Why a Quest for Legitimacy?

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Teleology is a major preoccupation of scholars of national legal systems and social scientists working in such fields as sociology, labor relation, politics, and anthropology. Treating law as a phenomenon worthy of study, these scholars and scientists seek to understand the root causes of patterned behavior. Why are laws obeyed? Why is governance (dominion) accepted? These questions are asked both by "value-free" inquirers seeking only to test their latest hypothesis of social organization, and, also, by many others, with various agendas, including ideologues of right or left, the first perhaps trying to buttress sacred and secular institutions of governance, the second possibly preparing the conceptual path to revolution by studying the mythological and class origins of social stasis.

Yet, oddly, almost no one, nowadays, seems to ask this type of fundamental teleological question of the *international* system. The philosopher of law, with few exceptions,[1] treats international law as a "no go" area.[2] This has not always been the case. When both the national and international systems of dominance, governance or order were based on similar divine or natural-order rationales, these questions were addressed to both national and international systems, if only because, in the two fields of inquiry, the respective phenomena of social behavior could not be separated neatly. The same "natural" or divine validation that was believed to authorize national governance also validated the rules of interstate behavior. God's writ, or the natural order of things, was no respecter of the puny lines drawn by men on maps.

Since the mid-nineteenth century, however, — and certainly since

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[1] A notable exception is H.L.A. Hart in *The Concept of Law*, which treats international law as an integral part of the teleological issue and devotes the final chapter (ch. 10) to it. *See* H.L.A. HART, THE CONCEPT OF LAW (1963).

[2] More typically, international law is confined to some four pages in John Rawls' seminal *A Theory of Justice*. *See* J. RAWLS, A THEORY OF JUSTICE 8, 108, 115, 457 (1971).

the advent of the twentieth — the teleological question, while ever more a source of wonder and discourse in the national legal context, has seemed to fade into irrelevance in the international arena. This, quite simply, may be because international law is thought *not* to be obeyed and the governance of international institutions and their norms are thought *not* to be accepted, their dominion being seen as a mere paper-fiction embedded in such unrealistically optimistic documents as the Charter of the United Nations and in self-serving books by professors of international law vainly attempting to justify their salaries and prerogatives at law schools. International "law" is thus seen as a quirky modern consequence of the disparity in salary scales between the law school and the department of government. Many modern social scientists, moreover, quite simply do not even see any international system, let alone an international pattern of deference to systemic norms, worth bothering about.

This is unfortunate at several levels. At the level of the intellectual agenda, for example, when these types of teleologically-based questions are asked of national legal systems, they may produce important speculative insights and social hypotheses which, in turn, generate grand socio-political and jurisprudential philosophy or, at least, useful insights into the workings of a social order. Even if the questions are not answered once and for all, the quest produces important spin-offs, rather like a full-throttled space program. Even its unsatisfying discoveries, in due course, can give rise to passionate, or in any event, intellectually engaging controversy in which the social "is" and the social "ought" (actual present, and alternative contingent, realities) interact to set minds thinking about how and why things are, and how they might or ought to be. Sociological jurisprudence, for example, by focusing on the decisions of judges as *the* "source" of the law, has not quieted the doubters, but it has helped spotlight and demystify the role of judges and made the process of judicial selection more consciously political. In sharp contrast, international law — because such "how" and "why" questions are not asked — at best generates dull, rather absurdly defensive, rule description and even more plodding prescription, as if the grand issues of domination, communication, obedience and transformation were beyond the attention span of serious international scholars. The rules are recited, new rules are proposed, but few ask why these, or any other, rules are or are not, or should or should not be, obeyed. Perhaps this is because observers assume the questions redundant: since the old international rules are not enforced, alternative new norms similarly will be ignored. This, after all, is *international* law. Disobedience is the only norm, and, thus, the study of norms — either the is *or*

the ought of a normative prescription — is irrelevant. States do as states do. That is all we know and all we need to know. The subject is dismissed as unproductive.

Any contemporary philosophy of international normativity therefore tends to appear in print as, at most, the scraggly tail on elegant, fully developed theories intended to explain *national* legal phenomena. This is not only unfortunate but quite unnecessary because the jurisprudential inquiries directed to the role of law in national communities provides ready tools for fruitful inquiry into the international system. With little adumbration and adaption, these mature philosophical inquiries could be of considerably more help to an inquiry into the international arena than they have been so far. Some of the basic notions, in particular, seem applicable to an understanding of the nature, purposes, and workings of the international arena. For example, in the search for a teleology of organized authority, political and social philosophers from Aristotle[3] to Ronald Dworkin,[4] have advanced sophisticated concepts of *polis*, the civil society or community, in which the citizen's affiliation, as a matter of status, engenders reciprocal rights and duties which in turn endow governance with what amounts to an architectural construct of socially pooled power. Certainly that says something to which the student of the international system might profitably pay heed. Hobbes advanced a comparable concept of pooled, or delegated, state power but did so by means of the formalized fiction of the *social compact*: an imagined contract between persons in the state of nature.[5] John Locke, and, more recently, John Rawls and Paul Ricoeur,[6] broadly in related analytical camps, characterize the phenomenon of social assent primarily in various illustrative or imaginative quasi-contractarian and bargaining metaphors.

The international observer's options for conceptual borrowing, more-

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[3] See the discussion of *politike koinonia* in Aristotle's political Greek city-state, the *polis*, in the first book of the *Politics*. An excellent analysis is found in Riedel, *Transcendental Politics? Political Legitimacy and the Concept of Civil Society in Kant*, 48 SOC. RES. 588 (1981), which states that the "central obligation associated with political communities . . . is that of general fidelity to law. . . ." *Id.* So the question is: "What must politics be like for a bare political society to become a true fraternal mode of association?"

[4] R. DWORKIN, LAW'S EMPIRE 208 (1986).

[5] Riedel, *supra* note 3, at 595-96. For a summary of the "contractarianism" of Hobbes, Rousseau, Kant, Hume, and Locke, see J. KEANE, PUBLIC LIFE AND LATE CAPITALISM: TOWARD A SOCIALIST THEORY OF DEMOCRACY 227-29 (1984).

[6] Ricoeur, *The Political Paradox*, in LEGITIMACY AND THE STATE 250 (W. Connolly ed. 1984).

over, certainly are not limited to the various brands of contractarianism. For one, there is the quite formidable line of analysis which does not try to relate rights to a *polis*, whether contractarian or otherwise-based, but, rather, to an empirically-demonstrable *power hierarchy*. Some tribal status mythology and the concept of divine right of rulers starts here.[7] John Austin, writing at the commencement of an era of demystifying skepticism, defined law as the enforced command of a sovereign to a subject,[8] a perspective on social organization not unrelated to that adopted by Marx, at least for purposes of describing the capitalist status quo: law as the enforced will of a ruling class.[9] Holmes saw the law as an emanation of judicial power.[10] Power-hierarchy analysis, mingled with interpersonal and intergroup dynamic concepts derived from psychology and sociology, also marks the work of some scholars loosely pinned to the critical legal studies designation.[11] Certainly power-disparity as a way of seeing and examining the phenomena of normativity, authority and obedience, speaks in tones of almost voluptuous suggestiveness to the student and scientist examining the world order.

Not only the *tools* of analysis may be borrowed, but the *differences* between modes of teleological analysis — so well developed at the level of national legal studies — ought also to be illuminating to the internationalist. In part, these differences of analytical mode are attributable to differences in quest. Although they may not say so specifically, Aristotle and the contractarians are really developing an idealized theory of the origin of rights, while Austin, Marx, and the "Crits" are trying to describe how elites, in *fact*, govern or manipulate, perhaps, but not necessarily, as part of a prescription for achieving radical change. The de-

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[7] *See* M. GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE 38-39, 130-33 (1965).

[8] J. AUSTIN, LECTURES ON JURISPRUDENCE 201 (1970); *see* Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405, 410 (1984).

[9] Marx views law as an expression of the *will* of those persons comprising the capitalist class; what shall be law is determined by their common interest masquerading as the general will. K. MARX & F. ENGELS, THE GERMAN IDEOLOGY 357-58 (S. Ryazanskaya trans. 1964).

[10] Holmes saw that the development of legal principles flows from policy considerations determined by judges. O.W. HOLMES, THE COMMON LAW 35-36 (1881).

[11] Unger's power-hierarchy analysis holds that as a society becomes less "closed" in its hierarchic determination, people begin to question the legitimacy of any basis for ordering. R.M. UNGER, LAW IN MODERN SOCIETY: TOWARDS A CRITICISM OF SOCIAL THEORY 172-73 (1976). They become conscious of the effect of power distribution in shaping "accepted ideas about right conduct." *Id.* at 173. Moral skepticism follows. "People lose confidence in their own judgments and they lose hope of discovering criteria for common judgments." *Id.* at 175.

bates between these perspectives, and the differences in definition that are their penumbra, continue to enliven the study of obedience to national authority, but there are no echoes in the field of international law. To take another example: what do international lawyers make of *disobedience*? Writing in 1971, John Rawls, despite his contractarian tendencies, defended the right to some civil disobedience, which might be seen as a breach of social contract, at least in a democracy. He upheld such actions by citizens against the state not only as socially desirable but also as manifesting the protester's morally-compelled adherence to a higher — but not necessarily divine — scheme of order, one which is not, surely, contractarian, but the validity of which (to go to the other end of the spectrum) Austin would not recognize.[12] Rawls' theory of rights, which rejects as unsatisfactory the mere empirical observation of how elites in fact govern, has freed itself to approve, however conditionally, the refusal of a citizen to do as the elite commands. Any theory of rights in which *justice* plays a validating role is loosening — not necessarily cutting — both the contractarian and the Austinian bonds and thereby encouraging a belief that whatever is, need not be. Indeed, with even more recent legal-philosophical writings, there has emerged a coherent, more radical theory which may be roughly characterized as informed by a presumption that whatever is (at least whatever power and role allocation there is) ought *not* to be.[13] In this conflict, therefore, the terms "law" and "right" take on strategic significance, with Austinians emphasizing law, contractarians emphasizing process, and libertarians preferring to emphasize rights in explaining why persons do or do not — or may not, or should not — obey.

What is rarely noted in all this systematic inquiry, however, is that obedience to national authority is currently most often challenged in connection with the dissenting citizen's sense of an *international* or supranational obligation, and in connection with some sense of an "ought" which has its roots in a perceived *international* order. Anti-war, prohuman rights campaigns throughout the world nowadays pose some of the most salient challenges to national governance and raise the most searching questions about why authority is, or is not, obeyed. The third world's campaign for a New International Economic Order challenges present power-driven command structures called "law" in the

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[12] J. RAWLS, *supra* note 2, at 377-91.

[13] R.M. UNGER, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* in POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY 32-40 (1987).

name of "rights" derived from notions of justice. Yet this has not translated into the growth of research into teleological theory by the scholarly community working on world order.

On the contrary, international studies seem paralyzed, rather than inspired by jurisprudence, perhaps because most observers of national legal systems — Austinians, contractarians, even libertarians — seem to agree that domination or governance requires *some* exercise of power by an elite in authority. If such dominance cannot be located in the global arena, where is one to begin? Little comfort has been derived by internationalists from the minority of social philosophers who reject all authoritarian explanation of obedience. Utopians such as Foucault, who reject all notions of dominance[14] and visualize a truly cooperative society in which norms operate on the basis of shared interest and non-coerced social conditioning, themselves have no internationalist bent, nor have they spawned internationally-oriented counterparts. Moreover, their rather elastic notion of "social conditioning" cannot altogether escape the suspicion that it, too, employs a disguised, if gentler, notion of conventional power-based "authority." Altogether non-existent, also, is some internationalist aspect or counterpart of the "minimal state" libertarian philosophers, from John Locke (both a contractarian and libertarian) to Robert Nozick, who suffer the notion of governance by constituted political authority but accept as justified only a very short-leashed state with sharply circumscribed powers. Yet such minimalist concepts of what is justifiable governance ought to be highly suggestive to students of the international system, if only because they make rather a virtue of the necessity compelled by a world of jealous national sovereigns. All the more odd to find the complete absence of any transference from nation-based to globally-based systematic libertarian theory.

The non-transference of theory from national to international thinking is the more remarkable when one's focus shifts from concepts of rights and norms to the question of coercion. Again, philosophers of the nation-*polis* are to be found in full cry. In utopian philosophy, coercive dominance figures as the central evil, and much effort is devoted to demonstrating that it is not only undesirable but unnecessary to an or-

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[14] Foucault rejects all notions of dominance, whether embodied in theories of sovereignty (divine rule, autocracy, "public rights," and so forth) or embraced in "mechanisms of discipline," including, for example, "power that is tied to scientific knowledge." M. FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 107 (C. Gordon ed. 1980). He visualizes, instead, a new form of "right" which is anti-disciplinarian and divorced from concepts of sovereignty. *Id.* at 108.

derly, just society. Among the majority who reject the utopian-libertarian analyses, on the other hand, there is vigorous, often scintillating disagreement on the importance of coercion in the matrix of factors that induce obedience and facilitate the decent *polis*. Marxist and Austinian observers of national systems split profoundly, for example, as to whether power to enforce is only a necessary or also a sufficient condition of habitual obedience and effective governance. Why is there no parallel debate among students of the international system? Neither camp, admittedly, gives much comfort to those concerned with visualizing an international "community" in which rules are obeyed and obligations taken seriously. They appear to agree with Machiavelli that the requisites for order are "good laws and good arms. [B]ut there cannot be good laws where there are not good arms."[15] That would seem to slam the door on the internationalists. Yet it does nothing of the kind. Those who deem coercive power necessary but insufficient to secure habitual social assent to governance posit that stable governance and habitual obedience can be secured (perhaps can *only* be secured except in the short-run) if the quality of governance by the "dominant elite" exhibits other characteristics besides dominant power. In chapter six of *Law's Empire*, Dworkin identifies three such characteristics: *fairness, justice, and integrity* (the last being a principled, more sensitive variant of consistency). Others focus on authority as process, identifying its necessary or desirable characteristics, such as consent, openness, and participation. A leading exponent of this view, Jurgen Habermas, emphasizes the role of discursive validation, somewhat in the tradition of Aeschylus and Aristotle, who may have been the first in the Western tradition to have identified reasoned communication as an essential factor in securing social assent to the elites' exercise of power.[16]

Thus, although coercive power is rarely completely absent from these

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[15] N. MACHIAVELLI, THE PRINCE 71 (L. de Alvarez rev. ed. 1981).

[16] Habermas states:

> Legitimacy means that there are good arguments for a political order's claim to be recognized as right and just; a legitimate order deserves recognition. Legitimacy means a political order's worthiness to be recognized. This definition highlights the fact that legitimacy is a contestable validity claim; the stability of the order of domination (also) depends on its (at least) de facto recognition. Thus, historically as well as analytically, the concept is used above all in situations in which the legitimacy of an order is disputed, in which as we say, legitimation problems arise. One side denies, the other asserts legitimacy. This is a *process*. . .

J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178-79 (T. McCarthy trans. 1979).

explanations of obedience behavior in the national community, the line of inquiry represented by Dworkin and Habermas surely can be read as an invitation to the internationalist, an opening to consider noncoercive factors in understanding the phenomenon of global obligation and rule conformity. Indeed, the invitation comes with the offer of a free ride to the party. Those who claim to have identified one or more noncoercive factors in the engendering of obedience generally use the term *legitimacy* and its variant, *legitimation*, to enclose some or all of the additional or alternative (non-coercive) requisites of obedience. Legitimacy thus ought to be, and, as it happens, *is* a term with which students of the international system have considerable familiarity. But familiarity has not led to much creative thinking about that notion either. The tendency is simply to make superficial declamations about the legitimacy of a government, an initiative, or a rule without serious examination of what is meant. Deployed by the students of the national community, the concept of legitimacy is used to postulate and explain what, other than a command and its enforcement, is required to create a propensity among the citizens generally to obey the rulers and the rules. The internationalist ought to feel both comfortable with, and stimulated by, this notion of legitimacy as the non-coercive factor predisposing towards obedience.

This becomes more apparent on closer inspection. The philosophers of the national community who champion this legitimacy teleology fall, more or less, into three categories, although some adhere to each. All three address issues both familiar and important to internationalists. The first group, led by Max Weber,[17] defines the legitimacy factor in terms of a rather narrowly specific *process*. A process, in this sense, is usually set out in a superior framework of reference, rules about how laws are made, how governors are chosen and how public participation is achieved. In this view, a sovereign's command, when applied, acquires the additional legitimacy necessary to promote habitual obedience without encountering serious resistance only when the rule's sub-

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[17] Weber postulates the validity of an order in terms of its being regarded by the obeying public "as in some way obligatory or exemplary" for its members because, at least, in part, it defines "a model" which is "binding" and to which the actions of others "will in fact conform. . . ." At least, in part, this legitimacy is perceived as adhering to the authority issuing an order, as opposed to the qualities of legitimacy which inhere in an order itself. This distinction between *an* order (command) and *the* order (authority) is easily overlooked but fundamental. M. WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 31 (G. Roth & C. Wittich eds. 1968). For a critique, see Hyde, *The Concept of Legitimacy in the Sociology of Law*, 1983 WIS. L. REV. 379.

ject is aware that the rule, and the ruler, both have a legitimate pedigree. By this is meant, for example, that the legislature that enacted the law was honestly elected, that the legislation was duly passed by a majority with a quorum present, and, perhaps, that the law is not *ad hominem* or, in Dworkin's phrase, a "checkerboard" approach to social regulation which applies frivolously, or mendaciously, unequal distinctions to its subjects. To say the least, that ought to interest, and be quite familiar to, the student of the international system.

The second group defines legitimacy in more complex *procedural-substantive* terms. It is interested not only in how a ruler, and a rule, was chosen but also whether the rules made and commands given have been considered in the light of all relevant data, both objective and attitudinal. Habermas speaks of a discursive validation which is rooted in scientific empiricist reasoning that produces a rational result.[18] In his view, the "procedures and presuppositions of justification are themselves not the legitimating grounds on which the validity of legitimation is based. The idea of an agreement that comes to pass among all parties, as free and equal, determines the procedural type of legitimacy in modern times."[19] He distinguishes this from "a contingent or forced consensus" and "domination . . . accepted *without reason* by the bulk of the population . . ."[20] The latter is inherently unstable or, to put it empirically, has low value in predicting whether the public will obey. Surely that, too, is relevant and highly suggestive to those working on understanding (and reforming) the international system.

The third group, composed particularly, but by no means exclusively, of neo-Marxist philosophers and related students of radical social restructuring prefers to focus entirely, or principally, on *outcomes*. In that view, a system seeking to validate itself — and its commands — must be defensible in terms of the equality, fairness, justice, and freedom realized by those commands.[21] How could that fail to be relevant to anyone seeking to understand the effect of the global north-south chasm on the prospects, processes, and outcomes of the international rule system and its institutions?

Naturally, these three arbitrary categories of legitimation theory do

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[18] "What are accepted as reasons and have the power to produce consensus . . . depends on the *level of justification* required in a given situation." J. HABERMAS, *supra* note 16, at 183.

[19] *Id.* at 185.

[20] *Id.* at 188.

[21] Hyde, for example, believes that the concept of legitimacy should be abandoned and replaced by investigation of "rational grounds for action." Hyde, *supra* note 17, at 380.

not fully accommodate all the nuanced positions of every jurisprudential thinker. Dworkin's approach, for example, integrates all three categories. For the most part, however, the problem is not so much overcategorization as underestimation of the differences between the categories, a problem inadvertently made more serious by a misleading sharing of vocabulary among scholars who mean different things.

Of course, there is muddle. All three of these teleological camps may use the same label, *legitimacy*, to explain why something beyond a coercively enforced sovereign command is needed to create a system in which law is habitually obeyed. But the concept of legitimacy, or the validation of power, is really a bracketing of many integral factors which are related but different and which must be investigated by reference to different social data: the procedures by which power is delegated to governing elites; the procedures by which elites inform themselves before making rules or deciding specific controversies between subjects; the procedures by which legislative decisions are taken, explicated, and ventilated; the probity and "integrity" of a specific law or decision, that is, how it fits into the principles underlying a network of specific commands; its social utility, that is, its distributive fairness and instrumental effectiveness; and the equality with which the same rule is applied to various situations.

If this be muddle, it is muddle of a very high order, and it should merely heighten the interest of the internationalist. Not surprisingly, the deconstructability of the commonly-deployed concept of legitimacy has raised questions about its scientific utility. Alan Hyde, in a searching analysis of legitimacy theory as a disciplined approach to the understanding of power and obedience, has suggested that the concept either means too little or too much to be useful in understanding or predicting systemic obedience behavior within the state. In particular, Hyde has argued that no one has ever demonstrated empirically that a subject obeys the sovereign's command, solely or even in part, because of a belief in the legitimacy of the process (he uses the term in the Weberian sense) since the subject cannot be expected to isolate that factor, in his or her motivational matrix, from such other strands as fear of punishment for disobedience, or a self-interested sense of benefits to be derived by obedience.[22] The same criticism could be made of efforts to study other, non-Weberian concepts of the legitimacy factor in the national community. These concepts, too, cannot be isolated in the

[22] *Id.* at 411-17, 422-25.

motivational matrix. Thus, the critics say the legitimacy factor's existence is unprovable.

This line of criticism would seem, at first, extraordinarily disheartening to those seeking to borrow concepts taken from the rich mass of obedience theory developed by students of national communities and to apply or adapt these to the international scene. Here is the one window of opportunity, the work done on non-coercive factors, being shut because it cannot be studied in a controlled environment, disentangled from other contributing factors, its very existence only hypothesized but essentially unprovable. If legitimacy is beyond the reach of discrete inquiry in the highly developed national community, how is one to justify the pursuit of it into an international "community" of states the existential validity of which, to say the least, is open to serious challenge? If legitimacy is an elusive factor in studying rule-conformity in the national context, it is certainly much more of a wild goose chase to attempt to study it in the international arena, where rule-conformity itself is such a "sometime thing."

It is at this point that the observant internationalist will spot a white swan, transportation to a significant insight via a radiant paradox. The paradox is this: the international system's weakness (in the Austinian sense) is its peculiar strength as a laboratory for those seeking to isolate and study the legitimacy factor. In international governance there is no sovereign, certainly not one regularly capable of coercively enforcing its commands. Empirically, the Austinian critique of international law as non-law is beyond reproach if one accepts that coercion is a necessary component of law and order. Yet it is also empirically verifiable that some (many) international rules of conduct are habitually obeyed by States. Otherwise, for example, no mail would go from one state to another, no currency or commercial transactions could take place, and passenger flights over foreign territory would routinely encounter the reception of Korean Airlines flight 007, which was shot down over Kamchatka. Thus, to whatever extent any rules are obeyed in the international system, they *must* be obeyed due to some factor, or mix of factors, other than the Austinian one. It appears that we have, in the world of nations, what cannot be reproduced even experimentally in the domestic order: a "system" of rules which, to the extent its texts are applied, permits the observation of one or more manifestly non-Austinian factors operating to secure behavioral conformity with its norms. In sum: there is at least the hypothetical possibility that, if one could show that there are rules which are *habitually* obeyed in international relations, then one may be able — indeed, may *only* be able — to account for that phenomenon by postulating an instrumental non-Austinian factor; one which is *not* a sovereign command, *not* enforced coer-

cively, *not*, even, obeyed solely by reason of short-term, self-interest gratification, since gratification cannot explain consistent deference to rules that are unlikely always to benefit equally all parties to interactions. It turns out — lo and behold! — that if the internationalist were to adapt the method and insight of what is commonplace in the jurisprudence of the national *polis*, he or she would not only be invited to the party but would bring along some gifts which might prove to be very useful to the host.

That is the *descriptive* justification for putting legitimacy theory to the test in international life. If one is ever to demonstrate the existence of the legitimacy factor in securing social obedience to prescriptive-predictive norms of behavior, the global *polis* is where that elusive factor may be found, isolated, and studied by the social scientist. This verification of the role of legitimacy in inducing compliant behavior certainly would be of significance far beyond the precincts of the international system, but the international system is the only place where the theory of legitimacy's validating function might be actually tested on a grand scale.

But there is also a *prescriptive* "ought" justification for studying legitimacy in the global arena. If a legitimacy factor, or a legitimacy syndrome of several factors, can be observed affecting state behavior in the direction of rule-conformity, then the international system's failure to perfect its rudimentary system of rule of conduct — the widely regretted fact that there is not more obedience to more norms — may not be attributable solely to the usual Austinian culprit: the absence of a global sovereign with worldwide coercive enforcement power. Also, or even *instead*, the black holes in the normative fabric may be due to a lack of legitimacy in the rules and the institutional processes by which they are made, interpreted, and applied.

To put it too baldly: a person arriving on earth from Mars would be seriously misled if the visitor were to try to understand how nations behave by reading the United Nations Charter or an international law textbook, even one by so eminent and indefatigable a scholar as, say, Sir Hersch Lauterpacht.[23] Nations simply do not behave — in many instances — as reported in these texts. But what if this dissonance were not explicable, either solely or primarily, in terms of the missing global monarch with a supranational police force? What if, more modestly, it turned out that texts that are rarely obeyed are obeyed rarely because — or *in part* because — they, or the institutions which generated

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[23] *See, e.g.*, L. OPPENHEIM, 1 INTERNATIONAL LAW (H. Lauterpacht 8th ed. 1955).

them, do not appear legitimate to most, or to many states some, or most, of the time?

To say the least, it would be useful to know if that were an (or the) operative explanation of the rule texts' shortcomings as a factor obligating states in their international relations. It would be cause, surely, for optimism. Almost everyone today concedes that the world will not soon elect a global sovereign endowed with overriding enforcement power. If that were the only factor predicting to a system of behavioral and procedural norms commanding general obedience, then any such system is surely not worth bothering about; it would be doomed for the foreseeable future. But what if the coercive sovereign were not the only factor — or even a *necessary* factor — in creating a system of obligation and of habitually obeyed norms? What if it were possible to demonstrate that, even in the absence of an Austinian, Marxist, tribal, or divine law-enforcer, many rules, nevertheless, are widely obeyed by states? What if it were hypothetically feasible to identify one or more non-Austinian factors which, in the international setting, are necessary and, perhaps, even sufficient to create effective obligations, engendering patterns of adherence to rules which operate and survive without the help of sovereigns and police? In sum, what if the evolution of a system of rules ordinarily obeyed by states were possible without a global Austinian sovereign?

Legitimacy research in the global context does not reject the utility of a world government for the community of states. It simply designates such a development as the capacity of the international system to generate an effective web of mutual obligation which depends, first and foremost, upon the perception that the rules and rule-institutions are imbued with a high degree of legitimacy. The higher the degree of this legitimacy, the more likely it is that states will act in obedience to the rules and institutional commands even when it is not in their short-term interest to do so.

These are intended as no more than provocative hypotheses, challenging international lawyers to separate themselves from vacuous rule-chanting litanies and even more counter-productive hand-wringing about rule-disobedience. The remarkable thing, to paraphrase Dr. Johnson's chess-playing dog, is not that some international rules are disobeyed but, rather, that many appear to be quite puissant when it comes to obligating even quite powerful states. Let us strive to understand that marvelous phenomenon and make its happening endemic.