THE JURISPRUDENCE OF INTERNATIONAL LAW: CLASSIC AND MODERN VIEWS

The panel was convened by its Chair, Daniel Bodansky,* at 10:30 a.m., April 2, 1992.

REMARKS BY DANIEL BODANSKY

Although all fields of law raise serious jurisprudential issues, international law raises these issues in a particularly acute form. Our colleagues in other fields of law are not constantly faced with the question of whether the subject matter they study *is* law. This is a persistent question plaguing the international lawyer. It is therefore surprising that this is the first panel devoted to the philosophy of international law at an annual meeting of the Society in several years. Perhaps this time lapse is due to a lingering doubt that a jurisprudence panel can attract a crowd. One hopes that our panel will dispel that fear.

This panel comes at a fortuitous time, because there have been many developments in the jurisprudence of international law in recent years. We will be hearing about some of them today. Among political scientists, there is also an awakening interest in international law. Later today, we will hear about the relationship between international relations and international law from another distinguished panel.

STATE CONSENT AND THE SOURCES OF INTERNATIONAL OBLIGATION

*By J. Shand Watson***

The most obvious jurisprudential issue separating classic from modern theory in international law is the role of state consent in the formation of rules. While classic theory has long required that international obligation can result only from state consent, modern theory is characterized by a growing disregard for it and a tendency toward the generation of rules along more autonomous lines of reasoning. It is common to find a brusque dismissal of state consent in the initial stages of many arguments purporting to establish some bold new international norm. The reason for such dismissals is simply that insisting on the consent of states to the creation of new norms puts a rather strict limit on the degree of creativity available to commentators. Invariably one finds upon further investigation that these brave new norms, created with the consent of states, are neither descriptive of what states are actually doing nor prescriptive in effect. This is because in international law, as in all customary legal systems, efficacy and validity are coextensive, and efficacy depends upon the consent of the participants.

I propose to argue in favor of maintaining the classical insistence on state consent as enumerated in the oft-quoted paragraph in the *Lotus* case: "The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law. . . .

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Restrictions upon the independence of states cannot therefore be presumed."[1] There are a number of ways in which state consent to norms can be eliminated, and it is not always apparent when this is being done; a few examples are in order. First and most obvious is the argument that treaties can bind nonsignatories. On occasion, one sees statements that because a large majority of states has signed a treaty, the treaty is of such importance as to be universal in effect, so that the minority of nonsignatory states are bound. More often, the treaty is universalized by more indirect means. For example, the "objective effect" doctrine singles out certain treaties as being valid *erga omnes*. It never seems to be made clear exactly which quality produces this effect, nor which organ decides whether that quality is present; but the effect is clearly to presume the consent of states. Such presumption of consent is also present in the use of a predominantly teleological mode of interpretation. This can produce a strongly legislative effect when the original purpose is unclear and the one chosen by the interpreter is inconsistent with the one perceived by the state allegedly bound. This effect can be increased if the interpreting organ is not clearly identified as having the authority to make binding interpretations. It is noteworthy that both of the above techniques—the *erga omnes* doctrine and the teleological approach to interpretation—are absent from the Vienna Convention on the Law of Treaties.

A final example of the presumption of state consent in the area of treaty law *is* to be found in the Vienna Convention, although the history of the provision and its form indicate that it was highly contentious. The concept of *jus cogens* is to the effect that certain customary norms are in some way "supernormative"[2] in effect and that this quality prevents states from concluding treaties inconsistent with them. Here the very vagueness of the concept produces such a high degree of subjectivity that any conclusion reached by any third party can be credibly argued to presuppose the consent of a state.

State consent is also often bypassed in modern approaches to custom as a source of international law. Since custom is ultimately a normative description of the existing state of affairs, classical theory is very unpopular with those seeking a legislative effect in the system. The modern variations on the classical approach to custom fall into two categories. The first establishes a custom between a finite number of states and then, on the assumption that all rules must be universal, generalizes the rule to apply to all states. It is not, of course, necessary, nor even likely, that customary norms be universal in scope. The second variation is to argue that the criteria for custom can be met by a new type of activity—something other than state practice. By far the favorite candidate here is the alleged legislative effect of UN General Assembly resolutions.

It is sometimes argued that, when resolutions pass by very large majorities, the votes cast constitute proof of such solid and widespread *opinio juris* that concurrent practice is no longer necessary. This is the position taken in Bin Cheng's widely cited article on "instant custom," though he did insist on consistent subsequent practice.[3] On other occasions it is argued that the practice requirement is met by the resolution or the vote thereon, with *opinio juris* being adjective to that

[1]The *S.S. Lotus* case, PCIJ Ser. A. No. 10, at 18 (1927). Brierly stated the matter even more succinctly: "Nothing can be law to which states have not consented." J. BRIERLY, THE LAW OF NATIONS 51 (6th ed. 1963).

[2]P. Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 427 (1983).

[3]Bin Cheng, *United Nations Resolutions on Outerspace: "Instant" International Customary Law*, 5 IND. J. INT'L L. 23 (1965).

practice in the traditional sense. The commonest version of this argument is that a consistent body of practice by the organ is equivalent to consistent practice by its member states. But there are almost always negative votes, and if positive votes are to be considered equivalent to practice, then the negative votes must constitute a clear objection to the alleged norm, and once more the consent of states is being presumed. Furthermore, since states voting for a resolution did so knowing that the General Assembly's power is only to recommend, they cannot be said to have consented to a norm. If there is a custom in such situations, it is only a custom to continue voting the same way.

Because international law lacks authoritative institutions to produce objectively valid rules, one is not in a position to adopt an approach to rule formation that might be at variance with the conclusions reached by the participants in the process. The appropriate mode of reasoning is inductive, not deductive, and any time a court or a commentator reaches a conclusion on the validity of rules by means of deductive or a priori reasoning, it is quite possible that this conclusion will not be shared by the state or states alleged to be bound by the rule. When this happens, it is just as likely that the rule is invalid as it is that the state position is invalid. Disregarding the importance of state consent by an academic observer is equivalent to a physicist disregarding the law of gravity because he prefers the results that can thus be obtained.

Defending the pivotal role of consent in international law is a distinctly unpopular position to adopt, and therefore quite likely to be correct. What follows is an outline of some reasons it is inappropriate to presume the consent of states.

All legal systems must have some method for identifying the valid rules of the system; in this regard international law is no exception. In a hierarchy the question of the validity of rules is settled by reference to an institutional source empowered by Kelsen's *Grundnorm*[4] or Hart's Rule of Recognition.[5] It is rarely, if ever, relevant to inquire into such matters as whether a rule is being complied with or whether it is being enforced. In international law, however, the lack of authoritative institutions makes such easy knowledge of objective validity impossible. If rules could be claimed to be valid by anyone interested in the legal system, by pluralistic states, dictatorships, international political institutions or North American academics, then the legal system would quickly be reduced to a normative chaos with a very wide selection of competing and inconsistent norms, all purportedly valid.

Another difference tending toward normative anarchy lies in the motivation to comply with rules. In a hierarchy one can assume that there is a stable, viable and continuing source of motivation to comply with the system's norms. One cannot make the same assumption in international law. There, as in all customary systems, one must cope with a motley array of potential and real reciprocal sanctions, together with potential and real reciprocal benefits. The motivation to comply is much more complex and elusive; so also is the motivation to sanction. Thus the question of enforcement becomes a major problem. One has to consider, when discussing the validity of a norm, the motivation of norm upholders, the motivation of potential norm violators and the motivation of potential sanctioning states in order to make any informed statement about a rule's existence.

[4]HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115–22 (1945).

[5]H. L. A. Hart's "Rule of Recognition," while similar to Kelsen's *Grundnorm*, is based on empirical evidence of acceptance by those within the legal system. *See* HART, CONCEPT OF LAW, chapter VI (1961).

The solution to the problem of analyzing this almost infinitely complex lattice-work of potential rules and sanctions is, and in classical theory always has been, to concentrate on the state practice that evolves from the process. By doing this, one excludes from the inquiry legal claims put forward by states without any great commitment and other rules suggested by nonparticipants, such as academics or institutions—rules not sufficiently consistent with state interest to be maintained in fact. Practice is thus the distilled result of the myriad adjustments made between states in their reciprocal relations. There is no need for the observer to dwell subjectively upon the validity or priority of various competing claims. An objective reading of the viable rules resulting from the whole process may be obtained simply by referring to the result.

Under normal circumstances, if a usage has hardened into custom, not only do the states acting in compliance with it consider it valid, but other states do also. States that could have objected or attempted to stop the practice will have been acquiescing, consenting to the evolving rule. Custom is thus more than just practice; it is tolerated practice, practice with the consent of other states. Seen in this light, custom is as much dependent on state consent as are treaties. In the latter the consent is expressed openly, while in the former it is tacit.

Without an authoritative institutional structure, any concept of legal validity not based on state consent would be hopelessly subjective and relativistic. One would have to construct a method for evaluating claims by some other means and would encounter two significant problems. The first is that the chosen means may not appeal to the participants in the process and that they therefore would not enforce the conclusions drawn. The result would be that the norms would be prescriptively inefficacious. The second is that the decision would inevitably be meta-legal, adopting a position external to the customary system.[6] As such, the values, choices and priorities would be different from those of the participants and therefore unlikely to produce accurate predictive results. This is the problem with all policy-oriented schools of international law; they provide no objective test for filtering out important claims from trivial ones, except by way of a series of subjective a priori preferences that have no basis whatsoever in the functioning legal system. In such schools of thought there is clearly no intersubjectivity between observer and participants in the process of rule formation. This can be provided only by a system based on state consent.

State consent, in the form of consent to treaties, acquiescence or *opinio juris*, ensures that two important prerequisites are met for the successful external analysis of the operation of a customary system. First, state consent is the method whereby states identify and acknowledge the rules they consider binding upon themselves and other states. Consent is the only objective way of ensuring communication between states as to which behavior is considered legal and which is not. By identifying the legally significant, consent makes communication about legality between states both possible and meaningful, in much the same way that agreement on rules of grammar facilitates communication between individuals. There has to be an objective core of accepted conduct against which states can assess conduct that can be fairly expected of other states and conduct that other states expect of them. Casting aside consent as a necessary element in custom and treaties is destructive of the ability of states to know what the prevailing rules are

[6]That the external viewpoint alone is insufficient as a means of analyzing legal systems is made abundantly clear by HART, *supra* note 5, chapter V and ALF ROSS, ON LAW AND JUSTICE 13–18 (1959).

supposed to be. Without such knowledge, there can be no reciprocity, because there is no point of reference for participants in the system.

The second factor requiring adherence to state consent relates to the issues of efficacy and implementation. Simply put, a state will not engage in sanctions against another state that has not consented to a rule, because the first state wishes to be able to control which future obligations it will incur. The only way it can maintain this control is by upholding the principle of consent. By not sanctioning the second state when it has not consented, the first state is clearly indicating that it considers the presence or absence of consent to control whether any state incurs an obligation. Thus, if one were to conclude that a norm existed binding a state, and that state had not consented to it, one would find no willingness on the part of other states to enforce that norm. As a matter of state practice, enforcement of the norm against the nonconsenting state would not be forthcoming, and the nonconsenting state would remain free of any external reciprocal motivation. For this reason, state consent is essential for the implementation of sanctions and for any compliance such sanctions might produce. The fact that the persistent objector is not considered bound by custom is proof of the wide acceptance of a voluntarist conception of obligation by states.

It is not unusual, even under the most favorable circumstances, for external motivation to be completely absent. This leaves a state with only unilateral or internal motivation to comply with a norm. On these occasions—and they indeed may be typical of the manner in which international law is observed—the only incentive for compliance with a norm is the desire of a state to be seen to be willing to carry out its promises in the long run. This is a very limited motivation, not significantly different from a purely unilateral decision that, because the state has committed itself to do something, it is proper to comply with that undertaking although there is little likelihood of sanctions or long-term benefits from compliance.

Consent remains important in such unilateral instances of compliance because the state deciding to comply with the norm on its own initiative is the same state determining the norms it is bound by. This being so, it is extremely unlikely that a state will spontaneously comply with a norm to which it has clearly not consented. On the other hand, it will be quite likely to comply with rules it has openly accepted. This is based not only on the desire to create a reputation for being a state that keeps its promises but also to the internal effect of consent to international obligations within the state's domestic legal system. Once the international act of consent occurs, there is invariably an internal legal process governed by the constitution, which often results in automatic internal compliance with the international obligation. Internal effects often triggered by clear international consent to a rule include bureaucratic adoption of the rule, judicial acceptance of international law and even full legislative parity. None of this occurs without the initial act of consent.

In summary, where compliance requires sanctions, sanctions will be forthcoming only when there is consent to the rule. States are clearly unwilling to endorse any other position. Where compliance occurs unilaterally, consent governs the selection of the rule in question and any internal mechanisms that produce consistent conduct. Ignoring these realities will produce inefficacious and futile rules.

In conclusion, the choice that has to be made is between (1) ignoring the inevitable importance of state consent as a prerequisite for an efficacious definition of obligation, in which case one generates norms neither complied with nor enforced, and (2) continuing to require consent, with the result that one is undeniably limited

to fewer and less ambitious norms. The apparent reduction in scope produced by the latter approach is clearly offset by the fact that the norms it produces have both descriptive and normative functions. The former approach will fail on both counts.

State consent must always be included in the definition of the two basic sources of obligation in international law, because it is the only way to (1) produce objectively valid rules and (2) allow for the difference in motivation for norm compliance in customary legal systems as opposed to hierarchies. Because of this, consent in the creation of obligation is not a matter of preference, choice or political predilection. It inevitably constitutes an integral part of the validity and efficacy of the rules of all customary legal systems.

Realism and Kantianism in International Law

*By Fernando R. Tesón**

By far the most popular theory of international obligation is positivism. That theory grounds obligation on *acts of states*, on some form of their will, as expressed nearly exclusively in customary and conventional sources. A glance at the international legal literature shows that what governments say and do is considered the ultimate arbiter, the normative source, of international obligation.

I have elsewhere argued that positivism is conceptually and morally bankrupt.[1] I wish to focus today on a neglected aspect of positivism: its link to the school of thought styled as *realism*.

First, an important clarification of terminology is in order. I understand "positivism" as the theory according to which international law is to be found exclusively in the acts of nation-states—for the most part, custom and treaty. In particular, I wish to sidestep the debate over whether custom is really a form of consent.[2] My critique will address any theory according to which binding international law is created exclusively by *states*.

Positivists claim that international law is grounded on the actual will or consent of states, either aggregate consent over time (regional or universal custom) or express consent (treaties and other international agreements). But what is the foundation of consent itself? One explanation is that states are in a state of nature, where might makes right, and where states, pursuing only their national interest, eventually subject themselves to international law.[3] States thus consent from interest. This may be called the realist version of positivism.

Realist positivism rests upon several premises: that for every state there is an identifiable national interest, that there is no transboundary universal justice or morality, and that therefore binding international law can be created only by states freely consenting (in some way) to its principles. I will examine here the first two premises—that is, the viability of national interest as a foundation of international law.

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[1] *See* Fernando R. Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84 (1990).

[2] *See* ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 187–99 (1971).

[3] The second version of actual consent conceives of states as having fundamental rights (not just goals or interests), and agreeing by custom or treaty to limit them for the sake of international cooperation (including the control of force). *See* Tesón, *supra* note 1, at 96, and references therein.