CIL AND NON-CONSENSUAL LAW

Consent lies at the heart of international law. Though it is clearly false to state that no obligation can emerge without a state’s consent, non-consensual rule-making is quite rare. So much so, in fact, that it is not unusual for commentators to declare that international law “is based on the consent (express or implied) of states.” Indeed, from time to time one sees learned writers, overtaken with an enthusiasm for consent, going so far as to say that a state cannot be bound without its consent.

In this brief discussion paper, I attempt to make just a couple of points. First, when considering the content of customary international law (CIL), the meaning of opinio juris must be taken to mean the sense of legal obligation felt by states other than the acting state. In this sense, while CIL is created by states (or by the beliefs of states) it is not within the control of the acting state and, in this sense, is a non-consensual source of international law. Second, though CIL has

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2 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 135 (June 27) (“[I]n international law there are no rules, other than such rules as may be accepted by the states concerned, by treaty or otherwise.”); Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3, 47 (Feb. 5) (“[H]ere as elsewhere, a body of rules could only have developed with the consent of those concerned.”); S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) (“The rules of law binding upon States ... emanate from their own free will.”); ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 169 (1987) (“Ever since the beginning of the international community . . . law was brought into being by the very [s]tates which were to be bound by it . . . there was complete coincidence of lawmakers and law-addressees.”); Gennadii Mikhailovich Danilenko, Law-Making in the International Community 7 (1993); Louis Henkin, International Law: Politics, Values, and Functions, 216 Recueil des Cours d’Academie de Droit Int’l 9, 27 (1989) (“[A] state is not subject to any external authority unless it has voluntarily consented to such authority.”).
many failings as a source of law, its potential to bind states (however weakly) against their will is not one of them. Though consent plays an important role in the international system, the presence of non-consensual forms of rule-making is essential, and CIL represents one such form. Indeed, aside from the power of the Security Council to make binding international law, CIL represents the only way states can be formally bound without their consent.³ Indeed, we should embrace this non-consensual form of rule-making.

A. Non-Consensual Customary International Law

CIL is certainly the oldest form of nonconsensual international law. It is nonconsensual in the sense that a state can be bound by CIL even if it has not agreed to or accepted the rule. The familiar requirements for CIL are that there be a sufficiently general practice of states and *opinio juris* (sense of legal obligation).⁴ Neither of these requirements explicitly requires consent, and although attempts have been made to argue that CIL satisfies conventional notions of consent, those arguments cannot sustain even mild scrutiny.⁵

If *opinio juris* required that the acting state itself felt a sense of legal obligation, this would begin to approach a notion of consent. But even this would not be enough. Perceiving a legal requirement as obligatory is not at all the same as consenting to that requirement. For example, a public corporation in the United States can recognize an obligation to disclose certain information under the Securities Act, yet this does not imply that the firm consented to that obligation. Similarly, to a state a sense of legal obligation might reflect (among other things) an understanding of the norms of the international community even if the state does not and would not consent to such norms.

In any event, the dominant view on the meaning of *opinio juris* is that the sense of legal obligation must be felt by states generally and not by the acting state in particular. The ICJ reflects this view in the *North Sea Continental Shelf* cases. In describing CIL, the ICJ states that

³ This statement might be a mild overstatement if one pushes hard on source of law such as general principles.
⁵ Id.
“[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”\(^6\)

Despite the tenuous connection between CIL and consent, the commitment to consent within international law is so strong that some commentators have felt compelled to seek a reconciliation of the two. The most common argument is based on “inferred consent.”\(^7\) The “inferred consent” argument relies on the persistent objector doctrine to conclude that if a state fails to object to a rule of CIL, then this failure to object can be taken as support for the rule.\(^8\) Whatever one might think of the persistent objector doctrine, it provides far too narrow an exception to support the inferred consent argument. First, the failure to object to a norm is not at all the same thing as consent.\(^9\) A state might fail to object for any number of reasons having nothing to do with consent. It may prefer to avoid objecting for political reasons; it may not feel that the norm is changing into custom — making objection unnecessary; or it may simply not be sufficiently affected by the rule to bother objecting. The inferred consent theory also fails to explain why objections brought after a CIL rule is established are insufficient to satisfy the persistent objector doctrine and why new states, which could not possibly have objected at the time CIL rules were being formed, are not able to take advantage of the persistent objector doctrine.

Some writers have attempted to rescue the notion of consent in CIL by arguing that states have consented to “secondary” rules of CIL.\(^10\) The idea here is that states have consented (at some unspecified moment in the past) to the way in which CIL rules change over time, including a rule under which CIL can arise without a state’s affirmative consent.\(^11\) At best, this approach amounts to a sort of consent-once-removed. On its own terms, the argument is flawed because it is simply a fiction to claim that states consented to the rules governing the creation of CIL.

\(^9\) Byers, supra note 7, at 143.
The argument does not (and could not) claim that states ever gave explicit consent to a set of secondary rules governing custom formation. Even if one does not demand explicit consent (though without such a demand the argument seems empty) the rules governing the formation of CIL were overwhelmingly developed by a few European states. The vast majority of states did not play any significant role in the development of the rules governing CIL.

Furthermore, there is no scope for any state to withdraw its consent to the secondary rules of CIL – or even for a new state to withhold its consent to such rules. Put another way, the supposed “consent” to these rules turns out to be a necessary and unavoidable part of becoming a state. Perhaps this is consent in the same sense that humans consent at birth to the laws or gravity.

Upon examination, then, it is clear that CIL can and does bind states without their consent. It is a non-consensual form of international law.

**B. The Problem with Consent**

It is not my goal here to argue that CIL is a particular powerful form of international law or that it is something that the community of states can effectively manipulate in pursuit of policy objectives. Neither of these propositions is true. My claim here is more modest. It is simply that there is too little – indeed vanishingly little – space for non-consensual rule-making in international law. A consent-based system creates a powerful status-quo bias that makes it difficult for the law to adapt as circumstances change. CIL introduces some, albeit modest, flexibility into this system, both by allowing the emergence of rules without the consent of some states and by allowing rules to change over the objections of some states. My claim is simply that this is a good thing. I take no position on the impact of this limited flexibility which, in truth, I suspect is quite small.

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12 See Michael Akehurst, *Custom as a Source of International Law*, 47 Brit. Y.B. Int’l L. 1, 23 (1977) (“A State can be bound by a rule of customary international law even if it has never consented to that rule.”).
States are, within reason, sovereign within their own territories. For this reason, issues tend to emerge at the international level only when they implicate the interests and concerns of two or more states.\(^{13}\) We can think of these issues as problems demanding some form of cooperation; and we can think of international law as a tool to facilitate that cooperation.

The way in which states respond to a particular challenge has two distinct consequences. The first consequence, which can be called the “efficiency effect,” affects the total value generated by the actions of states. Going to war destroys value and, in this sense, does poorly on the efficiency dimension. Improved management of a commons such as global fisheries represents an improvement in efficiency. The second consequence is distributional. Whatever value is generated, alternative approaches may distribute the resulting value differently. While states rarely (if ever) go to war to increase the total value generated by state interactions, they frequently fight in pursuit of a larger share of that value. Similarly, agreements on fisheries are impeded by the difficulty in overcoming objections to the resulting distributional implications.

Consensual international law allows states to manage cooperative problems. In an ideal Coasian world (i.e., one without transaction costs) consensual lawmaking would be sufficient to achieve the highest value outcomes in efficiency terms. The particulars of an agreement would affect distribution, but transfers could be constructed to ensure that all participants benefit from the value-maximizing agreement. Treaties represent the most obvious form of consensual lawmaking, but CIL can also play this role. An implicit agreement, developed over time, could become a rule of CIL. If all states involved supported the rule, then it could be called a consensual outcome. It would also be a good outcome in the sense that all states would be better off (otherwise, why would they each support the rule?).

We do not, however, live in a Coasian world. States often struggle to reach agreements that maximize the total value generated and identifying appropriate transfers can be extremely

\(^{13}\) One can think of this as issues that involve some form of externality.
difficult. In a consent-based system, the result is often paralysis. Where a group of states (or even a single one) refuses to consent, no agreement can be reached.\(^1^4\)

CIL provides one possible escape from this situation. If a large majority of states support a particular rule, and believe (or come to believe) that the rule is legally required, then it comes to bind even those states that are unwilling to consent and those that do not yet exist.\(^1^5\) It is true that a state can, at least in principle, be a persistent objector. But the requirements to maintain that status are extraordinarily demanding and only the most vehement objector is likely to succeed.\(^1^6\) Indeed, it is so difficult to be a persistent objector that some commentators argue that the doctrine is essentially irrelevant.\(^1^7\)

The remaining question is whether it is good or bad for states to be bound in this way. Do we prefer a world in which one or more states will be legally bound against their will (or at least without their consent) when many others believe a rule exists? There is no doubt that consent provides a valuable bulwark against coercion and value-reducing agreements. The cost of this protection, however, is a powerful status quo bias. It seems far more likely that the non-consensual potential of CIL improves rather than harms the international legal system. The alternative – an international legal system in which consent represents the only way to deploy

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\(^{1^4}\) This assumes, of course, that the state is essential to the agreement. Agreements can, of course, be formed by subsets of states that are supportive of a particular legal rule.

\(^{1^5}\) I put aside for now the usual questions about how many states are enough, how to identify the requisite sense of legal obligation, and so on.

\(^{1^6}\) As is familiar, a persistent objector must persistently and openly dissent while the rule is in formation, and then must continue to do so once the rule is in place. This rules out “subsequent objectors,” including states that did not exist when the rule was formed and states that had no interest in the rule at the time. It also excludes states that are insufficiently consistent with their objections. See Restatement (Third) of the Foreign Relations Law of the United States, § 102 cmt. d (1987) (“A dissenting state which indicates its dissent from a practice while the law is still in a state of development is not bound by that rule of law even after it matures.”); Charney, supra note 115, at 2 (“Virtually all authorities maintain that a State which objects to an evolving rule of general customary international law can be exempted from its obligations.”); Mendelson, supra note 114. Other useful articles on the persistent objector doctrine include David A. Colson, How Persistent Must the Persistent Objector Be?, 61 Wash. L. Rev. 957 (1986); Stein, supra note 120, at 457.

international law to further cooperation – would rule out arrangements that impose modest costs on one state and large benefits on all others. It would also invite hold-out behavior by states, even if they stand to benefit from a proposed rule. These are extreme results. It is worth noting that it is difficult to think of many important forms of governance that rely so heavily on consensus. It is no accident that national legislatures, homeowners’ associations, corporate boards, and academic faculties do not operate by consensus.

The last paragraph makes the point that non-consensual rule-making has the potential to generate rules that provide large benefits to most states and small costs to one or a few states. It is also true, however, that it lead to rules that provides modest benefits to many states and enormous losses to one or a few others. The normative desirability of the system turns on whether the relative frequency and importance of these two outcomes. We may also be concerned with distributional consequences of a non-consensual system if rules consistently favor some states at the expense of others. These are legitimate concerns, but it strains credibility to think that the correct response is to abandon any hope of ever entering into non-consensual rules that add value to the international system.

The consensual alternative to the current non-consensual system of CIL would be an extreme one in which no gains, regardless of their size, could ever justify even the smallest loss to a single state. A system of non-consensual CIL represents the smallest of steps away from that scenario. It opens the door even so slightly to high-value cooperation that does not benefit every single state. To the extent it allows any additional forms of cooperation, it allows the most important and valuable from a global perspective. The result is far more likely to be good, from a global perspective, than bad.\textsuperscript{18}

\textsuperscript{18} I also note, without further development here, that the costs of non-consensual rules are limited by the fact that states are able to violate international legal rules. No rule of CIL can impose costs beyond the cost of violating the rule.