Concepts of International Law

I

When I was last instructed in the subject – at Oxford in the 1950's – the first and most lively question about international law, bound to appear on the examination paper together with tedious questions about the navigable bays, was existential. Is there any such thing as international law? That question seems no longer to trouble anyone. (Old philosophical problems are not solved; they just go out of fashion.) Everyone assumes there is international law and also assumes that it includes, for example, the Statute of the United Nations and the Geneva Conventions – or at least some of them. But the old grounds for challenge remain, and that challenge is important, not because many people now doubt that there is international law and that the rules and principles set out in these documents are part of it, but because the question of *why* these rules and principles are part of a distinct body of law regulating otherwise sovereign states remains crucial. It is crucial because appropriate strategies of interpretation depend on the answer to that question, and issues of interpretation are both controversial and dramatically important. Nations and lawyers diverge, for instance, about the status of associates of Al Qaeda and the Taliban under the Geneva conventions, or whether there is such a thing as an enemy non-combatant who is not covered by those conventions. I will discuss, later, another celebrated interpretive issue: whether the NATO intervention in Kosovo, without the consent of the Security Council of the United Nations, was a violation of international law.

When it was popular to debate whether international law exists, legal positivism still dominated jurisprudence. The question was therefore a natural one, and a negative answer seemed plausible. In Austin's 19th Century version of positivism, still popular then, the ground of law is a social fact: law is the command of an un-commanded commander, a sovereign with absolute power over some territory. There is no meta-Austinian sovereign, commanding the parliaments of nations, in the international story. Herbert Hart had just introduced a more sophisticated version of positivism, however, substituting for Austin's sovereign a different social fact as the ground of domestic law:

the wide internalization, throughout a political community, of a fundamental pedigree test for valid law. He called that fundamental test the community's "rule of recognition."

He himself raised the question whether what was called international law really counted as law on this new test. However his study of that question deployed what I have called the *sociological* rather than the *doctrinal* concept of law.[1] He asked a question for social scientists: whether there is any system of practices that can sensibly and usefully be described, for their purposes, as international law. That is a very different question from the doctrinal question posed to those lawyers and judges who practice international law: the question, for instance, whether the intervention in Kosovo was legal under international law. Hart approached his sociological question by noticing that the distinction between primary rules and secondary rules such as a rule of recognition, which he took to be of fundamental importance in understanding ordinary domestic law, could not be made in the international realm. There was nothing comparable in that latter sphere.

He said that that was nevertheless not decisive of the question whether it would be helpful, for theoretical and practical purposes, to include international law within the more general concept of law; he suggested, at least, that it might be sensible to do so. His analysis was therefore like the recent discussions whether it would be sensible to continue to use the word "planet" in such a way as to make Pluto a planet.[2] I emphasize that this way of approaching the question is appropriate only for the sociological concept of law. Doctrinal questions, such as whether the Kosovo intervention was legal under international law, cannot be answered by considering whether it would be desirable, for theoretical or practical purposes, to speak of an international law.

A great many contemporary studies of international law attempt to law track Hart's version of positivism, or something very like it.[3] But they misunderstand his arguments; they take him to have suggested that his version of the pedigree test could supply a *doctrinal* concept for international law: that it could supply a factual, positivist, test for

[1] See the Introduction to my book, Justice in Robes, Harvard University Press.
[2] See Justice for Hedgehogs, 165-166.
[3] See, for example, Samantha Besson, "Theorizing the Sources of International Law," in Samantha Besson & John Tasioulas, The Philosophy of International Law (Oxford, 2010).

what they call the *grounds* of international law. They assume that this factual test can be found in the historical fact of consent. The rule of recognition for international law holds, according to this assumption, that though the sovereign states that make up the international community are not in principle subject to any external authority, they can nevertheless subject themselves to law by their own consent, not in derogation but in the exercise of their sovereign status. Contemporary text books and manuals of international law (at least those I have consulted) uniformly cite Article 38 (1) of the Statute of the International Court of Justice, established by the United Nations, which they take to state an elaborated version of the consent theory. This Article reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
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> c. the general principles of law recognized by civilized nations;
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> d. subject to the provisions of Article 59, 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.[4]

True, international lawyers also speak of what they call "ius cogens" or "peremptory norms" that cannot be cancelled by treaty or even by decisions of the United Nations. However, the Vienna Convention on the Law of Treaties brings these, too, under the umbrella of consent:

> For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted

[4] It would be nice to treat section (d) of this account as granting power to academic philosopher kings in international affairs. Law is what NYU's international law group says it is. I assume, however, that the clause is only meant to allow the International Court to appeal to academic interpretations of the other clauses, so we must concentrate on those.

> and which can be modified only by a subsequent norm of general international law having the same character.

Law for nations, on this view, is grounded in what nations – or at least the vast bulk of those that count as "civilized" – have consented to treat as law. Signatories to treaties are assumed to have consented to treating its provisions as law for them. States that have assumed, in their practices, that certain rules are law have in that way consented to the rules being law for them. If enough states to constitute "the international community of States" have recognized fundamental rules as non-avoidable law, then these are treated as unavoidable law for the whole community. If there is evidence that a general practice is very widely accepted as law, or that it recognized by civilized nations, then it is law for all nations. The scheme has one apparent advantage. Since it bases law on consent, it answers the question pressing from the start of the modern state system: How can a sovereign state nevertheless be subject to law? It answers: because it (or at least almost every state like it) has accepted, in the exercise of its sovereignty, to be bound by that law.

But the scheme has several, and finally fatal, defects as a proposed rule of recognition. First, it offers no priority among the different sources it recognizes. Must treaties yield to general practices? Or vice versa? More important, though it is founded on the idea of consent, it sometimes binds those who have not consented. It offers no explanation why states that have not accepted a rule or principle as law may nevertheless be subject to it because the bulk of other states, or of "civilized" states have accepted it. It offers no standard for deciding how many states must accept a practice as legally required before the practice becomes "customary" and therefore binding on everyone. It offers no guidance as to which states are sufficiently civilized to participate in that essentially legislative power. Or which norms are "peremptory." These latter difficulties stem from the scheme's perfectly understandable ambition to extend the ambit of international law beyond those communities that have explicitly consented to its principles to include those who have not. International law could not serve the purposes it must serve in the contemporary world – disciplining the threat some states offer to others, for example – unless it escaped the straight-jacket of state-by-state consent. But yielding to that

ambition seems to undermine the axiomatic place of consent in the scheme, and thus its assumed jurisprudential foundation.

However, I shall set that unsolvable problem aside to concentrate, for now, on difficulties that stalk even the core of the scheme: the proposition that treaties create law for signatory nations, and that the constraints that nations have accepted as law in their practices and statements are thereby made law for them. We should notice that the interpretive strategies licensed by this jurisprudential core give out rather early. If a provision is part of international law for nations only because they have consented to it in either of those ways, then the master interpretive question must be: what is it most reasonable to assume that the nations, whose consent made the principle law, understood that they were consenting to? That question may in many cases be answered satisfactorily by the plain meaning of the text (though interesting issues may arise about translation.) But in many cases the text will not in itself be decisive.

Here is an example I mentioned earlier as an important question of interpretation. Article 2(4) of the United Nations Charter provides that:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

How should we understand "territorial integrity or political independence" in this provision? Does a humanitarian intervention undertaken by a group of states, as by NATO in Kosovo, violate territorial integrity or political independence if its sole aim to stop genocide or crimes against humanity? There is a division of opinion among international lawyers.[5] It seems very unlikely that all the states that created the United Nations in 1945, or who joined that organization since, shared answers to these questions when they joined. It also seems unclear whose opinion, among the different officers or citizens of these states, counts as manifesting a state opinion. Nor has there been sufficient practice by nations or statements by their foreign ministries to provide a firm

[5] See, eg, Alicia Bannon, The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism, Yale Law Journal 115, 2006): 1157-1164; Michael Reisman & Myres S. McDougal, Humanitarian Intervention To Protect the Ibos, in Humanitarian Intervention and the United Nations 167, app. A at 175-77 (Richard B. Lillich ed., 1973).

answer. Nor does there seem any disposition among states to accept, in the spirit of a positivist approach to law, that a body applying international law, like the International Court, should be deemed to have discretion to impose an answer.

If the consent theory of international law were persuasive, then, we would therefore quickly come to an interpretive dead-end on these questions. Fortunately, it is not persuasive, even in the core cases when consent can be treated as genuine. Consider, first, the proposition that international law is created for nations, without any formal treaty, when they accept that certain constraints on their acts and policies are required not just by decency or prudence but as a matter of law. This assumes that in some way nations decide for themselves whether some constraint they accept is imposed as a matter of law or just by decency. What principle – what "rule of recognition" – do they supposedly follow in making that discrimination? It won't do to say that they follow the principle that what they regard as law is law. They need some other standard to decide what they must regard as not just decency but law.

Suppose we say: they accept the principle that what other nations accept as law is law. But then the other nations that each nation treats as making law for it need a test of what to treat as law for themselves. Our explanation needs to break out of the circle somewhere. Suppose we say: the requirement means that law is created not just by congruent practice but by convention: by the fact that each nation accepts the practice because and so long as other nations do. Perhaps so. But not all conventions generate obligations; there are many conventions of convenience that people are morally free to disregard when they wish so that the convention ends. When do conventions create obligations? The concept of customary law seems to presuppose that there is some different, more basic principle at work in the identification of international law, or at least that the subjects of international law think there is. What is that more basic principle on which they rely?

Now consider the idea, even more fundamental for the consent thesis, that treaties create international law for the parties to those treaties. Treaties are signed at a particular time: the all-important United Nations Charter over sixty years ago. Nations change dramatically over such periods of time. Boundaries change, regimes and constitutional

structures change. We personify states when we treat them, rather than their citizens, as the subjects of international law, and we might therefore be tempted to say that just as individual people are bound by promises long after they make them, so are states, in spite of all these changes. But the fiction of a continuing national person, as distinct from its structure of government and its individual citizens, cannot bear that weight. When we cash out the fiction we see that old treaties can impose serious disadvantage on contemporary citizens through documents signed by entirely different people under entirely different constitutions many generations ago. We cannot justify that by any analogy to the law of contract: these cannot bind people not parties to them. True, the domestic law of some states make treaties a continuing obligation of the state. The American constitution, for example, makes treaties part of "the Supreme Law of the Land." But what domestic law creates it can undo: international law cannot be just a function of what national laws do or do not reject through domestic law.

We need an explanation why the citizens of contemporary Ruritania have an obligation under international law, which cannot be cancelled by any Ruritanian political process, that their officials continue to recognize obligations incurred in another time long ago. It does not serve to declare that international law contains a more basic principle – "pacta sunt servanda" – that treaties must be respected over generations. What makes that more basic principle part of international law? It would, once again, be circular simply to reply that states have consented to that principle when they sign treaties. Compare the familiar institutions of promising. As many philosophers have pointed out, there is mystery in the bare assumption that promising creates obligation. How can an individual change his moral situation just by speaking a runic phrase? We must suppose some different, more basic moral principle in virtue of which promises impose obligations. Philosophers have suggested a variety of such more basic principles.[6] We must look for one within international law.

II

I draw this conclusion. We cannot take the self-limiting consent of sovereign nations as the ground of international law. The temptation to do so is understandable. It makes

[6] I discuss several of these in Chapter 13 of *Justice for Hedgehogs*.

international law compatible, as I said, with the doctrine of state sovereignty. It also resonates with a very popular conception of political legitimacy: that coercive dominion can be justified only by the unanimous consent of those subject to that dominion. That conception of legitimacy generated the extravagant accounts of consent that appear in the social contract tradition in political philosophy. I have argued elsewhere that these all fail and are anyway unnecessary because consent is neither a necessary nor sufficient ground of legitimacy. We need to locate the source of domestic political obligation elsewhere: in my view in the more general phenomenon of associative obligation.

Please return to the distinction I drew earlier between two concepts of law: a sociological concept, useful to social scientists deciding how most usefully to classify law as one type of system of social control, and a doctrinal concept that figures within the practice of law by naming a special kind of right or obligation. We share the sociological concept as what I have called a *criterial* concept: we can genuinely agree or disagree in its application because we share the same criteria for its application. The concept of a triangle is also a criterial concept: we share that concept because we use the same test – a three-sided figure – for deciding what is or is not a triangle. Some criterial concepts are vague, however. We share roughly the same tests of application for the concept of baldness, but in some cases these shared tests are not decisive. We may, if this proves convenient either practically or theoretically, agree to stipulate a more precise sense of "bald." That is what astronomers did about the concept of a planet, and what Hart proposed to do about international law.

The doctrinal concept of law is very different. It is not a criterial but an interpretive concept: we share it not by agreeing about tests for application but by agreeing that something important turns on its application and then disagreeing, sometimes dramatically, about what tests are appropriate to its use, given that its application has those consequences.[7] Any theory about the correct application of an interpretive political concept must be a normative theory: a theory of political morality about the circumstances in which something ought to happen. Since the doctrinal conception of law

[7] This is only a crude statement of the character of interpretive concepts. See Chapter 8 of Justice for Hedgehogs for a fuller and more accurate account.

is interpretive, we provide a theory of the grounds of law by posing and answering questions of political morality.

In *Justice for Hedgehogs*, I describe that process in domestic law. We articulate law, as a distinct part of political morality, by posing a question of political morality. Which political rights and obligations of people and officials are properly enforceable on demand through institutions like courts that have the power to direct coercive force? That is a moral question whose answer is a legal judgment. We draw legal obligation from a more general account of political obligation and we draw political obligation not from consent but from circumstances of association. We construct a moral argument for identifying law in that way, and we use that moral argument as the foundation for a theory of legal interpretation.

We must construct an international jurisprudence by in much the same way. We abandon the positivistic, supposedly consent-based, jurisprudence of interpretation law. We return to what I take to be a golden age of the subject in 17th Century European politics – to the influential writings of Hugo Grotius, for instance. These supposes that international law is part of – though a distinct part of – the principles that decent nations are morally obliged to follow in their relations with one another. But now we face a problem. We want a distinction between two questions. How should states treat one another as a matter of common decency? How are they required to treat one another as a matter of legal obligation. If we accept that the latter as well as the former is a moral question, how can we draw a distinction between them?

We can do this only institutionally. We can do it in a theory of domestic law because we find an appropriate institutional structure in force. Domestic legal systems distinguish between courts that have the responsibility and power to enforce rights and obligations coercively and on demand and other institutions, and we can ask, in search of a theory of domestic law, what rights and obligations the former have the responsibility and right to enforce. But no such structure, in any but the most rudimentary form, is yet in place in the international domain. Here is my suggestion. Let us imagine (though initially not in much detail) an international court with jurisdiction over all the nations of the world, that cases can be brought reasonably easily before that court, and that effective sanctions are

available to enforce the court's rulings. Of course that is purely imaginary, at least for the foreseeable future. But bear with me.

If we imagine such a court, then we can frame an important question. What tests or arguments should that hypothetical court adopt to determine the legal rights and obligations of states and other international actors? This is avowedly a moral question; a question of political morality. But it is a distinct one because institutions with compulsory jurisdiction with sanctions at their disposal are subject to different moral standards than those that should guide states on their own initiative. We should call the latter international morality and the former international law. What the law should be is a different and narrower question from the more general question of what morality requires of states, even though they are both moral questions.

Is it an objection to this counterfactual exercise that there is not and probably never will be, at least in foreseeable circumstances, a court of that character? No international court could deploy effective coercion without the cooperation of powerful nations, and that cooperation would not be effective in bringing those very nations under the rule of international law. But I offer the counterfactual exercise only as a way of identifying international law. It is of course a further question whether nations and scholars would accept that method of grounding international law or would agree sufficiently about the international law it would identify. That is, sadly, only partly a question of the method's argumentative strength. But experience shows that international opinion about what counts as international law is important even in the absence of coercive judicial institutions. (We should note, however, that the counterfactual exercise I describe could not serve even the purpose I describe unless it could *justify* the establishment of such a court if means were available to establish it.)

So that is how I shall proceed to try to develop a new basic for international law. That is my strategy. I begin with a special moral question and I try to extract a body of international law by answering it. But I must first explore a separate issue about the right standards of success in my project. This approach will yield a much richer body of international law than nations have heretofore accepted. As I just admitted, it is unlikely that the leaders or foreign ministers of many nations, or even many international law

scholars will accept this strategy or the putative law that it yields. They will insist that international law rests on consent, and that no-one has in fact accepted either my methods or my conclusions. So what? If consent were itself the test of international law, then this fact would be a decisive refutation. But under our different approach, rooted in moral argument, the situation is less clear. It may be that the best moral arguments must take some account of what states can and are likely to accept as law. But that is a substantive question we may postpone for now.

III

It is standard, in discussions of international law, to begin with a description of the central subjects of international law. The world is divided, in this story, into sovereign states each of which is immune from interference by other states. None of these states is permitted to try to select the rulers of any of the others, or to dictate what its religion or laws or policies should be. The sovereign power of each of these states can be limited only by its own voluntary acts taken through its own institutions. This regime is often called the "Westphalian" system of international accommodation; the name assumes that the system was initially established in a series of 17th century treaties grouped under that name. The Westphalian system was created out of the interests of hereditary monarchies intent on substituting economic competition for the bloody religious conflicts that had marked the previous century.

The system balkanized not just sovereignty but political philosophy as well. Political philosophers, statesmen, religious leaders and revolutionaries occupied themselves with fresh questions about political power. The widespread assumption that hereditary monarchs have an assumed absolute right to govern, at least in the temporal sphere, was gradually replaced among the old European powers by a very different set of assumptions: that coercive political power is consistent with the dignity of citizens only if it can be justified not just in pedigree but in substance – in the manner of its exercise– as well. Competing theories of political legitimacy were constructed and debated; these settled into theories about the best conceptions of democracy and of the rights of individual citizens in a democracy. But all these theories were confined to arrangements

within sovereign states. John Rawls offered an account of justice as limited to the basic structure of an individual state, for example.

But though this is not often recognized, the modern question—what justifies that power – does not arise only within national boundaries. For the Westphalian system of separate states with immunity in principle from any control by other states in itself affects individual citizens of all states. It does not matter whether that system is so built into history and culture that nothing radically different is feasible. We must still ask the familiar questions of political morality. Does the Westphalian that system protect the dignity of all the people whose lives it affects? Does it provide an acceptable degree of control of individuals over their political fates? Does it sufficiently protect those rights of individuals that must be protected in any legitimate political arrangement? In the domestic context, when we are talking about the legitimacy of a state government, the answers to these questions provides a constitutional theory and therefore a background of political morality in the light of which judges can interpret constitutional law. In the international context – so I suggest – the answers form the background against which the court we are imagining must interpret international law.

We might begin by noticing the variety of dangers that the Westphalian system, unless it is subject to international regulation, poses to individuals within the states it separates. I count four of these and there might well be more.

> First, the system provides no central force to protect citizens of one state from violations of the system by another. It does not protect the citizens of Kuwait from a murderous invasion that robs them of the local self-determination the system purports to guarantee. If states were not insulated from one another in the way the Westphalian system dictates, if citizens were all in some way subsumed under a central governing force, then the police power of that central force could protect citizens from that usurpation of their local control by external forces.
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> Second, as a mirror image of that first danger and in the same way, the Westphalian system does not protect people against the tyranny of their own governments. If there were some central control, then a central force would be available and obliged to rescue citizens from murderous local regimes. But the

Westphalian system, absent further regulation by law, declares local regimes immune from any such external rescue.

Third, the Westphalian system stands in the way of the kind of cooperation that is essential to prevent economic, commercial, medical or environmental disaster. Individuals are subject to constant risk of what philosophers call "prisoners' dilemmas:" circumstances in which it is rational for people one by one to do something – drop litter in the park – that ends in loss for them all – a park destroyed. Governments of sovereign states can and do respond to these circumstances, when they can be ameliorated locally, by adopting and enforcing laws: making it a crime for anyone to litter. But some problems – overfishing of the seas, for example, and pollution of the atmosphere with carbon – cannot be met by governments each acting only for its own territory. People in the states need the protection that only a coordinated policy backed by all or nearly all governments can provide.

Fourth, an unmitigated Westphalian system prevents people from having any impact on important political decisions that crucially affects their lives. It is now widely acknowledged that legitimacy requires that people participate in some appropriate way in their own governance. Political theorists disagree about what kind of participation is essential in different forms of government, but it is generally understood (even if this is far from universally provided) that some form of widespread suffrage in the election of officials is both necessary and sufficient within an established political communities. In a world of strong and increasing economic interdependencies people's lives may be more affected by what happens in and among other countries than by what their own community decides. Dignity seems to require that people everywhere be permitted to participate in some way – even if only by some indirect consultation – in some regulation of what other nations are permitted to do to them.

Governments have a standing duty to improve their own legitimacy. They therefore have a standing duty to improve the legitimacy of the international order in which they function. Each of them has a responsibility – not just to its own citizens but to the rest of

the peoples of the world – to pursue means to mitigate these and other risks we might imagine. They are not themselves fully legitimate unless they accept some such responsibility; it follows that each government has a duty to help to create and then to respect and help to enforce a general scheme of international law to that end. Only through such cooperative enterprise can individual states fulfill their own responsibilities of legitimate government.

IV

That duty provides the most general structural principle and interpretive background to international law. But as it stands it is not sufficiently determinative. In many circumstances a number of different regimes of international law would serve to improve the legitimacy of the international system, and states may reasonably disagree about which would be best. That obvious fact explains a further fundamental structural principle. This is the principle of salience: if a significant number states, encompassing a significant population, have developed an agreed code of practice, either by treaty or other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect would improve the legitimacy of the international order. If some humane set of principles about the justified occasions of and permissible methods within war gains wide acceptance, for instance, then the officials of other pertinent nations have a duty to embrace and follow that set of principles. The Universal Declaration of Human Rights declares this in the final "whereas" of its preamble: "A common understanding of these rights and freedoms is of the greatest importance for the full realization" of the rights the declaration states." This salience principle has an obvious snow-balling effect. As more nations recognize a duty to accept and follow widely accepted principles, those principles, thus even more widely accepted, have increased moral gravitational force.

In the 17th century, salience was provided by two traditions. The first was the fact and political force of Christianity. The Westphalian system was European and Europe was Christian. Church teaching, so far as it was pertinent, could be treated as the spine of developing international law of, in this example, the rules of jus ad bellum and in bello.

The second was the idea, inherited from imperial Rome but put to different uses, of a ius gentium: legal principles common to nations across the Westphalian system.[8] Early international law reflected both influences: of the natural law tradition developed through Aquinas and of the importance of principles widely shared by domestic legal systems – the latter idea fossilized now in paragraph (c) of Section 38 (1) of the International Court Statute I quoted.

But the world emerging from World War II was very different. There was no longer a dominant religious tradition across the world and widespread secularism in Europe and North America would have negated the influence of any such tradition anyway. War had made the Soviet Union, and revolution later made China, both nations crucial to world order and both sufficiently different in culture, legal tradition and political ambition radically to diminish the usefulness of reliance on shared fundamental legal principles. The retreat from colonialism that left behind many new or newly independent nations made that reliance even less useful. Some new focus of salience was needed and was quickly provided in San Francisco.

The charter and institutions of the United Nations are best understood not as arrangements binding only through contract or on signatories but as an order all nations now have a moral obligation to treat as law. The obligation is created not by consent but by the moral force of the principle of salience as a route to a satisfactory international order surrounding individual coercive governments. Indeed, more generally, multi-lateral agreements setting out conceptions of such an order, like the Charter, the Geneva conventions, the genocide agreements and the Treaty of Rome establishing the International Criminal Court, are international law for all, not just their initial signatories, through that principle. It is therefore important to distinguish the force of, and the appropriate interpretive strategy for, such multinational treaties from those of agreements creating international organizations like the European Union and the WTO that are designed from the start for only a group of signatory nations and members they

[8] I have had the advantage of reading a discussion of *ius gentium* in a draft of Jeremy Waldron's new book, expanding his Storrs Lectures on the use of foreign legal materials in domestic courts.

themselves later admit, with institutional procedures that cannot sensibly be used outside that club.

In that way the salience principle explains the role of *ius gentium* in international law. It also helps to explain the domestic use of that idea: why the domestic constitutional courts of nations are (and should be) drawn to notice and to attempt to achieve some integrity with the domestic constitutional principles of other nations.[9] The international order that nations have a responsibility to seek is strengthened as the pertinent "general principles of law recognized by civilized nations" grow more uniform. In that way there is (and should be) mutual interaction between the international and the domestic laws of human rights.

We can generalize this point, and in so doing we find a better account of the sources of international law set out in Article 38 of the International Court Statute than positivism and the consent theory can provide. We noticed, earlier, that the consent theory made much of Article 38 circular and unhelpful. But the principle of salience supports the sources that are named in that Article, though with the important proviso I mentioned added. It supports them individually: it explains the demands of customary international law, for instance. The more general duty to improve the legitimacy of the international system, from which the salience principle flows, itself explains the idea of a *ius cogens*.

Salience explains the great popularity of Article 38 – the consensus among scholars that it correctly states the grounds of international law – in a further way as well. The article not only sets out the implications of the principle of salience but is itself a beneficiary of the principle. Its provisions are self-confirming: it contributes to international order to continue to treat them as sources of international law. Snow-balling works at that level as well. According to the positivist account that makes consent fundamental, these sources flow – imperfectly – from the very idea of law as based in consent. On the account I describe they flow instead from the moral demands on which the legitimacy of the Westphalian system depends. These are taken to be more fundamental than consent and not contingent on consent.

[9] Jeremy Waldron discusses that issue extensively in his book.

If the two jurisprudential accounts end in roughly the same view of the actual sources of international law, does it make any difference which we choose? Have I only marched up the hill, like the Grand Old Duke of York, and then marched down again? No, because, as I said, the major yield of any theory about the ground of international law is an interpretive strategy for international law. The consent account, I said, yields no helpful strategy. But the legitimacy account does. We should interpret the documents and practices picked out by the principle of salience so as advance the imputed purpose of confronting the dangers of the Westphalian system. The correct interpretation of an international document, like the UN Charter, is the interpretation that makes the best sense of the text given the underlying aim of international law, taken to be the creation of an international order that protects political communities from external aggression and protects citizens of those communities from domestic barbarism. These goals must be interpreted together: they must be understood in such a way as to make them compatible.

V

I have now several times mentioned, as an example of an important interpretive question, one issue. It has been very widely assumed by distinguished international lawyers, including the late Tom Frank, that no humanitarian military intervention is legal under international law unless it has been approved by the Security Council. But the Security Council is often crippled by the power of each permanent member to veto even otherwise unanimous decisions. That power distorts what should be an essentially legal decision – does a violation of human rights justify intervention? – by questions of political and economic advantage. A permanent member might, for example, seek favorable economic treatment in Africa by promising its veto in aid of dictatorial regimes.

On occasions, however, states or groups or international organizations have intervened in force without Security Council authorization. The Iraq invasion is a minatory example. The United States did claim that it had Security Council permission– as did the United Kingdom, in spite of its Attorney General's initial opinion to the contrary. But that claim was spurious. The invasion is, I believe, widely condemned in the wider international community. But another example, which I believe is generally approved, was the intervention by NATO forces in Kosovo. No one claimed Security Council authorization.

Tom Frank declared this action illegal because it lacked that authorization. But he also declared the intervention morally necessary. He called it a morally mandatory act of international civil disobedience. That is a dangerous description, particularly from an eminent international lawyer. International law is fragile, still nascent and crucial: the proposition that a sense of moral duty can justify acts in violation of international law threatens the necessary development of that institution.

I mentioned another possibility: that the popular interpretation of Article 2 (4) of the United Nations Charter, on which Frank relied, is mistaken. Perhaps we should understand its prohibition to be limited to the use of violence to seek territorial or regime change so that unilateral military action to protect a population from genocide or other crimes against humanity is not excluded. We might argue to that conclusion in several ways. We understand the "Purposes of the United Nations" cited in 2 (4) to be those that flow from the moral responsibility nations had to create that institution: the responsibility to protect people from the dangers of the Westphalian system. External aggression is one of those dangers, but internal terrorism is another and we can sensibly attribute protection from both dangers as among the United Nations' purposes. That understanding is strengthened by the General Assembly's early (1960) Uniting for Peace Resolution (often called the Acheson plan). The General Assembly:

> Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security. In any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

It is further strengthened by the international community's generally favorable reception to the Responsibility to Protect declaration of the International Commission on Intervention and State Sovereignty (ICISS) in 2001. The Commission's report stated:

> We have made abundantly clear our view that the Security Council should be the first port of call on any matter relating to military intervention for human protection purposes. But the question remains whether it should be the last. In view of the Council's past inability or unwillingness to fulfill the role expected of it, if the Security Council expressly rejects a proposal for intervention where humanitarian or human rights issues are significantly at stake, or the Council fails to deal with such a proposal within a reasonable time, it is difficult to argue that alternative means of discharging the responsibility to protect can be entirely discounted.

A "World Summit" of more than 170 nations in 2006 endorsed the spirit of the ICISS report in this language:

> [W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

This language did not recognize intervention that is not authorized by the Security Council, but it nevertheless bears on the interpretation of Article 2 (4) because it clearly supposes that a nation's sovereignty, or "territorial integrity," does not protect it from legitimate intervention in its domestic affairs.

I cite these developments to offer a case for an interpretation of the UN Charter, and of international law more generally, that would permit humanitarian intervention if the Security Council failed to authorize that intervention because one or more of the permanent members exercised a veto. I mean only to illustrate the style of argument that is made possible by the alternate account of the grounds of international law I have suggested. This supposes that international law is finally grounded not in the consent of nations binding themselves as an exercise of their unchecked full sovereignty but in the responsibility of people, to be exercised by their leaders, to fulfill the moral requirements on which the legitimacy of the system of otherwise sovereign nations is based. We might

ask: does the interpretation of the Charter that would permit intervention not authorized by the Council promote that goal? Does such an interpretation violate the principle of salience by ignoring a practice reasonably conducive to the practical implementation of that goal? If we answer the first question yes, and the second no, we have made a case that the international court I imagined should not declare such intervention illegal.

I have suggested reasons favoring that legal answer. There is a powerful counterargument: its name is Iraq. Any doctrine that would allow powerful nations to justify aggressive war as a protection of basic human rights boils with the danger of abuse. (The humanitarian justification was not offered by American or British officials in advance in the Iraq case, but it has been offered by former officials of both in retrospect, and could be expected to be offered much more often if established in international law.) This counterargument is powerful because it suggests that legal permission to invade for that purpose would not further the overall goals of international law and would prove massively divisive rather than a principle around which further consensus and salience might develop.

But now consider a somewhat less fanciful fantasy than my earlier assumption of an international court with compulsory jurisdiction and effective coercive authority. Imagine that the General Assembly of the United Nations has adopted a resolution with the following substance: member states are forbidden, acting unilaterally or in groups or regional organizations, to threaten or use military force without the authorization of the Security Council, but not forbidden if the International Court, pursuant to its authority to issue advisory opinions upon the request of the General Assembly, declares that the actions of the regime against which force is proposed constitute crimes against humanity. [10]

Should we think that imagined General Assembly resolution ultra vires or otherwise invalid? The argument I suggested for a permissive interpretation of Article 2 (4) would support the resolution and the counterargument I described, about the danger of unilateral action, would be removed by the resolution itself. Crimes against humanity have been sufficiently well defined in other documents and international practice to provide a

[10] I do not use a more general description, such as "violations of human rights," because I believe that only certain violations are human rights justify military or even serious economic intervention or sanction.

satisfactorily clear standard for the International Court to apply in its advisory opinions, and to avoid a danger I described in my discussion of human rights in *Justice for Hedgehogs* – that intervention in the name of human rights could mean invading Britain to establish a bigot's right to hate speech.[11] Crimes against humanity have been defined in a variety of multi-lateral treaties including the Hague Convention of 1909 and in codification of the decisions of Nuremberg Tribunals following the second world war. I believe the most appropriate definition would be that of the Treaty of Rome, establishing the International Criminal Court. The treaty's explanatory memorandum states that crimes against humanity

> are particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings. They are not isolated or sporadic events, but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority. Murder; extermination; torture; rape, political, racial, or religious persecution and other inhumane acts reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice. Isolated inhumane acts of this nature may constitute grave infringements of human rights, or depending on the circumstances, but may fall short of falling into the category of crimes under discussion.

So, on the moralized approach to international law I am now defending, the resolution I imagine would not be ultra vires and action taken pursuant to that resolution would not be illegal under international law. Any sensible resolution would be much more elaborate, of course. It would no doubt provide for consultation with the Security Council and deny its permission unless the Council failed to act. It might revise the procedures of the International Court so as to expedite the advisory decisions called for. Or – a more radical idea – it might bypass the International Court altogether and create a special international court for this ad hoc purpose. I shall not try to explore the appropriate character of any such court. But any of these possibilities would establish a remarkable and important improvement in international law.

[11] See Chapter 15.

VI

I have so far dealt, cursorily, with responses through international law to the first two dangers imposed by the Westphalian system I described earlier. In a fuller version of this paper I hope to take up the latter two risks. But, for now, only two questions sufficiently broad at least to provoke reactions and, I hope, improvements.

First, imagine an international convention in which a great many nations, though perhaps not all the permanent members of the United Nations Security Council, agreed to a General Legislative Convention. This would authorize the United Nations to adopt legislation within the scope of its purposes addressed to global dangers requiring coordinated international action. Such legislation would be enacted if it received a majority of votes in the General Assembly, a majority of votes in the Security Council, and a majority of votes among the Permanent Members. Legislation so enacted would be submitted to the International Court of Justice which would apply principles of proportionality to determine whether such legislation was within the purposes of the UN properly construed or was essentially a matter properly left to national determination.

Second, imagine a debate about whether the institutions of the UN that would be so empowered are sufficiently representative so that the formula chosen for successive majorities would improve the participation of people everywhere in their own governance.

VII

You may be surprised by the free-wheeling character of the arguments I have been offering as arguments of international law. But remember that international law is very young: it was reborn in 1945. The arguments of famous judges in the comparable formative period of the Anglo-American common law, for instance – of Baron Bramwell, Edward Coke, and George Jessel – and those of some federal judges in the brave, halcyon days of *Swift* v. *Tyson* in the United States – might strike contemporary lawyers as equally free-wheeling. The constitutional arguments of John Marshall, who transformed a written constitution, and of Aaron Barak who made a constitution without a written one to transform, surprised many of their colleagues. If law is understood as a special part of political morality, and if it serves its community well, its doctrines will crystallize over

time. Its roots in morality will grow less prominent, though available when needed, in ordinary legal argument. That progress from principle to doctrine will signal its success. But a rigid separation between legal and moral argument in the development of international law would be premature now and would accelerate its practical irrelevance. We must free the subject from the torpor of legal positivism. We need, now, to nourish the roots not count the twigs of international law.

Consider legislation. Problems of representation. Don't need one-person, one-vote for legitimate international legislation. History of treaties.

Describe a treaty for legislation. Provides GA vote of nations whose population exceeds half together with both majority of SC and majority of permanent members. No one would have a veto power, but still a high hurdle. Would become binding.

Jurisdiction of such laws must respect proportionality. Cannot be solved at local level.

Questions. Could this be done without amending the Charter in a way that would require consent of every member? Or would it be an exercise of power that is in international law already?