agreed to have working groups that were not committees of the whole, but rather reflections of some of the economic realities underlying the issue being discussed.

Mr. GONZALEZ GALLEZ conceded that that was a difficult question to answer. His country had not accepted such a position, though he personally thought that there might be some value in changing the one country, one vote rule in some circumstances. How this could be accomplished, however, was extremely difficult to imagine. The developing countries were giving some thought to the question; for example, his country had been host to the Cancun summit in October where 81 heads of state, including President Reagan, had discussed how to solve the most important problems facing the international community in the economic sphere. It could not be expected that in two days the whole range of problems would have been solved, but at least there had been an exchange of views. His own personal interpretation of the Cancun summit was that it was an indication that his country was trying to find new and creative ways to solve the complex problems of international economic relations. For example, an agreement had been reached between Mexico and Venezuela to supply oil at a substantial discount to the countries of the Caribbean region. This indicated that the developing countries, or at least some of them, were trying to find alternative ways of addressing the problems.

JOHN R. LACEY*
*Reporte

THEORY AND REALITY IN INTERNATIONAL LAW

The plenary session was called to order at 8:30 p.m., April 24, 1981, by the Chairman, Oscar Schachter.**

THEORY AND REALITY IN INTERNATIONAL LAW

By Max Sorensen**

“International law: its present and future” is a title which in the past was as topical as it is today. It was, indeed, the title under which, 75 years ago, John Bassett Moore introduced the very first issue of the American Journal of International Law.1

There were, he said then, two modes in which international law might be developed. The first was the general and gradual transformation of international opinion and practice. And he cited the recent decision of the U.S. Supreme Court in which it was held that a Cuban fishing vessel, the Paquete Habana, could not be seized and confiscated as enemy property. The Court held that the exemption from capture as prize of war which such vessels had previously enjoyed as a matter of comity, courtesy, or concession, had by the general assent of civilized nations grown into a settled rule of international law.

The second mode of development, according to John Bassett Moore, was by

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what might be called acts of international legislation, examples of which were afforded by the several congresses of the preceding century.

But this unmistakable progress at the same time denoted the defects of the system. There was, said Moore, a want of some form of international organization for the common interpretation and enforcement of the law. Here lay the work of the future.

This analysis of future needs could not have been more perspicacious. Indeed, the intervening three-quarters of a century may be seen as the story of efforts and failures to proceed on the course plotted out by John Bassett Moore. We have witnessed the creation and growth of international judicial machinery, but also its decline. We have seen the establishment and proliferation of organizational structures, but the enforcement of the law is as deficient as it ever was.

The resulting discrepancy between theory and reality may be reduced to a very simple formula. In theory international law is a system of binding norms, but in reality effective compliance with the law is low, at any rate in matters affecting important national interests, and the substantive content of many norms is controversial.

The question now is: What insights have we gained in the course of the process that has led to the present situation?

One essential point is the following. We cannot expect the development of the international legal system to follow the historical pattern of development we have observed in national legal systems. The national model, characterized by a progressive centralization of norm setting and law enforcement, is not applicable to the international society. The centers of power, both physical and economic, remain dispersed in the world, and the cultural basis of organized life in society differs profoundly from one part of the world to another.

And yet the very concept of law we apply in relations between states is essentially the same as the concept of law which practice and jurisprudence have combined to develop in national legal systems, namely a body of norms endowed with specific qualities in terms of obligatory force. The persistence in applying the same basic concept of law in different social settings is, I think, at the root of some of the intellectual perplexities we feel as lawyers when faced with the harsh realities of international life.

There are, of course, several approaches to the study of law.

One approach is that of the observer who looks at the legal system from outside and describes the rules and regularities he is able to ascertain. This is typically the approach of the legal anthropologist, of the comparatist making an inventory of foreign law, and of the historian recording the law of times past. The essential point is the descriptive method that is applied.

A second approach is that of the actor in a legal system. The judge, the advocate, and the scholar engaged in throwing light on obscurities in the law, study the system from within and apply accepted standards of legal reasoning and interpretation. The result of the inquiry is expressed in normative terms.

A third approach is that of the reformer. His purpose is to find out in what direction and through what means the law should develop. His investigations belong to the realm of scholarship if he does not simply pursue sectional interests, but endeavors to relate the development of the law to underlying social factors.

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2The cultural factors have been studied in particular by Adda B. Bozeman in The Future of Law in a Multi-cultural World (1971), and On the Relevancy of Hugo Grotius and De Jure Belli ac Pacis for our Times, in 1 Grotiana, at 85-124 (1980).
and to generally accepted goals. This is a policy approach, for which there is a particularly adequate expression in the German term "Rechtspolitik." The results of the investigations are conveyed in terms of recommended action.

Other approaches are conceivable, each distinguished by its particular methodology. They may be combined, and any specific inquiry may contain varying doses of different methods, but they should not be confounded.

Cutting across these categories divided along vertical lines, as it were, there is a kind of preliminary question oriented along a horizontal line of division. How do we distinguish law from other social norms? Law as a system of norms does not hold a monopoly on regulation, either in national societies or in the international field. There are other norms, whatever names we apply to them—moral precepts, comity, codes of good behavior, professional standards of conduct, "rules of the game," etc.—which influence human action, and one of the perennial problems of jurisprudence and legal philosophy is precisely to determine the dividing line between legal and nonlegal norms. In whichever capacity we approach legal problems—be it as observers, actors or reformers—the question inevitably arises: by what criteria do we recognize a social norm as legal, that is as having the particular characteristics which warrant its classification as a legal norm?

At this point the notions and the terminology introduced by H.L.A. Hart naturally come to mind. He distinguishes between primary rules, or rules of obligation, and secondary rules, which specify the ways in which primary rules may be conclusively ascertained, introduced, eliminated or varied, and the fact of their violation conclusively determined. Foremost among secondary rules are what Hart calls rules of recognition, that is the rules for conclusive identification of primary rules of obligation by reference to some general characteristic possessed by the primary rules. This is, generally speaking, the problem which traditionally is dealt with by the doctrine of the sources of law.\(^3\)

In national law this problem does not nowadays attract great attention. In the field of international law, by contrast, doctrine as well as practice have never been more divided over the problem than today. When Article 38 was included in the Statute of the Permanent Court some 60 years ago, there were controversies over details only, not over fundamental issues. The enumeration of the categories of rules which the Court should apply was considered to conform, by and large, with accepted doctrine of the sources of international law.\(^4\)

This is no longer the case. The doctrine of customary law is in the melting pot, and the nature of resolutions adopted by international organizations is controversial, to mention only two points. Whether we approach the problem as observers, actors or reformers we have difficulties in ascertaining the rules of recognition in the international system. As a result, difficulties inevitably arise at the level of primary rules of obligation when we have to determine which norms are legal and which are not.

The causes of this unfortunate development are closely connected with the profound changes undergone by the international community in our time. New political forces, changed economic relationships, stronger manifestation of cultural diversity, and differing scales of value, are a few catchwords that indicate some major factors. Whatever the profound causes may be, it is a paradox that our difficulties over the identification of the law arise in part out of the new

\(^3\)H.L.A. HART, THE CONCEPT OF LAW, at Chapter 5, Law as the Union of Primary and Secondary Norms (1961).

\(^4\)I have briefly analyzed the drafting history of Article 38 in LES SOURCES DU DROIT INTERNATIONAL, at 30-33 (1946).
organizational structures and procedures which are often seen as an embryonic international legislature.

The paradox, however, is more seeming than real. The point is precisely that the development of these new structures is not comparable to the centralization out of which our present national legal orders have grown. If it is, therefore, a mistake to transpose the national model of legal development to the international field, the question arises whether it is not also a mistake to transpose unreflectingly our concept of law from the national to the international sphere.

It is so, most obviously, if as a point of departure we choose the concept in which enforcement by an effective system of sanctions is an essential element of the law. Under none of the provisions of the Charter—neither Chapter VII nor Article 94, paragraph 2—has anything like an effective system of sanctions been established. The power relationships in the world, the sheltering of weak law breakers behind powerful protectors, the political nature of any decision concerning enforcement measures, and existing inhibitions on self-help for the assertion of rights are factors which, separately and jointly, refute the idea that the availability of physical sanctions or means of coercion could be relevant to any useful concept of international law.

The instrument of the law, however, has many strings. Effective compliance may be promoted by other means than physical coercion. Diffused social pressure, ostracism, denial of advantages and privileges, as well as inducements and incitements, motivate the behavior of social actors. The behavior of states is no exception. In their case even bureaucratic routine may favor compliance with the law.

From this general experience the inference is sometimes drawn that the operation of these motivating factors is equivalent to a range of sanctions which do allow us to consider international law as a legal system in the proper sense of the word, in spite of the absence of legal machinery for direct enforcement.

This way of reasoning, however, tends to overlook that similar social pressures operate to secure compliance with social norms other than those of the law. In the conduct of international affairs, in particular, the same motivating factors influence observance of a wide range of norms, whether or not they are perceived as legal.

The activities of functional international organizations, the Specialized Agencies related to the United Nations, as well as others, offer rich material for reflection. The conference organized by the American Society of International Law in 1967 on the Effectiveness of International Decisions revealed the importance of the twilight area extending between legal and nonlegal phenomena. Out of the contributions to the conference emerged a general picture showing that compliance with rules and decisions of international organizations is secured by various effective mechanisms. Noncompliance may expose a defaulting state to severe natural sanctions depriving it of the benefits and advantages which generally flow from active participation in the work of the organization. Reciprocity plays an important part, and in many organizations the “mobilization of shame” is utilized as an effective means of influence.

The conference, however, demonstrated the difficulties in distinguishing legal from nonlegal elements. Reference was made to the high degree of paralegal or metalegal content in some organizations. The effective operation of several nor-

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9Id., at 83.
10The Effectiveness of International Decisions, (S. Schwebel ed. 1971).
mative factors was clearly recognized, but the debate was inconclusive as to
criteria for identifying those elements which should be considered as legal. If
anything, the debate suggested that it is not a simple matter to maintain the
unity of the concept of law. In terms of systems analysis most functional or-
organizations may be considered as subsystems, distinguished by structural and oper-
tional particularities within the general international system, and such elements
as they have in common suggest the emergence of some kind of international-
organization law as a separate discipline having characteristics of its own.8

However this may be, the elaborate and more or less coherent set of norms
which has grown up in contemporary international organizations has one pre-
dominant characteristic which is particularly relevant in the present context.
Adjudication is relegated to a modest role, if not to total absence. In this respect
functional organizations, general political organizations, and the traditional sys-
tem of international law are alike, and the overall trend in our time is retrograde
rather than progressive. There is a revealing contrast to the singular experience of
a few regional organizations in Western Europe, notably the European Communi-
ties, where a judicial function has been developed which bears comparison with
national legal systems.

The general decline of international adjudication, particularly over the last 20
years, has often been analyzed, and little can be added, except an underlining of
its far-reaching repercussions. It is not only that the potentialities of available
procedures for the settlement of disputes are left unexploited, nor that the devel-
ment of international law through the judicial process is inhibited. The problem
is more fundamental. Is it possible or appropriate to qualify any given normative
system as a system of law, if it does not adequately provide for adjudication, that
is if the system does not comprise judicial bodies as final arbiters in matters
concerning the understanding and application of the rules?

The question is pertinent, for there are, as we know, schools of jurisprudence
which draw the line of demarcation between law and other social norms by refer-
ence primarily to the judicial function. By that criterion a legal norm is one which
a judicial tribunal is currently applying or may be expected to apply whenever the
issue is properly presented to it. Historically, law is seen to have grown out of
customs and usages which judicial bodies have taken as directives for adjudicat-
ing disputes, and which in the process have acquired that particular quality or
validity which derives from the expectation that the same point will be decided
the same way in any future litigation, before a judge who exercises his functions
properly. Dogmatically, law is seen to be the rules courts apply, whether these rules
originally grew out of customs and usages, or were formulated authoritatively by
the holder of sovereign power in the community, or from any other source. In any
case, according to these schools of jurisprudence, to which I feel great affinity, it is
in the judicial process that the nature of a norm is put to the test: does it exist as a
legal norm or not? The point could be illustrated by no better example than the
case of the Paquete Habana mentioned above.

Given the continuity and consistency inherent in the proper exercise of judicial
power, the decisive criteria are then to be found in the principles recognized by the
judicial bodies as governing the selection of applicable norms, that is in the "rules
of recognition" according to the terminology of H.L.A. Hart, or in the sources of
law, as others would call it.

8See in particular Fitzgerald, in id., at 201-03, 365 and 379-82.
If adjudicatory machinery, operating to the same extent as in national legal systems or in the European Communities, existed now in the international system, theory and reality would not be so far apart as they are today. If, on the other hand, adjudication were entirely unknown in the international system, we would have either to conclude that what we call international law is not law, or to identify the quality of law with other characteristics of a normative system.

The situation, as we know, is somewhere in between the two extremes. The role of international adjudication is modest, but not entirely insignificant. The case law of the International Court and special arbitral tribunals operating in the orbit of international law is on the one hand not sufficiently substantial for the elaboration of a complete and coherent doctrine, but does on the other hand provide a certain measure of guidance. By way of example, the case law does not answer the controversial questions relating to the legal effects of resolutions of international organizations, but it does indicate that the classical doctrine of customary law is engaged in a process of change. The ICJ is sometimes reproached for being unpredictable. The essence of this reproach is that its case law is too sparse to form a coherent and systematic pattern, as regards not only primary rules of obligation, but also secondary rules of recognition.

Truly there is another aspect of the problem of adjudication. International law is applied by national courts, as J.B. Moore recalled 75 years ago. Treaty provisions are relied upon in national litigation when considered as self-executing. The common law doctrine holding international law to be part of the law of the land, finds its counterpart outside the common law world. Resolutions of international organizations are being invoked before national courts. It is true, as Professor Henkin concluded in a recent study of U.S. practice, that compliance with such resolutions is primarily a political, rather than a judicial, matter, but there are exceptions. A recent decision of a U.S. Court of Appeals took account of a series of treaties and U.N. declarations forbidding torture. There is also an interesting decision of the Supreme Court of the Federal Republic of Germany which gave effect to certain UNESCO resolutions, and to an unratified convention concerning illicit trade in cultural property, by declaring void a private contract providing for the export of such property from a foreign country in violation of a local prohibition. A further development of this way of implementing resolutions of international organizations has been proposed with respect to Security Council resolutions imposing economic measures against states having violated their obligations under the Charter.

Now, the importance of national courts as instruments of international law is beyond doubt. In a broader perspective, Professor Roger Fisher stated in his concluding volume of the series International Crises and the Role of Law that “(b)ending international rules into the domestic legal fabric is one of the key ways in which a state can cause initial respect for those rules.” National courts, however, cannot entirely replace international judicial machinery. First, not all


See Leutpacht in The Effectiveness, *supra* n. 7, at 57-65.

prescriptions of international law give rise to individual causes of action, or grounds of defense, which could be relied upon in national litigation. Secondly, and this is more fundamental, there are actually—except in the European Communities—no procedures for assuring uniformity, either in terms of substantive findings or with regard to methodology. Courts of each individual country remain masters of their own law-finding. They may wish to look for guidance from international bodies, but they do not always find it. Interpretation of treaty provisions and, even more so, recognition of customary rules may vary from one country to another, and often do. The subject matter of international immunities is one among several examples. So the shortcomings of international adjudication cannot be remedied by national judicial procedures.

How then can a normative system which is lacking in legal sanctions, and lacking in adequate judicial machinery, be reasonably considered as a legal system? For that is what it is, after all.

At this point of the argument I find it necessary to make explicit certain assumptions about the basis of obligation in international law. I do not intend to discuss this problem in depth. Others have done so better than I could do. Writing some years ago, Professor Schachter listed a baker’s dozen of different theories which had been brought to the fore of scientific debate through the ages. Contemporary ideas and values generally cherished throughout the world have narrowed the choice. Beliefs in any transcendental force which would endow the law with a special obligatory quality have lost their grip on minds, and no sovereign power has yet emerged over and above individual states. The theory of consent in the strict sense of the word leads to unrealistic and unacceptable consequences, but on a higher level of abstraction the existence of a general and global consensus as to the social need for a binding legal order seems to offer an adequate theoretical answer, and probably the only answer.

On that assumption, the doctrine of sources must have regard to the different consensual elements inherent in the various categories of rules. This is even more so if not only the static, but also the dynamic, aspects of the international legal system are considered, and if the metaphor of “sources” is exchanged for a more straightforward description of what is envisaged, namely the norm-creating process in international law.

In this perspective, treaty law raises no particular problems. The preliminary principle of pacta sunt servanda may be assumed as inherent in the basic consensus, and the specific obligations of each contracting state are determined by the scope and conditions of its consent. There is, of course, the difficulty of interpretation—not least of multilateral treaties—and the accepted canons of interpretation do not always offer sufficient help. No interpretation, however, could impose upon a state any obligation which could not—directly or indirectly—be derived from its consent.

Similarly, certain resolutions of international organizations which are binding under the rules of the organization, derive this quality directly or through intermediate stages from the constitutive act, to which member states have freely adhered.

Customary law was traditionally considered as created by tacit agreement. From the times of Roman law, through the classic writers on international law, up to recent doctrine this construction found expression in the requirement that a general practice should be followed ex opinione juris in order to qualify as a binding customary rule. Article 38 of the Statute of the ICJ reflects the same view in the term “a general practice accepted as law.”

The Court has drawn one particularly important inference from this assimilation of custom to a tacit agreement. In the Norwegian Fisheries case (1951) it held that a new rule of customary law could not be relied upon as against a state which, at the formative stage, had refused to be bound. This negative emanation from the doctrine of tacit consent can reasonably claim a permanent place, I submit, even when the positive emphasis in the law-creating process is shifted from consent to the less rigid notion of consensus.

Where traditional customary law is based on the observation of state conduct, from which inferences are drawn when a coherent pattern of regular conduct can be discerned, we now in addition have procedures which resemble legislation in that they lead to the adoption of verbal formulae having the same linguistic structure as binding prescriptions, but differ from legislation by not creating law in virtue of any higher constitutional rule or principle. Codification in the United Nations, resolutions of diplomatic conferences, and declarations by the General Assembly provide examples.

As the International Court seems to have recognized in the Icelandic Fisheries cases (1974), a normative text, although not binding as such, may serve as an authoritative guide for the conduct of states. It is likely to be invoked in support of claims or in order to justify disputed courses of action. It may promote and accelerate the formation of a general practice, and at the same time reduce the requirements as to generality and consistency of practice. It may also lower the threshold between unlawful conduct and acceptable practice.

The proof of the opinio juris, which traditionally has been a matter of controversy, also appears in a new light. Statements made and attitudes adopted by governments during the preparation of a text become relevant both to the material and the subjective element of a customary rule, and the proper approach may well be not to verify these elements separately, but to examine them as interlocking and mutually interdependent parts of a general process.

If then the existence of a customary international rule is at issue in litigation, the adjudicator, now as before, will have to cut through uncertainties and decide one way or the other. He cannot consider law as a question of degree. To the international, no less than the national, judge the concept of law is qualitative.

The present insignificance of the judicial process in international relations, however, accentuates the question whether such a concept is adequate in contexts where adjudication is not a practical proposition. The consensual element in customary law is quantitative, a question of more or less. The generality, the basic strength, and the mode of articulation of any consensus are matters of degree. This is clearly so when a text is put to the vote in an international assembly. It is also the case, I submit, although less conspicuously, when the so-called procedure

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of consensus is adopted. The course of debate may very well indicate that the declared consensus is more or less genuine, more or less comprehensive, and more or less consolidated.

The justification of this approach is even more apparent for purposes of examining the kind of diffuse and unstructured consensus which may emerge in the international community at large, outside, or on the fringe of, the organizational framework of international institutions. Is not the conclusion to be drawn that, in extrajudicial contexts, only a quantitative concept of international law is adequate? This is what Professor Schachter suggested some years ago, if I understand him correctly,\(^1\) and personally I believe that this is the more realistic approach in present circumstances.

The implication for the future is that our concept of international law will have to differ in different operational contexts. In a judicial context the traditional concept will remain adequate. There the need is for a revised notion of customary law, taking into account recent organizational developments. In extrajudicial contexts the concept of legal obligation will become relative, just as effectiveness is relative. The degree of effectiveness may even be seen as an indicator of the degree of consensus supporting any particular rule. At the risk of being unduly simplistic one may be tempted to conclude that the perplexing discrepancy between law and effectiveness will tend to vanish.

One point is certain. A relativist approach to the notion of legal obligation leads to a relativist notion of violation. Except for clear cases at either end of the spectrum, it becomes a matter of degree whether or not any given conduct is unlawful, even assuming that the facts are clear. The dichotomy between legal and illegal conduct which is inherent in adjudication is not necessary to other modes of conflict resolution. Emphasis will shift from condemnation to settlement by negotiation and conciliation. In this process legal appreciations will carry greater or lesser weight as compared to other factors thrown into balance, but will rarely be entirely absent.

The presence of active participants trained in the art and profession of law, and applying their particular skill and insights, their methods and techniques, to the solution of specific issues may help to secure that relativism does not degenerate into anarchy and arbitrariness. In the final analysis, the professional and ethical standards of international lawyers will remain as influential as they ever were.

**Remarks by Henry J. Steiner***

Professor Steiner presented a schematic outline of his pending project, "Norm-Structured Argument within International Law." In this project he would examine how arguments involving an international law norm were structured, given the amorphous nature of international law. His concern was with the conceptual structure of argument.

Professor Steiner saw two fundamental contexts within his conceptual framework that should be viewed: first, in argument between interacting states; second, in the judicial context. Argument was the course of reasoned exposition, and

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\(^1\) Schachter, *supra* n. 14, at 30: "legal obligation—whether national or international—may involve "degrees" and [that] it will depend on attitudes, expectations and compliance." Tunkin, in *19 Indian J. Int’l L.* 482 (1979), speaks of certain resolutions of international organizations being "only partially legal."

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might be seen in a variety of contexts. Argument was an embracive term. There were two forms of argument—the argument of “ought” and the argument of “interests.” Professor Steiner focused on the norm-structured argument—the argument of “ought.” A synonym for this form of argument was legal reasoning, as in what was inculcated in legal education in the United States. His concern was not with the rhetorical form of argument, the rhetoric of advocacy, the strategy of argument, nor with whether normative matters exacerbated rather than settled disputes.

Professor Steiner gave a brief notion of what he meant by norm-structured argument. He drew domestic legal analogies from the Anglo-American system. He saw three types of norm-structured arguments: formalism—applying a norm to a case; instrumentalism—reasoning towards a goal, looking at a means/end relationship; and forms of reasoning based on an ideal theory of moral justification. Professor Steiner next examined legal argument in the international scene based on the types that he had developed.

The first type was argument based on extant rules or principles. What he meant by that was the argument that a state should or should not do something because there was a rule, there was something in the corpus juris of international law. That “something” could be treaty or custom. What was important was that there was an existing consensus which could be found through empirical verification. The buzz words were “agreed to,” “accepted,” “recognized.” The second broad type was argument based on theories of moral justification. Professor Steiner drew upon the Western liberal tradition in looking at theories of utility and right or fairness.

The first ideal type, that of extant rules, drew on the concept of positivism, from the concept of law as an artifact, law as the product of the will of states. Professor Steiner referred to the form of argument dominantly expressed by Article 38, especially 1(a) and 1(b), treaty and custom. Positivism was resorted to, given the weak political foundation of the international system, because it placed the third party court or decisionmaker and the disputing states in the most neutral terms and apolitical posture. Professor Steiner pointed out that this concept was incoherent. He stressed the porousness of positivist legal theory—to focus on how broadly accepted a measure was to bring into question whether qualitative or quantitative measures had been employed. How was it determined whether a state’s practice was deviant, or constitutive of a new rule?

The second ideal type was that of right or fairness, of utilitarianism, the moral constructs of Western moral thought. In his draft project he had dealt with the argument that norm-arguments were disguised self-interest. He traced the structures of argument and their indeterminacy, and showed how, as one traced across the spectrum of argument—from positivism—extant law, to consensus, to argument based on an ideal theory, one moved from a more status quo oriented argument to one more change oriented.

THE CONTEMPORARY MARXIST THEORY OF INTERNATIONAL LAW

Vratislav Pechota*

Legal theories, like any ideas about society, are products of the processes of abstraction from reality. A sound theory abstracts in a useful and significant way;

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therefore, in order to be meaningful, a theoretical conception must not involve a rejection of empirical knowledge and must be able to help us to get into satisfactory relations with our experience. The key test is always whether the theory agrees with reality and, at the same time, is applicable within reality.

Those who assert the possibility of theory for international law must reckon with the difficulty of tying the study of their subject to the framework of national aims and aspirations and their areas of compatibility and incompatibility. The more political the theory, the greater is the likelihood that its proponents will confront the obstacles, ambiguities and contradictions which are at the root of every theoretical system too closely linked to a particular political outlook. This is the problem of the Marxist doctrine of international law, chiefly as formulated and developed by contemporary Soviet jurisprudence.

In attempting an appraisal of significant positions taken by Soviet international jurists, one must recognize that they have moved a long way from their starting point and that the theoretical concepts they embrace have considerable impact on many current notions of international law. Despite an evident discrepancy between the theoretical concepts and the reality of Soviet international behavior, the former are given credence in many sections of the enlarged international community, and their emphasis on sovereignty and sovereign equality as the cornerstones of international law makes them especially appealing to the Third World.

Basically, the conceptions, which Soviet jurisprudence shares, are a product of two factors: one, Marxist-Leninist ideological positions; the other, the sort of legal analysis which may be called positivist, using the word in its broadest sense.

On the ideological level, law is viewed as a phenomenon conditioned by the economic structure of society. As the Marxist-Leninist view holds that the state is an organization for advancing the interests of the ruling class, the structure of a given society determines whether the law is capitalist or socialist. International law, it is said, is a distinct element influenced by the economic structures of various states, and general international law is reflective of the existence of the divergent socio-economic structures of society that compete for influence in the world today. To explain how this influence is exerted is the task of both the theory of international law and that of international relations. For a Soviet analyst, political history since the 1917 October Revolution (which is identified with the advent of a new era in the history of mankind) has been largely the story of rival interests, socialist and capitalist, contending for primacy in the world, undermining each other's political and moral positions, bidding for Third World support, and finally staking everything on the preponderance of power. One implication of this outlook is that world issues are apt to reach the Soviet analyst without shading, all black and white, and that class instinct, rather than impartiality, is regarded as the main virtue of a socialist lawyer.

As Marxist jurists believe in objective historic processes, they hold for certain that the more progressive socio-economic structures, the collectivist ones, will influence the development of international law to a greater degree than the formations based on private ownership. In this respect, they may derive certain comfort from the emergence of such recent concepts as the "new international economic order" or the "common heritage of mankind," to name just two current notions clamoring for legal sanction.

Because of the divisions in the world today, international law does not qualify in the eyes of Soviet doctrine to be regarded as an organic law of the international community—the term which Soviet jurisprudence uses with extreme caution,
preferring the term 'international system'—but rather as a dynamic body of rules regulating relations between autonomous entities whose interests are too often antagonistic. This view may be consistent with many Soviet involvements in the struggle for power in various parts of the globe, but it is certainly not consistent with the quest for involvement which calls for a collective value and for investing the international community with legal competence to protect that value.

The cardinal notion of Soviet doctrine is, of course, that of state sovereignty. Exercise of sovereignty has, in fact, been the most important sociological context in which the Soviet conception of international law developed. For many years, Soviet jurisprudence interpreted state sovereignty in a most absolute sense. It is only recently that it has come to recognize that sovereignty under law is more desirable than sovereignty above law, a feat which is certainly worthy of praise. What is, however, less certain is whether the present Soviet thinking still identifies itself with the original Marxist view that valued sovereignty as a dynamic factor, capable of shattering the status quo for the benefit of revolutionary change or whether it has shifted toward a conservative position that cherishes sovereignty because it centralizes power and serves the interest of stability.

One implication of the Soviet notion of sovereignty is that international law and municipal law are regarded as completely independent systems, even at the expense of logical harmony and with some danger of conflict. It is perhaps worth noting that the position of Soviet legal theoreticians is more rigid than the existing Soviet legislation. While Soviet writers insist that the impact of international law on the legal system of their country is marginal since socialist law already contains all legal democratic institutions which municipal law might take from international standards, Soviet statutes make it quite explicit that there is room within the domestic system for the application of international rules. Thus, Section 129 of the Basic Civil Law and Section 64 of the Civil Procedure Act (both enacted in 1961) contain the following identical provision: “If by an international treaty or an international agreement to which the USSR is a party other rules are laid down than those provided for by Soviet civil legislation, then the rules of the international treaty or agreement shall be applied.” Nonetheless, the doctrinal view holds that the character of the socio-economic system determines the actual scope of domestic implementation of an international norm and, therefore, the contents of the norm when applied domestically may differ from country to country. Clearly, this view raises many serious questions about the implementation of international commitments, especially in such an important area of international concern as human rights. While most governments which enter into treaty relationships with the Soviet Union on matters of human rights, in general, are prepared to accept the premise that the state is the normal agency for the protection of rights, they are unwilling to subscribe to the view that the scope and content of universal standards may change, through a process of integration with domestic law, such that virtually no room is left for comparison and for a meaningful scrutiny of performance.

Conversely, the impact of municipal law on international law is equally underrated. Soviet jurisprudence invariably rejects as useless and even harmful any attempts to modify international law on the pattern of national legal systems and maintains that legal experience relating to the domestic systems of law is conveyed only through the legal consciousness of the interacting parties in the international sphere. To be sure, there are differences among the Soviet legal scholars on this and other related issues, but their differences are of degree rather than kind.
For the same theoretical reasons, notions of “transnational law” and “world law” are anathema to Soviet doctrine, and Soviet legal writers spare no effort in denouncing them as manifestations of imperialist tendencies in the legal sphere.

The other factor involved in the shaping of the Marxist concept is the sort of legal analysis applied by Soviet jurists in assessing the nature of contemporary international law. Preeminent among the theories which have currency in the Soviet Union and throughout Eastern Europe is the theory of the coordination of the wills of states. The theory was formulated by the most fluent and the most scholarly of the Soviet international lawyers, Professor Gregory Tunkin, and it contains much with which many a Western jurist may agree. Its essence lies in the proposition that in an international system embracing sovereign and legally equal states, there is no other means of creating the rules of international law, except by the coordination of the wills of states regarding the contents of the rules and their recognition as legal bonds.

If the formula sounds familiar to those acquainted with late 19th-century and early 20th-century legal positivism, it is not by fortuity. Professor Tunkin does not deny the relationship, but draws attention to a critical distinction. While the international law of the positivist period was a law agreed upon by states having the same system, and therefore reflected the will of the capitalist class only, at the foundation of contemporary international law lies the agreement resulting from the struggle and cooperation (in Marxist doctrine, there is a dialectic unity between the two) within an international system which by no means is homogenous in the class sense. As a consequence, contemporary international law is neither capitalist nor socialist, but it is of general democratic character, since this is the only possible basis for agreement.

As the relations of states with different systems are inherently conflictual, the agreement is ordinarily a compromise, and its outcome depends on how the mutual concessions result in an adjustment which brings in its train the most satisfaction and leaves the least animosity. Agreement, according to Professor Tunkin, injects order in the midst of conflict, and the order is not political but legal.

Predictably, this theory singles out the treaty as the principal source of international law. But it looks favorably upon other forms of the coordination of state wills as well. Some of its proponents are also prone to admit to the sanctuary of law-creating acts, collective decisions and even some recommendations of the political organs of the United Nations, while others are more circumspect. However, the support for UN resolutions as the sources of law is not unqualified. To be regarded as norms containing legal elements, they must be truly representative of the wills of states belonging to the main social, economic and legal systems existing in the world today. What this means, in practical terms, is that no legal norm can be created through the political process of the United Nations unless it has the explicit approval of the Soviet Union. In procedural terms it means that the international body should apply the method of consensus.

Significantly, the United Nations has been applying the rule of consensus with increasing frequency, particularly in the legal field. The 1970 Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States was adopted by consensus, and the same method is being used at the ongoing conference on the law of the sea. To be sure, the method of consensus benefits the numerical minority. It is no surprise, therefore, that it is favored not only by the socialist states which constitute a minority in the world body, but increasingly also by the Western nations which often find themselves outvoted on issues of consequence.
Similar consensual requirement applies, in the Soviet view, *mutatis mutandis* to the creation of the customary rules of international law. However, the positivist approach is less observable when it comes to the fundamental principles of international law, such as the nonuse of force, the peaceful settlement of disputes, sovereign equality, nonintervention, and self-determination. Given the Soviet penchant for general principles, it is not surprising that the fundamental principles of international law occupy a special place in the system of sources recognized by the Soviet doctrine. They are like stalactites: they grow by accretion, with each new treaty rule, each interpretation or each collective pronouncement adding a particle. It is through growth that international law as a whole progressively develops and becomes more democratic. Sometimes they are also called "general principles," because they represent the generalized expressions of concrete rules and also because they are deemed to be generally binding. According to Soviet doctrine, they constitute the backbone of the contemporary legal order and provide criteria to judge the lawfulness of the international behavior of states.

Since the purpose of Soviet doctrine is to explain the existence of law common to states governed by antagonistic social classes, a central issue involves the operational principle which makes possible the transition of the basic ideological tenet of the class struggle into justifiable Soviet behavior in international relations. The reference is to the concept of peaceful coexistence.

There is no doubt that the Soviet Union has a stake in détente and peaceful coexistence: for if the world were to be thrown into a new Cold War, it would be the one that would have to pay the highest price. The striving for a *modus vivendi* with the West is not of a new date. We may recall, in this connection, Lenin's famous dictum that if the Soviets didn't want to coexist with the capitalist countries on this planet, they would simply have to fly to the moon. Therefore, peaceful coexistence on terms acceptable to the Soviet Union became a fundamental tenet of Soviet policy, and theory was called upon to enhance the rationality of choice.

Soviet jurisprudence postulates peaceful coexistence as the most fundamental principle of international law overriding all other rules of international conduct. However, its normative content has never been adequately defined: Soviet jurists simply describe it as a composite principle combining the essential elements of such grand principles of contemporary international law as the nonuse of force, the peaceful settlement of disputes, nonintervention, respect for sovereignty, and cooperation. They seem to be unconcerned about the contingency that, in many instances, the common understanding of the principle is an assumption rather than a reality. Thus, its inclusion among the "Basic Principles of Relations between the U.S.A. and the U.S.S.R." agreed upon during President Nixon's visit to Moscow in May 1972 is regarded as the unqualified recognition of the legal principle by the United States, and no effort is made to ascertain whether the coordination of the wills of the signatories effectively amounted to an agreement regarding both the content and the binding character of the rule.

By definition, the principle of peaceful coexistence purports to apply to the relations of states having different socio-economic systems. In the Soviet view, it is not applicable to the relations between socialist states; the assumption is that these relations are governed by a different set of legal rules, the predominant being the principle of proletarian or socialist internationalism. The advocacy of the 'socialist international law' as a system distinct from and superior to general international law has become a vogue among the Soviet jurists and some of their colleagues in other East European countries, especially in the German Demonstrations.
ocratic Republic. Apart from being deeply rooted in the ideology and the structure of Soviet politics, the tendency represents a revival of prewar theories asserting the class character of international law. In this ‘new system,’ there is no place for the principle of nonuse of force (on the theory that socialism eliminates the stimuli for war), and all other principles of international law are interpreted in the light of the overriding principle of socialist internationalism which includes the duty of all socialist states to “cooperate with one another in resisting any imperialist attempts at subverting the socialist system,” to “jointly defend the socialist gains,” and to “base their mutual relations on fraternal assistance and solidarity.”

It is from these doctrinal origins as well as from the fact that the Soviet Union gained major-power status in the world that the so-called Brezhnev Doctrine emerged in 1968. Perhaps its most lucid enunciation can be found in the Moscow Protocol of August 26, 1968 forced upon the Czechoslovak leaders in the wake of the Soviet invasion of the Central European country. The Protocol contains a paragraph stating the following: “There was an affirmation of allegiance to the compacts of the socialist countries for the support, consolidation and defense of socialism and the implacable struggle with counter-revolutionary forces, which is a common international duty of all socialist countries.” (Emphasis added.) A similar clause appears in the Treaty of Friendship, Cooperation and Mutual Assistance concluded between the U.S.S.R. and Czechoslovakia in 1970. The disregard of the doctrine for the principle of state sovereignty (as commonly understood) is too obvious to be denied. To catch up with the reality, Soviet jurists try to project sovereignty as a shared value which cannot be separated from other interests of the socialist community. For them, the principle of state sovereignty acquires, under the conditions of socialism, a ‘new dimension’ as a result of the inclusion of additional rights and duties emanating from socialist internationalism. Significantly, among the rights and duties is the authority to intervene—if necessary, by military force—if the situation in any socialist country puts into jeopardy the “socialist gains of the working people.” In the tradition of the Soviet political doubletalk, such extreme action is not called by its proper name, but is referred to as “fraternal assistance” extended to the people of the respective country.

While the overall trend in the postwar period has been toward the universalization of international law, Soviet legal theory has, in fact, been working in the opposite direction. Despite the Soviet denials that there is a contradiction between the principles of socialist internationalism and the fundamental principles of general international law, it can hardly be disputed that the creation of a double standard—one for the relations of the Soviet Union with the West and another for the so-called fraternal countries—weaken the foundations of contemporary international law. The reality which emerges from the dichotomy thus created has grave consequences for the countries of Central and Eastern Europe. As members of the “socialist community,” it is futile to look to other states or international organizations for support, and their case is ambiguous in the eyes of those who accept the doctrine of peaceful coexistence in the Soviet interpretation.

The really troublesome element for the Soviet doctrine is the connection between the coordination of the wills of states and the processes involving the enforcement of established rules. In this regard Soviet theory is sadly deficient. Its neglect for the methods of ensuring compliance with international law can only partly be explained by the doctrinal emphasis laid on the principle *pacta sunt servanda*. Though it must be assumed that international commitments are undertaken in good faith, the international community must know whether its law is
fairly and consistently applied and must be able to restore respect for the law, should such need arise. What accounts for the lukewarm Soviet attitude toward international remedial procedures is perhaps preoccupation with defensive vigilance and general distrust in institutional enforcement, based on the suspicion of anti-Soviet bias. The Soviet Union has never made use of adjudication or arbitration and has consistently resisted treaty arrangements for an international scrutiny of its performance or compulsory procedures involving the use of third parties.

The extent to which Soviet thinking is influenced by distrust in institutional enforcement cannot be ignored. There is nothing more debilitating for a legal theory than to permit itself to be dominated by skepticism toward the mechanisms and methods for making international law more effective, and any theory which does not contribute to the efficacy of international law necessarily loses much of its cogency. On occasion, the above line of thinking conduces to clearly contradictory attitudes, as for example the Soviet judge's dissent in the Iranian Hostage Case before the International Court of Justice, when Judge Morozov concurred in the finding that Iran had violated the law on diplomatic immunity, but failed to support measures to redress the wrong.

Another example of inconsistency is the position that both the Soviet doctrine and practice take on the question of the legal powers of international organizations. While opposing on doctrinal grounds the concept of implied powers when the United Nations and other universal organizations are concerned, Soviet jurisprudence slips into an opportunistic position in claiming for COMECON, the economic grouping led by the Soviet Union, the right to exercise certain powers not explicitly granted by the treaty establishing the organization. More specifically, the notion of implied powers is being invoked by the Soviet Union in defending the legal capacity of COMECON to enter into treaty relationship with the European Economic Community.

It is true that the Soviet doctrine of international law, more than any of its counterparts elsewhere in the world, is responsive to the political aspirations of the country of its origin, and Soviet jurists take pride in admitting this. It is equally important to remember that, at the same time, Soviet theory influences the policies through which those aspirations are furthered.

Whatever one might think of particular elements in the Soviet approach to international law, one must recognize that the Soviet Union, like the United States, plays a crucial part in the processes of international lawmaker and law enforcement. Both powers have the capacity to ordain new rules in the critical areas of international life. Either has the power to veto new principles and emerging rules. Their mutual agreement is essential to the maintenance of international legal order. These are the realities which can by no means be ignored. It is therefore important to understand the doctrinal concepts that underlie the legal policies of the main actors on the contemporary international scene, and to explore the areas of their compatibility and incompatibility.

The fact that Soviet theoretical positions may be controversial and philosophically remote should not constitute an obstacle. The problem involved in the interaction between the Western and Soviet conceptions of international law is not to achieve doctrinal consensus but rather to achieve agreement concerning the goal of making international law a more effective instrument, which goal could be justified on highly divergent doctrinal grounds. There are clearly many areas where the discussion between Western and Soviet jurists may produce some useful results.
Remarks by Anthony A. D'Amato*

It seemed to Professor D'Amato that there were parts of international law that had been untouched by Wittgenstein. Wittgenstein had taught that the way that one asked questions could lead to nonanswers. (In other words one had to look at question formation.) In international law, Professor D'Amato saw a usefulness in the Wittgensteinian approach.

At level one were nonquestions, tautologies. In international law such nonquestions were, "Is international law really law?" "What are the sources of international law?" The questions were academic and purely theoretical, and ultimately futile. Level-two analysis suffered the problem of the criteria of relatedness, a problem often found in articles by practitioners. It was not clear why some things had been included or not. Criteria for inclusion or exclusion amounted to middle-level theories that were often unexpressed (and hence ambiguous).

According to Professor D'Amato a synthesis was needed, middle-level generalizations, grounded in specifics. One had to tease out the latent rules operant in the activity of states and other international law actors. Professor D'Amato took custom as an example of the synthesis of theory and reality, a subject of especial interest to himself and to Judge Sørensen. The latter, quoting H.L.A. Hart, had asked, "What are the rules of recognition?" Professor D'Amato replied that they were whatever middle-level generalizations could be deduced. According to Professor Reisman, there were seven ways of slicing the sources of international law, and three modalities of law determination. But what did Professor Reisman mean by this? What of something that didn't meet all his tests? Would it then be partially valid, partially persuasive, useful at least one litigant?

As an example, Professor D'Amato took two actors, A and B. They might be two states, an individual and a state, a corporation and a state, etc. A acted, or tried to act, and B interfered, or encouraged, or kept quiet. Yet there would be a "case." The generalization involved would have to be teased out. As Professor Boyle had done so well in his article on Entebbe in the Northwestern Law Review, normative principles had to be deduced. State cables, news reports, state papers, and the like had to be examined. It was creative for a student to do this, to show how international law norms interacted and were shaped by the international law situation under study. As for the question of whether international legal scholarship based on international practice had a future, Professor D'Amato's guess was that it was just getting started.

Remarks by Rosalyn Higgins*

Professor Higgins said that each speaker had approached the topic of theory and reality differently. Judge Sørensen reflected what had been widely perceived at this convocation by focusing on the discrepancy between prescription and application. Whether one talked of force, the environment, treaty, customary practice, the details were being filled in as never before. There had been a concern at this convocation that there was an inverse proportion of lawmaking to compliance. Judge Sørensen used "theory" and "reality" to underscore that disturb-

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1Supra, pp. 101-20.
ing discrepancy. In asking how to distinguish law from other social norms, Judge Sørensen was surely right to emphasize the futility of extended analogy with national legal systems. When Professor Reisman sought to answer this question in the context of communication theory, he had suggested three key criteria for distinguishing "simulated" law from "real" law. Judge Sørensen had focused on the adjudicative function, noting that in general it was in decline, but that in certain institutions it was at an increasingly important phase in the development of international law. She was not sure that she understood him when he said that it was in the judicial process that the nature of the norm was put to the test. The implication was that the only way that authoritative answers could be achieved was through the adjudicative process, but this would be to move back to the vertical, national law model that he was rightly rejecting.

Certain approaches of international law carried with them their own mechanism for appraising whether alleged norms were true legal norms. The answers were complex and depended on a variety of factors—i.e., authority, control, widely held expectations. They could not be answered on a procedural level—by reference simply to whether a court had upheld them. The intellectual task of a court was the same as that of a legal adviser or legal scholar. For that reason, Professor Higgins had difficulty understanding what Judge Sørensen had meant when he said that in a judicial context the traditional concept of international law would remain adequate, while in an extrajudicial context the traditional concept of international law legal obligation becomes relative.

Professor Steiner, too, had drawn distinctions between different international law actors. He distinguished state-to-state situations from those involving states and third-party adjudication. Professor Steiner had drawn attention to these actors to show that legal reasoning was used differently in each case. Professor Higgins had no problem in accepting that, in bilateral situations, states were using normative argument tactically, while courts in a Benthamite fashion tried to identify the common good. She had more trouble with the purported separation of the individual good, of "ought," from the maintenance of the common good, because that assumed that the common good was not most often compatible with state interests.

That led Professor Higgins to her next point, that what one saw as reality depended on theory. One's approach to international law determined one's perception of legal reality. Judge Sørensen suggested three groupings or approaches to international law, which could be expanded further—historical, positivist, anthropological, policy science, natural law... In each case, the perception of reality would differ. Eli Lauterpacht had said that "of course, it is appropriate for us to persuade and cajole governments, but let us not say that it is international law itself which prescribes the needs of justice." If one viewed international law as a set of fixed rules, that, of course, was right.

If one looked at international law as a process, with the attribute of normativeness relying on continued response to community aspirations, then one was entitled to say that international law itself prescribed the needs of justice. Mr. Lauterpacht himself acknowledged that the efficacy of law rested in large part on the extent to which it met the aspirations of the peoples of the world, and added that the demand for change was not per se "a bad thing." It seemed to Professor Higgins that the only way one could rigorously identify demands for change as being a "good thing" or not was to look at values one sought to promote through international law. Mr. Lauterpacht talked of the need for objectivity in the application of international law rules. But objectivity and impartiality were not self-
defining. They could only be defined in relation to a value system. Although acknowledging that demands for change might not be a bad thing, Mr. Lauterpacht said that we should not change the rules, which were “pretty good,” but rather we should change the effect of the rules. That indicated a perception of reality based on a theory of international law. The policy-science approach wouldn’t make a rigid distinction between rules and their effect. The identification of norms could not be made in isolation from their effects.

Judge Sørensen had some interesting things to say about consent and consensus, and Dr. Pechota stressed their importance in Marxist legal theory. Judge Sørensen said that the ICJ held in the Norwegian Fisheries case that a new rule of customary international law could not be relied on against a state which in the formative stage had refused to be bound. He suggested that the doctrine of tacit consent could reasonably claim a permanent place even when the positivist emphasis had shifted from consent to the less rigid notion of consensus. Why? Did this accord with our perception of the formulation of custom in the last 30 years?

If there was a newly emerged law on self-determination, was colonial Portugal really not bound by it? And if there was a customary law on nondiscrimination (the question that the court never got to in the 1966 South-West Africa case) would South Africa really be free to say that it wasn’t applicable to herself?

Professor Higgins wondered whether the desire to conceptualize phenomena around us might lead to self-deception. In illustrating his criteria, Professor Reisman described events as he saw them in the Nuclear Test cases. He contended that the court drew back from confirming as an international law norm the unlawfulness of atmospheric testing because of signals from the international community that it wasn’t ready to confirm the evolving norm. Well, perhaps, but could it not also be interpreted, prosaically, that the judges, after hard bargaining, found themselves divided on the substantive issue and therefore availed themselves of the opportunity presented by France’s unilateral announcement of no more testing? Given Professor Reisman’s emphasis on communication, Professor Higgins wondered how he dealt with the weight the court carefully placed on the fact that France communicated to Australia and New Zealand, by a variety of means, its decision not to test further—thus translating a unilateral statement into a commitment under international law, even if not a contract with the Applicants. Was the court’s failure in the 1966 South-West Africa case really a failure to supply one of the component elements, to identify truly emerged norms on apartheid and nondiscrimination? Or was the court simply responding to anxieties about compliance? This led back to the nature or quality of those who had to signal whether a norm existed. In the South-West Africa, and less clearly, in the Nuclear Test cases, a majority of the world seemed ready to say the norm existed. But other key states did not.

In Dr. Pechota’s paper, he guided us through the Marxist position on international law, reminding us that “sovereignty implies that the state cannot be bound by a rule without its express consent.” But did this really reflect the Soviet view on law development? It was expressed that way, but was it the reality? Did the Soviet Union really support the South African view that it was not bound by evolving customary law on self-determination or nondiscrimination? The same would seem to be true about the Marxist attitude toward sources of international law. Dr. Pechota reminded us that the Marxists singled out treaties as the primary source of international law, but it was also true that in certain circumstances U.N. resolutions had been relied on by the Soviet Union as legally compelling. Again, majority view on apartheid was a case in point, but could one really