

The Significance of State Consent for the Legitimate Authority of Customary International Law^{*}

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experience has taught us, that human affairs would be conducted much more for mutual advantage, were there certain symbols or signs instituted, by which we might give each other security of our conduct in any particular incident.¹

the reasonable expectation produced by a promise ... [which is] a declaration of your desire that the person for whom you promise should depend on you for the performance of it.²

1 Introduction

Norms of customary international law (CIL) pose a dilemma for international courts. Rules (and principles) of CIL are unwritten sources of international law with two central constituent features: they form ‘a general practice’ which enjoys ‘acceptance as law’ (*opinio juris*).³

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¹ ‘Of the Obligation of Promises’ D Hume, *A Treatise of Human Nature* (first published 1739, Clarendon Press 1960).

² A Smith, ‘Of Contract’ in RL Meek, DD Raphael & PG Stein (eds), *Lectures on Jurisprudence* (Oxford University Press 1978) 263.

³ ILC, ‘Draft Conclusions on the Identification of Customary International Law’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11, General Commentary 3 (CIL Conclusions); Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993, art 38(1); Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force

Among CIL are various *jus cogens* norms, with a higher rank than treaty law and other CIL.⁴ Judges and scholars may thus disagree about whether alleged CIL indeed is a rule of CIL – whether it satisfies both the two necessary conditions, its specific contents and whether it is *jus cogens*.

Customary international law appears to challenge the central role of state consent in accounting for the legitimacy of public international law (PIL) in general. Consider the immunity of foreign heads of state, the principle of non-refoulement, or *jus cogens* norms that outlaw slavery, torture, genocide, aggression, or crimes against humanity. Sovereign states are under a legal obligation to comply with these CIL norms, even though they have not explicitly consented to them. How should international courts accommodate non-consent-based CIL and state sovereignty? The following reflections outline one strategy that avoids or helps address challenges wrought against other attempts to create more consistency and coherence between CIL and the other sources of international law – whilst securing a central role for state consent.

Some argue to weaken the conception of state consent to include various ‘tacit’ forms in CIL. Challenges to these strategies are *legio*, including how to detect the sort of tacit consent that – unlike forced acquiescence or mindless habituation – can help account for the justificatory binding force of such consent.

Similar challenges arise when resorting to purely hypothetical consent. Thus, some argue that states sometimes have good reason to be bound to CIL norms precisely without their consent, in response to certain collective action problems.⁵ Such functionalist rationales illuminate the reasons states may have to comply with specific CIL norms, but they stop short of explaining or justifying the authority of such norms over sovereign states: why are states bound by such norms, and

27 January 1980) 1155 UNTS 331, art 31(3)(c); *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Rep 3 [77].

⁴ Some *jus cogens* norms may instead be ‘general principles of law’; ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries’ (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001/II – Part Two] YBILC 31 (ARSIWA); ILC (n 3).

⁵ AT Guzman & J Hsiang, ‘Reinvigorating Customary International Law’ in CA Bradley (ed), *Custom’s Future: International Law in a Changing World* (Cambridge University Press 2016); L Helfer & I Wuerth, ‘Customary International Law: An Instrumental Choice Perspective’ (2016) 37(4) *MichJIntlL* 563.

bound by them rather than by other equally functional rules? Others seek consistency by arguing the reverse: consent-based treaty obligations themselves are but instances of CIL since they rest on custom. Such strategies beg the question of whether there are any relevant differences in kind between treaties and CIL – what role does state consent serve? And what to make of the various constraints on when consent binds states, such as in the Vienna Convention on the Law of Treaties (VCLT) Articles 48–53? Some instead bite the bullet and downplay CIL as a source of international law, because treaties have come to replace and strengthen such unwritten norms.⁶ But such historical and causal claims are contested, and fail to account for all CIL – whether, for example, the authority of *pacta sunt servanda* only rests on states' consent 'all the way down'.

The following reflections pursue another answer to why and when non-consent-based CIL enjoys legitimate authority over states. A plausible account of why states have an obligation to honour treaties they consent to *also* contributes to justify states' obligation to honour CIL norms – which they have given normatively significant consent to. The shared normative basis for both sorts of obligations may be a 'Principle of Non-manipulation', a norm *to not violate intentionally created rightful expectations*. The account draws much on Scanlon, MacCormick and Hart.⁷

The aim of these reflections is limited to identifying one shared normative premise for the authority of treaties and of CIL: the principle of non-manipulation. This does not exhaust their normative premises – such as the justification of the *jus cogens* status of some CIL and their constraints on treaties. The account does not deny that state consent is often a valuable mechanism for states to commit to new obligations – to

⁶ J Trachtman, 'The Growing Obsolescence of Customary International Law' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2016).

⁷ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 1968) 28; TM Scanlon, 'The Significance of Choice' (1986) 7 *The Tanner Lectures on Human Values* 149, 211; N MacCormick, 'Voluntary Obligations and Normative Powers I' (1972) 46 *Proceedings of the Aristotelian Society* 59; J Raz, 'Promises and Obligations' in J Raz & PMS Hacker (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Oxford University Press 1977); TM Scanlon, 'Promises and Practices' (1990) 19(3) *Phil & Pub Aff* 199; N Kolodny & RJ Wallace, 'Promises and Practices Revisited' (2005) 31(2) *Phil & Pub Aff* 119; a frequent alternative is to try to build on a duty of fair play, D Lefkowitz, 'The Legitimacy of International Law' in D Held & P Maffettone (eds), *Global Political Theory* (Polity 2016) discussed briefly below.

the contrary, there are reasons to endorse the consent mechanism for states to create legal obligation. But rather than regard it as the centre and normative bedrock of international law with some odd epicycles of exceptions and conditions, we should understand the consent mechanism as embedded in a broader normative structure for international law. Some such normative premises also allow us to justify some non-consent-based CIL.

Section 2 motivates the quest for the grounds for valuing state consent. Section 3 defends state consent as necessary to render certain PIL norms legitimate authorities for international judges and other compliance constituencies. The justification is partly based on a normative principle of non-manipulation, to not harm other actors who have formed reasonable expectations about our future conduct on the basis of our deliberate attempts to foster such expectations. States can use consent to send such complex signals to others, that it henceforth regards some norm as an exclusionary, somewhat content-independent reason for action.

Sections 4 and 5 considers why non-consent-based CIL may also enjoy legitimate authority over states. The same principle of non-manipulation may contribute to justify norms that bind states even though they have not performed any recognisable act of consent.⁸ Section 6 brings this account to bear on some contested conclusions of the International Law Commission's (ILC) final report on the 'Identification of Customary International Law' (Conclusions or ILC Conclusions). This account may also guide the unavoidable broad discretion judges must exercise in discovering and creating CIL.⁹ The concluding section responds to several of the apparent puzzles about the scope and conditions of state consent to valid treaties, and considers objections concerning the relationship between PIL and normative premises such as the principle of non-manipulation: that it is too vague or that the account is unhelpful adds nothing.

2 Some Challenges and Puzzles Concerning State Consent in PIL

Of particular concern here are several apparent puzzles concerning the relationship between CIL and state consent. A wide range of authors have sought to explain the binding nature of all traditional sources of PIL exclusively based on consent. Some claim that there are great benefits to

⁸ I am grateful to Asif Hameed for prompting this clarification.

⁹ ILC (n 3) Conclusion 9.

require state consent as the sole basis of the legitimate authority of international law. However, such a requirement also entails some costs: consent by all states serves to *prevent* agreement to ‘global public goods’, so that important human interests go unmet.¹⁰ Leaving the cost-benefit issues aside, consider various claims about why consent enables states to create new legally binding obligations. Consent is often regarded as a central expression of state sovereignty, yet many challenge the central role of it in endowing international law with normatively legitimate authority in the following sense: how – if at all – and when, does state consent justify the claims of each of the sources of PIL to be legitimate authorities? That is: how does their consent give states new reasons to act otherwise, and judge new reasons when they interpret and adjudicate?

I shall suggest that CIL plays several roles with regard to when the mechanism of state consent creates valid PIL. The relevant conception of state consent should be consistent with and might help justify that source’s claim to be a legitimate authority. That is, what are the scope conditions and background requirements for when state consent creates new rules that enjoy legitimate authority over particular subjects?

I submit that the roles for and constraints on state consent in current CIL may identify a broader normative framework for when CIL (and other sources of PIL) is a legitimate authority for states and international courts (ICs): when do these norms give the actors reason to act differently than they otherwise would, and what is the appropriate role of state consent? On closer scrutiny, it seems that states’ consent is neither necessary nor sufficient for them to have or acquire legal obligations as a matter of PIL.

2.1 *Challenges to State Consent as a Necessary Normative Basis for CIL*

Several arguments based on the origins of such consent would appear to fail. Consider a frequent form of argument that draws from premises akin to ‘the presumptive ability of State representatives to speak and act on behalf of nations and their citizenry’.¹¹ State consent on this account binds because it expresses the moral autonomy of its citizens. Such a democratic, person-based line of argument appears implausible for PIL, at least without further elaboration. It seems unable to account for

¹⁰ N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108(1) *AJIL* 1.

¹¹ Y Shany, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’ (2012) 106(2) *AJIL* 225, 241.

how authoritarian non-democracies can be bound – if at all. Their claims to act ‘on behalf of’ their citizenry seem blatantly false in the absence of any signalling or accountability mechanisms linking the executive to the citizenry’s preferences.¹² Some may bite the bullet and conclude that non-democratic states cannot bind themselves by consent to treaties. Yet they – and other states – appear to hold otherwise, and there seems to be good reasons to hold non-democracies to be legally – and arguably morally – obligated to treaties when that is crucial to secure objectives such as combating climate change, piracy, or human rights violations. How can this be?

A second kind of challenge to claims that state consent is the sole reason that PIL binds states as a legitimate authority concerns the risk of infinite regress – a ‘chronological paradox’.¹³ In particular, why is it that their consent binds states? Appeals to the fact that states agreed to the legal norm ‘*pacta sunt servanda*’ in the VCLT would appear relevant, but is insufficient. Several states have not consented to the VCLT. Moreover, how could states’ act of consent to the VCLT *create* a state obligation, if state consent had no such magical consequences for the states prior to their consenting to the treaty? The binding force of the practice of state consent itself cannot only rest on the binding force of state consent ‘all the way down’.¹⁴

In order to accommodate CIL as based on state consent, Suarez and many later scholars have appealed to versions of ‘tacit’ or ‘presumed’ consent.¹⁵ Such strategies meet with a range of objections. Who has the authority to determine the specific content of norms that a state tacitly consents to?¹⁶ Are these norms ‘particular’ among a limited group of

¹² T Christiano, ‘Climate Change and State Consent’ in J Moss (ed), *Climate Change and Justice* (Cambridge University Press 2015) 22.

¹³ M Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) ch 9.

¹⁴ H Lauterpacht, ‘The Nature of International Law and General Jurisprudence’ (1932) 37 *Economica* 301; JL Brierly, ‘The Basis of Obligation in International Law’ in H Lauterpacht & CHM Waldock (eds), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (Clarendon Press 1958); A Pellet, ‘The Normative Dilemma: Will and Consent in International Law-Making’ (1989) 12 *Aust YBIL* 22; E Posner, ‘Do States Have a Moral Obligation to Obey International Law?’ (2003) 55(5) *Stan L Rev* 1901, 1910–11; R Collins, ‘Consent, Obligation and the Legitimate Authority of International Law’ in P Capps & HP Olsen (eds), *Legal Authority Beyond the State* (Cambridge University Press 2018) 206.

¹⁵ F Suarez, *The Laws and God the Lawgiver* (Naples 1612); more recent contributions include K Wolfke, *Custom in Present International Law* (2nd ed, Martinus Nijhoff 1993).

¹⁶ J Locke, *Two Treatise of Government* (first published 1690, The New English Library 1963) 2nd treatise, ch 8 [119].

states only, or general? How can we distinguish normatively binding tacit consent from ‘tacit acquiescence’,¹⁷ or from submission as the only alternative to destruction?¹⁸

The ILC Conclusions explicitly dismiss state consent as a plausible ground for CIL. They note the *peculiar* nature of CIL as not based on formal consent. The Conclusions include the term ‘*opinio juris*’ alongside ‘accepted as law’, because ‘it may capture better the particular nature of the subjective element of customary international law as referring to legal conviction and not to formal consent’.¹⁹

Several authors argue that these foundational challenges and various peculiar features of the practice of state consent gives reason to question the significance of consent for issues of legitimate authority.²⁰ These concerns should not lead us to dismiss state consent too quickly. The topic at hand – of the legitimacy of CIL – can benefit from reflections on the reasons that may have led us to believe that consent in general, and state consent in particular, endows parts of PIL with legitimate authority – that is, so that states may have moral obligations to comply with PIL.²¹

2.2 *Puzzles of State Consent*

There are several striking features of the role of state consent. Standardly, a state’s consent must be informed and voluntary to create an obligation, not ‘procured by the threat or use of force’.²² However, aggressor states may be bound by peace treaties even if they sign only due to threats carried out in accordance with the UN Charter.²³

¹⁷ Wolfke (n 15) 97.

¹⁸ Thucydides, *The Complete Writings of Thucydides: The Peloponnesian War* (Random House 1951).

¹⁹ ILC, ‘CIL Conclusions’ (n 3) 123 [665].

²⁰ Thus D Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’ (1999) 93(3) *AJIL* 596; M Zürn, ‘Global Governance and Legitimacy Problems’ (2004) 39(2) *Government and Opposition* 260; A Buchanan & RO Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20(4) *Ethics and International Affairs* 405, 412–14.

²¹ N Roughan, ‘Sources and the Normativity of International Law: From Validity to Justification’ in S Besson & J d’Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 680; O Suttle, ‘Rules and Values in International Adjudication: The Case of the WTO Appellate Body’ (2019) 68(2) *ICLQ* 399.

²² VCLT art 52.

²³ *ibid* art 75.

States are also subject to some legal obligations without their express consent – such as *jus cogens* norms, ‘accepted and recognized by the international community of States as a whole’, but not necessarily accepted by every state.²⁴ Indeed, the number of non-consent-based CIL suggests that state consent is indeed the exception. Consider the weakened persistent-objector rule, third-party effects of treaties giving rise to a general practice, majority voting within treaty bodies, law making by international organizations and international courts, invalid reservations, or the severability doctrine.²⁵ Sometimes states appear to agree to treaties that crystallise existing CIL, such as *pacta sunt servanda* as recognised in Article 26 of the VCLT.²⁶ Their consent then does not create new obligations, but the reverse: they consent as a way to recognise and confirm that they regard themselves as already bound. Finally, some CIL norms such as *jus cogens* circumscribe the material contents of the legal obligations states can create through their consent – even retroactively.²⁷ Indeed, new *jus cogens* norms may in principle even invalidate treaties retroactively. How can such constraints be justified?

So consent plays important roles when PIL makes claims to be obeyed or deferred to.²⁸ But the mechanism of consent is neither always necessary, nor always sufficient for sovereign states to be under, create, or

²⁴ *ibid* art 53; ILC, ‘CIL Conclusions’ (n 3) Conclusion 8.

²⁵ A Peters, ‘Global Constitutionalism Revisited’ (2005) 11 *International Legal Theory* 39, 51; M Fitzmaurice, ‘Third Parties and the Law of Treaties’ (2002) 6(1) *UNYB* 37; J Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2006); I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012); E Fahey, *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (Routledge 2017); ILC, ‘Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law’ (ILA, 2000) Principle 10 and its accompanying commentary; ILC, ‘CIL Conclusions’ (n 3) Conclusion 11(1)(c); ILC, ‘Report of the International Law Commission on the Work of Its 59th Session’ (7 May–5 June and 9 July–10 August 2007) UN Doc A/62/10, 101; L Helfer, ‘Nonconsensual International Lawmaking’ (2008) 2008(1) *U Ill L Rev* 71, 75; R Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’ 96(3) *AJIL* 531; C Tomuschat, ‘Obligations Arising for States without or against Their Will (Volume 241)’ in *Collected Courses of the Hague Academy of International Law* (Brill 1993), 262–64. I owe some examples to an anonymous reviewer.

²⁶ ILC, ‘Fourth Report on the Law of Treaties by Gerald Fitzmaurice, Special Rapporteur’ (17 March 1959) UN Doc A/CN.4/120, reproduced in [1959/II] *YBILC* 37, 42.

²⁷ VCLT arts 53 & 64.

²⁸ This is consistent with S Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press 2015) 4; T Christiano, ‘Is Democratic Legitimacy Possible for International Institutions?’ in D Archibugi, M Koenig-Archibugi

avoid, legal obligations. State consent thus seems to create new binding obligations only within some material domain and when some procedural conditions are met. Not all these rules that regulate state consent can exhaustively be based on state consent. A better understanding of the present practice calls for further reflections on the reasons to value state consent, thus regulated, in creating legitimate authority.

3 Why Value State Consent?

The practice and puzzles of state consent sketched above calls for further reflection about the role of state consent, so that we neither dismiss CIL and other PIL norms simply because they are not based on state consent, nor rashly approve the tendency that state consent is ‘falling out of favour’.²⁹ The conditions, limitations and incompleteness of state consent as necessary or sufficient conditions for some of the states’ legal obligations may help us identify the justification that such circumscribed state consent provides, to understand why and when international law in general, and CIL in particular, can correctly claim to enjoy legitimate authority.³⁰ The standards for when CIL is a legitimate authority may be different for states, for judges who interpret and adjudicate international law, and for other ‘deference constituencies’.

Such reflections about how well state consent secures certain values may help us assess both criticisms and improvements to the present alleged central role of state consent. On the one hand, the mechanism of state consent may privilege the *status quo* unduly, or give too many actors untrammelled discretionary power to avoid morally required obligations, and block beneficial or urgently needed treaties.³¹ On the other hand, improvements will presumably be better specified in light of the reasons we have to value international law, so that we can further fine tune the conditions and exceptions for when state consent creates binding legal obligations – including a better understanding of why and when we have reason to value also the consent of non-democratic states.

& R Marchetti (eds), *Global Democracy Normative and Empirical Perspectives* (Cambridge University Press 2011) 69.

²⁹ Collins (n 14); Krisch (n 10).

³⁰ There may be no reason to assume that international legal positivism – understood as a theory of interpretation of given sources – should answer such questions. But theories of international law with more comprehensive objectives might do so.

³¹ For example AT Guzman, ‘Against Consent’ (2012) 52(4) *VaJIntlL* 747; Christiano (n 28).

Attention to our reasons to value state consent may thus also help us acknowledge certain non-consent-based sources of PIL – be it soft law, lawmaking by international organizations and by international courts – and CIL. Their lack of state consent may be open to benefits but also further risks – risks that may be addressed in light of such a broader understanding. So: why might sovereign states, born free, consent to live in chains? What reasons do they have to consent to treaties in order to publicly acquire or acknowledge an obligation to defer to such norms – to subject themselves to their authority?³² In general, state consent grants states some *influence over the future* within some policy space that may be of value to them and their citizens for several reasons.

3.1 *Non-domination*

State consent grants states a domain of protected sovereignty that reduces *domination*: it reduces risks that other actors can arbitrarily determine its options, intentionally or otherwise. Such legal sovereignty of course does not yield perfect protection against domination, as the citizens of Melos realised, and begs important questions about the domains of such sovereignty.

3.2 *Some Strategic Control Over the Future*

State consent may also increase a state's *control*, to better carry out and adapt the policies its government believes it has reason to pursue. If other actors recognise such consent as a state's attempt to self-bind, the state may secure outcomes otherwise unachievable. The consent must then trigger some new (exclusionary and somewhat content independent) reasons for the state to act otherwise that it has reason to value, and that other actors must understand and respect. Such strategic control is of value only when the state is actually able to identify, assess and select among its options, and when its preferences are not objectionable. Reversely, state consent lacks such value when a state is ignorant of the consequences of alternatives, acts under duress or is unable to reflect

³² For further discussions see A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2003) 301; T Christiano, 'Ronald Dworkin, State Consent, and Progressive Cosmopolitanism' in W Waluchow & S Sciaraffa (eds), *The Legacy of Ronald Dworkin* (Oxford University Press 2016) 49.

about the choice³³ – or if the choice has detrimental effects on other parties – for example, if it violates human rights.

3.3 Predictability

A state's express consent may increase its future compliance with international law, and hence increase other actors' ability to predict its actions. This process requires a shared understanding that consent imposes legal obligations that exclude or override some other reasons to act. Note that such predictability is only of value if the state's future actions are in fact of value for others. And this may be the case also concerning acts of authoritarian, non-democratic states. And predictability may be enhanced even with some escape clauses for emergencies and exemptions – as long as they cannot be too readily abused. Note that such predictions only work if a state succeeds in conveying its 'intention to abide by a rule'³⁴ by a signal that convinces other states. The practice of state consent is one way to signal such complex intentions – if the actors know that the consenting state generally respects international law.

3.4 Status Equality

A further value of state consent is to express *status equality* among states.³⁵ So if *some* states enjoy such legal sovereignty within some domain, it is of value for *other* states and their citizens to enjoy the *same* domain for consent. Smaller such domains give rise to two distinct concerns. The state may risk *domination* by other states, and it expresses their relative inferiority. Oppenheim arguably made the latter point thus: 'In entering the Family of Nations a State comes as an equal to equals; it demands a certain consideration to be paid *to its dignity*, the retention of its independence, of its territorial and its personal supremacy.'³⁶ Note that this value does not require any particular domain of issue areas for binding state consent, as long as all states enjoy the same legal domain.

³³ Hart (n 7) 44–45; Christiano (n 28); R Dworkin, 'A New Philosophy for International Law' (2013) 41(1) *Phil&PubAff* 2, 10.

³⁴ S Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart 2005) 459.

³⁵ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, 4, art 2(1).

³⁶ L Oppenheim, *International Law – Vol 1: Peace* (8th ed, Longmans 1955) 263 (emphasis added).

3.5 *Some Implications*

One important type of cases where state consent may promote some of the values identified above is when consent helps secure coordination for mutual gain. The requirement of consent may help states negotiate on a somewhat more equal basis when they specify shared objectives and select among available means.

So on the one hand, to require state consent may facilitate a fairer bargaining process, reducing domination.³⁷ Yet to require unanimity also risks deadlock by states who simply seek a larger share of benefits. There are important coordination challenges: states may agree on overall objectives but disagree about how to specify them and the requisite strategies.³⁸ Indeed, states often face such two-stage challenges: 'before States can cooperate to enforce an agreement they must bargain to decide which one to implement'.³⁹ So states' interest in *control* over outcomes may hinder 'global public goods' which they all have an interest in, such as a sustainable environment.⁴⁰

Such benefits and risks may be why member states of the EU agree to (qualified) majority voting for certain issues.⁴¹ Such decision rules may be more appropriate and more likely when states trust that power differentials will not be exploited, and when all expect to often be in the winning coalitions. Similarly, some multilateral environmental treaties and IMO Conventions have secured simplified consent procedures, or developed opt-out clauses etc.⁴² Such weaknesses notwithstanding, state consent may sometimes be the best way to manage constrained, 'reasonable' disagreement in 'battle of the sexes' situations. One upshot of these reflections is that the mechanism of state consent is double-edged. It can sometimes promote cooperation on somewhat more equal terms, but it

³⁷ RD Luce & H Raiffa, *Games and Decisions: Introduction and Critical Survey* (Wiley 1957) ch 5; such cases seem appropriate for the account offered in S Besson, 'State Consent and Disagreement in International Law-Making' (2016) 29(2) LJIL 289, 292.

³⁸ Besson appears to hold that PIL generally substantially serves to coordinate under circumstances of reasonable disagreement among states, see Besson (n 37); I take it that the cases discussed here are examples of this.

³⁹ JD Fearon, 'Bargaining, Enforcement, and International Cooperation' 52(2) *International Organization* 269, 270; A Buchanan, 'Institutional Legitimacy' in D Sobel, P Vallentyne & S Wall (eds), *Oxford Studies in Political Philosophy Volume 4* (Oxford University Press 2018) 57.

⁴⁰ Krisch (n 10).

⁴¹ RE Goodin, 'Institutionalizing the Public Interest: The Defense of Deadlock and Beyond' (1996) 90(2) *APSR* 331 addresses some ways to resolve these.

⁴² I am grateful to an anonymous reader for these examples.

can also hinder cooperation, because some states – often sub-state actors within them – insist on agreements that secure them more benefits and less burdens from cooperation.

These brief points have several implications when we turn to consider the legitimate authority of customary international law. The values of state consent draw on some broader account concerning the domain wherein, and conditions under which, state consent is decisive in creating expectations. States' own choice, sufficiently informed and uncoerced, among certain options within some domains, may help states secure some of their appropriate objectives.

The limits of those domains and conditions are *parts* of an account of the value of state consent, not a fundamental challenge to the value of state consent. State consent that contributes in this way to endow treaties with authority is not fundamentally a unilateral act that *expresses* sovereignty, but rather a complex shared practice. As Peters notes, international treaties are thus not simply

the result of *unilateral decisions (rational choices) to bind oneself*, but [we] can only understand them as commitments towards other actors. The bindingness of a legal instrument (for example a treaty or a pledge not to use nuclear weapons first or to stop nuclear testing) results from the promise given to the other party, and the normative expectations created thereby in the other, and not from a unilateral decision.⁴³

Specification of the domain and conditions of state consent helps delineate the substantive contents of state sovereignty in international law, not the other way around.⁴⁴ Sovereignty is in part defined as having legal standing to enter into treaties within some domain under certain conditions: 'the sovereignty of the States may be a consequence of these rules, not the rules a consequence of sovereignty'.⁴⁵

Arguments about the domain and conditions for which we have reason to value state consent may help clarify whether the *current* specifications under international law render sovereign states legitimate authorities, and how to change such specifications to enhance the states' legitimate authority.

⁴³ A Peters, 'Precommitment Theory Applied to International Law: Between Sovereignty and Triviality' (2008) 2008(1) U Ill L Rev 239, 248–49 (emphasis added).

⁴⁴ J Crawford, *The Creation of States in International Law* (Oxford University Press 2007) 33.

⁴⁵ H Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) Yale LJ 207, 209–10; *ibid* 100.

Several of these reasons to value state consent also hold for non-democratic states. They – and their populations – may have reason to avoid domination by other states, and their compliance may often but not always be of value also for others.⁴⁶ Such commitments increase the likelihood of general compliance and hence are sometimes necessary to ensure the objectives of the treaty. Resolving some such conflicts, for example, to promote human rights, or some forms of trade, also with authoritarian states, may sometimes be of value – also for citizens of those states – and hence legitimate. But the treaties such authoritarian states negotiate may be so unjust as to merely whitewash non-democracies. Consent by non-democratic states may also help address the ‘battle of the sexes’ situations, to help determine which of several possible institutions that might provide the desired service, should actually be implemented and recognised as authoritative. But the consent requirement does not guarantee a fair domestic allocation of the benefits and burdens – neither in democracies nor especially in authoritarian states.

It is an open question whether these values – of predictability, control, non-domination, and status – can also be secured sufficiently or to some extent through *other* means of international lawmaking that do not rely on state consent, without putting these or other values at risk – or indeed in furtherance of such values. The following sections show that CIL may secure and promote these values, even without state consent.

4 Normative Bases for the Legitimate Authority of Consent and Treaties

This brief sketch has not yet addressed the issue of why and how the mechanism of consent may create a *normative obligation* for states to defer to PIL norms, even if at that time they have countervailing reasons to act otherwise. What are these normative bases that help render PIL legitimate authority for states? We move to that topic now.

It is submitted here that states seek to use consent and promises more generally to create a moral obligation to honour such agreements, to provide assurance among each other. What normative principle would states violate if they fail to act as they have consented to? Consider a specification of the ‘do no harm’ principle as concerns manipulation, to the effect that we should not frustrate intentionally induced expectations. As background,

⁴⁶ *Pace* Besson’s claim that ‘only democratic States may invoke their consent as a ground not be bound’. Besson (n 37).

first consider an alternative basis, the normative principle of fair play, which seems insufficient to account for this case.

A principle of 'fair play' (or 'fairness') prohibits free riding on others' compliance. As developed by Hart and discussed by Rawls,⁴⁷ it holds that we should do our part as the rules of a practice specify when others have already complied with the practice in ways we have benefitted from. The normative obligations triggered by consent and promises might appear to be of this kind, in that breaches violate a principle of fair play. However, it does not seem correct that states' obligations first arise when they have received actual benefits from others' compliance with the practice of promise keeping. Moreover, this account seems insufficient to account for the complex conditions that regulate when state consent to treaties is taken to bind the state. In particular, the principle fails to explain or criticise when and why there are excusing conditions, and the particular scope conditions for binding consent. Such explanations must go beyond simply more careful sociological mapping of the rules of the actual practice, and should instead refer to conditions for, and the domain within which, we have reason to value such a practice of state consent.

An alternative account, developed by Hart, MacCormick, Scanlon and others holds that the normative principle that undergirds promises and contracts is not restricted to existing practices such as the making of binding agreements, but rather concerns manipulation and fidelity. *We should not frustrate intentionally brought about expectations of others about our own conduct.* They suggest that this is a particular case of the more general principle to do no harm. Fulfilment of such promises is 'what we owe to other people when we have led them to form expectations about our future conduct'.⁴⁸

Section 3 above indicates several reasons states may have to deliberately seek to influence others' expectations of their future actions. In particular, we have an interest in constraining our future actions in some ways, in order to have *others* – states, individuals or other actors – restrict their options and act in certain other ways that benefit us. If we are able to impose upon ourselves constraints that others trust, they constrain their actions in ways that increase our ability to predict and pursue policies we prefer. On this account, to lead others to form such expectations without intending to act accordingly would be a form of manipulation of others for the sake of their own interests.

⁴⁷ HLA Hart, 'Are There Any Natural Rights?' (1955) 64(2) *PhilRev* 175, 185; Rawls' Principle of Fairness, J Rawls, *A Theory of Justice* (Harvard University Press 1971) 112, 343.

⁴⁸ Scanlon, 'Promises and Practices' (n 7) 199–201; MacCormick (n 7); Smith (n 2) 263.

The consent mechanism, duly specified and constrained, is one *effective, precise* and *valuable* mechanism to create such expectations: 'State consent signals intention to abide by a rule.'⁴⁹ This mechanism enables the promisor to convey quite complex intentions quite precisely, with the aim to establish certain expectations in others. The promisor aims to signal that she would regard it as wrong of her not to satisfy these expectations, indeed even a violation of her legal obligations, except under certain sets of conditions.⁵⁰

One upshot of this account is that it underscores that the limits of state sovereignty is not left for an individual state to decide, and particularly not by express or tacit consent. It is PIL that determines the domain within which states can consent to treaties: 'sovereignty seems to amount to a large extent to what legitimate international law says it is, and not the other way around, contrary to what consent-based accounts of sovereignty have long defended'.⁵¹ Also note that the conditions for states to enter into legally binding treaties also reflect other values than honouring expectations created under favourable conditions. On this account there are good reasons to have some conditions and domain constraints on such signals. Hart noted some considerations that restrict the conditions where consent can bind, to ensure that the obligations are ones the agents can regard as worth acquiring. There are only under some such conditions that the possibility to acquire obligations and settle expectations is worth having. We can bring some such conditions to light by answering questions such as 'How important is it to have the selection among these alternatives depend on one's choice? How bad a thing is it to have to choose under these conditions?'⁵² We now move to consider such conditions on the procedure and the substantive content of the treaties.

5 Normative Bases for the Authority of Customary International Law

Customary international law may serve at least three important roles relating to the principle of non-manipulation, as applied to PIL. Consider

⁴⁹ Besson (n 34) 359; see also 'the Federal Republic had held itself out as so assuming, accepting or recognizing, in such a manner as to cause other States, and in particular Denmark and the Netherlands, to rely on the attitude thus taken up' *North Sea Continental Shelf Cases* 27.

⁵⁰ Compare Scanlon, 'The Significance of Choice' (n 7); J Raz, *Morality of Freedom* (Oxford University Press 1986) 176.

⁵¹ Besson (n 37) 305.

⁵² Scanlon, 'The Significance of Choice' (n 7) 183.

first constraints on the procedure of consent, and then on the domain within which states may consent to treaties.

5.1 *Procedural Aspects of Becoming Bound by Consenting to Treaties*

States often appear to hold themselves to be obligated by ‘pre-existing’ norms such as *pacta sunt servanda*, and some other norms recognised in the VCLT, such as fraud or coercion as invalidating consent to be bound.⁵³ On this account, these norms serve one role of CIL which states have reason to acknowledge. They help delineate when state consent can provide control over own behaviour and the expectations and behaviour of others worth having for a state. States often have good reason to foster expressions of more precise and shared expectations and have an interest in publicly signalling such expectations to others by means of consent to treaties – but only under certain conditions. For instance, states must have information about some alternatives available to them and their likely consequences, for the mechanism of consent to plausibly signal such complex commitments that states have reason to give. In particular, such signalling is usually of no worth if it takes the form of treaties signed under coercion or due to fraud.⁵⁴

Stating such conditions in the VCLT specifies such obligations in ways that are helpful. But these norms cannot easily derive their binding force from the mechanism of state consent – which they help constitute and specify. Indeed, if these norms were only binding among states who consented to them, this would hinder stability and foreseeability. The role of these norms as helping constitute the valuable practice also explain why new states are bound by them: being a sovereign state entails being able to commit to treaties by consent – which is constituted by such complex rules.

Some such conditions may absolve the actor of any obligations. Some excusing conditions identify when it is not wrong to create false expectations. These include when consent does not sufficiently express the interests of the consenter,⁵⁵ for example when consent is not voluntary, as when a treaty is signed under duress. Similarly, considerations may excuse the agent if they are unable to reflect sufficiently on alternatives and their consequences, for example due to fraud.⁵⁶

⁵³ VCLT arts 26, 38, 49, 51–52.

⁵⁴ *ibid* arts 49, 51–2.

⁵⁵ Christiano (n 12) 23.

⁵⁶ VCLT art 49.

Such lack of deliberation and control among the citizenry would be one reason to be wary of consent by non-democratic states. And this is one reason why it may be appropriate to deny non-democratic governments the ability to bind their successors, for example to repay international loans. However, there may be overriding reasons to still grant such states the authority to enter into certain treaties, based on the value of predictability for others, avoiding domination etc.

I submit that the list of excusing conditions for when treaties are not binding may reflect such complex considerations.⁵⁷ The value of honouring expectations may also reasonably be limited under certain drastic, unexpected changes in circumstance – carefully curtailed to prevent abuse and allow credible monitoring.⁵⁸ It seems reasonable that there are circumstances where other parties should accept that their expectations may still be broken. Thus, states are not held responsible for otherwise wrongful acts if they are due to *force majeure*, in situations of dire duress, or necessary to safeguard its essential interests⁵⁹ – as long as they do not violate peremptory norms. An important issue is who should have the authority to assess such claims of exceptional circumstances, excusing conditions etc., given the risk of abuse by leaving the determinations to the parties of the agreement.

Consider furthermore the particular puzzle of coerced yet binding consent to peace treaties agreed by aggressor states.⁶⁰ First of all, the aggressor state's interest in continuing the aggression is not a privilege that the state should be permitted to continue to pursue except when consenting otherwise. And an aggressor state that refuses to consent to a peace treaty has no acceptable reason to do so: that option is not one within the appropriate domain of the mechanism of state consent. To the contrary, all parties, even the aggressor state, have an interest in ending armed conflict at some stage before utter destruction. The aggressor state may have an interest in credibly committing to surrender on some terms – if only to prevent further large-scale demolition of its infrastructure and military by other states. Such considerations counsel that peace treaties signed by aggressor states may be recognised as legally and morally binding even when clearly signed under duress.

⁵⁷ Such 'institutionalised' considerations may also reduce the problems of anthropomorphism of the ability of a state to 'will'.

⁵⁸ VCLT arts 61–62.

⁵⁹ ILC, 'ARSIWA' 23–26.

⁶⁰ VCLT art 75.

5.2 *Material Aspects of the Domain of Valid Treaties*

Treaties are one way to knowingly induce others to form expectations about one's future conduct. The brief overview above indicates that the possibility of entering into binding treaties has value only under certain conditions. Some CIL norms delimit the domain and conditions of state consent to treaties, to help ensure that this practice of creating legal obligations is of value – and hence legitimate. The value of honouring intentionally created expectations is after all only one of several values, and itself only of value in some cases. We may ask how important it is for the legitimate plans of states to create expectations among others about their future behaviour, and (thereby) for them to be able to form expectations about the behaviour of each state.

Thus consent should not be assumed to bind states to clearly objectionable actions – in which states have no legitimate interest – or when they infringe on the interests of third parties, be they states, individuals, or other entities. The claims to honour others' expectations do not outweigh or displace all other values. For instance, expectations that would entail human rights violations would not merit much weight. This concern arguably justifies several constraints on the domains where states may consent to treaties, in the form of peremptory norms of CIL – such as *jus cogens* prohibitions on genocide, torture etc.⁶¹ Just as with the procedural rules, these scope conditions cannot easily themselves be based on state consent for their legitimate authority 'all the way down'.

5.3 *Inducing Expectations*

A third role of some non-consent-based CIL are as norms that states have an interest to induce and maintain expectations about, but where state consent is an unsuitable mechanism. To not require universal consent reduces the 'transaction costs' of securing general compliance with rules. Moreover, non-consent-based CIL allow states to show that they regard themselves as obligated, and hence that others can be somewhat assured of their future actions – which reduces the commitment problems for some common challenges.

That is: the *same* general normative principle of non-manipulation explains why these particular customs bind states, namely the obligation

⁶¹ VCLT art 53.

to not frustrate intentionally brought about expectations of others about our own conduct. States must take due care to live up to such expectations, and not lead others to form false expectations.⁶² Consider an existing practice with public rules which the practitioners regard as creating obligations for them, so that they do wrong if they violate these rules – except in some overriding circumstances. Such rule-guided practices may also serve as signals about complex intentions about one's own future action. The practice may induce others to form expectations about the practitioners' future behaviour, and such expectations may be foreseen and indeed an objective of the participants in the practice. Under such conditions, the same principle on non-manipulation applies to this public practice even though it has not been explicitly consented to. It creates obligations of future compliance among those who uphold the practice.

I submit that states comply with some CIL norms by precisely such practices. Those who have participated in upholding the practice thereby create expectations about their own future actions, and such expectations are part of the rationale of the practice. One aim of CIL norms is to get others to believe that they can expect future behaviour from these parties according to these norms, thus CIL creates and stabilises expectations. This holds true even though states need not explicitly engage the consent mechanism to create such obligations. Why is this, and when might CIL be preferable to consented treaties? On this account, in some cases treaties may be better suited mechanisms for creating such expectations, while in some cases custom may be better – and in yet other cases the two may be equivalent.

There are sometimes reasons to prefer consent-based mechanisms, for example when control over the specifics of the practice is of particular value *and* can be achieved by the mechanism of state consent, such as when the choice is of contested and different value among the parties, or when the expectations and conditions need to be very precise, or when having the decisions be subject to others' discretion is objectionable – *and* where the risk of blocking states is not unreasonable. Cases may include areas when it suffices that a 'club' of states move forward, or when the likelihood of non-consent by any state is small.

⁶² This would seem to differ from views that consider CIL based on tacit consent, for example 'As a matter of fact, customary international law-making combines tacit consent in the converging practice of States and explicit dissent in their possibility to object to that practice through a persistent objection'. Besson (n 37) 295.

On the other hand, there are cases where CIL may at least in principle be better than treaties. Some examples are when actual consent is difficult or impossible to secure in advance yet coordination is obviously important for all. Several such cases concern the scope of state sovereignty: the domain of state and diplomatic immunity,⁶³ and the customs of *pacta sunt servanda* and of how to express the speech act of giving promise in order to engage in the morally binding practice of consent itself indicated above. This is arguably what occurs when states agree to *pacta sunt servanda*: they recognise, acknowledge and specify a norm that they already regard as binding. Other domains of sovereignty where consent is impractical or impossible concern ways to prevent negative impact on other parties of one state's choices. The parties may include states, or citizens of that and other states. Thus, some principle of 'do no harm' has a long pedigree in international law. For some such norms the stability of the international order is arguably at stake. One example is the right to self-defence, where the issue is paramount yet universal consent is improbable. The ICJ notes that 'Article 51 of the [United Nations] Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.'⁶⁴

Another set of cases where relying on a custom may be more beneficial than securing consent to a treaty are those where all parties clearly benefit greatly from having one set of shared practices within some domain,⁶⁵ yet where the negotiations about how to distribute benefits and burdens threaten to postpone or even prevent any unanimous treaty. In some such 'battle of the sexes' situations, the veto of any state may block any option. One preferable way to identify and implement one of the several possible solutions may then rather be to follow an established custom – as long as it is within that domain of mutually beneficial alternatives. The selection mechanism is thus to comply with the rules that several states already follow – among several that could have been followed. And once a practice is established, there may be a *prima facie* case to honour

⁶³ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, 122–23 [55].

⁶⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 98.

⁶⁵ Compare the 'core' in game theory.

expectations according to the principle of non-manipulation – and often a duty of fair play as well.⁶⁶

Scanlon proposes a more precise specification of the reliance on customs as a ‘Principle of Established Practices’, for

cases . . . in which there is a need for some principle to govern a particular kind of activity, but there are a number of different principles that would do this in a way that no one could reasonably reject. What I will call the Principle of Established Practices holds that in situations of this kind, if one of these (nonrejectable) principles is generally (it need not be unanimously) accepted in a given community, then it is wrong to violate it simply because this suits one’s convenience . . . it would be reasonable to reject any principle permitting people to violate one of these established practices whenever they wished to do so or preferred some alternative. It would also be reasonable to reject a principle that would require a practice to be unanimously accepted in order to be binding, since if unanimous agreement were required, practices would be very difficult to establish and the needs they serve would be very likely to go unmet. (It is not necessary to insist on unanimity in order to prevent excessively burdensome practices from being made binding, since the Principle of Established Practices supports only practices that themselves cannot reasonably be rejected.⁶⁷

A note of caution is appropriate. There is no reason to hold that any rule generally followed as custom is normatively acceptable. The ‘survival of the fittest’ custom may simply mean that those customs survive that the more dominant states have an interest in maintaining. In particular, the emergence and survival of customs does not reliably depend on their fair treatment of all affected parties. One central reason is that not all states, and certainly not all affected individuals, may have been able to contribute equally to develop the custom to ensure it does not impose unacceptable and avoidable burdens. A wide range of criticisms of PIL make this point – including feminist and Third World Approaches to International Law (TWAIL) arguments.⁶⁸ This condition may arguably support the

⁶⁶ J Bentham, *First Principles Preparatory to Constitutional Code* (Clarendon Press 1989) 97; L Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge University Press 2014) 60.

⁶⁷ TM Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) 339.

⁶⁸ C Chinkin, ‘Feminism, Approach to International Law’ [2010] MPEPIL; D Otto, ‘Feminist Approaches to International Law’ in A Orford & F Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016); JT Gathii, ‘TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography’ (2011) 3(1) Trade, Law & Development 26; JD Haskell ‘TRAILing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law’ (2014) 27(2) CJLJ 383.

specially affected states doctrine, and the requirement of the Conclusions that the CIL practice needs to be widespread, representative, constant and uniform, but not unanimous. A further reason to be wary of customs is that they may not adapt well to changing circumstances.

I submit that this argument supports claims that CIL may create moral obligations to comply for states. Some central cases occur when the norms address issues in ways that most affected parties derive large benefits from, without anyone bearing undue costs; and where prior actual universal consent is impossible or impracticable for various reasons. These norms and conditions will have to be specified and identified in certain ways. The delineation in the Conclusions seem generally consistent with this. The specification of conditions may include:

- When universal consent is *impossible*: that occurs inter alia for the norms that constitute and limit the procedures and domains whereby state consent binds – including those CIL norms that help constitute sovereign statehood; and *pacta sunt servanda*, *jus cogens* limitations etc.
- When universal consent is *impracticable*: in cases where free riding becomes more tempting as more parties join a scheme, or when some parties clearly abuse their power to free ride or to derive undue benefits compared to others.

Such considerations must on the other hand be robust against abuse, for example, when some parties have good reason to not value the alleged benefits secured. This account thus appears to illuminate the ‘puzzle’ of non-consent-based obligations concerning PIL: certain CIL norms may well bind, though they are not consent based.

5.4 *The Values CIL Secures*

Consider some objections and challenges to this claim, that CIL may be justified on the basis of the same principle of non-manipulation as treaties. One objection is that CIL, thus circumscribed, may not equally well secure the values that the mechanism of state consents, duly circumscribed.

Customary international law which has been in existence for some time prior to the case at hand *reduces* but does certainly not remove the risk of *domination* by some states over others. This is one reason to not recognise ‘instant custom’. And this is one reason to have stringent requirements on international courts’ determination of new CIL, to

reduce the risk of being subject to the broad discretion of international courts in this regard. Judges' good faith references to other cases contribute to reducing such suspicion.

Customary international law does not appear to always give states as much strategic control over the future as the veto power granted them by the consent mechanism. While this is correct, as brought out by TWAIL and feminist critics, this comparative advantage may be limited, and only holds for some CIL norms. Some CIL arguably helps constitute important conditions *for* such control, insofar as CIL (a) helps constitute states and (b) enables states to use consent to enter into binding treaties. Furthermore, the loss of such lack of control has no normative weight not when the discretion lost would anyway only concern others' legitimate policy spaces, that is, when the *jus cogens* norms limit options in unobjectionable ways. The disvalue is even smaller when CIL is binding only on some conditions, and for a range of expected circumstances, but allowing certain exceptions – unexpected very high costs, etc. Finally, less powerful states may not even be able to use the consent mechanism to protect themselves against domination by powerful states – as the Melian dialogue showed.

Customary international law that delineates the scope of what other states may do also enables states to *predict* the future to some greater extent than without such norms – especially if new CIL cannot be introduced suddenly.

Note finally that CIL also preserves the status equality of states, insofar as CIL constitutes and constrains the policy spaces of *all* states equally and thus does not express relative inferiority of some states. However, the criticism of TWAIL and feminist perspectives remains. The domains of equal treatment may favour certain individuals and states more than others, be it the domains of non-interference or free use of the oceans.

Customary international law secures these values more when the processes of identifying and specifying CIL secures broad representation from diverse states, avoids 'instant custom', and when the rules of the practice are clear and not subject to broad discretion by any state.

6 Implications for the Content of CIL

I have suggested that CIL serves several important roles: it delineates some conditions and constraints on both the procedures and the

domains for when states' consent bind them. Customary international law is also a means to create expectations among others that states will be legally obligated. I submit that this account supports and helps specify several of the Conclusions regarding the limited role of consent, and the two criteria for CIL – that there must be 'a general practice' which enjoys 'acceptance as law' (*opinio juris*).

6.1 *Is There a Role for 'Tacit Consent'?*

On this account, CIL does not require state consent to be binding. What appears to be required is a weaker form of knowing compliance with the rules of a practice, in the form that a range of states (but not necessarily all) participate in a certain practice. A state that participates in such a practice leads others to expect that it will act in certain ways in the future in ways others want to be assured about. And a state that participates in such a practice should be aware that the practice provides such assurance. Other states may join an existing practice, and thereby signal such commitments – without them having any meaningful consent to give or withhold. An exception may be that persistent objectors to certain rules and practices may thereby prevent such assurances about intentions. This is arguably weaker than 'tacit consent', and it seems that to use the term 'consent' only adds confusion.

6.2 *General Practice*

This account provides a justification and explication of the requirement of a 'general practice' regarding a possible CIL. There is extensive debate on this point. Some urge to replace 'practice' due to conceptual problems⁶⁹ and 'determining the existence of practice is far from self-evident'.⁷⁰ Indeed, critics argue that international judges exemplify Hart's claim that custom lacks a clear rule of recognition.⁷¹ What is actually practice among states is difficult to discern – and especially in disputes, since parties may point to clusters of states who maintain incompatible practices.

⁶⁹ GJ Postema, 'Custom, Normative Practice, and the Law' (2012) 62(3) *DukeLJ* 707; Murphy (n 66) ch 8.

⁷⁰ A Pellet, 'Article 38' in A Zimmermann & C Tomuschat et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 750.

⁷¹ HLA Hart, *The Concept of Law* (Oxford University Press 1961) 235.

Conclusion 8 maintains that a general though not universal practice suffices – that is, actual consent by all states is not required. But it is important to consider ‘the extent to which those States that are particularly involved in the relevant activity or are most likely to be concerned with the alleged rule (“specially affected States”) have participated in the practice’.⁷² And the practice must be public – known to other states.⁷³ This is one reason why there can be no ‘instant custom’, in the literal sense, though a short period may suffice.

All these specifications seem appropriate requirements to create expectations about compliance with the practice in the future, and to reduce the risk that the practice is a mechanism of domination by some states that is detrimental to others. Note that actual consent is not required – it suffices that states have been in a position to react,⁷⁴ relying on what it is reasonable to assume regarding whether the state has such knowledge.

I submit that these requirements blunt some criticism against the central role of international judges in determining such a practice. They are often said to exercise extensive discretion – firstly in specifying the criteria of CIL,⁷⁵ and then in determining that there is a practice, and which are the rules that govern it.⁷⁶ However, the task of the international judges is to determine that the practice is sufficiently general, especially among those states likely to have a stake in the specific rules of the practice. This is certainly not an easy task, especially because the international judges are also called upon to interpret conflicting evidence about a practice. For instance, verbal practice may easily conflict with what states actually do. And the judges of international courts (IC) must decide which instances of conduct

that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides. The Permanent Court of International Justice referred in the *Lotus* case to ‘precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general

⁷² ILC, ‘CIL Conclusions’ (n 3) 135 [4].

⁷³ *ibid* 132 [5].

⁷⁴ *ibid* Conclusion 9.

⁷⁵ CJ Tams, ‘Meta-Custom and the Court: A Study in Judicial Law-Making’ (2015) 14(1) *LPICT* 51; J d’Aspremont, ‘The Four Lives of Customary International Law’ (2019) 21(3–4) *IntCLRev* 229.

⁷⁶ F Schauer, ‘Pitfalls in the Interpretation of Customary Law’ in A Perreau-Saussine & JB Murphy (eds), *The Nature of Customary Law* (Cambridge University Press 2007).

principle [of customary international law] applicable to the particular case may appear'.⁷⁷

What is thus comparable and analogous is to a great extent a matter of intellectual reconstruction, which leaves much discretion to the IC judges. I submit that this discretion is unavoidable. However, there are ways to reduce the possible damage; firstly, to ensure that the judges reflect a broad range of perspectives and are likely to include the impact of different formulations on different states and populations. The risks are also reduced by the requirement that claims that there is such an (emerging) practice must be made public, especially to those states that may have views. And there must be time for states to formulate opinions about such proposals, and possibly express alternative formulations of the rules.

Another risk stemming from this fluidity is the risk of domination by stronger states – and arguably the international judges they nominate, even when the requirement of generality is satisfied. State consent grants each state a veto, which more powerful states may use to maintain the status quo.⁷⁸ Similarly also general principles and CIL that have emerged are likely to promote the interest of strong parties rather than those of weaker states.⁷⁹ Thus, some argue that several great powers moved to establish a prohibition against aggressive wars with the Kellogg-Briand /Peace Pact in 1928, precisely at a time when they had finished conquering and had much to gain by preventing other states encroaching on their (new) territories.⁸⁰

These constraints and guides for the discretion of international judges reduce the risk that they exercise undue influence on the development of CIL. However, this is compatible with substantiated concerns that the international judges fail in their tasks. Indeed, some claim there is 'a marked tendency [of the ICJ] to assert the existence of a customary rule more than to prove it'.⁸¹ This seems highly problematic on the account

⁷⁷ ILC, 'CIL Conclusions' (n 3) 137 [6].

⁷⁸ Goodin (n 41); Guzman (n 31) 754.

⁷⁹ E Benvenisti & GW Downs, 'Comment on Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods"' (2014) 108 AJIL Unbound 1.

⁸⁰ O Hathaway & SJ Shapiro, *The Internationalists: And Their Plan to Outlaw War* (Allen Lane 2017); O Hathaway & SJ Shapiro, 'What Realists Don't Understand About Law' (*Foreign Policy*, 9 October 2017) <<https://bit.ly/3kxeVlf>> accessed 1 March 2021.

⁸¹ A Pellet, 'Shaping the Future of International Law: The Role of the World Court in Law-Making' in MH Arsanjani, JK Cogan et al (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff 2011) 1076; S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417.

explored here, especially for ‘emerging’ customs.⁸² A better response by the international judges would be to ensure that any such claims at least are based on evidence drawn from a range of countries with different legal traditions.

6.3 *Opinio Juris*

The role of *opinio juris* in determining whether a norm is CIL is that states must accept this practice *as law*. That is, the practice in question must be undertaken *with a sense of legal right or obligation*. It is implausible and anthropomorphic to hold that states ‘have a sense of’ – or that they ‘feel’ or ‘believe’ that there is such an obligation. The present account does not require such metaphors and need not refer to mental entities. The main point is rather that the practice must signal to others that the practitioners limit their action and policies because this is what some norms require or prohibit under certain conditions. These norms are thus somewhat content independent and exclusionary – hence enjoy *the sort of authority over the state that law does*. I submit that this provides a helpful explication of accepting a practice ‘*as law*’, or ‘conforming to what amounts to a legal obligation’.⁸³ Evidence of *opinio juris* should thus not focus on psychological effects, but instead consider states’ responses to reasons of several kinds. What counts as relevant evidence is that states recognise the legitimate authority of such norms as setting other reasons aside. Such self-constraint ‘reflects the existence of a social rule’, arguably showing that the actors ‘take an internal point of view with respect to that behaviour’.⁸⁴ Note that this does not amount to the states actually expressing *consent* to the norm. This behaviour serves to induce expectations among other parties that the practitioners will constrain their future conduct in similar ways. I submit that there are several ways states can send such signals, including several noted in the Conclusions and by ICs: deliberate abstentions, excuses for breaches, etc.

Evidence of the practice may include inaction – but only when clearly deliberate. Conclusion 6–3 mentions that ‘deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed

⁸² Lauterpacht (n 14) 31; Brierly (n 14); I owe these references to Collins (n 14).

⁸³ *North Sea Continental Shelf Cases*.

⁸⁴ See D Lefkowitz, ‘(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach’ (2008) 21(1) CJLJ 129, 132–34, citing Hart (n 71) 56–57, 101–03 and MacCormick (n 7).

that abstention from acting is deliberate'.⁸⁵ Other expressions of state intention may include breaches if they are treated as if they are breaches of apparent legal obligations, and not of etiquette or of mere patterns of behaviour. The relevant state behaviour may include denials of the actions, or arguments concerning excusing conditions, etc. This is in accordance with the Conclusions and the reference to the ICJ's *Nicaragua* judgment:

instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁸⁶

Evidence would include efforts by states to defend or justify their non-compliance. This indicates that they acknowledge that there is a presumption of deference, violations against which require defence and that such defence may be of the form of plausible specifications and exceptions to the rule or overriding reasons. This account also appears to fit with the Conclusions' discussion of the persistent objector rule:

the State must express its opposition before a given practice has crystallized into a rule of customary international law, and its position will be best assured if it did so at the earliest possible moment. While the line between objection and violation may not always be an easy one to draw, there is no such thing as a subsequent objector rule: once the rule has come into being, an objection will not avail a State wishing to exempt itself.⁸⁷

Two implications of this are worth noting. This underscores the need for clear statements by those who formulate CIL norms, such as international judges, prior to them being expressed as binding CIL norms. Secondly, new states have no options in this regard – they do not have the possibility to oppose. On this account, that is not an objection to CIL norms being binding, since consent by states is not required to be bound by them.

7 Conclusions: What Is the Added Value of This Account?

The main argument of these reflections is that the reason why CIL can create morally binding legal obligations for states is the same as why

⁸⁵ ILC, 'CIL Conclusions' (n 3) 133 [3].

⁸⁶ *Military and Paramilitary Activities in and against Nicaragua* [186].

⁸⁷ ILC, 'CIL Conclusions' (n 3) 153 [5].

states can do so by consenting to treaties: to honour intentionally created expectations among others about one's future actions. The aim is not to reject several important roles of the mechanism of state consent in current international law, but rather to revise the grounds for its centrality in light of the grounds for valuing such consent. These include the underlying value of fixing expectations and providing assurance of own future conduct. This helps explain why state consent is sometimes but not always appropriate, and neither necessary nor sufficient for a state to create new legal obligations for itself.

States have reasons to value both consent-based obligations, and non-consent based CIL. They are both important signalling mechanisms. This account appears to help resolve several puzzles of the role of state consent. States' consent may sometimes create binding obligations even under conditions that usually are taken to invalidate consent. Aggressor states may be coerced into signing valid peace treaties,⁸⁸ because we have good reason to allow states to express such commitment to peace and to create expectations among others about such commitments, to avoid further bloodshed.

I submit that this account also helps justify why states are subject to some legal obligations without their express consent. Some CIL norms are binding in part because they are necessary to constitute state sovereignty and to delimit the domain and conditions for the practice of state consent to establish the legitimate authority of new PIL. On this account, that does not seem paradoxical: states have good reason to foster such expressions of more precise and shared expectations, and have an interest in publicly signalling such expectations to others – even without explicit consent.

On the other hand, states cannot by their consent create legally binding obligations to anything without limits. Some *jus cogens* norms *limit* the material contents of the legal obligations states can create through their consent.⁸⁹ States also often appear to hold themselves to be obligated by 'pre-existing' norms – such as some CIL, for example *pacta sunt servanda* as recognised in the VCLT.⁹⁰ One main reason is that such limits on the domain of state consent to treaties helps ensure that valid treaties enjoy legitimate authority – *jus cogens* violations are treaty agreements states have no good reason to pursue, and which they have no good objection to

⁸⁸ VCLT art 75.

⁸⁹ *ibid* art 53.

⁹⁰ *ibid* art 26.

others violating. Furthermore, CIL may serve to help states pursue other shared objectives, especially when there are difficulties in securing universal consent, and when there is low risk involved – for example, as long as the practice is ‘general, meaning that it must be sufficiently widespread and representative’.⁹¹

Consider in closing concerns that such an account is flawed because it draws on moral premises to account for the legitimate authority of PIL. Such contributions are hence of little use, since moral norms about honouring expectations are too vague or contested. Thus Koskeniemi rejects ‘a conception of justice at the root of all customary rules – the principle “legitimate expectations should not be ignored”’.⁹² At least two responses are appropriate. Such claims about vagueness and contestedness would seem to be comparative. We would need to hear *other* accounts of the normative grounds for the claim to legitimate authority of PIL – including CIL, which provide a reasonable reconstruction of the practice albeit with critical perspective. We should look closely at such accounts. Secondly, the moral premise used for this account is not a general principle to ‘honour legitimate expectations’. Rather, it is more limited: *we should not frustrate intentionally brought about legitimate expectations of others about our own conduct*. It is only legitimate expectations that impose an obligation – where the ‘legitimacy’ of these expectations is unpacked in light of what we and others have reasons to pursue and expect of others, for example so that expectation of complicity in torture has no standing as an objection to not fulfilling treaty obligations in this regard. Furthermore, states may follow some patterns of behaviour without any interest in bringing about expectations among others about their behaviour. I submit that the practices that contribute to CIL are different: their rationales and justifications require that other parties take the behaviour as evidence that the states will seek to comply with the rules also in the future. Some may further challenge this account because there is no value added by states solemnly agreeing to norms that are morally binding anyway – be it *pacta sunt servanda*, or as Koskeniemi notes:

it is really our certainty that genocide or torture is illegal that allows us to understand State behavior and to accept or reject its legal message, not State behavior itself that allows us to understand that these practices are

⁹¹ ILC, ‘CIL Conclusions’ (n 3) Conclusion 8.

⁹² M Koskeniemi, ‘The Pull of the Mainstream’ (1990) 88(6) *MichLRev* 1946, 1951.

prohibited by law. It seems to me that if we are uncertain of the latter fact, then there is really little in this world we can feel confident about.⁹³

But Koskenniemi also claims that:

[a] norm is *jus cogens* . . . not because it was so decreed by God, or because according to this or that theory it is necessary for the survival of the human species. It is *jus cogens* if and inasmuch as, to quote Article 53 of the Vienna Convention on the Law of Treaties, it 'is a norm accepted and recognised by the international community of States as a whole.'⁹⁴

One challenge to Koskenniemi's brief account is cases where states claim that they are *recognising* 'pre-existing' *jus cogens* norms that have normative authority prior to or independent of their consent. If they are correct, it is not obvious that it is *only* states' consent that render such a constraint normatively legitimate, which seems to be Koskenniemi's claim. Instead, it seems we need to look further. We need not reject state consent, but combine it with something more, to help explain under what conditions the claims to be legitimate authorities on behalf of CIL and other sources of IL are correct.

I thus submit that some general moral norms can also be *part of* the justification for why *jus cogens* norms are correct in claiming legitimate authority over states – while accepting that state consent is often *also* required. Such moral norms must be specified in order to suit the particular circumstances, for example that the actors are states, with new risks of abuse of rules; and the added value of having such norms be public knowledge. The task, on this view, is to dismiss neither moral principles, nor all roles for state consent, nor all non-consent-based IL, but seek to bring somewhat more order into our considered judgments on these complex issues.

⁹³ *ibid* 1952.

⁹⁴ M Koskenniemi, 'International Law in a Post-Realist Era' (1995) 16 *AustYBIL* 1, 3.