1. State consent as foundational myth

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1. INTRODUCTION

Throughout history, the conclusion of treaties based on the consent of states has been an important feature of international life. Today, the role of consent in international law is arguably more important than ever, with an unprecedented number of treaties in place, mostly created through the expressed will of states. Even where non-state actors have assumed a pivotal role in the creation and application of treaties, ‘the treaty paradigm generally continues to be pre-conditioned on the presence of state consent’.¹ Consent also continues to play an important role in areas other than the law of treaties, such as customary law or the regime regulating the legality of foreign intervention.²

From the nineteenth century, however, the consent of states has become more than a way of validating treaties, legitimizing customary law or legalizing foreign interventions. Increasingly, state consent has been portrayed as the sole foundation or defining characteristic of international law as a whole. International law, in the *Lotus* dictum of the Permanent Court of International Justice, is an order resting on the express and tacit consent of states: ‘International law governs relations between independent states. The rules binding upon them therefore emanate from their own free will (...)’.³ The *Lotus* case thus understood international law as grounded in the consent of particular entities (territorially defined, independent states) and only binding upon those states that had, in one form or the other, bound themselves through consent. Under the *Lotus* reading of international law, all rules binding upon states are the product of lawmaking; they are not pre-given, but result from the freely expressed will of states, either explicitly or tacitly.⁴

¹ D Hollis, ‘Why Consent Still Matters: Non-State Actors, Treaties and the Changing Sources of International Law’ (2005) 23 *Berkeley Journal of International Law* 1, 4.

² For a discussion see E Lieblich, ‘Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements’ (2011) 29 *Boston University International Law Journal* 337, 339–82.

³ *SS Lotus (France v Turkey)* [1927] PCIJ Series A No 10 available at <http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm> accessed 25 June 2012.

⁴ Take, for example, the position adopted by Kooijmans in 1964, that stands in sharp contrast to the *Lotus* idea and the belief that all law is the product of lawmaking: ‘The directives are given by the Eternal God, and man will never be able to fully fathom their magnitude. Only in so far as they touch upon life in this created world, can man, through his reason, deduce the necessary rules for society. He discovers the norms, he does not draw them up.’ PH Kooijmans, *The Doctrine of the Legal Equality of States: an Inquiry into the Foundations of International Law* (AW Sijthoff 1964), 13.

While the *Lotus* reading of international law was controversial at the time,⁵ the idea that the international legal order is the product of lawmaking and ultimately based on some form of state consent has survived up to the present day.⁶ Higgins, for example, states that 'we have in international law a system in which norms emerge either through express consent or because there is no opposition [...] to obligations being imposed in the absence of such specific consent'.⁷ In similar fashion, Sweetser regards consent 'as constitutive of the international legal order; treaties and even customary international law are based on norms of state consent, whether explicit or tacit'.⁸ Even when authors readily admit the limits of the consensual paradigm, they often fall back on consent as the *sine qua non* for the existence of international law. Shaw, for example, while admitting the existence of some legal obligations that do not rest on state consent, still contends: 'In a broad sense, states accept or consent to the general system of international law, for in reality without that no such system could possibly operate.'⁹ In similar terms, Weil argues: 'Absent voluntarism, international law would no longer be performing its functions.'¹⁰ The constitutive value or functional necessity of consent is reaffirmed in several general introductions to international law.¹¹

This chapter focuses on the core argument articulated by the different authors mentioned above: international law as a whole rests on the tacit or express consent of states. According to these approaches lawmaking is not just a process through which norms are produced; rather, international law as a whole is defined as being made through the will of sovereign states. Following Koskenniemi, I will treat this family of approaches to international law as 'consensualism', whose 'normative sense [...] is [...] in its claim to override some other view *because* this does not give required effect to

⁵ In Brierly's much quoted criticism the *Lotus* decision is characterized as being 'based on the highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent States'. JL Brierly 'The 'Lotus' Case (1928) 44 *Law Quarterly Review* 154, 155.

⁶ The rest of this paragraph is taken from W Werner, 'Security and International Law' in Ph Bourbeau (ed), *Security, Dialogue Across Disciplines* (CUP 2015).

⁷ R Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 16.

⁸ C Sweetser, 'Humanity as Alpha & Omega of International Law, Four Replies to Anne Peters' (2009) 20 *European Journal of International Law* 545, 550, available at <<http://www.ejil.org/pdfs/20/3/1851.pdf>>.

⁹ M Shaw, *International Law* (CUP 2003), 10. While Shaw discusses several legal obligations that bind states without their consent, he still uses consensualism as a foundational principle for the international legal order as a whole.

¹⁰ P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 420.

¹¹ For an overview see A Guzman, 'The Consent Problem in International Law' (2011) Berkeley Law School, University of California, (fn 1 and 2), available at <<http://www.escholarship.org/uc/blewp>>; see also OA Elias and CL Lim, *The Paradox of Consensualism in International Law* (Kluwer 1998), xi. While acknowledging the paradoxical nature of state consent, still hold on to consensualism: '[...] seeking to impose some conception of the law as being distinct from the actual claims of states fails for a number of reasons [...] (because) [t]here is no better evidence of international law doctrine than that which is expressed by States as a reflection of their legal expectations'.

what States will'.¹² I will argue that this use of 'state consent' is part of a foundational myth that presents international law as more coherent, unitary and encompassing than it actually is. While it is indeed impossible to make sense of contemporary international law absent the notion of lawmaking; and impossible to make sense of lawmaking *without* using the notion of state consent, grounding the international legal order as a whole on the consent of states is only possible if one accepts the paradoxes and blind spots that come with it. This chapter seeks to elucidate these paradoxes and blind spots at three different levels. *First*, the inherently paradoxical nature of state consent as a foundational principle itself. As critical legal scholars have pointed out, invoking state consent as the basis of international law yields paradoxical results because 'consent' as a validating principle in law presupposes the validity of some non-consensual principles and necessarily assumes that legal norms created through consent exist independently from the actual will of states. This point will be further explained and concretized through an analysis of the case law of the International Court of Justice, the European Court of Human Rights and the International Tribunal for the Former Yugoslavia. *Secondly*, the idea of sovereign equality that underlies consent-based readings of international law. Consensual understandings of international law generally presuppose the legal equality between states. The justifications given for the legal equality of states, however, can easily be turned against the idea that consent is constitutive of international law. I will turn to the paradoxical nature of legal equality in Section 2. *Thirdly*, the assumption of the state as privileged and unitary actor that underlies consent-based readings of international law. Theories that understand international law as grounded in the free will of states assume that the territorial division of the world in unitary sovereign states is (still) the most important background condition for international law. While this assumption has never been accepted uncritically in legal scholarship,¹³ it has become even more controversial today. Alongside territoriality, functionality has emerged as an operating principle, giving rise to new forms of political organization and lawmaking. The effects of the rise of functionality as operating principle in law and politics will be discussed in Section 3.

2. CONSENT, NORM EVOLUTION AND THE PURPOSES OF LAW

As has been observed by many scholars, the will of states as such cannot be the basis of a system of law.¹⁴ For one, it would assume that norms can be based on facts (acts

¹² M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005), 310 fn 14 (italics in original).

¹³ See for example the attitude and assumptions of the founding fathers of the first international law institutes and journals as discussed in M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2002).

¹⁴ In analytical positivism this point was made by HLA Hart, *The Concept of Law* (OUP 1994), 225: 'For, in order that words, spoken or written, should in certain circumstances function as a promise, agreement, or treaty, and so give rise to obligations and confer rights which others may claim, rules must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do.' See also H Kelsen, *Reine Rechtslehre* (Deuticke Wien 1960). Kelsen's pure theory is based on the impossibility of deriving norms from facts alone. For a

of will) alone – a logical fallacy.¹⁵ Grounding law on consent, in other words, requires the existence of non-consensual rules stipulating that the freely expressed will of states counts as law. The classical example is the principle of *pacta sunt servanda*; without assuming the validity of this principle it is impossible to regard consent as the basis for treaty-making. Secondly, there need to be rules of recognition that spell out which utterances or acts by states count as lawmaking acts of will.¹⁶ Examples of such rules can be found in article 11 of the Vienna Convention on the Law of Treaties (setting out the ways in which consent to a treaty can be expressed)¹⁷ or in legal doctrines positing that absence of protest against customary rules counts as tacit consent. It is impossible to ground all such rules of recognition in the consent of states; this would only beg the question how we know what counts as lawmaking acts of will by states in the first place.¹⁸ Thirdly, acts of will are supposed to produce *legal norms* whose meaning is accessible to others, not just arbitrary expressions of the intentions of states at different points in time. These legal norms obtain an independent validity, need to be interpreted by others and can also be held against the state that has consented to them, even if that state has changed its mind since the creation of the norms in question. For international law to be possible at all, processes of norm-finding cannot therefore be made wholly dependent on the whims of states. It should, in principle, be possible that someone else successfully claims that she knows better what a state has consented to than that state itself. In other words, state consent can only function as a basis for international obligation if ‘the movement is from consent into something more, or other than that’.¹⁹

The inherently paradoxical nature of consent plays out in all areas of international lawmaking.²⁰ However, with the creation of so-called ‘world (or regional) order treaties’ the problems of consent-based readings of international law have become more

more recent articulation see Hollis (n 1); see also C Reus-Smit, ‘Politics and International Legal Obligation’ (2003) 9 *European Journal of International Relations* 591.

¹⁵ The first part of this paragraph is taken from Werner (n 6).

¹⁶ For the idea that ‘rules of recognition’ eventually reside in social practices rather than acts of will, see Hart (n 14).

¹⁷ Article 11 reads as follows: ‘The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed’ (Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)). Note that the last phrase (any other means if so agreed) raises the question how states then know what counts as one of the ‘other means agreed’; which rules of recognition tell us what the ‘other means so agreed’ are?

¹⁸ As Koskenniemi has noted, this is precisely one of the reasons why state intent fails to provide determinate guidance for legal interpretation as well: ‘Intent can only be known in its manifestations- which manifestations (text, behavior, teleology etc) count, depend on whether they express intent [...] the argument is hopelessly circular’ (Koskenniemi (n 12), 337). See also the way in which theories of interpretation have oscillated between ‘intent as it is expressed’ and ‘original or actual intent’, J d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011), 180–81.

¹⁹ Koskenniemi (n 12), 309. See also Elias and Lim (n 11), 241: ‘[...] the logic of consensually-derived law entails the “objectivation” of the law and its consequent detachment from the subsequent claims of a State as to what it had “actually” or “in fact” willed’.

²⁰ D Kennedy, *International Legal Structures* (Nomos Verlag 1987); Koskenniemi (n 12).

acute. World order treaties are characterized by two elements: a broad – and sometimes quasi-universal – membership, and the fact that they aim to protect community values that transcend the interests of individual states, such as peace and security, human dignity, the environment or economic development.²¹ Examples are the Charter of the United Nations (UN), the International Covenant on Civil and Political Rights or the Geneva Conventions. World order treaties thus go beyond the establishment of reciprocal obligations between states, instead establishing a communal regime ‘towards the world rather than towards particular parties’.²² While these treaties are of course initially created through the expressed consent of states, the treaty provisions take a life of their own and are interpreted in light of different considerations. Below I will illustrate this point by means of four examples taken from the world order treaties mentioned above: (a) the UN Charter; (b) the European Convention of Human Rights; (c) the Geneva Conventions; and (d) treaties regulating areas beyond state sovereignty.

The first example concerns the way in which the International Court of Justice has interpreted the UN Charter in the classic *Reparation for Injuries* Advisory Opinion.²³ As may be recalled, the Court was called on to determine whether the UN enjoyed (objective) legal personality under international law; a question not explicitly settled in the text of the Charter. In order to determine the legal personality of the UN, the Court begins by asking what kind of organization the Charter purported the UN to be (‘what characteristics it was intended thereby to give to the Organization’). While this seems like an approach that rests on consensualism, the next step of the Court was a general observation on the interplay between international law and international society. The Court argued:

Throughout its history the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

The Court thus combines a logic based on consent (the establishment of the UN by states) with a functional, teleological logic (the need to achieve its purposes) and an evolutionary logic (the evolving requirements of international life). The legal personality of the UN is said to follow from the intentions of the Charter and its founders, as inferred from the principles and purposes of the UN, read against the background of an ever-changing international society. In the Court’s perspective, in other words, the

²¹ For a discussion see W Werner, ‘The Never-Ending Closure: Constitutionalism and International Law’ in N Tsagourias (ed), *Transnational Constitutionalism* (CUP 2007) 329.

²² C Brölmann, ‘Limits to the Treaty Paradigm’ in M Craven and M Fitzmaurice (eds), *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (Wolf Legal Publishers 2005) 24, 28, quoting *Second Report on the Law of Treaties* by Sir Gerald Fitzmaurice, UN doc. A/CN.4/107, YILC 1956, Vol. II, at 54.

²³ *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

functional and teleological considerations regarding the nature and function of the UN served as sufficient basis to determine what the founding states *must have intended*. In this way, the Court provides a telling illustration of the paradoxical nature of consent. While the UN Charter is based on the consent of states, it subsequently turns into something beyond consent; a legal regime that is treated as having its own purposes, organizing principles, identity and interactions with socio-political life. It is up to others, including the Court, to construct the will of states against the background of such considerations. This point is nicely captured in Gautier's understanding of constituent treaties of international organizations in general: 'Once a treaty is concluded it leads its own life. States are not free to lay down the law; their acts and conduct do not escape the consequences to be drawn from them by international law.'²⁴ International lawmaking based on consent, in other words, results in something that cannot be fully explained in terms of the consent of states.

The second example concerns a form of interpretation that the *Reparation* Opinion already hinted at a form of interpretation that is often used in the context of world order treaties, the so-called evolutionary approach that regards treaties as 'living instruments'. As Brölmann has pointed out, the evolutionary approach is different from a teleological approach grounded in the principles, powers and purposes laid down in a constitutive treaty. The evolutionary approach, by contrast, is 'not triggered by a problem in the interpretation of the text, but primarily by a changing social reality'.²⁵ When courts apply an evolutionary approach they reread the treaty in question in light of changing social conditions. Brölmann illustrates this point by reference to the *Matthew's Case* where the European Court of Human Rights downplayed the lack of express consent by states as a 'mere fact' that cannot prevent the Court from applying the Convention to unforeseen situations: 'The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention.'²⁶

In the evolutionary approach, consent recedes even further than in traditional teleological approaches. The explicit absence of consent is bypassed in the name of what the Court believes to be the function of the Convention in society. Of course, this function is still construed on the basis of a text that has come into existence through the express will of states. In addition, the Court generally seeks to ground its conclusions in its reconstruction of the opinions of states. However, it is not the will of states on a particular issue that forms the basis of decisions, but rather the Court's interpretation of what kind of living instrument states have created (or rather: *must have meant to create*) through their consent. This interpretation determines how the Court applies the treaty to new and unforeseen developments in society.

The third example highlights that sometimes courts or tribunals deviate even more radically from a consensual understanding of international law, arguing that treaties and customary law have moved international law as such to a stage beyond consent and the interests of states. A prime example can be found in the first case before the

²⁴ P Gautier, 'The Reparation for Injuries Case Revisited: The Legal Personality of the European Union' (2000) *Max Planck Yearbook of United Nations Law* 331, 335-36.

²⁵ Brölmann (n 22), 33.

²⁶ *Matthews v United Kingdom* App no 24833/94 (ECtHR 18 February 1999), para 39.

International Criminal Tribunal for the Former Yugoslavia (ICTY). In the *Tadic* case, the ICTY presented its reading of the impact of human rights law on the nature and function of international law in general. The ever-expanding body of human rights norms, the Tribunal argued, has moved the international legal order beyond its state-centric foundations: 'A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.'²⁷

The ICTY subsequently used this reading of international law to reconsider some basic provisions of the law of armed conflict. In the case of the *Čelebići* prison camp, for example, the ICTY had to determine the scope of the Fourth Geneva Convention, protecting civilians who are under enemy control.²⁸ According to article 4, the Convention protects persons who find themselves 'in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. The ICTY, however, found this emphasis on nationality unsatisfactory in the context of the armed conflict in Bosnia. It deviated from the nationality requirement laid down in article 4 based on two principal grounds. The first was that in the Bosnian conflict conceptions of enmity were primarily structured along ethnic lines, not along statist lines. This approach could still be regarded as based on an evolutionary approach, which adapts international treaty law to new circumstances. The Tribunal, however, added a second ground which concerned the very nature and identity of the laws of armed conflict itself. The ICTY regarded the primary aim of the law of armed conflict to be the protection of individuals, not the facilitation of state interests. The result was that the category of protected persons under the Fourth Geneva Convention was broadened so as to include those who were regarded as enemies on ethnic grounds – a broadening that the ICTY regarded as in line with the increasing emphasis on human rights law since 1945.

The three examples mentioned above illustrate the transformative nature of consent in international lawmaking. In order to function as the basis of legal obligations, consent has to give rise to something else, to something beyond the actual consent of states. It is then up to interpreters to make sense of the legal instruments that states have produced through their consent. As the cases discussed above demonstrate, making sense of law can involve recourse to principles and purposes of legal instruments, to theories about the function of legal instruments in evolving societal conditions, or even to non-consensual theories about the very nature and identity of legal instruments or international law as a whole. Consent can play a paradoxical role

²⁷ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadic*, IT-94-1, ICTY, 2 October 1995, para 97. The ICTY was not alone in its proclamation of a new normative basis for international law. A year after *Tadic*, the President of the International Court of Justice stated in similar terms: 'The resolutely positivist, voluntarist approach of international law still current at the beginning of the century [...] has been replaced by [...] a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community' (*Legality Of The Threat Or Use Of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 227, Declaration of President Bedjaoui, para 13).

²⁸ Judgment, *Prosecutor v Delalic*, IT-96-21-T, ICTY, 16 November 1998.

in these processes at best; as the ground that needs to be transformed into something else in order to function as the basis for legal argumentation.²⁹

The fourth example emphasizes that the paradox of consent in international law-making is even more outspoken in treaties that build on concepts such as 'mankind' or 'humanity'.³⁰ Since the Second World War, the invocation of such concepts has proliferated in international treaty law. For example, in areas such as the law of the sea, the regulation of outer space or the preservation of cultural heritage states have acknowledged that 'mankind' has interests that are worth protecting through international lawmaking. Against the backdrop of rapid technological developments and increasing concerns about the gap between rich and poor countries, the concept of mankind was introduced to prevent over-exploitation and to ensure that the exploitation of territories such as the sea bed, the ocean floor, Antarctica or outer space would not only benefit powerful nations. Following the ideas of the Maltese representative Pardo,³¹ the seabed and ocean floor were declared 'common heritage of mankind' in the 1982 Law of the Sea Convention, which also set out that 'all rights in the resources of the Area are vested in mankind as a whole' (articles 136–137). In order to ensure that the exploitation of the seabed and ocean floor would take place for the benefit of humanity, a specific authority was created; the International Seabed Authority.³² The idea that areas beyond sovereign jurisdiction should be exploited for the benefit of mankind as a whole was taken up in other branches of international law as well. Article 1 of the Outer Space Treaty, for example, states that '[t]he exploration and use of outer space, [...] shall be carried out for the benefit and in the interests of all countries, [...] and shall be the province of all mankind', with astronauts being elevated to the status of 'envoys of mankind' (article 5).³³ The preamble of the Antarctic Treaty speaks of the

²⁹ See for example the interesting re-reading of world order treaties by E Hey. According to Hey state consent still matters in relation to world order treaties. What states consent to, however, is not an identifiable set of obligations, but rather an underdetermined normative development. Consent is thus turned into a ground that can be used as a justificatory claim against an objecting state. E Hey, *Teaching International Law: State-Consent as Consent to a Process of Normative Development and Ensuing Problems* (Kluwer Law International 2003). See also Koskenniemi's discussion of the paradoxes inherent in theories of tacit consent; Koskenniemi (n 12), 325–33.

³⁰ W Werner, 'Mankind's Territory and the Limits of International Law-Making' in R Liivoja and J Petman (eds), *International Law Making Essays in Honor of Jan Klabbers* (Routledge 2013) 103.

³¹ See Pardo's proposal in 1967 which led to the adoption of the 'Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and the ocean floor underlying the seas beyond the limits of present national jurisdiction, and the use of the resources in the interest of mankind' UNGA Res 2340 (XXII) (18 December 1967) UN Doc A/6695 (1967).

³² For more information on the International Seabed Authority, see <<http://www.isa.org/jm/en/home>>.

³³ See also Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) UNGA Res 3468, art 4, ensuring that '[t]he exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind'.

‘interests of mankind’ that are at stake in ensuring that Antarctica is used solely for peaceful purposes. Notions such as the ‘common heritage of mankind’ even gained a foothold in areas other than the law of non-sovereign territory. The Cultural Heritage Convention, for example, regards parts of the cultural or natural heritage as ‘part of the world heritage of mankind as a whole’ (Preamble) and seeks to protect it accordingly, while in the field of bio-law attempts have been made to protect the human genome as the ‘common heritage of humanity’.

The invocation of ‘mankind’ within the traditional paradigm of treaty-law, however, creates a paradoxical situation. Following the structures of the law of treaties, its validity, scope of application and meaning derives largely from the express or tacit consent of states. The *pacta tertiis* formula, for example, would stand in the way of attempts to create worldwide obligations for the sake of mankind through treaty provisions. At the same time, including terms such as ‘mankind’ in international treaties seeks to do exactly that; to go beyond the rights and interests of individual states by presenting an encompassing world community or set of core values that transcend the confines of state sovereignty. This is also how the concept of ‘mankind’ has traditionally been invoked in international law: as reference to a pre-given encompassing community that exists independently of the lawmaking activities of states.³⁴ If the very same concept appears in modern treaty-law, there seem to be two opposite ways of reading ‘mankind’. Either one sticks to consensualism, arguing that the validity, scope and meaning of ‘mankind’ is ultimately dependent upon the free will of states. This reading, however, would undermine the performative force of the concept of mankind; its claim to go beyond the will and interests of individual states. Alternatively, one regards ‘mankind’ as a pre-existing community that is legally recognized – but not created – in treaty law. This interpretation, however, undermines the consensual understanding of international law and the very idea that legal provisions are ultimately the product of lawmaking by states.

3. CONSENT AND SOVEREIGN EQUALITY

3.1 Consent as Instrument to Protect Sovereign Equality

On what grounds have consensual readings of international law and international lawmaking been defended? In international legal scholarship, at least two (partly contradictory) answers to this question have been put forward. The *first* is that grounding international law in consent links it with international practice and sets it apart from normative positions unrelated to the actual will and behavior of states. In addition, basing international legal obligations on consent would foster compliance as states are more likely to carry out obligations that they have voluntarily undertaken than obligations that have been imposed upon them in the name of some abstract normative theory. Sticking to consent, in other words, would ensure the reality of international

³⁴ Despite their fundamental differences on many points, thinkers such as Vitoria, Grotius and Vattel all regarded ‘mankind’ as a natural law concept whose validity is independent from and predates lawmaking by states. For an analysis see Werner (n 21).

law. If the push towards reality is taken too far, however, consensualism would become, in Koskeniemi's words, 'a non-normative apology, a mere sociological description',³⁵ that 'would lack critical distance from state behavior, will or interest'.³⁶ Not surprisingly, therefore, a *second*, non-apologetic justification has been offered for a consensual reading of international law. This justification maintains that reliance on consent is a part of a counter-hegemonic strategy; a way of protecting the sovereignty of weaker states against political and normative projects pursued by the more powerful states. Notwithstanding differences in power and wealth, one state cannot make laws that are binding upon another state without its consent. In this line of argumentation, consensualism is a normative project aimed at preserving the sovereign equality of states.

An articulation of this position can be found in Brad Roth's recent defense of sovereign equality.³⁷ Roth's defense of equality between states should be read against the background of recent attempts to bypass sovereignty in the name of liberal projects such as human rights protection, democratization and ending impunity; attempts that seek to set limits to the freedom of states to create binding rules through lawmaking. While not arguing against the pursuit of human rights, democracy or accountability for international crimes per se, Roth argues that such projects endanger the possibilities of international cooperation and the protection of weaker states that find themselves labelled as violators of hegemonic norms. Given the plurality of interests and moral values across different political communities, Roth believes sovereign equality to be the best articulation of the political morality in international life.³⁸ Roth's plea for sovereign equality is not based on a radical value skepticism, but rather derives from considerations of prudence that political communities should have 'an ample, though not unlimited, moral right to be wrong about justice'.³⁹ Neither is it based on naïve positivistic assumptions about the possibility to somehow impartially find 'the law as it is' on the basis of the will and practice of states. Instead, it is based on a moral reading of international law as providing a common vocabulary that should be able to mediate between competing conceptions of justice and to help protecting weaker political communities against hegemonic ambitions. In this context, Roth pays tribute to the principle of consent, alongside principles of territorial integrity and political independence.⁴⁰ Grounding international law on the consent of states, however paradoxical and notional this consent may be, offers the best starting point for legal analysis, according to Roth. The idea that a state is only bound through its own free will remains the

³⁵ Koskeniemi (n 12), 17.

³⁶ *ibid.*, 20.

³⁷ B Roth, *Sovereign Equality and Moral Disagreement, Premises of a Pluralist International Legal Order* (OUP 2011).

³⁸ *ibid.*, 11, referring to Dworkin's idea that hard cases should be decided on the basis of the best justifications available in the principles of political morality of a particular society as a whole.

³⁹ *ibid.*, 5. Roth adds: 'outsiders, even when objectively correct in condemning internal practices, have a presumptive moral obligation not to interfere coercively [...]'.
⁴⁰ *ibid.*, 8–9.

‘default position, that a claim of international obligation must, by some authoritative justification, overcome’.⁴¹

3.2 The Indeterminacy of Sovereign Equality

Roth’s analysis provides some strong moral and prudential justifications for sticking to the principle of sovereign equality as the rebuttable position in international legal argument. At the same time, however, his defense of consent as instrument for the protection of sovereign equality results in yet another set of paradoxes for consensual theories of international law. For one, the equality of states cannot, by definition, be the result of the consent of free and equal states – this would only beg the question why the consent of each state would have to count equally. It cannot, in other words, be the product of lawmaking based on state consent. Here again, consensual understandings of international law have to rely on non-consensual arguments. In addition, the notion of sovereign equality *itself* is quite indeterminate; what equality implies largely depends on dominant beliefs regarding the nature and function of states in international society.⁴² Take for example the regulation of the use of force in international law. In the *Jus Publicum Europaeum* the notion of sovereign equality implied that no state had a right to judge the lawfulness of the causes of a war waged by another sovereign; it was for each state itself to decide whether waging a war was justified and necessary.⁴³ Under the UN Charter, by contrast, the notion of sovereign equality forms the basis for the prohibition on the use of force. Sovereign equality no longer implies the prerogative to decide for oneself on the necessity and justness of a war; it implies a protection against the use of force by other states. The prohibition on aggressive wars has now even been lifted to the status of a peremptory norm of international law and under the revised ICC Statute aggression is treated as an international crime.

The indeterminate character of sovereign equality has direct consequences for the link between the equality of states and consensualism. Theories that assume states to be equally sovereign do not necessarily embrace a purely consensual reading of international law. A case in point is the legal theory of Emerich de Vattel (1714–1767), who is often invoked for his forceful expression of the idea that the equality between states is a dictate of nature:

Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations [...] are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, count for nothing. A

⁴¹ *ibid.*, 8. Note that Roth here defends a position that comes close to Koskenniemi’s description of consensualism, whose ‘normative sense [...] is [...] in its claim to override some other view *because* this does not give required effect to what States will’; Koskenniemi (n 12), 310 fn 14.

⁴² C Reus-Smit, *The Moral Purpose of the State, Culture, Social Identity and Institutional Rationality in International Relations* (Princeton University Press 1999).

⁴³ C Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press 2006); S Neff, *War and the Law of Nations, A General History* (CUP 2005). See, however, the continued relevance of just war criteria in measures short of war during the nineteenth century, as discussed by Neff, 215.

dwarf is as much a man as a giant is; a small Republic is no less a Sovereign State than the most powerful Kingdom.⁴⁴

For Vattel, however, the presumed equality between states did not automatically translate into an exclusively consensual reading of the positive law of nations. Alongside conventional law (based on the idea of lawmaking through express consent) and customary law (based on tacit consent) Vattel identified a third category of 'positive law', the so-called 'voluntary law' based on the *presumed* consent of states.⁴⁵ The latter category consists of those rules 'to which the natural law obliges Nations to consent; so that we rightly presume their consent, without seeking any record for it; for even if they had not given their consent, the Law of nature supplies it, and gives it for them [...]'. While for modern readers the term 'voluntary law' thus suggests a basis in the expressed or tacit will of states, it is actually grounded in something beyond the consent of states. One of the most important rights that Vattel located in the voluntary law of nations was the right to use force against those states that threaten the 'laws of the society which Nature has established between them, or who directly attacks the welfare and safety of that society'.⁴⁶ Vattel, in other words, emphasized the importance of non-consensual branches of international law in order to protect the society of free and equal states.

The brief discussion of Vattel's work illustrates that there is no necessary connection between sovereign equality and consensualism. Even if one is keen on protecting the equality between states, it may be possible, or even inevitable, to invoke non-consensual bases for the validity of international legal norms. A more contemporary example of the need to invoke non-consensual arguments can be found in the rules regulating the obligations for newly independent states. For states already existing, the creation of a new state transforms their rights and obligations; there are borders to be respected, immunities to be granted, jurisdictions to be reckoned with, etc. If international law is indeed based on the free will of states, such alterations of the rights and duties of existing states should not be brought about without their consent. On the other hand, however, newly created states are equally entitled to be bound only by those rules to which they have freely consented. If international law is indeed based on the free will of states, the newly born states could not be bound by rules to which they had not previously consented. In other words, consensualism can be invoked to argue either in favour or against constitutive effects of recognition and both to support and to reject the principle that newly created states are automatically bound by existing international rules. Whatever position is taken, it is unavoidable that some states are presumed to be bound by rules that do not derive from their consent.⁴⁷

The relation between sovereign equality and consensualism has become even more complex due to processes associated with globalization. Globalization and the development of a world risk society have created an increasing number of problems that

⁴⁴ E de Vattel, *The Law of Nations or the Principles of Natural Law* (1758), para 18 available at <http://files.libertyfund.org/files/2246/Vattel_1519_LFeBk.pdf>.

⁴⁵ *ibid*, para 27: 'These three kinds of law of nations, the *Voluntary*, the *Conventional*, and the *Customary*, together constitute the *Positive Law of Nations*'.

⁴⁶ *ibid*, para 22.

⁴⁷ For a more elaborate discussion see Koskenniemi (n 12), 272–82.

surpass the boundaries of sovereign states.⁴⁸ Problems such as global warming, nuclear risk regulation, the vulnerability of financial markets or global terrorism are simply not the issue of one state alone. In this context, understanding state equality in terms of consensual international law creates a dilemma: if states are only obliged to act upon these problems if they have given their consent, what happens to the legal position of other states that are affected by those global problems? In this context, normative pluralism alone is of little help. If respecting the freedom of one state means that other states, against their will, are confronted with global problems, recourse to pluralism and independence only begs the question. It is not surprising, therefore, that different modes of governing and different rationales have been developed to deal with global issues. One recurring argument here is that states cannot be viewed as the unproblematic starting point of international legal argument (as in *Lotus*) but should rather be treated as instruments for the protection of world order.⁴⁹ Examples can be found in areas such as climate change and biodiversity regimes, where international legal regimes 'conceptualize states as functional actors, acting in the interest of individuals and groups in society, including future generations'.⁵⁰ In an even more radical fashion, one could argue that linking normative pluralism to a purely consensual understanding of international law could be self-defeating. The protection of normative pluralism, after all, requires a broader societal and legal framework. If states assume the liberty to undermine this broader framework in the name of their freedom under law, it would be self-contradictory to defend this freedom on the basis of normative pluralism. This point was driven home by Judge Weeramantry's separate opinion to the Nuclear Weapons Advice. According to Weeramantry, answering questions regarding the legality of nuclear weapons exclusively from the assumption of state freedom and state equality are doomed to fail. The use of nuclear weapons, after all, could destroy the very legal and societal framework that protects the freedom and equality of states in the first place. Just as Vattel made room for non-consensual forms of law in order to protect an international society of sovereign states, Weeramantry argues that in contemporary society, the freedom of states should presumed to be limited in order to protect the foundations of international law:

It is implicit in 'Lotus' that the sovereignty of other States should be respected. One of the characteristics of nuclear weapons is that they violate the sovereignty of other countries who have in no way consented to the intrusion upon their fundamental sovereign rights, which is

⁴⁸ U Beck, *World Risk Society* (Polity Press 1999).

⁴⁹ This position goes back a long way and has been articulated by Judge Alvarez in his individual opinion in 1949:

Today, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an *institution*, an *international social function* of a psychological character, which has to be exercised in accordance with the new international law.

Corfu Channel Case (UK v Albania) (Judgment) [1949] ICJ Rep 15, Separate Opinion of Judge Alvarez, 43.

⁵⁰ E Hey, 'Addressing the Market or the Hard Work of Developing a Regime to Protect Humanity's Interest in a Good' in B van Beers ao (eds), *Probing the Boundaries of Humanity* (currently under review, document on file with author).

implicit in the use of the nuclear weapon [...]. An individual's right to defend his own interests is a right he enjoys against his opponents. In exercising that right, he cannot be considered entitled to destroy the village in which he lives [...]. it can scarcely be contended that any legal system can contain within itself a principle which permits the entire society which it serves to be thus decimated and destroyed.⁵¹

4. TERRITORIALITY

The idea of consent as constitutive of international legal obligations emerged in a particular context: the rise of territorial units that presented themselves as the highest authority.⁵² Within this context, express or tacit consent came to be viewed as the representation of the norm-creating will of the state. Territoriality, however, has never been the only way in which political communities were formed nor the only way through which boundaries between insiders and outsiders were drawn.⁵³ Territoriality always had to compete with principles such as dynastical ties or balance of power considerations that could require territorial redistribution.⁵⁴ With the acceleration of the process of globalization since the 1990s, territoriality has come under renewed strain. Alongside the territorial distribution of the world, *functionality* emerged as a leading principle in different areas.⁵⁵ While territoriality as a dividing principle came with the authority of the state, functionality comes with the authority of the expert and conceptual boundaries between different fields. This tendency is reflected in international law curricula. General courses on international law (where the territorial division of the world is the starting point) are more and more being replaced by specialized courses in functional areas such as environmental law, humanitarian law, economic law, etc.⁵⁶ In contemporary international law, it is not only important to know which states are part of a legal regime, but increasingly also which expert-language one needs to speak in order to be heard. As Koskenniemi has put it: 'Political intervention is today often a politics of re-definition, that is to say, the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias.'⁵⁷

⁵¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 227, Dissenting Opinion of Judge Weeramantry, 494, 464 and 471 respectively.

⁵² F Kratochwil, 'Sovereignty as "Dominium": Is there a Right of Humanitarian Intervention?' in M Mastanduno, G Lyons (eds), *Beyond Westphalia? National Sovereignty and International Intervention* (Johns Hopkins University Press 1995), ch 2. For a critique of Kratochwil's theses, see B Holland, 'Sovereignty as *Dominium*? Reconstructing the Constructivist Roman Law Thesis' (2010) 54 *International Studies Quarterly* 449.

⁵³ For an analysis of the rise of territorial jurisdiction and cartography, see R Ford, 'Law's Territory (A History of Jurisdiction)' (1998-99) 97 *Michigan Law Review* 843.

⁵⁴ For an analysis of balance of power, dynastical considerations and territoriality in the context of the Treaty of Utrecht, see Reus-Smit (n 42).

⁵⁵ N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp Taschenbuch 1995).

⁵⁶ M Koskenniemi, 'The Politics of International Law: 20 Years Later' (2009) 20 *European Journal of International Law* 7.

⁵⁷ *ibid.*, 11.

In a system dominated by sovereign states, it is important to know what represents the will of the state; in a system dominated by experts, representation takes a different form. It is the representation of knowledge and expertise that counts. The rise of functionality has impacted upon the role of consent in at least two ways:

- It has led to a disaggregation of the state and the rise of international agencies
- It has spurred the creation of legal regimes beyond the state.

In international law, the idea of the state as a unitary actor was never meant as an accurate description of reality; no-one would be so naïve as to assume that the state is indeed one monolithic bloc. The idea of the state as a unitary actor instead functioned as an assumption that was deemed necessary for the proper functioning of international law.⁵⁸ In the area of state responsibility, for example, states are presented as if they were unitary actors; whatever level or branch of government violates the rights of other international legal persons, it is the state as such that bears responsibility. There is no doubt that the unity of the state in this sense is still important in international law. At the same time, however, states are disaggregating in unprecedented ways. As Slaughter has pointed out, governments are more and more organized in transnational networks, both horizontally (networks between national regulators, judges and legislators) and vertically (between national and supranational officials).⁵⁹ This has led to forms of transnational governance based on agreement and custom between, for example, groups of regulators instead of treaties under international law, concluded between unitary states. One of the driving forces between the establishment of such networks is the turn from territoriality to functionality; the increased specialization and expertization of contemporary societies: '[...] two hallmarks of modern industrialized society are specialization and regulation. The result? Legions of regulators with specialized expertise – expertise that often guarantees a measure of deference from judges, legislators, and fellow regulators'.⁶⁰ The same logic of specialization, regulation and abundance of expert-knowledge has spurred the formation of global networks between judges and even, albeit to a lesser degree, legislators.⁶¹

Slaughter has portrayed the rise of transnational government networks as a move to a new, more just and more efficient world order.⁶² There is no need, however, to buy into Slaughter's optimistic liberal agenda to be convinced by her empirical evidence that the state is indeed partly transforming into a network of networks, both horizontally and vertically. What is more, the turn from territoriality towards functionality has not only spurred bottom-up cooperation between states. At the level of international

⁵⁸ In this sense, the idea of the state as a unitary actor fulfills a function that is comparable to the assumption of legal equality; this too is not a description of a pre-given reality, but rather a presentation of reality that presses upon the legal community to be acted upon.

⁵⁹ A Slaughter, *A New World Order* (Princeton University Press 2004).

⁶⁰ *ibid.*, 39.

⁶¹ See for example, Slaughter's discussion of the role of global databases and specialization in judicial cooperation, *ibid.*, 71–5.

⁶² *ibid.*, ch 6.

organizations, it has led to the creation of specialized, technocratic agencies, that sometimes create new, even more specialized bodies themselves.⁶³ As Wessel has set out:

[...] here also, the tendency towards functional specialisation because of the technical expertise required in many areas may be a reason for the proliferation of such bodies and for their interaction with other international organizations and agencies, which sometimes leads to the creation of common bodies. [...] It is not entirely uncommon for international organizations to establish bodies with public law functions.⁶⁴

In similar fashion, Dunoff has argued that the unprecedented powers of lawmaking currently arrogated by international organizations and international agencies has transformed international law fundamentally.⁶⁵ The core question for international law, Dunoff observes, shifts from relations between equal states and their consent to 'the normative results when international organisations interact *among* each other'.⁶⁶

The disaggregation of the state and the rise of technical agencies question the usefulness of consent-based readings of international law. Sure, it may still be possible to portray rule-making in transnational government networks as somehow resting on the tacit acceptance by states. Bringing in the consent of unitary states in this context, however, sounds more like the invocation of a magic formula than as an attempt to grasp the way in which international legal rules are made, interpreted and applied. Nineteenth century imageries of consent as the representation of the will of the unitary state are too far removed from the realities of rule-production in transnational networks, where functional imperatives and expert-knowledge are pivotal. Alternative foundational formulas such as the 'collective conscience of states', a 'sense of right' or 'membership of a society of sovereign states' would be as informative (or rather *uninformative*) as consent in this context.⁶⁷

Consent-based readings of international law have ascribed to a particular understanding of law; legal rules are validated through the freely expressed or tacit consent of states. This almost exclusive focus on the state as lawmaking agency, however, has come at a price. For one, it has made international law more vulnerable than necessary to the charge that it is a marginalized form of law, or no law at all.⁶⁸ If law can only originate from the will of an agent which has monopolized force domestically, the lack of enforcement mechanisms at the international level is an obvious trump card for those

⁶³ For an overview of new forms of lawmaking in international organizations, see J Alvarez, *International Organizations as Law-Makers* (OUP 2005).

⁶⁴ R Wessel, 'Informal International Law-Making as a New Form of World Legislation?' (2011) 8 *International Organizations Law Review* 253, 258.

⁶⁵ J Dunoff, 'Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organisations' (2013) 44 *Netherlands Yearbook of International Law* 99. Dunoff refers to a variety of activities by international organizations, including binding decisions, standard setting, external referencing, administrative decisions, adjudication and supervision.

⁶⁶ *ibid.*, 26.

⁶⁷ For a discussion of the different proposed foundations for international law see H Koh, 'Review Essay: Why Do Nations Obey International Law' (1997) 106 *Yale Law Journal* 2599 available at <http://digitalcommons.law.yale.edu/fss_papers/2101>.

⁶⁸ J Goldsmith and E Posner, *The Limits of International Law* (CUP 2005).

who are skeptical about the legal nature of international law.⁶⁹ This is not to say, of course, that the skeptics are correct. International lawyers have routinely – and rightly – pointed out that the reality of international law resides in its actual *use* by a variety of actors, including governments, courts, international organizations, NGOs, etc. What counts is that international law is treated as a system of binding (and non-binding) legal rules, even if it is often not possible to enforce those rules through sanctions. Factors such as perceived long-term interest, habitualization, internalization, identity, lobbying by domestic interest groups etc. all contribute to the use of international law.⁷⁰

Saying that the reality of international law consists in its actual use reinforces a more general insight from legal sociology: law only functions if it is ‘a constitutive part of culture, shaping and determining social relations’;⁷¹ if it is used as ‘a distinctive manner of imagining the real’.⁷² If law primarily works as a particular way of imagining the real, however, there is no reason to exclude a-priori legal norms that do not originate in the (assumed) will of states.⁷³ What matters then is not whether the validity of norms can be traced back to one single ultimate ground (such as state consent), but rather what is accepted as law in different social practices. If there are different social practices, different sources of law will emerge – and overlaps, reinforcements and conflicts between norms of different origin will become unavoidable.

And indeed international law always had to deal with alternative forms of legality, for example in the form of canon law or the rules of *lex mercatoria*. Processes of globalization, specialization and expertization have reinforced this to an unprecedented extent. In contemporary global society, global private regimes have emerged in different functional areas, simply bypassing traditional sources of domestic or international lawmaking. One only needs to think of the regulation of the internet (*lex digitalis*), fisheries law⁷⁴ or the codes governing transnational construction (*lex constructionis*) to realize important normative regulation takes place outside the confines of traditional international law.⁷⁵ These private regimes often contain the three hallmarks of law that have been identified in Hart’s analytical legal positivism:⁷⁶

⁶⁹ For this argument see also P Berman, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 487, 492.

⁷⁰ For an overview see Koh (n 67).

⁷¹ Berman (n 69), 494.

⁷² *ibid*, 493–4.

⁷³ This point has been made over and over again in pluralist scholarship. See eg B Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (OUP 1999); J Griffiths, ‘What Is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1.

⁷⁴ For a discussion see T Hale, ‘Marine Stewardship Council’ in T Hale and D Held (eds), *Handbook of Transnational Governance: Institutions and Innovations* (Polity Press 2011), 308–14.

⁷⁵ For a discussion see A Fischer-Lescano and G Teubner, ‘Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999.

⁷⁶ Hart (n 14). For a discussion of the private regimes in Hartian terms see Fischer-Lescano and Teubner, *ibid*.

- They constitute a unity of primary rules (rules of conduct) and secondary rules (rules of change, adjudication and recognition);
- The primary rules of the regimes are generally obeyed by private citizens;
- The rules of change, adjudication and recognition are generally accepted by officials (although, by contrast to Hart's notion of law, these officials need not necessarily be *public* officials).

The proliferation of private functional regimes has contributed to new forms of collision and conflict in transnational law. Instead of disputes between territorially separated units, conflicts now arise between functional areas because the private regimes 'inevitably reproduce, albeit in a different form, the structural conflicts existing between the various functional systems within the law'.⁷⁷

Global private legal regimes challenge the traditional understanding of international law in perhaps the most fundamental way. They bring home points made by pluralist scholarship for quite some time and force international lawyers to reimagine their discipline as a form of global law, grounded in different social practices rather than in a single ultimate foundation such as the consent of states. Of course, within many social practices (such as the conclusion of treaties) the will of states remains an important point of reference. It is not possible, however, to somehow transcend these practices and ground the system as a whole in the consent of states.

5. CONCLUSION

As has been demonstrated in this chapter, consensualism alone cannot provide a stable foundation for the validity international legal obligations. Arguments that start out from consensualist assumptions constantly need to refer back to non-consensual arguments in order to bridge gaps between 'is' and 'ought', 'will' and 'norm', law-creation and law-application, etc. With the advent of so-called 'world order treaties', the paradoxes of consensualism have become even more acute. Treaties such as the UN Charter or the Geneva Conventions contain provisions that are difficult to square with the traditional inter-state paradigm that underlies consensualism. In these contexts, sticking to state consent as the ultimate basis of international law (further) detaches theoretical reflection from actual developments in international life. In addition, consensualism is often wrongly portrayed as the logical corollary of the principle of sovereign equality. While sticking to the consent of states may in concrete cases indeed help to protect the equality between states, sovereign equality can also be used to argue *against* consensualism. The need to protect an international society of free and equal states, for example, may be invoked to argue for the validity of obligations binding upon states even without or against their will. While this insight was already developed in early

⁷⁷ Fischer-Lescano and Teubner, *ibid.*, 1013. At the same page the authors mention as examples of such conflicts 'standard contracts within the *lex mercatoria* reflecting the economic rationality of global markets (... colliding ...) with WHO norms that derive from fundamental principles of the health system. The *lex constructionis* ... (colliding ...) with international environmental law'.

scholarship (eg by Vattel), the development of a world risk society has given the call for non-consensual obligations new meaning and force. Finally, limiting international legal analysis to inter-state law blinds us for the development of legal regimes beyond the state. Here again, processes associated with globalization have provided new challenges to state consent as the ultimate basis for international law. The disaggregation of the state, the rise of international agencies and the increasing importance of global private regulation put the continued relevance of state consent as ultimate foundation of international law in question.

Now this all does not mean that 'state consent' has become irrelevant or that we should start looking for alternative foundations of international law. For one, alternative foundational approaches come with their own paradoxes, blind spots and limits.⁷⁸ Moreover, state consent still plays an important role in international legal discourses on the creation, interpretation and application of law. There is no point in theorizing state consent away because it is unable to provide a coherent and encompassing foundation of international law as a whole. State consent remains pivotal if one wants to understand the construction of international legal arguments, however paradoxical and limited these arguments may be. It is necessary, however, to free ourselves from state consent as a foundational myth; of the idea that ultimately international law can be traced back to one single formula. State consent matters as part of the often inchoate and paradoxical argumentative practices of international law, not as the principle that allows us to transcend these practices.

⁷⁸ For an analysis of the limits of international constitutionalism see: Werner (n 21).