

WITHOUT CONSENT, THERE CAN BE NO INTERNATIONAL LAW, CONSENT IS THE BEGINNING AND THE END OF INTERNATIONAL LAW

MUSORE Felix

*Independent Institute of Lay Adventists of Kigali, Faculty of Law, PO Box6392
Kigali Rwanda*

Abstract

This Article is intending to challenge the traditional understanding of international law, that states cannot be bound by a legal rule against their will. In another words, it intends to analyze if the consent is the beginning and the end of international law. It argues that existing commitment to consent is excessive and that better outcomes would result from greater use of nonconsensual forms of international law. Unlike in domestic democratic systems, where individual freedom can be restrained by majority decisions of a representative body, there is no majoritarian decision making mechanism in international law that could restrain the freedom of a state against the will of its representatives.

This contribution analyzes the role of consent in the formation of customary law. It will challenge the assumption that customary norms cannot bind states against their will. Relying on game theory, it will distinguish between different situations and argue that the role of consent differs according to the structure of the social problem that a potential norm is supposed to address.

Key words: Consent, Custom, Treaty and International Law

I. INTRODUCTION

According to the traditional understanding of international law, states cannot be bound by a legal rule against their will. This also applies to customary international law.¹²¹

The emergence of a customary rule requires a general practice accompanied by *opinio iuris*. General practice does not mean that

¹²¹ For a traditional account of customary law, see, e.g., GODEFRIDUS J.H. VAN HOOF, RETHINKING THE SOURCES OF

INTERNATIONAL LAW 290 (1983); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 87 (1993).

every state has to participate actively in this practice.¹²² But a state cannot be bound by a customary rule if it explicitly resists its emergence.¹²³

There are two competing schools of thought that stress different characteristics of a customary norm.¹²⁴ Some scholars stress the practice requirement and see customary norms as crystallization points of patterns of state behavior,¹²⁵ while others focus on *opinio iuris* and perceive customary law as a type of tacit agreement, which can only bind those who have consented to it.¹²⁶

In practice, however, there is a mixture of both positions, which creates certain tensions. Customary norms can, on the one hand, be formed without the explicit consent of each individual state being necessary. The identification of a customary norm only requires the observation of a general and consistent pattern of state conduct.¹²⁷ States

can thus also be bound if they were simply inactive during the phase of the formation of the customary rule or if they were not yet in existence. On the other hand, every state has the opportunity to opt out of a specific customary norm if it explicitly objects to its formation and can thus be considered as a persistent objector,¹²⁸ which can only be explained from a voluntarist standpoint focusing on consent.

According to this interpretation of customary law, there is thus one decisive difference between obligations imposed by treaty and those stemming from custom. Treaty law is an opt-in system. You are only part of the legal regime if you have explicitly consented. Custom, in contrast, is an opt-out system. States are bound by customary rules unless they explicitly object to their formation¹²⁹.

Treaties are negotiated, usually written down, and often subject to cumbersome domestic ratification processes. Nonetheless, nations often have the right to withdraw unilaterally from them. Many treaties expressly provide for a right of withdrawal, often with a notice requirement. As Professor Helfer has noted “Treaty clauses that authorize exit are pervasive.”¹³⁰ Indeed,

¹²² Yoram Dinstein, *The Interaction between Customary International Law and Treaties*, 322 RECUEIL DES COURS 242, 282 (2006).

¹²³ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 8 (1966); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L. J. 457 (1985).

¹²⁴ Niels PETERSEN, *The Role of Consent and Uncertainty in the Formation of Customary International Law*, *Max Planck Institute for Research on Collective Goods, Kurt-Schumacher-Str.* 10, D-53113 Bonn available on

<http://www.coll.mpg.de>, accessed on 5/03/2014.

¹²⁵ *Ibidem*.

¹²⁶ For such a voluntarist position, see, e.g., Godefridus J.H. van Hoof, *Rethinking the Sources of International Law* 290 (1983); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 Am. J. Int'l L. 413 (1983); Karol Wolfke, *Custom in Present International Law* 87 (1993).

¹²⁷ Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New*

Century, 281 Recueil des Cours 13, 326 (1999); Patrick Daillier, Mathias Forteau, Alain Pellet & Nguyen Quoc Dinh, *Droit International Public* 360 (8th ed. 2009).

¹²⁸ Pierre-Marie Dupuy, *A propos de l'opposabilité de la coutume générale: enquête brève sur l'"objecteur persistant"*, in *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* 257(1991).

¹²⁹ *Ibid.*

¹³⁰ Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1582 (2005); see also, e.g., ARNOLD

these clauses exist even in treaties that reflect core principles of international public policy, such as the Geneva Conventions and the Nuclear Non-Proliferation Treaty.¹³¹ Moreover, treaties that do not address the issue of withdrawal may be found to allow implicitly for withdrawal, based, for example, on their subject matter. Even when a treaty does not generally permit withdrawal, nations may still have a right to withdraw in the event of a fundamental change of circumstances.¹³²

Unlike treaties, the rules of CIL do not arise from express negotiation, and they do not require any domestic act of ratification to become binding. The conventional wisdom is precisely the opposite. According to most international law scholars, a nation may have some ability to opt out of a CIL rule by persistent objection to the rule before the time of its formation (although even that proposition is contested), but once the rule becomes established, nations that are subject to it never have the right to withdraw unilaterally from it. Rather, if a nation wants to engage in a practice contrary to an

DUNCAN MCNAIR, THE LAW OF TREATIES 510 (1961) (noting that the existence of an express treaty termination provision “occurs so frequently that it hardly requires illustration”).

¹³¹ Treaty on the Non-Proliferation of Nuclear Weapons, art. 10, *done* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (allowing withdrawal after three-months’ notice); Geneva Convention Relative to the Treatment of Prisoners of War, art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (allowing withdrawal after one year’s notice).

¹³² See Vienna Convention on the Law of Treaties, *supra* note 3, art. 62, 1155 U.N.T.S. at 347. This basis for withdrawal is a narrow one, and it is thought to be more restricted today than in the past, in part because of the prevalence of clauses either limiting the duration of treaties or expressly allowing for withdrawal.

established CIL rule, it must either violate the rule or enter into a treaty that overrides the rule as between the parties to the treaty.

II. JUSTIFICATION OF CONSENT IN INTERNATIONAL LAW

Consent, which serves as another fundamental principle of international law, performs at least three different functions. Using consent, states create and amend international law and excuse other states’ wrongdoings. Most significantly for this Article, consent enables the supremacy principle to function.

A. Creating or amending international law

Many scholars and international tribunals view consent as the foundation of international law itself.¹³³ States consent to enter into treaties with each other, and by virtue of that consent, are bound to those treaty commitments.¹³⁴

The 1969 Vienna Convention on the Law of Treaties establishes a scheme governing the interrelationship between various, but by no means all, rules of international law depending upon their origin. In particular, it addresses three relationships: between two or more treaties relating to the same subject matter; between a treaty and a rule of *jus*

¹³³ Thomas Buergenthal & Harold Maier, Public International Law 15 (1985) (“Positivism gradually emerged as the dominant theory, leading to the acceptance of the view that international law as law depended upon the sovereign consent of the states comprising the international community”); Louis Henkin, International Law: Politics and Values 27 (1989) (“State consent is the foundation of international law. The principle that law is binding on a state only by its consent remains an axiom of the political system, an implication of state autonomy.”).

¹³⁴ *Ibid.*

cogens; and between a treaty and other relevant rules of international law, including customary norms which do not have the status of *jus cogens*. It does not address the relationship between two or more norms of customary law. Beyond this scheme, the International Court, in the *Nicaragua* case, has confirmed that essentially the same rules can coexist as customary and conventional law. This ruling has potentially far-reaching implications for, *inter alia*, the prospects for connection and conflict between treaty and custom across subject matter areas.¹³⁵

The relationship between two or more treaties is governed by Article 30 of the 1969 Vienna Convention, which is entitled "Application of successive treaties relating to the same subject matter." Article 30 establishes reasonably clear provisions that are used more or less mechanically to determine which treaty obligation is to apply when two or more treaties adopted at different times but relating to the same subject matter are in conflict. Assuming that the two agreements do address the same subject matter, and that the parties to the earlier treaty are also parties to the later treaty, then only those provisions of the earlier treaty which are compatible with the later treaty will apply.¹³⁶ But when one state is not a party to the later treaty, then it is the earlier treaty, which will govern their relations.

¹³⁵ See Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. U.S.*), 1986 I.C.J. 14 (June 27).

¹³⁶ Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969).

The process usually is straightforward when two states consent to amend a bilateral treaty. It is legally more difficult for two states to conclude a subsequent bilateral agreement with the goal of amending their multilateral obligations as between themselves.¹³⁷ The Vienna Convention on the Law of Treaties (VCLT) provides that two states may modify their multilateral obligations between themselves only where the modification does not affect the rights of other parties to the treaty, and where the modification would not defeat the treaty's object and purpose.¹³⁸ It will not always be clear when a bilateral arrangement violates that provision.¹³⁹

The Vienna Convention on the Law of Treaties of May 23, 1969, makes this

¹³⁷ Giving consent in this context may violate the host state's international legal obligations and thus trigger liability under the international rules of state responsibility. For reasons of space, this Article does not discuss state responsibility issues in detail. See generally *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Rep. of the Int'l Law Comm'n, 53rd Sess., April 23-June 1, July 2-Aug. 10, 2001, arts. 16-19, 33, 42, U.N. Doc. A/56/10 and Corr. 1; U.N. GAOR, 56th Sess., Supp. No. 10 (2001), as reprinted in 2 Y.B. Int'l Law Comm'n, pt. 2, 2001, at 20, U.N. Doc A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter DASR], available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

¹³⁸ See, e.g., Gregor Noll, *Diplomatic Assurances and the Silence of Human Rights Law*, 7 Melb. J. Int'l L. 104, 114-15 (2006) (explaining how the relationship between a bilateral agreement such as an assurance not to torture and a multilateral treaty such as the Convention Against Torture is not clear).

¹³⁹ Deryck Beyleveld and Roger Brownsword describe this function of consent as "a defence to wrongdoing" and the function of consent described in Section A as "the reason for entitlement." Deryck Beyleveld & Roger Brownsword, *Consent and the Law* 336-37 (2007).

separation; after dealing with the *pacta tertiis* problem in Articles 34 to 37, Article 38 reads "Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such."

The term "binding," correctly used in this quotation, may create some conceptual difficulties. Clearly treaties are binding, in all their richly detailed provisions, upon parties to them. The claim made here is not that treaties bind nonparties, but that generalizable provisions in treaties give rise to rules of customary law binding upon all states. The custom is binding, not the treaty.

B. Excusing wrongdoing under international law

As a related matter, a state may invoke consent after the fact to justify violating an international agreement.¹⁴⁰ Assume, as has been reported, that Yemen has consented to the U.S. use of force in Yemen against Al Qaeda.¹⁴¹ The United States could invoke Yemen's consent as a defense against subsequent Yemeni allegations that the United States violated its international legal

obligation contained in the U.N. Charter not to use force in another state.¹⁴²

Several types of extra-territorial actions by the United States against suspected members of Al Qaeda appear to represent problematic uses of unreconciled consent.

These actions including forcibly rendering these individuals from one state to another,¹⁴³ targeting them using lethal force,¹⁴⁴ and detaining them in secret facilities. These consensual actions seem to have violated the domestic laws of the host states, where those laws would have provided certain protections to individuals subjected to forcible action by the United States. In each case, it remains unclear what the scope of the host state's consent was and what weight the affected governments put on consent as a basis for using force under international law.

Consent to lethal uses of force also reveals limited attention to host state law. The United States reportedly has used lethal force against Al Qaeda members in

¹⁴² DASR, *supra* note 14, art. 20. The Commentary to the DASR notes, "The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation."

¹⁴³ Francesco Messineo, *The Abu Omar Case in Italy*, 7 J. Int'l Crim. Just. 1023 (2009) (citing Article 605 of the Italian Penal Code, making it a crime to deprive someone of his personal freedom); Craig Whitlock, *Testimony Helps Detail CIA's Post-9/11 Reach*, Wash. Post, Dec. 16, 2006, at A1. Prime Minister Silvio Berlusconi, who did not support the trial of Italian and U.S. officials who allegedly conducted the rendition, reportedly stated, "You can't tackle terrorism with a law book in your hand."

¹⁴⁴ *Ibid.*

¹⁴⁰ Siobhan Gorman & Adam Entous, *CIA Plans Yemen Drone Strikes*, Wall St. J., June 14, 2011, at A8. The U.N. Charter requires states to refrain from the "threat or use of force against the territorial integrity or political independence of any state." U.N. Charter art. 2, para. 4.

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Afghanistan, Iraq, Yemen, Somalia, and Pakistan. Most commentators believe that it has done so with the consent of those countries.¹⁴⁵

For example, in a 2009 meeting between President Saleh and President Obama's top counterterrorism adviser, Saleh "insisted that Yemen's national territory is available for unilateral CT [counter-terrorism] operations by the U.S." and claimed that he had "given [the United States] an open door on terrorism." This suggests both that Yemen's consent was broad and that the Yemeni President was unconcerned about possible Yemeni domestic legal restrictions on the use of force against individuals in Yemen.

In the above situations USA has violated the 2(4) of UN Charter which stipulates that All members shall refrain in their relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of United Nations.

The Draft Articles on State Responsibility, which generally reflect customary international law, recognize this role for consent. The Draft Articles assert, "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."¹⁴⁶ This permits the state receiving consent to act in a manner inconsistent with

its existing legal obligation to the consenting state without committing a legal wrong.

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C. Enabling supremacy

In addition to serving as the basis for constructing and amending international obligations and for defending against claims of wrongdoing under international law, consent has a more complicated function. By virtue of consent's power, a state must comply with its treaty obligations even where the provisions of that treaty contradict its domestic laws. Rather than treating that state's consent to the treaty as an *ultra vires* act without legal consequence, international law allows the state's treaty partner to insist on performance.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibidem.*

¹⁴⁷ Vienna Convention on the Law of Treaties, 63 A.J.I.L. 875, 887 (1969).

International law does not require one state to look behind its partner's consent to an international agreement. Thus, the first state has no obligation to assess the consistency of that consent with the partner's domestic laws. By making domestic law irrelevant when determining the validity of an international agreement, supremacy allows states to craft agreements with the goal or effect of overriding domestic laws.¹⁴⁸ Supremacy thus offers a mechanism by which states may attempt to use international law to "brush aside the bounds" of domestic law.¹⁴⁹

The above point of view has been enhanced by article 45 of VCLT which states that A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

- (a) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
- (b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

¹⁴⁸ William Van Alstyne, "Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 Harv. J. L. & Pub. Pol'y 303, 307 (1993).

¹⁴⁹ Paul Stephan, *The Political Economy of Jus Cogens*, 44 Vand. J. Transnat'l L. 1073, 1095 (2011) (discussing how jus cogens allows states to brush aside the bounds of inconvenient international law obligations).

An overriding goal in developing international human rights law over the last half-century has been to respond to perceived inadequacies in the way states protect individual rights under their own laws.¹⁵⁰ As a result, it has been salutary to rely on reconciled consent to allow new international legal protections to trump inconsistent domestic laws.¹⁵¹ Indeed, one reason that states around the world have improved their human rights laws (if not their practices) in the past forty years is that international human rights treaties deliberately set standards higher than those in the domestic laws of many states. This practice forced states to amend their domestic laws to comply with their international commitments.¹⁵²

¹⁵⁰ Samantha Power & Graham Allison, *Realizing Human Rights*, at xvii (Samantha Power & Graham Allison eds., 2000) (describing how World War II prompted a recognition that a "higher law [that is, international human rights law] was needed to check and, in extreme cases, override the will of the ruler even when his actions directly affected only his own citizens").

¹⁵¹ Louis Henkin, *The Age of Rights* 17 (1990) ("[National protections for accepted human rights are often deficient; international human rights were designed to induce states to remedy those deficiencies.>").

¹⁵² International Covenant on Civil and Political Rights art. 2, para. 2, Dec. 19, 1966, 999 U.N.T.S. 171 ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.>").

III. CONSENT VERSUS CUSTOM IN INTERNATIONAL LAW

In this section, I will attempt to deal with the ongoing debate based on consent and custom in international law. It is known that the law of treaty is governed by the consent of states because the states cannot be bound against their will.

For a better analysis', some questions need to be asked, is it true that the consent is the beginning and the end of international law? Specifically, with the emergence of new problems and new solutions to old problems related to the parity between treaty and custom, the needs and possibilities of law constantly change. How, then, is a nation to deal with a problem when custom is outmoded? How, in the absence of an international legislature, can unworkable customary law be changed? A nation can, if it wishes, simply act illegally. But more often it will prudently conclude a treaty or treaties.

Indeed, most of the substantive rules regulating international affairs today are found in the myriad treaties concluded between and among nations. Customary international rules makeup only a small portion of the operative international norms and daily the sphere of treaty regulation intrudes on what is left of the area of customary practice. Some arenas of international law have developed so completely in modern times that they have been preempted entirely by treaties. For example, it would be hard to find customary

rules regulating flights through the airspace in the sense of a custom¹⁵³ apart from treaty.

International law has allowed for a curious inroad into the maxim *pacta tertiis nec nocent nec prosunt*¹⁵⁴ in that it is said that when a rule is repeated in a large number of treaties the rule passes into customary law, or that when an important multilateral convention has been in existence for some time, its provisions become absorbed into the stream of customary international law.¹⁵⁵

A. The tacit treaty

A few decades ago a few writers of positivist convictions publicized the theory that international custom is in fact tacit

¹⁵³ There are also wide areas of the law where customary rules are so broad as to be useless in the solution of particular cases. For example, there is a lack of customary law in the case of diplomatic envoys in regard to the extent of diplomatic immunities, the immunities of the subject of the receiving state, the immunities of person combining diplomatic and consular functions, immunities in respect of movable and immovable property, immunities in actions brought in connection with non-diplomatic activities (*e.g.*, commercial) of the envoy, the aspects of express and implied renunciation of immunity, and matters relating to execution, set off, counterclaim, etc. These have been pointed out by Hersch Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 BYIL 65, 87-88 (1929).

¹⁵⁴ *Ibid.*

¹⁵⁵ P.E. Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 BYIL 20, 27 n.2 (1925). In the Nuernberg judgment, it was held that the rules of land warfare in the Hague Convention of 1907 were recognized by all civilized nations by 1939 "and were regarded as being declaratory of the laws and customs of war", Office of US Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression: Opinion and Judgment* 83 (1947).

treaty, distinguishable from treaties strictly so-called only by its form.¹⁵⁶ The idea was not new. It dated back to Grotius, Bynkershoek, and Vattel, but the dualistic doctrine contributed to its revival.¹⁵⁷ The theory went out of favor, and it has been until recent years fashionable to discredit it along with the general discrediting of the exaggerated regard for sovereignty¹⁵⁸ thought to underlie the theories of its proponents.

The doctrine of tacit treaties has been labeled purely fictitious¹⁵⁹ or, alternatively, criticized on specific grounds which had a surface plausibility. In the latter manner Briery writes that the theory of implied consent as the basis of custom fails to explain why international law is binding and observed by other nations which cannot be said to have consented expressly or impliedly.¹⁶⁰ A customary rule, he states, is observed not because it has been consented to, but because it is believed to be binding.

¹⁵⁶ CAVAGLIERI, *Corso Di Diritto Internazionale* 56-62 (3rd ed. 1934); Strupp, *Les Regles Generales du droit de la paix*, in 47 *RÉCUEIL DES COURS* 263, 301-12 (1934); 1 DIONISIO ANZILOTTI, *Cours Du Droit International* 73-76 (1929). Strupp says that international rules taken as a whole form a treaty in the large sense, composed of formal treaties and tacit treaties.

¹⁵⁷ Hugo Grotius, *DE JURE BELLI AC PACIS*, PROLEGOMENA, secs. 1, 17 (1646); EMMERICH DE VATTEL, *LE DROIT DES GENS* sec. 25 (1758); James Madison, *Examination of the British Doctrine* (1806), in 2 *Letters And Other Writings Of James Madison* 229, 262 (1867).

¹⁵⁸ Hersch Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 *BYIL* 65, 83 (19-29).

¹⁵⁹ Josef Kunz, *The Nature of Customary International Law*, 47 *AJIL* 662, 664 (1953).

¹⁶⁰ JAMES BRIERLY, *The Law of Nations* 52 (5th ed. 1955).

¹⁶¹. Such a criticism misconstrues the tacit treaty theory. The theory does not hold that in order for nation *D* to be bound by a rule of customary law nation *D* must itself have consented impliedly to the rule. Rather, once a rule has become customary among nations *A*, *B* and *C*, the general doctrine of international law will apply such a rule to nation *D*.

The reason for Briery's confusion appears to be his own conception that the words "consent" and "treaty," once mentioned, must be strictly limited to the participants of the consent or the signatories of the treaty.¹⁶² It is clear that this reasoning if it is the source of Briery's confusion, is circular.¹⁶³ While international custom is grounded in the consent of specific nations, it comes to be of general validity, even as applied to nations who have given no tract of consent. This is true in practice whatever theory is given to explain it the last states involved will be bound by international custom.

It may be helpful to consider that the first states have in a sense acted as representatives for the entire body of states in the matter.¹⁶⁴ To say, as Briery does, that

¹⁶¹ *Id.* at 53.

¹⁶² This indeed Triepel's view of *customary* law—that it becomes particular law applying only to the tacitly agreeing states. TRIEPEL, *VOLKERRECHT UND LANDESRECHT* (1899). It is this type of extreme view for which most writers blame the positivists.

¹⁶³ Briery, Kelsen, and Gihl have made the same unwarranted extension of the idea of tacit treaty to new states or one which has had no opportunity to agree tacitly to a practice as a nation which has just been given an outlet to the sea and is deemed subject to the international rules regarding the seas.

¹⁶⁴ Indeed, there is nothing strange about one nation acting as a representative for later nations in consenting to practice. The same is very much the

the rule is observed not because it has been consented to, but because it is believed to be binding is really only to say that it has become international law. How it became so is still the question and it seems that at some point in the development the important factor was consent.

B. Consent in treaty and custom

The controversy just examined has proceeded for the most part on assertions and counter assertions by publicists who have had an axe to grind with respect to positivism and dualism. But a recent article by MacGibbon in the British Yearbook has demonstrated that the element of consent at the basis of international custom is indeed the true explanation of such custom.¹⁶⁵ MacGibbon's article is so noted and well-reasoned that it is difficult to believe that future discussion of customary international law will ever again assume the form it took prior to the publication of his paper. For present purposes it will suffice to examine MacGibbon's principal contentions with respect to general customary international law.¹⁶⁶ MacGibbon relies heavily on a statement of

basis of the power of judicial decisions—the parties to a case present arguments that are presumably more or less representative of the views of all states, and the decision rendered becomes a precedent for all nations.

¹⁶⁵ I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BYIL 115 (1957).

¹⁶⁶ MacGibbon devotes considerable space to the law of prescription, which is excluded from the scope of the present paper because of the specificity of effect of such law.

Sir Gerald Fitzmaurice that is well worth quoting again:

*“Where a general rule of customary law is built up by the common practice of States, although it may be a little unnecessary to have recourse to the notion of agreement (and a little difficult to detect it in what is often the uncoordinated, independent, if similar, action of States), it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law”.*¹⁶⁷ It is clear that consent is at the heart of the matter. The opposite of consent, or protest, has the contrary effect of disestablishing the practice as legal. The presence of consent or acquiescence, however evidenced, tends to endow the practice with a general stamp of approval, and after a reasonable period of practice tends to throw the burden on other states to protest. Absent protest, a law is formulated binding on the world community.

The problem of how to find evidence of this consent and what to do with the notion of *opinio juris* in this regard was considered in detail by MacGibbon and shall be examined shortly. For the present, however, let us assume it is possible to show consent to a practice by a state. Under this assumption, consider the relation between custom and

¹⁶⁷ Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-3654: General Principles and Source of Law*, 30 BYIL 1, 68 (1953).

treaty in the following hypothetical examples:

(a.) “The United States launches a number of reconnaissance satellites over a continuous period of time to fly over the airspace of the Soviet Union for the purpose of photographing Russian military installations. Although able to do so, Russia decides not to shoot down or otherwise interfere with these flights.

(b.) The United States and Russia sign a treaty, one provision being that neither nation will interfere with reconnaissance satellites launched by the other. The United States then launches a number of such satellites over a continuous period of time, and Russia does not interfere with them”.

1. Duration of the Consent

One of the apparent differences between the above two cases seen at first glance is that in case (a.) Russia seems to be tacitly agreeing indefinitely to satellite over flights, a precedent obliging her to permit them henceforward, while in case (b.) she agrees conditionally until such time as she might choose to terminate the treaty.

To answer this problem, reference might be had to the basic norm of international law: *pacta sunt servanda*.¹⁶⁸ From the consent

¹⁶⁸ Writers have disagreed whether it is, in fact, the basic norm. However there seems to be little else it can be called and little that can be accomplished without it. It is a moral and a legal norm. Oppenheim and others have called it a rule of customary international law, implying that customary law is on a higher plane than treaty law. See TORSTEN GIHL, International Legislation 14 (1937); DIONISIO

view of international law it is seen that this is the norm which gives custom its binding force. Thus, in case (a), if Russia allows four satellites to fly over its airspace, tacit consent enjoins it from shooting the fifth. Similarly, *pacta sunt servanda* requires that Russia keep its treaty obligations in case (b). Russia would be violating essentially the same norm whether it broke a treaty to fire on the satellite or violated a custom to which they had tacitly acquiesced.

A more difficult question arises if the treaty is of limited duration, explicitly extending for, say, two years. If at the end of that time Russia informs the United States that the treaty will not be renewed and that further flights will be interfered with, she would be within her rights according to the original agreement. For the United States, in consenting to a two-year limit, impliedly consented to the possibility of an opposite rule at the end of two years. But a similar result could be arrived at by custom. Russia could submit initially a conditional protest a protest that the United States stop its flights after two years, though they may continue in the interim. Even in this case of limited duration treaties, there is great similarity therefore between their operation and the operation of custom.

However, it is only reasonable to consider such treaties very limited in the effect they may exert on customary international law, for if a treaty promises less than a universal rule of law, it cannot, barring special circumstances, be considered the equivalent

ANZILOTTI, Cours De Droit International 44 (1929).

of customary practice. Most law-making treaties, however, and to a slightly lesser extent those treaties that extend for a given period of time with the proviso that they are to continue in force indefinitely unless notice be given in advance of termination, set up rules that purport to remain in existence indefinitely. Such treaties are closest to customary practices.

2. Time at which the consent is given

Barring the question of limited duration treaties, the differences between case (a.), over flights permitted, and case (b.), over flights permitted by treaty, are slight, and in many situations or instances would favor case (b.).

For example, in case (b.) Russia's consent is unequivocal. Secondly, there is explicit reciprocal consent by the United States, rather than consent implied because the United States is the acting nation.¹⁶⁹ Finally, from a practical standpoint in the modern world, it would be dangerous if situations analogous to case (a.) were to be the usual way of creating law. The United States would be risking the destruction by Russia of the satellites and moreover the heightening of international tension. Making certain of Russia's consent before launching obviates this danger.

However, classic theory would hold that case (a.) would tend to generate

international custom, and not case (b.). (Of course several other nations or several more acts would be required, in the usual case, before a rule of noninterference with reconnaissance satellites would achieve universal recognition as binding.) Is it not unreasonable to find a complete absence of rule-making force in the second set of facts? The only great difference is a formal one that Russia's consent was received in advance rather than "discovered."

The operative, substantive facts are the same. Underlying the treaty, so to speak, is the practice of the states. The only element that has shifted is the time in which consent is given. In the first case the acting country, the United States, has impliedly consented to reciprocal acts by Russia simply because the United States launched the satellite. Russia's consent to the same principle is also implied. Thus there is in this tacit agreement a union of wills that reconnaissance satellites may travel unmolested. In case (b) the same proposition is explicit. Indeed, it may here be seen that custom resembles treaty practice in a very real sense.¹⁷⁰ The treaty is a formal agreement to do acts which are in respect the same as acts which could form custom in the absence of treaty the same pressures and motives may be inferred to exist in the states which perform these acts. In other words, absent the treaty, the parties would have felt a growing need to do things in the way

¹⁶⁹ It shall later be considered what happens when A's action is consciously in derogation of existing law. When A does so act, can we readily infer consent from A's act that other nations may also break the law?

¹⁷⁰ An *unratified* treaty, if nevertheless implemented for some reason or other by the formulating states, would similarly have the element of underlying custom. There would be a question, though, whether the unratified treaty might indicate consent or the absence of consent.

they legalized through the treaty.

In 1806 Madison suggested this line of thought. One evidence of general consent, he wrote, <<is general usage, which *implies* general consent. The rhetorical question followed: Can *express* consent be an inferior evidence.>>¹⁷¹

3. *Opinio juris* may reduce the consent

Following the discussions made above, the similarity of consent in treaty and custom, in that consent may certainly exist in both, may be clearer in a treaty, and is perhaps different only as to the time it becomes evident. Still, there is another matter which may be raised concerning a possible difference between the types of consent in cases (a) and (b), one which goes to the question of its quality.

Under the classic theory, customary international law is composed of two elements:

1. Usage, the repetition of similar acts by various states.
2. *Opinio juris sive necessitates*, the habit of doing certain actions under the aegis of the conviction that these actions are legally necessary or legally right.¹⁷²

¹⁷¹ James Madison, *Examination of the British Doctrine* (1806), in 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 262 (1867). Compare P.E. Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 BYIL 20, 25 (1925): A Custom proves the achievement of general consent. Treaties, considered as agreements, are acts of consent; considered as documents, they are records or evidence of consent.

¹⁷² LASSA OPPENHEIM, *International Law* 22 (8th ed. Hersch Lauterpacht 1955).

The important question here is the nature of this latter psychological element. Under the analysis of MacGibbon, the rather artificial psychological element¹⁷³ is replaced by the concepts of consent and acquiescence. It might be helpful to present the consent thesis in a somewhat diagrammatic form. Let us denote nation *A* as the acting state and nation *B* as the state which is "involved" in this action. Nation *C* is totally uninvolved, unconcerned, and unaffected by the acts of *A*.¹⁷⁴

There are three kinds of international acts possible act *X* might be the sending of a satellite over the other nation. This is a simple act, since *B* need do nothing positive in the way of acquiescence to allow this act to take place. Act *Y* requires the positive cooperation of state *B*. For example, by *force majeure* a vessel of *A* must dock within the territorial sea of *B*, and *B* assumedly must cooperate in the docking of the vessel. The trickiest act is act *Z*, which is abstention from acting. In the *Lotus* situation, act *Z* would mean that state *A* abstained from exercising criminal jurisdiction over a national of *B*, who on the high seas was responsible for a collision involving a vessel of *A*.¹⁷⁵

When the *opinio juris* is thought of in terms of obligation, as MacGibbon tends to view it,¹⁷⁶ proof would be required that when *A*

¹⁷³ SORENSEN, *Les Sources du Droit International* 100-01 (1946).

¹⁷⁴ SORENSEN, *Les Sources du Droit International* 100-01 (1946).

¹⁷⁵ *Ibid.*

¹⁷⁶ The more usual, though strictly speaking inaccurate, way to interpret *opinio juris* is to conceive of it in terms of a right or an obligation to act in

performed act *X*, *B* would be obliged not to interfere. An immediate difficulty of course is that if *B* does not interfere, there is little chance of discovering whether such inaction is due to a belief that interference is illegal or simply not worth the trouble and effort. Nevertheless, there is some slight assumption that might be made.

The fact that *B* was aware of the act and did not complain tends to show that *B* thought the act legal. Of course, this is very flimsy evidence, particularly in the case of a *new* act, such as the flight of a satellite, where there is no international law. Here it is especially difficult to come to any conclusion as to *B*'s state of mind on the question of legality, since even if *B* were aware of the problem, *B* could not discover what international law would hold on the problem, as there would be no international law on the problem. However, a state would likely protest if it objected to the action and felt protest reasonable, for fear that not doing so would establish an unwanted precedent.¹⁷⁷

On *A*'s side, to conceive of the act in terms of a claim of right presents similar difficulties. How is it discoverable whether

conformity with international law. See Lassa Oppenheim, *supra* note 90, at 22.

¹⁷⁷ Josef Kunz has noted the problem of the original formulation of a norm of customary law. When there is no prior law on a point, the very coming into existence of such norm would presuppose that the states acted in legal error. Josef Kunz, *The Nature of Customary International Law*, 47 AJIL 662, 667 (1953). But after criticizing the Kelsen and Verdross explanations, Kunz concludes that it is a challenging theoretical problem which, as far as this writer can see, has not yet found a satisfactory solution

A did act *X* because *A* felt it was legal to do so, or because it desired to enough to act in a way it felt illegal, or that it acted without any consideration of the legality?

In regard to act *Y* it is perhaps slightly less difficult to find *opinio juris*. The fact of *B*'s action might be *prima facie* evidence of a feeling on *B*'s part that *B* ought to assist. However, this manner of reasoning has drawbacks also, as it views nations as basically unfriendly, acting only in response to legal obligation.

In practice, the only use of *opinio juris* by the International Court of Justice occurred with respect to act *Z*.¹⁷⁸ In situation *Z*, state *B* is totally unaffected in physical sense. What has transpired is simply that nation *A* has not acted with respect to a national of *B*. This is the most extreme situation. It is highly unlikely that any evidence of state of mind can be found with respect to *B*, the nation whose state of mind might have been construed in situations *X* or *Y*.

Therefore the Court could not hope to find anything of international precedent value in examining the practices of *B*. It had to look to state *A*. But state *A*, by hypothesis, did nothing. Here the Court laid down the requirement of *opinio juris* that *A*'s abstention would have to be proved to have been in response to a conviction of an international law requirement for abstention

¹⁷⁸ Apart from the individual opinion of Judge Negulesco in the Advisory Opinion concerning *European Commission of the Danube*, P.C.I.J., Ser. B, No. 14 (1927), the only emphasis of psychological element of custom by the International Court has been in the *Lotus* case.

on A's part. Since A is the "actor" it would also be possible for the Court to see if A abstained under a claim of right, but while logically possible, this is absurd in practice. No nation would feel the need to proclaim that it has a legal right not to exercise criminal jurisdiction over the national of another state in such a situation.

The Court's use of *opinio juris* in this, the most extreme situation does not logically compel the use of *opinio juris* in situations X and Y. Indeed, as MacGibbon has shown, international tribunals have not resorted in practice to this artificial element advanced by the test writers.

MacGibbon's essay demonstrated that the operative fact about the reactions of B to the acts by A is whether or not B consented to the acts. In older terminology, the wording would have been: whether there existed a tacit treaty between A and B. The *opinio juris* is a byproduct, as it were, of this consent: Acceptance of a course of conduct as lawful seems necessarily to involve the further otiose conviction that participants in the course of conduct are entitled to act as they are doing; and this in turn appears to leave little alternative to submission in the belief that submission is obligatory. And, it must be remembered, the *opinio juris* is really needed as evidence of the consent only in the extreme case where there is the absence of a positive act by the "acting" state.

In sum, the differences between treaty and custom are that the treaty is a more reliable instrument of the evidence of international

practice, of consent, and of international character of the act. The similarities are the most crucial: both are based on consent, and both involve practices undertaken in response to the compelling force of the norm *pacta sunt servanda*. Both can encompass a large number of nations in the first instance, and both may affect a large number of third states. Therefore whether the practice of states in the international arena be consented to latently or patently, the practice itself together with the consent should be regarded as precedent for rules of international law. This is not to say that treaties are a form of customary international law, or *vice versa*. Rather, they are on a par with each other and should thus be considered as precedents for international law decisions.

C. The paradox of withdrawing the consent in a treaty and customary international law

Once a rule of customary international law (CIL) has formed, the modern understanding is that it is binding on all states except those that have clearly and persistently objected to the rule prior to the time that it has "ripened" or "crystallized."¹⁷⁹ Persistent objection must involve affirmative international communications, not mere silence or adherence to contrary laws or practices, and there are few examples of agreed-upon successful persistent objection. Moreover, when a new state comes into

¹⁷⁹ Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 458 (1985) ("A State that fails to object prior to the time that the rule finally crystallizes cannot claim exemption from it . . .").

being, either through decolonization or the breakup of another state, the new state is purportedly bound by all previously ripened rules of CIL, even though the new state did not have an opportunity to object. The complete disallowance of unilateral withdrawal from CIL is what we call the Mandatory View.¹⁸⁰

It is accepted that a CIL rule can be overridden by a later-in-time treaty, but only as between the parties to the treaty.¹⁸¹ In that case, the rule continues to bind nonparty states as well as parties in their relations with nonparty states. As a practical matter, therefore, the treaty-override option not only requires obtaining the agreement of other nations, but also that the CIL obligation be such that a nation can differentiate in its conduct between parties to the treaty and nonparties. This will not be possible for some CIL obligations, such as those that concern the human rights obligations of a nation to its own citizens or the resource or environmental obligations of a nation with respect to something regarded as a global commons (such as the air, the seabed, or outer space).¹⁸²

¹⁸⁰ We are considering here only legal doctrine. In light of the uncertain standards for CIL formation and the frequent lack of adjudicative and enforcement mechanisms for this body of law, it is arguable that nations have some de facto ability to exit from CIL by, for example, contesting the content of the rules. We consider this idea of de facto exit in Section V.B when discussing the rule-of-law argument for the Mandatory View.

¹⁸¹ PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 56 (7th rev. ed. 1997) ("Clearly a treaty, when it first comes into force, overrides customary law as between the parties to the treaty . . .").

¹⁸² *Ibid.*

The only way for nations to change a rule of CIL (as opposed to overriding it by treaty) is to violate the rule and hope that other nations accept the new practice. As one commentator explained with approval, "Nations forge new law by breaking existing law, thereby leading the way for other nations to follow."¹⁸³ Needless to say, there is tension between this idea and the idea of an international rule of law.¹⁸⁴

A small set of international norms, which may or may not be a subset of CIL, has a special status. These norms, referred to as "peremptory norms" or "*jus cogens* norms," are said to arise from nearly universal practice and to be absolute in their character, such that they do not permit any exceptions—even in times of emergency.¹⁸⁵

¹⁸³ Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 21 (1985); see also, e.g., Anthony D'Amato, *The President and International Law: A Missing Dimension*, 81 AM. J. INT'L L. 375, 377 (1987) ("Existing customary law, then, contains the seeds of its own violation; otherwise it could never change itself."); Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 957 (2005) ("[C]ustomary international law is thought to be altered by acts that initially constitute violations of old rules; that is how it changes.").

¹⁸⁴ G.J.H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 99 (1983) ("It must be quite an extraordinary system of law which incorporates as its main, if not the only, vehicle for change the violation of its own provisions."); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 8 (1974-75) ("There is no doubt that customary rules can be changed in this way, but the process is hardly one to be recommended by anyone who wishes to strengthen the rule of law in international relations.").

¹⁸⁵ Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1987); Evan J. Criddle & Evan

Examples purportedly include prohibitions on genocide, slavery, and torture.¹⁸⁶ *Jus cogens* norms cannot be overridden, even by treaty, and there is no right to opt out of them by prior persistent objection.¹⁸⁷ This has been confirmed by article 53 of VCLT which stipulates that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

There is significant debate about the materials that are relevant in discerning the existence of a CIL (or *jus cogens*) rule. For example, although treaty and CIL obligations frequently overlap, there is debate over whether and to what extent treaties can serve as evidence of CIL.¹⁸⁸ Nevertheless, claims about the content of

CIL often rely heavily on the content of treaties.¹⁸⁹

There is also debate over whether and to what extent nonbinding resolutions promulgated by international bodies, such as the U.N. General Assembly (in which each nation has one vote), have evidentiary value.¹⁹⁰ In practice, due to resource, expertise, and other constraints, few adjudicatory bodies conduct anything like a 193-nation survey of state practice in deciding whether to recognize and apply a rule of CIL. It is also common in academic commentary to see claims about the content of CIL that are not based on empirical evidence of state practices.¹⁹¹

Running through all these uncertainties and debates surrounding CIL are questions about whether it can or should be grounded in state consent.¹⁹² In an international system that

Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009);

¹⁸⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987).

¹⁸⁷ Holning Lau, Comment, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495, 498 (2005).

¹⁸⁸ Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986); Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988).

¹⁸⁹ R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 275 (1965-66) ("Both multilateral and bilateral treaties are not infrequently cited as evidence of the state of customary international law.").

¹⁹⁰ See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 85 (1991); see also, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254-55 (July 8) ("[General Assembly resolutions] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinion juris*.").

¹⁹¹ See, e.g., Jack L. Goldsmith, Panel Discussion, *Scholars in the Construction and Critique of International Law*, 94 AM. SOC'Y INT'L L. PROC. 317, 318 (2000).

¹⁹² LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 27 (1995); MARK WESTON JANIS, INTERNATIONAL LAW 44 (5th ed. 2008); see also S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) ("The rules of

lacks a central sovereign government, some commentators argue that the consent of nation-states is a prerequisite for the binding force of international law. Other commentators dismiss consent as the touchstone for the legitimacy of CIL, noting (among other things) that it is difficult to reconcile the modern understanding of CIL with any meaningful conception of state consent.

Whatever the proper role of consent in international law, CIL (as it is currently conceived) is less consensual than treaty-based law. Treaties bind only nations that have affirmatively ratified them, and, as discussed, nations often have the ability to withdraw from treaties, albeit sometimes with a notice requirement. CIL, by contrast, binds new states regardless of their consent and binds existing states based merely on their silence. There is also no unilateral right of withdrawal.

IV. CONCLUSION

The current arena of international law is dominated by the treaties which are the main source of international law. The treaties are adopted or formed by consent of states, thus one can be attempted to say that the consent is the beginning and the end of international law. Though consent has an important role to play, the world's greatest problems can be addressed unless we are prepared to overcome the problem it creates the consent problem. International law is built on the foundation of state consent. A state's legal obligations are overwhelmingly some would say exclusively based on its consent to be

law binding upon States therefore emanate from their own free will . . .").

bound. This focus on consent offers maximal protection to individual states.

The previous analysis illustrated that there is a need to rethink the approach to consent in the formation of customary international law. There are normative reasons not to stick to one uniform approach, but to distinguish different social situations and different levels of uncertainty. This contribution considered two such situations. First, there are rules with regard to consent, which serves as another fundamental principle of international law, performs at least three different functions. Using consent, states create and amend international law and excuse other states' wrongdoings. Most significantly for this Article, consent enables the supremacy principle to function.

Second, we have discussed, then, the controversy of consent in treaty and custom, in that consent may certainly exist in both, may be clearer in a treaty, and is perhaps different only as to the time it becomes evident. However the International law has allowed for a curious inroad into the maxim *pacta tertiis nec nocent nec prosunt* in that it is said that when a rule is repeated in a large number of treaties the rule passes into customary law, or that when an important multilateral convention has been in existence for some time, its provisions become absorbed into the stream of customary international law.

Therefore the consent is not the beginning and the end of international law. This would be true if the international law is exclusively based on the treaty law.