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Consenting Is Not Willing

ALAIN PELLET*

Legal theories are not – at least, not only – innocuous intellectual games. They have concrete consequences and may become political challenges.

It seems in order nowadays to apologize for being 'mainstream'. In some respects, I am 'critical', but not on the general approach to international law. I remain convinced that the biggest theoretical problem – and the one of greatest practical importance – is that of the foundation of public international law: what makes it 'law', that is, what makes it a system of norms of behaviour that the addressees consider as legal?[1] And I also maintain two important beliefs, which explain the developments that follow:

- The only theories that have a real explanatory value with respect to the legal character of rules (or norms – I maintain that there is no material difference between them) are voluntarism (to which I do not adhere) or sociological objectivism (to which I do adhere, but not in its Scellian and moralizing version, rather in a so-called Marxian – and maybe outmoded – perspective).
- I also persist in thinking that the venerable notion of 'sources of law' retains an irreplaceable explanatory virtue.[2] Indeed, law is not a mere form, but it needs form and, in this respect, the concept of sources of international law continues to be useful and enlightening despite its despisers. What is a source of law (I speak of formal sources)? Nothing

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[1] I will confine myself to inter-State law, but I consider of course that States are not the only 'subjects' of public international law.

[2] No need to expand on these two postulates: they form the substratum of my *Cours général de droit international public*: see Alain Pellet, 'Le droit international à la lumière de la pratique: L'introuvable théorie de la réalité' (Volume 414) *Collected Courses of the Hague Academy of International Law*, 2021, pp. 28–547.

> but a method to evaluate the acceptability of a rule within a given circle. It is the test through which you can determine whether a political project or wish has penetrated into the legal sphere or, in the words of Jacques Dehaussy, '*tout processus juridique créateur de normes générales destinées à régir des rapports internationaux*'.[3]

I intend to illustrate these purely doctrinal postulates and show their explanatory efficacy by revisiting and updating an old paper that appeared in the *Australian Yearbook of International Law* in 1992 under the title 'The Normative Dilemma: Will and Consent in International Law-Making'.[4] It has, of course, aged a little, but, on the whole, I still adhere to the essence of what I said more than thirty years ago. I think that the fundamental 'message' still holds true: neither will nor consent are explanatory factors of international law even if both are taken into account by international law – but in somewhat different ways.

In my last century's article, I had made much of the distinction between 'consent' and 'will'. I still value the distinction between both notions – and maintain that it was (and is) appropriate to differentiate between 'will' and 'consent'. Hence the title of this chapter: 'Consenting Is Not Willing'. But, upon reflection, I think I was a bit confused about the respective desirable use of the two words.

In reality, what I have (now) in mind is that 'will' is an affirmative attitude: 'I *want* this', 'this is my *will*' – and I would add: 'this is what I *really* want'; it has a psychological and subjective component. 'Consent' is different; indeed, it belongs to the same 'family' of expressions in that it too conveys a sense of assent or acceptance; but it implies (or may imply) something more 'passive' and includes resignation, discouragement or even dismay and, notwithstanding these aspects, it will produce legal effects – upon legally rather well-defined conditions.

A consent can be valid even if it expresses a reluctant will. And it is primarily in that sense that will does not equate with consent. The shade in meaning of

[3] Jacques Dehaussy, 'Sources du droit international' (1958) 1(10) *Jurisclasseur de Droit international*: 'any legal process creating general norms intending to govern international relations' (my translation). Unfortunately, in his last – and stimulating – book, the eminent writer changed this excellent definition and restricted it to the individual or collective *decisions* whose effect is '*de créer une norme* ayant valeur obligatoire *dans un système de droit*' ('*to create a norm* with binding force *in a system of law*') (my translation) (emphasis added): see Jacques Dehaussy, *Propos sur les sources du droit international* (Paris: Pedone, 2017), p. 23. I strongly disagree with this restriction: see, for example, the text from fn. 55–58.

[4] Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1992) 12(1) *Australian Yearbook of International Law* 22–53.

both words might not be as clear in English as it is in French. 'Consent' in the sense used in this paper can be an equivalent to what other writers have in mind when they use the word 'consensus'.[5] The point here is that States may not 'want' a particular rule of international law, but, even if their will is not free, they can consent to that rule, not because they *want* it, but because they have no real choice.

Yet, the distinction is rarely made. Thus, in her article in the *Leiden Journal* (2016), Samantha Besson notes: 'A cursory survey of the use of the term "consent" in international law reveals that consent is used to refer both to the "free will" of States and to their "acceptance" of international law.'[6] This is true indeed and this is precisely what the 1969 Vienna Convention on the Law of Treaties[7] (hereafter VCLT) does: the word 'consent' is used there sixty-two times but, in reality, it is 'discredited' or 'conditioned' in more than half of its occurrences – that is, every time the Convention provides for the conditions of a 'valid' consent. However, leaving aside the VCLT, the reverse is nearly as common and 'will' (or in French '*volonté*') is used instead of consent.[8]

This is regrettable and I would urge both international courts and tribunals as well as colleagues not to conflate both notions. As the International Court of Justice (hereafter ICJ) rightly noted in the *Genocide (Croatia* v. *Serbia)* case, 'there is a distinction between the legal nature of ratification of, or accession to, a treaty, on the one hand, and on the other hand, the process by which a State becomes bound by a treaty as a successor State or remains bound as a continuing State'. In the first case, there 'is a simple act of will on the part of the State manifesting an intent' to become a party.

> In the case of succession or continuation on the other hand, the act of will of the State relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences flowing from those

[5] See Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971); Jutta Brunnée, 'Consent' (last updated January 2022), in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008). Available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1388, last accessed 13 December 2022.

[6] Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29(2) *Leiden Journal of International Law* 289–316, at 295.

[7] The Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980).

[8] See, for example, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, Separate Opinion of Judge Guillaume, p. 291, para. 10; Brunnée, fn. 5: 'States can easily come to be bound by customary law without their explicit consent. In fact, they may even incur obligations against their *will*' (emphasis added). Interestingly, the *Max Planck Encyclopedia*, in which this paper is published, does not include an entry 'Will'.

> circumstances, so that any document issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form.[9]

Strictly speaking (and even though the Court mentions an 'act of will' in both cases), 'consent' would more properly mark a less clearly affirmed will.

Even though consent itself is not a univocal concept – or maybe more exactly, the manifestations of consent in the international legal sphere are quite diverse – the difference between both notions is more effectively represented on a scale than by determining a threshold. It is rather easy (even if probably over-simplistic) to construct a scale showing the various degrees of will and consent implied by the various ascertained sources of international law, their varying respective intensity and their unequal legitimizing and stabilizing effects.

Unilateral acts of the State are probably the epitome of 'willing consent', at least when they aim at imposing obligations on their own author; and this is also true for reservations to treaties (and objections to them) made in accordance with Articles 19–23 of the VCLT.[10]

It is well established that States can bind themselves by unilateral expressions of will.[11] This is compatible with the voluntarist approach. But when such declarations have been made, 'the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance of an arbitrary power of reconsideration'.[12] *Acta sunt servanda* in the same way as *pacta sunt servanda*.

[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (Preliminary Objections) [2008] ICJ Rep. 412, p. 450, para. 109.

[10] On the very complex issues made by the law applicable to reservations with regard to the respect due to the will of the reserving State and the will of the other parties to the treaty, see International Law Commission (hereafter ILC), 'Guide to Practice on Reservations to Treaties', *Yearbook of the International Law Commission* (2011) Vol. II, Part Two, UN Doc. A/66/10, pp. 26–38; see also the challenging views expressed by Vassilis Pergantis, *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives* (Cheltenham: Edward Elgar, 2017), pp. 234–323.

[11] *Nuclear Tests Case (Australia* v. *France)* (Judgment) [1974] ICJ Rep. 253, p. 270; *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)* (Jurisdiction and Admissibility) (Judgment) [2006] ICJ Rep. 6, pp. 27–28; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)* (Judgment) (Merits) [2018] ICJ Rep. 507, p. 554.

[12] *Nuclear Tests (Australia* v. *France)*, fn. 11, p. 270; *The Enrica Lexie Incident (Italy* v. *India)*, PCA, Provisional Measures (29 April 2016), 177 ILR 651, paras. 128–131. On unilateral acts and their termination, see, for example, Alfred P. Rubin, 'The International Legal Effects of Unilateral Declarations' (1977) 71(1) *American Journal of International Law* 1–30; Jean-Didier Sicault, 'Du caractère obligatoire des engagements unilatéraux en droit international public' (1979) 83(3) *Revue générale de droit international public* 633–688, at 650–656.

However, the degree of willingness required when accepting a treaty is weaker. As noted by Philip Allott: 'Negotiation is a process for finding a third thing which neither party wants but both parties can accept.'[13] Indeed, being bound by a treaty is a voluntary, supposedly free, decision – to the point that the VCLT is replete with provisions supposed to ensure that the consent of the State is effective and 'free'; and I have in mind not only Articles 46–53 on the 'Invalidity of treaties', but also Articles 7 and 8 on full powers, 11 *et sequitur* on the means of expressing consent to be bound or Article 40 on amendments to treaties. With these provisions, the VCLT postulates that, when a State follows the usual procedure and concludes a treaty without error or fraud, corruption or coercion in the sense of the VCLT, its will is free.

But this, in fact, is pure hypocrisy. It is not enough to will; it is also necessary *to be able to will*. And it is quite clear that in the international society, if States are equal, some are 'more equal', sometimes much more equal, than others. It is obvious that the 'will' of small and weak States is 'less free' than that of wealthy powerful ones; but this certainly does not prevent them from validly expressing their 'consent' to be bound by treaties or to participate *volens nolens* to the formation of customary rules. This is all in the name of the principle of sovereignty – which, nevertheless, must be recognized as having other virtues.[14]

This is not the place to enter into a lengthy discussion on the effects of coercion on the validity of international law norms or obligations, which, even limited to treaty law, the painstaking compromise embodied in Article 52 of the VCLT and the joint Declaration included in the Final Act of the Conference, are far from solving. This results in a marked reluctance of international courts and tribunals to recognize the invalidity of a treaty on grounds of coercion or to interpret it widely. Thus, in its 1973 judgments in the *Fisheries Jurisdiction* case, the ICJ refused to admit that the mere inequality of power between the United Kingdom and the Federal German Republic, on the one hand, and Iceland, on the other hand, could, in itself, void the relevant fisheries agreements.[15] To give a more recent example: in

[13] Philip Allott, 'The Concept of International Law' (1999) 10(1) *European Journal of International Law* 31–50, at 43.

[14] See Pellet, fn. 1, p. 490, paras. 852–857; Alain Pellet, 'Le droit international à l'aube du XXI^{ème} siècle (La société internationale contemporaine: Permanences et tendances nouvelles)', in Alain Pellet, *Le droit international entre souveraineté et communauté* (Paris: Pedone, 2014), pp. 19–112, pp. 48–55.

[15] *Fisheries Jurisdiction Case (United Kingdom* v. *Iceland)* (Judgment) [1973] ICJ Rep. 3, p. 14, para. 24; *Fisheries Jurisdiction Case* (*Federal Republic of Germany* v. *Iceland*) (Judgment) [1973] ICJ Rep. 49, p. 58, para. 24. For another example of the Court's reluctance when

the Advisory Opinion on the *Chagos*, the ICJ observed that, given the circumstances in which the Mauritian representatives had given their 'consent' to the territorial detachment of the archipelago on the eve of independence, this 'was not based on the free and genuine expression of the will of the people concerned'. However, the Court was careful not to characterize these circumstances (independence in exchange for detachment) as coercion within the meaning of the law of treaties, preferring the ground of violation of the colony's right to territorial integrity.[16]

That said, there can be no doubt that consent is not incompatible with at least a certain amount of coercion.[17] It must be admitted that coercion *lato sensu* is a component of international society as of any society; but this does not impede States in validly consenting to rules of, and obligations under, international law.

In reality, no State's will is entirely free. Great powers have different kinds of constraints to those of small countries, notably because they are, in fact, more deeply involved in international relations and therefore would usually care more for reputation, influence, soft power or interdependence. They too must compromise and consent to rules that do not necessarily correspond to their best interest at the time of conclusion of the treaty. Communality is indeed for all States an important incentive for consenting to legal rules – being of course accepted that 'depending on whether you are powerful or powerless' ('*selon que vous serez puissant ou misérable*'),[18] it will be easier to get out of the legal chains thus accepted. It remains that, as Tom Franck wrote, 'membership confers a desirable status which is manifested when the members have internalized socially functional and status-rooted privileges and duties'.[19]

Whatever the conditions for a valid consent, when they express their 'consent' in conformity with these rules, States buy a 'one-way ticket'.

coercion is invoked: *Case concerning Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) (Preliminary Objections) [2007] ICJ Rep. 832, p. 859, para. 79; see also the strong formulas in *Aminoil* v. *Kuwait*, Arbitral Tribunal, Award (24 March 1982) 21 ILM 976.

[16] Judgment, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep. 95, p. 137, para. 172. In that case, the Court addressed the consent of the people; but this does not matter for my purpose, which is to approach the limits of consent in a context of coercion.

[17] Monique Chemillier-Gendreau, 'Le droit international entre volontarisme et contrainte', in *Mélanges offerts à Hubert Thierry: L'évolution du droit international* (Paris: Pedone, 1998), pp. 93–105.

[18] Jean de La Fontaine, 'Les animaux malades de la peste', in Jean de La Fontaine, *Les Fables de la Fontaine* (Paris: Aubert, 1842), pp. 7–9, p. 9.

[19] Thomas M. Franck, 'Legitimacy in the International System' (1988) 82(4) *American Journal of International Law* 705–759.

Take a case like *The S.S. "Wimbledon"*.[20] By its consent, whether it corresponded to its real will or not,[21] Germany entered into the Treaty of Versailles. Obviously, when the events that gave rise to the dispute occurred, Germany had changed its will and was no longer willing to apply that part of the Treaty concerning the Kiel canal – and for quite respectable reasons. Nevertheless, the Court rightly answered: *Pacta sunt servanda*.[22] But the formula is very ambiguous and this sacrosanct slogan of voluntarism as used here means in reality the very contrary of voluntarism: 'whatever its will, a State must abide by the law it entered into'.

This same idea of a 'will trap' is conveyed by the recent judgment on the preliminary objections in *Guyana* v. *Venezuela*. Commenting on the wording of the Agreement by which the Parties had 'conferred on the Secretary-General the authority to choose among the means of dispute settlement provided for in Article 33 of the Charter "until the controversy has been resolved"', the Court observed that the Parties had thus 'conferred on the Secretary-General the authority to choose the most appropriate means for a definitive resolution of the controversy'.[23] Then, noting that the decision taken accordingly by the Secretary-General 'would not be effective ... if it were subject to the further consent of the Parties for its implementation' and 'would be contrary to the object and purpose of the Agreement', the Court concluded 'that the consent of the Parties to the jurisdiction of the Court is established in the circumstances of this case'. In other words, in spite of its strong struggle against the ICJ's jurisdiction,[24] the procedural conditions being fulfilled, Venezuela could not go back on the will clearly expressed in the Agreement concluded fifty-four years earlier. Professor Christian Tams will further explain that while State consent remains an indispensable condition for binding dispute settlement, States lose control over what they have

[20] *Case of the S.S. "Wimbledon" (Great Britain* v. *Germany)* [1923] PCIJ Rep. Ser. A No. 1.

[21] But the Court did not question that Germany had expressed a free consent, and the Treaty of Versailles was not subjected to the principle of the prohibition of the use of force in international relations: see ibid., pp. 25, 30.

[22] Ibid., pp. 29–30. However, the Court does not expressly refer to the Latin formula.

[23] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)* (Judgment) [2020] ICJ Rep. 455, p. 478, paras. 83, 84.

[24] Venezuela did not only object to the Court's jurisdiction, it systematically refused to participate in the proceedings until 28 November 2019 when it sent a 'Memorandum' objecting to the admissibility of the Guyanese Application; it also made a lot of declarations and a press communiqué vociferously stating that the Court lacked jurisdiction and that it would not comply with any judgment on the merits, including after the Court's judgment asserting jurisdiction: see ibid.

consented to once the process is under way – it is then an independent third party that will determine, affirm and interpret the scope of consent.[25]

It would therefore seem that consent is only an explanation for one part of the process: the access to the treaty. It does not explain the basis of a State's obligation when that State is no longer willing to implement a treaty – in this respect, I join Samantha Besson who rightly drew attention to the importance of 'disagreement'.[26]

This does not mean, of course, that treaties are established *ne varietur*. It is necessary to be aware that treaty law changes and lives as does any part of any legal system, either through an informal evolution (mainly thanks to interpretation), or formally through amendments. As also stressed by Allott: 'A treaty is not the end of a process, but the beginning of another process.'[27] But it is suggested that there is no symmetry between the two processes: what has been done willingly cannot be changed or terminated by merely expressing a new unilateral will.

Indeed, except in a very few conceivable cases (e.g. in the field of human rights or of the environment), at least two States must express their consent to be bound. However, when it enters into an agreement, a State acts unilaterally: ratification, accession, acceptance, signature, etc., are unilateral acts – even though means of expressing consent to be bound show an increased flexibility in the conclusion of treaties. But, as underlined by Jutta Brunnée, the treaty-making process can progress, and the treaty take effect, only when a collectivity of States so agrees.[28] Similarly, when they want to amend or terminate the treaty, the Parties must act together: 'all States' must express the same will (except, of course, if the treaty itself prescribes otherwise); if not, the recalcitrant State will be responsible for its violation of the treaty. This is the clear result of Articles 54 and 56–60 of the VCLT. And the rules in this regard demonstrate an increase of formal rigidity, notably with the pressure of the treaty bodies that are jealously guarding the integrity of the treaty and of its membership.[29] It can be maintained that will is not absent from this process. But it is not State will, not even majority will, but communal consensus, in a very strict sense – the consent (be it implicit) of each and every party, not of one or a few or even many of them; this very much looks like unanimity. And this confirms Vassilis Pergantis' remark in his excellent

[25] Tams, Chapter 3 in this volume.
[26] Besson, fn. 6, at 292: 'consent, when it is required in international law-making, does not amount to strict agreement only, but rather to an agreement to disagree further'.
[27] Allott, fn. 13, at 43.
[28] Brunnée, Chapter 8 in this volume.
[29] On this approach, see Pergantis, fn. 10, pp. 154–188.

book on *The Paradigm of State Consent in the Law of Treaties*: 'States can exist only within a collaborative framework (legal order), which means we are forced . . . to "construct" their will on the basis of communitarian ideals.'[30]

However, it can happen that some liberties are taken with apparently strict rules embodied in the VCLT. Thus, the famous Smithsonian Institute Agreement, which was instrumental in changing the Bretton Woods monetary system in 1971, was a purely informal agreement that certainly does not meet the requirements of Article XXVIII of the International Monetary Fund (hereafter IMF) Statutes.[31] In the same vein, the short-lived Protocol 14 bis to the European Convention on Human Rights of 27 May 2009,[32] simplifying the procedure for examining applications to the European Court of Human Rights (hereafter ECtHR), entered into force following its acceptance by only three States, whereas the Convention and Protocol 14, which it replaced pending its entry into force, required unanimity.[33] In these cases, the initial *pactum* was not respected, it was modified: the communal consent achieved what isolated State wills could not have done.

It is also true that the law of treaties offers an apparent safety net to States in the form of the famous doctrine of fundamental change of circumstances, to which Article 62 of the VCLT is dedicated.[34] According to this principle, a

[30] Ibid., p. 3.

[31] 'Communiqué from the Group of Ten (Washington, 18 December 1971)' (1971) 1 *Bulletin of the European Communities* 19–21; see also the 'habilitation clause', adopted by the General Agreement on Tariffs and Trade (hereafter GATT) at the end of the Tokyo Round in 1979, which undoubtedly should have been voted for unanimously but, instead, was adopted by consensus: see GATT, 64 UNTC 187 (adopted 30 October 1947, entered into force 1 January 1948); Olivier Long, 'La place du droit et ses limites dans le système commercial multilateral du GATT' (Volume 192) *Collected Courses of the Hague Academy of International Law*, 1983, pp. 13–142, p. 76.

[32] Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, *Council of Europe Treaty Series*, No. 204 (adopted 27 May 2009, entered into force 1 October 2009).

[33] Jean-François Flauss, 'Le protocole n°14 bis de la Convention européenne des droits de l'homme' (2009) 3 *Revue Générale de Droit International Public* 621–634; Linos-Alexandre Sicilianos, 'Le protocole 14 bis à la convention européenne des droits de l'homme: un instrument (heureusement) éphémère' (2009) 55 *Annuaire français de droit international* 729–742; Annelise Quast Mertsch, 'The Reform Measures of ECHR Protocol No. 14 and the Provisional Application of Treaties', in Malgosia Fitzmaurice and Panos Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights* (Leiden: Martinus Nijhoff, 2012), pp. 33–71.

[34] See, for example, Philippe Cahier, 'Le changement fondamental de circonstances et la Convention de Vienne de 1969 sur le droit des traités', in *Le droit international à l'heure de sa codification: études en l'honneur de Roberto Ago*, Vol. 1 (Milan: Giuffrè, 1987), pp. 167–186; Aymeric Hêche, 'Les conditions d'application de la *clausula rebus sic stantibus*' (2014) 1 *Revue Belge de Droit International* 322–354; Thomas Giegerich, 'Article 62', in Oliver Dörr and

treaty can be terminated provided circumstances have changed in a radical way and this change affects the very scope of the treaty. This well-established rule of law[35] puzzles voluntarists as it is not easy to be reconciled with the idea of will. Voluntarists have tried, by claiming that any treaty embodies an implicit clause providing for its termination in case of fundamental changes of circumstances: *clausula rebus sic stantibus*. This problem cannot be discussed here in any detail, but it is clear that the *clausula* is a purely fictitious explanation: 'Such clauses, if ever employed, are not now generally employed.'[36] In fact, it is certainly more convincing to root this principle – which does exist in all systems of law – in the necessities of social life: the function of legal rules is to meet social needs; when social needs change legal rules lose legitimacy and lose their binding force.

Thus, it appears that treaties or unilateral commitments, praised as they may be in voluntarist doctrine, flow effectively from the consent of States; but when they enter into force, they negate the notion of sovereign will. Once a State, by an apparent act of its free will has entered into a treaty or a unilateral commitment, the trap closes; its will is captive and can be freed only through processes in which the will of an individual State has little or nothing to do.[37]

Moreover, it is not clear that, in the prevailing conditions of modern international life, a formal expression of consent is always necessary. The rules embodied in the so-called 'codification treaties' which, more often than not, are 'progressive development treaties' can, nevertheless, be or become binding upon all States, even if not in force.[38] At any rate these general treaties certainly provide 'general indications' of what the law is.[39] And it can be recalled that in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, the Court considered that it 'would have had *proprio motu* to take account of

Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2nd ed. (Berlin: Springer, 2018), pp. 1143–1181; or Julian Kulaga, 'A Renaissance of the Doctrine of *Rebus Sic Stantibus*?' (2020) 69(2) *International & Comparative Law Quarterly* 477–497.

[35] *Fisheries Jurisdiction Case (United Kingdom* v. *Iceland)*, fn. 15, p. 18; *Fisheries Jurisdiction Case* (*Federal Republic of Germany* v. *Iceland*), fn. 15, p. 63, para. 36.

[36] Clive Parry, 'The Law of Treaties', in Max Sørensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968), pp. 175–245, p. 234.

[37] See, for example, Pergantis, fn. 10, p. 157.

[38] Thus, the VCLT was referred to by the ICJ before its entry into force in 1980: see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep. 16, p. 47; *Fisheries Jurisdiction Case (United Kingdom* v. *Iceland)*, fn. 15, p. 18, para. 24.

[39] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep. 73, p. 94, para. 46.

the progress made by the [Third United Nations Conference on the Law of the Sea] even if the parties had not alluded to it in their Special Agreement'.[40]

In any case, whatever the role of State will in treaty-making – where consent is, nevertheless, predominant – it is clear that its influence is even less regarding other means of formation of legal rules.

Thus, concerning customary obligations, Prosper Weil himself, the most rigorous advocate of voluntarism in the last century, has defined them as 'the Achilles heel of consensualist outlook'.[41] This is indeed confirmed by a very quick look at the classical theory based on the well-known two 'elements' of custom, as enunciated by Article 38 of the ICJ Statute.

First, as far as the so-called 'material element' is concerned, that is, the 'general practice', States' behaviour converging towards such a practice can be said, in a way, to be 'voluntary'. But State wills are aimed here at doing something, not at elaborating a rule of law. If a national court renders makes a decision on State immunity, its judgment will be part of the general practice; that, however, was not the aim of the court's decision: its only concern was to decide on the precise dispute it had to solve. Therefore, concerning our inquiry, the only question is whether the requirement of an *opinio juris* – the 'psychological element' – is a confirmation of voluntarist theories. The answer must be in the negative for several reasons which I only mention:

– Both elements are not on the same footing. The practice is 'constitutive'; except in the special case of the '*coutume sauvage*'[42] which

[40] *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep. 18, p. 38, para. 24.

[41] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77(3) *American Journal of International Law* 413–442, at 433; Georges Abi-Saab, 'La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté', in *Le droit international à l'heure de sa codification: Études en l'honneur de Roberto Ago*, fn. 34, pp. 53–65; Maarten Bos, 'The Identification of Custom in International Law' (1982) 25 *German Yearbook of International Law* 9–83; Jean Combacau, 'Ouverture: De la régularité à la règle' (1986) 3 *Droits* 3–10; Serge Sur, 'La coutume internationale: Sa vie, son œuvre' (1986) 3 *Droits* 111–124; Brigitte Stern, 'La coutume au cœur du droit international: Quelques réflexions', in *Le droit international: Unité and diversité: Mélanges offerts à Paul Reuter* (Paris: Pedone, 1981), pp. 479–499; Ielbo Marcus Lobo de Souza, 'The Role of State Consent in the Customary Process' (1995) 44(3) *The International & Comparative Law Quarterly* 521–539; Maurice Kamto, 'La volonté de l'État en droit international' (Volume 310) *Collected Courses of the Hague Academy of International Law*, 2004, pp. 13–428, pp. 262–312; Aymeric Hêche, 'L'élément subjectif dans la coutume internationale', in Samantha Besson, Yves Maussen, Pascal Pichonnaz (eds.), *Le consentement en droit* (Zürich: Schulthess, 2019), pp. 31–53.

[42] See René-Jean Dupuy, 'Coutume sage et coutume sauvage', in *La communauté internationale: Mélanges offerts à Charles Rousseau* (Paris: Pedone, 1974), pp. 75–87; René-Jean Dupuy, 'Droit déclaratoire et droit programmatoire: De la coutume sauvage à la "soft law"', in Société

relates more to the law-making by the General Assembly; *opinio juris* can only appear after the event. States cannot 'feel that they are conforming to what amounts to a legal obligation', in the words of the ICJ in the *North Sea Continental Shelf cases*,[43] if this legal obligation does not already exist.

– The wording used by the Court is revealing: a 'feeling' that an obligation exists is a very different thing from a will and certainly corresponds more to the ideas of consent or consensus than to those of will or agreement; thus the International Law Commission (hereafter ILC) noted in its commentaries of its Draft conclusions on identification of customary international that '[t]he Latin term *opinio juris* has been retained in the draft conclusions and commentaries alongside "acceptance as law" because of its prevalence in legal discourse … and also 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'.[44]
– Above all, this 'feeling', or even 'acceptance' in the wording of Article 38 of the Statute of the ICJ, is, by no means achieved by the expression of will of individual States, but by a general, communal acceptance of some more or less openly expressed conviction by States or by international bodies. In its 1984 Judgment, the Chamber of the ICJ constituted in *Gulf of Maine* contented itself with an examination of 'the legal conviction … of all States' ('*de l'ensemble des États*').[45] As late President Jimenez de Arechaga has underlined, the Court 'has not required strict proof of the specific acceptance of the defendant State, thus rejecting the voluntarist conception of custom'.[46] Moreover and very significantly, new States find, in their birth crib, the whole body of customary rules existing at the time together with their sovereignty. Customary obligations as lying on a tacit agreement is a totally misleading fable.

française pour le droit international, *L'élaboration du droit international public: Colloque de Toulouse* (Paris: Pedone, 1975), pp. 132–148.

[43] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep. 3, p. 44, para. 77.

[44] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries', in ILC, 'Report on the work of the seventieth session' (2018), UN Doc. A/73/10, pp. 122–156, p. 123, fn. 665.

[45] *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America* (Judgment) [1984] ICJ Rep. 246, p. 299, para. 111.

[46] Eduardo Jimenez de Arechaga, 'Custom', in Antonio Cassese and Joseph H. Weiler (eds.), *Change and Stability in International Law-Making* (Berlin: De Gruyter, 1988), pp. 1–4, p. 3.

It is, of course, impossible to ignore the 'persistent objector' doctrine. But it must be observed that it is, at best, a 'contracting out' doctrine and that it is largely unrealistic: in most cases, States do not care; practice develops without them being aware of the process. When they 'awake', that is, when the time of *opinio juris* has arrived, it is too late – the evil is done and the rule does exist.[47] Of course, nothing impedes a State from expressly accepting a customary rule, but no theoretical conclusion can be inferred from this: 'Acceptance of a rule contributes to its effectiveness',[48] but is not a prerequisite for its existence.

And, it must be stressed that what has been said about treaties is *a fortiori* true for custom. Whatever role their will plays in the formation of customary rules, once these rules exist, States are bound – and even more strongly than by treaty rules. The reason for this is that it is virtually impossible for a State or a group of States to repudiate an existing custom by which they are bound.

From this very quick overview of custom, it can at least be concluded that State will contributes very little to its formation, while some form of soft consent can be presumed.

This conclusion is even more obvious regarding general principles of law. They are such a problem for voluntarist authors that most of them deliberately ignore these principles and deny them the quality of an autonomous source of law.[49]

This position is quite easy to understand. If, arguably, custom could be equated with a tacit agreement – *quod non* – such a conjuring trick is clearly impossible as regards general principles of law. If Article 38(1)(c) of the World Court's Statute has an autonomous meaning, those principles represent the degree zero in State consent: they are deduced from domestic laws whose rules have been elaborated without any intent as to their role as the source of obligations in international law. Of course, it is plain that State will has nothing to do with such rules: from a voluntarist point of view, this is a condemnation to death! Most certainly, these principles do exist in domestic

[47] For an illustration see, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (Judgment) (Merits) [1986] ICJ Rep. 14, p. 107, para. 204.

[48] Cassese and Weiler, fn. 46, p. 16.

[49] See Alain Pellet, *Recherches sur les principes généraux de droit en droit international*, thèse Paris II, 1974. Available at: www.alainpellet.eu/ouvrages, last accessed 18 November 2022, pp. 334–338; for an update see, for example, Jean d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law', in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds.), *Global Justice, Human Rights and the Modernization of International Law* (Berlin: Springer, 2018), pp. 163–184. For more moderate views, see Samantha Besson, 'General Principles in International Law: Whose Principles?', in Samantha Besson and Pascal Pichonnaz (eds.), *Principles in European Law* (Zürich: Schulthess, 2011), pp. 19–64.

legal orders; but in no way have they been created in order to apply at the international level and, in fact, there are cases when they do not apply. This has nothing to do with State will: it depends entirely on the question of whether or not the international society can be compared with national society – and it can only be with great caution.[50]

And yet, according to both the dominant doctrine and the international case law, all these sources are 'equal'. Well, equal 'in dignity' maybe; but, concretely, things are different: the intensity of recourse to one or the other of the sources I have mentioned is quite proportional to the 'consent load' in each source. No doubt the preference given to written law is in part dictated by practical convenience: it is easier to refer to treaties, declarations or resolutions than to customs or general principles. However, this is not the only reason: the intensity of consent and, consequently, of legitimacy – which is a main factor for the acceptability of the rule – impregnating the respective obligations also plays a role in this preference. Now, it would be erroneous to draw a 'voluntarist' conclusion from this: customary obligations are not less binding legally speaking than treaty obligations.[51] Simply handling customary norms is more difficult and their acceptability is lower.

But there is more: *jus cogens*. Perhaps can it be interpreted 'as some form of older natural law thinking'; at any rate, it is clearly 'an updated denial of [voluntarist] positivism'.[52]

Contrary to a voluntarist recurring criticism, the definition given by Article 53 of the VCLT of a 'peremptory norm' is less blurry than that of an 'international custom' by Article 38 of the ICJ Statute, under which it is unclear whose 'general practice' must be taken into account and by whom it must be 'accepted as law'. For its part, a peremptory norm must be 'accepted and recognized *by the international community of States as a whole*'; this clearly means that acceptance and recognition are not given by individual States but by their 'community', which surely goes beyond a simple majority but just as surely does not require unanimity.[53] This acceptance relates to the

[50] See Pellet, fn. 49, pp. 294–318.

[51] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, fn. 47, pp. 94–95, para. 177.

[52] Maarten Bos, 'Will and Order in the Nation-State System: Observations on Positivism and International Law', in Ronald St. J. Macdonald and Douglas M. Johnston (eds.), *The Structure and Process of International Law*, 2nd ed. (Leiden: Martinus Nijhoff, 1986), pp. 51–78, p. 51; Dan Dubois, 'The Authority of Peremptory Norms in International Law: State Consent or Natural Law?' (2009) 78 *Nordic Journal of International Law* 133–175.

[53] See, for example, ILC, 'Text of the draft conclusions on peremptory norms of general international law (*jus cogens*) and commentaries thereto', in ILC, 'Report on the Work of the Seventy-first Session', pp. 147–208, p. 170, para. 6; *Smith* v. *Socialist People's Libyan Arab*

particular quality of the norm, its imperative nature, which results in a strengthened, but not necessarily unanimous, *opinio juris* and means that no derogation is allowed. Indeed, peremptory norms of general international law are the only rules that are truly binding in the sense that they cannot be derogated from, even by the common will of the transgressors.

Now, the role of *opinio juris* is not confined to custom (whether 'normal' or peremptory): it is an indispensable test applying to all legal obligations. I would go even further: it is *the* very criterion of law that differentiates it from ethics or religion, even more so from political sciences or economic so-called laws. You could call it 'conventialism' but I must say I do not favour the expression that reduces to a single set of sources that have in common that they give rise to binding rules only if they are based on some form of 'consent', but the manifestations of this consent are so diverse and its 'intensity' so variable that the word seems to me to be rather reductive.

Moreover, I do not totally accept Dame Rosalyn Higgins' assertion that 'what one identifies as international law will be closely dependent upon what one believes is the basis of legal obligation'[54] since I suspect that, under the eminent author's pen, 'legal obligation' means 'binding commitment'. Personally, I cannot accept that law be reduced to this. It is wider than that – legal norms exist when the addressees have a feeling that a conduct, whether binding or desirable, is expected from them – that they must *or should* do something.[55] But I fully agree that they are 'closely dependant upon what one believes is the basis of legal obligation'. And this has a name: *opinio juris*.

Opinio juris and consent are different notions. In many cases, you may feel legally bound even if consent is very remote: willy-nilly you accept that through the legal system, obligations can be imposed upon you. Now, it goes without saying that the effectiveness of the obligation will be enhanced if the addressee has consented to it: by consenting to the obligation, it becomes subjectively legitimate, and legitimacy clearly is a guarantee of increased effectiveness.

Why do you comply? For a lot of reasons that you can find outside the law: this is the totally convincing 'no-law hypothesis' (*'hypothèse du non-droit'*) once proposed by Dean Carbonnier.[56] As very aptly explained by the late Tom Franck:

Jamahiriya, 101 F.3d 239 (2nd Cir. 1996), p. 242; Dubois, fn. 52, p. 135; João Ernesto Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (Zürich: Schulthess, 2016), p. 125.

[54] Rosalyn Higgins, 'The Identity of International Law', in Bin Cheng (ed.), *International Law: Teaching and Practice* (London: Stevens, 1982), pp. 27–45, p. 32.

[55] See fn. 58 and accompanying text.

[56] Jean Carbonnier, 'L'hypothèse du non-droit' (1963) *Archives de philosophie du droit* 55–74.

> [C]oercion is not law's whole story. Persons also comply with law because they think it right to do so. Why do they think it right? One reason is that they believe the law to be legitimate. This belief in a law's legitimacy has to do with properties of the legal text: how it was enacted, its clarity, pedigree, and how it fits into the overall framework and skein of the legal system.[57]

The question of State consent and legitimacy is carefully developed by David Lefkowitz[58] so I will not discuss it at length and I apologize for making apparently exciting ideas totally banal and a bit pedestrian, but I think that this simply means that legitimacy stems from the belief that an obligation exists because the interested persons are convinced that it has a 'legal basis' – let us say, if I dare to be even more banal and pedestrian, because they can recognize its *source*. It does not mean that the addressees are happy with it, that they approve it, but they know they must comply whether they like it or not. Law is law; *dura lex sed lex*.... However, whatever positivist voluntarists may say, this does not mean that they are in favour of the obligation in question – simply, 'objectively' they are prepared to comply with it. They have no real will to do so but they comply.

There is no doubt that consent can play a crucial role in creating or reinforcing this feeling and consequently in making the acceptability of the obligation stronger by comforting its legitimacy, and its implementation more effective. Indeed, the correlation is far from absolute between consent and effectiveness but there is no doubt that it helps. Let me just illustrate this with a few examples:

– Acceptation of the ICJ's jurisdiction (or, for that matter, any international court or tribunal) clearly gives rise to fewer difficulties when it is given in a Special Agreement or – but to a lesser extent – in the compromissory clause of a treaty, than when it is given rather abstractly in an optional declaration under Article 36, paragraph 2, of the Statute which is a nest for preliminary objections.[59] And you may think also of China's virulent opposition to the *South China Sea* Arbitration.[60]

[57] Thomas M. Franck, 'Fairness in the International Legal and Institutional System (General Course on Public International Law)' (Volume 240) *Collected Courses of the Hague Academy of International Law*, 1993, pp. 9–498, p. 41.

[58] Lefkowitz, Chapter 2 in this volume.

[59] Since 1947, preliminary objections have been raised in fifty cases introduced by a unilateral application (out of 183).

[60] *The South China Sea Arbitration (The Republic of Philippines* v. *The People's Republic of China)*, PCA, Award on Jurisdiction and Admissibility (29 October 2015) 55 ILM 805, Award (12 July 2016); Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018) 17(2) *Chinese Journal of International Law* 207–748.

Indeed, as Rüdiger Wolfrum noted, 'international law proceeds from the assumption that the establishment of continuous obligations is possible by a single original consent'[61] and, in this case, you have a compromissory clause in the United Nations Convention on the Law of the Sea[62] (hereafter UNCLOS), and you could allege that China gave its consent when ratifying. But such a remote one – just at the time of ratification and, most probably, with the feeling that its declaration under Article 288 was a sufficient precaution.

– And, another example among others, showing the stabilizing role of consent: the evolution of the law of the sea. No need to elaborate but just have in mind the major stages in the extension of maritime spaces: three nautical miles; slight marginal unilateral differences; massive claims (in particular, the Truman declarations) almost instantaneously endorsed by a great majority of States; two successive waves of treaty law that have permitted to stabilize the situation including among States that have not ratified UNCLOS. Moreover, the role of consent as a stabilizing factor is also crystal clear when one thinks about maritime delimitation: equidistance/special circumstances; virulent objections (the negative, destabilizing, side of consent) in the name of equity; destruction of the rule; patient reconstruction with the passive acceptance (consent) of the community of States; stabilization. And the same goes with space law: the need for legal rules has called for immediate consent at least to general principles – so stringently that some have spoken of instant custom;[63] then, again stabilization through a wide series of resolutions followed by treaties. Hardening of consent – progressive stabilization.

Consent has another virtue: it can be given to non-binding norms. In such a case, it expresses an intent, it fixes a target, without creating strict obligations to act for the addressees. Contemporary international law is replete with such instruments – foremost among them the recommendations of the collective bodies of international organizations, which lack the capacity to impose obligations or prohibitions on their addressees, but which nevertheless seek to influence the conduct of those addressees and do not necessarily fail to do so any

[61] Rüdiger Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations', in Rüdiger Wolfrum and Volker Röben (eds.), *Legitimacy in International Law* (Berlin: Springer, 2008), pp. 1–24.

[62] United Nations Convention on the Law of the Sea, 1833 UNTS 397 (adopted 12 October 1982, entered into force 16 November 1994).

[63] Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23–48.

more than treaties. As Sir Hersch Lauterpacht magnificently explained in the separate opinion he attached to the ICJ Advisory Opinion of 7 June 1955 in one of the many cases concerning South-West Africa, this does not mean

> that a recommendation is of no legal effect whatsoever. A Resolution recommending to an Administering State a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If . . . it decides to disregard it, it is bound to explain the reasons for its decision.[64]

In these cases, collective consent is at the origin of flexible (soft) norms intended to guide the conduct of the members of the Organization, without imposing binding obligations. And, while it has sometimes been argued that a recommendation is binding on a State that, by its vote, has contributed to its adoption, based on the principle of good faith, good faith is not violated merely because a State does not implement a recommendation it has voted for. Similarly, as the ICJ rightly stressed in its Judgment of 1 October 2018, a State's 'participation in the consensus for adopting some resolutions . . . does not imply that [it] has accepted to be bound under international law by the content of these resolutions'.[65]

Nevertheless, like the ratification of a treaty or a unilateral commitment, a vote in the United Nations General Assembly or the Security Council or any other organ of an international organization expresses the consent of the State that casts it. It may reflect the deep-seated will of the State or it may be coerced within the limits imposed by the prohibition on the use of force in international relations: in all cases it is consent, not necessarily a commitment. Thus, consent irrigates 'the great shades of nuance that permeate international law'[66] and contributes to the 'infinite variety' of international law.[67] But, definitely consenting is not willing.

[64] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa* (Advisory Opinion) [1955] ICJ Rep. 67, Separate Opinion of Judge Lauterpacht, pp. 90–123, p. 120.

[65] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)* (Judgment) (Merits) [2018] ICJ Rep. 507, p. 562, para. 171.

[66] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep. 403, Declaration of Judge Simma, pp. 478–481, p. 481, para. 9.

[67] Richard R. Baxter, 'International Law in "Her Infinite Variety"' (1980) 29(4) *The International & Comparative Law Quarterly* 549–566.