuse of rights (*abus de droit*), recognised in principle . . . by the Permanent Court of International Justice . . . is merely an application of this principle [the principle of good faith which governs international relations] to the exercise of rights. . . . [p. 121] The exercise of a right — or supposed right, since the right no longer exists — for the sole purpose of causing injury to another is thus prohibited. Every right is the legal protection of a legitimate interest. An alleged exercise of that right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law. (p. 122)

This is, in effect, a specific limitation on external sovereignty.

31. WRIGHT, *op. cit. supra* note 29, at 21.

32. U. N. CHARTER art. 1, para. 3.

conduct of rational beings. To say that law emanates from the will of a state is to misconceive the nature and the true source of law. Both historically and analytically it appears to be incorrect to account for the emergence of law in terms only of the command of a sovereign.³³ The facts of recent history point to an element at work rather different from the will of sovereign states. This is the rational and ethical postulate of a community of interests and functions and values. A far more creative principle in the formation and development of international law is the postulate of moral obligation; this obligation is grounded not in the physical force of sovereigns but in the common concerns of the human beings who make up the international community. Thus, the "first cause" in international law is not so much the will of individual states as it is the rational and moral rules which the emerging international community is finding increasingly new opportunities to express.³⁴

To ground the international law upon the moral consensus of the world community is both a slow and ambiguous process. The law must take concrete and precise form and must be reducible, if not to a code, then at least to a working set of principles. The law must provide its instrument of adjudication, the Court, with the guides for decisions. Ultimately the rule of law must mean the settlement of controversies on the basis of clear rules by the competent judicial organ. This is, of course, the very point at which legal theorists confront their most difficult task, for they seek a precise source of law. This is the reason they look to the sovereign, which is such a definite entity, and turn away from the more ambiguous realm of "moral consensus," which is almost incapable of exact identification or delineation. This is the reason, too, for identifying law with what the courts do, for, in the last analysis, the decision of the court represents the *law* in the realistic sense of the term. Nor can we deny that the inner logic of the economic order affects the legal order. But what our analysis has shown is that, granted the legitimate relevance of economics, court, and sovereign, the idea of law flows through all these toward the level of morality from which it cannot be conceptually separated.

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33. Cf. Stumpf, *Austin's Theory of the Separation of Law and Morals*, 14 *VANDERBILT LAW REVIEW* 117 (1960).

34. Cf. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 420-23 (1933). Lauterpacht argues that "undoubtedly the effectiveness of the law depends to a large extent upon the prevalent practice and the general level of morality, but the very fact of the reign of law is, and tends to become increasingly, part of common practice and morality." *Id.* at 437.

A former judge of the International Court of Justice, Charles De Visscher, in a significant and penetrating book made substantially the same point when he wrote that "in the international order as in the internal order, the human values are the final reason for the rule of law. Founded upon the moral conceptions which are the essence of civilization, they impose themselves upon the State whose mission is to assure their protection and their free development." DE VISSCHER, *THEORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 211 (1953).