The Basis of International Law: Why Nations Observe

Jianming Shen
# The Basis of International Law: Why Nations Observe

Jianming Shen, S.J.D.*

<table>
<thead>
<tr>
<th>I. Introduction</th>
<th>289</th>
</tr>
</thead>
<tbody>
<tr>
<td>II. The Naturalist Theories</td>
<td>290</td>
</tr>
<tr>
<td>A. Naturalism in General</td>
<td>291</td>
</tr>
<tr>
<td>1. The General Teachings of Naturalism</td>
<td>291</td>
</tr>
<tr>
<td>2. General Critiques</td>
<td>296</td>
</tr>
<tr>
<td>B. The Doctrine of “Social Contract”</td>
<td>297</td>
</tr>
<tr>
<td>1. The Doctrine</td>
<td>297</td>
</tr>
<tr>
<td>2. Critiques</td>
<td>300</td>
</tr>
<tr>
<td>C. The Doctrine of Fundamental Rights of the State</td>
<td>303</td>
</tr>
<tr>
<td>1. The Doctrine</td>
<td>303</td>
</tr>
<tr>
<td>2. Critiques</td>
<td>304</td>
</tr>
<tr>
<td>D. The Theory of “Necessity of Law”</td>
<td>306</td>
</tr>
<tr>
<td>1. The Theory</td>
<td>306</td>
</tr>
<tr>
<td>2. Critiques</td>
<td>308</td>
</tr>
<tr>
<td>III. Positivist Theories</td>
<td>309</td>
</tr>
<tr>
<td>A. Positivism in General</td>
<td>309</td>
</tr>
<tr>
<td>B. The Doctrine of the Will of the State</td>
<td>311</td>
</tr>
<tr>
<td>1. The Doctrine</td>
<td>311</td>
</tr>
<tr>
<td>2. Critiques</td>
<td>313</td>
</tr>
<tr>
<td>C. The Doctrine of Consent</td>
<td>314</td>
</tr>
<tr>
<td>1. The Doctrine</td>
<td>314</td>
</tr>
<tr>
<td>2. Critiques</td>
<td>316</td>
</tr>
<tr>
<td>D. Voluntarism and the Doctrine of Automatic Limitation</td>
<td>321</td>
</tr>
<tr>
<td>1. The Doctrine</td>
<td>321</td>
</tr>
<tr>
<td>2. Critiques</td>
<td>322</td>
</tr>
<tr>
<td>E. The Doctrine of Pacta Sunt Servanda</td>
<td>323</td>
</tr>
<tr>
<td>1. The Doctrine</td>
<td>323</td>
</tr>
</tbody>
</table>

* Visiting Professor of Law, St. John's University School of Law, New York. Professor Shen was formerly Research Fellow in International Law, University of Hong Kong, Faculty of Law, Hong Kong; Kenneth Wang Research Professor of Law, St. John's University School of Law, New York, and Assistant Professor of International Law, Peking University Faculty of Law, Beijing.
2. Critiques ........................................ 324

IV. Contemporary Doctrines and Approaches .......... 325
   A. Neo-Naturalism .................................. 326
      1. The Doctrine ............................... 326
      2. Critiques ................................... 328
   B. Neo-Positivism/Normativism/“Pure Science of Law” 330
      1. The Doctrine ............................... 330
      2. Critiques ................................... 333
   C. The Doctrine of Peaceful Co-Existence .......... 334
      1. The Doctrine ............................... 334
      2. Critiques ................................... 334
   D. The Theory of Power Politics .................. 335
      1. The Theory ............................... 335
      2. Critiques ................................... 336
   E. The Policy-Oriented Theory ..................... 337
      1. The Theory ............................... 337
      2. Critiques ................................... 338

V. Factors Affecting Compliance ..................... 340
   A. Legal Belief and Legal Habit .................. 340
   B. Consent and Pacta Sunt Servanda ............. 341
   C. Necessity of International Relations ........... 342
   D. Interests .................................... 345
   E. Reputation .................................... 348
   F. Reprisals and Sanctions ....................... 349

VI. The Decisive Factor: Compromised Wills of States 350

VII. Conclusions ................................... 352
I. Introduction

“Implementation, Compliance, and Effectiveness” was the main theme of the 91st Annual Meeting of the American Society of International Law (ASIL) (1997). This theme reminded international law scholars about Professor Henkin’s familiar and well-known statement with which the program description of the ASIL’s meeting began: “Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹ From this statement, one might infer the following: First, “almost all nations,” except for a very small number, observe international law most of the time. Second, the phrase “almost all principles of international law and almost all . . . obligations” suggests that there may be very few international law principles and obligations that are not routinely observed by a given State(s). Third, there must be very few instances when States do not comply with international law, even with respect to those principles and obligations which they do routinely observe. The 91st ASIL Annual Meeting sought to address questions concerning (1) the degree to which States observe international law, (2) the reasons why they observe or disobey international law, (3) the enforcement or implementation of international law within the domestic legal system and (4) the effectiveness of the international legal system. Regarding these four questions, the first one has been thoroughly addressed in Professor Henkin’s work. The second question is the primary focus of this article. The third and fourth questions, while related, present different broad issues that may be better dealt with in a separate or more comprehensive treatment.

Generally speaking, international law is treated and observed by States as law with binding authority, and States generally comply with their international obligations. Yet, what makes international law “work” has never been easily answered. Many international law scholars and practitioners have been bewildered by questions such as: Why do States generally comply with obligations imposed by rules of international law? Where does international law derive its validity? Why does international law have its binding force? Given the complexity of these issues, these questions deserve

further study and discussion. This article will examine what drives States to generally comply with their obligations under international law.

For the purpose of this article, the phrase "international obligations" denotes those obligations required of a State or States by general and special international law rules of conduct. In this context, one must distinguish between obligations imposed by international law and those imposed by international politics. For example, it is one thing that States comply with rules of international law. It is quite another that they may choose to comply with a call for sanctions against a given State deemed to have violated international law. It is important to note that compliance with or an affirmative response to a call for sanctions should not be confused with compliance with international law. This article will address compliance with international law and not compliance with a call for sanctions.

An integral part of a discussion on this subject should be devoted to the mainstream schools of thought regarding the basis of validity of international law. Accordingly, Parts II and III, discuss the most influential traditional doctrines of naturalism, positivism, and their variations. Part IV evaluates some contemporary doctrines and approaches. Finally, Part V examines a non-exclusive list of extrinsic factors that affect a State's choice to comply with international law and attempts to explain the ultimate driving force behind States' general adherence to their obligations under international law.

II. The Naturalist Theories

Various doctrines exist regarding the basis for the binding authority of international law. The two most prominent schools

---

2. This latter type of compliance may involve a legal obligation, as in the case of compliance with Security Council resolutions under Article 25 of the Charter of the United Nations.


of thought are naturalism and positivism. Many other doctrines are either derived from or founded upon these two doctrines.

In the 17th and 18th centuries and earlier times, under the influence of theology and the “law of nature,” the science and study of international law was dominated by the naturalist school. This school maintained that the validity of international law was based upon the will of God and that sovereigns were subject not only to divine law, but also to the laws of nature established by God. From the 19th century and onwards, positivism gradually replaced the dominant role of naturalism. The positivist school generally taught that the will of the State was the ultimate source of all laws, international and domestic, and the basis of the binding force of international law could only be sought from the fact that States consented to be bound by it.5 Between the naturalist and the positivist schools, there was an “eclectic school,” also known as the “Grotian” school, which attempted to harmonize naturalism and positivism. However the proponents of eclecticism were either “more naturalist” or “more positivist,” thereby making it difficult to regard the eclectic school as a separate discipline. For example, the renowned “eclecticists,” Baron Christian von Wolff (1679-1754)6 and Emerich de Vattel (1714-1767), essentially belonged to the naturalist school.7

A. Naturalism in General

1. The General Teachings of Naturalism—The naturalist school generally negates the necessity, and denies the existence, of positive law. It proposes that besides natural law (jus naturae), there is no room for any other law and that international law and other systems of law all belong to the system of the law of nature. The basis of the legal validity of all legal systems, to the naturalists,

7. Id.
rests on the will of the Supreme Being, God-created law or the law of nature.  

The so-called “natural law” is a system of “natural law of morality” invented and advocated by early European theologians and philosophers, and recognized and accepted by later naturalists and eclecticists. It is a system that represents the “celestial” will or the will of God and is otherwise known as “divine law” or that body of legal norms and principles created by God.

The notion of “jus naturae” may be traced back to Stoicism of the Ancient Greek times in about the third century A.D. Stoicism taught that man was a reasonable being, and the basis of natural law was the reason of man. “Jus gentium” of the Ancient Romans was a system of law based on the adoption of the concept of natural law. The teaching of Saint Thomas Aquinas (1225-1274), an Italian theologian and philosopher of the medieval times, represented a historical apex in the development of natural law. It is observed that, according to Aquinas, “all human laws derive from, and are subordinate to, the law of God. This law is partly reflected in the law of nature, a body of permanent principles grounded in the Divine Order, and partly revealed in the Scripture.”

Nevertheless, the formation, development and domination of naturalism as a matured theoretical school was largely a matter for the scholars of the 16th, 17th and 18th centuries. Early writers that can be labeled as “naturalists” include the two well-known Spanish theologians and jurists, Francisco de Vitoria (1486-1546) and Francisco Suárez (1548-1617). For Vitoria, the law of nations “was founded on the universal law of nature.” Similarly, Suárez believed that international law was the derivation from or extension

---


9. FENNIS, supra note 8, at 26 (quoting Joseph Raz, Kelsen's Theory of the Basic Norm, 19 AM. J. JURIS. 94, 100 (1974)).

10. See KELSEN, 2nd ed., supra note 8, at 243; see also CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 16 (P.E. Corbett trans., rev. ed. 1968) [hereinafter VISSCHER].


12. HENKIN, ET AL., supra note 1, at xxiv.

of natural law, and that natural law was the basis of international law.14

Theories based on the “law of nature” became even more popular and dominant in the 17th and 18th centuries. Insofar as concerns the field of international law, the German jurist, Sammuel Pufendorf (1632-1694) was the most prominent pioneer and representative of the 17th century doctrines of natural law. An extreme naturalist, Pufendorf (and his followers) denied the existence of any positive rule, holding that only natural law contained legally binding norms.15 Pufendorf and his followers not only considered that the basis of international law was the law of nature, but also viewed international law as part of natural law or completely identified the two as the same.16

Also influenced by and representative of the 17th and early 18th century naturalism were Christian Thomasius (1655-1728), another German jurist, and two well-known English political and juridical thinkers, Thomas Hobbes (1588-1679) and John Locke (1632-1704). Thomasius’ central theme of writings was about the “law of nature.” A celebrated international law scientist though, Thomasius hardly showed “any great concern with the special problems of international law” even if his major work bears the title of “...jus naturae et gentium.”17 While Hobbes and Locke

14. See SHAW, 3rd ed., supra note 13, at 22 (observing Suárez’s belief that “the obligatory character of international law was based upon Natural Law, while its substance derived from the Natural Law rule of carrying out agreements entered into”). Suárez’s main contribution is his TRACTATUS DE LEGIBUS AC DEO LEGISLATORI (Carnegie Classics 1944) (1612).


16. See ARTHUR NUSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 148 (1954) (stating that “Pufendorf arrives at the unfortunate idea that there is no independent jus gentium at all, and that jural relations among nations can be found only in natural law,” and “Pufendorf in fact sets out to prove that every rule actually observed among nations is nothing but law of nature”). See also G. SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 16 (6th ed., rev. 2nd impression, 1978) [hereinafter SCHWARZENBERGER & BROWN]; STARKE, 10th ed., supra note 5, at 22.

17. NUSBAUM, supra note 16, at 164, 338, n.102. Two of Thomasius’ main works were: CHRISTIAN THOMASIUS, FUNDAMENTA JURIS NATURAE ET GENTIUM (Foundations of the Law of Nature and Nations) (1705) (referred to in NUSBAUM, supra, at 338; STIG STRÖMHLIN, A SHORT HISTORY OF LEGAL THINKING IN THE WEST 190 (1985)); CHRISTIAN THOMASIUS, INSTITUTIONES JURISPRUDENTIAE DIVINAE (1688). Another major work of Thomasius’ was titled De optima respublica, but the publication year is unavailable to the present author.
have sometimes been labeled “founders” of positivism, their natural law orientation is also beyond doubt. Hobbes’ naturalist preference is reflected in his doctrines of social contract and “the state of nature.” The law of nature occupied an important part in the writings of Hobbes, who believed that the law of nature forbid such acts as theft, murder, adultery, and all injuries, are forbid by the laws of nature. For Hobbes, with whom Pufendorf agreed, “there is no law among nations except natural law.” Locke, who “clung to the notion of just war by asserting that only in the case of such a war did the victor acquire a right over the vanquished,” developed a whole new set of ideas (vis-à-vis Hobbes’) on natural rights, state of nature, social contract and laws of nature.

The Dutch writer Hugo Grotius (1583-1645), widely considered to be the “founder” or “father” of the Law of Nations, also had natural law as “a dominant element” in his teachings. However Grotius’ work was authority to both naturalists and positivists. Commenting on Grotius, the late Judge Laches observed:

Grotius was extremely able in combining theory and practice . . . . He did not abandon the concept of immutable natural law. Without identifying it with divine law, still less with the law of nations, he regarded it has a moral code and as an independent, superior source of law; it was thus the guardian of justice, not of the status quo, and he saw in it no barrier to

18. See, e.g., Theodore P. Rebard, A Few Words on John Locke, 40 Am. J. Juris. 199 (1995) (stating that the “dubious honor” of being “founder of the powerful school of legal positivism . . . must belong in the modern age to Machiavelli and to Hobbes” and that “Locke stands as an historical founder of legal positivism in a broad sense, to include matters not only of legislation but also of political and juridical practice”); Rex J. Zedalis, On First Considering Whether Law Binds, 69 Ind. L.J. 137, 143, n.27 (1993) (stating that “the historical antecedents of positivism extend at least to . . . John Locke, who maintained that consent created a majoritarian community that succeeded to the earlier state of nature and gave rise to the notion of legal obligation,” citing JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT ch. VIII, at 95-99, reprinted in JOHN LOCKE, ON POLITICS AND EDUCATION 75, 123-25 (Classics Club ed. 1947).


22. Id., at 164.


25. Nussbaum, supra note 14, at 135. For more discussion of Grotius’ teachings, see id. at 106-114.
the evolution of *jus voluntarium*. Within this evolution, potential new rules, based upon the will of States, not imposed but exercised by consent, could regulate international problems in a progressive manner.²⁶

Grotius’ works attracted a number of followers, known as the “Grotians” who sought to refine the concept of natural law. Among these followers included the proponents of the eclectic school of the eighteenth century. The great Swiss writers of Wolff and Vattel are regarded as the the 18th century, are regarded the leading exponents of the eclectic school.²⁷ The eclecticists attempted to combine elements of both naturalism and positivism but leaned more toward the former than toward the latter. In 1758, *e.g.*, Vattel wrote:

> We use the term necessary Law of Nations for that law which results from applying the natural law to nations. It is necessary, because nations are absolutely bound to observe it. It contains those precepts which the natural law dictates to States, and it is no less binding upon them than it is upon individuals. For States are composed of men, their policies are determined by men, and these men are subject to the natural law under whatever capacity they act. This same law is called by Grotius and his followers the international Law of Nations, inasmuch as it is binding upon the conscience of nations. Several writers call it the natural Law of Nations.²⁸

Naturalism and its variations, in numerous ramifications, begin with the assumption that, according to its nature, the law is a super-sensibly valid order and must therefore also, in the last instance, derive its validity from a super-sensual source. This super-sensual source has been sought in, for example, the will of God, pure reason inherent in man, the idea of justice and social solidarity. According to naturalists, the individual has some rights which can be deduced directly from nature in general, and, in particular, from

---


²⁷. See SCHWARZENBERGER & BROWN, supra note 16, at 17.

nature as created by God. The nature from which these rights are deduced is mostly considered to be the nature of man himself, in particular his reason. Consequently, one speaks of inborn or inherent rights as distinct from those rights conferred upon man by positive law. "These rights," remarks the well-known Viennese jurist Hans Kelsen (1881-1973), "include freedom, equality, property [and] self-preservation." Starke observes that "there are . . . writers . . . who treat . . . 'natural law' as [being] identical with reason and justice applied to the international community and who look upon it as thereby elucidating the lines of the future development of international law."

2. General Critiques—There are several criticisms of the doctrine of natural law. First, each naturalist uses the "law of nature" as "a metaphor for some more concrete conception such as reason, justice, utility, the general interests of the international community, necessity, or religious dictates" and these various interpretations of natural law may differ so widely as to lead "to a great deal of confusion." Additionally, Schwarzenberger and Brown have noted that the propositions of the naturalist school "were so vague as to become practically meaningless." A second criticism of naturalism involves it's disconnection with reality. By denying the existence of rules of positive law, extreme naturalists espouse a doctrine that many modern scholars view as simply not being supported by reality. According to these critics, the

32. Starke, 10th ed., supra note 5, at 22.
doctrine of natural law is aloof from the realities of international life and lacks emphasis on the actual practice of relations between States.\textsuperscript{35}

Last but not the least the question of whether "natural law" exists is itself problematic. Under natural law, the right of one individual or entity presupposes the duty of another and there cannot be any right in the absence of a corresponding obligation. Thus, natural law proponents argue that natural law imposes duties upon persons in relation to others. Critics contend that this position is absurd and instead argue that the so-called notions of "natural law," "inherent human rights" and the like are purely artificial creations of theoreticians and that such concepts do not exist in the absence of positive law-making. As is properly noted by Kelsen, duties and rights presuppose the existence of a legal system, which can only be established by acts of men or associations of men.\textsuperscript{36}

On the other hand, naturalism is not completely meaningless and worthless. According to Starke, the notion of natural law, due to "its rational and idealistic character, . . . has had a tremendous [positive] influence . . . on the development of international law . . . has at least generated respect for international law, and provided . . . moral foundations" for international law.\textsuperscript{37} Some of these moral foundations derived from natural law include the doctrines of social contract, fundamental rights of States, the necessity of law and the like. These doctrines may each emphasize different aspects of the structure of rights, however, each is derived from the doctrine of naturalism.

B. The Doctrine of "Social Contract"

1. The Doctrine—The doctrine of social contract, otherwise known as the school of social bond or the doctrine of social solidarity, is a theory derived from the naturalist school. The concept of social contract can be traced to the teachings of ancient Greek Sophists (meaning teachers of wisdom or specialists in wisdom). Some of the Sophists believed that "law and society are based upon a contract between those concerned ("the social contract") and . . . this fact has an impact upon the contests of legal

\textsuperscript{35} Id.
\textsuperscript{36} See Kelsen, 2nd ed., supra note 8, at 243-244.
\textsuperscript{37} Starke, 10th ed., supra note 5, at 23.
It was further developed by Hobbes, Locke and most notably by the French jurist and political philosopher Jean Jacques Rousseau (1712-1778). According to the doctrine of social contract, all laws are the result of society and their validity is based on a kind of social bond, social contract or social solidarity, which is the case with domestic law as well as with international law.

For the proponents of this doctrine, the individual is born free and equal. He is only bound by his own will and not by any external force. On the other hand, the individual does not live in a vacuum, but co-exists with other individuals in a social bond. Thus, there arises the need and necessity to regulate the common behavior of and mutual relations between all individuals, and to establish a certain social order among them. The only way of establishing such a social order is to "conclude" a social contract between free and equal individuals, which will be binding upon all individuals due to their common consent. As a result, a society emerges comprising individuals, State authority and social order (the State). In the interest of himself and others, each individual voluntarily places limitation on part of his inherent freedom and "natural" rights. This social bond between men necessitates the establishment of a certain legal order and determines the binding validity of such order. The doctrine's point is well stated in Rousseau's famous *Contrat social*.

38. STRÖMHOLM, supra note 17, at 28.
39. *See* WAYNE MORRISON, JURISPRUDENCE: FROM THE GREEKS TO POST- MODERNISM 107, n.7 (London: Cavendish Publishing Ltd., 1997) (quoting and discussing Hobbes' concept of "social contract" in his LEVIATHAN (Ch. 21:265, 269 (stating that "every subject is Author of every act the Sovereign both . . . the Consent of a Subject to Sovereign Power, is contained in these words, I Authorise, or take upon me, all his actions")), 398 (briefly discussing Locke's philosophy and referring to Locke as "the classical social contract theorist") & 153-62 (discussing Rousseau's "expressive idea of the social contract").
42. *See id.* at 446.
43. *See id.* at 247-248.
45. JEAN JACQUES ROUSSEAU, CONTRAT SOCIAL (1762). *See* Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 J. L., Ethics & Pub. Pol'y 139-299, 297 (1984) (stating that "Rousseau was the most important eighteenth century thinker to highlight the intrinsic value of the social contract as the act which
Similarly, according to the doctrine of social contract, the State, before becoming part of an international society, possesses sovereignty and fundamental rights conferred upon it by nature; it is only bound by its own will, and is not subject to any extraneous authority. Nevertheless, the State does not exist alone. Rather, it co-lives with other States in a social bond - the international society, from which it cannot separate itself. For a State to take part in the international society, that State must voluntarily limit some of its own inherent natural rights. Thus, it becomes necessary to establish a certain order for the international society and to regulate the behavior of and relations between all State by entering into social contracts.

Besides Rousseau and a few other writers of his time, proponents of the social bond doctrine include the American jurist Roscoe Pound (1870-1964), the Dutch jurist H. Krabbe (1859-1936) and the French jurist Leon Duguit (1859-1928). Pound held that international law had a social function and it was necessary for international law to meet the need of constant changes of the international society. According to Krabbe, law derives from man's perception of right or their conscience, and such perception of right or conscience is, like moral and religious perception, man's inherent psychological quality. International law is born when men of different States under external influence apply their perception of rights and legal conscience to international relations. That is, the validity of international law rests upon the legal conscience of various nations or their ruling class.

Duguit wrote that “there is no sociological philosopher who has tried to determine the exact moment when a social norm really becomes a juridical norm. Jurists should do this, and in France the only one who has really tried is . . . Gény.” To Duguit, “law is not a creation of the state; . . . it exists apart from the state; . . . the idea of law is entirely independent of the idea of the state; and . . . a rule of law is imposed upon the state as upon individu-

---

46. See Kelsen, 2nd ed., supra note 6, at 147-148.
47. See id.
49. See H. Krabbe, L'Idee moderne de l'Etat, 13 Recueil des Cours 513 (1926).
50. L. Duguit, Objective Law, 20 Columbia L. Rev. 816 (1920); 21 Columbia L. Rev. 17, 126 (1921).
He emphasized the "social fact" character of the basis of international law, and proposed that international law should be properly called "inter-social law." He believed that religious, moral, material and economic factors united individuals so that they felt the need for unifying their "feeling." Such "social fact" created social norms and law, without which the society cannot exist anymore.

Under the social contract doctrine, without doubt, there are preconditions before the individual or the State agrees to be bound by a certain social contract. The individual enters into the society and agrees to a social bond on the condition that, on the one hand, his natural rights be saved from the authority of the State, and on the other hand, that other individuals exercise the same self-restrictions, compromise and reservation. Similarly, the State enters into the international society and agrees to be bound by a certain legal order on the condition that its fundamental rights are preserved and other States make their self-limitation and reservation in the same manner. That is to say, the individuals are by nature free and equal. The State, as the society of men, comes into existence due to two facts: (1) that free and equal individuals consent to an agreement upon a social order to regulate their mutual behavior; and (2) that every individual voluntarily restricts his freedom in the interest of others, provided that others restrict theirs in the same way. Likewise, the State exists as a subject (a personality) of natural rights (sovereignty, independence, jurisdiction, etc.) before it enters into the international society. When the State voluntarily enters into the community of nations, it impliedly submits itself to international law, resulting in implied restriction of its natural rights and freedom. Yet, the State does so not only on the condition that it retains certain fundamental "natural" rights, but also on the condition that other States consent to the same restriction on their rights and freedom.

2. Critiques—The doctrine of social contract may appear to be more persuasive than other naturalist doctrines. Nevertheless, like the whole system of naturalist theories, the "social contract" doctrine is still vulnerable to criticism. It is true that just as the individual is a social entity, no State exists alone in a vacuum.

51 Id. at 21.
52 1 L. DUGUIT, TRAITÉ DE DROIT CONSTITUTIONNEL Y 17 & 67 (1927); see also Joseph C. Gidynski, Duguit's Sociological Approach to the Bases of International Law, 31 IOWA L. REV. 599 (1946).
Rather, each State must enter into relations or transactions with other members of the international society. However, as stated earlier, natural law and natural rights do not exist at all. The reason that the State inevitably has to enter into international relations is not because of the exercise of its "natural" and "inherent" rights, but rather because such intercourse is determined by the State's national will, which in essence is the will of the decision-making class of the State. Sovereignty and other "fundamental rights" of the State are not "natural rights," but are the requirements and expressions of the wills of the State. The so-called "legal conscience" and similar concepts are unable to find their basis from nature. This indicates that the basic point of the doctrine of social contract is erroneous and groundless.

Further, in the sense of international law, it is not that the need arises for the State to participate in the international society after the State enjoys its rights (and undertakes its obligations), but rather it is the reverse. It is because of the need for States to take part in international life and after States do enter into international relations that the legal relations of rights and obligations between States are created. As far as the original creation of the fundamental rights and obligations of States in international law is concerned, these rights and obligations were the result of States' mutual compromise between, and reciprocal recognition of, one another. Therefore, the rights and obligations of States, no matter how fundamental they are, are neither natural rights nor obligations accorded to States by "God," but rather are "man-made," positive rights and obligations.

Third, the so-called "social bond" or "social contract" is also a fictitious concept. According to the doctrine of social bond, the State's entry into the international society is impliedly conditional (the so-called social contract). This doctrine seems to suggest that the State either may or may not participate in international life, because a contract can be entered into only on a voluntary basis. The reality is that the State is the creation of, and exists in, an international society. The social attribute of a State is in a sense beyond the control of its will. As long as it acquires or possesses the capacity to enter into international relations (and therefore physically constitutes a sovereign State), it inevitably has to become a participant in international relations regardless of its willingness or unwillingness. The proposition that the State enters into the international society on implied conditions (social contract) is thus without merit.
Fourth, the doctrine of social contract suggests that the social bond (or implied social contract) between man and man or between State and State “is somehow less natural, or less a part of the whole personality, than the individuality of the man or the state.” That is, the existence of individuals or States precedes their social connections. This proposition, however, is without merit. The only individuals are individuals in society. All men are born into a preexisting society. They enter into a social bond at the same time they become existent in the world. The social contract doctrine is in no better position when applied to international relations. No State evolves in a vacuum. A State becomes a player in the international system from the very moment of its inception. It is not that States enter into the family of nations on the condition that their “natural” rights be preserved and their individuality and freedom be emphasized, but that their rights (and duties) are contingent upon recognition by international law and, in the end, upon their interdependence and upon their mutual recognition *inter se*. It is thus especially misleading to apply the view of the doctrine of the social bond to the international society of States. In the society of States, if there is a sense in the notion of “social bond,” the need is not for greater liberty for the individual States, but for enhancing the “social bond” between them or strengthening their reciprocal relations and interdependence.

Fifth, the social attribute of the State naturally determines that States cannot exist without intercourse between one another. It also calls for the establishment of an international legal system for the regulation of such intercourse between States. However, the social attribute of the State is not itself the basis of the validity of international law. It is the States themselves that together (1) participate in the creation, formation, perfection and acceptance of international law and (2) accord international law with legally binding validity. Therefore, the basis of international law and of its validity must be sought in the wills of States, not in the so-called “social bond” between States or the social attribute of their being.

Since the doctrine of social contract (1) over-emphasizes the social attribute of the State, (2) overlooks the fact that the basic constituent units of the international society are sovereign States

---

54. Of course, the “wills of States” are not the individual wills of one State or a group of States, nor the “common” wills of all States, but the compromised and coordinated wills of States in general.
themselves and (3) ignores the sovereign wills of the State, this
discipline is bound to enter into a theoretical dead end, being unable
to explain why international law is legally valid and binding.\textsuperscript{55}

C. The Doctrine of Fundamental Rights of the State

1. The Doctrine—The doctrines of fundamental rights of the
State and of social bond are closely related theories based on the
law of nature. As de Visscher pointed out, the doctrine of
fundamental rights of States and the doctrine of social contract,
“far from being mutually exclusive, were complementary. Both
were essentially individualistic.”\textsuperscript{56} These two theories both
prevailed in the 18th and 19th centuries, and still have their
supporters in the 20th century.\textsuperscript{57}

Indeed, the doctrine of fundamental rights of the State, from
a somewhat different angle, expresses the same idea as the “social
contract” theory. Under the “fundamental rights” doctrine,
principles of international law can be deduced from the essential
nature of the State. According to this doctrine, every State by
virtue of its statehood and its capacity as a member of the family
of nations is endowed with certain fundamental, inherent or natural
rights.\textsuperscript{58} These rights are not created by general customary or
conventional international law, but originate in the nature of the
State. The norms underlying these fundamental rights of the State
are the ultimate basis and source of positive international law, and
have a greater obligatory force than the rules of positive interna-
tional law which exist in the form of customs and treaties.\textsuperscript{59}

\textsuperscript{55} See GUOJI FA (International Law) 7 (Wang Tieya & Wei Min, eds.,
\textsuperscript{56} VISSCHER, supra note 10, at 17-18.
\textsuperscript{57} Cf., e.g., CHARLES G. FENWICK, INTERNATIONAL LAW 32-33 (4th ed.,
New York: Appleton-Century-Crofts, 1965), where it is stated that
... states are not juridical abstractions; they are corporate groups made
up of individual human beings with common moral and material interests
transcending territorial boundaries. Hence the same forces that have
driven individual men to unite in civil society, to organize separate
national groups, have driven states to recognize the need of developing
a law to govern their mutual relations. ... International law is thus
based ultimately upon the realization by states that in spite of their
national divergencies they have certain common ideals and common
moral and material interests which give to their collective group the
character of a community.
\textsuperscript{58} See id. at 49.
\textsuperscript{59} See id.
The doctrine of fundamental rights of States, as summarized by Brierly,\(^6\) stems from the doctrine of the "state of nature."\(^6\) According to the latter doctrine, individuals lived in a "state of nature" before forming themselves into political communities or States.\(^6\) This doctrine implies that the state of nature is a pre-political condition of the human race. This is not necessarily a condition in which individuals have ever actually lived in history, but a condition in which they would find themselves to be living together without a State for the ordering of their lives. The doctrine of the "state of nature" is designed to explain and justify the establishment of the State above individuals and the "eventual" establishment of a "supranational" entity above States.

The doctrine of "the state of nature" (1) considers the State as being a supra-individual institution which individuals have together agreed to set up so as to substitute law and order for the inconvenient anarchy of their natural condition and, likewise, (2) deems a "super-State" as being a supranational organization which States will likely agree to establish together in order to replace the inconvenient international anarchy of their natural condition with a "world" law and a "world" order. Under the doctrine of fundamental rights of States, since States have not formed themselves into a supranational entity or a super-State, they are still supposed to be living in a "state of nature." In other words, the overriding philosophy of rights of States as of today is still natural rights, \(i.e.,\) States existing in a "state of nature," lacking a supranational entity or a "super-State" as a political institution above them all.

2. **Critiques**—Brierly suggested that the doctrine of fundamental rights must be read subject to the two following conditions. First, the identification of the doctrine of natural or fundamental rights with the doctrine of natural law must be guarded against. Second, it must be borne in mind that the doctrine of fundamental rights of States, like that of the natural rights of individuals, has exercised a salutary influence at certain stage of the history of the law.\(^6\)

61. The conception of "the state of nature" is illustrated in the works of both Hobbes and Locke. See notes 18-23 & 39 supra and accompanying text.
62. Brierly, Basis, supra note 60, at 3-4 & 33.
63. See Brierly, Basis, supra note 60, at 8; see also Brierly, 6th ed., supra note 44, at 49-50.
Briery's position is credible to the extent (1) that the doctrine of fundamental rights of the State is but a variation of the naturalist school and (2) that both the traditional naturalism and the idea of natural or fundamental rights of men and States have played positive roles in the development and perfection of human society and of national and international legal systems. Beyond these, however, one has to admit that the doctrine of fundamental or natural rights of the State, like any other variation of the naturalist school, is neither historically sound nor theoretically justified. The reasons are as follows.

In the first place, the doctrine of fundamental rights is against the weight of history because it regards the State as something stagnant instead of being the product of a historical process of which the main outlines can be traced. The doctrine overlooks the fact that States underwent a long process of historical development and the fact that the attribution to States of such notions as sovereignty, independence and equality, which is often labeled as "inherent" and "natural" fundamental rights of States, is merely one of the many stages in that historical process. After all, States' sovereignty, independence, equality and other fundamental rights (and corresponding obligations) were not established and recognized until modern times.

Second, the normal or typical State, as necessarily assumed by the doctrine of fundamental rights, is a product of imagination. What exists is not "the typical State," but "States" which differ from each other in an indefinite number of ways. This difficulty cannot be eluded by maintaining that the doctrine of fundamental rights is intended to apply only to States that have entered into the international community and submitted to international law or only to States that are members of the so-called family of nations. This would be the equivalent of saying that rights are inherent not in States as such but only in those States in which they are inherent. It would also result in the abandoning of the very essence of this doctrine itself and ultimately lead to the conclusion that the rights are derived not from the "nature of the State," but from membership in a juridical system.

Third, it is clear that the doctrine of fundamental rights is a product of the pure doctrine of individualism. As de Visscher criticized, "[b]orn with modern States, the theory of fundamental rights..."
rights betrays its origin; it is the direct reflection of their struggles for independence and 'a product of the pure gospel of individualism applied in the international domain'.

Fourth, the doctrine of fundamental rights appears as if it emphasizes nature, reality and society and has made a connection between the law on the one hand and nature, reality and society on the other. However, it neglects the fact that the international community is composed of sovereign States whose obedience to the law of nations is not based on any "inherent" fundamental rights when they enter into international relations, but rather based on their compromised political wills and consent.

Fifth, it is theoretically defective to draw analogies between individuals and States, or between a society of men (normally a State) and a society of States (the so-called international community). Although it is proper to "personify" States in international law for the sake of convenience, the State and the individual are such different beings that it would be more appropriate not to place them in the same category by analogy with reference to one another. The basis of the validity of international law and the rights (and duties) of States thereunder may not be explained in light of the positive rights (and duties) of individuals under the domestic legal system, not to mention the irrelevance of any "natural rights" of individuals.

Lastly, a "right" is a meaningless term unless the existence of an objective legal system from which it derives its validity is presupposed. It is a fallacy to imagine that a system of law can be constructed out of rights as existing in the nature of things. Nature knows nothing of such human creations as rights and obligations and "law." Rights and obligations exist only in the thoughts of human beings as recognized by a certain legal system established by human beings themselves.

D. The Theory of "Necessity of Law"

1. The Theory—The doctrine of necessity of law is another theory closely related to the doctrine of social bond, but with different emphases. Brierly observes that the subjection of States to law needs no special philosophical explanation other than that

67. See KELSEN, 2nd ed., supra note 6, at 243-244. For more discussion, see BRIERLY, BASIS, supra note 60, at 5-9.
by which one explains the subjection of individuals to the law of
the State.\textsuperscript{68} "[T]here are important differences between interna-
tional law and the law under which individuals live in a state, but
those differences do not lie in metaphysics nor in any mystical
qualities of the entity called state sovereignty."\textsuperscript{69} Under this
assumption, some jurists were able to develop a theory of "necessi-
ty of law" that would purportedly apply to all laws, domestic and
international.

The doctrine of necessity of law grows out of the Latin maxim
\textit{ubi societas, ibi jus} (where there is a society, there is law), and is in
fact another form of expression of the doctrine of social contract.
According to this doctrine, law is not a mere accidental develop-
ment of history, but an essential element of human association.
Where there is a human society, there is the need for law. By the
same token, international law is an essential and necessary element
of inter-State relations and, as such, is bound to exist as long as
there exists an international society. The need of the international
society for international law is the same as the need of human
society for domestic law.

Aristotle (384-322 B.C.), the great ancient Greek philosopher
and scientist, pointed out that man was by his very nature a social
being and by his very nature in need of law. Likewise, the State,
despite its corporate character, had itself become "a social being"
in relation to other members of the international community. He
believed that "[t]he state is the perfect natural society" within
whose circle man might fulfill all of his needs.\textsuperscript{70}

Baron Christian von Wolff (1679-1754), the 18th century
Prussian philosopher and eclecticist (more often considered a
naturalist) mentioned earlier, created the concepts of \textit{jus necessari-
um} (necessary law) and \textit{jus gentium necessarium} (necessary
international law) and believed that international law had four
sources: natural international law, voluntary international law,
conventional international law and customary international law.\textsuperscript{71}

\textsuperscript{68} BRIERLY, 6th ed., \textit{supra} note 44, at 56.

\textsuperscript{69} \textit{Id.} at 55.

\textsuperscript{70} See 1 J. PASQUAZI, \textit{IUS INTERNATIONALE PUBLICUM} (Public International Law) 43 (Rome, 1935).

According to his interpretation, natural international law is "necessary international law," because he had the belief that the nature of man required him to continuously improve his own perfection and promote that of others.\textsuperscript{72}

Sir Robert Phillimore (1810-1885), an English naturalist who believed that custom and usage expressed "the consent of nations to things which are naturally, that is by the law of God, binding upon them," developed this theory in more explicit terms. He stated:

To move, and live, and have its being in the great community of nations, is as much the normal condition of a single nation, as to live in a social state is the normal condition of a single man. From the nature of states, as from the nature of individuals, certain rights and obligations towards each other necessarily spring; these are defined and governed by certain laws.\textsuperscript{73}

According to the doctrine of "necessity of law," the interdependence of States is a fact and there exists a community of interests between States in the same sense as there exists a community of interests between individual men. The need of law between States is as great as the need of law between individuals. The prevention of war, the regulation of conflicting claims, and the promotion of the general welfare of the group are conditions which create a moral and material unity among States in the same manner that they create a moral and material unity between individuals within the State. That States have common interests constitutes an actual community of States and demands a rule of law. Therefore, the necessity for international law and the constant contact of human beings with one another constitutes the very basis of international law.\textsuperscript{74}

2. Critiques—The doctrine of necessity of law is partly correct in that States, which do not exist in a political vacuum but in consecutive political relations with one another, do have and realize the need for a system of order in which their interdependent activities may be carried on. The major defect of this doctrine, however, is that it offers only a marginal explanation of

\textsuperscript{72} Id.
\textsuperscript{74} See Fenwick, supra note 57, at 36-37.
the basis of international law, which constitutes a philosophical or sociological explanation rather than a legal one.

Another defect of this theory is that it starts with the concept of natural law. It teaches that where there is a society, there is law. At the same time, it ignores the decisive roles played by the will of States, holding that certain rights and duties of States are inherent in the very nature of the State. More obviously, the necessity of law theorists consider (as Sir Robert Phillimore did) international law as being “naturally” binding upon States, that is, by virtue of “the law of God.” The so-called “law of God” or “law of nature,” like “God” per se, is non-existent.

Also, it is improper to match the State being a society of men with a society of States. While it may be argued that the State is the perfect society of men in which men may fulfill all their needs, there is no comparable entity at the international level to be called a “perfect society of States.”

Nevertheless, the doctrine of “necessity of law” can serve as a marginal explanation to the validity of international law if, and only if, it is “purified” by excluding any element of natural law.

III. Positivist Theories

A. Positivism in General

In direct opposition to the naturalist theories are positivism and various derivative positivist theories. Positivism generally teaches that the law of nations is the aggregate of positive rules by which States have consented to be bound, exclusive of any concepts of natural law such as “reason” and “justice.” For the positivists, nothing can be called “law” among States to which they have not consented. The proponents of the positivist doctrines maintain that the will of the State is absolutely sovereign and that it is the source of the validity of all law. The validity of all laws, whether domestic or international, depends upon the supreme will of the State. The positivists believe, as Starke observes, that the rules of international law are, in the end, similar to domestic law in the sense that they both derive their binding force from the will of the State.75

Alberico Gentilis (1552-1608), the English writer of Italian origin, and Richard Zouche (1590-1660), another English writer, may be said to be the originators of the school of positive law. Although Gentilis formulated the school of the so-called "jus

---

naturae et gentium” (natural law and international law), his doctrine had already departed from theology and canon law. He opposed to the idea of identifying international law with natural law, advocated the interpretation of international law from the perspective of reality, recognized the existence of different nation-states, believed that every nation-state in reality had equal rights and for the first time attributed the basis or foundation of international law to the practice (and will) of the State, as reflected in treaties, voluntary obligations, custom and history. On the other hand, some critics decline to regard Gentilis a positivist because there was not enough concern with State practice in his works despite the influence he received from realism.

On the basis of Gentilis’ doctrine, Zouche completely negated natural law. Zouche no longer used the term *jus gentium* to denote international law and instead used the expression *jus inter gentes*. He believed that international law, being the law among states, was a law recognized by states with sovereign authority - “a law ‘which has been accepted [through] custom conforming to reason among most nations or which has been agreed upon by single nations,’ to be observed in time of peace and war.”

During the time of the renowned Dutch jurist Cornelis van Bynkershoek (1673-1743), one of the most learned and respected of the early positivist thinkers, positivism gained another opportunity for further development. Admittedly, due to the naturalist influence of his time, Bynkershoek particularly emphasized the “principle of bona fides” as being the theoretical foundation of all agreements between states, and reason occupied an important place in his thinking. And “his own protestations notwithstanding,” one commentator observes, Bynkershoek “must be accorded a place

---

76. See Lachs, supra note 26, at 50.
78. See e.g., Nussbaum, supra note 16, at 164.
80. See Nussbaum, supra note 146 at 165-166.
among the Grotian eclectics who found a bridge between positive and natural law.\textsuperscript{82} Nevertheless, Bynkershoek's strong positivist orientation must be recognized. In his famous \textit{Quaestio n um juris publici}, Bynkershoek emphasized the importance of the practice of modern States, custom and treaties, completely ignored the "law of nature" and held (1) that the rules of international law were established through the consent of States, and (2) that all agreements between States were the products of their sovereign wills.\textsuperscript{83}

Despite the teaching of early positivist thinkers, positivism did not begin to take over the theoretical domination by naturalism until the 19th century. Since then, positive international law underwent important development under the influence of positivism and the most obvious examples include Europe-centered international conferences, various international conventions and institutions of international law that emerged in the stages of the nineteenth century. The expansions of Western Powers, the maturation of the system of international law, and the continuing spread of the positivist school led men to the belief that law is essentially the command issued by sovereigns or sovereign entities, that is to say, it is the body of rules of conduct prescribed by human beings. Any concept of "reason," "morality" or "justice" is totally irrelevant to the issue of validity of such "man-made" law. The validity of domestic law of one State depends in the last analysis on the sovereign will of the State itself, while that of international law depends on the collective wills of all sovereign States.

Within the positivist school there are several doctrines or variations: the doctrine of the will of the State, the doctrine of consent, the doctrine of auto-limitation, and the doctrine of \textit{pacta sunt servanda}. These doctrines or variations have one thing in common: they all maintain positivism and oppose naturalism, though from different perspectives or with different emphases.

\textbf{B. The Doctrine of the Will of the State}

\textbf{1. The Doctrine—While Gentilis was the first to maintain that the basis of international law was the will of States, Georg Wilhelm Friedrich Hegel (1770-1831) was perhaps the first to have systematically advanced and analyzed the doctrine of the will of the}
State. Hegel taught that the individual belonged to the State because the State contained the wills of all citizens, and those wills were transformed into a higher-level will of the State. Law was also subject to the abstract concept of the “State” because the State itself was sovereign and supreme, therefore nothing could be beyond the State, or there was no room to subject the State to any other authority. On this met the minds of Hegel and Jean Bodin. According to Jean Bodin, the state “has an absolute power over its subjects, and that power is not limited by any law. The state alone can issue laws, without being bound by them, and laws, in fact, are nothing but the sovereign’s commands.”

Of course, Hegel and his followers also recognized the existence of international law. They considered international law as the “external public law” (äußeres Staasrecht) of the State, and emphasized the principle of pacta sunt servanda. On the other hand, they believed that the will of the State determined the existence and concrete contents of treaties. Hegel even believed that the State in its own interest might declare war against another, so as to preserve itself and even to expand the sphere of its sovereign influence.

Heinrich Triepel (1868-1946), one of the spokesmen of dualism, is another supporter of the doctrine of the will of the State. He attempted to extend the binding force of international law without completely denying its voluntary nature by developing the doctrine of the “general will” or the “common will” (Gemein-wille) and the notion of agreements between States (Vereinbarung). He was of the opinion that the individual will of each State, if isolated from one another, could not give rise to international law. Only when these individual national wills met together

85. See VISSCHER, supra note 10, at 35-36 (discussing “the Hegolian concept of the State”) & 61 (observing Hegel’s concept of “ethical will” of “nation-States”). See also FRIEDMANN, supra note 81, at 167-68; LACHS, supra note 24, at 15-16.
86. See FRIEDMANN, supra note 84, at 169-70.
87. STRÖMHL, supra note 17, at 151.
88. For example, Georg Jellinek was of the view. See BRIERLY, BASIS, supra note 60, at 13-14 (citing Jellinek’s GESETZ UND VERORDNUNG 197). For more discussion on Jellinek, see text accompanying notes 120-122 infra.
89. See FRIEDMANN, supra note 81, at 170. See also SCHLOMO AVINERI, HEGEL’S THEORY OF THE MODERN STATE (1972).
90. H. TRIEPEL, VÖLKERRECHT UND LANDESRECHT (International Law and Municipal Law) (1899).
could there be law-making treaties and the general will of States ultimately determined the contents and validity of international law.  

2. Critiques—The positivist doctrine of the will of the State represents a major theoretical progress in that it recognizes the objective linkage between the basis of validity of international law and the will of States. It is inaccurate, however, to state that the binding force of international law depends simply on the will of the State or the common will of the States. If the will of the individual State determined the validity of international law, then each State might have easily renounced a given rule of international law merely on the ground that such rule was against its supreme will, thus resulting not in the affirmation but in the very negation of the validity of international law. If "the will of States" denoted the common wills of all States upon which the binding force of international law were founded, then one must say every rule of the law ought to be based on such "common wills." But this is not the case in real international life either. Although, in certain circumstances, it is not impossible for States at large to have one or more common will, it is virtually impossible to imagine the presence of common wills of all States with regard to every and all customary and conventional rules of international law, considering the tremendous diversity and variance of nation-States in terms of size, population, history, culture, religious belief, geographical location, economic development and political systems.

Kelsen even held that States were bound by general international law without, and even against, their will. According to Kelsen, when a new State comes into existence, it has all the rights and duties stipulated by general international law, without any act of recognition of general international law on the part of the new State being necessary. For Kelsen, "[j]ust as the individual does not submit [himself] voluntarily to the domestic law of [his] state which is binding upon him without and even against his will, a state does not submit voluntarily to international law, which is binding upon it whether it does recognize international law or does not

91. See id. This work of Triepel's was generally considered an improvement over earlier ideas of auto-limitation discussed below. However, the "common will" (Gemeinwille) doctrine neither eliminated the voluntary aspect of international law nor satisfactorily proved its binding force.

92. KELSEN, 2nd ed., supra note 8, at 247. For further discussion of Kelsen's neo-positivism, see text accompanying notes 148 ff. infra.

93. KELSEN, 2nd ed., supra note 8, at 247.
recognize it." The present author does not agree with Kelsen’s analogy of States with individuals, but he agrees that not all rules of international law reflect the true and original will of a given State, especially in the case of a newly independent State, which typically played no significant role or no role at all in the formation of existing international legal rules.

C. The Doctrine of Consent

1. The Doctrine—The exponents of the doctrine of consent also maintain that the will of the State is the controlling element of the binding force of international law, but their emphasis is on the mechanism of State consent through which the will of the State is expressed. For them, the rules of international law become positive law when the will of the State consents to being bound by them whether expressly or impliedly. According to the consent doctrine, it is the sovereign and supreme will of the State that commands obedience. This will of the State is said to be expressed in the case of domestic law through State legislation and in the case of international law through consent to international rules. Being a main theory of positivism, the doctrine of consent generally teaches that the consent or common consent of States voluntarily entering the international community constitutes the basis of validity of international law. States are said to be bound by international law because they have given their consent.

An extreme faction of the consent theory, on the one hand, professes that a State is not bound by any legal norm to which it has not explicitly consented. To some positivists, observed Bhattacharya, international law is essentially a species of “conventional law” consisting of treaties and agreements entered into among States in their mutual intercourses and it is in such treaties and agreements that international law has its binding force. According to the observation of Ross, “[t]he positivist theories take it for granted that all International Law is conventional law . . . and that all validity of International Law is in the last instance derived from a union of the wills of the sovereign states." This emphasis on the “conventional” nature (that is, the element of explicit

94. Id.
95. See, e.g., SIR JOHN SALMOND, JURISPRUDENCE 55 (2nd ed.), (quoted & cited in) BRIERLY, BASIS, supra note 60, at 10. Brierly also observed similar viewpoints of other jurists. BRIERLY, BASIS, supra, at 10-11.
consent) of international law could arguably lead to the denial of the binding force of customary international law.

On the other hand, another faction of the consent doctrine holds that if a State (especially a newly created or newly independent State) has not openly and expressly objected to a certain norm of international custom, it may be said to have given its implicit consent to such norm.\textsuperscript{98} In other words, the consent of States to a given rule of international law may be either explicit as indicated in a treaty, or tacit as implied in the acquiescence in a customary rule. In the case of custom it is the implied consent and in the case of treaties it is the express consent that is said to serve as the basis for the validity of international law. When States exercise their wills to explicitly or implicitly accept and consent to be bound by certain rules of law, those rules become positive rules of international law and acquire legally binding validity.

As far back as early 18th century, Bynkershoek took the position that the basis of obligations in international law derived from either the express consent or implied consent of States, and that there was no room for the existence of inter-State law beyond what States had accepted as binding by means of express or implied consent.\textsuperscript{99} Triepel, while believing that the Gemeinwill (common will) of States was the basis for the validity of international law, pointed out (1) that international law depended upon Vereinbarung (agreements between States), which included not only treaties but

\textsuperscript{98} See, e.g., Emmerich de Vattel, Law of Nations 316 (Joseph Chitty trans., 1863) (stating that "if custom has introduced certain formalities in the business, those nations who, by adopting the custom, have given their tacit consent to such formalities, are under an obligation of observing them"); Albert Lapradelle, Introduction to 3 Emmerich de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and the Affairs of Nations and of Sovereigns' 27, at 9 (Charles G. Fenwick trans., Carnegie ed. 1916) (1758) (noting that there are three divisions that "form together the positive Law of Nations, for they all proceed from the agreement of Nations[:] the voluntary law from their presumed consent; the conventional law from their express consent; and the customary law from their tacit consent"); Antonio F. Perez, Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law, 14 Wis. Int'l L.J. 463, 467, n.20 (1996) (discussing the proposition that "[t]he voluntary assumption of treaty obligations should not be regarded as a limitation upon but rather as an expression of the state's sovereignty" (quoting Hans Blix, Sovereignty, Aggression, and Neutrality 11 (1970)) by noting that "Blix's argument need not be limited to treaties, since customary law equally involves the transfer based on tacit consent of such entitlements and even new states might be said to have consented . . . to limits on their sovereignty under customary law" (emphasis added)).

also custom, and (2) that Vereinbarung was the only creative source of international law. F.L. Oppenheim (1858-1919), a modern master of international law, also belonged to the positivist school of State consent. For him and his followers, the basis of international law was nothing else but the explicit or implicit consent of States.

2. Critiques—The consent doctrine and the doctrine of the will of the State express virtually the same idea. There is certain sense in these positivist doctrines. The most obvious merit of these two doctrines is that they approach the history, development and reality of international law more than any other doctrines. It is correct to say that international law, being a system of law of coordination and cooperation among States, is the reflection of the will of sovereign States. The creation and continuing validity of such legal system must be dependent on the general consent, acquiescence and/or acceptance of States at large. Further, legal obligation may arise en consensu. State consent plays an important role in maintaining an international legal order. The obligation of a contract in civil law, or the obligation of a treaty in international law, clearly arises by way of consent.

Fenwick is particularly critical of the positivist consent views regarding the basis of international law. He points out that the positivist theory is incorrect because it goes against the principles and things which the States accepted “from their very inception.” In his opinion, the theory that international law is based upon the consent of States is “inadequate to explain the assumption upon which governments appear to have acted from the beginning of international law.” Whatever the position taken by writers, he observes, governments have always looked upon international law as having an objective character, as being binding because it is the “law,” not because States find it convenient to observe.

100. TRIEPEL, supra note 90. Triepel’s ideas are discussed in BRIERLY, BASIS, supra note 60, at 15-16; NUSSBAUM, supra note 146 at 235.
101. 1 L.F.L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 1 (1st ed., 1905-1906) [hereinafter OPPENHEIM, 1st ed.]; vol. 1, 8th ed., supra note, at 16-17; 1 OPPENHEINM, 9th ed., supra note 34, at 14 (stating that “[t]he common consent that is meant is . . . not consent to particular rules but . . . the express or tacit consent of states to the body of rules comprising international law as a whole at any particular time”).
102. FENWICK, supra note 57, at 35-6.
103. Id. at 36.
104. Id.
105. See id.
Brierly opines that the assumption that international law consists of nothing except what the States have consented to is an inadequate account of the international legal system as can be seen in its actual operation. Brierly even argues that implied consent is not a philosophically sound explanation of customary law, but merely a fiction invented by the theorist, since a customary rule is observed not because it has been consented to but because it is believed to be binding. He concludes that States do not regard their international legal relations as resulting from consent, except when the consent was express.\textsuperscript{106}

The present author agrees that there are situations where States may be treated as being bound by rules and principles to which they did not consent. For example, a defeated State may find itself to be in a situation in which it must comply with obligations imposed upon it by other States at large collectively or individually. Nevertheless, the present author rejects the opinion that implied consent does not exist. When a customary rule of international law is generally observed by States, some States, especially those which participated in the initiation of the custom or pattern of behavior in question, follow the rule or continue to follow it actively partly because they have tacitly consented to the pattern of behavior as a legal norm. Such active and voluntary behavior may be properly said to be implying a tacit consent of the States concerned. On the other hand, for other players, especially for new States which did not contribute to the formation of the rule, they observe it or at least do not object to it passively, because they feel themselves to be compelled to do so even against their will due to an overwhelming number of existing States following the rule. Such passive and even involuntary submission to a rule, although sometimes described as implied consent, may hardly be said to constitute "consent" in the strict sense of the word.

Therefore, the words "consent" and "implied consent," as they appear in international legal literature, must be understood with care and/or qualification. Even some of those who believe common consent to be the basis of international law admit that common consent does not necessarily mean that consent has been given by each and every State. It is stated, for example, that "common consent merely means the express or tacit consent of so overwhelming a majority of States that those who do not consent are of

\textsuperscript{106} See BRIERLY, 6th ed., supra note 41, at 51-52.
no significance as compared to any community viewed as an entity in contradistinction to the will of its single member." 107 Irrespective of the above, the major point here is that although consent plays an important role, it is not the only or the ultimate factor determining the validity of the rules of international law.

One of the defects of the pure consent theory is that it may be used to justify the withdrawal of consent, leading to the denial of a given rule of international law. If a State concludes a treaty with another, such a treaty will be binding upon the parties. But if the consent once given is subsequently withdrawn, will the State still be bound by the treaty? If the treaty was said to be no longer binding after withdrawal of consent, it would lead to the conclusion that a State can by its unilateral act enforce its unconditional right to relieve itself from any obligation to which it was bound under the treaty. Under this assumption, the State could not still be held to be under the obligation, for the consent which allegedly was the very basis of such obligation no longer existed after such withdrawal. Similarly, since custom was said to be the tacit consent of States, a State might, at will, withdraw this tacit consent by changing its direction of behavior or breaking a given custom. As Brierly comments, a consistently consensual theory would have to admit that if consent is withdrawn, the obligation created by it comes to an end. 108

To overcome this difficulty, Oppenheim, as edited by Lauterpacht, points out:

[N]o State can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations. The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one State. This applies not only to customary rules, but also to such conventional rules as have been called into existence through a law-making treaty for the purpose of creating a permanent mode of future international conduct without a right of the signatory Powers to give notice of withdrawal. It would, for instance, be a violation of International Law on the part of a signatory of the General Treaty for

107. 1 OPPENHEIM, 8th ed., supra note 5, at 17. See also 1 id., 9th ed., supra note 34, at 14 (stating that the words "common consent" "cannot mean . . . that all states must at all times expressly consent to every part of the body of rules constituting international law, for such common consent could never in practice be established").

the Renunciation of War of 1928 to declare that it has ceased to be a party.\footnote{1 OPPENHEIM, 8th ed., supra note 4, at 18-19.}

It is true that once “common consent” is reached it may be changed, withdrawn, or replaced only by way of another “common consent.” It is also true that common consent of States at large forms a partial explanation why States observe international law. Yet, in the last analysis, and for the reasons stated above,\footnote{10 See text accompanying notes 107-108 supra.} common consent is not the ultimate basis of the validity of the law. While common consent may be an important and, at times, a major factor, in the formation of rules of international law, it certainly is not the sole factor and in certain circumstances is even not a decisive factor.\footnote{111 It must be noted that common consent of States does not equate the so-called “common wills” of States. Consent is not necessarily a process of expressing the will of the State; rather, it is a process of concession, compromise and understanding.}

First of all, the term “consent” is inappropriate when applied to new States, since new States did not participate in the process of formulating existing rules of international law. They may not be said to have consented to every and all existing rules of international law when or before they acquired or regained independence and/or became formally established or reestablished.\footnote{112 See N. SHAW, INTERNATIONAL LAW 9-10 (2nd ed., Cambridge: Grotius, 1986) [hereinafter SHAW, 2nd ed.].} Of course, newly independent States and new States created through other means, after attaining their statehood and becoming a participant in the international community, have the right to expressly or impliedly indicate their acceptance as binding law the whole body or part of existing rules of international law. If such explicit or implicit acceptance by new States may be said to have the significance of constituting “subsequent consent,” then such consent, essentially, is the result of the compromise of their national will. It is difficult to maintain that new States’ acceptance of existing rules of international law, the creation of which they did not take part in, stems from their true and whole-hearted consent.

Further, even in the course of formation of specific norms of international law by existing States, there may be situations where no common consent is ever reached at all. For example, the consent doctrine is incapable of taking into account “the tremendous growth in international institutions and the network of rules
and regulations that have emerged from them within the last generation." Although none of the existing international organizations constitutes a legislative body above States, their significant role in facilitating the evolution and development of new rules and principles of international law cannot be ignored. Many of the new rules have been drafted and formulated by a handful of legal experts from various leading legal systems under the auspices of international organizations, particularly the International Law Commission of the United Nations, and are gradually accepted and/or adhered to by an increasing number of nations. This law-creating process would better be called a process of compromising rather than a process of consent.

In addition, it must not be forgotten that consent cannot by itself create an obligation. It can do so only within a system of law which declares that consent duly given shall be binding on the party consenting. In other words, a contract or treaty is capable of having this legally binding effect only because there exists an underlying general principle of law - *pacta sunt servanda* - that gives effect to the terms of a contract or treaty. On the other hand, the validity of this general legal principle again rests upon an entire system of law which recognizes it. Without a legal principle to that effect, and without a legal system giving effect to that principle, it would be meaningless to talk about rights and obligations arising from consent (mainly contract or treaty).

Finally, the notion of *pacta sunt servanda* is an important principle of international law and may be said to be the immediate (though not the ultimate) basis of obligations arising from international treaties. If one assumes that the validity of international law is based on the consent of States, then this principle itself as part of the body of legal rules must also be regarded as being based on consent. But this assumption is circular, absurd and unsound as one cannot say that a legal principle is the basis of obligations arising from consent while at the same time that principle is also based on consent. One may well speak of a legal obligation as consensual, meaning only that the occasion out of which it arises is

113. *Id.* at 10.
115. *See id.*
116. *See Shaw*, 3rd ed., *supra* note 13, at 10 (stating that "the principle that agreements are binding (*pacta sunt servanda*) upon which all treaty law must be based cannot itself be based on consent").
a consensus of parties, but without implying that its immediate
basis, the rule of law which gives binding effect to the consensus,
is itself consensual in character. "To say that the rule pacta sunt
servanda is itself founded on consent is to argue in a circle," as
Brierly correctly points out.117

D. Voluntarism and the Doctrine of Automatic Limitation

I. The Doctrine—The consent theory as originally propound-
ed was later modified in certain respects by followers of the
positivist school. It later developed into the auto-limitation or self-
limitation doctrine (also known as "voluntarist positivism" or
"voluntarism"),118 and the doctrine of pacta sunt servanda.

Some proponents of the auto-limitation doctrine attribute a
will to States, clothe that will with full sovereignty and authority,
and maintain that international law consists of those rules which
the wills of the various States have accepted by a process of
voluntary self-restriction. The doctrine of States' auto-limitation or
self-limitation is thus another traditional theory of the positivist
school. It teaches that international law is the outcome of the
exercise of self-limitation by States, and that the basis of its validity
is the wills and voluntarism of States. The self-limitation doctrine
proclaims that States are sovereigns, whose wills reject any type of
external limitation, and if their sovereignty is in any way limited,
that limitation cannot be from any external force, but only be
imposed by the States themselves.119

Voluntarism stemmed from the teaching of Hegel120 and was
put forward and fully developed by the Austrian, Georg Jellinek
(1851-1911), on the basis of the main postulates of positivism. In
the view of Jellinek, the supra will of the State by consenting to be
bound by customary and conventional rules of international law
places limitations on its sovereignty. The rules of international law
derive their binding force by self-limitation of the sovereign will of
States through consent. The will of the State being sovereign could
not be subordinated to any external power unless it consented to
it. Jellinek was more concerned with the effect of consent on the
will of the State rather than with the source of the binding force of

118. See VISSCHER, supra note 10, at 51-54.
119. For an account of the doctrine of States's self or auto-limitation, see
BRIERLY, 6th ed., supra note 44, at 53-54; VISSCHER, supra note 10, at 51-54.
120. See BRIERLY, 6th ed., supra note 41, at 53.
international law. He believed that the international community was an emanation of the rights of individual States - hence its imperfection, lacunae and imbalance. The voluntarists recognized the existence of rules of international law, but did not regard these rules absolute because the legal validity of such rules was contingent upon the self-limitation of States. If international rules ever conflicted with a State’s sovereignty, then they had to yield to it.\textsuperscript{121} This theory thus appears to have come together with the naturalist theory of social contract.\textsuperscript{122}

2. Critiques—Jellinek’s theory is not only incapable of adequately explaining the basis of international law, but it also \textit{contains a certain element of danger}. In the relationship between State sovereignty and international law, there does exist an element of a kind of self-restriction by States on their sovereign power, but it would go too far to maintain that such self-limitation on a State’s sovereignty constitutes the basis of validity of international law. It would also be incorrect to say that such self-limitation may be withdrawn at a State’s will.

Visscher is particularly critical of Jellinek’s theory. He points out that “... caught between the search for a higher objective order and respect for sovereignties, Jellinek finally surrendered to the latter. Sovereignty, he says, implies the absence of any subordinations other than those created by the State’s capacity to bind itself.”\textsuperscript{123} In reality, the voluntarist theory is scoffed at by some on the ground, among others, that a voluntarily self-imposed limitation “is no limitation at all.”\textsuperscript{124} In case of any complicity between State interest and individual right and between State sovereignty and international order on the other, as Friedmann remarks, the voluntarist theory is bound to come down on the side of State sovereignty. In the absence of a superior legal order and authority, the State can revoke its voluntary self-limitation \textit{internally} by altering the constitutional functions of its organs, and \textit{internationally} by revoking its voluntary observation of rules of

\begin{itemize}
\item \textsuperscript{121} See NUSSBAUM, \textit{supra} note 16, at 235, citing GEORG JELLINEK, \textit{DIE RECHTLICHE NATUR DER STAATS-VERTRÄGE} (Vienna, 1880). \textit{See also} GEORG JELLINEK, \textit{ALLGEMEINE RECHTSLEHRE} (Vienna, 1905); \textit{id.}, \textit{SYSTEM DES SUBJEKTIVEN ÖFFENTLICHEN RECHTS} (1905).
\item \textsuperscript{122} See text accompanying notes 38-67 \textit{supra}.
\item \textsuperscript{123} VISSCHER, \textit{supra} note 10, at 51-52.
\item \textsuperscript{124} BRIERLY, 6th ed., \textit{supra} note 44, at 53.
\end{itemize}
conduct. The objective result of voluntarism would thus appear obvious: a classical denial of international law itself.

The truth is that international law and its binding validity come from the compromise between different and at times conflicting wills of various States. The compromise and "consent" of States result in both gains and losses. The rules of international law, when created by the compromised wills of sovereign States in the form of "consent," become legally binding upon those States whose compromised national wills so "consent" from the very moment of the creation of these rules. Thus, States may not unilaterally withdraw, at will, their compromise "consent" to the coordinative rules of law thus created, nor can they unilaterally withdraw their "self-limitation" on their sovereignty no matter how "voluntary" the self-limitation may be.

E. The Doctrine of Pacta Sunt Servanda

1. The Doctrine—It was "the true [Italian] Maestro" Dionisio Anzilotti (1869-1950) that formulated the theory of pacta sunt servanda to explain the basis of the validity of international law. He regards the rules of international law to be either customary rules or rules arising out of treaties or agreements among States and considers the doctrine of pacta sunt servanda as "an absolute postulate of the international legal system." Anzilotti considered States to be bound to obey such rules by reason of a pact both express and implied and "stressed the openly or tacitly conventional character of international law, which in his view relied on pacta sunt servanda." In his famous standard textbook of international law, Anzilotti writes:

Every legal order consists of a complex of norms which derive their obligatory character from a fundamental norm to which they all relate, directly or indirectly. The fundamental norm determines, in this way, which norms compose a given legal order and gives unity to the whole. The international legal

125. See FRIEDMANN, supra note 84, at 388.
126. LACHS, supra note 24, at 97. For Anzilotti's accomplishments, see 1 D. ANZILOTTI, CORSO DI DIRITTO INTERZIONALE (3rd ed., Rome, 1928); id., TEORIA GENERALE DELLA RESPONSABILITA DELLO STATO NEL DIRITTO INTERNAZIONALE (Florence, 1902); id., IL DIRITTO INTERNAZIONALE NEI GUIDIZE INTERNI (Bologna, 1905).
128. LACHS, supra note 26, at 97.
order is distinguished by the fact that, in this order, the principle *pacta sunt servanda* does not depend, as in international law, upon a superior norm; it is itself the supreme norm. The rule according to which “States must respect the agreements concluded between them,” thus constitutes the formal criterion which distinguishes the norms of which we speak from other norms and gives unity to the whole; all norms, and only the norms, which depend upon this principle *as the necessary and exclusive source of their obligatory character*, belong to the category of those with which we are concerned here (*italics* original).^1^2^9^  

Anzilotti’s doctrine is analogous to the normativist school discussed below,^1^3^0^ especially to the proposition of Hans Kelsen and Alfred Verdross (1890-1980). Kelsen observes that in accordance with the principle of *pacta sunt servanda*, the basic norm of customary international law is identical with that of conventional international law. That is:

> [T]he principle *pacta sunt servanda*, as a rule of natural law, serves as the basic norm of the whole legal system we call international law. The essential function of this theory is to maintain the principle that a State can be legally bound only by its own will, and hence by its consent to the norms regulating its behaviour. In this way the theory maintains the dogma of the sovereignty of the state.^1^3^1^  

Verdross also believes that the dogma of *pacta sunt servanda* is the source of validity of all norms of international law, and treats this dogma as a “basic norm” in the international legal system.  

2. **Critiques**—Again, the principle of *pacta sunt servanda* again is a partial explanation of the basis of the validity of international law. In the first place, it only explains why treaties have obligatory force. The notion of “implied pact” in the form of custom and usages is hardly convincing. The consent of States does not equal an agreement or a pact. A pact is only one of the ways of expressing the consent of States, and it specifically denotes a formal and normally written agreement reached between two or more States creating specific legal rights and obligations. Consent

---

130. See text accompanying notes 148 ff. infra.  
132. See LACHS, *supra* note 26, at 94.
can be either express or implied, but an agreement or pact must always be express. Although in a sense custom may express an implied consent of States, it would be too far to attribute custom to the formal status of a "pact" even though it is preceded with the word "implied." Starke holds that the view of Anzilotti that customary international law is binding by virtue of an implied pact is no more persuasive than the "tacit" consent arguments of other positivists.133

Secondly, one has to further question the validity of the principle of pacta sunt servanda, which gives validity to express consent in the form of a pact. Lacking an underlying legal system, the principle that agreements must be observed per se is not capable of ultimately answering the question why international law is legally binding. Obviously, the principle that pacta sunt servanda itself must be based on a certain legal system. If the system of international law had not recognized the principle of pacta sunt servanda, then that principle would have become legally meaningless and all agreements reached between States would have been rendered ineffective and non-binding. Thus, the doctrine of pacta sunt servanda fails to offer a satisfactory explanation of the basis of validity of international law.

IV. Contemporary Doctrines and Approaches

In the 20th century, there emerged the so-called "neo-naturalism."134 As a result, the naturalist thought revived for a period of time. On the other hand, the positivist school continued its influence in various forms and on the basis of the traditional positivist doctrine, gave rise to the so-called "neo-positivism" which is also known as Kelsen's pure theory of law.135 In addition, the emergence of the doctrines of neo-realism (the power politics theory and the policy-oriented theory) as well as the doctrine of peaceful co-existence have complicated the theory and practice of

133. STARKE, 10th ed., supra note 5, at 25.
134. See text accompanying notes 137 ff. infra.
135. See text accompanying notes 148 ff. infra.
None of these doctrines, however, has been overwhelmingly dominant during the 20th century.

In a sense, neo-naturalism and neo-positivism respectively represent the continuation of the traditional naturalist school and positivist school, but neo-positivism contains certain elements of the school of natural law.

The so-called neo-realism is mainly reflected in the doctrine of power politics and the policy-oriented theory. Commonly, these two doctrines mingle law with politics or State policy, and mix international law with international politics or the foreign policy of States. These two contemporary theories in effect depreciate the value and function of international law, displace international law with power politics or policy, or interpret international law on the basis of power politics and power policy and ultimately deny, subjectively or objectively, the validity of international law.

The doctrine of "peaceful coexistence" over-emphasizes the role played by the need of peaceful coexistence, and overlooks the fact that such need is determined by the compromised wills of States. Indeed, these contemporary approaches have created more confusions than provided solutions.

A. Neo-Naturalism

1. The Doctrine—The term "neo-naturalism" broadly denotes those newly-emerged theories that are based on the school of natural law, and designed to revive naturalism by emphasizing the concepts of inherent sense of justice, moral standards and the like. The doctrine of the "law of nature," as Kelsen noticed, "has again in the 20th [century] re-entered the foreground of social and legal philosophy, in company with religious and metaphysical


speculation." Starke observes (1) that the 20th century movement toward obliging States to observe human rights and fundamental freedom by international covenants is colored by the natural law approach, and (2) that the Draft Declaration on the Rights and Duties of States of 1949 outlined by the International Law Commission was also founded on the philosophy of "natural law."

The neo-naturalist school has adopted different approaches of thoughts in the pursuit of moral bases of law. One of the approaches is to simply re-propagate the principles of natural law advanced by Aquinas and recognized and adopted by the tenets of Christianity. This approach recognizes the importance of the dignity of human beings and the supremacy of reason, and emphasizes that if any law that is contrary to reason and the law of God is binding, it at the least is immoral.

Another method is the formalist and logic-oriented approach. It proposes to establish a legal structure that conforms to logic so as to include the concept of a "natural law with changing contents." It also differentiates between "legal concept" and "legal idea," the former containing abstract and formal legal definitions with universal applicability, and the latter comprising the goal and direction of systems of law and legal definitions with different contents in different societies and cultures.

A third method is the sociological approach of France Cois Gény (1861-1959), Duguit and others. It opposes any emphasis on formality and proposes to define and interpret "natural law" with physical, psychological, social, historical and other elements. 

---

139. STARKE, 10th ed., supra note 5, at 23.
142. STAMMLER, supra note 141.
143. See id.
144. See FR. GÉNY, MODE D'INTERPRÉTATION EN DROIT PRIVÉ POSITIF (1899); 1 L. DUGUIT, TRAITÉ DE DROIT CONSTITUTIONNEL 17 & 67 (1927); L. Duguit, Objective Law, 20 COLUM. L. REV. 817 (1920). See also Joseph C. Gidynski, Duguit's Sociological Approach to the Bases of International Law, 31 IOWA L. REV. 599-613 (1946).
that dominate the structure of society. The doctrine of social contract discussed earlier in essence belongs to this approach.

After the two World Wars, especially after World War II, naturalism once again became popular, although it was picked up in revised forms. Gustav Radbruch (1878-1949), a German legal philosopher, proposed a new theory maintaining that positive law has failed to personalize the society within and outside of the State and that the mere reliance on positive law was not sufficient to punish war crimes, crimes against peace and anti-humanitarian crimes. He further maintained that all unjust laws must be opposed to on the basis of the supreme law of nature.

The proponents of neo-naturalism believe that their theories have provided moral bases to the development of new areas of international law, such as, opposition to aggression and international protection of human rights.

2. Critiques—The critiques of naturalist theories earlier generally apply here. Ideas originating from old or new naturalism have objectively played certain progressive roles in the promotion of and respect for human rights. Nevertheless, no matter which approach is adopted, neo-naturalism, like the traditional naturalist school, was still unable to explain the question of why international law has legally binding validity. The attachment of importance to the dignity of human beings is plausible and appreciated, but the concept of reason has been always subjective and difficult to ascertain. It may be meaningful within the context of one culture, but not necessarily so in another. It is hardly imaginable how the reason growing out of one culture can be applied to a universal legal system. No matter how progressive and how desirable the notion of reason is, it leads States with different histories, traditions, religions and cultures to no where without being distilled by them to a higher level of existence. That is to say, reason, or the so-called natural law, means nothing to the international legal system unless and until it is raised to the level of concrete rules and principles through the positive adoption by States as such.

Similarly, the division between legal concept and legal idea by the formalist approach is not convincing enough, either. It is true that, by coincidence or through mutual copying and adoption, there

145. G. RADBRUCH, INTRODUCTION TO LEGAL PHILOSOPHY (1947).
146. See id. See also G. RADBRUCH, RECHTSPHILOSOPHIE 336, 337 & 352 (5th ed., 1956).
147. See SHAW, 2nd ed., supra note 112, at 49.
may exist legal provisions or principles that are similar or common to essentially all legal systems. These common principles form part of the notion of "general principles of law recognized by ... nations" that constitutes a supplementary source of international law in accordance with, *inter alia*, Article 38(1)(c) of the Statute of the International Court of Justice. However, this does not mean that a legal concept that may happen to be general or common to different legal systems has any control over the contents and validity of rules under these legal systems. What makes such a common legal concept work is not the concept itself or natural law, but rather the fact that it happens to reflect what exists in the body of positive law of different nations.

Further, the idea of "natural law with changing contents" does not respond to the reality of the international legal system and diversified national legal systems. In practice, few legal systems expressly recognize "natural law" with binding authority. Natural law, if it does exist at all, is non-law. It is only an artificially created body of legal doctrines, proposed "laws," theoretical ideas, and the like. This non-law "law" may play a certain role, at times a significant role, in the promotion and formation of concrete legal rules in the sense that they may lead to being adopted into legislation or international law-making by States. Nevertheless, without this positive adoption, the non-law "natural law" would have no place in the day-to-day observation and application of law nationally and internationally. One must differentiate between *lex ferenda* and *lex lata*, just as one has to do between legal theories and "the law."

Moreover, general principles of law that may be said to be common to the legal systems of all States are very few, and they exist only in limited legal fields and to a limited scope. A parallel existence of a universal legal concept and distinct legal ideas with respect to every legal rule is but a fiction. Without such a parallel existence, one does not see how legal ideas with different contents derive their validity from legal concepts that allegedly are of universal applicability. In other words, one does not see evidence indicating that the concrete rules and principles (legal ideas) in different legal systems, including the international legal system, are rooted in their respective common or universal sources - natural law (legal concepts).

Furthermore, although neo-naturalism and its predecessors played certain roles in the promotion and creation of some new rules and regimes of international law, the so-called law of nature, which is largely intangible and non-existent, is neither law nor
something that turns legal values into legal rules or turns lex ferenda into lex lata. The calls for self-determination, anti-aggression, protection of fundamental human rights and the like are real, concrete, tangible, and positive demands made by "men" and "States." These are not "inherent" rights and powers vested in men or States by nature. Only within the scope authorized by States and recognized by international law can these concepts become part of the rights and obligations of States. After all, any reference in a doctrine to the notion of God, the law of God or the like would make the doctrine too religious, too superstitious, too arbitrary, too abstract, too unpredictable, too non-identifiable, and too non-real to prevail.

B. Neo-Positivism/Normativism/"Pure Science of Law"

1. The Doctrine—The so-called "neo-positivist" school, which is another 20th-century theoretical school on the nature and bases of law in general and international law in particular, attempts to defend positive law by attacking the various naturalist theories. Neo-positivism, otherwise known as the famous "Vienna school of jurisprudence," was greatly influenced by the teaching of its founder and architect Hans Kelsen (1886-1973), and it was maintained and modified by his followers and revisionists, including Alfred Verdross and Josef L. Kunz (1890-1970). Since neo-positivism focuses on studying all legal systems from the perspective of "legal norms" (that is, laws whose social contents are extracted away), it is also called "normative theory," "normativist school" or "pure science of law."

Neo-positivism is alleged to have developed positivism to a peak. Kelsen is sharply critical of naturalism, but he does not

---

148. See VISSCHER, supra note 10, at 66.
149. See LACHS, supra note 26, at 94.
150. Kelsen's theory was developed in, among others, a number of works in English. See, e.g., KELSEN, 2nd ed., supra note 8; HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945) [hereinafter KELSEN, GENERAL THEORY].
151. See text accompanying notes 148-171 supra.
152. Josef L. Kunz, The "Vienna School" and International Law, [1934] N.Y.U.L.Q. (1934); id., The "Vienna School" and International Law, in THE CHANGING LAW OF NATIONS: ESSAYS ON INTERNATIONAL LAW 59 & 89 (Columbus: Ohio State University Press, 1968) [hereinafter Kunz, Vienna School].
completely agree with all of the positions of traditional positivist theories (especially the doctrine of self-limitation or voluntarism).\textsuperscript{156} He seeks to establish a pure theory of law by making a sharp distinction between positive law and “transcendental” justice (natural law).\textsuperscript{157} He does not believe the existence of natural law or rights and duties created by nature and concludes that “it is impossible to deduce from ’nature’ any rights.”\textsuperscript{158} For him, positive law is the rule that must be obeyed, and only positive rules of law are legal norms with binding effect. In other words, only human beings through the expression of their “will” may create “binding” or “authorizing” norms. In contrast, nature does not have a “will,” and the so-called “natural rights” are not positive legal norms but are merely an assumption.\textsuperscript{159}

Kelsen envisages law as a pyramid of normative rules, \textit{i.e.}, a pure normative system which is unaffected by outside influences such as politics, morals, ethics and sociology. The reason why the norms of positive law have binding force, he believes, is because these norms ultimately rest upon a fundamental assumption (a \textit{Grundnorm}).\textsuperscript{160} He states that the question as to why a norm is binding would necessarily return one to an utmost basic norm whose basis of validity is no longer questioned.\textsuperscript{161} In domestic law, the basic norm is that certain acts are lawful because they are done under the authority of the constitution. A rule becomes law by reason of the power of the State to make it obligatory. State and law are identical because the State is merely the expression of a legal system. The reason why a certain enforcement action is legal is that it is authorized by a certain norm such as a judicial decision. The reason why such norm (judicial decision) is binding is because it is conforming to the provisions of the criminal law. Criminal law has binding authority because it is enacted by the legislature in accordance with the provisions of the constitution, and the constitution derives its power from an older constitution. When one goes back to the first constitution, the question of the basis of its validity then becomes an ultimate “hypothesis of juristic thinking,” that is, a \textit{Grundnorm}: people should behave in accor-

\begin{itemize}
\item \textsuperscript{156} Kelsen, 2nd ed., \textit{supra} note 8, at 243.
\item \textsuperscript{157} See id.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} See id. at 244.
\item \textsuperscript{160} See id. at 557.
\item \textsuperscript{161} Kelsen, 2nd ed., \textit{supra} note 8, at 243.
\end{itemize}
dance with the behavior of the drafters of the first constitution.162 This *Grundnorm* ("basic norm") makes it possible to determine what rules of law in force contradict those rules which ought to be in force.

On the international level, the basic norm or assumption, Kelsen maintains, must be a norm recognizing that custom is the law-creating fact and has the creative force to make rules of law.163 That is say, States should behave in accordance with their customary mode of behavior.164 Under this basic norm is a pyramid consisting of (1) customs, including the customary norm *pacta sunt servanda*, as the first stage of norms, (2) treaties as the second stage of norms, and (3) norms created by authority established under a treaty as the third stage of norms, such as resolutions and decisions of international organizations or judgments and decisions of international tribunals.165

Elsewhere, Kelsen has made this pyramid even clearer. "Customary international law, developed on the basis of this norm, is the first stage within the international legal order,"166 then come treaties deriving their force from the rule of customary law *pacta sunt servanda*, and then come rules created by international organs, which themselves are created by treaties.167 For Kelsen, the validity of resolutions, decisions and judgments of international organizations and tribunals is based upon treaties.168 The validity of treaties is again based on the norm of customary international law *pacta sunt servanda*, customary international law being superior to conventional international law.169 Presumably, for the pure legal scientists, the validity of customary international law would in turn stem from a higher norm, i.e., the "basic norm" (*Grundnorm*).170 Then, what is the basis of this *Grundnorm*? Kelsen continued:

The binding force of customary international law rests in the last resort on a fundamental assumption: on the hypothesis that international custom is a law-creating fact. This hypothesis may

---

162. *Id.* at 559.
163. See *id.* at 441-442.
164. See *id.* at 564.
165. See *id.* See also NUSSBAUM, *supra* note 16, at 280-281.
167. See *id.* See also H. KENSEN, *Law and Peace in International Relations* (Cambridge, 1945).
169. See *id.*
170. See *id.* at 442 & 557.
be called the basic norm. It is not a norm of positive law; it is not created by acts of will of human beings; it is presupposed by the jurists interpreting legally the conduct of states.\textsuperscript{171}

2. Critiques—Perhaps no other modern theories have been the targets of (and perhaps deserve) more comments and criticism than the pure theory of law. Kelsen’s theory has been commented upon and criticized by such well-known writers as Lauterpacht,\textsuperscript{172} Tunkin,\textsuperscript{173} and Visscher,\textsuperscript{174} and Wang Tieya,\textsuperscript{175} among others. Visscher, for example, stated:

Kelsen’s neopositivism is of all contemporary doctrines the most deliberately and most completely isolated from social realities. For the author ‘any content whatever can be law’, for the positivity of norms depends solely on their quality of being logically reducible to one fundamental (and moreover hypothetical) norm (Grundnorm), regarded as the ultimate source of the legal order.\textsuperscript{176}

Quoting the words of Gény, Visscher continued to remark that Kelsen’s abuse of intellectual constructs leads him to an “... extreme and ... dizzy [height where] the idea, completely detached from its object, finds its own realization and lives a life of its own deprived of all contact with the living reality. At this point, abstraction can play nothing more than the role of a tool operating in a vacuum.”\textsuperscript{177}

More importantly, being unable to explain why the so-called basic norm is binding from the point of view of positivism, members of the Vienna School, who labeled themselves, or were labeled, as neo-positivists, have ultimately found themselves to be still among the various naturalists. As a matter of fact, the system of the pure theory of law as a whole did not completely rid itself of naturalism. To the contrary, Verdross, in the latter part of his

\textsuperscript{171} Id at 446. See also Kunz, Vienna School, supra note 152, at 59 ff. & 89 ff.


\textsuperscript{173} G.I. TUNKIN, THEORY OF INTERNATIONAL LAW (1974).

\textsuperscript{174} Visscher, supra note 10, at 66-68.

\textsuperscript{175} WANG & WEI, EDS., supra note 55, at 7-8.

\textsuperscript{176} Visscher, supra note 10, at 66.

\textsuperscript{177} Id. at 68, quoting 1 FRANCOIS GÉNY (1861-1959), SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF: NOUVELLE CONTRIBUTION À LA CRITIQUE DE LA MÉTHODE JURIDIQUE (Doctrine and Technique in Private Positive Law: A New Contribution to the Critique of Legal Method) 133 (1914).
life, reached out closer and closer to natural law. According to Professor Wang Tieya and the late Professor Wei Min of Peking University, the neo-positivists' inability to further explain the basis of the so-called "Grundnorm" lead them to admit that the ultimate source of the basic norm would have to be found in philosophical relativism, legal conscience and reason, which again lead them to the registry of naturalism.

C. The Doctrine of Peaceful Co-Existence

1. The Doctrine—The doctrine of peaceful coexistence and cooperation has been typically maintained by former Soviet writers and best explained in a standard Soviet textbook of international law published in the 1960's. It is held that the present-day international law is the law of peaceful co-existence, and peaceful co-existence presupposes the possibility of and need for economic, political, and cultural cooperation between nations. Such co-existence and cooperation between States are possible only if the generally recognized principles and rules of international law are consistently observed. Section 4 of the above mentioned textbook is even captioned "Peaceful Coexistence and Co-operation Between States - The Basis of International Law." The textbook maintains (1) that the existence of generally recognized rules and principles of international law is out of the objective and vital demands of international relations and (2) that successful international cooperation is possible only when States strictly adhere to these generally recognized rules and principles of international law, which are considered "the legal foundation on which peaceful coexistence and co-operation between States can and must be implemented." Elsewhere, writers of the former Soviet Union also frequented the use of peaceful coexistence as a basis of international law and international relations.

2. Critiques—It is proper to emphasize co-existence and cooperation between States, especially between States with different

178. See LACHS, supra note 26, at 96.
180. See KOZHEVNIKOV, ED., supra note 34, at 15-17.
181. See id.
182. Id. at 15.
183. Id. at 16-17.
184. See, e.g., I. Tunkin, Co-Existence and International Law, 95 REC. DES COURS 1 (1958 III).
political systems, but it would be out of focus to overstate the role of the principle of peaceful co-existence to an unrealistic degree. Although peaceful co-existence is, and should be, a fundamental and important principle of international law in the relations between States, this principle itself is not the basis of international law. The need for peaceful co-existence, like the need for cooperation, can at most be said to be one of the many factors in motivating States' general compliance with rules of international law.

D. The Theory of Power Politics

1. The Theory—The doctrine of power politics, also known as the “power theory of politics,” is an extreme form of expression of the positivist doctrine of the will of the State. In his early days, the German jurist, Erich Kaufmann (1880-1972), was the first to put forward the slogan “Nur der, der kann, darf auch” (only those who can may). He distinguished between “Macht” (authority, power) and “Gewalt” (force, power) and held that “Macht” should always be based on morality, while “Gewalt” was not required to be accompanied with such moral basis. He further believes that if treaty obligations come into conflicts with the interests of the State, the State is entitled to denounce the treaty.

Hans J. Morgenthau (1904-1980), a well-known American political scientist and jurist, may be said to have further developed and become a chief proponent of the power theory of politics. He emphasizes the significance of political context and the comprehension of international relations in the context of power, influence and dominance. For him and his supporters, politics is focal, while law is only secondary. Even where normative law exists, its basis of validity cannot independently be ascertained other than from a political analysis. International law is binding only

---

185. E. KAUFMANN, DAS WESEM DES VÖLKERRECHTS UND DIE CLAUSULA REBUS SIC STANTIBUS (1911).
186. See id.
187. See id. However, Kaufmann, in his middle and late ages, completely changed his attitude and viewpoints. He became a theoretical enemy of positivism. This change is reflected in his belief that the State must be bound by natural law. See LACHS, supra note 26, at 142-143.
189. See id.
“more or less” and even the merely “more or less” binding force of international law is determined by international politics.190

2. Critiques—The most deplorable point of the theory of power politics is that it confuses law with politics, substitutes international politics for international law, and in the end denies the validity and existence of international law. It must be pointed out that what international politics “adjusts” must be what international law does not adjust or what is not yet governed by international law. In other words, what international politics solves must be problems to which international law is unable to provide direct solutions.

What’s more, international political affairs must be conducted within the sphere permitted by international law. In this sense, it is not quite that international politics dominates existing and stable international law, but rather that existing international legal rules govern international politics which are more of an expeditious nature. The power politics approach will necessarily result in the disbelief and even negation of international law. As indeed indicated in Morgenthau’s writing, it considers international law to be not uniformly and absolutely binding, but only marginally binding subject to the influence of politics.191 It makes much sense for this approach to be properly labeled as “skepticism.”192 It is true that power politics, unfortunately, has in reality affected both the formation and observation of rules of international law, but once a rule has been created and established, it must prevail over politics. Departures from established rules of international law do take place from time to time, especially by some major powers. Nevertheless, most rules are observed by most States most of the time. Occasional ignorance of established rules of international law by decision makers, in no way affecting their binding authority, may be considered nothing but gross violations of such rules that undoubtedly give rise to State responsibilities.


191. Morgenthau, POSITIVISM, supra note 188.

E. The Policy-Oriented Theory

1. The Theory—The policy-oriented approach was adopted mainly by Professor Myers McDougal of the Yale Law School and his followers.  

Like the theory of power politics, the policy-oriented theory also analyzes and interprets international law from the perspectives of politics and power, but it substitutes the words "policy" and "decision-making." This theory holds that policy is the essence of politics and that decision-making is the core of power. It defines international law as a "flow of decision in which community prescriptions are formulated, invalidated and in fact applied," and regards international law as a comprehensive and complex process of decision-making rather than an established body of rules.

The policy-oriented approach, from the viewpoint of establishing and maintaining a so-called "world public order," focuses on value-dependent policies and a wide range of factors utilized by decision-makers. It asks sociological and behavioral questions such as why, how, when and to what extent, but overlooks questions relating to the validity and content of international law. McDougal and his followers diminish the role played by rules of law and hold that the notion of international law "quite obviously offers but the faintest glimpse of the structures, procedures and types of decision that take place in the contemporary world community." In the end, according to the policy-oriented approach, policy itself is law, while the process of formulating policy (the decision-making process) is the process of formulating and enforcing law. To the exponents of that approach, international law is the expression of the foreign policy of the State and its validity depends on national foreign policy and ultimately on the state of mind and decision of

194. See id.
195. Id.
those institutions and individuals who control and formulate the foreign policy of the State.

2. Critiques—Since the founder and followers of the policy-oriented approach are mostly from Yale Law School, it is sometimes known as the "New Haven School of Law." Its study and examination of international law allegedly focus on phenomena, therefore, this approach is also otherwise known as the "phenomenological approach." The theoretical value of the "New Haven School" is subject to skeptics. Although advocacy for and comment on the "policy-oriented approach" has been seen in numerous articles and books in the theoretical field, this approach is far less influential than neo-positivism. The policy-oriented theory, like that of power politics, has been under attacks and criticism by many contemporary writers and other legal commentators since it is sound neither in jurisprudence nor in practice.

In the first place, the policy-oriented approach overly minimizes the concept of international law and fails to recognize the fact that States generally obey the established rules of international law. If one considers international law to be a process of decision-making, then there would never exist a permanent body of relatively steady and expressive rules of international law, for

198. See CHEN, supra note 196, at 14-20.
199. See id.
202. See Allott, supra note 201, at 79.
each time the "decision-makers" made a decision there would be a new rule created, and the result would be a lawless and chaotic international community in which the strong and powerful direct and dominate the weak and powerless, with the strong balanced powers themselves trying to dominate one another.

Moreover, the policy-oriented approach, as one commentator points out, "seems like a useless exercise in academic theory." Unlike what the policy-oriented approach suggests, what "decision-makers" are really interested in is not simply which decisions will fulfill which values, but more importantly which rules are valid and which are not. That is to say, the formulators of various nations' foreign policy must consider positive and existing binding legal rules rather than those impractical sociological idle dreams. It is further pointed out that to avoid apologetics, the policy-oriented approach would have to take a position that would undermine its self-claimed scientist assumptions.

More importantly, although international law is closely linked with international politics and the foreign policies of States, it is groundless and anti-scientific to delegate (as the policy-oriented theory does) the validity of international law to the "decision-makers" of a nation's foreign policies, or liken it to foreign policies. It is much more appropriate to say that a nation's foreign policy and its formulating process must be subject to existing international law reflecting the compromised wills of States, than to say that international law is subject to individual and expediential policy and decision-making. Only when sovereign States at large, through new compromise and coordination between their wills, change or supplement existing rules of international law (be this process labeled what the policy-oriented approaches would call "decision-making"!) may it be said that such collective "decision-making" has played a decisive role.

In any case, the process of such collective "decision-making" is a process of continuing compromise and coordination between the wills of sovereign States. In reality, the policy-oriented approach and the power theory of politics, besides having the effect of minimizing and negating international law, represent a potential danger. The danger lies in that these approaches are likely to become readily available theoretical tools which strong powers could find most useful in carrying out their power politics and

203. See Koskenniemi, supra note 192, at 174-175.
204. See id.
hegemonism. To be more precise, and following the logic of the “policy-oriented approach,” the rules of international law would be contingent upon the foreign policy of the State or would be the reflection, or part, of the “might policy” of the State. The so-called “world public order” would be an international order established or to be established by those powerful “decision-makers” of the world. It is obvious that in a rather unbalanced international society, any emphasis on “policy” and “decision-making” would facilitate and promote the rise and growth of might policy, power politics and hegemonism in the absence of a body of existing rules, principles, regulations and institutions of international law.

V. Factors Affecting Compliance

Some of the doctrines discussed above to some extent offer partial explanations why rules of international law are generally complied with. The following identifies, not exclusively, factors which, from the point of view of philosophy, sociology, behavioral science, and phenomenology, play certain roles in the process of promoting States’ observation of international law.

A. Legal Belief and Legal Habit

Whether a nation believes a rule to be binding and to what extent it possesses such legal belief matters. By “legal belief” the present author means legal consciousness, reason, sense of justice, legal thought, legal sense, and *opinio juris sive necessitatis* which States themselves formed in their long mutual intercourses and their own respective State practices. What the present author calls “legal belief” here is distinguishable from the naturalist concepts of “legal conscience,” “justice” and “reason.” What the naturalists emphasize is the inherence, intrinsic-ness and naturalness of the so-called human conscience and reason,\(^2\) while the “legal belief” (including legal conscience, reason and sense of justice) of various States referred to here emphasizes the objectivity, practicality, historicity and reality of such belief.

The conscience of human beings or nations, their sense of justice and reason, or their legal conviction all has stemmed from their prolonged social (inter-personal) or international practice. None of these is inherent in or naturally-given to human beings or nations. Different nations or States do not share a completely

\(^{206}\). *See* text accompanying notes 29-31 *supra.*
uniform and common legal belief. Yet, certain common or similar beliefs and practices between different States exist and continue to evolve on such fundamental issues as good and evil, just and unjust, moral and immoral and legal and illegal. Agreements on such issues may also be established between States through their mutual compromise and influence. A nation with strong legal belief is more likely to follow than to disobey what it deems to be legal rules and norms regulating inter-State relations and governing States’ foreign behavior.

Similarly, a nation’s “legal habit” directly affects its observation of international law. Such “legal habit” is inseparable from its legal conscience, especially its conscience of international law. A State with strong legal conscience normally has a relatively good legal habit. A State that habitually is accustomed to observing international law, due to such habit itself, is normally reluctant to violate and disobey international law. Thus, legal belief, legal habit and legal conscience of States may be said to offer partial explanations why international law is generally observed.

B. Consent and Pacta Sunt Servanda

Whether a State has consented to the formation and regulating force of a given alleged rule of international law to a large extent determines the willingness or lack of willingness of that State to comply with such a rule. As stated before, international law is and should be largely a law of coordination and cooperation. The creation and continuing validity of such a legal system is conditioned upon the consent, acquiescence and acceptance of States ultimately to be determined by their compromised national wills. Without the consent, acquiescence, acceptance or at least non-objection of States, it would have been impossible for States to formulate and develop a system of law among themselves with legally binding force and the issue of the basis of validity of international law would have been moot. Express and implied consent of States thus constitutes a partial basis for the validity of international law.

Where a State has, in contractual forms, consented to be bound by certain rules or obligations of international law, such explicit consent requires the consenting State to honor its obligations. The maxim “pacta sunt servanda” is a universally recognized jus cogens principle of international law established through long
international practice.208 Realistically speaking, since there is almost no State that opposes or does not recognize this principle, States have no reason to not comply with those general rules of international law to which they have agreed through the conclusion of international treaties. Similarly, there would be no reasons for States not to perform specific contractual obligations which they have agreed to undertake under international agreements. In this sense, the principle of pacta sunt servanda constitutes another partial explanation why States generally comply with their obligations under international law.

C. Necessity of International Relations

International law is both the product and regulating force of international relations. States are inevitable to enter into relations with one another. This is particularly so in an age of globalization. Such indispensable international relations give rise to the needs for the formation and development of international law, international order, peaceful co-existence, reciprocity, and international cooperation. These needs that arise in international relations in return dictate that States behave in an as lawful, orderly and peaceful manner as possible.

The notion of “necessity of law,” that is, the objective demand of States and the international society for legal rules, partly explains why international law has legally binding effect.209 States are “social” beings and they are not isolated existents in a vacuum. The social attribute of States determines that they are bound to enter into relations with one another, while international law is a by-product of international relations. As one commentator said:

No nation of the world can keep itself aloof from the rest of the world. It is the interdependence of the interests, i.e., national interests that plays an important role in determining the international relations. So each nation while framing the outlines of its own national policy is bound to take into consideration interest of other nations as well as other possible reactions. The dominant role of course is played by powerful nations of the world.210

Along with the increase of mutual intercourse and the deepening of interdependence among States, international law

208. See texts accompanying notes 126-133 supra.
209. See text accompanying notes 68-73 supra.
210. BHATTACHARYA, supra note 96, at 5.
“emerged” as required by history in the sense that it was (1) deemed necessary and (2) created by States for the purpose of regulating their international relations. It has been thus stated:

In order to maintain normal relations with other countries, we must be able to predict the behavior of others, and this can be done only in a relatively stable situation. The observance of the known rules of international law thus becomes a requirement for states.211

The necessity of law in the international society may therefore be said to be an extrinsic factor determining the validity of international law.

In the second place, the needs for peaceful co-existence and international order similarly require routine observation of rules of conduct by States in their relations to one another. “Peaceful co-existence” and “international order” represent two other aspects of the same issue as “necessity of law.” The majority of peace-loving nations generally desire to establish and maintain a certain international order under which they peacefully cope with the relations among themselves. This desire, as an extrinsic element, has the objective effect of helping impel States to cooperate with each other for the establishment, observance, and maintenance of an international legal system.

On the one hand, in a world with unbalanced forces, if there were no commonly observed law and order at all, such a world would be one in which States would struggle for domination and supremacy. It would be one in which big and strong powers would conquer small and weak nations, and peaceful co-existence would be but a dream. The pre-modern world history is precisely a history without order and international law. It is a history wherein the strong among themselves fought with and conquered one another, and a history of individual or collective aggression, invasion, exploitation, plunder and colonial domination by the strong against the weak. For the majority of nations, especially for the weak and small, an orderly and peaceful international society is always more desirable than one in chaos.

On the other hand, Western powers, confronted with the rising power of developing countries (the Third World) in the contemporary era, would also naturally stress the importance of world order

and peace. Brierly, rejecting the definition of law as a command, states that

[the] ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.\(^2\)

Brierly is correct in stating the general realization that order rather than chaos is what the international society needs. A chaotic world is not beneficial to big and powerful nations and is even more harmful to small and weak nations. Therefore, it has become a general desire and demand of the majority of members of the international society to establish, maintain and improve a relatively peaceful, just and rational international legal order. This general desire and demand for world order and peace would necessarily call for the general acceptance and observation of international law by States. Otherwise, it would be pointless to establish and maintain international order and world peace.

Nevertheless, international order and world peace are by no means supra-national order and peace. Still less should there be an “order” and “peace” in which a few strong and powerful nations dictate to and dominate the rest of the world. Rather, what is needed is a system of international law and order established and maintained by equal and sovereign States on the basis of consultation, cooperation, and compromise.

In addition, the needs for international cooperation require regulation by existing norms and principles and lead to development of new rules to govern further cooperation among States. Simply put, “international cooperation” represents another necessity that the social attributes of States demands. Such cooperation has more significance and is practical in the present day of high scientific and technological development. Cooperation between States is necessary because of mutual interests. The pursuit of common interest and the need for international cooperation may well constitute one of the significant reasons why States generally observe international law. International cooperation facilitates the formation of rules of international law, while further progress in international cooperation relies on the guidance and coordination of existing international legal rules.

\(^{212}\) \textit{Brierly,} 6th ed., \textit{supra} note 44, at 56.
Finally, the law of "reciprocity" demands that States observe rules of conduct of international law in their mutual relations. Reciprocity by definition signifies mutual benefits and reciprocal advantages. If in the relations among States only one or a few States are subject to a rule of conduct while another or some others are not, such rule has no practical significance. Self-imposed limitations by a State without reciprocal limitations by another are not limitations after all. However, once a State agrees to limit itself on the basis of reciprocity vis-à-vis another State, such limitations become legally binding international obligations. In discussing the importance of reciprocity in international affairs, Schwarzenberger and Brown state:

Even in a world society engulfed in a system of power politics, States find it to their benefit, on a basis of reciprocity, to limit the crude play of power and force. Especially in spheres which are irrelevant or peripheral from the point of view of power politics, the law of reciprocity can be seen at work. In matters such as diplomatic immunity, extradition, commerce, communications and transport, rules of international law freely and beneficially develop on a footing of reciprocity. On the levels of partly or fully organized international society, international law is primarily a law of reciprocity. Yet, even in the thick of power politics, that is, in time of war, some scope exists for the law of reciprocity. The laws of war and neutrality owe their existence to typical considerations of this kind which tend to impose restraints on belligerent and neutral States alike.213

In essence, matters of international concern are (or should be) always reciprocal. No State in the world is willing to participate in the formation of and willing to be bound by a rule of international law that only restricts itself but not other States, or that is only beneficial to other States but not to itself. In the absence of the principle of reciprocity, it would have been impossible for international law to emerge with universal binding validity.

D. Interests

In some cases, the interests of a nation may be of significant importance in promoting or affecting compliance with international law by that nation. The present author is not suggesting that a nation should observe international law only when it is in their interests to do so. What he is suggesting is that it is generally to

the benefits of States for them to observe international law, while in exceptional circumstances the interests of a State may direct to the opposite.

There are areas in which States have relative freedom to decide upon its mode of behavior because international law does not yet regulate all aspects of international relations. When a State makes such decision, its national interests may play a decisive role. In other words, where there is an international legal vacuum, it is up to each individual State to determine how it is to behave in accordance with its best national interests. In this sense, interests may be said to not only affect but even dominate the behavior of the State in question. Where a certain conduct is already regulated by international law, the role of interests becomes less important. In such cases, national interests may still affect State behavior, but, generally speaking, they do so only to the extent to which rules of international law are not violated.

It is noticeable that a State may find it against its fundamental national interests to follow the rules on one particular occasion concerning one particular matter. The magnitude of conflicts between such national interests and international obligations may affect or change the pattern of State behavior. This is particularly true in the case of mighty and stronger powers. However, even when national interests disfavor compliance with international obligations, the decision-making will necessarily include a "gain and loss" balance and comparison between observance and violation of international law. On the one hand, not all rules of international law are absolutely in accord with the interests of a given State. On the other hand, a given rule of international law is not necessarily always in absolute accord with the interests of all States. A given State may well find that none of the rules of existing international law is completely in line with its national interests, but each such rule contains elements to its advantage. Thus, it is necessary for the State to weigh the overall advantages and disadvantages of the system of international law as a whole.

The State, during its course of participation in the creation and formation of rules of international law, likely takes into consideration the overall advantages and disadvantages of such rules. Its agreement to be bound by international law as a whole system, or by specific rules of international law, is preceded by, or connected to, its assessment of the consequences for its national interests. Generally, it is not in the interest of a State to violate a given rule of international law since the violation may in turn provoke similar breaching actions to its disadvantage by other States. As Akehurst
says, a State is normally unwilling to create situations that may be used against it in the future.\textsuperscript{214}

It must be admitted that there always may be conflicts between the regulating force of international law and national interests. Violations of international law most often occur in situations where a balance cannot be maintained between the observance of rules of international law and the loss of vital national interests. Using the words of Williams and Mestral:

Where, after weighing all relevant matters, a state decides that the only way to protect its vital interests is to break a rule of international law, it will be done. It will be a case of cost-benefit analysis. It will weigh its short and long term vital interests against the immediate and long term repercussions of such conduct.\textsuperscript{215}

If a State has become bound by a given rule or principle of international law by way of treaty or custom, its departure from the rule because of vital national interests is utterly unjustifiable. Such law-breaking behavior should be discouraged, condemned, prevented, and prohibited.

Nevertheless, as there are cases of violations by the individual of the law in the domestic legal system, it is not surprising that there are in fact violations by the State of international law. The focal theme of discussion of this study is why States, at least most States, do generally observe international law rather than why some of them sometimes violate it. It is enough to state here that in normal and most circumstances, the State is willing to and in fact does observe international law. Then, one of the significant reasons is that, generally, the State, by complying with international law, gains much more than it loses, and compliance is much more advantageous than disadvantageous to the State. In other words, the benefits of observing international law far outweigh the costs of non-observance. By the same token, the losses and other disadvantageous consequences far exceed the expedient yet often transient gains and interests following the State’s non-compliance. After all, international law is the result of compromise and cooperation among members of the international community and is, generally speaking, beneficial to all nations. Therefore, States

normally comply with international law in order to receive one or more gains at the cost of some less significant loss.

E. Reputation

Individual behavior to some extent is often influenced by the individual's concern or lack of concern about his or her personal reputation. The degree to which a State and its political leaders mind the nation's reputation affects the nation's behavior in its external relations pretty much in the same way as in the case of individuals. In essence, national reputation is but one of the aspects of national interests. Reputation serves to promote compliance with international law when the concerned State cares much about its image. At stake are reputation-related concepts of world public opinion, social approval, and credibility.

*World public opinion*, to a certain extent, is a factor that a State needs to take into consideration when choosing between observance and violation of international law. Among today's media in the world, Western media occupies an overwhelmingly dominant place in terms of volume and power. For various reasons, their propaganda and news coverage are frequently biased, subjective, predetermined and even hostile, and they fail to represent the positions and opinions of most States, especially those of the developing nations. Therefore, international or world public opinion may not be understood simply as the voice of news media (particularly Western media) or whatever is louder, but as the attitudes, comments and opinions of the majority of nations. Such world public opinion may imperceptibly influence the attitude, decision making and behavioral practice of a State and sometimes functions as an underlying factor in the prevention and deterrence of violations of international law. Nevertheless, the impact and function of this "soft weapon" are very limited.

Whether State behavior meets *social approval* matters. Social approval not only facilitates the formation of customary rules of international law, but also contributes to their observance and enforcement. If a State's practice has gained universal approval, impliedly or explicitly, of the international society, such practice will continue. In contrast, if a certain conduct or practice of a State fails to gain such approval, the conduct or practice in question is often likely to be discontinued and abandoned. When a rule of international law is firmly established, State behavior which does not conform with such rule will meet disapproval by the interna-
tional community. In this regard, social approval functions similarly as world public opinion.

Likewise, the *credibility* of a State has some impact upon its pattern of behavior. By "credibility" the present author means the fame, reputation, and reliability of a State. States generally wish to maintain a good reputation rather than to undermine and destroy their reputation in exchange for transient gains and interests by violating international law. If a State, no matter how affluent or powerful it is, acquires the reputation of "a frequent violator of international law," it only hurts its interests. State credibility has the objective effect of contributing to the observance and enforcement of international law, and constitutes one of the extrinsic elements affecting the State's behaviors, too.

F. Reprisals and Sanctions

To some extent, the existence of such limited remedial mechanism as reprisals and sanctions helps deter violations of international law. A State may wish to depart from its international obligations but nevertheless refrains from doing so partly out of fear for reprisals by the infringed State or for sanctions by that State or members of the international community which stand behind the infringed State. By *fear for reprisals*, the present author means the psychological concern of a State over possible retaliation or other remedial acts of States that might be offended by its violative conduct against international law. This fear constitutes an extrinsic factor which States sometimes take into consideration in deciding whether or not to violate international law. Under international law, when a State sustains injury as a result of the international dereliction of another State, the former is entitled to take appropriate and reasonable remedial or retaliatory measures against the latter. These measures include requests for restoring *status quo ante*, requests for official apology, claims for damages, counterattack in self-defence and other measures corresponding to the international *delict* of the offending State. The consequences of such remedial or retaliating measures often place the offending State in a much more unfavorable position. This has to be taken into account by potential offending States, especially those less than powerful States, before they decide to violate international law.

*Fear for sanctions* can similarly cause some States to refrain from breaching international legal order and peace. As in the case of fear for reprisals, some States may have the intention to breach international law, but in the end often desist, partly out of the need
to avoid or the fear for possible collective or international sanctions and their consequences. It is true that sanctions are not guaranteed by international law, but in certain circumstances, sanctions, especially collective sanctions, constitute a manifestation of international law enforcement to some degree.

VI. The Decisive Factor: Compromised Wills of States

While the above factors - legal belief and legal habit, consent, *pacta sunt servanda*, necessity of international relations, interests, reputation, and reprisals and sanctions - serve to enhance the binding validity and promote the observation of international law, none of them provides an ultimate answer to the question why international law is binding. The present author believes there is a decisive factor that makes compliance with international law the rule rather than an exception, and this factor is the compromise among the wills of nations. We must not overlook the fact that while international law has binding force upon sovereign States, it at the same time derives its binding force from the same sovereign States. This, at first glance, may appear to be self-contradictory, but it is determined by the uniqueness of international law and reflects the reality of international life more than any of the factors and doctrine discussed above and earlier.

According to common sense and knowledge, law is a set of standards of conduct representing and originating from the will of the decision-making class of the State (though sometimes in the name of the people), having legally binding force and being enforced under the guarantee by a certain mechanism. No law is separable from the will of the decision-making class, although such will is often expressed in the form of the will of the State or the will of its people. This concept of law would cover both domestic law and international law.

Needless to say, international law is made and enforced in a way different from that in which domestic law is made and enforced and the legal validity of the two systems of law must necessarily be demonstrated in different modes. At the international level, the State is not only the subject of rights and obligations in international law, but also the participant in formulating, accepting, and enforcing the rules, principles, regulations, and institutions of international law, as well as, in arbitrating international disputes. The most fundamental reason why States participate in the above international activities is because they are required and directed to do so by their own national wills.
When reflected in international law, the wills of States are not necessarily the original individual will of one single State or another, nor the common wills of all States. Rather, they are the aggregate of the harmonized wills of different States after they have compromised, explicitly or implicitly, between or among themselves.

States, large or small, strong or weak, generally observe rather than violate international law. The reason why people incorrectly perceive that “violations are more than observations” is partly because violative behaviors tend to get more attention and publicity by and among the media and the public. States generally observe international law because their compromised and coordinated national wills per se require that they behave in a certain manner in accordance with those norms of conduct of international law which they have participated in formulating, amending, and developing. Accordingly, the ultimate basis of validity of international law rests in the compromise and coordination between the wills of different States. This is a legal and jurisprudential interpretation of the issue in question, and is also the decisive and fundamental factor in States’ general observation of international law.

The ultimate explanation of the basis of international law, i.e., why States generally comply with rules of international law instead of disregarding them, may also be seen from the perspective of international legal sources. Although they are sometimes confused in legal literature, the terms “bases” and “sources” denote very different concepts despite their similarities and close links. In fact, an analysis of the sources of international law may help reveal why States generally observe rather than violate international law.

The sources of international law denote the place(s) of origin where rules, principles, regulations, and institutions [hereinafter “rules”] of international law first emerge and become known, established, and binding. International law is a distinctive legal system. At the international level, there is neither a central legislature nor a complete and comprehensive code of State conduct. The rules of international law originate from the explicit or implicit consent of sovereign States following their compromise and coordination between and among their national wills. Rules so established will necessarily reflect the compromised and aggregated wills of different States.

Generally speaking, States express their explicit consent by concluding treaties between or among themselves and imply their implicit consent by way of custom and general principles of law. In other words, the sources of international law comprise three categories: international treaties, international custom and general
principles of law. Treaties and custom contain crystallized rules and norms of international law. On the other hand, general principles of law comprise general legal principles that are common to various national legal systems and/or those that are deduced, induced, or generalized from crystallized rules of international law. The process in which States give their explicit consent (by way of treaties) and implicit consent (by way of custom and general principles of law) is in itself a process of compromise among themselves. One of the necessary elements of custom is the acceptance by States, as law, of *opinio juris sive necessitatis* (necessary legal conviction). In treaties, this *opinio juris* of States is expressed in more explicit forms. When States accept conventional rules and customary rules as law, no matter how much compromise they have made and whether the gains and losses are balanced, as long as they accept certain practice or rules as law in accordance with their compromised wills (even if against their original wish), those national "wills" will inevitably require States to observe the body of law among nations which they themselves formulated or accepted as binding upon their external conduct. In short, international law is the result of compromise and coordination of the wills of sovereign States; and likewise its basis of validity.

VII. Conclusions

Justice, reason and some other assertions of the naturalists and new-naturalists have certain progressive significance. The doctrines of social bond and necessity of law, if isolated from naturalism, may partly explain why States observe international law. However, since various doctrines of naturalism do not start from State practice but from the so-called "celestial will," God-made law and natural rights, they have distanced themselves from the objective international history and reality of life. Consequently, these doctrines are incapable of satisfactorily explaining why international law is legally binding.

The normativist school (neo-positivism) and the neo-realist doctrines contain beliefs that to some extent reflect the reality of international life, but their obvious defects have greatly diminished their credibility. In the end, the proponents of normativism, when unable to explain the basis of validity of "Grundnorm," consciously or unconsciously find themselves in-line with the naturalists. The doctrine of power politics and that of policy-orientation have not
only caused theoretical fallacy and confusion, but they are also somewhat dangerous and reactionary.

Among the various theories discussed earlier, the positivist doctrines of State will and State consent are closer to the reality of international life and are hence the most progressive and significant. These doctrines associate international law with the will of the State, thereby completely negating naturalism. In the formation of international legal rules, the necessary consent of the State is the expression of the State will, while the will of the State in return requires the consent of the State. Many of the legal obligations of a State under international law, especially those provided in treaties, are the immediate result of State consent. Compromised "common" consent of States plays a significant role in establishing and maintaining a certain international legal order.

Nevertheless, the doctrines of "State consent" and "State will" alone are not the ultimate basis of validity of international law. If the "will of the State" here denoted the will of one single State or the separate wills of different States, then the possibility of formulating a system of international law acceptable by and applicable to all States would not exist. That would be because each State would have its own national will different from that of others, and the separate wills of different States would give rise to the demands for different legal rules regulating each State's external relations, and resulting in different "laws." Such different and even conflicting external public laws of States would not constitute international law (the law among States), but would in fact be part of the internal law of different States.

On the other hand, even if one maintains that the will of the State means the "general will" or "common will" of all States, such a belief is still contrary to history and reality. The nation-States are distinct from one another in terms of nation, history, tradition, culture, custom, social system, and particularly national interest. This makes it extremely difficult and virtually impossible for States to form among themselves a "common" or "general" will of their respective decision-making class without reciprocal compromise.

Reality indicates that all States, large and small, generally observe rather than violate international law, although violations are far more widely publicized than observance. They do so for a variety of reasons. Any, or any combination, of the following non-exclusive factors may have been taken into account when international law is complied with: legal conscience and belief, opinio juris, consent, pacta sunt servanda, necessity, reciprocity, world public opinion, credibility, self-interests, costs and benefits, social
approval, legal habit, fear for reprisals and sanctions, and other disadvantages of noncompliance.

It is because of the regulating force of international law that order and stability of the international community are maintained. International law affords common standards of behavior for States and the observance of such standards is normally to the common benefits of States. Among the above mentioned factors, certain elements, such as legal conscience and belief, *opinio juris*, the necessity for law, order and cooperation, reciprocity, and the principle *pacta sunt servanda*, may be of more importance. Other factors such as the fears for reprisals or sanctions may be less significant. States generally comply with international law not merely because of possible consequential sanctions against them, but more importantly because of "a sense of conscience, duty, reciprocity and the need to live together in peace."216

Notwithstanding, none of the above-mentioned factors by itself constitutes the ultimate legal basis of international law. None of the above explanations adequately touches upon the real and conclusive basis of the law. The explanation must be sought from the will of States. As the Permanent Court of International Justice stated in *The Lotus* case, "[t]he rules of law binding upon States . . . emanate from their own free will."217 States are both the creators and the addressees of international law – they make the "law" for themselves in the exercise of their sovereign will. Absent the will of the State in the form of consent, international law would not be performing its functions, and even its creation and existence would have been in doubt. One must not overlook the fact that international law is "enforced" in a different way from domestic law. At the international level, it is the States themselves, as subjects of international law, that create, observe, interpret, and enforce the law. The States simultaneously function as the "legislators," arbiters and law-enforcement agents of the international legal system, although they do so in a manner different from their counterparts in domestic legal systems. One must seek an answer to the question why States observe international law from the same States that make, obey and enforce the law.

In addition, one should not ignore the fact that the legal rules and standards for State behaviors in international relations are established through a process of *compromise* and coordination.

216. *Id.*, at 12.
between the sovereign wills of States. The true, genuine and ultimate basis behind the binding force of international law is the compromised wills of States. It is the States themselves being its subjects that give international law the validity of law through compromises in explicit and tacit international agreements. Such compromised and coordinated wills of States may be expressed in the form of compromised consent with gains and concessions being taken into consideration. In the case of conventional rules of international law, it is the explicit and written compromised consent of States that directly gives rise to contractual rights and duties enforceable under the notion of pacta sunt servanda. Indeed, the notion of pacta sunt servanda is deeply rooted in the legal conscience of States or in the minds of the policy-makers of the State, and this notion is deeply felt to be a basic legal norm underlying contractual rights and obligations. It is the compromised wills of States that give effect to the fundamental principle of pacta sunt servanda. In the case of customary international law, it is the tacit and usually non-written compromised consent of States that directly creates customary rules and norms. Different States act, and believe to be bound to act, in a certain manner so as to express their implied compromised common consent to these rules. That is, their behavior and opinio juris are the implied expression of the compromise in their "wills." In the end, it is such compromised wills of sovereign States that make routine compliance with international law the norm rather than the exception.