

University of Bristol Law School

**FORMATIVE ASSESSMENT COVER SHEET**

***This form should be completed and submitted with your formative assessment.  
Please attach this sheet as the first page of your submission.***

<b>Unit Code/Name</b>	General Principles of International Law
<b>Assessment title/question</b>	<i>Is the importance in international law of “state consent” on the wane? Should it be?</i>
<b>Submission date</b>	05/12/2016

<b>Student name</b>	Christopher Olsen
<b>Date submitted</b>	05/12/2016

**Before you submit your formative assessment, please check:**

- ✓ I have observed the preparation and submission instructions for this assessment
- ✓ I know what marking criteria apply to this assessment  
(Unless informed of specific marking criteria for the assessment, the assessment will be marked in accordance with the Intended Learning Outcomes (ILOs) for the Unit (see the Unit Guide) and the Law School assessment criteria (see Blackboard: Law Student Information - Assessment))
- ✓ I have completed the boxes above, and have completed the optional box below if there is any particular issue I would like my marker to provide specific feedback on

<b>Specific feedback request</b> <i>Please complete this section if there is something on which you would like specific feedback from your marker. For example your reflection on previous assessments might identify difficulties in a particular area (eg structure; level of detail; analysis; referencing). By completing this section your marker will know to provide you with feedback specifically directed to this issue to assist your skills development.</i>	<b>I would like to receive specific feedback on:</b>
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*Feedback on your formative assessment will be provided as set out in your Unit Guide and/or as instructed by your Unit Co-ordinator. Please contact your Unit co-ordinator if you are unsure of when or how your feedback on this assessment will be provided.*

## UNIVERSITY OF BRISTOL LAW SCHOOL: FEEDBACK

Your work is assessed with reference to the Law School's assessment criteria (based on the University Assessment Criteria). These criteria are driven by Intended Learning Outcomes (ILOs) with your final, overall mark for this Unit reflecting how well you have attained the Intended Learning Outcomes (ILOs) for the Unit.

The following table provides an indication of your relative performance in relation to the ILOs that generally apply in law units, so that you can more easily spot particular strengths or weaknesses. (See the assessment criteria guide for more detail on these). Your mark is **not** calculated by 'adding up' these boxes, but by reference to the assessment criteria and a judgment of the quality of this piece of work in the round. Please pay particular attention to the comments provided by the marker in relation to your work, and their specific suggestions for improvement.

If, after reading the comments and reviewing your assessment, you have any queries relating to this feedback or require clarification, please see your tutor or the unit coordinator in their consultation hours. Additional general feedback or a feedback session may also be provided in relation to this piece of work: please check on Blackboard or with your Unit co-ordinator. Your personal tutor can provide more general support in understanding and acting on feedback.

		Exceptional	Excellent	Good	Satisfactory	Poor	Inadequate
K	Knowledge and Comprehension						
S	Problem-Solving, Critical Analysis, Synthesis and Evaluation						
A	Quality of Argument						
E	Quality of Expression						
R	Use of Authority, Reference and Research						
Note: your marker may use the codes (K, S, A, E, R) on your work or in your feedback to refer to these criteria							

### General comments on your work:

You have chosen an original line of argument and that is good (if nothing else it cheers up the person who is made to read ten version of the same—other—argument). You might have dealt with topics such as jus cogens and the persistent objector, however. You usefully rely on a wide range of writings, which is good. The language is clear—but there are some inaccuracies and solecisms, which you may want to think about. There is perhaps too much focus on territorial integrity in your essay.

### To improve your work:

Think more closely about how, in answering the question title, you can draw on the various fundamentals of our topic—in this case that would have been sub topics such as jus cogens, the persistent objector, and possibly the discussion about the bindingness of unilateral acts.

**Mark:**

65

**Deductions:**

**Marker:**

EB

**Date:**

11 Jan 2017

**(Formative work only) Specific feedback as requested on:**

## General Principles of International Law: Formative Essay

### *Is the importance in international law of “state consent” on the wane? Should it be?*

**Word Count (including footnotes): 1,527 words**

#### **Introduction**

International law is built on the foundation of state consent. A state's legal obligations are 'overwhelmingly – some would say exclusively – based on its consent to be bound'.<sup>1</sup> This focus on consent offers the utmost protection to individual states. Lately, however, the notion of state consent has become increasingly ignored and violated in international law. This essay will attempt to examine the reasons as to why this might be and why instead state consent ought to be taken more seriously as an obligation under international law, as the classical model insists.

State consent, in the sense of consent to treaties, acquiescence or *opinio juris*, certifies that two important prerequisites are met for the successful external examination of the operation of a customary system. First, state consent is the method whereby states acknowledge and identify the rules they deem to be binding upon themselves and other states. Consent is the only unbiased way of guaranteeing communication between states as to which type of behavior is considered legal and which is not. By ascertaining the legally significant factor, consent makes communication about legality between states both achievable and meaningful. There must be an objective core of accepted conduct against which states can evaluate conduct that can be justly expected of other states and behavior that other states expect of them. Dismissing consent as a necessary element in custom and treaties damages the ability of states to understand what the prevailing rules are supposed to be. Without such knowledge, there can be no reciprocity, because 'there is no point of reference for participants in the system'.<sup>3</sup>

In response to attacks from ISIS, Iraq has requested that the United States and its allies assist it in defending itself against the group. Since September 2014, Iraq, together with the United States and several other states, has been using force against ISIS in Syria without the consent of the Syrian Assad regime. Iraq acts on the basis of its right to individual self-defence and the other intervening states intervene on the basis of the right to collective self-defence. Self-defence, as well as the use of force within an authorisation given by the United Nations (UN) Security Council, constitute the two exceptions to the international prohibition on the use of force between states.<sup>4</sup> An action in self-defence can be individual, when the victim state reacts to an armed attack, or collective, when other states react to an armed attack on the request of the victim state.

Following the terror attacks of ISIS in Paris on 13th November 2015, France extended its strikes, thereby exercising its right to individual self-defence and asked for assistance. Several Western states, including the United Kingdom and Germany, decided to become

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<sup>1</sup> A. Guzman, *The Consent Problem in International Law* (University of California, Berkeley Law School 2011), p 2.

<sup>2</sup> The *S.S. Lotus* case, PCIJ Ser. A. No. 10 (1927), at 18.

<sup>3</sup> D. Bodansky & J. Shand Watson, 'State Consent and the Sources of International Obligation' in *Proceedings of the Annual Meeting* (American Society of International Law), Vol. 86 (April 1-4, 1992), pp. 111-112.

<sup>4</sup> UN Charter, Articles 42 and 51.

involved in different ways in the fight against ISIS in Syria, invoking, in particular, the right to collective self-defence and, sometimes, also the right to individual self-defence. Russia too has been perpetrating strikes in Syria since November 2015 but ‘these happen with the consent of that state’.<sup>5</sup> Consent by Syria to the resort to force by Russia precludes the wrongfulness of that act in relation to Russia and thus provides legal grounds for Russian military action.<sup>6</sup> Defensive action in Syria, without its explicit consent, affects its territorial integrity. There should therefore be a reason, other than the need to respond to an armed attack, to enter into Syria’s territory. States have an obligation to ensure that their territory is not used to the detriment of other states.<sup>7</sup>

So, why has this seemingly callous disregard for Syrian sovereignty, by violating the state consent rule, been allowed to go unchecked under international law? Critics view the dramatic demonstration of U.S. power in Iraq unfavourably, suggesting that it raises the spectre of international hegemonic law. Such a system would replace the rule of equally sovereign states ‘creating law through consent and practice with a system whereby a single actor, the hegemon, dictates new rules of law’.<sup>8</sup> While supporters of realpolitik would likely reject international law as such, opponents and proponents of a system of international hegemonic law instead consider whether ‘U.S. pre-dominance is somehow transforming the existing international legal order into something new and quite different,’<sup>9</sup> whereby consent is implied without being expressly given by a foreign power.

The concept that state consent serves as the exclusive source of obligation in international law has been unable to escape censure. Scholars question what gives legal force to the consent of states expressed through treaties.<sup>10</sup> Do treaties bind states because they consent to the binding effect of treaties? Such a construction leads to an inestimable logical regression of states consenting to consent. Or, does a treaty’s legal force originate from a non-consensual basis such as natural law? If so, ‘consent cannot be the only basis for creating international law’.<sup>11</sup>

State consent is often ‘bypassed’ in modern approaches to custom as a source of international law.<sup>12</sup> As custom is ultimately a normative description of the present state of affairs, classical theory is decidedly unpopular with those pursuing a legislative effect in the system. The modern variants of the classical approach to custom fall into two categories. The first establishes a custom between a limited number of states and then, on the belief that all rules must be universal, generalises the rule to affect all states. Naturally, it is unnecessary, nor even likely, that customary norms be universal in their scope. The second variation is to argue that a new type of activity can meet the criteria for custom: something other than state

<sup>5</sup> I. Couzigou, ‘The Fight against the ‘Islamic State’ in Syria and the Right to Self-Defence’, *E-International Relations*, (5/2/2016) <<http://www.e-ir.info/2016/02/05/the-fight-against-the-islamic-state-in-syria-and-the-right-to-self-defence/>> Date accessed: 2<sup>nd</sup> December 2016.

<sup>6</sup> Article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

<sup>7</sup> *The Corfu Channel Case (United Kingdom v Albania)* ICJ Rep 1949 22.

<sup>8</sup> See, for example, D. F. Vagts, *Hegemonic International Law*, 95 AM. J. INT’L L. 843 (2001); J. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873 (2003).

<sup>9</sup> D. B. Hollis, *Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 Berkeley J. INT’L L. 1, Article 4 (2005), p 138.

<sup>10</sup> *Ibid*, p 142.

<sup>11</sup> T. M. Franck, *The Power of Legitimacy Among Nations* 187 (Oxford University Press 1990).

<sup>12</sup> Bodansky & Watson (n 3), p 109.

practice. By far the most popular candidate here is the alleged legislative effect of UN General Assembly resolutions.

It is perhaps at this point that we should ask ourselves whether a state's refusal to provide consent actually matters. One of the key issues that has emerged surrounding the state consent requirement is that states do not possess the kind of moral liberty that is supposed to be protected by the requirement of consent. Consequently, as in the case of the relations of individuals to states, 'consent may not be necessary to obligate states to go along with a treaty or organisation'.<sup>13</sup> International law scholar Andrew T. Guzman wisely argues that a commitment to consent is inefficient. Guzman has also surveyed the international legal system's non-consensual forms of rule making and has shown them to be inadequate to address the consent problem.<sup>14</sup> Guzman shrewdly surmises that 'there is simply too little flexibility or authority in these non-consensual approaches to address the world's problems'.<sup>15</sup> If the global community wishes to make progress, we will have to improve our ability to overcome the consent problem.

### **Conclusion**

Although state consent has an important role to play, 'we cannot address the world's greatest problems unless we are ready to overcome the problem it creates – the consent problem'.<sup>16</sup> International law has developed a variety of ways to tolerate the consent problem. These include the granting of concessions by supporters of change to opponents thereof, customary international law, and to the United Nations Security Council. However, none of these provide a sufficient counterweight to the consent problem.

Policies are also in place to help work around the consent problem, mostly through the use of 'soft law'. For instance, the international system has developed a plethora of international organisations and international tribunals that generate soft law. As currently used and perceived by the international legal system, states, and commentators, these soft law strategies are beneficial, but insufficiently so. We could achieve better results within the system by further accepting the soft law promulgated by these bodies and raising the expectation of compliance placed on states. This move toward greater support for non-consensual soft law would help to overcome the consent problem and 'represent a step in the right direction for the international system'.<sup>17</sup>

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<sup>13</sup> T. Christiano, 'State Consent and the Legitimacy of International Institutions' in A. Marmor (ed), *The Routledge Companion to Philosophy of Law* (London, Routledge, 2012), p 21.

<sup>14</sup> Guzman (n 1), p 14.

<sup>15</sup> Ibid, p 60.

<sup>16</sup> Ibid, p 2.

<sup>17</sup> Ibid.