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International Obligation and the Theory of Hypothetical Consent

Fernando R. Tesón†

Traditionally, the problem of the basis of obligation in international law has been framed in terms of the following questions: Why is international law binding? Why should states obey international law? Or, what is the source of the binding force, or the “reason of validity” of international law?² The question of obligation seems to many an important one, and distinguishable from the analogous question of the duty of obedience in domestic law, for this reason: under the doctrine of state sovereignty, if the nation-state is sovereign and independent, how can it possibly be subject to a higher authority, to a superior legal system?³ The issue also has relevance in light of the problem of cultural diversity. One could perhaps rely on some notion of common traditions, cultural identity, or shared values to explain and justify domestic political obligation.³ Relativists, however, believe that those elements are absent at a global level. Individuals and national communities, they argue, have irreconcilable ethical views, and there is no valid transboundary moral reasoning which could settle those differences or establish the moral superiority of one set

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2. See, e.g., Triepel, Distinction du droit interne et du droit international, in R.C.A.D.I. 82-83 (1923).

3. Many political philosophers, liberal and communitarian, assume that political obligation is anchored in some form of common tradition or shared values. See, e.g., R. DWORKIN, LAW'S EMPIRE (1986) [hereinafter LAW'S EMPIRE]; M. WALZER, SPHERES OF JUSTICE (1983).
of values over the others. Therefore, it is thought, one may not rely on any shared values as a springboard for a theory of international obligation.\textsuperscript{4} From any of these perspectives, the question posed is one of fidelity to international law, of explaining the normative reasons why governments and other international actors owe allegiance to the law of nations.

In this article I make three related arguments. First, I argue that the traditional approach to the problem of international obligation is incomplete and much too simplistic. Drawing in part on the ideas of Ronald Dworkin, I suggest that rather than a question of fidelity to international law, the foundational problem is the determination of international law. Second, I consider and reject two theories of international obligation: the theory based on the concept of interdependence and the theory of actual consent of states. Third, I suggest a theory of international obligation based on human rights. This theory is drawn from the idea of social contract or rational hypothetical consent. While my thesis might be styled naturalist, it differs significantly from traditional natural law theories. At any rate, I will not attempt to examine in any detail competing natural law theories.\textsuperscript{5}

I. A Fresh Methodological Approach

International disputes very rarely take the form of one nation seeking to enforce its international legal rights against another nation asserting an entitlement to disobey international law on grounds, say, of self-interest. In the vast majority of international controversies, governments argue instead about what international law permits, prohibits or commands. Governments will very seldom claim the right to disregard international law, even when they believe that their most basic national interests are at stake.\textsuperscript{6} Thus, as Ronald Dworkin has pointed out in a

\textsuperscript{4} For a defense of this view, see T. NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES (1983).
\textsuperscript{5} For a detailed account of traditional natural law theories in international relations, see E.B.F. MIDGLEY, THE NATURAL LAW TRADITION AND THE THEORY OF INTERNATIONAL RELATIONS (1975).
\textsuperscript{6} For example, in Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (Merits Judgment of June 27) [hereinafter Nicaragua Case], the United States was not arguing that international law did not matter or that the United States national interest overrode its duty to comply with international law. Rather, the United States considered the decision invalid for lack of jurisdiction and radically mistaken on the merits; in short, an unlawful decision. See id. at 27 (the United States did not argue that international law was not relevant); see also Department Statement (Jan. 18), U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the I.C.J., DEP'T ST. BULL, 64 (Mar. 1985) (explaining United States disagreement with the Court's jurisdictional overreaching); Leich, Contemporary Practice of the United States Relating to International Law, 80 AM. J. INT'L L. 151, 163-65 (1986); Reis-
different context, the problem is not, as the traditional approach would have it, one of fidelity or obedience to international law, but rather of agreement as to what international law permits or prohibits. The problem is the determination of international law.

In advancing their competing claims, governments will seek to interpret treaty language, state practice, and judicial precedents in a way that puts their claims in the best possible light, just as advocates would do in a national legal system. This is different from asserting that governments will simply manipulate legal materials to advance their interest. If legal discourse in international relations is to be meaningful, nations must appeal to principles that transcend their national interest, that are intersubjective and impartial. States may not simply justify breaches of international law with claims based on national interest. A simple look at the attitude of governments toward international law shows that most of the time governments will not attempt to justify a breach of international law by alleging self-interested reasons; rather, they interpret international law in such a way that it is contested by other nations. In light of these considerations, the attempt to answer the problem of international obligation by an inquiry into the ultimate reason why states should obey international law tells only part of the story. International legal discourse has this peculiar and critical feature: it results from competing interpretations of institutional history, from “community processes,” and from contrasting appeals to publicly available institutional reasons. Either one gives up the search for neutral principles and concludes that there is no principled way of choosing between the competing readings of state practice, or one tries to elaborate a background theory of international law to help decide among the alternative interpretations. I choose

7. See LAW’S EMPIRE, supra note 3, at 1-44 (1986) (real theoretical disagreements about the law are about its content, not about fidelity to the law). By “theoretical disagreements,” Dworkin means disagreements about the substantive grounds of legal obligation.

8. A famous exception is Dean Acheson’s view that when basic national interests are at stake, international law loses all of its relevance. See Remarks by the Hon. Dean Acheson, 57 PROC. OF AM. SOC’Y OF INT’L L. 13, 14 (1963).


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the latter approach. A fruitful inquiry into international obligation does not try to explain why governments owe fidelity to the law, but rather attempts to construct second-order criteria, standards, and principles which will enable international lawyers (and governments, international courts, and other international actors) to choose the best, that is the most philosophically favored, among the competing interpretations of diplomatic history.11

Thus, in an important way, the problem of the basis of obligation has been wrongly posed. There is no real dispute about the proposition that nations must honor international law; rather, disputes are about what international law requires. Sometimes these disagreements are, in Dworkin's terms, "empirical disputes," that is, disputes about whether the particular acts that function as sources of law (custom, treaties) have in fact taken place.12 The most interesting disputes, however, are theoretical, relating to the actual grounds of international legal principles. The search for the appropriate grounds of international legal propositions is the search for appropriate substantive principles of international justice. Every bit of history has to be interpreted, and for that task the interpreter has to rely on some second-order principle. It follows that positivism, the view that international law can be ascertained by just examining some facts that have occurred in the past, or, as Dworkin calls it, "the plain-fact" view, must be called into serious question.

The methodology suggested here is quite close to the one adopted by Grotius in his discussion of the basis of obligation in international law.13 Grotius argued that the law of nations contained both a natural and a conventional element.14 A reasonable reading of Grotius' work is that the conventions (treaties and custom) must be interpreted in accordance with natural law. It is true that Grotius, in making his well-known distinction between law derived from reason and law generated by common consent, did not expressly address the question of the priority or rela-

11. I attempt here to expand some of the suggestions I made in F. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988) [hereinafter HUMANITARIAN INTERVENTION]. I follow the approach to legal argument suggested in LAW'S EMPIRE, supra note 3. The expression "most philosophically favored" is found in J. RAWLS, A THEORY OF JUSTICE 18 (1971) [hereinafter THEORY], from whom I borrow the essentials of my contractarian approach to international law.

12. See LAW'S EMPIRE, supra note 3, at 4-6.

13. Of course, Grotius' views should not affect the persuasiveness of my argument. However, given the reliance upon Grotius by many positivists, and given Grotius' preeminent place in the history of the discipline, a short digression seems appropriate.

14. See H. GROTIUS, DE IURE BELLI AC PACIS 23-24 (F. Kelsey trans. 1925) (1646). As Quadri points out, this duality or eclecticism in Grotius has enabled both positivists and naturalists to invoke his authority in support of these inconsistent theories. Quadri, supra note 1, at 605.
tionship between the two. Many commentators, however, agree on the interpretation of Grotius given here, namely that both systems of law, natural and conventional, are to be used in determining international obligations.\textsuperscript{15} Even scholars who interpret Grotius' definition of international law as referring only to the consent of states concede that the Dutch Master conceived of natural law (with the concept of "human societas" or natural kinship among men) as informing the "positive" law of nations.\textsuperscript{16}

My own view is that the importance of the Grotian distinction between the law of nature and law derived from common consent has been overstated. It seems that all Grotius was trying to say is that many detailed or technical rules of international law cannot be logically derived from the principles of the law of nature, and therefore must be attributed to consent alone — a harmless point Hart and others have made as well.\textsuperscript{17} What Grotius seems to be saying is that there is the law of nature derived from reason, there is the practice of states (i.e., diplomatic history), and that often the rules formed through state practice could not have been logically derived from the law of nature. He was not, in my view, suggesting that natural law is irrelevant in interpreting state practice, nor, more radically, that state practice may supersede the law of nature.\textsuperscript{18}

Following this Grotian-Dworkinian view of international law, then, there are on the one hand "conservative" jurisprudential principles that argue for deference to relatively uncontroversial interpretations of institutional history (i.e., state practice and treaties).\textsuperscript{19} On the other hand, there are substantive principles derived from a theory of international

\textsuperscript{15} See J. Brierly, \textit{supra} note 1, at 10 (for Grotius, natural law is systemic to international law, and so consent can never be the sole basis of obligation); see also N.C. Chan, \textit{La philosophie du droit international en France depuis le XVie siècle} 10-11 (1940); H. Wheaton, \textit{Elements of International Law} 35-37 (1836).


\textsuperscript{17} Grotius writes: "For whatever cannot be \textit{deduced from certain principles by a sure process of reasoning}, and yet is clearly observed everywhere, must have its origin in the free will of man." H. Grotius, \textit{supra} note 14, at 24 (emphasis added). See also H.L.A. Hart, \textit{The Concept of Law} 223-224 (1961) (showing that many international legal rules have a morally indifferent character and therefore cannot be inferred from morality); D. O'Connell, \textit{International Law} 6 (1965).

\textsuperscript{18} See H. Grotius, \textit{supra} note 14, at 40 (law of nature is unchangeable). Chan rightly points out that subsequent commentators departed from Grotius' eclectic and moderate position, emphasizing either its voluntarist or naturalist dimensions. See Chan, \textit{supra} note 15, at 10.

\textsuperscript{19} See R. Dworkin, \textit{Taking Rights Seriously} 36-39 (1978). For a methodology of international relations that also borrows from Dworkin, see M. Frost, \textit{Towards a Normative Theory of International Relations} (1986), ch. 5. Professor Frost's own theory, however, differs radically from the one I suggest in this article. He defends a Hegelian theory of the state as the basis of international relations.
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justice, or international morality, that help interpret and explain the institutional history both generally and in the harder cases. Those two sets of principles (the "deferential" and the "substantive") may, of course, pull in different directions. What international lawyers attempt to do is to put diplomatic history in the best possible light. For my purposes, preferred interpretations of history are those that adequately explain all relevant features of an event or situation. An explanation is adequate when two conditions are met. First, the interpretation utilizes the preferred scientific, psychological, sociological, and ethical theories available. Second, the interpretation accounts for all relevant features of a situation; that is, rather than leaving important elements unexplained, it offers a coherent and integral explanation. To put state practice (diplomatic history) in the best possible light is to explain it descriptively and normatively in a way that makes sense in all relevant material and moral respects. Doing that requires a normative foundation of international law. The world community, therefore, needs a philosophy of international law; it needs a theory of international justice, both to illuminate the content of international law and to supply legal answers in those cases where the legal materials are silent.

Hopefully, the theory will also provide an answer to the central concern of traditional foundational theory: why states would comply with any international law in the first place.

II. Interdependence

The two classical theories of international obligation are natural law theory and the theory of the consent or will of states, commonly called

20. Dworkin writes: "[P]ropositions of law are not merely descriptive of legal history, in a straightforward way, nor are they simply evaluative in some way divorced from legal history. They are interpretive of legal history, which combines elements of both description and evaluation but is different from both." R. DWORKIN, A MATTER OF PRINCIPLE 147 (1985).

21. International lawyers have rarely been concerned with the philosophy of international relations. Among recent works on international justice by philosophers are C. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979); H. FAIN, NORMATIVE POLITICS AND THE COMMUNITY OF NATIONS (1987); and M. FROST, supra note 19.

22. Cf. Professor Franck's definition of international legitimacy: "Legitimacy [means] the quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process. Right process includes the notion of valid sources but also encompasses literary, socio-anthropological and philosophical insights." Franck, Legitimacy in the International System, 82 AM. J. INT'L L. 705, 706 (1988) (emphasis in the original). I do not quarrel with this definition as long as it is supplemented with a theory to help us decide which "literary, socio-anthropological, or philosophical insights" are properly factored into international legal propositions. I take it that Professor Franck is not suggesting that any insight will do.

23. See, e.g., E.B.F. MIDGLEY, supra note 5; Kunz, Natural-Law Thinking in the Modern Science of International Law, 55 AM. J. INT'L L. 951 (1961); Quadri, supra note 1, at 585-603; Verdross, supra note 1.
positivism. Before turning to an examination of consent as the basis of obligation, I shall discuss another possible foundational concept: interdependence.

Some writers have suggested that the concept of interdependence may explain international obligation. Wilfred Jenks, for example, described interdependence as

[a] principle of obligation sufficiently general and dynamic in character to be a seminal idea, which . . . can bridge the differences of tradition, culture and interest which divide the world . . . [Interdependence] furnishes a basis of obligation which is applicable to the wide range of different legal relationships . . . and can contribute to making a reality of the concept of universality of international law.

The idea of interdependence is rhetorically contrasted to the idea of independence or sovereignty, long considered as the primary normative concept from which the very notion of international law derives. Independence or sovereignty in turn leads naturally to consent as the basis of obligation. Independent states, sharing some common aims but having many diverse goals and interests as well, agree on principles, rules, and procedures to regulate their mutual relations; thus international law is seen as the result of implied or express agreement among states. Because states are sovereign or independent, their will, as expressed by custom and treaty, is the basis of their allegiance to international law. While states may share some substantive goals, the main thrust of international law making is the search for fair procedures and for the few

24. See, e.g., D. ANZILOTTI, COURS DE DROIT INTERNATIONAL 42 (1929); W. HALL, A TREATISE ON INTERNATIONAL LAW 1-7 (1924); M. KOROWICZ, INTRODUCTION TO INTERNATIONAL LAW 23-24 (1964); 1 L. OPPENHEIM, INTERNATIONAL LAW 15-19 (H. Lauterpacht 8th ed. 1955); G. SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW 4-7 (1965); G. TUNKIN, THEORY OF INTERNATIONAL LAW 113-33 (W.E. Butler trans. 1974); Corbett, The Consent of States and the Sources of the Law of Nations, 6 BRIT. Y.B. OF INT'L L. 20 (1925). The positivist idea is that binding international law originates only in custom and treaties. Positivists might differ as to whether custom is really consent. No positivist, however, would deny that custom is created by the acts of states, and in some sense, by their will (even if it is unconscious will, or "aggregate consent over time"). One form or another of positivism permeates the vast majority of international legal scholarship.


27. For a discussion of the conceptual link between sovereignty and consent, see T. NARDIN, supra note 4, at 210-20. See also S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . .").

basic principles that best guarantee the pursuit of diverse national interests or protect the states' "fundamental rights."\textsuperscript{29}

In contrast, the concept of interdependence directs our attention not to the opposition of interests or the clash of fundamental states' rights but to the unavoidable need for cooperation between states. The theory attempts to underscore the fact that even the most powerful states are no longer able to prosper or even subsist without the cooperation of others. Jenks does not develop this idea further, but one could say that interdependence thus defined has a double effect. First, it creates a \textit{prima facie} obligation on states, an obligation to advance something beyond, or in addition to, the national interest.\textsuperscript{30} States must further the welfare of others because all states are bound together in the same enterprise, that of common survival and prosperity. Based on this view, the proper way for governments to look at international law is to acknowledge that nations are inevitably dependent on each other and that they cannot advance their interests without accepting that interdependence. Second, the \textit{prima facie} obligation informs the interpretation of all international legal obligations. Thus, interdependence can be seen as an interpretive principle for deriving legal obligations in hard cases, as the underlying policy that animates every positive rule or principle of international law. In every controversy, governments or international courts should ask themselves what resolution would be most conducive to solving problems of cooperation.

This view, however, encounters substantial difficulties. One could say, perhaps, that interdependence is what makes states inclined to agree to international legal rules and principles in the first place. States voluntarily assume legal obligations (through custom and treaty) because they realize that they cannot pursue their interests or exercise their fundamental rights without the help of other societies. But then the basis of obligation would just be consent, even if what motivated states to consent in the first place was the realization of their interdependence. On this view, consent is the basis of the law of nations, although interdependence is still maintained as a prior motivation, or causal origin, of the agreement or customary practice. Interdependence thus becomes super-imposed and tautological, and consequently devoid of explanatory power. The theory can hardly provide a test for international obligation. Any international legal norm (customary or conventional) could be described as a result of

\textsuperscript{29} For a distinction between these two versions of consent theory, see \textit{infra} notes 48-51 and accompanying text.

\textsuperscript{30} See, e.g., Root, \textit{The Need of Popular Understanding of International Law}, 1 \textit{Am. J. INT'L L.} 1 (1907).
states' interdependence, but one would still need to determine in each case whether the actual acts constitutive of custom or treaty (the voluntary or consensual acts) had taken place.

The idea of interdependence needs to be refined if it is going to provide a non-trivial basis of obligation in international law. One could perhaps say that the degree of interdependence determines the kind and number of matters that states ought to feel obligated to agree upon — the substantive scope of obligation. For example, one could argue that the problems posed by scientific and technological innovation are such that they can only be solved by concerted action, by cooperation. Interdependence not only would determine the issues or problems in which states would have great interest, but also may create a \textit{prima facie} moral obligation to negotiate and seek the establishment of appropriate legal principles. These observations, while perhaps true, are irrelevant to the question of international obligation. It is one thing to say (uncontroversially) that growing interdependence has made it desirable or even necessary for states to agree to, say, a convention to control marine pollution. It is a very different thing to say that the fact of their interdependence somehow is the \textit{normative} basis of that obligation: What obligation? To protect the environment? To negotiate a treaty? Here again, the basis of obligation would be consent.

Maybe one could be more radical and say, like Hume, that the degree of interdependence determines the degree of binding force of international obligations — more interdependence, more intensity of interest, hence more stringent obligation; less interdependence, less intensity of interest, hence less stringent obligation. But this view of interdependence is highly problematic. Not only am I not sure about what the notion of \textit{degrees} of binding force is supposed to mean, but also, and more decisively, the view that particular obligations may depend on the degree of interdependence leads to unacceptable results. If interdependence is the basis of obligation in this sense, then states that depend less on others would owe a lesser allegiance to international law. To put it differently: if the basis of a state's obligation is only its realization that it depends less on other states, that obligation would decrease correspondingly as its degree of dependence decreases. Jenks apparently was aware of

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\item See, e.g., Jenks, \textit{supra} note 25, at 93-95.
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dthis, since he felt it necessary to warn that “interdependence implies obligations for the strong and the weak alike.”

The question of how much states depend on each other is an empirical one, so the mere assertion of interdependence as the basis of international law either says nothing (it just says that states, some more than others, depend on others for their prosperity or subsistence) or it makes legal obligation dependent upon the contingent degree of interdependence. For example, the United States is noticeably less dependent upon certain other nations than these are dependent on it. Is the proper conclusion that the United States may breach a legal obligation, to use Hume's words, “for a more trivial motive,” i.e., that international obligations are less stringent for the United States, at least in some relationships? Surely such a result is unacceptable. The existence or stringency of international legal obligations cannot be contingent in this way upon the degree of interdependence. It is one thing to acknowledge that different states may have different rights and duties defined, at least partly, by their power and influence (e.g., the right to a veto in the United Nations Security Council). But surely part of what the maxim of equality of nations means is that whatever the legal rights and duties of nations are, all nations, large and small, are equal before the law. This, in turn, entails the proposition that the law obligates all nations regardless of power. States do not have the option of ignoring their obligations just because their power and influence allows them to get away with it. To argue the contrary position would simply mean giving up the very concepts of law and obligation; part of what “obligation” means is that an obligee must comply regardless of power or status.

The difficulty does not end there. Not only can a low degree of interdependence motivate a state to ignore its international obligations, but a high degree of interdependence may have exactly the same effect. We have recently seen Western democracies respond in a hesitant, almost

34. Jenks, supra note 25, at 88.
36. See U.N. Charter Preamble, reaffirming “faith in the equal rights . . . of nations large and small.” See also Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28) at 121, 124, U.N. Doc. A/8028 (1970) (Under the heading "The principle of sovereign equality of States": "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political, or other nature . . . .")
37. I am indebted to Jeffrie Murphy for calling my attention to this point.
servile manner to Iran's unlawful threats and acts of terrorist violence, presumably from fear of losing trade partners or strategic allies. Most Western leaders apparently regard their nations as being so dependent on others that they end up departing from their international obligations, in this case the obligation to condemn the unlawful threats and confront the wrongdoers. It is not clear, then, that nations should be too interdependent; the will of just governments to respect the law (that is, to act justly) may be weakened by interdependence.

One could of course retort, again, that interdependence is the moral foundation of international law because it is the reason why states agree to international legal principles; thereafter, everyone is equally obligated regardless of the degree of interdependence. However, this revives the threat of tautology. Why does one need the concept of interdependence? Why not rely only on consent? To say that states agree to international legal rules because they depend on each other is to add nothing to the basis of obligation. At best, interdependence might be a useful (albeit vague) historical explanation of international law. To insist upon confusing causal origins with justification is to commit what logicians call the genetic fallacy. Thus, on this view of interdependence, the basis of obligation is simply the fact that states have agreed, for whatever reasons, including maybe the realization of their interdependence, to certain rules and principles. But the basis of obligation would then be the implied or tacit consent of states. I conclude that the concept of interdependence as a foundation of international law is either trivial or morally implausible, and therefore is unable to provide an independent basis of international obligation.

III. Consent

By far the most popular theory of international obligation is based on acts of states, on some form of national will, as expressed (almost) exclusively in customary and conventional sources. Even a casual glance at the international legal literature shows that what governments say and do is considered as the ultimate arbiter of international obligation. In spite of brief flirtations with natural law and other teleological theories of

41. See supra note 24.
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international law, reliance on the actual practice of states as the normative source, as the test, of international obligation, remains largely the norm in current international law scholarship. To be sure, there are understandable reasons for this view; I wish to show, however, why consent theory and other forms of positivism cannot withstand close scrutiny.

First, an important terminological clarification is in order. I will use interchangeably the words "consent theory," "voluntarism," and "consensualism" to refer to the theory according to which international law is to be found exclusively in the acts of nation-states, consisting for the most part in custom and treaty. In particular, I wish to sidestep the debate as to whether custom is really a form of consent. My critique will be addressed to any theory according to which binding international law is created exclusively by states.

The theory that consent (or the will of states) is the basis of international law traditionally has been called "positivism." This terminology is adequate insofar as one contrasts actual consent of states with natural law theory. The theory of actual consent is positivist in that it attempts to define "international law" (and thereby ground international obligation) only by reference to certain non-moral facts that have occurred in the past: the practice of states and the acts conducive to the conclusion of international agreements. Yet this identification is somewhat misleading, for there are at least two other theories of international obligation that are consensualist in an important sense yet cannot properly be called positivist. First, the theory of fundamental rights of states is also consensualist in an important way, even though it relies on some peculiar naturalistic premises. Second, theories of hypothetical consent of states, or international social contract theories, can hardly be called positivist in the sense described, since they do not rely on the actual conduct of governments but rather on what representatives of states would hypothetically agree upon in the state of nature or in an original position. Conversely, there is at least one famous positivist theory that expressly rejects consent as the basis of obligation, namely, Kelsen's pure theory of law. Therefore, "consent theory," "voluntarism," or "consensualism"

42. See, e.g., Verdross, supra note 1. See also M. McDougal & W.M. Reisman, supra note 9 (New Haven approach).
45. See infra note 49.
46. See infra notes 81-115 and accompanying text.
47. See infra notes 57-61 and accompanying text. For reasons that will become apparent, I assimilate Kelsen's theory to consensualism for our purposes.
seems a more accurate label for the view that the will of states (in some form) is the basis of obligation than does the traditional word “positivism.”

Consent theorists claim that international law is grounded in the actual will or consent of states, either aggregate consent over time (regional or universal custom) or express consent (treaties and other international agreements). There are two forms of consent theory, in the sense of actual consent of states. The first is the view that states consent from interest. They agree to treaties and customary practices in an effort to reach acceptable modi vivendi and compromises between their clashing interests. On this view, nations are in a state of nature, where might makes right, and, while pursuing only their national interest, they eventually subject themselves to international law. The second version of actual consent conceives of states as having fundamental rights (not just goals or interests), and agreeing by custom or treaty to limit them (including the use of force) for the sake of international cooperation. More precisely, states consent freely to limit their rights through international norms only to the extent necessary to protect those rights in the long run. The rules created are of two kinds: basic international legal principles, which amount to a “bill of fundamental rights of states,” and process rules, which permit states to settle their disputes and to create fresh law to pursue their interests. This idea has the added attraction of relying upon the notion of rights, as opposed to mere interest or preference. If it is true that states or national communities have fundamental rights, then it will be true that, in order to be binding on states, international law must embody those rights and must enable governments consensually to make further law within that rights framework. This will be true even if the content of those derivative rules is not itself determined by the content of fundamental rights.

The theory of actual consent, in either of its two versions, has unquestionable merit, which may help to explain its persistent popularity. As a general matter, it seems almost self-evident that if a person consents to

48. See supra note 24.
49. See generally J. BRIERLY, supra note 1, at 3-9; Alfaro, The Rights and Duties of States, 97 R.C.A.D.I. 95 (1959-II); Gidel, Droits et devoirs des nations, 10 R.C.A.D.I. 541 (1925-V).
50. Hans Kelsen has forcefully underscored the logical link between the “fundamental rights” theory and consensualism. See H. Kelsen, supra note 1, at 245-246. See also Quadri, supra note 1, at 609-610 (claiming that positivism is linked to state of nature and fundamental rights assumptions).
51. For example, whether coastal states ought to have rights to a territorial sea of 3, 4 or 12 miles is not derivable from any notion of the fundamental rights of the state. The fundamental rights, according to the theory, are embodied in fundamental principles of international law.
something, that is a sufficient reason for his being bound by his promise (absent fraud, substantial error, coercion, etc.). International law has well-developed (although not uncontroversial) rules about how and under what circumstances states do in fact express their will, both for the formation of custom and the making of treaties.\textsuperscript{52} Consent thus seems a most natural way of grounding obligation. Furthermore, actual consent as a basis of obligation in \textit{international} law is a form of positivism that has considerably more appeal than actual consent as a jurisprudential theory of \textit{domestic} law. In domestic law it seems to be the case that most laws are not strictly consented to by citizens. There is an element of heteronomy in domestic law, a sense that somehow the law is enacted by government officials even against citizens’ consent. Those officials also have the power and the ability to use force should citizens refuse to comply. The monopoly of force and relative centralization of political power within states, and the consequent institutional structure of courts, police, and governments, cast decisive doubts on whether actual consent can function as a basis for obligation in domestic law.\textsuperscript{53} In contrast, international law is not enacted or applied by centralized institutions; as the cliché goes, there are no international legislatures, courts, or police. What, then, could be more natural than to say that the only basis for obligation is the free consent of states? On this view, international law, unlike municipal law, is not externally imposed; rather, it is the result of the consent, freely given, of those to whom the law applies: nation-states.

In addition, the theory of consent shows a healthy distrust for traditional natural law theories and their persistent tendency to impose idiosyncratic rules on other nations. By emphasizing states’ consent, the theory serves as a reminder that international law is a human creation, a device contrived by men and women to solve human problems, and hence that every nation should have its say in what the rules should be. Consent of states also seems an elegant way of circumventing the problems of cultural diversity mentioned above.\textsuperscript{54} If moral reasoning cannot validly extend across borders, consent theory directs us to the only way in which nations with hopelessly irreconcilable moral, political, and social systems can subject themselves to higher authority. Finally, in


\textsuperscript{53} Of course, a nation in which law-makers are democratically elected comes closer to a consensual society than does a nation in which those officials are not elected. \textit{See generally THEORY, supra} note 11.

\textsuperscript{54} \textit{See supra} notes 3-4 and accompanying text.
the best tradition of positivism, consensualism provides a test for distinguishing genuine from spurious, as well as legal from moral, rules of international law. In Dworkin's terms, the theory furnishes a pedigree test for governments, diplomats, foreign offices, international courts, and international lawyers. If the alleged rule can be traced back to some form of consent (custom or treaty), then the rule is part of the system. If it cannot meet this test, then it will not be an international legal rule, even though it may lay the foundations for an emerging customary practice.

Defenders of voluntarism have been able to respond to their critics by making some amendments and accommodations. For example, to the critique by Kelsen and others that many states are bound by international law even though they have never consented to its rules, the defenders of voluntarism respond that the theory does not require each state's express consent to validate every rule that is binding upon it. They divide consent into two types: aggregate consent of the community of nations as a whole over time (custom), and express consent (other forms of agreement). For a new state to accede to the community of nations is for it to agree to the normative practices of that community, even if the state has not, and could not have, consented to each one of the community's rules. This response is all the more powerful when one considers that Kelsen's own proposal, the theory of the basic norm, does no more than validate customary consent. Kelsen's famous basic norm has no independent normative grounding. One is simply asked to "presuppose" that states ought to behave as they have customarily behaved, which is almost exactly the assumption of consent theorists. The only difference is that for Kelsen pacta sunt servanda is a customary rule so that, logically, treaty is subordinated to custom. But the main tenet of consent theory is left intact: the basis of international law (the reason for its validity) is a hypothetical presupposition that custom (which can be described in some sense as a form of aggregate consent over time) is binding. Kelsen in turn derives the validity of treaties from the customary norm pacta sunt servanda. All that Kelsen's theory proves is that custom is not

55. See, mutatis mutandi, R. DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1978).
56. The convenient "pedigree" term, coined by Dworkin, is used by Professor Franck in his discussion of legitimacy. See Franck, supra note 22, at 725-35.
57. See H. KELSEN, supra note 1, at 447-448.
58. See id. at 556-65. Kelsen's basic norm of international law reads: "States ought to behave as they have customarily behaved." Id. at 564. It is obvious that, if custom can be described in some sense as a form of consent or acquiescence, Kelsen's proposal does not differ from consensualism.
59. Id. at 564.
60. Id. at 445-446.
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strictly a form of treaty. Even Kelsen would not deny that custom originates in acts of states or in their will; indeed, that is precisely the definition of custom. So while Kelsen’s positivism is in many important respects a significant improvement over prior consent theories (and is even directly at odds with a “fundamental rights” version), his pure theory of law can be assimilated to the theory of consent for present purposes. For Kelsen, too, international law is created exclusively by the acts of governments.61

IV. A Critique of Consent Theory

Let us first address the “fundamental rights” version of consent. This theory presupposes that states have some fundamental moral rights (usually derived from the idea of sovereignty or state autonomy) and that it is precisely this feature that identifies consent as the sole proper source of international obligation.62 If a state is free, or autonomous, or sovereign, it can only be obligated through its voluntary submission, that is, through agreement. The result would thus be a type of international social contract, where states agree to principles of international law that preserve the states’ rights except to the extent that a reduction of those rights is needed to have minimal international cooperation. A consequence of this view is that international law ought always be interpreted in a way favorable to the rights of the state (e.g., in doubtful cases, the presumption should be that states are free or sovereign).

But this idea, popular and widespread as it is, is indefensible. To say that a state has fundamental moral rights is to use rights language completely out of its original and proper context. This view presupposes the state’s status as a moral being analogous to a person, capable of holding rights just as individuals hold rights.63 But states are not persons in precisely the sense in which personhood is crucial to the idea of rights. Rights are grounded in individual autonomy. To refer to individual rights is to allude to the sphere of autonomy and choice that individuals retain after they have agreed, or would ideally agree, on the structure of civil society.

61. For a detailed analysis of Kelsen’s theory of international law, see J. Puente Egido, La Teoría Pura del Derecho y la Ciencia del Derecho Internacional 48-90 (1962).
62. For an unexpected judicial revival of this view, see Nicaragua Case, supra note 6, at 133. I have elsewhere argued that the reasoning of the Court in this case illustrates the type of moral and conceptual fallacy criticized in the text. See Tesón, Le Peuple, C’Est Moi! The World Court and Human Rights, 81 Am. J. Int’l L. 173, 181-83 (1987); Humanitarian Intervention, supra note 11, at 201-27.
63. I have elsewhere called this metaphor “The Hegelian Myth.” See Humanitarian Intervention, supra note 11, at ch. 3.
To be sure, it is possible to talk about rights of corporate entities. In domestic corporate law one speaks this way when postulating a legal entity for particular purposes, usually (but not exclusively) for economic or commercial purposes. As legal philosophers have argued, those entities are best described as organizations within the state. Part of what this means is that the corporation is subordinated to the state's constitution. If that constitution protects human rights, for example, the individuals who create the corporation may not transfer powers to it which infringe upon those constitutional rights. Thus, a legally (and morally) justified corporate entity is one that has a lawful purpose and acts within constitutional boundaries, especially with respect to the protection of individual rights.

The problem with the state is that it, alone among corporate entities, is the organization created precisely (although maybe not exclusively) for the purpose of protecting individual rights. The state could be thought (perhaps not exclusively) as an agency contract between people and government, what some writers have called a "vertical contract." Under that agency agreement, the government is entrusted with political power to enforce the rights of individuals. A necessary corollary of this is that the government itself does not hold any autonomous rights. From an ethical standpoint, states are created to implement social cooperation within a framework of respect for the rights of all persons. A morally justified state is a state in which the sphere of individual autonomy is relatively large and in which people enjoy more extensive human rights. A morally justified government is one that faithfully enforces this social contract and does not overstep the constraints imposed by human rights. It follows that the international "rights" of a state have to be congruent with, and in many cases directly derived from, the rights of individuals, given that the rights of individuals justify a state in the first place. When the "exercise" by governments of the international "rights" of the state (e.g., the "right" of a state to "choose" its "political system") is used as a justification for tyrannical practices, those governments forfeit their legitimacy, because they betray the rationale that justifies their existence in the first place. In other words, only governments that respect human rights are entitled to the protection afforded by international law.


65. For a brief discussion of alternative justifications of the state, see infra notes 103-06 and accompanying text.

The Lockean view of international law (whereby states, not persons, have fundamental rights and agree in a state of nature to principles of international law) does not work simply because persons are not analogous to states.\(^6\) On the Lockean-statist view, one would have to say that a state would retain those rights not delegated to the basic structure of the international law system. But these so-called states' rights are not comparable to individual rights. They do not refer back to notions of individual autonomy and respect for persons. On the contrary, because international acts performed by the state are actually the acts of a government, once we pierce the corporate veil we see these so-called states' rights for what they are: prerogatives of governments. That is why the alleged fundamental rights of states consist almost exclusively of "hands-off" rules, such as sovereignty, nonintervention, and the "freedom" of states to pursue their own social, political, and cultural "development."\(^6\)

68 I am even tempted here to risk a conspiratorial explanation of why this view of international law is so pervasive. Governments are interested in incumbency, in preserving their power and privileges. It is only natural, therefore, for them to emphasize the moral standing of the state in international relations through a strict application of principles such as nonintervention and self-determination. They (the rulers) are the state, they embody and represent the "people" who "freely determine themselves."

It seems fairly obvious that the way in which governments have conceptualized international law has tended to maximize governments' prerogatives. What is less obvious is why scholars have followed suit so passively.

The analogy here is presumably that just as individuals are to be thought of as autonomous beings, states can be thought of as autonomous corporate entities. This analogy is not only conceptually indefen-

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67. Writers who argue that the analogy can be made have, in my view, overlooked the central place that normative notions of autonomy have in our thinking about rights. For example, one author, after recognizing that "it seems extremely difficult to understand what it means to transfer the free and equal moral status of persons to national societies," nevertheless espouses a collectivistic or organicist theory of the state (drawn from J. Maritain). See Skubik, Two Models for a Rawlsian Theory of International Law and Justice, 14 DENVER J. INT'L L. & POL. 231, 241-42 (1986).

68. For example, the famous Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, supra note 36, is plagued by such principles. In contrast, human rights and fundamental freedoms are mentioned only once, and only in connection with the duty to "co-operate." See id. at 123, under the title "The Duty of States to Co-Operate with One Another in Accordance with the Charter." In my view, this government-oriented declaration ought to be revised. Respect for human rights should be given the independent and fundamental status that it enjoys today in international law.
sible, but also is morally perverse in two ways. First, it glorifies government and state power at the expense of the human rights of citizens of the state, that is at the expense of rights in their original sense. The “freedom” of the state (for example, to adopt any political system it wishes to adopt) means, more often than not, the demise of individual freedom.

Second, the analogy enshrines and justifies the pursuit of the so-called national interest at the expense of the rights of persons in other states. If human rights are to have some meaning, it has to be that of a side-constraint to the pursuit of policies, not only by a citizen’s own government, but by foreign governments as well. The violation of individual rights by foreign powers, for example by mining foreign harbors, cannot be justified by saying that the aggressor has exercised a “fundamental right” of the state (e.g., self-preservation). Defenders of this view cannot escape this objection by claiming that the mining of harbors is after all only a violation of the rights of a state, not of an individual. For all these so-called infringements of rights of the state can and should be analyzed in terms of violation of individual rights. Because states are created for the sake of life and liberty, the idea of states’ rights under international law makes conceptual and ethical sense only if one treats it as congruent with, and often derivative of, the basic and original notion of individual rights. Similarly, to speak about the rights of corporations makes sense only if one sees them as subordinated to a constitution which in turn protects individual rights.

Another way of stating this view is in Kantian terms: the state is instrumental, while the individual is not. Persons are ends in themselves, and through a Kantian view of morality we regard this quality (human dignity, respect for persons) as a cornerstone of the idea of human rights. But states are merely instrumental: they are created to solve problems of coordination in social cooperation within the framework of respect for persons. Therefore, whatever international rights governments hold, as representatives of persons, these rights are instrumental and subordinate, not fundamental or basic.

Considerations of philosophical consistency support this conclusion. If our constitutional moral-political theory ranks human rights as basic, then prima facie our international moral-political theory should likewise rank human rights as basic. Realizing that states are corporate entities created to protect individual rights and that governments are mere moral

69. For a positivist critique of “states’ rights” theory, see J. Brierly, supra note 1, at 5-7 (states cannot have rights independently of an objective legal order).
agents of citizens, one may brush aside the objection that international relations must be different because the actors are governments and international organizations rather than individuals. Individuals create the state and entrust the government with certain tasks, including the conduct of foreign relations. In turn, these governments create rules and principles of international law. Just as constitutional law protects individual rights, international law should be derivative or at least congruent with the moral basis of the state, and particularly with the limited moral prerogatives of government. Human rights are an indispensable part of international law. The mistake of dominant international legal thinking is that the transition is made from domestic moral reasoning to international moral reasoning by postulating the concept of state sovereignty as analogous to personal freedom, arguing from there that states are free. Individual freedom is thus circumvented and brushed aside. The correct view is that our moral reasoning leading to principles of international justice cannot be disengaged from the same normative assumptions (respect for individual rights) present in our reasoning leading to constitutional principles for civil society. Therefore, if our theory of domestic justice yields human rights as basic in one way or another, the presumption should be in favor of incorporating those rights in our account of international justice.

Similar basic objections can be raised against the theory of consent of states based on interest rather than fundamental rights. On this view, states create law by their consensual acts (through treaty or custom) even though the states have no pre-existing natural rights. Yet again, the intuition that consent creates obligation is based on notions of individual free will and responsibility. The reason why a contractor should be bound by a contractual promise is that he chose freely, that he indeed had a choice, and that he was aware of the consequences of that choice; in short, that the contractor is (to a large extent) morally autonomous. But it is clear that governments are not autonomous in this sense. Their moral existence is vicarious, ephemeral, and subordinated. They are, in the most important ethical sense, our servants. If this analysis is correct, it seems strange to say that the consent of governments should be entitled to special normative deference, just because they happen to be in power. There is no discernible moral principle behind the idea that the consent given by rulers is morally binding, just because they are the rulers. It is a mere assertion.

70. See supra note 24 and accompanying text.
Again, one must see if there is any analogy with individual consent as the basis for contractual obligation. That analogy fails once more. The notion of autonomy, itself the basis for the moral rationality of consent, can only be predicated of individual persons. Autonomy does not make sense, morally or conceptually, when predicated of governments or states, unless there has been an actual delegation of the right to consent, that is, unless the government has in fact been democratically authorized by citizens to act on their behalf. So while this version of consent theory does not presuppose states' "fundamental rights," it does presuppose that the state is a valid consenting agent; and so the same objections raised against the "fundamental rights" version are in order here. For a theory of consent to be compelling as the basis of international obligation, the consenting agent has to be morally entitled to consent. It is plain that some governments are so entitled and some are not. It just cannot be presumed (as it has been by traditional international legal theory) that all governments are automatically empowered to represent the interests of the citizens over whom they rule. Morally justified governments are those that respect human rights and genuinely represent their people. Only where delegation of powers has actually occurred is one able to say that the government's acts are acts "of the state" in a moral sense.

Of course, sometimes legitimate governments have to negotiate with illegitimate governments. Such a situation is similar to a case where the police must negotiate with outlaws or criminals. Perhaps agreements reached under such conditions are binding if they further the human rights cause of the oppressed populations. But in any case they are provisional; there is no general moral obligation to honor agreements with unrepresentative governments. For example, there may now be a need to deal with the unrepresentative government of South Africa. But it seems clear, both in law and morality, that whatever agreements are reached are to be interpreted against the backdrop of human rights. If the government of South Africa attempted to commit the South African people to international obligations that are not in that people's interests, then the agreement's binding force would clearly collapse. This analysis applies also to subsequent legitimate governments. For example, under the theory here defended, it is at least doubtful that a democratic government is under an obligation to repay the foreign debt incurred by a previous unrepresentative government.

71. I do not need, for present purposes, to prejudge the different ways in which such consent may take place.
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It will be useful to recapitulate what I have said so far about voluntarism. Voluntarism proposes a simple test of consent. Binding rules will be those that states have consented to in some way or another, rules and principles that can be traced to the will of states as expressed by their governments. Yet there are three major problems with consensualism as the basis for obligation. The first is that even if one can identify norms that states have consented to (such as particular treaties or custom), those rules and principles need to be interpreted, as explained above, in light of appropriate principles of justice. International legal obligations cannot be determined solely by reference to what states have consented to in the past. What custom and treaty language mean has to be determined in accordance with principles that transcend consent itself.\textsuperscript{72} Hard cases in international law cannot be solved by pointing to certain facts that have occurred in the past (i.e., state practice and treaty-making acts); we need to understand their meaning, or rather to assign normative meaning to those facts. We need a theory of international justice that will guide us in determining the content of international law. Indeed, the determination of when a customary rule is valid necessitates a reliance on a second-order principle. We cannot just “look” at state practice, at history, to find or discover the customary rule. History is read, evaluated, and interpreted.\textsuperscript{73} Take, for example, the situation where state practice is inconsistent or fragmented.\textsuperscript{74} Interpreters (e.g., international courts) must make sense of that practice. They must maze through government statements and intentions, and the multiple and complex components of international incidents. Yet the interpreters cannot just infer a normative proposition from the pure description of diplomatic history. Voluntarists believe that the interpreters should not go beyond what government elites have expressed as their normative attitudes towards state practice. But that in itself is a normative proposition, not an objective assessment of state practice. So the debate between voluntarists (and other positivists) and natural law theorists is not a debate between advocates of an “objective” study of state practice and advocates of “value-oriented” determinations of international law. It is a debate about the proper normative theory of international law, a truly ethical debate. The voluntarists’ philosophy contains just one principle: interpret the practice in light of what ruling elites believe the practice means. Natural law

\textsuperscript{72.} See supra notes 6-12 and accompanying text.
\textsuperscript{73.} See HUMANITARIAN INTERVENTION, supra note 11, at 11-15.
\textsuperscript{74.} See, e.g., Nicaragua Case, supra note 6, at 108-10, where the International Court of Justice acknowledged that practice with respect to intervention had not been consistent.
theorists attempt instead to instill into international legal discourse the richness of philosophical insight.

The second problem is the degree to which and the sense in which governments can be valid consenting agents. There seems to be no justification for declaring that rules of international law are binding if, and only if, they have been consented to by governments of some kind. Normally, rational consent by autonomous persons provides a sufficient basis for obligation. But, as I observed, many governments are not entitled to represent their citizens, and thus the notion of “state consent” is suspect. Traditional international law theory has unjustifiably overlooked the crucial moral significance of the agency relationship between government and people, in its double form of respect for basic human rights and genuine political representation.

The third problem with consensualism is of a general nature: why would any consent by governments, even legitimate ones, be binding? Suppose states consented to immoral things, such as acts of state terrorism or suppressing freedom of speech worldwide. Even in those cases where consent is given by morally legitimate governments, the international legal rule agreed to may infringe individual rights (just as legislation enacted by a legitimately elected legislature may infringe constitutional rights). It seems that, unless one adopts a radical moral skepticism, one would still have to rely on an independent moral standard for legal obligation. This, of course, is the point repeatedly made by various theories of natural law. Quite simply, states might consent to rules that are plainly immoral and that therefore are not entitled to allegiance.75

The notions of state consent and states’ fundamental rights, then, acquire a new meaning when placed in their proper ethical perspective. Governments are simply moral agents of people. Their rights qua governments are defined and circumscribed by this essential agency dimension. Such is the proper place that states and governments have in a theory of international law. If this analysis is accurate, the only way actual consent (and its close relative, “fundamental rights of states”) can be partly rescued is to make consent congruent with justice.

Accordingly, I suggest that customary or conventional consent given by a government is binding upon the state if, and only if, two conditions are met: the government is legitimate, and the rule or principle consented to is not trumped by basic principles of international justice, most particularly

75. Mircea Djuvara made this point fifty years ago. See Djuvara, supra note 1, at 500.
human rights. A legitimate government is one that generally respects human rights and is genuinely representative.

I should emphasize here that, once human rights are guaranteed, the exercise by (legitimate) governments of the rights that derive from their international personality is perfectly beneficial and morally defensible under a human rights-based theory of international law. I am not suggesting that talk about rights of the state is utterly nonsensical. I am arguing instead that such talk acquires meaning only when we do not lose sight of the fact that the original purpose of states is to protect individual rights, that governments are mere moral agents of the people, and that therefore governments do not enjoy any independent international moral standing.

The next step is to suggest a theory of international justice, an explanation of why human rights are preeminent. A possible avenue is to explore theories of rational, as opposed to actual, consent. This is done below.\footnote{See infra notes 81-115 and accompanying text.}

V. The Problem of the Dual Role of Governments

We can perhaps better highlight the need for a theory of international justice by focusing on a central problem of international law and morality, that of a government’s conflict of roles. What do we mean when we talk about international rights and duties of states? Since there is no “state” separate or different from a collection of individuals, to say that nation A has a duty to do X means that some individual P has, in his capacity as an official (agent) of nation A, a duty to do X.\footnote{See H. Kelsen, supra note 1, at 194-220. See also J. Harrison, supra note 33, at 230-31. Obvious as this proposition seems, it has long been ignored by the great bulk of international law writers, who insist on conceptualizing international law in terms of duties and rights of states. While this way of speaking may be a convenient shorthand, it often obscures the essential truth that law, including international law, is created for, and regulates the conduct of, individuals.} To put it more precisely, the internal law of nation A determines under what conditions P has the power to perform the class of actions that, according to international law, would be considered acts of the state, and consequently regulated by substantive international legal norms.

If this is accurate, then there arises an ethical issue which is unique to international law. I can assume that part of the job description of a representative of the state (say, the President or the Secretary of State) is that he has the duty to advance the interests of his fellow citizens. By
advancement of interests I mean maximization of preferences. That is what representatives and diplomats are supposed to do and is the purpose for which they are hired. This duty is moral as well as institutional. Part of what I mean by good government is government in the interest of the people, and not in the ruler's own interest. So someone who is appointed to conduct foreign relations is guided and constrained by the duty to advance the interests of the citizens of the state he represents.

But there is a dark side to this healthy liberal limitation on the powers of the sovereign. Just as most people conceive of governments as being constrained in their actions by their institutional role, many believe that governments have, by virtue of that same institutional role, license to do things that would be abhorrent if performed by individuals, such as waging aggressive wars, when those actions advance the perceived interests of the citizens. This is the core of Hume's idea that it is easier to condone immoral acts performed by governments in the conduct of international relations than immoral acts committed by individuals within the state.

But this view, popular as it may be in many circles, is highly problematic. The duty to advance the interests of the citizens is not the only moral duty the state official has. A complete description of the official's task includes the acknowledgement that there are principles and rules of international law and morality which act as a guide and constraint on the pursuit of the national interest. The official is thus under a moral obligation to conduct foreign relations in conformity with international law and justice. Of course, it is possible to analyze this obligation in terms of the first one. One could say that the state official has a duty to obey international law because it is in the interest of his fellow citizens that the nation be perceived as law-abiding (i.e., observing international law increases the nation's prestige). This, however, is immaterial for our purposes. The main issue here is that the state official will experience a conflict of moral duties prompted by his dual role of advancing his people's interests and having his conduct normatively constrained by international law. The "motive" for breaching international law thus would not be a trivial one, but rather the primary moral reason that justifies the existence of governments in the first place: the maximization of the well-being of the citizens. The main issue of international political morality,

79. See the insightful account of this duality in Nagel, Ruthlessness in Public Life, in PUB-LIC AND PRIVATE MORALITY 78-79 (S. Hampshire ed. 1978).
80. See D. HUME, supra note 32, at 567-69.
then, concerns the sense in which international law can trump the pursuit of national interest, when such interest is itself based on democratic principles.

This real moral conflict can be resolved only by appealing to a unified theory of domestic and international law, one that would coordinate the internal and external demands that justice makes on governments so that those demands are coherent. This theory of justice must provide rationales for state officials who must decide on a course of action when external and internal duties seem to pull in different directions.

VI. Hypothetical Consent

I frame the foundation of international law in terms of social contract theory, that is, in terms of rational hypothetical consent. If actual consent cannot lay the foundation for international obligation, perhaps we should give special foundational status not to any consent, but only to rational consent.81 We want to give allegiance to principles of international justice that would be agreed upon in a fair bargain, in an original position where constraints would be introduced so as to bring about an agreement which is fair to all. The use of models of ideal rationality of hypothetical consent in international law is well overdue.82 In a sense, the move from actual to hypothetical consent is a shift from positivism to natural law theory in its social contract version. For one would no longer say that the consent of states is the basis of obligation but rather that international law (including instruments and practices to which states have actually consented) must be seen and interpreted in light of the principles of international justice that would result from a hypothetical, original contract. Here I shall suggest a starting point for thinking about international law in this way. I can only sketch the results which I think the theory would yield. My suggestions will certainly have to be further refined, elaborated, and developed in several directions.

A theory of hypothetical consent as the basis for international obligation maintains that just international principles are those that would be agreed upon by rational agents in an original position.83 The situation thus imagined is characterized as one which provides every party with the opportunity to participate fairly in the agreement. This conception

81. This idea, of course, may be traced back to Kant and has been forcefully revived in recent philosophical literature. See Theory, supra note 11; D. Gauthier, Morals by Agreement (1986). A neo-Kantian view of international obligation can be found in Djuvara, supra note 1, at 554, 574-603.
82. The exceptions are Skubik, supra note 67, and Pogge, Rawls and Global Justice, 18 Canadian J. Phil. 227 (1988).
83. See Theory, supra note 11, at 11-22.
raises a number of difficult issues. What is meant by rational agents? Representatives of actual states? Representatives only of just states? Or individual persons agreeing to a global scheme? (With such agreement including whether or not to have states at all!) Most importantly, which international principles would be agreed upon by the parties in the original position? How do current international law and practice fare under such principles?

The most famous and influential theory of hypothetical consent, of course, is John Rawls' *A Theory of Justice*. Rawls argued that the international original position would be one where state representatives would negotiate without knowing what state they represent. The representatives' ignorance represents Rawls' well-known "veil of ignorance." According to Rawls, the parties would choose the familiar international legal principles of equality of states, nonintervention, and nonaggression. I have discussed elsewhere at some length the difficulties with Rawls' position, especially with respect to the rule of nonintervention. I argued there that (1) parties in the original position would not be representatives of states, but individuals speaking for themselves; (2) the first and most important principle of international law and justice that the parties in the original position would establish is that of the sacredness of human rights, rather than the priority of nonintervention, self-determination, or similarly state-oriented principles; (3) in light of the above, the parties in the original position would agree on a limited right of humanitarian intervention to remedy serious human rights violations.

I now want to expand on the proposition that the first principle of international justice chosen by the parties in the original position would be the principle of respect by all governments of basic civil and political rights. I have previously taken the view that parties in the original position would hold natural rights and that their main concern would be to agree to a scheme of international justice that would protect those rights. The most natural principle that these individuals (who, recall, do not know what society or culture they belong to) would agree upon is one that would guarantee those rights that they already hold as a matter of natural law. While the correctness of the thesis in my book does not depend upon this strong natural rights assumption, I am now somewhat skeptical about the assumption, for a number of reasons. Most importantly, I want to say (with Rawls) that just principles are those that

84. *Id.*
85. *Id.* at 379-381.
86. *See* *HUMANITARIAN INTERVENTION*, *supra* note 11, at 58-71.
87. *Id.* at 112-114.
would be agreed upon in an hypothetical situation that is fair, but then human rights would not be basic or natural; rather, they would hopefully be the result yielded by a fair hypothetical bargain. If I can show that the rational interest (not preexisting natural rights) of parties in the original position can plausibly yield principles protecting human rights, the argument is philosophically much stronger. There is nothing fundamentally compelling in the claim that, if one believes in natural rights, one's theory of international justice would contain a protection of rights. The social contract device is not needed for that. Only if rights can be derived from parties in the original contract advancing their basic interests can I avoid begging the question of why rights are so important. I could then show that rational individuals would have reasons (other than the mere assertion that human rights are paramount) to agree upon an international system of protection of human rights. Of course, it is still perfectly possible and, I believe, correct to rely on a strong natural rights approach. The rational interest alternative, however, adds one more layer of philosophical justification.

So, following Rawls, I will assume that parties in the original position will try to advance their rational interest, as represented by a set of primary goods. These are rights and liberties (or, better still, liberty interests), power and opportunities, income and wealth, and self-respect. One could add some other goods to these, such as the need for love and affection or for satisfactory and fulfilling personal relations. I assume here, however, contrary to some forms of communitarianism, that rational persons would pursue such goods outside the basic structure of the domestic, and even more certainly the international, society. In other words, I agree with Rawls in his limitation of a theory of justice to the basic structure of society. In the global arena, this means the design of international institutions so as to allow for meaningful social cooperation in a framework of respect for persons.

A preliminary issue, of course, is who participates in the bargain. For if the parties are individuals, they might derive one set of principles for the law of nations; whereas if the parties are (as Rawls suggests) representatives of states, they might obtain a different set of international legal principles. I now believe, however, that the choice of a model regarding the identity of the parties does not significantly affect the result.

88. See Theory, supra note 11, at 62.
89. Id. at 7-11.
On the first model, the parties in the Rawlsian original position are individuals. The parties are autonomous moral agents trying to agree on principles of justice among nations. These parties do not know their social position or wealth; nor do they know to what group, national, ethnic, or otherwise, they belong. They know they have a conception of the good, but they do not know what that conception is. They are thus aware that they are about to choose principles of global justice for a world in which disparate conceptions of the good can be pursued. The idea is to agree on a set of principles that will serve as a framework to adjudicate mutual global claims. I suggest that the following principles are among those that would be adopted.

A. First Principle

An international bill of human rights, along with effective and well-developed international mechanisms for the global protection of these rights.

Liberty is first among the primary social goods that the parties, as rational beings, would try to maximize in the original position. A rational individual in the original position will not risk living in a world in which there are states where liberty interests are ignored, because she might end up as a citizen of a tyrannical state. Therefore, by maximin, it is rational for the parties behind the veil of ignorance to agree to a set of international human rights principles and to international mechanisms and institutions (such as international human rights courts) designed to protect such rights. Contrary to the relativists, I suggest that it is rational for persons to pursue liberty interests (or freedom) within the limits imposed by the need to agree to some form of social (including international) cooperation. Any rational being in the uncertainty of an original position will place human rights at the top of the basic international normative structure. This conclusion is reinforced by the fact that international human rights have a preeminent place among the

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90. This model is suggested by Pogge, supra note 82; Taylor, The Concept of Justice and the Laws of War, 13 COLUM. J. TRANSNAT'L L. 189, 191 (1974).

91. Here I follow Theory, supra note 11, at 136-142.

92. According to Rawls, the “maximin” principle of rational choice would be followed by the parties during their choice of principles. The idea is that a rational person would choose that principle which would maximize his position should the worst alternative occur. See Theory, supra note 11, at 130-61.

93. One critic claims that I have not demonstrated that human rights are basic in international law. See Bederman, Book Review, 83 AM. J. INT’L L. 406 (1989). My reply, simply put, is that human rights are basic in international law because all rational persons would agree to protect such rights. On the other hand, it is quite understandable that governments would not be as enthusiastic about human rights and would therefore relegate them to a mere by-product of state sovereignty.
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agreed upon moral judgments in world opinion today. Human rights are among the publicly acknowledged objective reasons that governments, international organizations, non-governmental organizations, and private individuals can rely upon to criticize other governments and question their legitimacy.94

The main objection against placing human rights at the top of the international normative structure is the well-known relativist thesis. A contractor's liberty interest, it is argued, is determined by cultural, economic, and historical factors, and so the suggestion that an international theory of justice should give priority to human rights amounts to an illegitimate transposition of biased liberal values.95

While the question of relativism cannot be fully addressed here,96 I propose to demonstrate the primacy of human rights in a theory of international obligation by proceeding from two ends. First, there is a quantitatively broad, yet substantively modest in scope, human rights consensus in international law. This is evidenced by the many global and regional instruments created for the protection of human rights and by the practice of states and international organizations.97 Cultural differences, or cultural diversity, are generally not considered to be valid reasons for departing from the international human rights code. Hence, it is not possible to dismiss the place of human rights in international law by asserting that persons in different cultures value freedom differently and claiming that there can be no agreement on this matter. The fact is that a general consensus already has emerged concerning the duty of govern-

94. See HUMANITARIAN INTERVENTION, supra note 11, at chs. 2-4 and references therein.
95. Some believe that this relativist view is reinforced by the fact that Rawls himself has drifted toward relativism in his recent work. See, e.g., Rawls, Justice as Fairness: Political not Metaphysical, 14 PHIL. & PUBLIC AFF. 223 (1985). But I do not regard this as a credible defense of relativism. The fact that Rawls has focused his theory on Western liberal democracies has no relevance for the potential globalization of his ideas. Moreover, it is hard to see why details of Rawls' intellectual biography affect the validity of his philosophical arguments. Even if Rawls has become a relativist (which I doubt), I believe that the social contract theory he devised in A Theory of Justice is vastly superior to the theory which results from subsequent amendments. I prefer, therefore, to rescue the universality (and consequent greatness) of the original theory.
ments to respect human rights, at least a core group of them. The significant international consensus on human rights can function as the set of shared intuitions, or overlapping consensus, that the relativists demand of any theory of justice.

It must be conceded that the argument from consensus is not sufficient to demonstrate the primacy of human rights. Traditional international legal theory argues that human rights are subordinated to state sovereignty, that rights exist as a minor part of the modus vivendi that governments have agreed to as representatives of sovereign states. In answer to this, I can only say that the protection of human rights is what justifies any government in the first place. Governments exist in a moral sense because the citizens have delegated to them the power to perform certain functions necessary for (realistically) successful social cooperation. Thus state sovereignty has no moral legitimacy unless it is justly exercised.

My argument assumes that all individuals, regardless of history, tradition, and culture, possess the same powers of moral personality. In the social contract the parties derive their principles of justice by exercising two powers. These are the Rational, that is, the capacity for having a conception of the good, and the Reasonable, that is, the capacity for a sense of justice. No more than this is required to derive principles of justice (including the liberty principle and its lexical priority), assuming a diversity in conceptions of the good. These powers of moral personality do not vary with social, cultural, or economic circumstance; accordingly, any rational person will seek to maximize freedom. Relativists, however, believe that no argument can persuade those whose interest is to advance, not their individual autonomy, but moral homogeneity or the submission of the individual to the state. But to say that a religious fundamentalist, a Nazi, or a radical communist, would not seek to maximize freedom in this way is not a valid refutation of contractarian assumptions. One has to assume, in those who do not actually seek to maximize freedom, a

98. See supra note 97.
99. One could start, of course, with a simpler but less philosophically powerful natural rights assumptions, that human rights accrue to individuals just by virtue of their being persons, regardless of history, tradition, and culture. The Rawlsian analysis takes us one step further in the search for justification.
100. See Theory, supra note 11, at 505.
101. I have always thought that this objection, parroted by communitarians and nihilists each time that they want to romanticize a tyrannical regime, is fallacious. The views of the Hitlers and Ayatollahs of the world will not suffice as refutation to our ethical theories. Some modicum of human dignity has to be assumed if we are to debate seriously about these matters. Further, someone who says that his interest is to advance moral homogeneity is making a statement not just about himself but critically about thwarting the liberty interests of others.
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coulded rationality or an insufficiently thick veil of ignorance.\footnote{102} If some empirical confirmation is required, recent events in Eastern Europe and China forcefully and dramatically show that the quest for freedom is not dependent on geography or culture.

The liberal-contractarian justification of states and governments, then, presupposes a theory of primary goods. Rational actors behind a veil of ignorance would seek to maximize their share of those goods. The theory also presupposes that liberty interests are the first and most important set of goods that those rational agents would seek to protect and advance.

Alternative attempts to justify states and governments have been unsatisfactory. I assume that I may safely discard the theory of the divine right of princes, despite its relatively prominent place in the history of political thought. Another possible justification of the state is the one Hobbes (or at least one reading of Hobbes) suggests: that states exist, not to protect rights, but to secure order and peace.\footnote{103} But that cannot be right. The ethical end of political power cannot be the prevention of conflict even at the cost of oppression and tyranny. Regardless of one's substantive theory of appropriate principles of justice, legitimacy is withdrawn from governments when those principles are (egregiously) ignored. I have elsewhere argued at length that this extinction of political legitimacy entails an extinction of international legitimacy.\footnote{104} To defend, as a principle of justification of the state, the notion that the government's only end is to secure peace, is to recommend, as Hobbes did, whatever amount of coercion is needed to subdue citizens into the Pax Romana. A third possible justification of the state is the Hegelian-communitarian theory. States and governments are legitimate, it is argued, when they represent and advance shared community values, the "national spirit," or, to use fashionable communitarian jargon, the "intimations of the tradition."\footnote{105} This moral positivism has the intolerable

\footnote{102} I am inclined to offer a less charitable view of some of those who in the real world argue for the supremacy of the state, moral homogeneity, communal values, or similar ominous things. It may be said that, given that those authoritarian schemes promise tremendous concentration of power, the proponents secretly hope that they will be the ones in power, or at least closely allied with power elites (e.g., the "intellectuals of the revolution"). This is, of course, an ad hominem argument. I am inclined to use it, however, because I am quite tired of hearing nihilists (e.g., Critical Legal scholars) and communitarians of all sorts accuse liberals of defending human rights because that (allegedly) enhances or perpetuates the liberals' privileged positions.


\footnote{104} See Humanitarian Intervention, supra note 11, at chs. 3-4.

\footnote{105} Representative communitarians include M. Sandel, Liberalism and the Limits of Justice (1982); M. Walzer, supra note 3; A. Mcintyre, After Virtue (2d ed. 1984).
consequence of denying moral currency to the dissenters from a tradition. Communitarianism is an extremely conservative doctrine with ominous authoritarian overtones, one that leaves persons at the mercy of the official interpreters of tradition and community values. Communitarians have given up on the best and most effective tool for criticizing and reforming existing institutions: the argument that individuals are entitled, as a matter of moral right, to social and political arrangements that deviate from tradition. What is needed are criteria to determine when the dissenters are justified in deviating, when their struggle is morally justified. By definition, those criteria cannot be the "intimations of tradition," precisely because the tradition is what the dissenters are challenging. Thus we need independent, critical standards of justice and political morality.106

B. Second Principle

The international community is subdivided into discrete units or nation-states.

In the original position, the parties would acknowledge, as part of their liberty interests, the interest to form relatively discrete national groups with distinct cultural, historical, and political cohesiveness. Contrary to what communitarians believe, however, this principle is derived from the primacy of human rights. An international community subdivided into states is preferable for two reasons. First, such a community would allow fuller development of persons' rational life plans by permitting them to form self-governed communities. Rational persons would hardly agree to a world federalism where, presumably, the interest of members of groups to govern themselves, to decide their own policies in a framework of respect for the rights of all, would be threatened. The protection of persons' rational interest, rather than mystic Hegelian notions of "people," "nation," or "state," is the appropriate philosophical foundation for the right of self-determination. Second, rational persons would agree to a world of (relatively) separate states because that would increase the probability of overall respect for human rights. If a world federalism went wrong, there would be no asylum, no safe harbor, no refugees. Hence, a world consisting of separate nation-states maximizes the probability of protecting everyone's liberty interests.

106. I am interested in hearing what communitarians have to say about the democracy and human rights movements in Central Europe and China. Are these reformers misfits in their own cultures? Indeed, the fate of the liberal dissenters in China, and the mostly peaceful liberal revolutions in Central Europe, are recent and dramatic illustrations of the moral poverty of communitarianism and its first cousin, relativism.
C. Third Principle

War and intervention are prohibited except when indispensable for the defense of human rights.

Resort to violence, in international as well as in domestic law, is justified only by the protection of rights. If all nation-states were minimally just, then it would be rational for the parties in the original position to agree to a rule of nonintervention, by virtue of the first two principles. But if some states seriously ignore human rights, no rational party would want to risk being a citizen in one of those tyrannical states, and all would favor a rule of limited intervention. So while the principle of non-intervention entails a respect for the state's political independence and territorial integrity, the principle should be tempered by an exception allowing governments to intervene, sometimes even by force, on behalf of the victims of human rights violations.107

War and non-forcible intervention are justified only in defense of basic liberties at home and, in some cases, abroad.108 For example, the right of self-defense is a right of a government to fight a threat of injury to the lives and property of its citizens from foreign invasion. The justification of war is always the defense of persons, not of governments or states as such.109 Forcible humanitarian intervention is justified only at the request of victims of serious human rights deprivations (it follows that tyrannical governments never have a right of self-defense against foreign attacks directed at their human rights abuses). In all other cases, war is prohibited. In particular, the pursuit of national glory, territorial aggrandizement, or trade concessions can never serve as a justification for the use of military force.

These three principles are not the only ones the parties would choose. In addition, they would agree on principles of international distributive justice.110 Determining the content of those principles is very difficult.

107. See generally, HUMANITARIAN INTERVENTION, supra note 11; Damrosch, Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs, 83 AM. J. INT'L L. 1 (1989). Professor Damrosch takes an intermediate position. While she claims that there are compelling reasons for respecting states' political independence and territorial integrity, Damrosch also defends the primacy of the individual over the state: “[T]he nonintervention norm must not become a vehicle for exalting the abstract entity of the state over the protection of individual rights and fundamental freedoms.” Id. at 37.

108. Rawls writes, “Conscription is permissible only if it is demanded for the defense of liberty itself, including here not only the liberties of the citizens of the society in question, but also those of persons in other societies as well.” THEORY, supra note 11, at 380.


In any case, I believe that in most instances the *lexical priority* of liberty holds and that the parties in the original position would not choose to subordinate their liberty interests (their human rights) to economic gain. Two caveats should be noted with respect to this difficult matter. First, subsistence rights or basic socio-economic rights, are included among the human rights covered by the first principle. Second, the priority of liberty does not mean that current international economic arrangements are acceptable; on the contrary, there are good reasons to believe that the theory of international justice that I am suggesting would yield principles which would require an extensive reform of present international economic and financial structures. I cannot, however, pursue this matter here. Suffice it to say that international human rights are agreed upon in the original position as the foundation of the law of nations, and economic and social arrangements are subordinated to the achievement of minimal global respect for those rights.

Looking to the model that Rawls suggests, where the parties in the original position are not individuals speaking for themselves but representatives of nations, the choice of principles would be the same, except for the choice of a world divided into separate nation-states. In the Rawlsian version the nation-state would be taken as a given. So the thesis of this paper, that international human rights would be the first set of principles the parties would agree upon, is not affected by defining the original position in the way Rawls does. This is particularly evident when one realizes that in Rawls’ vision, the representatives of states have already chosen the principles of domestic justice, which of course embody the priority of civil and political rights. It would therefore be incongruous for those parties, when choosing principles of justice for the law of nations, to overlook international human rights. Behind the veil of ignorance, and assuming operation of the *maximin* principle, even representatives of nation-states would insure themselves against the possibility that they might be citizens of a tyrannical state.

111. See H. Shue, Basic Rights 22-34 (1980).
112. Of course, the parties in the original position would enshrine their economic and social arrangements with a second set of human rights, namely economic, social and cultural rights. See, e.g., International Covenant on Economic, Social and Cultural Rights, supra note 97.
113. I have elsewhere shown why the state-centered principles advocated by Rawls could not possibly be chosen by the parties in the original position. See Humanitarian Intervention, supra note 11, at 58-71. There is a latent inconsistency between the individualistic thrust of Rawls’ theory of justice and his pro-government theory of international law.
114. See Theory, supra note 11, at 377-78.
115. See supra notes 93-107 and accompanying text.
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VII. Conclusion: Interdependence Again

Hypothetical consent of individuals takes us much further than its main competitor, actual consent of states. The theory is richer in its normative consequences since it provides a philosophical vantage point from which to judge the justice of actual institutions and offers the best method of interpreting international legal materials. But going back to the question posed earlier: Why would individuals (or representatives of just states) want to agree on anything in the first place? Why not settle for the state of nature in international relations? After all, we have arguably lived many centuries without international law, so it does not seem to be such a necessary feature of an orderly social life.

I would like to suggest, however, a reason why individuals would choose to agree in the first place on principles of justice for international law. On Rawls’ assumptions, the parties know, as part of their general knowledge of the laws of economics and sociology,116 that in the global arena there is an identity of interests, since international cooperation makes possible a better life for all than any nation would have if each were to live only by its own efforts.117 There is also, of course, a conflict of interests since individuals and nations are not indifferent as to how the benefits of social cooperation are distributed, but rather each would prefer a larger share.118 International law is designed to regulate both conflict and cooperation, and, while the Rawlsian hypothetical agreement is itself the basis of obligation, the reason why the parties would choose to enter (hypothetically) into an agreement is the realization of their interdependence. To put it differently, the reason why there is any international law at all is the knowledge of the parties that they can achieve more (lead better lives) by engaging in social cooperation.119 Which rules and principles are actually binding in international law will depend on how they cohere with the principles of international justice that result from the hypothetical original contract. The concept of interdependence (the acknowledgment by parties in the original position that it is in their interest to agree to some set of international legal institutions), while incapable of providing a test for identifying binding rules and principles of international law, is still an important concept and a building block for the scheme of ideal rationality suggested here.

One last thought: I realize that my suggestion of the privileged place of international human rights in a theory of international justice may

116. See Theory, supra note 11, at 136-42.
117. Id. at 4.
118. Id.
119. This is also one of Hume’s main points. See D. Hume, supra note 32, at 567-69.
have far-reaching consequences. First, the theory entails the reform of much of current international law, mostly in the direction of reinforcing international human rights mechanisms. The theory will require a rethinking of prevailing notions of intervention and sovereignty, as well as a major reform of the international economic order. Second, if the theory is correct, much of the state-centered international law existing prior to the Second World War must be deemed morally defective. So be it. Classical international law is morally flawed in the same sense as the pre-Enlightenment social order. Whereas the order of the Ancien Régime consisted mostly of rules that privileged the nobility at the expense of everyone else, classical international law (and much of the popular conception of current international law) glorifies government prerogatives at the expense of the rights and interests of individuals. Yet one should never forget that all law, including international law, is made to solve the problems that confront us as autonomous moral agents. Every set of institutions should make room for that imprescriptible entitlement to human dignity.