WHY HAVE INTERNATIONAL LAW?

Mohammed Subhan Hussain

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International law has never had a sovereign to answer for it. No legislature drafts it in the round. No executive enforces it as a matter of course. No single court holds compulsory jurisdiction over all its subjects. To the positivist tradition descending from Austin, this absence is not a peculiarity but a disqualification. Law is the command of a sovereign backed by sanction. Where there is no sovereign, there is no law, only the habits and courtesies states extend to one another when it suits them.[1] This essay does not ask whether international law works or is enforced consistently. It asks why international law should exist at all, given that its central premise, an obligation binding without a commanding sovereign, is precisely what classical legal theory says cannot occur. The answer is this. The Austinian premise was never true even within the state. Plural normative orders, of which Sikh doctrine offers an exceptionally well-documented instance, have for centuries supplied the obligation a single earthly sovereign was never well placed to give. The order claims a justification beyond any sovereign will. It binds a community wider than any sovereign's reach. International law's claim to exist is not a claim that it has finally produced a sovereign at the global level. It is a claim that obligation never needed one. The argument proceeds in three stages, each drawing on my own published research as a comparative tool rather than mere illustration. Sikh doctrine and the documented practice of the eighteenth-century Sikh community supply the central illustration: a tradition that bound a dispersed people with no sovereign behind it at all. That illustration is then disciplined by a three-tier test I developed in a separate monograph on honour-based violence in India and Pakistan, to ensure the thesis does not collapse into an undiscriminating defence of any plural order whatever. The thesis is tested twice more before it closes: once against the deferred prosecution agreement, the subject of a further thesis of mine, where consent does less work than it claims; and once against state immunity, where the same gap reappears at the international level.

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1. John Austin, *The Province of Jurisprudence Determined* (John Murray 1832).

I. THE PROBLEM STATED

Austin's account of law rests on three elements: a command, issued by a sovereign, backed by a sanction.[2] Applied to international law, the model fails almost immediately. There is no single sovereign command behind the prohibition on the use of force, no unified legislature behind the law of treaties, and no general sanction attaching automatically to breach. Austin drew the conclusion himself: international law was not law at all but "positive morality", opinion and sentiment that resembled law without sharing its defining structure.[3]

The puzzle did not disappear with Austin. Hart's refinement, the rule of recognition, asks not for a sovereign command but for a secondary rule officials accept as the criterion of valid law.[4] International law strains against this too. There is no single, settled rule of recognition across all states as to what counts as binding. Article 38 of the Statute of the International Court of Justice lists the sources the Court will apply, but a list of sources is not a rule of recognition in Hart's sense, and whether states genuinely treat it as binding on themselves, rather than as a menu of convenient arguments, remains contested.[5] International law has spent the better part of two centuries answering a question domestic law was never made to answer for itself. By what right does a norm bind a subject who never agreed to be commanded, and who answers, ultimately, to no one?

II. THE TRADITIONAL ANSWERS AND THEIR LIMITS

Three answers explain why international law might bind without a sovereign: consent, natural law and coordination. Each fails.

The most influential answer has been consent. States are bound because they have agreed to be bound: through treaty, through custom built from their own practice, or through the principle that a state's freedom of action is curtailed only by rules it has accepted. The *Lotus* case put this starkly. Restrictions on the independence of states cannot be presumed, and international law leaves states a wide measure of

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2. *ibid*.

3. *ibid*, Lecture VI.

4. H.L.A. Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) ch 10.

5. Statute of the International Court of Justice, art 38.

discretion, limited only by rules they themselves have accepted.[6] The difficulty is that consent theory cannot do the work asked of it. Customary international law binds states that never consented to a given norm, including states born after the custom had crystallised. Peremptory norms, *jus cogens*, are rules from which no derogation is permitted regardless of a state's contrary will. That is consent theory's contradiction, not its extension.[7] If consent were the foundation, *jus cogens* could not exist. That it does, and the order treats this as unremarkable, suggests the foundation was never consent alone.

The strain on consent theory is visible domestically too, where a state deals with its own subjects rather than other states. The deferred prosecution agreement, consent theory's domestic analogue and the subject of my own doctoral research into the regulation of economic crime, makes the point. A prosecuting authority negotiates a settlement with a corporate offender instead of prosecuting. The agreement binds because the company has consented, yet that consent is extracted under the standing threat of a prosecution the company cannot realistically resist, and the bargain is approved by a court applying a test of the interests of justice, not what the parties actually agreed.[8] Consent is doing far less work than the label suggests. A body of authority has had to be built around the agreement, judicial approval, published statements of facts, terms enforceable independently of the company's continuing willingness, precisely because consent alone could not carry the legitimacy needed.[9] If consent requires this much scaffolding to legitimate a bargain between a state and a single company, it was never a plausible sole foundation for an order binding nearly two hundred states that signed nothing resembling identical terms.

Natural law revival offers the second answer: international law binds because certain norms are right independently of any state's agreement, just as the prohibition on genocide or torture would remain wrong even if every state permitted it. This explains *jus cogens* without strain, but grounds international law's authority in a contested moral metaphysics that a global community of different traditions has no settled mechanism for adjudicating.

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6. *The Case of the S.S. Lotus* (France v Turkey) PCIJ Series A No 10 (1927).

7. Vienna Convention on the Law of Treaties 1969, art 53.

8. Crime and Courts Act 2013, sch 17; *R v Standard Bank plc* [2016] Lloyd's Rep FC 216 (Crown Ct).

9. cf M.S. Hussain, 'Deferred Prosecution Agreements: Assessing the Effective Regulation of Economic Crime' (MPhil thesis, Institute of Advanced Legal Studies, University of London 2026).

The third, more modest answer treats international law as a coordination device: states comply because compliance serves their interests, not because they are commanded. This explains a great deal of state behaviour, but as a justification for international law's existence it is thin. It tells us why states find international law useful, not why the resulting practice should count as law, imposing genuine obligation, rather than self-interest abandoned the moment it stops suiting.

Each leaves an unexplained residue. What is needed is a different premise: that the Austinian model was always asking the wrong question, because it assumed obligation requires a sovereign in the first place.

III. THE PLURALIST RE-FRAMING

The premise this essay advances is that obligation has never, in any tradition, depended on a single commanding sovereign for its force. Religious, customary and communal orders generated binding rules long before the modern state claimed a monopoly on law-making. They bound their members across territories no single ruler controlled. Their authority lay deliberately beyond any sovereign's revision. The state's claim to be the sole source of law is a recent and parochial development, one the positivist tradition mistook for a timeless truth about what law must be. International law's absence of a sovereign is not an aberration. It is a return to the ordinary condition of normative life, in which plural orders have always supplied the obligation no single sovereign could.

This is not merely an assertion. It can be tested against a tradition that has left a documentary record of solving the problem for itself.

IV. THE SIKH ILLUSTRATION

Two strands bear directly on the question: the doctrinal, in Guru Nanak's and Guru Arjan Dev's teaching, and the institutional, in the documented practice of the Sikh community after Guru Gobind Singh's death.

The first is doctrinal. Guru Nanak's formulation, *hak paraiya*, treats the taking of "what rightfully belongs to another" as forbidden. The terms are absolute, the same register used for the gravest dietary prohibitions of the two faiths surrounding the Punjab: a Muslim eating pork, a Hindu eating beef.[10]

The analogy is deliberate. The prohibition does not depend on any ruler's enactment, and it does not lapse where no ruler enforces it. It binds because it is right, independently of sovereign will, and it is addressed to a community defined by adherence to the teaching rather than by territory or subjecthood. Guru Arjan Dev's vision of *halemi raj* is cast in the same register: a reign in which, on the Guru's own command, "let no one chase after and attack anyone else" and "let all abide in peace".[11] This is not a description of any state Guru Arjan Dev ruled. It is a normative claim about the conditions of legitimate rule, addressed over the heads of any sovereign to the community of the faithful and, in its own terms, to humanity at large. Both passages do the work natural law theory does for international law. They supply a ground for obligation that does not depend on consent or sanction. But they do so from within a tradition that never had, nor sought, a single earthly sovereign to enforce them. The obligation was never waiting on a state to make it real.

The second strand is institutional, and the more demanding test, because it is recorded practice, not aspiration. Guru Gobind Singh died in 1708. His widows, Mata Sundari and Mata Sahib Devi, each maintained an establishment in Delhi and issued *hukamnamas*, written orders, to dispersed *sangats*: Mata Sundari's to Patna and Ghazipur, Mata Sahib Devi's to Patna, Benares, Pattan Shaikh Farid and Naushehra Pannuan.[12] These orders were not abstractions: one *hukamnama* of Mata Sundari, dated 18 October 1723, directed five named Sikhs to resolve a dispute between two parties according to *dharamnian*, moral justice, on behalf of the whole Khalsa. The disputants approached Mata Sundari directly, not a panchayat or a court, and she appointed the arbitrators herself.[13] A later *hukamnama* of Mata Sahib Devi, dated 30 December 1734, ordered the construction of a well at Pattan Shaikh Farid, and both women's orders were obeyed by figures of consequence, including Ala Singh, the future founder of the Patiala state, addressed in them as one among their "sons".[14] Malhotra's description is exact: the two women "appear to exercise their authority essentially on moral grounds". No army, no revenue-collecting apparatus, no sovereign title recognised by the Mughal state, yet their orders bound a

10. Guru Nanak, M.1, Sri Guru Granth Sahib (SGGS), Ang 141.

11. Guru Arjan Dev, M.5, SGGS, Ang 74.

12. Karamjit K. Malhotra, 'Issues of Gender among the Sikhs: Eighteenth-Century Literature' (2013) 20(1&2) *Journal of Punjab Studies* 53, 67.

13. *ibid* 67, citing *Hukamname: Guru Sahiban, Mata Sahiban, Banda Singh ate Khalsa Ji De* (Ganda Singh ed, Punjabi University 1967) document no 73.

14. Malhotra (n 12) 67, citing *Hukamname* (n 13) document no 85; *ibid* 67, citing document nos 74, 76.

community dispersed across a subcontinent.[15] This is, in miniature, the problem international law must solve about itself: how does an order with no coercive apparatus and no territorial sovereignty bind a community that could simply have ignored it? The *hukamnamas* did not bind because Delhi could compel Patna. They bound because the addressees recognised an obligation independent of any compulsion, which consent theory cannot supply for international law and natural law theory can only supply by assertion. The Sikh tradition supplies it by demonstrated practice.

It would be a mistake to read this history as straightforwardly egalitarian, and the honesty of the comparison depends on resisting that temptation. The eighteenth-century *rahitnama* literature, the manuals setting out the Khalsa way of life, is internally divided on the position of women, in exactly the way customary international law is divided on the content of its own rules. The *Prem Sumarag* sets out an inheritance scheme of real specificity, in which a daughter's son and daughter take equal, defined shares of their grandfather's property and a widowed daughter receives a double share, and Malhotra records that the text disapproved of *sati* and permitted widow remarriage in defined circumstances.[16] The *Chaupa Singh Rahitnama*, compiled in roughly the same period, takes the opposite view, treating a Sikh who administers baptism of the double-edged sword to a woman as a defaulter liable to penance.[17] But Malhotra resists the more totalising reading of that text, associated with Doris Jakobsh, that the Khalsa instituted a wholesale "polarization of sexes": the Chaupa Singh text was, on her own account, "neither the earliest nor the representative prescriptive text", and the wider *rahitnama* literature does not bear out a settled "theology of difference" between the genders.[18] J.S. Grewal reaches a similar conclusion: the tradition created "a large space for women" while still operating "within the patriarchal framework", an equilibrium between equality as a principle and inequality as a social reality.[19] This makes the comparison rigorous rather than decorative. International law's own customary norms are no less contested, and no less marked by the gap between what is claimed as binding and what is practised. A tradition that argued with itself, while never doubting that obligation bound regardless of sovereign enforcement, is the better analogue.

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15. *ibid* 67.

16. Malhotra (n 12) 60–61, 70.

17. *ibid* 61, discussing *The Chaupa Singh Rahit-Nama* (W.H. McLeod tr and ed, University of Otago Press 1987).

18. *ibid* 56.

19. *ibid* 70, citing J.S. Grewal.

The present moment supplies a final, uncomfortable test of the same question. The Sikh Court, launched in London in April 2024, runs a two-stage "med-arb" process, mediation first, then binding arbitration under the Arbitration Act 1996, its award enforceable by the ordinary courts.[20] Humanists UK has warned that such bodies, whatever their formal voluntariness, can function coercively: women may enter them "not out of choice but fear of stigma, isolation and even violent repercussions".[21] Mata Sundari's authority bound on its own terms, with no statute behind her at all; the Sikh Court's award binds because Parliament has clothed a non-state order in the coercive apparatus of the state. The first is obligation without sovereign command. The second is a hybrid, where the state has supplied the sanction the order itself lacks, without testing its substantive fairness. International law, which has no Parliament to lend it that apparatus, is closer to Mata Sundari's position, and that is reason to take its authority seriously.

V. A DISCRIMINATING TEST: RECOGNITION, COMPATIBILITY, REDRESS

A thesis that obligation does not require a sovereign is incomplete, until it can distinguish a plural order whose claim to bind deserves respect from one whose claim does not. Legal pluralism scholarship has confronted this difficulty in international law directly: normative conflict among overlapping legal systems cannot be resolved by sovereigntist territorial control or universalist harmonisation, but pluralism cannot mean unconditional deference either, since some plural orders are repressive, violent or illiberal, and a decision-maker who declines to defer must explain why.[22] Not every order operating without state coercion is legitimate for that reason. Some are simply unaccountable. The absence of a sovereign is no virtue if the order entrenches the harms a sovereign legal system exists to redress. I have developed one such explanation elsewhere, as a comparative tool in a study of formal and informal adjudicatory systems addressing honour-based violence in India and Pakistan. Three questions decide whether any adjudicatory order, state or non-state, deserves to bind: does it recognise the transgression as a transgression at all; are its judgments compatible with the substantive commitments, gender

20. Baldip Singh, Sharan Kaur Bhachu and Mani Singh Basi, 'The Sikh Court: A New Model of ADR' *Counsel* (Bar of England and Wales); Arbitration Act 1996; Humanists UK, 'Concern for women's rights as first "Sikh court" established' (6 June 2024).

21. *ibid*, quoting Pragna Patel.

22. Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 Southern California Law Review 1155, 1155–56.

equality among them, that any acceptable order must observe; and does it furnish a genuine remedy, rather than merely a forum in which a wrong is named?[23] That study found that the Khap Panchayat in India, and analogous Panchayat and Jirga structures in Pakistan, fail this test decisively. They recognise transgressions only against, never of, prevailing cultural norms. Their diktats are systematically incompatible with gender equality. Far from furnishing redress, they have themselves been a vehicle for honour-based violence, enforced through social compliance rather than state sanction.[24] The absence of a sovereign behind the Khap Panchayat does nothing to legitimate it. If anything, that absence is precisely why it has inflicted the harms it has, unconstrained by the accountability a state apparatus, however imperfect, at least supplies in principle.

Running the same three-tier test across the practice already examined exposes exactly the discrimination the thesis needs. The Mata Sundari *hukamnamas* pass cleanly: they recognised the transgression placed before them, an unjust killing and a forced remarriage, in the 1723 dispute resolved by appointed arbitrators on terms the petitioner herself invoked; the order was compatible with a substantive conception of justice, *dharam-nian*, rather than the interest of the more powerful party; and it issued in an actual remedy, accepted by a community with no means of compelling compliance beyond its own recognition of the order's legitimacy.[25] The Sikh Court fails the test in a more troubling way: its advantage over the Khap Panchayat, statutory backing and judicial enforcement, removes the pressure that might otherwise force it to demonstrate compatibility and redress on the merits, and a binding award may substitute for a real remedy where consent to arbitrate was extracted by social pressure rather than freely given.[26] The test does not say all three orders are alike because none has a sovereign behind it. It says the opposite: the presence or absence of a sovereign is the wrong question; recognition, compatibility and redress are the right one.

A sharper objection remains. If legitimacy rather than sovereignty is what makes an order worth obeying, why have international law at all, rather than a world of locally legitimate orders, each policing itself and answering to no one beyond its own community? The Mata Sundari *hukamnamas* show why

23. M.S. Hussain, *Crimes of Honour: Formal and Informal Adjudicatory Systems in India and Pakistan to Enforce and Contest Honour Crimes* (Sulis Academic Press 2022) 5.

24. *ibid*, ch 4 (Comparison of the Formal and Informal Honour Crime Adjudicatory Systems) and Conclusion.

25. Malhotra (n 12) 68.

26. Humanists UK (n 20).

that will not do. They bound a dispersed community, but never had to settle anything between that community and a different one operating under a different authority. International law's distinctive task begins where local legitimacy runs out: adjudicating between orders that each pass the three-tier test on their own terms, and yet still come into conflict, over territory, over a debtor, over a victim entitled to a remedy two legitimate systems each claim the right to deny. No degree of internal legitimacy equips an order to judge a dispute to which it is itself a party. That is the reason a connective layer of obligation between orders, owed to no single sovereign, was always going to be necessary, however it came to be supplied.

VI. THE THESIS APPLIED: SOVEREIGN IMMUNITY AND THE LIMITS OF CONSENT

The thesis can be tested against state immunity, usually defended as flowing from sovereign equality and consent: one sovereign does not sit in judgment over another because no state has consented to be judged by another's courts. The majority of the International Court of Justice held exactly this in 2012, upholding Germany's immunity from Italian proceedings over war crimes committed by German forces in the Second World War.[27] But the same case contains the sharpest challenge to consent theory the doctrine has produced, in Judge Cançado Trindade's dissent. His argument does not deny that states can waive their own rights by consent. It denies that consent can waive rights that were never the state's to give away: a state may waive a claim belonging to itself, but cannot waive, on behalf of the individuals it represents, rights inherent to the human person, and any purported waiver to that effect is void for conflict with a peremptory norm.[28] This is consent theory failing from the inside, in the one place it claims to be strongest: if a state's consent could extinguish a victim's claim against torture or slave labour, sovereign equality would have purchased impunity. The dissent does not carry the judgment; immunity from civil suit for these acts remains decided law.[29] But the disagreement is not about

27. *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening) [2012] ICJ Rep 99.

28. *ibid*, Dissenting Opinion of Judge Cançado Trindade, paras 71–72.

29. *ibid* 139 (operative paragraph, majority judgment).

consent's application. It is about whether consent could ever be the foundation at all, and the dissent's answer is the same one Guru Nanak gives in *hak paraiya*: certain claims are not the sovereign's to grant or withhold, because they were never the sovereign's to begin with.

VII. CONCLUSION

International law exists because the question "why have it" wrongly assumes that obligation requires a sovereign to manufacture it. It does not, and never has. The Sikh tradition examined here makes the point, read with its own contradictions intact rather than smoothed away. It bound a dispersed community with no coercive apparatus behind it, argued within itself about that obligation in terms structurally indistinguishable from the disputes that animate customary international law, and supplies, in the *hukamnamas* of Mata Sundari and Mata Sahib Devi, a documented case of authority recognised as binding for reasons that had nothing to do with sovereign command. Tested against recognition, compatibility and redress, the same three questions that expose the Khap Panchayat and counsel caution about the Sikh Court, the *hukamnama* practice survives, because legitimacy, not sovereignty, was always the operative variable. That legitimacy does not make international law redundant. It is what makes the connective work international law does, adjudicating between legitimate orders that still collide, necessary in the first place. Plural normative orders have always supplied obligation that no single sovereign could, and have not always done it well, but can do it well, answerable, in the final analysis, to something other than the sovereign's sanction. No world government stands behind that. None is needed. It is the only foundation international law was ever going to have.