THE ABSENCE OF A SOVEREIGN LEGISLATURE AND ITS CONSEQUENCES FOR INTERNATIONAL LAW

1. *The denial of the character of 'law' to international law*

There being no international legislature for international society some writers have refused to concede the nature of true laws to the rules of international law.[1] The 'Austinian' objection that law cannot emanate from a non-sovereign body clearly illustrates this view.[2]

John Austin had defined international law as a system consisting of rules of 'positive morality'.[3] In his opinion:

> If the same system of international law were adopted and fairly enforced by every nation, the system would answer the end of law, but, for want of a common superior, could not be called so with propriety. If courts common to all nations administered a common system of international law, this system, though eminently effective would still, for the same reason, be a moral system.[4]

Similarly W.E. Hearn had declared that 'Law cannot be predicated of mere customs which are not even true commands much less the commands of any competent State'.[5] Following John Austin's thesis, Holland

1. For a general survey of theories denying the legal force of international law, see Strupp, K., 'Les regies generales du droit de la paix' *Recucil des Cours* (1934), vol. 47, pp. 268-286.

   As opposed to the writers denying the legal character of the rules of international law, chiefly because of the absence of a legislator and an enforcement machinery, some writers have even denied the very existence of international law. See Hobbes, *Leviathan,* Part I, Chapter XIII; Spinoza, *Tractatus Theologico-Politicus,* translated by R. Willis (1862), Chapter XVI, p. 276; Hegel, *Grundlinien der Philosophie des Rechts* (1820), 330 and 339; Lasson, *Prinzip und Zukunft des Volkerrechts* (1871), p. 56 and *System der Rechtsphilosophie* (1882), p. 402; Seydel, *Grundzuge einer allgemeinen staatslehre* (1873), pp. 31-32; Binder, *Philosophie des Rechts* (1925), pp. 550-593; Hold-Ferneck, *Lehrbuck des Volkerrechts* (1930), pp. 12, 23-24, 80 and 86-88. From among these, Hobbes' definition of law, that 'Law properly, is the word of him that by right hath command over others', seems to have influenced both Bentham and Austin; but the denial of the existence of international law is scarcely consistent with the facts in the twentieth century, and even earlier was a view which was based upon the premis that all law must correspond in nature to the law of the modern State society; it is that premis which history rejects.

2. For a critical examination of this view see Reeves, 'La communaute internationale', *Recueil des Cours* (1924), vol. 3, pp. 52-53; Hart, *The Concept of Law* (1961), pp. 1-76.

3. See generally, *Province of Jurisprudence Determined* (1832); *Lectures on Jurisprudence* (1885), vol. 1, p. 96 *et seq.,* 182 *et seq.*

4. *Ibid.,* vol. 2, p. 594.

5. *The Theory of Legal Duties and Rights* (1883), p. 40.

had called international law a 'law by courtesy' or 'law by analogy'.[6] These jurists and their followers clearly refused to accept anything except the acts of a sovereign legislature body or the commands of a sovereign as true laws.[7] They had, thus, not only set up a very narrow definition of law, but thereby also expressed reluctance to recognise the historical evolution, or the changing character, of human institutions. Further, such an attitude had not only obscured the organic relationship of law to society[8] but also the vital part which custom, as opposed to legislation, has always played in the legal systems of national states.[9]

6. See *The Elements of Jurisprudence* (1893), 6th Ed., p. 339; *Lectures on International Law* (1933). p. 6. Also see Zimmern, *The League of Nations and the Rule of Law,* 1918-1935 (1939), p. 98. Some of the continental writers had also expressed the same view by denying the character of true laws to the rules of international law — see Somlo, *Juristische Grundlehre* (1927), pp. 158-173; Burckhardt, *Die Organisation der Rechtsgemeinschaft* (1927), pp. 314-416; 1944 edition, p. 315 *et seq.*

7. Thus all those laws which could not be satisfactorily explained within the context of the Austinian framework were relegated to the domain of ethics or morality. See Pomeroy, *Lectures on International Law in Time of Peace* (1886) pp. 17-25; Stephen, *International Law and International Relations* (1884), pp. iii-vi and p. 15 *et seq.*

   That in the Austinian concept of law the essence was sacrificed at the altar of form — see Scott, 'The legal nature of international law', *A.J.I.L.* (1907), vol. 1, p. 838.

8. For the view that Austin can be regarded 'as an early example of "grand theorist" among the schools of sociology' — see Sawer, *Law in Society* (1965), p. 2. But, clearly, Austin was no sociologist, Sawer's argument that Austin's framework was only meant to apply to 'the societies of Western Europe and North America' and not to primitive societies, is no doubt relevant in the light of those writings which disputed Austin's definition of law by referring to the existence and efficacy of customary law in primitive societies, nonetheless it does not explain why Austin's framework fails to account for the 'common law' then prevailing in Western Europe and North America. In this context, Austin's framework can hardly be called a 'model' or an objective sociological 'account of actual mature legal systems in a general or abstract form'. Moreover, had Austin's framework been in the nature of a theoretical model only there would have been no problem. The difficulty arose when Austin and his followers attempted to explain the whole legal phenomenon covered by the term 'law' on the basis of a definition. Even though that 'definition' had some basis in the social realities then obtaining in Western Europe and North America, it was quite erroneously exalted into the position of the supreme test for determining and explaining what is law and more so what was *not* law. See, Aldrich, *World Peace* (1921) p. 35 *et seq.* As regards the view that Austin was the creator of purely 'postulational systems', see Stone, *The Province and Function of Law* (1946), Chapter 2.

9. Sterling E. Edmunds while disputing the Austinian theory of law, provides a sharp contrast to Austin's view by pointing out: '. . . the Anglo-Saxon has fought and bled since the landing of Caesor's legions in 55 B.C. against attempts to make his law the command of a sovereign... Until recent times, at least, his law was the custom or usage of a free people, not originally expressed in writing, not commanded by anybody except, possibly, by the English people themselves' — *The Lawless Law of Nations* (1925), pp. 18-19. Reference must also be made to the celebrated writings of Sir Henry Maine in this connection, see his *Village Communities* (1880), pp. 67-68; and *Early History of Institutions* (1888), p. 384.

   Quite rightly, Marek St. Korowicz finds it rather 'paradoxical that this objection was raised in Great Britain (Austin, Rodgers, Mill, Bekker), the classical homeland of common law, which was brought into existence not by a determined legislative authority, an autocratic ruler or parliament, but by general practice, accepted as Law' — *Introduction to International Law* (1959), p. 3.

However, the Austinian concept of law so far as it indentified 'law' with commands of a sovereign seems to have been completely rejected by modern writers; even from among the few modern writers who have denied the character of 'law' to international not one seems to have subscribed to it, Thus, the denial of the legal character of the rules of international law simply on the ground that they do not represent 'commands' of a sovereign or because there is no sovereign international legislature in existence is clearly a thing of the past.

The few modern writers who have denied the legal character of the rules of international law[10] have done so mainly by taking refuge in the smug opinion that the rules of international law, even though substantially observed, are not 'legal' because they cannot be effectively enforced against States if the States themselves do not submit to them. This, it must be submitted, brings us to a completely different problem, i.e., the problem concerning the 'enforcement' of the rules of international law[11] which is quite different from the question of its 'legal character '. The legal validity of a rule, based on the conviction that it is binding, is quite distinct from its enforceability: law is not law

10. See Corbett, *Law and Society in the Relations of States* (1951), p. 11, Corbett has questioned the use of the term 'law' for the rules of international law because its use 'involves wasteful self-deception and misdirection of energy, and leads to false expectations on the part of the public'. But he too has conceded that in some 'narrowly limited fields' the international system has been successful in setting 'up rules and procedures that operate with a decisiveness and a regularity which compare favourably with national systems' — see generally *ibid.,* p. 8; —, *The Study of International Law* (1955), p. 53. Also see generally Levontin, *The Myth of International Security* (1957). Levontin discusses the role of international law on two levels, i.e., on the 'security level' and outside the security level or on the 'sub-security level'. In his opinion the only theory which can adequately explain the conduct of States on the 'security level' is that of legal anarchy — by 'legal anarchy' he means 'lawlessness' but not utter disorder — see p. 14. In his opinion the rules of international law are usually obeyed so far as the 'sub-security level' is concerned but 'not because they are legally binding but because their violation fails to engage the imagination of the would-be violator State or be invoked by any of its vital needs' — p. 61. Finally he points out that the rules of international law even though substantially observed are not 'legal' because there are no legal sanctions attached to them — p. 68.

    On the controversy concerning 'whether international law is really law?' see generally, Williams, 'International law and the controversy concerning the word law', *B.Y.I.L.* (1945), vol. 22, p. 145 *et seq.;* Campbell, 'International law and the student of jurisprudence', *T.G.S.,* vol. 35, p. 114 *et seq.;* Hart, *op. cit.,* p. 209 *et seq.;* Kooijmans, *The Doctrine of the Legal Equality of States* (1964), p. 198 *et seq.;* Coplin, *The Functions of International Law* (1966), pp. 1-25.

11. The point that the rules of international law, on the whole, are generally quite well observed has been emphasized by several writers. But more importantly the enforceability of a rule does not mean that its observance, in case of a breach, must be compelled by the use of force. On this question see generally, Briggs, *The Progressive Development of International Law* (1947), p. 11; Brierly, 'International law: some conditions of its progress', in *The Basis of Obligation in International Law* (1958), p. 333; Fawcett, *The Law of Nations* (1968), pp. 9 and 11; Parry, 'The function of law in the international community' *in Manual of Public International Law* (1968), edited by Max Sonensen, pp. 4-5.

because it is enforced, on the contrary it is enforced because it *is* law.[12]

2. *The question of the 'source' of obligation in international law*

Doubts about the character of international law as true law can, however, only be dispelled by showing that obligations upon States exist in international relations which are very similar to the normative obligations that exist in any system of law. To show this, however, involves an examination of the source of such obligations, for it is not possible, given the absence of an international parliament, to rely on the formal source of a sovereign legislative body. It is to an examination of the theories of the source of obligation in international law that we must, therefore, now turn.

But as the term 'source' has been used by different writers implying different meanings it is perhaps necessary to indicate here the meaning attributed to this term; it has been used in the sense of 'originating cause' and not in that of 'evidence'. Also no attempt has been made to distinguish sharply between the terms 'cause' and 'basis'. The question of the rise of obligations is certainly not the same as the question concerning the *validity or the binding character of obligations after they have been established.* It is only in connection with the latter question that we can use the term 'basis of obligation' and to that extent we can distinguish between 'basis' and the 'originating cause or causes'. But this must not lead us to believe that there is no correlation between the two. On the other hand, there is a vital connection between the originating causes, which explain the *rise* of obligations, and the *basis* of those obligations, in the sense that the 'originating causes' to a very large extent also provide the very basis for the continuing validity, application and the binding character of the obligations which they are instrumental in creating.

Much depends also on how we formulate our question. The question that needs to be answered is in Ehrlich's words: 'Whence comes the rule of law, and who [in essence *what]* breathes life and efficacy into it?'

(a) *The 'will' of the State — the Continental approach*

A strong reaction against the Austinian concept of law was inevitable. On the Continent, Bergbohm had been one of the earliest writers to suggest that the absence of an international legislature should only lead us to the conclusion that a particular source of law does not exist within the society of States and, further, that it should not lead us to deny the 'legal character' of the rules of international law.[13] To Bergbohm, the expression of State will, as evidenced in international

12. See Pollock, *First Book of Jurisprudence* (1923), 5th Ed., p. 29; Fitzmaurice, 'The foundations of the authority of internattonal law and the problem of enforcement' *The Modern Law Review* (1956), vol. 19, pp. 1-33.

13. On this question see generally Gihl, 'The Iegal character and sources of international law', *Scandinavian Studies in Law* (1957), vol. 1, pp. 53-92; Kelsen, 'The basis of obligation in international law,' *Estudios de derccho internacional* (Homenaje al Profesor Camilo Barcia Trelles 1958), pp. 103-110.

agreements, constituted a proper source of law.[14] Similarly Jellinek traced the source of obligation in international law to the will of the State. First, he pointed out that States are not above law and can be bound by their own will — through a process of auto-limitation.[15] Secondly, he emphasized that the international and the municipal systems of law are different systems having different objectives, that is, whereas the the municipal system of law envisages the 'subordination' of the members of a community, the international society is run on the principle of 'co-ordination'. Thus, international law was according to him a law between co-ordinate entities and different from the law of the States which emphasized the element of command. However, by asserting that the States are legally free to disengage themselves from any such obligation which runs counter to their interests,[16] he called into question the very 'legal' character of international obligations.[17] The difficulty with Jellinek was that he could not deny the States, especially within the framework of his theory of 'auto-limitation', the right to disengage themselves from those obligations which they had themselves created. The answer to this difficulty was provided by Triepel's *Vereinbarungstheome.*[18] Triepel pointed out that although the will of the State is a necessary element, the will of any single State alone is not sufficient for the creation of international obligations; for

14. *Staatsvertrage und Gesetzc als Quellen des Volkerrechts* (1877), p. 18 *et* .seq.

15. *Die Rechtliche Natur der Staatsvertrage* (1880). pp. 1-44. For his defence of the 'legal' character of the rules of international law, see pp. 46-49.

    The theory of auto-limitation was also endorsed by Rudolf von Jhering, see *Der Zweck im Recht* (1877), English translation by T. Husik; also see generally Spiropoulos, *Theorie generale du droit international* (1930).

    Jellinek's theory, on the whole found supporters in the persons of Heilborn and Schoen, but it stands largely discredited. However, it would be wrong to presume that the theory of auto-limitation did not survive after Jellinek and Jhering. It continued to exercise some influence until quite recently and reference need only be made to its influence on the writings of Hatschek and Hold-Ferneck — see Fenwick, *International Law* (1948), p. 63, footnote 89.

16. So he said in *Allgemeine Staatslehre* (1900), at p. 340: 'das Volkerrechts ist der Staaten, nicht aber sind die Staaten des Volkerrechts wegen da'.

    A somewhat similar stand was taken by Heinreich von Trieitschke (1834-1896) who said that every treaty represents a voluntary curb upon the power of State but further added that 'all international agreements are prefaced by the clause "Rebus sic stantibus" ' — see *Politics,* translation by Dugdale and de Bille (1916), vol. 1, p. 28; vol. 2, p. 597.

17. He also called international law an 'anarchical law' because it originates from an unorganized authority — see *Allgemeine Staatslehre* (1921), 3rd Ed., p. 397. But, his theories of 'auto-limitation' and 'co-ordination' when properly analysed constitute the very negation of international law. For a critical analysis of Jellinek's theory, in this light, see Lauterpacht, *The Function of Law in the International Community* (1933) pp. 409-412. Also see, Le Fur, 'Les regles generales du droit de la paix', *Recueil des Cours* (1935), vol. 54, pp. 21-25.

18. See *Volkerrecht und Landesrecht* (1899) ; 'Droit international et droit interne', *Recueil des Cours* (1923), vol. 1, pp. 77-118. A sharp contrast is provided by Kaufmann's view who reasseited the supremacy of the State and the antiquated view that within the international sphere might is right — see *Das Wesen des Volkerrechts and die clausula rebus sic stantibus* (1911); 'Regles generales du droit de la paix', *Recueil des Cours* (1935), vol. 54, p. 313.

that purpose he envisaged that a fusion of several wills leading to the creation of a 'common will' is necessary. He called this 'common will', as expressed in treaties and agreements, by the name of *Vereinbarung*. By making the *Vereinbarung* the source of international obligations Triepel had also succeeded in creating 'a legal power over States': only *Vereinbarung* could undo what it had created. But one of the serious charges levelled against Triepel's theory is that it does not explain the existence of customary or general international law and reduces the rules of international law to a conglomeration of particular law.[19] Cavaglieri, Anzilotti and Strupp attempted to answer this question — raised by the criticism of Triepel's theory — by asserting that those States which do not participate in the formulation of a particular law later on become bound by it through certain processes.[20] Claiming that rules of international law are expressions of the will of the State as evidenced in agreements, these writers also attempted to establish a basis for the binding force of international agreements in the rule of *pacta sunt servanda,* which in Cavaglieri's opinion is a rule of customary international law whereas Anzilotti describes it as an original hypothesis and a postulate incapable of proof.[21] But, despite these variations in the approach of writers to explain the genesis of the rule or the fact that recourse to the principle of *pacta sunt servanda* leads them to a tautology (international agreements are binding because they are binding)[22], such doctrinal assertions at least indicated a movement towards interpreting law on a much more practical basis than hitherto employed.[23]

19. For a criticism of Triepel's views, see Verdross, 'Le fondement du droit international', *Recueil des Cours* (1927), vol. 16, pp. 275-296; Brierly, 'Fondement du caractere obligatoire du droit international', *ibid.* (1928), vol. 23, p. 484 *et seq.*

20. See Cavaglieri, 'Regles du droit de la paix', *Recueil des Cours* (1929), vol. 26, p. 340 et seq.; Anzilotti, *Cours de droit international* (1929), vol. 1, pp. 51-161; Strupp, 'Lesregles generales due droit de la paix', *Recueil des Cours* (1934), vol. 47, p. 422 *et seq.*

21. For other writers who try to justify the validity of the rules of international law or seek to explain the basis of obligation by referring to certain fundamental and unwritten norm or norms, see Perassi, 'Teoria domatica felle fonti di norme giuridiche in dirritto internationale', *Revista di diritto internazionale* (1917), vol. 11, pp. 195-223 and 285-314; Kelsen, 'Les rapports de systeme entre le droit interne et le droit international public', *Recueil des Cours* (1926), vol. 14, pp. 231-329; —, *General Theory of Law and State* (1945), pp. 328-388; —, 'Why should the law be obeyed', in *What is Justice?* (1957), pp. 261-285. Also Verdross, 'Le fondement du droit international' *Recueil des Cours* (1927), vol. 16, pp. 251-321, and in *Volkerrecht* (1950), p. 18 et seq.; Castberg, *Problems of Legal Philosophy* (1947), pp. 23 and 50 et seq.; Guggenheim, *Lehrbuch des Volkerrechts* (1947), vol. 1, p. 10 *et seq.*

22. Gihl, *International Legislation* (1937), p. 15.

23. From this we pass on to doctrines which have eventually succeeded in emancipating law from the fortress of sovereign will. Prominent among these is the doctrine which seeks to interpret law as a social factor or to explain its existence as well as its problems by referring to existing social realities. For example, Anzilotti did not rest content with reposing his faith in the principle of *pacta sunt servanda* as explaining the binding force of international agreements and consequently of international law. He went a step further, in stating that, 'II ya d'autre part le point de vue explicatif, qui est celui de la sociologie et de la politique: ce point de vue consiste a se demander pourquoi les traites internationaux sont en fait generalement observes. Et ici il est clair qu'il peut y avoir a cela de multiples raisons, variables suivant les temps et les lieux, qui, en substance, se resument dans l'existence d'uri complexe d'interets, d'exigences diverses, qui poussent les Etats a maintenir leurs engagements' — *op. cit.,* p. 69.

(b) *The 'Consent' of the State — the Anglo-American approach*

The leading Anglo-American writers on international law, despite the absence of an international legislature, try to justify its 'legal character' on certain practical grounds, i.e., that its rules are moulded in legal cast, have a sound legal basis, and, as evidenced by state practice, are undeniably binding on the States. The source of obligation is sought in the consent, express or implied, of States.[24] A typical expression of this attitude is found in Lawrence's statement:

> If we take the source of a law to mean its beginning as law, clothed with all the authority required to give it binding force, then in regard to international affairs there is but one source of law, and that is the consent of nations. This consent may be either tacit or express.[25]

The consent theory was also invoked by a majority of the members of the Permanent Court of International Justice in the *Lotus case*[26] and has received full judicial recognition by the English[27] and American courts[28] as well.

The reasons for its widespread appeal are not far to seek. Only the consent theory could have provided a direct link with all that had been said before. Especially within the context of natural law teachings which had declared every nation free and independent of all other nations the development of law and the creation of legal obligations could therefore only proceed and be explained on the basis of the consent of nations. It would be wrong to presume that legal philosophy could have travelled in any other direction.[29]

(c) *Consent versus 'common consent'*

But today an acceptance of the consent theory does, however, involve

24. See generally, *Phillimore's International Law* (1879), vol. 1, p. 38; Maine, *Lectures on International Law* (1894), p. 32; *Wheaton's International Law* (1929), 6th Ed., p. 6; Potter, *A Manual Digest of Common International Law* (1932), p. 131; Schwarzenberger, *The Frontiers of International Law* (1962), pp. 37, 299; Fawcett, *The Law of Nations* (1968), p. 6.

25. Lawrence, *The Principles of International Law* (1929), p. 95.

26. *P.C.I.J.,* Series A, No. 10, p. 18.

27. *R.* v. *Keyn* (1876) 2 Ex.D. pp. 63, 131 and 202; *West Rand Central Gold Mining Co.* v. *The King* [1905] 2 K.B., p. 407.

28. *Ware* v. *Hylton* (1796), 3 Dallas, pp. 199 and 227.

29. There are still many advocates of the consensual theory in its strictest and orthodox sense. See Tunkin, "Co-existence and international law", *Recueil des Cours* (1958), vol. 95, pp. 5-78. Tunkin opposes the Natural Law doctrine mainly because it emphasizes a non-consensual source for the rules of international law. Moreover, his dislike to the idea of the supremacy of customary international law over particular international law can also be traced, perhaps, to a similar reason. But as rightly pointed out by Alexandrowicz, Professor Tunkin "makes no reference to the Nuremberg trials in which the Soviet lawyers were unwittingly the most emphatic spokesmen of reliance on extra-consensual principles" — see Alexandrowicz, "The Soviet conception of international law and the doctrine of positivism", Preliminary Working Paper No. 5, *Australian Society of Legal Philosophy and the Grotian Society Papers* (Australian Group), 1963.

a certain artificiality the moment one leaves the treaty as a material source of law or tries to explain the general effect attributed to custom. Even in relation to treaties, it scarcely explains how certain multilateral treaties acquire a general law-making character transcending the circle of immediate parties. Moreover, reliance on the notions of 'implied' consent to explain the applicability of old rules to new States is highly artificial; can it be argued that a new State can negative any such implied consent by an express rejection of certain rules?[30] It is perhaps artificialities of this kind which have led many writers to emphasize consent in the form of a 'common consent', rather than as a consent existing in each and every individual member State of the international community.

This approach is implicit in the use of such expressions as 'general consent', 'consent of nations', 'consent of a society' and 'mutual consent'.[31] From among the 'positivists', as early as 1875 Manning had pointed out that the positive law of nations 'is dependant on custom and convention' and that 'it is allowable to cite... treaties as indicating the general consent and constant usage of nations'.[32] Westlake laid emphasis on the 'consent of a society',[33] and not on the consent of each individual member of the international community. Oppenheim stated that the 'Law of Nations is based on the common consent of states'.[34] The use of the word 'common' before consent was clearly intended to convey a specific meaning which becomes very clear if we refer to Oppenheim's definition of law[35] and his other statement that

30. Hold-Ferneck has asserted that there is no rule of international law which prescribes that 'a new State must observe the rules of international law' and that the new State is free to decide whether or not to subject itself to international law' — see *Lehrbuch des Volkerrechts* (1930), p. 177. That the consent theory is susceptible to such interpretations or can lend itself to such claims is clearly obvious.

31. Even some of the Naturalists have referred to the role of 'common consent' or the 'consensus of the majority of mankind' or the action of 'most nations' in the creation or the establishment of the rules of international law. See Vitoria, *De Indis recenter inventis* (1557), Relectio V, section (iii), Classics of International Law series, p. 391; Scott, *The Spanish Origin of International Law* (1932), pp. 161-162, 168-169, Appendix E, pp. CXII — CXIII. Also see generally, Grotius, *De jure belli ac pacis,* translated by Kelsey and others, Prolegomena § 9, Book I, Chapter I, § XIV; Thomas J. Lawrence, *Essays on Some Disputed Questions in Modern International Law* (1885), at p. 196 where he quotes Grotius; Zouche, *Juris et judicii fecialis sive juris inter gentes explicatio,* translated by J.L. Brierly, vol. 2, Classics of International Law series, Part 1, section 1, pp. 1-2; Vattel, *Le droit des gens* (1758) translation by C.G. Fenwick, Book 1, Chap. I, § XIV; Gentili, *De jure belli libri tres,* translation of the 1612 edition by John C. Rolfe, Classics of International Law series (1933), 'introduction' by Coleman Phillipson, p. 22a.

32. *Commentaries on the Law of Nations* (1875), p. 86.

33. *Chapters on the Principles of International Law* (1894), p. 81.

34. Oppenheim, *International Law* (1958), pp. 15-17.

35. *Ibid.,* p. 10. Oppenheim defined law as 'a body of rules for human conduct within a community which by the common consent of the community shall be enforced by external power (external to the persons against whom they are enforced)'.

'common consent is the basis of *all* law'.[36] Oppenheim was obviously seeking to provide the rules of international law with the same sort of basis as exists for the rules of municipal law[37] In short he was not speaking of the 'collective consent'[38] or the 'collective will theory' but of a common consent which is based on the consent of the majority — the overwhelming majority — of States.[39]

If we switch from 'consent' to 'common consent' — which certainly more appropriately describes or explains the rise of 'normative' obligations under the present international legal order — then a difficulty arises in explaining what is meant by 'common'. One can argue that the prefix 'common' is meant to signify the consent of an overwhelmingly large majority,[40] but even that is not sufficient. The 'giant powers' will also have to be included in that majority.[41] Oppenheim had a simple solution for this problem. He defined 'common consent' as the

> express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance as compared with the

36. Italics added.

37. The view still persists that no state can be forced to accept an obligation which it does not freely and willingly accept, a view which clearly refers to 'contractual obligations' rather than 'normative obligations'. It is true that all States are free to enter or not to enter into contractual obligations but the validity of normative obligations which apply within a *community* of States rather than between specific contracting parties, is not dependent upon the consent of each and every member of that community.

38. See *ibid.,* pp. 16-17.

39. *Ibid.,* p. 17.

40. That an overwhelmingly large majority can exercise 'legislative' powers on certain occasions or in respect of the maintenance of international peace and security has been emphasized by several modern writers — see Ross, *The Constitution of the United Nations* (1950), pp. 32-33; Reuter, 'Principes de droit international public' *Recueil des Cours* (1961), vol. 103, pp. 448-449; Falk, *The Authority of the United Nations to Control Non-Members* (1965), pp. 58, 75-76, 100.

    Also see Jenks, *Law, Freedom and Welfare* (1963), p. 90 *et seq.* for his theory concerning the 'will of the world community': according to Dr. Jenks the theory of the will of the world community presents before us a 'synthesis' of 'everything which is of value in the earlier conceptions'. This is no doubt true. The theory of the 'will of the world community' is, in fact, the theory of 'common consent' stated in more general terms and rolled into one with the concepts of *Gemeinwille* and *Vereinbarung.*

    Attempts to introduce the concept of the will of the world community as the 'original hypothesis' in international law are also not lacking — see Lauterpacht, *The Function of Law in the International Community* (1933), p. 421; Corbett, *op. cit.,* p. 75, footnote 20.

41. That the consent of 'great powers' is necessary for the creation, crystallization or establishment of legal norms in international society has been rightly emphasized by several writers. And, no doubt the 'veto power' of the big five only reflects 'the simple and necessary recognition of the ineluctable fact' of their political power. See generally Bourquin, 'Dynamism and the machinery of international institutions' *Geneva Studies* (September 1940), vol. 11, No. 5, pp. 53-55; Quincy Wright, 'The strengthening of international law' *Recueil des Cours* (1959), vol. 98, p. 140; Falk, 'On the quasi-legislative competence of the General Assembly', *A.J.I.L.* (1966), vol. 60, pp. 788-790.

community viewed as an entity in contra-distinction to the wills of its single members.[42]

(d) *Some modern approaches to the problem*

A number of writers do not refer to the principle of consent, rather they emphasize the sociological, psychological, and moral factors which force States to assume obligations and also to fulfil them.[43] Thus, Brierly speaks of 'reason' and 'social necessity'; Politis believes in 'la conscience juridique des peuples'; Duguit and Scelle speak of 'social solidarity'; Basdevant speaks of the needs of international life; and Ross draws our attention to the 'socio-psychological account of the conditions under which... legal obligations arise'. Visscher speaks of ethical, political and social factors as 'the foundation and ultimate explanation of law' and partly discards the consensual theory which he calls 'voluntarist positivism'. In his opinion 'voluntarist positivism' sacrifices 'the idea of an objective order to a purely formal conception of international law' as it excludes 'from law higher considerations of reason, justice and common utility which are its necessary foundation'. Ago believes in the 'spontaneous formation' of a sense of legal obligation. O'Connell is also of the opinion that law is a 'spontaneous generation' as a result of 'the needs and aspirations of man in community'. He elaborates this further by stating that 'law is induced

42. *Op. cit.,* p. 17.

But evidently Oppenheim is not the only writer who has emphasized the role of common consent in the creation or establishment of normative obligations. The one great merit of Oppenheim's treatment of the principle of common consent is that it is most explicit and reveals a realistic approach to the question of the source of normative obligations both under municipal and international law. However, during the last few years, an increasingly large number of writers have emphasized the role of common consent or "consensus", in contradistinction to the traditional theory of consent, in the creation and establishment of international legal norms. See generally, Falk, "The adequacy of contemporary theories of international law — gaps in legal thinking" *Virginia Law Review* (1964), vol. 50, pp. 245-247; —, "On the quasi-legislative competence of the General Assembly" *A.J.I.L.* (1966), vol. 60, pp. 782-791; —, "The South West Africa cases: an appraisal" *I.O.* (1967), vol. 21, pp. 15, 22-23; Judge Tanaka, in *I.C.J. Reports* (1966), pp. 291-292; Jenks, *A New World of Law* (1969), pp. 205-211.

43. See Higgins, *The Binding Force of International Law* (1910), pp. 10-13; Duguit, *Traite de droit constitutionnel* (1921) ; Politis, *Les nouvelles tendances du droit international* (1927), pp. 46-51; Max Huber, *Die Soziologischen Grundlagen des Volkerrechts* (1928); Fischer Williams, *Chapters on Current International Law and the League, of Nations* (1929), pp. 12, 17, 21 and 27; Scelle, *Precis du droit des gens* (1932), p. 2 *et seq.:* Schindler, 'Facteurs sociologiques et psychologiques du droit international', *Recueil des Cours* (1933), vol. 46, pp. 233-322; Basdevant, 'Regles generales du droit de la paix', *Recueil des Cours* (1936), vol. 48, pp. 508-520; Ross, *A Text-Book of International Law* (1947), pp. 46-49; Cecil Hurst, 'The nature of international law and the reason why it is binding on states' in *International Law — The Collected Papers of Sir Cecil Hurst* (1950), pp. 9-11; Brierly, *The Law of Nations* (1955), pp. 42-43, 54-57; —, *The Basis of Obligation in International Law and Other Papers* (1958), pp. 1-67; Visscher, *Theory and Reality in Public International Law* (1957), pp. 21, 51-52 and 362-365; Ago, 'Positive law and international law', *A.J.I.L.* (1957), vol. 51, pp. 691-733; O'Connell, *International Law* (1965), vol. 1, p. 3 e*t seq.;* Schachter, 'Towards a theory of international obligation' *Virginia Journal of International Law* (1968), vol. 8, No. 2, pp. 300-322.

by the mere fact of physical co-existence of man with man in the human community'. If rightly understood this is, in other words, the theory of 'social necessity'.

While it is admitted that 'social necessity', 'social solidarity', 'reason', 'justice', 'moral consciousness', etc., do influence the action of States, it is difficult to conceive that they ever constitute the 'immediate' source of obligation. There is actually nothing new in these concepts or the philosophy behind them. Writers adhering to the consensual theory can easily point out that whether States accept 'reason', 'self-interest', 'moral duty', 'force of social requirements', or repose their faith in established precedents for guiding their international conduct, it is their *willingness* to accept one of these factors or a combination of them which is the real source of their obligations, unless it can be shown that some of these factors leave no choice for the States but to act in a certain manner.

In addition to those who emphasize sociological and ethical factors, there are writers who favour a reiteration of the natural law doctrine by advocating the concept of right as the source of legal obligation.[44] Jurists adhering to the 'grundnorm theory' or its variations, although successful in explaining the validity of obligations in general, because of their over-emphasis on abstract juridicial notions hardly ever enter into the realms of reality. For instance, in Kelsen's theory of law we find a tailor-made conception of the international legal order,[45] resting on the notion that states are under a 'duty' to define and elaborate certain basic norms whose validity finally rests on a 'grundnorm'.[46] But, then, as we all know, States do not always enter into or accept obligations because they feel that they are duty-bound to define or apply any particular norm; only the reasons of self-interest, expediency, and may be 'community interest' (if it does not conflict with national interest), which largely determine the action of States in each given case, provide us with the true answer.[47] In the light

44. The reiteration of natural law theory appears in various guises — even in the concept of 'reason' for explaining the question of the source of obligation — see in particular Krabbe, *The Modern Idea of State* (1922);—, 'L'idee moderne de l'Etat', *Recueil des Cours* (1926), vol. 13, pp. 513-583.

45. Although some jurists would like to see the society organized and run in terms of logical principles one to be deduced from another and constituting a logical composite whole the fact remains that neither social institutions nor the social processes are works of art. It is not surprising that Kelsen's theory has been criticized from various angles by different people. For a criticism of Kelsen's theory that the system of international law has its sanctions in war and reprisals see Friedmann, *The Changing Structure of International Law* (1964), pp. 83-85. For the view that Kelsen's theory is 'an empty dialectic' see Corbett, *Law and Society in the Relations of States* (1951), p. 72 *et seq.* Also see Castberg, *Problems of Legal Philosophy* (1957), pp. 43-47.

46. On the question whether it is at all necessary to think in terms of a 'basic rule' by reference to which the validity or the binding force of all legal norms could be explained see Hart, *The Concept of Law* (1961), pp. 228-231.

47. Criticising McDougal's concept of 'international law of human dignity' Falk has pointed out that 'national behaviour, especially in foreign spheres of action, is shaped by interests and capabilities rather than by values' — see, 'The adequacy of contemporary theories of international law — gaps in legal thinking', *Virginia Law Review* (1964), vol. 50, pp. 239-240.

especially of State practice which nearly always reveals conflicting patterns of behaviour on the part of States, the theory that States proceed on the basis of a predetermined notion of a 'duty' implied in the existence of a norm — hypothetical or otherwise — must be discarded.

Recent attempts at explaining the creation, adoption and promulgation of normative obligations in terms of a process or processes, rather than in terms of oversimplified juridical principles, clearly represent a better technique of evaluating the role of this process.[48] But even so as this involves a description of a 'fluid' and a highly complex process there cannot be any simple answers to the questions concerning the source, bases, or foundation of normative obligations in international law. Furthermore no comprehensive set of values or factors that influence the creation of normative obligations can be easily devised.

(e) *The partial repudiation of the theory of consent*[49]

The theory of consent is largely a by-product of the principle of State sovereignty i.e., that States are free from superior control and that they are equal — a principle evidenced in the adoption of the unanimity rule and the rule 'one State, one vote'. But we find that with the growing interdependence of nations since 1815 and the progressive institutionalisation of international society these principles could not be rigidly adhered to in State practice. It became increasingly difficult to explain the basis and validity of the rules of international law simply by reference to the 'consent principle', especially when tested in relation to the primacy of great powers and their capacity to legislate on certain occasions.[50] Nearly all the important peace treaties since 1815 are known to have laid the foundations for new systems, regimes, international settlements, rules of conduct, etc. Though they were dictated by a few powers only these treaties nevertheless constituted valid legal instruments for the whole of Europe and in some

48. See generally, McDougal, *Studies in World Public Order* (1960); —, 'International law, power and policy: a contemporary conception', *Recueil des Cours* (1953), vol. 82, p. 137 *et seq;* —, 'A footnote', *A.J.I.L.* (1963), vol. 57, p. 383; Schachter, 'Towards a theory of international obligation', *Virginia Journal of International Law* (1968), vol. 8, p. 307 *et seq.*

49. For an incisive criticism of the 'consent theory' see Corbett, *op. cit.,* pp. 38-39 and 68 *et seq.* Here he has clearly abandoned his earlier opinion which favoured the consensual theory, see *B.Y.I.L.* (1925), vol. 6, pp. 20-30. Also see Brierly, *The Basis of Obligation in International Law* (1958), pp. 9-18; Hart, *The Concept of Law* (1961), p. 221; Jenks, *Law Freedom and Welfare* (1963), p. 85.

On the importance of the role of consent and non-coercive methods in the national and international legal orders, see generally, Claude, *Swords into Plowshares* (1956), pp. 437-438; Chayes, 'A common layer looks at international law' *Harvard Law Review* (1965), vol. 78, p. 1409.

50. See Mower, *International Government* (1931), at p. 276: 'Thus it often happens that legislative proposals adopted by the more important states, and backed by their power, are to all intents and purposes the established rules on the points involved.'

cases even laid down *law* for the whole of international society. But these treaties were not based solely on consent. The defeated powers can hardly be said to have 'willingly consented' to the terms imposed on them by victorious powers. Yet these treaties created 'law': they were the source of obligations which were (for all practical purposes) in no way less valid or effective in the eyes of the whole world than had they been freely or willingly accepted by the powers which were literally forced to accept them. George Schwarzenberger calls it 'the law of power'. As every one knows the validity of this 'law of power' has never been seriously questioned by jurists. And how could it be? Especially when, within the context of the traditional theories, this 'law of power', (so far as its 'effects' are concerned) could not be distinguished from the 'law based on consent'.

Still more, we may take the example of those treaties which are virtually forced upon the small States by the major powers even though the clauses for adherence and acceptance inserted therein are technically optional. The States invited to accept have no opportunity to argue or bargain. With this type of *'contrat d'adhesion'* the smaller powers have little real choice but to accept the 'legislative' role of major powers. The primacy of the great powers in imposing binding rules also stands enshrined in the U.N. Charter, not only in the fact that the Dumbarton Oaks proposals were, so far as the 'Yalta formula' was concerned, regarded as not subject to amendment by the San Francisco Conference, but also in the fact that these powers are given a privileged position within the Security Council, the organ capable of taking decisions binding all members. It is doubtful how many States would have willingly consented to the 'veto principle' or the primacy of the 'big five' if they had in reality commanded any bargaining power, so that 'consent' has always been a somewhat illusory notion.

If one remembers that, on the objection of the first French delegate to the Geneva Conference of 1864 that the consent of every State was necessary, no voting procedure was adopted at all at the conference, the progress made within the course of a century is remarkable.[51] Today, not only voting but the principle of majority voting is the accepted rule in international conferences and their committees. At least in the preliminary stages of the formulation of international rules as a draft treaty, the 'consent principle' in its original meaning has been completely abandoned.

51. For a critical historical review of the progress made in legal theory concerning the question of the basis of obligation — from authority (reason) to 'consent' to 'consensus' — see Falk, 'The adequacy of contemporary theories of international law — gaps in legal thinking' *Virginia Law Review* (1964), vol. 50, pp. 243-248. There is considerable truth in his observation: 'At each subsequent stage, however, the earlier basis for obligation persists and co-exists to some extent with the newer basis; for example reason continued to underlie the perception of law in its positivistic stage, despite the emphasis upon the sovereign will and the requirement of consent. Similarly, if today we attribute a certain. potency to consensus and the growing reality of a global will, this does not entail a denial of the continuing role played by sovereign consent or even a challenge to its dominance in many areas, including perhaps the most vital areas of human concern' — p. 246.

Furthermore, the consent principle as it was understood in the latter part of the nineteenth or the earlier part of the twentieth century is now challenged by the practice whereby a large majority of States draw up an instrument and stipulate therein that the 'third States' must follow the principles laid down by them. Clearly enough by seeking to govern and regulate the conduct of non-contracting parties the 'treaty' as well as the States who adopt the treaty assume a legislative and a coercive role. The validity of such a treaty can only have a basis in the principle of 'common consent'.

We can even say that general law-making treaties, like custom, do not require the express consent of all States; they come into operation if accepted by a preponderant majority of States and in due course the opposing States will be forced to conform. Furthermore, the capacity of an individual States or a few States to prevent the evolution of a particular law stands seriously limited — a law having a majority backing is very likely to be accepted even by those who disputed it in the beginning. The exact way in which rules contained in treaties become binding on third States — States not having consented expressly to them — is a complex matter and cannot be examined properly within the scope of this paper. Suffice it to say at this juncture that, whether it be because these rules are in some cases regarded as merely declaratory of existing customary law, or whether a genuine legislative effect can be found in the treaties *ab initio,* the trend has undoubtedly been for these treaties to fulfil for the international community the same function as does legislation in a State. One further factor deserves attention, and this is that there undoubtedly exists a pressure towards conformity with the rules accepted by the majority of the international community of States. Thus third States are, for one reason or another, often found to be placed in a position which becomes inconvenient and even untenable by reason of non-participation. One suspects that it is pressure of this sort which has already begun to make the U.N. Charter a well-nigh 'universal' treaty, and which has disposed third States to accept the Geneva Convention of 1949 as binding upon them during hostilities (as happened in Korea).

The description of this process as 'coercive' is perhaps a misnomer. It is true that Article 2(6) of the U.N. Charter implies that the Security Council may use coercion to compel third States to abide by the principles of the Charter so far as this may be necessary to maintain international peace and security, and this is a startling example of the assertion of the primacy of the general interest in maintaining international peace over State sovereignty, reflected in the maxim *'pacta tertiis nec nocent nec prosunt'*. Yet for the most part the process is one of the compulsion of events rather than coercion by other members of the international community: it is the compulsion of convenience which accounts for the 'legislative' role of the U.P.U., and the compulsion of economic and social pressures which accounts for the success of the highly sophisticated (in terms of comparison with traditional treaty practice rather than municipal techniques) legislative techniques of the I.L.O.

(f) *The source or sources of obligation in international law*

The growth of law is inevitable in any society. Within national societies, because men are social animals and must work and live together and because such corporate life cannot be achieved without some form of discipline and regulation, men are forced to devise rules and procedures to govern the ever increasing complexities of their relationships. The same thing is also true of the society of States. Because States are composed of men, because there is a fundamental unity which underlies the existence of all States, and finally because in the modern world States cannot live in isolation from each other, they have to come together and regulate their relationships in such a way that corporate existence is made possible. On this basis it can be further pointed out that to the extent that it is necessary for States to live together peacefully and to seek co-operation from one another for their mutual benefit, States are interdependent[52] and subject to international pressures for the sake of community living or 'community interests'. In this sense they are not always their own masters. Rather like individuals, they are slaves of their own self-interests.

52. The phenomenon of interdependence is something more than a mere fact of social life — for a sociologist and even for a jurist it must represent a grundnorm without the help of which neither questions of social life nor fundamental questions relating to the nature of law or its function within a society can be properly explained.

The greater the interdependence among the members of a given community the lesser will be their capacity or the need to act independently of each other. It is true that a State is still considered 'sovereign' but the theory of the absolute and unfettered sovereignty of State is certainly no longer valid: while the State may still be regarded free to act in any way it pleases it can do so within a very limited domain — its freedom now stands much curtailed and limited by the existing norms of international law so much so that it can hardly be regarded as completely sovereign even within the 'domestic' field. Recently Falk has even suggested that the United Nations be granted a limited authority to intervene, in certain cases, even in the internal affairs of a State. He has however pointed out that there is nothing highly revolutionary in his suggestion as it will simply lead to 'a formalization and an extension of United Nations practice' — see *Legal Order in a Violent World* (1968), p. 339 *et seq.*

Judge Alvarez has certainly made a remarkable contribution to the literature on international law by emphasizing the concept of the law of social interdependence — see his 'individual opinion' in the *Fisheries Case, I.CJ. Reports* (1951), pp. 149-153. That the whole basis of international legal obligation is being transformed by the growing role of cooperative activities see generally Friedmann, 'The changing dimensions of international law', *Columbia Law Review* (1962), vol. 62, p. 1147; —, *The Changing Structure of International Law* (1964). Concerning the relevance of the notion of 'interdependence' for justifying the validity or the binding character of the rules of international law within the framework of more recent theories see in particular Falk, *The Authority of the United Nations to Control Non-Members* (1965), pp. 74-75; Miller, 'Transitional transnational law', *Columbia Law Review* (1965), vol. 65, p. 845; McDougal, Lasswell and Reisman, 'Theories about international law: prologue to a configurative jurisprudence', *Virginia Journal of International Law* (1968), vol. 8, pp. 188-299; Schachter, 'Towards a theory of international obligation', *ibid.,* p. 303; Quincy Wright, 'The foundations for a universal interriational system' *Notre Dame Lawyer* (April 1969), vol. 44, No. 4, pp. 529-530.

Even 'self-interest', though it is one of the primordial sources (as it generally provides the necessary motivation for the assumption of obligations through consent), cannot be regarded as constituting the only source; evidently it is not the only motive which sends the States into council. 'Community interest', which may coincide with 'self-interest' or may not, has also often compelled nations to lay down general rules of law and to adopt specific obligations for themselves in conferences and assemblies; apart from a positive desire to promote 'community interests', sometimes a realization that the self-interest is inconsistent with the 'community interest' has *forced* or *compelled* nations to abandon their self-interest and to acquiesce in and follow the dictates of the majority. Here 'reason', 'moral considerations', 'justice' or even the concept of 'social solidarity' may play their part, but none of them *alone* is sufficient to explain the complex question of the source of obligations; these are merely the different factors behind the processes which create obligations.[53]

Instances are also not lacking in which some members of the international community have even been compelled, much against their declared policy or wishes, by other members to abide by a particular norm or to behave in a particular way for the sake of community living or community interests. Especially in this context one can safely add that the element of compulsion is not totally absent from the international system and further that such vitally opposed legal concepts as 'consent' and 'compulsion' can also co-exist within the framework of the international legal theory.

When the modern international society developed in the eighteenth and nineteenth centuries it did so largely on the basis of an acceptance of the sovereign State as an entity enjoying complete freedom of action; association in the work of European institutions and conferences could therefore proceed only on a voluntary basis and such law as developed could only be explained by a reference to the consent principle. But this primitive stage is now virtually over as the international society has reached a comparatively advanced stage — a stage signifying greater integration and requiring the effective regulation of international needs through institutional control. Naturally, in the circum-

53. These factors are generally speaking so closely interlinked that it is difficult, if not impossible, to separate them completely from one another and then to assess their effect or importance separately in terms of the part which they play in creating or establishing legal obligations.

Secondly within the scope of this work, it is not possible to go into details concerning the 'content' of the term 'national interests' or 'community interests'. This is evidently not the place to enter into a description of a comprehensive theory concerning the values and factors which condition perspectives or influence the 'international decision-making process'. The expressions 'community interests' and 'national interests' have been used as blanket terms for denoting the values generally which guide or influence national action leading to the creation or acceptance of normative obligations. That the term 'national interests' is a 'shorthand expression' see Friedmann, *The Changing Structure of International Law* (1964), p. 47,

stances consent no longer plays that important role which it was assigned in the earlier stages.[54]

In the ultimate analysis, it must be observed that the source of obligation in international law cannot be explained simply by referring to any single principle or factor. In reality there are always several factors at work and we must either speak in terms of a combination of several factors as providing the real source of obligation or we must think in terms of several *sources.* Further, it must also be pointed out that there is always a certain amount of link-up between these factors or elements or sources. For example, even though within the State society laws are in a way dictated to the individual, yet his consent is also there in all democratic societies. Similarly, even though rules of international law as well as international obligations generally arise from the consent of States, expressly or tacitly given, there is also a certain amount of compulsion to which States are subjected from time to time for reasons of community interests. But in view of the difficulties involved both in determining the exact degree of consent or compulsion actually employed in each given case[55] or the range of interaction between 'self-interest' and 'community interest', one has to fall back upon such compromise formulae as the concept of 'common consent' or 'social solidarity' or 'will of the international community'. In this context, and especially if one relegates 'reason', 'moral considerations', 'justice', 'the concept of social solidarity,' 'power', etc. to the realm of motivations for State action, rather than accepting them as the immediate source of obligation, it is tempting to conclude that the theory of 'common consent', although it does not admit of precise formulation, appears to offer a much more satisfactory solution for our problems than any other theory concerning this question. Moreover, it may well be that far too much emphasis has been placed upon the need for a satisfactory 'theory' and far too little on the actual processes evolved in international society for the creation of obligations.

54. See in this connection the remarks of Richard A. Falk in 'The adequacy of contemporary theories of international law — gaps in legal thinking', *Virginia Law Review* (1964), vol. 50, pp. 245-247. He rightly observes that although the 'shift from consent to consensus' has nothing to do with decisions concerning 'force and war at the strategic level', there is 'increasing evidence of the roles of consensus both in the formation of authoritative practice and in the development of rules of behaviour' in other fields.

55. Within the international sphere this difficulty is more acute; although the majority rule within the municipal systems certainly points to a much more simplified process the element of 'command' is not so preponderant as we are made to believe. Even the draftsmen of the Code Napoleon had unhestatingly declared that 'laws are not pure acts of power' — see Fenet, *Recueil complet des travaux preparatories du Code Civil,* vol. 1, 'discours preliminairi'.

3. *The relative scarcity and, uncertainty of the rules of international law*[56]

It has also been contended, and correctly too to a large extent, that due to the absence of an international legislature, rules of international law are scarce, that they lack clarity,[57] that they cannot be developed and adapted to changing conditions easily and that the State differences which thus develop can only be settled through diplomacy or power politics.

Apart from exaggerating the effects which flow from the non-existence of a centranzed body entrusted with legislative functions within the international society, these criticisms only point out the general problems which even systems of municipal law have of face in one way or another, though to a lesser degree. Even within the municipal legal systems rules are not so comprehensively laid down so as to cover all conceivable situations and relationships. We have to remember that law within a society has always a limited role to play. The rules within municipal legal systems also lack definiteness[58] and clarity. Their adaptability to changed circumstances also varies from country to country, depending upon the constitution which a country has, the attitude of the courts and the willingness of the government to recognize changes and to deal with them. International law has to face these problems and their existence cannot be denied. Yet, if one simply looks at the decisions and opinions of the International Court of Justice since the Second World War, the number of disputes which one would have expected to have been avoided if there had been an international legislature are comparatively few: *The Asylum*

56. See Brierly, *The Law of Nations* (1950), at p. 75, where he says: 'It is a natural consequence of the absence of authoritative law-declaring machinery that many principles of international law are uncertain. But on the whole the layman tends to exaggerate this defect. It is not in the nature of any law to provide mathematically certain solutions of problems which may be presented to it; for uncertainty cannot be eliminated from law so long as the possible conjunction of facts remain infinitely various'.

That the familiar weaknesses of international law result 'from reliance upon self-interpretation to discern the scope of permissible behaviour' see Falk, 'The adequacy of contemporary theories of international law — gaps in legal thinking', *Virginia Law Review* (1964), vol. 50, p. 249 *et seq.*

'That there is not enough of international law' see Jelf, 'International law in its strictest meaning' *T.G.S.,* vol. II, p. 54; Feller, *United Nations and World Community* (1952), p. 133.

That international law is weak only so far as its enforcement is concerned, see Briggs, 'New dimensions in international law', *American Political Science Review* (1952), vol. 46, p. 678.

57. But as pointed out by Professor Julius Stone 'even an unclear rule constitutes a *certain* means of social control, moderating the claims of States to the extent of keeping them within the range of debated alternatives. An unclear rule is not necessarily a mere nullity in its impact on State conduct' — see 'On the vocation of the International Law Commission', *Columbia, Law Review* (1957), vol. 57, p. 18.

58. *Moore, International Law and Some Current Illusions* (1924), p. 299. He rightly pointed out: 'The fact cannot be lenied that there exists in the sphere of international law a considerable amount of uncertainty as to what the law actually is: but that such uncertainty is not unknown in the domain of municipal law is amply demonstrated by the ever-accelerating accumulation of judicial decisions and the diverse, discordant, conflicting views which they so often exhibit'. Also see Falk, *Law, Morality, and War in the Contemporary World* (1963), p. 33; —, in *Virginia Law Review* (1964), vol. 50, p. 235.

Case,[59] the *Anglo-Norwegian Fisheries Case,*[60] the Advisory Opinions on *Reservations to the Genocide Covention*[61] spring to mind as examples, but they are very much in the minority. For the most part the problems that have arisen have been problems which would be unforeseen by the 'legislator' — such as the Admissions Cases — or problems arising from the interpretation or application to the facts of rules which in themselves were clear. Moreover, in not one case decided by the P.C.I.J. or the I.C.J. has reference had to be made exclusively to 'general principles of law' because there existed no applicable rule of international law. In other words, the experience has been very much similar to that which is common to all legal systems, international or municipal. Moreover, international society has now developed legislative techniques and even a comprehensive process for codification so that the problem can be expected to be a diminishing one. Certainly experience suggests that this particular criticism of international law does not amount to a denial of the nature of its rules as 'law', put merely to a statement about its relatively immature character.

4. *The lack of machinery for 'peaceful change'*[62]

59. *I.C.J. Reports* (1950), p. 266.
60. *I.C.J. Reports* (1951), p. 116.
61. *I.C.J. Reports* (1951), p. 15.
62. See generally, Dahm, *Volkerrecht* (1961), vol. 3, p. 176.

A legal system must not only perform the most difficult task of providing order and stability within a society but it must also provide a mechanism which can quickly, efficiently and effectively deal with the changes or new developments within that society. In the absence of an international legislature the international society admittedly lacks an effective mechanism for dealing with the problems of change or new developments but these problems do not remain unsolved for a long time. Secondly while one can no doubt say that the international legal system is an immature legal system because of the absence of an international legislature or because it is slow to adapt to change it must also be emphasized that change in order to be welcome has to be gradual and should be preferably brought about by an 'almost inperceptible process'.

That the growth of a new interest nearly always leads to the establishment of a new institution, within the international sphere, see Schachter, 'Scientific advances and international lawmaking' *California Law Review* (May 1967), vol. 55, p. 423 *et seq.*

On the question of the 'peaceful change' generally, see Cruttwell, *A History of Peaceful Change in the Modern World* (1937); Levi, *Fundamentals of World Organization* (1950), p. 56 *et seq.;* Visscher, *Theory and Reality in Public International Law* (1957), pp. 308-324; Kaplan and Katzenbach, 'Law in the international community', in *Legal and Political Problems of World Order* (1962), edited by Saul H. Mendlovitz, p. 97 *et seq.;* Quincy Wright 'Toward a universal law for mankind', *Columbia Law Review* (1963), vol. 63, p. 452; Dillard, 'Conflict and change: the role of law', *P.A.S.I.L.* (1963), pp. 50-67, esp. 57-59, 62-63; Miller, 'Transitional transnational law' *Columbia Law Review* (1965), vol. 65, p. 838 *et seq.* — Miller discusses the relationship between social and legal change; Arangio-Ruiz, 'Development of peaceful settlement and peaceful change in the United Nations system' *P.A.S.I.L.* (1965), pp. 124-131.

On questions concerning 'inter-temporal law and legal change' or desuetude and legal change see Friedmann, *The Changing Structure of International Law* (1964), pp. 130-134.

For the view that within the U.N. system the problem of change is met by informal interpretation and usage rather than by formal interpretation and amendment, see Padelford and Goodrich, *The United Nations in the Balance* (1965), p. 50 *et seq.*

For reasons peculiar to international society,[63] the development of international law will necessarily be a slow process and unless an international legislature is established, the possibilities of speedy adaptation of its rules to changed circumstances are not comparable to those in municipal law. Perhaps the most difficult problem arising from lack of an international legislature is not so much that of developing and codifying international law but rather that of bringing about peacefully changes in the law which are tantamount to the suppression of existing State rights under international law. This, the problem of 'peaceful change', remains largely unsolved.[64] In international society, as in municipal society, the *status quo* is not necessarily identical with justice as determined by contemporary standards. The dispossession of large landowners or shareholders in municipal law has been a recurrent feature of the legislation of the socialist States of the twentieth century. But even in municipal systems, it has often required a revolution — a resort to 'extra-legal' techniques — to accomplish this. The dispossession of European States of their colonial possessions has had to come about either by agreement or, as in Goa, by action which may be condemned as contrary to the established rules of international law.

Once the problem of change and the role that an international legislature has to play with regard to it has been realized we should take care not to exaggerate it. The legislature is only one of the agencies for adapting law within modern societies. The suggestion that a quasi-judicial agency, a Conciliation Board or Equity Tribunal, should do so is not novel.[65] However the essential problem is not so much one of establishing machinery, whether legislative or quasi-judicial, as of persuading States to accept a variation of their rights on the basis of the changed conditions. By compulsorily laying down a rule for all and forcing its acceptance on a minority within the international society a legislature can easily precipitate a crisis.

5. *Reliance on custom as a source of law*

Custom[66] is generally the law of primitive societies.[67] But international society is certainly not a primitive society today except in a structural sense; it is a progressive and dynamic society in every other sense. The evidence of a community consciousness which forces

63. See Friedmann's discussion of the question of the relative importance of 'legal change' in the international and national societies, *op. cit.,* pp. 118-120.

64. The potentialities of Articles 14 and Chapter VI of the Charter are minimised by the fact that the General Assembly and the security Council can only proceed by way of recommendations to States.

65. See Clark and Sohn, *World Peace Through World Law* (1960), 2nd rev. Ed., Annex III.

66. That the prevailing notions concerning (custom' are full of anomaties, see D'Amato, 'Wanted: a comprehensive theory of custom in international law' *Texas International Law Forum* (1968), vol. 4, No. 1, p. 29 *et seq.*

67. Moore, *op. cit.,* p. 296. That custom is an 'unsuitable vehicle' for the rapidly expanding and complex modern international relations, see generally Friedmann, *op. cit.,* pp. 121-123.

the members of a society to enter into organized and complex relationships became noticeable in the society of States as early as 1815. Customary practices having been found inadequate in meeting the demands of a rapidly growing society of nations, law had to be consciously created through conferences and congresses which then provided the only meeting points for the representatives of States.[68] Rules relating to international travel and hygiene, postal and telegraph communication, and inter-State transport of goods had to be developed as a matter of necessity. The States as members of a growing community could not rest content with the customary international law. Their activities in this direction, i.e., to provide themselves with rules of conduct in matters relating to travel, transport of goods, postal and telegraph communication, health and hygiene, warfare and several other matters of international concern must be taken to be in their nature legislative. Thus, much of the development of international law after 1815 has very little to do with custom. It has been consciously created in international conferences, assemblies and councils, taking the form of a codification and restatement of its existing laws or of the creation of new principles and rules. This fact has been emphasized by a majority of writers and does not deserve detailed discussion. This point was well made by John Basett Moore in 1924 when he said:

> But, just as, in the case of municipal law, the statutory element has increased at the expense of the customary, so in international law there has been an increasing tendency to introduce modifications and improvements by acts in their nature legislative.[69]

Today it can be stated with some confidence that 'most modern international law is treaty-law'[70] or that international law, which has developed in the course of its history 'chiefly as custom supplemented by agreement' is now in reality a law of agreements supplemented by custom.[71]

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68. Dunn has rightly pointed out that it is 'difficult to see how the existing relations between States could have grown to their present complex structure without the assistance of some kind of legislative process' — 'International Legislation', *Political Science Quarterly* (1927), vol. 42, p. 575.

69. Moore, *op. cit.,* p. 296.

70. Jennings, *The Progress of International Law* (1960), p. 14.

71. Dickinson, *Law and Peace* (1951), p. 32. Also see Friedmann, 'General course in public international law' *Recueil des Cours* (1969), vol. 127, p. 136.

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