

## A NEW PHILOSOPHY FOR INTERNATIONAL LAW\*

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Dean, Secretary General, professors, students, friends, I thank you from the bottom of my heart for this honor. By awarding me a degree of this university you make me one of you and I'm proud to join you and I thank you. As for professor Alegre's summary of my work, may I say, I never liked my ideas so much as when I heard him describe them. So I'm very glad for that, it was very quite wonderful.

I wanted this evening to say a little bit about international law. I represent a citizen of one country, I come here, you are part of the international community, more responsive and aware of your role in that respect than most citizens of my country are. And international law, I believe, will become a matter of increasing importance, indeed perhaps one day of paramount importance to the survival of our civilizations.

When I was first taught about international law I was in Oxford, as you can gather, almost a hundred years ago. And at that time the most important question that my teachers addressed was "is there any such thing as international law?" That was a question bound to appear on the examination paper, so we paid a lot of attention to it. That doesn't seem any longer to be a pertinent question.

All international lawyers or statesmen or Ministers of State seem to assume that there is international law and that, for example, the statutes and edicts of the United Nations are part of international law. But old philosophical puzzles are never solved. They simply go out of fashion. And the worries that come to the question "is there any such thing as international law" are still vivid.

The great importance to my mind and thinking about what international law properly understood really is, comes when we must interpret what we say is international law, we must interpret it and apply it to the most politically charged issues. For example, just now there is much debate about the status under the laws of war and under the Geneva Conventions of international terrorist organizations, that don't occupy any territory and whose soldiers do not wear uniforms. The question arises:

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are we at war with Al Qaeda or is this a police action directed against criminals? Does international law require that the prisoners America holds in Guantanamo Bay should be accorded the privileges of the Geneva Conventions or are they really to be understood, as president Bush called them, as “enemy combatants not entitled to the status of enemy soldiers?”

The United States has in recent times sent unmanned bombs over many thousands of miles directed by “pilots”, as they call themselves in Texas, to kill individual members of what it takes to be –or what our government takes to be– members of terrorist organizations. And the question of what we do with “drones”, as they are called, is a vivid question of international law, much debated.

I’m going to talk this evening more about another matter of interpretation which is very much alive and that is the question whether NATO’s intervention in Kosovo without Security Council backing was a violation of the United Nations Charter, particularly article 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”.

This intervention in Kosovo, designed to put a halt to genocide, should we count that as a violation of the prohibition against an attack on territorial integrity or political independence? Very important issue – it came up I think again in Libya, though under very different circumstances. International lawyers divide about the question, how to answer this [how to answer the question]. One very eminent colleague of mine at NYU, sadly recently dead, Thomas Franck, said “the intervention in Kosovo was illegal; it was an example of international civil disobedience. It was morally required though legally forbidden”. That is a very dangerous idea. International lawyers nascent at the present times [are] struggling for rebirth. And to announce that... is a trump over law in circumstances such as this [is a] very dangerous idea. And that makes the question of interpretation all the more vivid.

When I was asked as a student “is there any such thing as international law?”, legal positivism, which Marcelo mentioned, was still the dominant theory of international law and that made the question an obvious one and indeed a negative answer seemed plausible. Legal positivism at that time was taken to come to the views of John Austin, who held that law exists only when there is an uncommanded commander, someone indisputably in charge, and law are the commands that the undisputed sovereign issues. In international law there is no undisputed sovereign wholly in charge and, therefore, if you adopt the Austinian theory, the Austinian version of positivism, then there is no international law.

Just about the time that I considered the matter Herbert Hart had developed a more sophisticated version of positivism, according to which law exists even when there is no uncommanded commander; law exists when the officials of a political community or the vast bulk of them have accepted a certain -accepted just as a matter of convention- a certain way of identifying law, of identifying how law is made,

how law is enforced, how law is recognized. He called that rule, that fundamental rule accepted as a matter of convention, a rule of recognition. And then in his most famous book when he came to talk about international law, he said it is obvious there is no rule of recognition in the international community. But then, as a kind of surprise, he said: "However that doesn't decide the question whether international law is law". One would have thought, given his definition, that it did decide the question, but then he said "perhaps it is theoretically or practically useful to count international law as a kind of law". It's worth pausing a moment, I think, to understand that in saying that, as great positivist professor Hart, is bringing together two different concepts of law. A sociological sense of law, the sense we use when we ask ourselves "would it be a good idea to count the internal rules of great international cooperation as constituting a legal system?" Well, we would say "yes, if that's helpful, if that throws light on the general nature of law, that may be a good idea, or that might just lead to confusion". That I would call "the sociological concept of law". There's another concept of law, it's the concept you use in this building, it's the concept that your professors adopt when they tell you what the law is on a certain question. It's the sense of law that the President uses when he asks his advisors "Is our treatment of the prisoners in Guantanamo Bay legal under international law?" In this sense, which I've called the "doctrinal sense of law", the question is not "would it be useful in some way to classify international law as law?" That's a different question; the doctrinal question is how do we decide what international law actually requires on some issue? That's the question that, though Hart did not attempt to answer, many of his disciples have attempted to answer; and the theory has developed on the ground of international law in recent decades -actually it's older than that-, which claims that the ground of international law understood in the doctrinal sense is the consent of sovereign nations. How do we tell whether something is rule of law? We ask: Have the nations, the subjects of international law, actually consented to that being law for them?

This view that consent is the basis of all international law, and therefore the basis of interpretation when we come to the difficult issues I described, was apparently codified in the Statute of the International Court of Justice. Every textbook and thinking about this issue I've read a number of textbooks on international law and they all answer the question "what are the grounds of law?" by pointing to the following paragraphs in the Statute of the International Court of Justice: "(Article 38 1)" -if you don't mind, I'll read it to you- "The Court, whose function is to decide in accordance with international law shall apply 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states; 2. International custom, as evidence of a general practice accepted as law; 3. the general principles of law recognized by civilized nations; and then they add a 4<sup>th</sup> one (rather comforting to you people in this building) which says, subject to the provisions of Article 38, the teachings of the most highly qualified professors

of law at distinguished universities (don't be excited by that, it actually doesn't count for anything anymore than any law review article, anywhere would count).

Article 38.1 says "the basis is consent", and that's a very appealing idea for many reasons. One of them is that it makes, -the great positivist dream- it makes what is the law just a matter of fact, you find what the states consented to. It also seems to preserve the idea of basic sovereignty of states. International law is consistent with the purest kind of sovereignty because international law is just what states have consented to in the exercise of their sovereignty. It also resonates incidentally with a very important strain of political theory called "social contract law". People say the basis of the legitimacy of government must lie on a social contract to which all people have agreed or might have agreed under some circumstances, would have agreed, or something of that sort. And the consent theory says that's also true at the international level.

There are, however, weaknesses, some of them apparent in this idea that international law rests on consent. One of the weaknesses is: (I read you all a list of the standards proposed by in Article 38.1 of the Statute) No priority is given among these, no idea what happens when they conflict.

Also you will recall from what I said, that the Statute doesn't really say that every state's consent is necessary, the Statute says civilized nations must have consented but doesn't tell us who they are, it tells us about customary practice among nations but it doesn't say every nation who is bound by the customary practice must have consented. And that is perfectly understandable because international law that really applied only to those who have consented to it would not be very helpful. However, it does undermine the idea that consent is really consistent with sovereignty.

I'm going to set those familiar objections aside this evening however, because I want to concentrate on a more basic difficulty in the consent theory - a difficulty that points the way of my view to a better theory about the grounds of international law. The consent theory seems at every state of its application to be fatally circular. Consider the idea that states make law by customary practice. 38(1) is explicit that it isn't just any old custom, any old usual style of behavior by a state that gets that state obliged by law.

It's only, according to the international law doctrine, it's only custom established as if through recognition of law - the technical term is *opinio juris*. A state does not commit itself as a matter of law unless its behavior shows not just that it follows a certain practice but that it follows a certain practice because it supposes that practice required by law. But then, if that's so, the state must, of course, have a different theory of the grounds of international law, it must have decided when it's bound by law or not, it can't use the standard of consent because then it would be saying: "in order to decide whether we've consented we have to see whether we've consented".

You might say, well, a state is bound as a matter of legal acknowledgement when it recognizes that other states have consented to be bound. But that doesn't break out of the circle, it simply means that we then have to ask what theory of law those other states were adopting when they decided that they were bound as a matter of law.

You might say it's just a convention, but conventions are not automatically law. The existence of a convention can be destroyed simply when one party to the convention decides no longer to accept it. So, in fact, the consent theory does not, cannot explain customary law once you accept that customary law means behavior governed by some other more fundamental standard of what the law is.

What about treaties? You would think that treaties are a perfect example of consent, nations being bound because they have consented. It won't do. We personify states, we say states who have signed a treaty have promised and they must keep that promise. But it isn't the personified legal abstraction that is actually bound, it's the population. And that population may be -probably is- entirely different from the population whose leaders signed the treaty. There might have been constitutional changes so dramatic that none of the domestic law of that state has survived. Why does the obligation of treaties survive? Even if we hold fast to the personification and say "the state itself has promised", we simply raise the question, a philosophical puzzle ever since humans identified it: Why does promising create obligations? Philosophers assume that there must be some deeper, some other principle of morality that explains why promising creates obligation. You cannot simply say that speaking magic words creates an obligation; there must be some explanation why. International lawyers might say to you "there is a deeper principle, it's called "*pacta sunt servanda*" - very grand, when international lawyers speak Latin, you know that further unpacking is necessary. But *pacta sunt servanda* simply repeats that treaties impose obligations, it doesn't explain *why* they do.

I believe that we must start again. The consent theory with its roots in legal positivism, its roots in absolute sovereignty of nations theory, must be set aside, we have to begin again. And I suggest that we begin again by going back to the spirit that animated the architecture of international law on its first Golden Age, 16<sup>th</sup> and 17<sup>th</sup> century, that we follow the lead of architects like Hugo Grotius, who began by saying, just assuming that international law is an aspect of international morality. As soon as one says that, then, of course, the question arises: "how do we tell the difference?" If we start saying international law is part of morality, we look to morality for the grounds, then, we face the immediate question "what is the difference between decency and morality among nations?", which is, of course, a moral matter in international law; which is, if you say, also a moral matter, cries out for a distinction.

Am I suggesting to you that there is no difference between what the law is, internationally speaking, and what it ought to be? No. The question of what international law is is, from my view, a moral question, but it is a distinct moral

question. In other work, in particularly in the book that Marcelo mentioned “Justice for Hedgehogs” -that we are going to discuss tomorrow-, I argue that we distinguish law from other parts of morality by identifying law as the set of rights that people are entitled to enforce on demand without the action of any other political institution, are entitled to demand from a coercive institution, like a court. And so when we’re thinking about what the law is, we ask ourselves the question “which rights or duties are appropriately enforced in that very special way on demand of individual people?” Hard to apply that to international law, I agree, because there is not such institution as a General Court with powers to enforce a jurisdiction over all states, it doesn’t yet exist.

We can solve that problem very quickly, we simply imagine such a Court. We ask the question “if there were such a Court, what would it be appropriate for the Court to enforce on demand, without further international agreement or legislation, simply on the demand of a single party?” That is where we start. And then, we start to answer that question, and I believe we start by concentrating on questions of political legitimacy. All across the planet there are people with power, guns and armies at their disposal. Some of them, indeed most of them, claim moral authority to govern. They are not just terrorists, they are not just people with guns, they are legitimate rulers in some territory. What conditions must be met in order that a government be legitimate, that it have earned the title it claims? Very complicated matter, many books written on it. It comes down to three requirements: The power must have been formed, the State must exist properly. We are interested in the formation of a government historically. It’s a very complicated question, which I won’t touch on. When a State that was formed illegally, by conquest -as North America and South America where-, when a state, through some historic statute of limitations, becomes properly formed? That’s an important question. But let us say that the formation of a state is one condition of its legitimacy.

The second condition is not how it acquired power, but how it exercises that power. A legitimate government must rule democratically, according to some proper sense of democracy, and it must respect the basic human rights of its inhabitants. That’s again very vague and general, but it states a condition of legitimacy.

I want to concentrate now on the third condition of legitimacy; that is the international system, which gives a particular state power, and limits that power. The international system must itself be legitimate in order for any state whose power is secured by the international system of states. And that makes international law directly relevant to the legitimacy of all the members, one by one, of the international community. The Westphalian System, as we call it, of individual states with particular territorial boundaries, was formed in the 16<sup>th</sup> and 17<sup>th</sup> centuries as a way out of the horrors of the wars of religion which had torn the continent of Europe apart.

But the Westphalian System, recognizing existing boundaries, has had and has many defects. The boundaries that are established under the present international

understanding are arbitrary. They depend on where rivers run and who slept in which King's bed. They leave states vulnerable, and they have the system which awards territorial sovereignty on the basis of these historical accidents, and protects states from interference by other states. The system, we might call it "of immunities", has at least four grave defects that are stains on its legitimacy. First, it does not allow people in nations around the world to come to the rescue of fellow human beings who are terrorized by their own governments. Conversely, it allows states to terrorize their own citizens. Those are important defects in legitimacy. There are others: The international system prevents the nations from achieving any kind of coordination. We normally solve problems of what are called "prisoner's dilemmas". The problem created by the banking crisis, for example, a problem that can't be solved unless all nations coordinate certain constraints on banks; the problem of climate change, which cannot successfully be attacked unless all nations agree, or all economically important nations agree to certain restrictions. The international system of separate sovereignty makes that nearly impossible.

Here is my suggestion for remedies to these problems: my suggestion is that States, out of a duty to protect their own legitimacy, have a further duty to mitigate the defects of the world system of nations; they have a duty to adopt practices that might bring about an improvement. That's a simple straightforward duty and it's a duty out of concern for their own moral title to govern.

That is the underlying ground of international law. But by itself it doesn't say much because it doesn't tell states which of any number of practices they should adopt, any of which would be helpful if adopted by all States, but it doesn't tell us where to begin. I therefore recommend, in addition to the duty to mitigate, a different duty which is a duty of salience, a principle of salience, and that is to say: if some rule or practice is made pertinent by history or practice, then States have a duty to join that rule, or that practice, or that principle as law; they have a duty to mitigate and a duty to do it in a way that focuses on salient principles, provided, of course, that the principle that is said to be salient, say the laws of war, provided that the salient principle is one such that if all nations did adopt it as law, then the legitimacy of the international system will be significantly improved.

Where did salience come from? In the great Golden Age, salience came from two sources. International law was European and Europe was Christian; and it was just accepted that the basic principles of natural law were also principles of international law. Europe also enjoyed what the Romans called "*ius gentium*", that is the principles that were common and shared among nations generally.

We don't have a world understood to be Christian; the world has grown much larger, it includes not just all European civil law or common law system, it includes many different kinds of systems, we do not have a "*ius gentium*". We need a different source of salience, a different beam of light, around which nations may collect and equip their duty to mitigate. We need that, and the world provided it in

1945 in San Francisco. We should think of the United Nations not as a big treaty, binding on the nations that signed it or that later joined it, we should think of the United Nations as an engine of salience. It is obvious that the structure of the United Nations should be used to fill this need for collective action and the duty to mitigate.

I think, -I shouldn't take much more of your time-, but I think I want to illustrate this by going back to the question of interpretation that I said was so important. Does article 2(4) prevent intervention to stop genocide whenever one or two members of the Security Council veto an attempted intervention? There is a great disagreement among international lawyers about the powers of the General Assembly, which is not, of course, crippled by a veto. Would the United Nations have the authority, have the title, to adopt a resolution empowering intervention to stop genocide? Consider a resolution adopted, often called the Acheson Resolution, adopted in the United Nations at the time when Russia was boycotting it. The General Assembly resolves that if the Security Council, because of a lack of unanimity, fails to exercise his primary responsibility, then the General Assembly can do so.

I believe that the structure of international law that I've described, the structure that says international law is a response to a duty to cure the illegitimate aspects of the international system, provides a very good argument that the General Assembly does have that power. I would myself, if drafting a resolution on behalf of the General Assembly, adopt a more limited version of the Acheson Resolution; more limited in two ways, I would restrict the intervention to cases in which Article 2(4) is not plainly applied - that is seeking a shift away from genocide rather than changing territorial boundaries. And I would also say that any General Assembly Resolution licensing intervention would have to be submitted to International Court (the General Assembly has the power to do that). It will have to be submitted as a question to the International Court, and the question should be "is the target government is guilty of crimes against humanity, as defined in the Treaty of Rome, establishing the International Criminal Court". I'm not suggesting that I can draft a resolution here and now, but that would be the main body of it. Would it be *ultra vires* the General Assembly to do that? That's a question of interpretation. If you adopted the positivist consent theory, undoubtedly no. If you adopt the theory that I am recommending now, I believe yes.

There are other suggestions that we might think of. If you want something even more extreme, I believe the General Assembly should adopt a resolution which would provide that a climate change regime could be enforced against all nations, its allocation of emissions privilege could be enforced against all nations, provided that the scheme had collected what I would call a "four majorities regime"; that is a majority of votes of the General Assembly, the votes of countries in the General Assembly collectively representing most of the people on the planet, a majority of members of the Security Council, a majority of the permanent members of the Security Council. I think if -that's a very high hurdle-, I think that if some hurdle



of that character was adopted, there could be no objection made to it on grounds of world democracy and it would, in my opinion, be within the power of the General Assembly given the difficulties that the veto has posed in the Security Council.

Now, you have been very patient as I have gone from one extravagant idea to another, and nobody has jumped up yet and said: “but who would accept that?” Very important question. The time may very well come when the need for an international law more robust than we have it, is apparent to all nations - my money would be on climate change as bringing that about. It will be, indeed, of course it is, that few nations will accept the theory of international law and the hypothesis about the powers of the General Assembly that I unveil. But, to repeat, we don’t have a theory of international law. The consent theory is not an adequate theory, it’s a failed theory. When, and if, the time comes when the nations of the world are ready for a better theory, it shouldn’t be our fault, it shouldn’t be the fault of the Academy, it shouldn’t be the fault of the law schools that we aren’t ready with one. So, we should debate and if you think mine is a bit extravagant, then the question would be “can we have any theory?”, given that the consent theory won’t do, and it falls on the profession and particularly on international lawyers to return to the old question: “is there any such thing as international law?”, and on the assumption that there is what are its grounds and what are the interpretative implications of those grounds. We have been for too long cataloguing the bowers and the twigs of international doctrine. Now it’s time to nourish the roots. Thank you.