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Normative Surrender

Jerome B. Elkind*

INTRODUCTION

In the published papers of a recent colloquium on the life and works of Hugo Grotius, the observation was made that Grotius attempted to steer a path between "Utopian idealism which had no chance of exercising any influence on the actual behavior of States, and Machiavellian realism which would have amounted to total surrender to their will and whim."¹

Concern for the distinction between idealism and realism, an issue even at the dawn of the era of power politics, is very much a current issue. In the world of modern international law doctrine there is no greater scorn than that reserved by self-professed "realists" for those whom they choose to regard as "idealists." In the cynical atmosphere of the late twentieth century, it is fashionable to be a realist. Few willingly claim the title of idealist. Among the sins ascribed to idealists are naivete, blinkered optimism, and failure to understand the realities of international life. But the charge which carries a real sting is that of "normative sloppiness," a failure to distinguish between *lex lata* and *lex ferenda*.²

It is a fallacy to assume that any given international lawyer can be neatly categorized as a realist or an idealist. Most approach the subject with a mixture of realism and idealism. To be charged with some of the sins ascribed to idealists can amount almost to a charge of professional incompetence. Yet few would approach international law without some concern for human justice, without some desire to use the discipline to attempt to avoid nuclear cataclysm and without some sense of futility at the prospect of securing peace and justice simultaneously.

It is submitted, at the risk of being accused of idealism, that those who most

*Visiting Professor, University of Wyoming, College of Law. This article was completed while the I was a Visiting Scholar at Columbia University School of Law. I would like to thank Professor John Hazard for very kindly sharing his office space with me during that period and for his considerable support and encouragement. I would also like to thank Professors Oscar Schachter, Walter Gelhorne, Bruce Ackerman, Richard Gardner, William Young, Lori Damrosch, and Michael A. Schwind of New York University Law School for their helpful advice and criticism.

1. Abi-Saab, *Grotius as a System Builder: The Example of Jus Ad Bellum*, GROTIIUS ET L'ORDRE JURIDIQUE INTERNATIONAL 81 (Dufour ed. 1985).

2. This charge is related to the charge of wishful thinking. The normative assumption that idealists are frequently accused of is the assumption that because something *ought* to be the law it is the law.

conspicuously don the mantle of realism are also guilty of normative sloppiness, a form of sloppiness which deserves the name "normative surrender" because it concedes large areas of the law to the will and whim of States. This article will examine the phenomenon of normative surrender and provide some examples of it.

I. THE "GROTIANS" AND THE "INDUCTIVISTS"

The question of normative integrity surfaced rather sharply just over twenty years ago in a debate between C. Wilfred Jenks, a proponent of the "Grotian" school of international law, and Professor Georg Schwarzenberger, the founder of the "inductive" school of international law. The modern Grotian approach to international law was announced by Professor Hersch (later Sir Hersch) Lauterpacht when he took over the editorship of Oppenheim's great treatise on *International Law*. The fifth edition of that treatise, the first under Lauterpacht's editorship, discussed, for the first time, Article 38(3) of the Statute of the Permanent Court of International Justice³ which referred to "The general principles of law recognized by civilized nations." Commenting on that provision, the fifth edition says:

The formal incorporation of that practice in the Statute of the Court marks the explicit abandonment of the positivist view according to which treaties and custom are the only sources of International Law, with the result that in their absence international tribunals are powerless to render decisions. It equally signifies the rejection of the naturalist attitude according to which the law of nature is the primary source of the Law of Nations. It amounts to acceptance of what has been called the Grotian view which, while giving due—and on the whole, decisive—weight to the will of States as the authors of International Law, does not divorce it from the legal experience and practice of mankind generally.⁴

Lauterpacht named his school of international law after Hugo Grotius. Its unique feature was that it professed to combine natural law with positive law. He linked the Grotian position with seventeenth and eighteenth century writers whom he described as standing midway between naturalists and positivists. They considered the positive or voluntary law of equal importance to natural law and devoted their interest to both alike.⁵

The inductive approach was described as:

an empirically and dialectically evolved response to:

- (1) the shortcomings of deductive speculation and rationally unverifiable eclecticism in the Doctrine of international law;
- (2) oversimplifications such as the antinomies posed between naturalist and positivist approaches to law in general, and international law in particular, between the analytical and sociological treatment of international law, and between "idealism" and "realism" in international law;

3. L.F.L. OPPENHEIM, *INTERNATIONAL LAW* 28 (5th ed. Lauterpacht ed. 1937).

4. *Id.*

5. *Id.* at 91.

- (3) doctrinal attempts to blur, rather than clarify, the boundaries between *lex lata* and *lex ferenda*.⁶

In essence, the inductive school holds that a rule of international law can only be authenticated as a rule *de lege lata* if it can be inductively verified by reference to one of the three sources of international law set out in Article 38(1) of the Statute of the International Court of Justice.⁷ The inductive school is analytical and it is positivist to the extent that its “basic proposition rests on actual consent of the overwhelming body of the subjects of international law.”⁸ But it parts company with positivism in rejecting the “voluntarist” first principle which holds that international law consists solely of rules emanating from the will of States. Thus, it accepts natural law notions “or any other ethical postulates—as, for instance, considerations of humanity—if authenticated by one of the three generally recognised law-creating processes of international law”.⁹ Schwarzenberger’s book, *Power Politics*,¹⁰ is an unsentimental description of the environment in which international legal norms operate. As such, it provides a very clear description of the functional limitations of the discipline of international law.

The main charges levelled by the inductive school against the Grotian school were “deductivism” and “eclecticism” in that the Grotians were said to “pick and choose from natural and positive law exactly as they think fit.”¹¹

The response was delivered by Jenks in his well known book, *The Prospects of International Adjudication*.¹² Chapter 11 purported to contain a refutation of the inductive approach. In Jenks’ view, the conclusions of the inductive school “reflect the view that the present and potential effectiveness of international law are narrowly circumscribed by the contingencies of power politics.”¹³ Thus, “their implications for a major breakthrough towards the rule of law in world affairs are distinctly discouraging.”¹⁴

Much of Jenks’ attack was concerned with logical methodology. But he also suggested that the inductive school was “irresponsible”¹⁵ because of the negative effect that he thought it would have on the development of international law.

In response, Schwarzenberger asserted that international relations is a related but quite distinct discipline. Therefore, the inductive approach to the study of

6. G. SCHWARZENBERGER, *THE INDUCTIVE APPROACH TO INTERNATIONAL LAW* 4 (1965) [hereinafter *THE INDUCTIVE APPROACH*].

7. *Id.* at 5.

8. *Id.*

9. *Id.* at 13.

10. G. SCHWARZENBERGER, *POWER POLITICS* (3d ed. 1964).

11. *Id.* at 13.

12. J. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION*, 617–62 (1964) [hereinafter *PROSPECTS*].

13. *Id.* at 617.

14. *Id.*

15. *PROSPECTS*, *supra* note 12, at 643.

international law on the normative plane is independent of the views one may hold on matters of international relations.¹⁶ As to the charge of irresponsibility, he considered that whether the implications of an analysis are discouraging is beside the point if the analysis is correct. Jenks, he said, had not discharged the burden of demonstrating that the analysis was incorrect. A breakthrough towards the rule of law in world affairs, he felt, cannot be the responsibility of theorists. It depends on whether those concerned (*i.e.* States) "are prepared to pay the price required in terms of transfer (not merely limitation) of national sovereignty to international and supranational institutions."¹⁷

The inductive approach is conservative and positivist. It must always remain the law of the past. As Schwarzenberger himself admitted, "any inductive 'proof' of a rule of international law always remains provisional: it is liable to be disproved at any moment by better evidence that, in making any particular assessment, was not available or was overlooked."¹⁸ One may even detect, in Schwarzenberger's work a sort of wistful sympathy with World Federalism although in his view "such a possibility may be dismissed as Utopian."¹⁹

A rich diet of optimistic eclecticism can lead to disillusionment when one measures the expectations it creates against the real world of State sovereignty, State interest, national security, and power politics. By comparison, the "realism" of the inductive school seems remarkably clear-headed. But it is open to at least one objection. While it must be granted that the willingness of States to abide by and strengthen the rule of law is of paramount importance to its effectiveness, this author parts company with Schwarzenberger's suggestion that the doctrine of international law is irrelevant to the attitude of States. As we shall see, the doctrine is vital.

II. RECENT COMMENTARY

In recent years, the fiercest advocate of a "realistic jurisprudence of international law" has been J.S. Watson of Mercer University Law School.²⁰ With considerable gusto, Professor Watson has cut a critical swathe through the ranks of academic international lawyers delivering and receiving many wounds.²¹

16. THE INDUCTIVE APPROACH, *supra* note 6, at 116.

17. *Id.* at 117.

18. *Id.* at 5.

19. See SCHWARZENBERGER, *FRONTIERS OF INTERNATIONAL LAW*, 312-13 (1962).

20. Watson, *A Realistic Jurisprudence of International Law*, 34 *Y.B. WORLD AFF.* 265 (1980) [hereinafter *Realistic Jurisprudence*]. See also Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 *HOFSTRA L. REV.* 269 (1977-78) [hereinafter *Demanding Human Rights*]; *Mass Killing by Governments: Lawful in the World Legal Order?* 12 *N.Y.U. INT'L L. & POL'Y* 239 (1979-80) [hereinafter *Mass Killing*]. It is Watson's criticisms that go right to the heart of legal doctrine.

21. Perhaps the most pointed response to Watson's theories is to be found in a correspondence in the *AMERICAN JOURNAL OF INTERNATIONAL LAW* by Jordan Paust, 71 *AM. J. INT'L L.* 749-50

The epigraph preceding his essay on a realistic jurisprudence of international law reveals his Austinian²² bias:

“What you cannot enforce, do not command”—Sophocles, *Oedipus at Collonus*.²³

The foundation of Watson’s jurisprudence is relatively clear. International law has no central enforcement authority. It has no court with compulsory jurisdiction, no legislature, and no centralized police force:

There are, however, few theorists in international law who fully appreciate the extent of the problem so created. Rather than seek to discover the technique whereby the system operates, the tendency is clearly towards the suppression of this knowledge, while creating or advocating rules that require, for their successful implementation, the same degree of competence enjoyed by a domestic legislature or appellate judiciary.²⁴

His primary accusation against many international lawyers, some of them the most prominent in our generation, is wishful thinking in the sense that they wish to assume a coercive and prescriptive force in international law which simply does not exist:

No matter how inept a government might be, such power is always latent within the system [of municipal law]. This power cannot be created by wishful thinking, or projected into reality by a comparison of symptoms of its absence. It is either there or it is not, and it is on this fact that all efficacious, prescriptive legal systems are built.²⁵

Watson is quite scathing about a number of explicit and implicit academic assumptions. Among them are the assumption that United Nations organs have the power to interpret the domestic jurisdiction clause of the United Nations Charter (Article 2 (7)),²⁶ the assumption that academic advocacy alone may create world order,²⁷ and the assumption that international law is superior to municipal law.²⁸ He also derides attempts to elaborate an international law of human rights:

(1977). See also Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms* 9 HOFSTRA L. REV. 347 (1980–81) [hereinafter *Reply*]; Schechter, *The Views of ‘Charterists’ and ‘Skeptics’ On Human Rights in the World Legal Order*, 9 HOFSTRA L. REV. 357 (1980–81) [hereinafter *Charterists and Skeptics*]; D’Amato, *The Concept of Human Rights in International Law*, 82 COL. L. REV. 1110 (1982).

22. “Austinian” refers to the jurisprudence of the 19th Century English jurist John Austin. Austin held that law is the command of the sovereign. Since there is no sovereign over nations, Austin concluded that international law was not law properly speaking but positive international morality. Today, theories that tie law to enforceability rather than normativity are said to be “Austinian.”

23. *Realistic Jurisprudence*, *supra* note 20, at 265.

24. *Id.*

25. *Id.* at 273.

26. Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the U.N. Charter*, 71 AM. J. INT’L L. 60 (1977) [hereinafter *Autointerpretation*].

27. *Realistic Jurisprudence*, *supra* note 20, at 270.

28. *Id.* at 267–68.

Amnesty International has concluded that torture has been officially sanctioned in sixty countries in the last decade and that forty states continued to practice it in 1975. These figures indicate a considerable discrepancy between the real rules and the paper rules of international law.²⁹

Watson's realism can be seen in the following passage:

International law has always built into its rules and concepts *a posteriori* mechanisms which ensure reasonably close relationship between law and reality. . . . The rules of international law . . . acknowledge that when there is a prolonged tension between international law and international political reality it is the former that must yield to the latter.³⁰

In Watson's view, norms that are not observed by States are not norms of international law. He takes the voluntarist position³¹ that international law consists solely of the will of States as evidenced by State practice:

In the context of international theory in the human rights realm, the "inconvenient facts" are the political arrests, the torturing and the killing of hundreds of thousands of people in dozens of countries. The inconvenient facts are state practice.³²

If one carries the voluntarist view to its logical extreme, there can never be a violation of international law since the very fact of violation would refute the existence of the norm. Watson does not go that far. What he does say is that international law is only effective when it can be enforced by reciprocal expectation,³³ *i.e.* State A observes a rule *vis-à-vis* State B in the expectation that State B will treat it in a similar manner. The sanction, and in Watson's view, perhaps the only sanction, is a withdrawal of reciprocity. If State B violates a rule it can expect a counter-violation by State A.

It will become clear that not only are the norms for the protection of human rights inefficacious because of the lack of reciprocity in the horizontal order, but also that the rules proposed are invalid under the prevailing techniques of norm creation in international law.³⁴

III. NORMATIVE SURRENDER—EXAMPLES

Example 1—Human Rights

With the above statement, Watson surrenders the whole body of human rights law. He makes it quite clear that it is indeed a normative surrender:

29. Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L. F. 611 (1979) [hereinafter *Legal Theory*]. See also Watson, *Normativity and Reality in International Human Rights Law*, 13 STETSON L. REV. 221 (1983-84) [hereinafter *Normativity and Reality*].

30. *Legal Theory*, *supra* note 29, at 626.

31. See text at notes 8-10, *supra*.

32. *Legal Theory*, *supra* note 29, at 641.

33. *Id.* at 619.

34. *Id.* at 626.

Consent is a crucial element in the overall functioning of effective international law, and any theory that disregards it is certain to experience severe problems in compliance, when looked at from the normative viewpoint, and in accuracy, when looked at from the descriptive viewpoint.³⁵

Watson is not entirely consistent. Perhaps subconsciously, he contradicts his main point:

The current extent of human rights violations throughout the world cannot escape the attention of even the most insulated of academics.³⁶

To speak of violations assumes that there is something to violate. Rights cannot exist without a legal order that creates them and if they do not exist, they cannot be violated.

Watson hardly mentions human rights treaties in his analysis. At one point he characterizes treaties as a source of obligation rather than as a source of law.³⁷ Human rights do, in fact, present a unique problem in international law. Since they involve a State's treatment of its own citizens, there can be no reciprocal enforcement mechanism even in the case of human rights obligations voluntarily undertaken by States through treaties.³⁸ According to Watson, the lack of a significant reciprocal interest in human right substantially reduces the efficacy of treaties as a means of implementation:

This constitutes a very real limitation on the scope of the international legal system's jurisdiction. For, if the subject matter of a norm does not affect another state to a sufficient extent to make it willing, or likely, to respond to the violation, then there is no motivation for compliance beyond pure self-limitation on the part of the violator or potential violator. Such self-limitation needs no legal system at all.³⁹

Thus, according to Watson even norms which are observed are not law if observance stems from self-limitation rather than external enforcement. States do undertake human rights obligations and they do comply with them. Perhaps the most significant evidence of this is the willingness of many states to accept the right of individual petition to some authoritative law-determining agency such as the United Nations Human Rights Committee, the European Commission on Human Rights or the Inter-American Commission on Human Rights. But Watson does not mention these.⁴⁰

Watson also runs into trouble where international human rights norms *are* hierarchically enforced. In reply to Watson, Professor Richard Lillich produced substantial evidence of the application of norms of international law by United

35. *Realistic Jurisprudence*, *supra* note 20, at 274.

36. *Legal Theory*, *supra* note 29, at 611.

37. *Id.* at 618.

38. *Id.* at 619.

39. *Id.* See also *Perspectives on Enforcement of Human Rights*, 1980 AM. SOC. INT'L L. PROC. 1,4 [hereinafter PROCEEDINGS].

40. *Mass Killings*, *supra* note 20, at 265-8.

States Courts.⁴¹ The U.S. Courts have applied general international law since the United States Supreme Court ruled that such law is part of U.S. law and must be ascertained and applied by U.S. courts.⁴²

Lillich found "well over 50 cases since 1952 where international human rights law has been invoked directly or indirectly by U.S. Courts."⁴³ He remarked:

To the extent my remarks have a thesis, it is that not only is there plenty of international human rights law extant, but that courts increasingly are being briefed on such law and taking it into account in reaching their decisions.⁴⁴

Watson's response to Lillich was succinct: "You cannot create customary international law in one nation's courts."⁴⁵ While this may be true, it misses the point. Lillich was not concerned with the creation of customary international law. The point he was making was that U.S. courts, far from doubting the existence of international human rights law, recognize it and employ it.

The doctrine that customary international law is part of internal law is not unique to U.S. courts. Article 25 of the Constitution of the Federal Republic of Germany says:

The General Rules of International Law shall form part of Federal Law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the Federal Territory.

In English jurisprudence, it has been held that:

whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.⁴⁶

Many other States regard general international law as part of their law.⁴⁷ Here, Watson's theory of international human rights law, if it were taken seriously,

41. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, PROCEEDINGS, *supra* note 39, at 20. See also Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CINN. L. REV. 367 (1985).

42. See Justice Gray's frequently quoted holding in the *Paquete Habana*, 175 U.S. 677, 700 (1900).

43. PROCEEDINGS, *supra* note 39, at 21.

44. *Id.* at 20. See *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980); *Fernandez v. Wilkinson*, 505 F.Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F. 2d 1382 (10th Cir. 1981).

45. PROCEEDINGS, *supra* note 39, at 26.

46. *West Rand Gold Mining Company v. The King* [1905] 2 K.B. 391, 406-7 (per Lord Alverston C.J.). See also *Trendtex v. Central Bank of Nigeria* [1977] 2 W.L.R. 356 (per Lord Denning M.R.).

47. The term "general international law" has been a source of confusion. It is used here to refer collectively to those norms described in Article 38(1)(b) and (c) of the Statute of the International Court of Justice, customary international law and "the general principles of law recognized by civilized nations."

would prove genuinely detrimental to the development of that body of law. Furthermore the theory involves an inadequate understanding of the place of international law in municipal law.

Watson stresses the element of consent in international law. Yet he does not entirely appreciate the nuances of consent as part of the law-creating process. A norm of international law is a legal norm because it is conceived of as binding by States or because States have undertaken to comply with it. This Watson recognizes as the *opinio juris* element of customary international law.⁴⁸ But a State may accept a norm in principle even though it subsequently refuses to comply with that norm. The response of a State charged with a violation of a well-recognized legal norm is seldom to deny its existence as a legal norm.⁴⁹

No State in the modern world, whatever its actual practice, would argue the legality of torture, genocide, or even the detention of political prisoners. A more likely response is for the State to deny the accusation and to put the accuser to the proof. The problem is not the lack of existence of law but the infrequency with which a court or forum is available for the submission and trial of such proof.

Another response for a state accused of human rights violations is to hire an advocate to justify its behavior in terms of the law. This is the same strategy employed by a person charged with law violation in a municipal legal system. Here too, the main problem is that an international tribunal is rarely available to try conflicting claims of law.

The second element of customary international law is state practice. Watson's main quarrel with international human rights law is based on his perception of state practice. In his view, stories about massive and widespread violations of human rights refute the claim that an international customary human rights law is developing. Watson argues:

With increasing frequency one reads of governments killing, torturing, and imprisoning their citizens, almost on a routine basis. Yet at the same time one may read learned articles in the legal literature which, with practiced ease, assure us that such abuses of governmental power are subject to an international regime of human rights. This discrepancy poses serious questions concerning both the validity and the efficacy of the alleged rules, questions which should be of concern to any theorist who sees the role of international law as something more than disembodied ethical statements or wishful thinking.⁵⁰

In reply, Louis Sohn says:

In his next debunking argument, Professor Watson points out that there is a very wide discrepancy between human rights law and the reality of state practice. He notes the newspapers are full of stories about governments killing, torturing and imprisoning their citizens. But the same newspapers are also full of local and

48. *Legal Theory*, *supra* note 29, at 632.

49. *Reply*, *supra* note 21, at 350.

50. *Legal Theory*, *supra* note 29, at 610.

national stories about murders, vicious attacks, and robberies—though we supposedly have an effective system of law and order on a domestic plane.⁵¹

Violations of the law are much more notorious and much more likely to be reported than instances of compliance. They make better copy.⁵² The attention they get neither proves nor disproves that non-compliance is more prevalent than compliance. One is more likely to read about a bank robbery than about a bank that has not been robbed.

There is a motive for compliance with international human rights law which Watson has overlooked. It may, to some extent serve a function similar to that served by reciprocal interests in other branches of international law. Violations of many of these rules are international crimes or “crimes against humanity.”⁵³ There is the possibility (regrettably not a certainty) that those who violate such norms when they are in positions of authority will ultimately face criminal charges before an international tribunal, courts of their own States, or even courts of other States.⁵⁴

Klaus Barbie is being tried for “crimes against humanity.” Macias Nguena⁵⁵ and the Argentine Junta⁵⁶ have been tried on charges involving violations of both

51. *Reply*, *supra* note 21, at 350.

52. *Charterists and Skeptics*, *supra* note 21, at 363. Freedom House publishes a periodic survey Gastel, *Freedom in the World*. This document usually lists the States with the best record of human rights observance although the survey has been criticized as limited to civil and political rights observance while ignoring economic, social and cultural rights, *Charterists and Skeptics*, *supra* note 21, at 364. Watson is accused of suppressing evidence when dealing with the current status of human rights.

[H]e does not mention the European Convention on Human Rights or the case law being developed under that convention by the European Commission of Human Rights and the European Human Rights Court. Nor does he mention the impact that other Western European countries have had on the progress towards greater political and civil rights in Spain and Portugal. Nowhere does he discuss the successes, however limited, of bilateral government actions. Nor does he devote any space to the successful work of private organizations in the human rights field.
Id. at 366–67.

But Watson is dealing with the practice of States in which all this good news would be irrelevant. One cannot quarrel with the gloomy facts. But it is submitted that Watson's view of the effect of State practice on the law is not wholly accurate.

53. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945, Charter of the Int'l Mil. Tribunal, 59 Stat. 1546, E.A.S. No.472, 82 U.N.T.S. 284 [hereinafter *Nuremberg Charter*].

54. In *Filatiga v. Pena-Irala*, 630 F.2d at 890, Judge Kaufman said; “the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind.”

55. Jiménez, Fernando Volio, *Study of the Human Rights Situation in Equatorial Guinea*, U.N. Doc. E/CN.4/1371 (1980).

56. Decision of the National Appeals Court (Criminal Division) for the Federal District of Buenos Aires, *reprinted* in 26 I.L.M. 331, 359, 359n (1987). The Due Obedience Bill, which passed the Argentine Senate on May 29, 1987, will exempt all but the most senior officers from further prosecution and thus undo much that the trials have done to vindicate human rights law. This may provide grist for the mills of the skeptics. In Argentina it is certainly a political, as well as a legal question. But, as it is a political and legal matter, international human rights law must be an important

domestic and international law. Bokassa has been tried and sentenced to death.⁵⁷ If Idi Amin were to return to Uganda, no doubt he would be tried on the same sorts of charges.

There are other encouraging signs. Duvalier⁵⁸ and Marcos have fled. With the new policy of *glasnost* in the Soviet Union, the doors of political prisons are beginning to swing open however reluctantly.

True we have a long way to go. There *ought* to be some sort of international criminal tribunal. Torturers, mass murderers and other international criminals ought to be *hostis humani generis*⁵⁹ and, like pirates, triable in the courts of States wherever they are found. But that is not the same as saying that there is no international human rights law.

Rules of international law may take years before they are vindicated. For that reason, they were of little use to the person at the end of the hammer's arc at Makindye prison, or being battered to death by a shovel in Kampuchea, or bastinadoed in Chile. But Watson's denial of international human rights law would not have been of any use to such people either.

For those who are not in peril of immediate destruction, such as political prisoners, international human rights law represents a hope. Denial of international human rights law can only inflict a damaging blow to that hope.

Example 2—Soft Law

The second example of normative surrender involves international agreements in which the language is deliberately ambiguous or which leave a wide measure of discretion to the contracting parties. The question is whether such agreements envisage an intent to enter into legal relations. The clearest example of normative surrender of this type is to be found in an article published in 1953 by J.E.S. Fawcett.⁶⁰

part of the debate. Cesar A. Chelola has argued, in an article in the *New York Times*, June 3, 1987, p. A27, that this Bill is unconstitutional under Argentine law and is a violation of the United Nations Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, G.A. Res. 39/64, U.N. Doc. A/RES/35/46 (1984); The political question involves President Alfonsín's control over the Argentine military. While cynicism is justified, a denial of international human rights law contributes nothing to the discussion.

57. *N. Y. Times*, June 13, 1987, at 5. There were observers there from both Amnesty International and the International League for the Rights of Man, *N. Y. Times*, December 21, 1986, at 9.

58. Although recent events in Haiti indicate that it is still far from being a model democracy.

59. A proposed amendment to Section 6 of the Canadian Criminal Code will provide Canadian courts with jurisdiction to prosecute war crimes and crimes against humanity that were committed outside Canada. Minister of Justice and Attorney General of Canada, News Release June 23, 1987.

60. Fawcett, *The Legal Character of International Agreements*, 30 *BRIT. Y. B. INT'L L.* 381 (1953) [hereinafter *Legal Character*]. This author notes, with admiration, the contribution of Sir James Fawcett, as he is now, to the development of European Human Rights Law as President of the European Commission on Human Rights. The article cited here is, nonetheless, an example of the approach to international law which is being criticized in the present article.

Fawcett had before him a copy of Draft Articles and attached notes which were a part of the *Report on the Law of Treaties*⁶¹ by Professor Lauterpacht as Special Rapporteur to the International Law Commission. Article 1 of that Draft defined "treaties":

Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties.

This provision was subsequently developed by the International Law Commission into Article 2(1)(a) of the Vienna Convention on the Law of Treaties:⁶²

For the purposes of the present Convention:

- (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

The earlier Draft and Article 2(1)(a) provide only limited assistance to the task of determining whether a particular instrument is a treaty. The problem is circular. Attempts to demonstrate that such an instrument is a treaty are usually motivated by a desire to prove that it creates legal obligations. But one must first show that it is governed by international law before one can establish that it is a treaty. The words "governed by international law" are an independent criterion. Commenting on Article 2(1)(a), the I.L.C. said:

it ought to confine the notion of an "international agreement" for the purposes of the law of treaties to one the whole formation and execution of which (as well as the *obligation* to execute) is governed by international law.⁶³ [emphasis in original].

The commission felt that the element of intention is inherent in the phrase "governed by international law" and therefore it was not necessary to refer to the intention of the parties in the definition.⁶⁴

Also discussing the nature of treaties Judge Jiménez de Aréchaga said, "the intention of the parties, express or implied, would appear to be controlling."⁶⁵

The *Aegean Sea Continental Shelf Case* involved the question whether a certain communique issued by the parties was a treaty. In its judgment, the International Court of Justice stated:

[i]n determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.⁶⁶

61. U.N. Doc. A/CN.4/63 (1953).

62. U.N. Doc. A/CONF.39/27 (1969), entered into force January 27, 1980; 8 I.L.M. 679 (1969), reprinted in, 63 AM. J. INT'L L. 875, 876 (1969).

63. Documents of the 14th Session including the Report of the Commission to the General Assembly, [1962] 2 Y.B. INT'L L. COMM'N 32, U.N. Doc. A/C.N. 4/SER. A/1962/ Add. 1.

64. *Id.*

65. See Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 3, 37 (1978).

66. The Aegean Continental Shelf Case, [1978] I.C.J. Rep. 3, 39.

In 1953 the intent to enter into a treaty was an essential element in its creation. It still is.

There are nonbinding agreements. States are free to enter into them whatever their subject matter. One conspicuous example is the Final Act of the Conference on Security and Co-operation in Europe adopted at Helsinki on August 1, 1975, commonly called the Helsinki Agreement.⁶⁷ In it, the "High Representatives" of the thirty-five States which signed the text declared in the concluding paragraph "their determination to act in accordance with the provisions contained in the above texts."⁶⁸ However, delegates during the conference expressed an understanding that the Final Act did not involve a "legal" commitment and was not intended to be binding upon the signatory powers.⁶⁹

Professor Oscar Schachter has described such agreements as leading a "twilight existence."⁷⁰ He argued that it is not strictly correct to call them "nonbinding." The expectation is that they create obligations even if they are not, strictly speaking, "legal" obligations.⁷¹ The Helsinki Agreement carries with it a strong expectation that it will be observed. Perhaps the obligation is a "moral" rather than a "legal" obligation. But note that it is nonbinding because there is clear evidence that the parties intended that it *not* be binding.

Governments are, however, reluctant "to state explicitly in an agreement that it is nonbinding or lacks legal force."⁷² With respect to most agreements, inferences have to be drawn as to the intent of the parties from the language of the instrument and from the attendant circumstances of its conclusion and adoption. Fawcett's work was aimed at examining this intent and trying to develop rules for determining whether an agreement is, in fact, a treaty.

Fawcett argued that intent cannot be presumed but must be clearly manifested.⁷³ He then suggested a number of tests:

First, have the parties included in the agreement provision for the settlement by compulsory judicial process of disputes arising out of it? Secondly, have they both accepted the jurisdiction of the International Court of Justice under Article 36 of its Statute in terms which would give the Court jurisdiction over any such dispute? Third, has the agreement been registered under Article 102 of the Charter of the United Nations or Article 18 of the Covenant of the League of Nations? Fourth, is there an intention declared, or to be deduced from the subject-matter of the agreement, that the agreement or particular provisions of it are to be governed by public

67. 14 I.L.M. 1292 (1975).

68. *Id.* at 1325.

69. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?*, 70 AM. J. INT'L L. 242, 247-48 (1976).

70. Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

71. *Id.* at 300.

72. *Id.* at 297.

73. *Legal Character*, *supra* note 60, at 385.

international law, or by a specified system of municipal law, or by the general principles of law recognized by civilized nations⁷⁴

The first test he says "appears to be decisive" provided that the process of settlement is fully judicial and compulsory.⁷⁵

He describes the second test as a complicated extension of the first and it is subject to the proviso that the agreement itself does not exclude settlement by the I.C.J. and that the States in question have no reservation to their acceptance of the compulsory jurisdiction of the Court which would obviously exclude such a case.⁷⁶ It is submitted that the second test is, in fact, no test of intent to enter into legal relations. It is entirely dependant on conditions extraneous to the agreement. Even if the agreement did not bar settlement by the I.C.J. and there were no reservations obviously excluding the agreement from consideration, the Court could still find, on the basis of the language and attendant circumstances, that it was powerless to enforce such an agreement since there was no intent to enter into legal relations.

Perhaps most surprising, is Fawcett's assertion that the third test, that of registration, is inconclusive.⁷⁷ Article 102 of the U.N. Charter provides:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

The real object of registration, according to Fawcett is to prevent, as far as possible, the conclusion of secret agreements. The expression "treaty or other international agreement" is wide enough to include agreements which do not create legal relations.⁷⁸ Neither Article 102 nor the regulations made under it define "treaty" or "international agreement" and they do not require that such instruments shall be intended to create legal relations.⁷⁹ For this reason he felt that the reference to "treaties and other international instruments" does not necessarily refer to instruments creating binding legal obligations.

The second reason why he does not feel that the test is decisive is that agreements which have not been duly registered are not declared void but rather of limited applicability before organs of the United Nations. Parties registering their agreements under Article 102 may be intending to rely on them, not before the

74. *Id.* at 387-88.

75. *Id.* at 388.

76. *Id.* at 388-89.

77. *Id.* at 389.

78. *Id.* at 390.

79. *Id.* at 389.

I.C.J. but before other organs of the U.N. "which do not necessarily consider agreements in the light of the law."⁸⁰

The question is how does one "invoke" an instrument? Certainly Article 102 does not bar a State representative from mentioning any instrument he or she may wish to mention in a speech before the General Assembly, Security Council, or any other political organ of the U.N. Invoking an instrument may involve in some way the process of placing the instrument before an organ for formal consideration. But there is no established procedure for that. It seems that Article 102, even if it does not say so specifically, is concerned with the invocation of treaties and other international agreements before the International Court of Justice.

The reference in Article 102 to "treaties and other international agreements" must be understood according to its ordinary meaning. Article 2(1)(a) of the Vienna Convention indicates quite clearly that the commonly understood meaning of the word "treaty" is a contractual arrangement between States that creates binding legal obligations. Article 31(4) says:

A special meaning shall be given to a term if it is established that the parties so intended.⁸¹

Thus, the burden of proof would rest with any party attempting to establish that the term "treaty" has a special meaning in a specific instance, and that an instrument called a "treaty" does not, in fact, create legal obligations. The reference in Article 102 to "treaties" must be a reference to binding legal obligations. Registration under Article 102 is therefore conclusive evidence that the parties intended to enter into legal relations. For the same reason, the act of designating an instrument a "treaty" or a "convention" or a "covenant" is also powerful evidence that the parties intended to enter into legal relations.

Fawcett had a reason for rejecting the third test. He clearly wanted to focus attention on the fourth test which he regarded as decisive. The thrust of his argument was that, unless there is some clear agreement to submit the treaty to judicial settlement, the intention to enter into legal relations must be specifically declared or it must be deduced from the subject-matter of the agreement.

He then observed that certain provisions in international agreements appear to negate any intention to create legal relations. "These are provisions which in one way or another leave it to the parties themselves to determine the extent of the obligations they have assumed and the mode of performance."⁸²

His first example was an undertaking qualified by the words "subject to the law in force." This, he said, would create no legal obligation at all because it would enable a party to successfully appeal to municipal law against any attempt by another party to enforce the obligation.⁸³

80. *Id.* at 390.

81. 8 I.L.M. at 692.

82. *Legal Character*, *supra* note 60, at 390.

83. *Id.* at 390-91.

Another example he gives is an undertaking “to use best endeavours” or “to take all possible measures.” This represents, in Fawcett’s view, no more than a declaration of policy or “goodwill toward the objects of the agreement.”⁸⁴

Fawcett uses Article 5 of the North Atlantic Treaty of April 14, 1949 as an example of a provision which gives the parties complete freedom of action as to the mode of implementation. It says:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an attack occurs, each of them, in the exercise the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith individually and in concert with the other Parties, such action *as it deems necessary*, including the use of armed force, to restore and maintain the security of the North Atlantic area. . . . [Emphasis added].

The point of using the words “as it deems necessary” rather than “as is necessary,” said Fawcett, “was to give each party freedom of action, that is to say, freedom from *strict legal* [Fawcett’s emphasis] responsibility, in a situation which could not be wholly foreseen; and the practical reason is not far to seek when the constitutional limits upon the war-making powers of certain Government members of N.A.T.O. are taken into account.”⁸⁵

Yet the North Atlantic Treaty is quite clearly a legal obligation. It is called a treaty and regarded as a treaty by the Parties and it has been registered with the United Nations.⁸⁶ But because Article 5 gives the States Parties considerable discretion as to the mode of implementation, Fawcett is prepared to yield up its normative content.

Fawcett has lumped together a number of treaty provisions which appear to share the common feature that they allow States considerable discretion as to the mode of performance or even the extent of the obligations assumed. He denies the normative content of such provisions.

In a more recent analysis, Professor Prosper Weil, borrowing from Judge Richard Baxter,⁸⁷ calls these provisions “soft law.” He describes them as “norms whose substance is so vague, so unconvincing, that A’s obligation and B’s right

84. *Id.* at 391.

85. *Id.* at 392. A similar point is made by Glennon, *United States Mutual Security Treaties: The Commitment Myths* 24 COL. J. TRANS’L L. 509, 546–47 (1986) [hereinafter *Mutual Security Treaties*] where he calls U.S. security treaty commitments “illusory.” The thrust of the article is that U.S. security treaties do not alter the constitutional relationship between the President and Congress and do not serve as a source of authority permitting the President to introduce U.S. armed forces into hostilities, *id.* at 544. In this he is quite correct. But much of the legislative history he cites indicates quite clearly that the commitments, despite their limitations, were accepted as “legal” commitments by the U.S. Government. See, e.g., *id.* at 528–29.

86. The Treaty Series number is 161 U.N.T.S. 253.

87. Baxter, *International Law in ‘Her Infinite Variety’*, 29 INT’L & COMP. L. Q. 549 (1980).

all but elude the mind.”⁸⁸ To further confuse matters, Weil accepts, under the term “soft law,” the “sublegal value of some non-normative acts” such as the Helsinki Agreement.⁸⁹ Aside from this, and in contrast to Fawcett, he acknowledges their normative content:

Whether a rule is “hard” or “soft” does not, of course, affect its normative character. A rule of treaty or customary law may be vague, “soft”; but, . . . it does not thereby cease to be a legal norm.⁹⁰

In further discussing the normativity of such provisions, he says:

The acts accomplished by subjects of international law are so diverse in character that it is no simple matter for a jurist to determine what may be called the normativity threshold: *i.e.*, the line of transition between the nonlegal and the legal, between what does not constitute a norm and what does.⁹¹

Thus both Weil and Fawcett struggle in different ways with a confusion over what constitutes normativity. If we look at the actual language of the provisions, the distinction between “hard law” and “soft law” is not much more helpful than an outright denial of normativity. What is important is whether it is possible to identify an obligation and a violation of that obligation.

When we reexamine Fawcett’s examples in this light, we can see that each example can be analyzed differently. The similarities on which Fawcett and Weil rely obscure real differences. We will focus on Fawcett’s examples although there are many other examples of discretionary language.⁹²

The words “subject to the law in force” can be read as qualifying only the mode of performance, the method that a State may choose to render compliance. Allowing a State to determine in accordance with its own law *how best* to fulfill an obligation cannot be construed as releasing it from the obligation. A State may not appeal to its own law as a defence to a charge of non-fulfillment of an obligation.⁹³ But it is quite common for a State to insist on treaty language which ensures that its fundamental constitutional provisions are not offended. In fact, Article 46 of the Vienna Convention places the Parties on notice as to constitu-

88. Weil, *Toward Relative Normativity in International Law?* 77 AM. J. INT’L L. 413, 414 (1983) [hereinafter *Relative Normativity*]. See also Boetha, *Legal and Non-Legal Norms: A Meaningful Distinction in International Relations?*, 9 NETH. Y.B.INT’L L. 63 (1980) who points out, at 68, that the true distinction is not between normativity and non-normativity but between legal and non-legal norms.

89. *Relative Normativity*, *supra* note 88, at n. 7.

90. *Id.*

91. *Id.* at 415.

92. *Id.* at 414. Weil mentions Article IV of the Moscow Test Ban Treaty which gives each Party a right to withdraw at its discretion. He also talks about obligations to “consult together,” to “open negotiations,” to settle certain problems by “subsequent agreement,” and what he calls the purely hortatory and exhibitory provisions to “seek to,” to “make efforts to,” to “avoid,” etc.

93. Vienna Convention on the Law of Treaties, Article 27, 8 I.L.M. at 690.

tional rules "of fundamental importance" which deal with the competence of a State to enter into a treaty.⁹⁴

Obligations "to take all possible measures" and "to use best endeavors" create what we shall call the "best efforts" standard of performance. Such obligations are applied and enforced in municipal contract law.⁹⁵ When the obligation is to "take all possible measures," it is possible to identify a violation by arguing that measures that could have been taken were not taken or that the burden of proof has shifted to the defendant to show that no measures could have been taken. An obligation "to use best endeavors" is susceptible to the criticism that the defendant's approach was demonstrably tepid or that the defendant did not really try at all.⁹⁶

The words of the North Atlantic Treaty, "as it deems necessary" present a different problem. Arguably, a Party might deem no action necessary and still be in compliance with the Treaty. Yet, a Party which does not act in the face of a genuine common danger will no doubt be censured or even excluded from the benefits of the Treaty. A recent example of this may be found in the United States' reaction to New Zealand's policy of banning nuclear-armed and nuclear-powered warships from its ports and harbors.

New Zealand is a Party to the ANZUS Agreement, a Treaty which resembles the NATO Agreement.⁹⁷ Yet the weak language of this Treaty and the vast

94. *Id.* 8 I.L.M. at 697.

95. *Bloor v. Falstaff Brewing Corporation*, 601 F.2d 609 (2d Cir. 1979). In *Wood v. Lucy, Lady Duff Gordon*, 222 N.Y. 88, 91, 118 N.E. 214, 215 (1917) Judge Cardozo found that an obligation to pay royalties involved an implied promise to "use reasonable efforts to bring profits and revenues into existence." § 2-306(2) of the Uniform Commercial Code imports a "best efforts" clause into many contracts:

A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

The best efforts standard is an essential normative standard in U.S. common law. In French law, article 1174 of the *Code Civil* provides:

The obligation is null when it is contracted under a potestative condition. . . . But nothing prevents the insertion in a contract of a condition simply potestative, that is to say, consisting in the happening of a future fact which depends upon the will of one of the parties.

The judges of fact have to determine the potestative character of the condition. Planiol, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, vol. 2, Part I (An English Translation by the Louisiana State Law Institute, 1959) No. 1269A, p. 721.

96. *Bloor v. Falstaff Brewing Corporation*, 601 F.2d at 614.

97. Article III of the ANZUS Treaty says:

The Parties will consult together whenever in the opinion of any of them the territorial integrity, political independence or security of any of the Parties is threatened in the Pacific.

Article IV says:

Each Party recognizes that an armed attack in the Pacific area on any of the Parties would be

measure of discretion that appears to be left to the Parties has not prevented the United States from accusing New Zealand of violating its ANZUS obligations and, as punishment, cutting off the flow of certain intelligence information and treating New Zealand as if it were no longer a Party to the Treaty.

States do not treat such discretionary obligations as devoid of normative content. In fact, when they are trying to hold another party to an obligation, they insist that it is possible to identify a violation. It is doubtful that New Zealand has violated the ANZUS Treaty. But if there were an armed attack in either the Pacific or the North Atlantic, a decision by a Party to join with or aid the attacker would clearly be a violation of an alliance agreement with the attacked Party.⁹⁸

The second example of normative surrender involves yielding up the normative content of binding treaty obligations because they give the parties a broad discretion as to the mode of implementation. But we can see that in each example given it is possible to identify an obligation and a breach of that obligation.

Example 3—Jurisdiction of the International Court of Justice

For the third example of normative surrender we can come back to Watson. Here we are not dealing with a matter which is central to his thesis. He simply repeats a half-truth about the Court which has been frequently asserted in recent years and follows it with a normative concession of some magnitude:

The International Court of Justice, consistent with the traditional theory of international law, bases its jurisdiction firmly on state consent. This acknowledgment of the importance of state consent has the effect of substantially increasing the compliance rate of the Court's judgments since, in deciding whether to appear before the Court, a State can assess its own willingness to comply with an adverse decision. A State that is not willing to comply with such a decision will simply not appear before the Court.⁹⁹

There are two assumptions in this passage that require analysis. The first is the express statement that the jurisdiction of the Court is founded on the consent of States. The second, implicit in this passage involves the notion that States have no duty to appear before the International Court of Justice. The first assumption

dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.

This contrasts with Article 5 of the NATO Treaty in three ways. It does not contain:

(i) the acknowledgment that an armed attack upon one is an attack upon all; (ii) the specific obligation to take immediate action to assist the party or parties attacked; (iii) the reference to the restoration and maintenance of the security of the treaty area.

J.G. Stark, *THE ANZUS ALLIANCE*, 116 (1965).

98. See *Mutual Security Treaties*, *supra* note 85, at 546–47.

99. *Realistic Jurisprudence*, *supra* note 20, at 278. A slightly more accurate reference to I.C.J. jurisdiction may be found in *Normativity and Reality*, *supra* note 29, at 225.

is true. But, as it has been formulated by Watson and others, it is misleading. The second is controversial and, in the present author's view, incorrect.

It is a truism that the consent of States forms the basis of the jurisdiction of the International Court of Justice. In a joint dissenting opinion in the *Anglo-Iranian Oil Company Case*, Judges Winiarski and Badawi said:

En droit international, c'est le consentement des parties qui confère juridiction à la Cour; la Cour n'a compétence que dans la mesure où sa juridiction a été acceptée par les parties.¹⁰⁰

Stated in this unqualified form, the principle has been used to justify the non-appearance of States before the International Court of Justice.¹⁰¹ The impression created is that consent must be obtained from the respondent State in each specific case. But this is a false impression.

There are three types of consent. We may call them "consent to Statute," "consent to case," and "consent to Court".

Confusion arises from a failure of analysis which is typical of normative surrender. Consent to Statute occurs when a State becomes a Party to the Statute of the Court. Article 93 of the United Nations Charter sets out the ways in which a State can become a Party to the Statute. A State automatically becomes a Party by becoming a member of the United Nations. If it is not a member of the U.N., it may become a Party to the Statute under Article 93(2). Article 35(1) of the Statute says that the "Court shall be open to states parties to the present Statute."

A State should be well aware that by becoming a member of the United Nations, it becomes a party to the Statute of the Court. It accepts the benefit that the Court is open to it should it choose to avail itself of that benefit. It accepts the duties imposed upon Parties by the Statute and it consents to the Court exercising certain inherent judicial functions.¹⁰²

Consent to case occurs when States conclude a special agreement under Article 36(1) of the Statute to bring a specific case to the International Court of Justice. The element of consent is unequivocally present and jurisdiction is not usually contested.¹⁰³

100. [1951] I.C.J. Rep. 89, 97.

In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties.

101. See e.g., Nuclear Test Cases, 1974 I.C.J. Pleadings 348, (Letter of 16 May 1973).

102. This is discussed in some detail in Elkind, *INTERIM PROTECTION: A FUNCTIONAL APPROACH*, 162-63, 177 (1981).

103. Although, a State may claim that a certain document is not, in fact, a special agreement, *Aegean Sea Continental Shelf Case* [1978] I.C.J. Rep. 3, 44. This case was, however, commenced by unilateral application.

Consent to Court occurs when a State accepts the compulsory jurisdiction of the Court either through a provision in a treaty or convention in force¹⁰⁴ or through acceptance of the compulsory clause in Article 36(2) of the Statute.

In the case of acceptance of compulsory jurisdiction, we can see that the element of consent is definitely present. But it is general consent either to a certain type of case described in the treaty or to international law cases generally under Article 36(2). Such cases are commonly commenced through unilateral application by a "state accepting the same obligation."

Consent to Court through the vehicle of compulsory jurisdiction differs significantly from consent to case. Acceptance of compulsory jurisdiction may be and frequently is qualified by reservations on the part of the accepting State. But even with such reservations, it is difficult for the accepting State to forecast the type of case that will ultimately be brought against it. The problem arises when a State which has generally accepted the compulsory jurisdiction of the Court is unhappy with the specific case which has been filed against it. Its first course is to challenge the jurisdiction of the Court which it has every right to do. But the principle of consent, raised by some international lawyers almost to an incantation,¹⁰⁵ provides a spurious justification for renegeing on the earlier obligation. Too often, a State may seek to bolster its objection to jurisdiction by refusing to appear in a case on the ostensible ground that the Court lacks jurisdiction.¹⁰⁶ Consent to Statute however imposes upon Parties a duty to allow the Court to decide whether it has jurisdiction. Article 36(6) of the Statute provides:

104. Statute of the International Court of Justice, Article 36(1).

105. *Id.*

A typical example of this deficiency of analysis may be found in HENKIN, PUGH, SCHACHTER AND SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS*, 615 (2d ed. 1987). Referring to an unacknowledged work, it says:

It has been suggested that when the Court has jurisdiction *ratione personae* under Article 35 [of the Statute of the Court], it may order interim measures against any state party to the Statute. However, no judge has accepted this view, which runs counter to the premise of consent to the Court's jurisdiction under Article 36.

The argument which has been either dismissed or ignored so many times is that the jurisdiction of the Court to order interim measures is based on consent to Statute under Article 35. That point still awaits refutation in logic or principal if such refutation is possible. The judges, by failing to accept this logical approach to interim measures jurisdiction are acquiescing in the perpetuation of the very rod with which their authority has been flogged throughout the history of the Court.

See also Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855, 865-66 (1987) which manifests the same defect in analysis in discussing jurisdiction to order interim measures. For some reason this article ignores the literature on the subject.

106. In the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, the United States took the step of actually withdrawing from the case after a decision by the Court that it did, in fact, possess jurisdiction, [1984] I.C.J. Rep. 169.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.¹⁰⁷

Some scholars have attempted to provide elaborate justifications for non-appearance. One norm which is yielded up in the process is the duty to appear before the Court. The notion that there is no duty to appear was first mooted by Shabbatai Rosenne¹⁰⁸ and developed by the First Secretary of the International Court of Justice, Hugh Thirlway, in his study of non-appearance before the I.C.J.¹⁰⁹

The argument is grounded in the fact that non-appearance is recognized by the Statute of the Court. Article 53 provides:

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.
2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well-founded in fact and law.

The argument strays into Austinian territory by pointing out that the authors of the Statute did not intend to penalize a State which does not appear. The guts of the argument seems to be that, since the Statute expressly contemplates and provides for non-appearance, the Parties therefore have no duty to appear.¹¹⁰ Rosenne says that the Parties have a right not to appear.¹¹¹ Thirlway relies on Hohfeldian analysis to argue that the absence of a duty is the equivalent, not of a right, but of a privilege. The absent State does not rely on a right not to appear, "but since neither its opponent nor the Court has a right to insist that it do appear, it is under no duty to appear, or may assert a 'privilege' not to appear."¹¹²

The drafting history of Article 53 does not bear out this interpretation. An Advisory Committee of Jurists was charged with the task of drafting the Statute of the Permanent Court of International Justice. Some of the draft schemes originally submitted to it contained proposals dealing with the non-appearance of one of the parties. However the question of non-appearance was considered premature because the Committee had not yet considered the question of the

107. For a more detailed discussion see Elkind, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS* 117-68 (1984).

108. Rosenne, *The Reconceptualization of Objections in the International Court of Justice, Il processo internazionale, Studi in onore di Gaetano Morelli XIV COMUNICAZIONI E STUDI* 735, 749-50 (1975).

109. Thirlway, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* 64-82 (1985) [hereinafter Thirlway]. See also Eisemann, *Les effets de la non-comparution devant la Cour internationale de justice*, 9 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL*, 351, 357-58 (1980).

110. Thirlway, *supra* note 109, at 65, quoting the dissenting opinion of Judge Gros in the *Nuclear Test Cases (Interim Measures)* (Australia v. France) [1973] I.C.J. Rep. 99, 116.

111. Rosenne, *supra* note 108.

112. Thirlway, *supra* note 109, at 81.

Court's jurisdiction.¹¹³ The issue depended, at least in part, on whether the Statute was to provide for compulsory jurisdiction.

Article 34 of the Draft Statute submitted by the Advisory Committee to the Council of the League of Nations did provide for compulsory jurisdiction. It said:

Between States which are members of the League of Nations the Court shall have the jurisdiction [and this without any special conventions giving it jurisdiction] to hear and determine cases of a legal nature. . . .¹¹⁴

It was not until this provision reached the League of Nations Council that compulsory jurisdiction was dropped on the ground that it exceeded the authority granted by Article 14 of the Covenant of the League of Nations.¹¹⁵

At the 28th Meeting of the Committee a memorandum on non-appearance was tendered by M. Hagerup.¹¹⁶ In it, he contrasted the Continental procedure of the time with the English procedure. In the former, plaintiff's allegations of fact were taken as admitted. In the latter, plaintiff was required to prove his case insofar as the burden of proof lay with him. M. Hagerup preferred the Continental procedure because the English system placed the plaintiff under the disadvantage of having to prove facts which the defendant would not have disputed had he presented himself before the Court. But the Advisory Committee as a whole preferred the English system.¹¹⁷

M. Ricci-Busatti of Italy opposed the Article. He did not see it as giving the defending party a right or privilege not to appear. Rather, he objected that, if the powers of the Court were to be exactly the same in cases of judgments by default as they were to be when both parties appeared, the provision would be quite useless. To his way of thinking, the inclusion of a special provision would be justified only if it were to operate in the interests of the plaintiff and to punish the other party for its dereliction in failing to come to the Court. Since such a provision was not practicable in international affairs, he proposed suppression of the Article.¹¹⁸ Mr. Root of the United States countered that judgments by default were necessary and that such judgments should contain a full statement of the reasons.¹¹⁹

Thus, Article 53 was part of an original scheme containing draft Article 34 by which jurisdiction was to be compulsory. So the Committee did not foresee that

113. PROCES VERBAUX OF THE COMMITTEE OF JURISTS TO DRAFT THE STATUTE FOR A PERMANENT COURT OF INTERNATIONAL JUSTICE 247 (1920) [hereinafter PROCES VERBAUX].

114. J.B. SCOTT, THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTION OF THE ADVISORY COMMITTEE OF JURISTS 95 (1920).

115. *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Statute of the Permanent Court of International Court of Justice* 38 (1921).

116. PROCES VERBAUX, *supra* note 113, at 607, 28th Mtg, Annex No. 2.

117. *Id.* at 569.

118. *Id.*

119. *Id.*

the parties would have an opportunity to challenge the jurisdiction of the Court or a half-way plausible excuse not to appear. Given the original scheme it does not seem credible that the Committee intended to confer upon the parties a right or a privilege not to appear. On the contrary, it appears that some of the members wanted to punish states for failure to appear. This was abandoned because the Committee felt that such punishment would not be practicable in international affairs.

The purpose of Article 53 is to provide for the eventuality of non-appearance. To contend that it thereby permits non-appearance is rather like arguing that if one buys a policy of fire insurance, that person creates in some other person a right to burn down his or her house.¹²⁰

The duty to appear is found in Article 36 of the Statute of the Court and, to some extent in Article 94 of the United Nations Charter. When we talk about jurisdiction under Article 36(1) of the Statute, whether through special agreement or through "treaties and conventions in force," the duty to appear is a natural by-product of the rule *pacta sunt servanda* combined with the undertaking in those instruments to submit certain disputes for decision by the Court.

Article 36(2) says that the States party to the Statute may declare unilaterally that they recognize the jurisdiction of the Court as compulsory. The Court has held in the *Nuclear Test Cases (Second Phase)* that a unilateral declaration by a State can create legal obligations.¹²¹ It involves a remarkable use of language to contend that a legal duty freely undertaken to recognize the Court's jurisdiction as compulsory involves no legal duty. There is a legal duty to act consistently with that recognition, to accept the process of the Court and to allow the Court to decide questions of disputed jurisdiction.

Once the Court has decided that it has jurisdiction, then Article 94 of the U.N. Charter creates a duty to comply with the decision. Thus, a decision on jurisdiction strengthens the obligation to appear in the merits phase unless we can somehow convince ourselves that a refusal to appear is compliance with the decision of the Court. A State which does not appear cannot be compelled to do so. But both the opposing Party and the Court have a right to insist that the respondent State appear.

There is no doubt that the compulsory clause has fallen on hard times. France, and most recently the United States, have withdrawn their acceptance of the clause. Today, a small minority of members of the United Nations accept the clause.¹²²

Submitting international disputes for third party settlement seems to have

120. This example is, of course subject to the obvious riposte that arson is illegal in any event and that I cannot give someone a right or a privilege to commit arson. But even if arson were not illegal, providing for an eventuality does not, without more, create a right or a privilege.

121. *New Zealand v. France* 1974 I.C.J. Rep. 457, 472.

122. Scott & Car, *The I.C.J. and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AM. J. INT'L L. 57, 58 (1987).

become rather unpopular. So it is not surprising that timid international lawyers, should suggest scrapping Article 36(2)¹²³ on the ground that “[m]ost States prefer not to accept a condition that might place them before the Court involuntarily.”¹²⁴

This is not normative surrender in the strict sense. It does not involve the same sort of normative sloppiness which has been criticized in this article. Yet it is born of the same spirit. There seems to be a fear that States will be embarrassed by the temptation to virtue that compulsory jurisdiction represents and a concern to spare them that embarrassment. The proposal must be viewed as a “law reform” proposal, a sort of progressive enfeeblement of international law.

CONCLUSION—THE MOTIVE FOR COMPLIANCE

The term “normative surrender” describes an approach to law which denies the normative legal content of certain rules which can be authenticated according to one of the three law-creating processes set out in Article 38 of the Statute of the International Court of Justice. Normative surrender has three characteristics; (1) the Austinian fallacy that a norm which cannot be enforced is not a legal norm; (2) an overemphasis on the consent of States; and (3) the fallacy that a norm which leaves States with a wide margin of appreciation as to the mode of enforcement is not a legal norm.

Lawyers and laypeople alike seem to be transfixed by the notion that a norm, to be law, must be enforceable. If a norm cannot be enforced, they want to say that it is not a legal norm¹²⁵ and the principle that international law is based on consent provides a spurious escape from this conceptual problem.

Most international lawyers would reject the full logical extension of this princi-

123. *Id.* at 57.

124. *Id.* at 58.

125. This moral outlook would seem to be accurately summarized by Lawrence Kohlberg in his description of Stage 1, the most primitive of his “Stages of Moral Development”. Kohlberg calls Stage 1 “The Punishment and Obedience Stage” in which:

The physical consequences of action determine its goodness or badness regardless of the human meaning or value of these consequences. Avoidance of punishment and unquestioning deference to power are valued in their own right.

L. Kohlberg, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* 17 (1981). By contrast, in Stage 6, “The Universal Ethical Principle Orientation”:

Right is defined by the decision of conscience in accord with self-chosen ethical principles appealing to logical comprehensiveness, universality and consistency. These principles are abstract and ethical (the Golden Rule, the categorical imperative) they are not concrete moral rules such as the Ten Commandments. At heart, these are universal principles of justice, of the reciprocity and equality of human rights, and of respect for the dignity of human beings as individuals.

Id. at 21.

If, as the “realist” international lawyers seem to believe, the majority of statespersons and leaders are at Stage 1, must the academic community follow?

ple which is that international law can never be violated. But there is a pervasive notion that if States can violate a rule without sanction or if they have discretion in determining the mode of compliance with a rule, then perhaps it is not a rule of law.

The principle of “consent” is valid to the extent that international law is created by States and to the extent that it provides many mechanisms by which a State can opt out of a rule to which it does not wish to consent.¹²⁶

The principle of consent is most often put to the test when a State seeks to renege on consent previously given or when it balks at the specific application of a rule to which it has given general consent.¹²⁷ Here we must say that there is a rule, grounded in consent, and that the rule has been violated. As in contract law, the withdrawal of consent must be governed by rules. The fact that one doesn’t like one’s bargain cannot be a sufficient ground for withdrawing from it. If that were so, then there would be no rule *pacta sunt servanda*. We would have to surrender virtually the whole of contract and treaty law. The doctrines of normative surrender which we have been discussing provide a striking analogy.

The expectation of reciprocity is probably the most important motive for compliance with international law. But there is another motive involving the concept of the “rule of law.” We will not here deal with the formulation of the “rule of law” advanced by A.V. Dicey.¹²⁸ This involves precepts of English Constitutional Law which are irrelevant for our purposes. We can abstract two fundamental propositions from the “rule of law” idea. The first is the notion of the supremacy or predominance of law as opposed to the influence of arbitrary power. The second is the duty of all to obey the law.

Every Government, even the most despotic Government has an interest in being seen by its own population and by the world in general as a repository of the rule of law. It wants its own citizens to accept a duty to obey the law apart from the content of the law itself and apart from the coercive power of the State.¹²⁹ A State which violates its legal obligations can justifiably be viewed as lawless, not only by its own population, but by the rest of the world.

126. With respect to the law of treaties, a State first of all may choose not to become a party to a treaty. But should it choose to become a party, Articles 19–23 of the Vienna Convention on the Law of Treaties allow it to condition its acceptance by means of reservations. Articles 39–41 permit a States to modify treaties and Articles 42–71 set out rules relating to “Invalidity, Termination and Suspension of the Operation of Treaties”. The leading case on dissent from rules of customary international law is the *Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway) 1951 I.C.J. Rep. 116.

127. Fitzmaurice, *The Problem of the ‘Non-appearing’ Defendant Government* 51 BRIT. Y.B. INT’L L. 89, 99–100 (1980).

128. Dicey, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202–03 (10th ed. 1962).

129. This is the crux of the perennial debate on civil disobedience. See F. BOYLE, DEFENDING CIVIL RESISTERS UNDER INTERNATIONAL LAW (1987). It is in the interest of every Government, even those which have come into being through civil disobedience and revolution, to answer the advocates of civil disobedience by invoking the “rule of law” as a moral duty to obey the law.

This is not just an appeal to world opinion. It is tied up with the legitimacy of the State itself. A State which does not acknowledge a duty, on its own part, to obey the law forfeits much of its moral authority to insist on obedience from its own citizens.¹³⁰ The detriment is that it undermines the authority of its own laws and sabotages the authority of its judiciary. Of course, it retains the means of coercion, but that is all it has. The rule of law is transformed into the rule of force.

It is here that we return to the effect of doctrine on the development of international law. The justification that is presented in this article has seldom been articulated and is little understood. As a practical matter, its importance as a motive for law-compliance depends on whether States recognize and fear the detriment which has been identified. This, in turn, depends upon two preconditions; a) that violations of international law are clearly identified as such and b) that the detriment is widely understood. Both of those preconditions are the responsibility of international law scholars, the creators of the doctrine.

The realist schools of international law serve a very useful function. They help us to understand the functional limitations of the discipline. But the danger is that, in order to avoid appearing naive, we may be deterred from fully utilizing what there is and from testing the outer boundaries of the functional limitations.

The real disservice is normative surrender. Denial of the legal nature of certain norms of behavior provides too ready a justification for the violation of such norms. It surrenders unto Caesar what should be rendered unto God and the law.

130. See Pitkin, *Obligation and Consent*, 60 AM. POL. SCI. REV. 39, 40 (1966); Raz, *Authority and Consent*, 67 VA. L. REV. 103, 117 (1981). A somewhat different view is taken by R. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1987). He argues that a duty to obey is not necessarily linked to legitimate authority. The argument herein advanced is that a Government's call for obedience to the law is logically linked to respect for its own legal obligations.