THE ROLE OF STATE CONSENT IN THE CUSTOMARY PROCESS

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I. INTRODUCTION

THE idea that customary international law is closely related to State consent was first advanced by the classic writers on international law.[1] Since then, more refined consensualist views have been developed, and they could be grouped into three main theories: the auto-limitation theory; the tacit pact theory; and the collective will theory.[2] In general, those theories try to explain two main points: first, whether State consent alone, i.e. independent of any superior norm to that effect, explains the transmutation of a given standard of conduct into a customary rule, or, in other words, if State consent alone is that which imparts to a customary rule its legal character; second, whether the expression of State consent is a necessary step in the procedure which leads to the formation of a customary rule. The first point is not dealt with in this article.[3] The object of this article is to investigate whether State consent really plays any role in the creation of customary law. It is hoped that this investigation will raise some relevant theoretical and practical questions on the role of consent in the customary process.

II. STATE CONSENT AS PART OF A LAW-CREATING PROCEDURE

THE central argument to be examined in this article is the following: irrespective of whether there is some superior rule or principle which deter-

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1. See Francisco Vitoria, *Escritos Politicos* (1961), pp.300–301, 303, 307; Christian Wolff, *Methodo Scientifica Petractatum* (The Classics of International Law, James Brown Scott (Ed.), 1934), Vol.II, pp.6, 11, 12, 17; Emmerich De Vattel, *The Law of Nations* (1982, translator unknown), Preface, p.lxvi; Hugo Grotius, *De Juri Belli Ac Pacis Libri Tres* (The Classics of International Law, James Brown Scott (Ed.), 1925), Vol.II, pp.9, 23–24, 44.

2. See Hildebrando Accioly, *Tratado de Direito Internacional Publico* (1933), pp.9–10; H. Triepel, "Les rapports entre le droit interne et le droit international" (1923) 1 Hag.Rec. 82–87; L. Oppenheim, *International Law* (8th edn, H. Lauterpacht (Ed.), 1955), pp.15–17, 25; A. Cavaglieri, *Lezioni di diritto internazionale*, pp.7–8; D. Anzilotti, *Cours de Droit International* (1929, trans. Gilbert Gidel), Vol.I, pp.46 *et seq.*; G. Tunkin, *Theory of International Law* (1974, trans. W. Butler), pp.123 *et seq.*

3. However, an answer to this question could be summarised in the statement that even the consensualist writers admit that State consent or will alone is unable to explain its own validity or its law-creating (or normative) force. Anzilotti e.g. says (*idem*, p.339) that it is not a State's will or consent that produces law-creating effects but, rather, the law which attaches such effects whenever this will or consent is manifested.

mines that the manifestation of State consent produces normative effects, consent is necessary and indeed essential for the creation of customary rules. Whether this argument is logically consistent or whether it faithfully reflects the reality of the customary process depends upon the investigation of some basic premises which seem to be behind it. They may be summarised as follows:

(1) that it is clear what State consent or will means, and when and how it is expressed;
(2) that, as in a treaty process, the rule or the practice to which a State expresses its consent is clearly identifiable or known;
(3) that this method is logically consistent, workable, and in fact operates in any customary process;
(4) that States recognise their consent or will as a law-creating means (though they may not necessarily recognise, or may disagree as to, the principle which validates this method).

This will be examined in detail below.

A. Premise 1: It Is Clear what State Consent or Will Means, and When and How It Is Expressed

Most consensualist theories use the terms "will" or "consent" without first defining or elaborating on them. In general, they limit themselves to mentioning in a rather vague manner how those concepts function in a legal process. This attitude may be attributed to an idea that both terms are self-explanatory or self-evident. In doing this, however, they fail to define what is included in and what is excluded from those terms. This is surprising if one realises that those concepts are fundamental to consensualist theories. The limitations and problems regarding the use of such terms become manifest when they are examined in more detail.

It is perhaps appropriate to commence the treatment of this question by dealing with the word "will", if only because it is a term of wider scope than "consent". "Will" refers to volition, a state of mind, and ordinarily means (deliberate) desire or intention. Applied to the customary process, a State's will could only mean (from a voluntarist perspective) an intention or desire that a customary rule be created. In legal theory, a distinction is made between the acts accomplished to the end intended by a will and the will itself. Although the act(s) are originated or motivated by the will, the substance of the will, that is, what is intended, is represented by the end to be achieved (the customary rule) and not by the act(s).[4]

4. As Rudolf von Ihering has pointed out, the "act itself is never the purpose, but only a means to the purpose": *Law as a Means to an End* (1924), pp.8–10.

A State's will should not be confused with the expression "legislator's will" as used in legal theory applied to municipal legal systems, for the latter usually refers to the intention or purpose of a law which has already been enacted. By contrast, one is concerned here with the intention to create a law or have it created. Similarly, a State's will should not be understood as a State's desire or intention that it be bound by a customary rule, or that its practice be in conformity with a customary rule, for it would presuppose the existence of a customary rule and hence negate the law-creating effect or role of such will. It may be argued against the last assertion that State practice can be sometimes both constitutive and declaratory of customary law. However, a piece of practice can be declaratory only of something which already exists. If the customary rule already exists, one is speaking of "constitutive" in the sense of "corroborative", and the role of will in the *formation* of the rule is not proved.

It is common ground that in some fields of municipal law, such as contract law and criminal responsibility, mental states and subjective notions play an important role.[5] What has to be asked, however, is whether legal consequences result from those subjective factors alone or from the acts performed under them. It seems fair to hold that law attaches legal consequences not to the intention of an individual, but to the acts accomplished by him. The notion of will plays a part in qualifying or defining the purposes or motivations of such acts, or the end intended by such acts. Thus, intention alone could not produce legal effects unless it were accompanied by an act or conduct. For instance, if someone wills or intends to kill somebody but does nothing to that end (either directly or indirectly), the law attaches no legal consequences to it. In the same vein, a State's will alone would be incapable of producing any legal effect in the customary process, unless it were externally manifested through acts or behaviour. What has been said so far may be summarised in two propositions:

(1) a will and the acts performed under it are closely related;
(2) the performance of acts would be a necessary condition for the production of the legal effects intended by a will.

Proposition (2) seems to substantiate another conclusion, namely, that only the acts themselves would bring about any legal effects and the will concerned would serve to qualify the legal effects intended by such acts.

It may be argued that in so far as there is a causal connection between a subjective factor (like intention or will) and an objective factor (an act or conduct), the former is to be considered the principal or sole normative element. By "normative element" is meant an element which, when manifested, produces law-making effects by virtue of a superior norm which so

5. See H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (1983), pp.96–97.

prescribes. The problem is that, when a relationship is seen as a causal connection, the initial cause is undetermined since there is always an antecedent. In the case of "will", its antecedent could be described, for example, as "sufficient reason".[6] Apart from that, this relationship may be much more complex than some would have thought. For instance, it is possible that an individual performs a single act with many different (but not mutually incompatible) intentions. It is also possible that he performs many acts (or successive acts) with a single intention in mind. Last but not least, an individual may perform an act with an intention opposite to or distinct from the intention which would normally be construed from such act.[7] The same variants, and others, are conceivable on the international plane. For instance, it is theoretically possible that a given State has its real intention misread by other States when they consider the former's practice or the justification of its practice.[8] It is also possible that a State attempts to cover its real intentions behind a given act or conduct in order to mislead other States or simply to avoid hostile reactions on their part.[9] Another possibility is that a State performs an act which does not conform to what it really willed because its plans were badly realised. Another example is when the consequences of an act performed by a State, though foreseen by it, were not all intended.[10] In other words, a given State anticipates that a certain course of action may give rise to three or four different consequences, say, A, B, C, and D. Although this State would do everything possible to avoid result D, it finds results A and B most desirable, and in calculating the final cost–benefit (considering also the possibility of result D not occurring) it decides to carry out the action. If all results come about from its action, how can one establish any link between that State's will and result D?

It is noticeable from the examples just given that the relationship between a subjective factor and an objective factor is even more complex in the international system. This is explained by the system's anarchical character, which determines that in the customary process what other

6. See Ihering, *op. cit. supra* n.4, at pp.1–2.

7. The incompatibility here is between the real intention of the individual and the individual's intention as construed by others.

8. E.g. in 1978 Israeli Defence Forces crossed the Lebanese border. Israel's representative before the Security Council stated that the aim of such action was not to incorporate any Lebanese soil but only to "clear the PLO once and for all from the area bordering Israel". Other countries, such as Jordan, viewed Israel's action as an "armed aggression against the territorial integrity" of Lebanon designed to occupy yet another country. See UN Security Council Official Records, 2071st meeting, 17 Mar. 1978, pp.7–9. This clear difference between Israel's manifested intention and Jordan's interpretation of Israel's intention indicates that either Israel's real intention has been disguised or that Jordan misread it (purposely or not).

9. See M. H. Mendelson, "Practice, Propaganda and Principle in International Law" (1989) 42 C.L.P. 6–11.

10. This possibility was raised by Hart, *op. cit. supra* n.5, at p.98, in dealing with the issue of intention.

States *interpret* as the will or intention of a given State (as manifested in its practice) may prevail over what this State may really have willed. If the determination of a State's will is subject to third-party construction, the utility of the concept as proposed by the consensualists is open to doubt. It is well known that a State or group of States may deliberately hold a distorted or partial interpretation of a given practice on account of a given political interest.

The complex relationship between a subjective factor and an objective factor brings into the picture the potential difficulties surrounding the ascertainment of a subjective factor, but they may also serve to support those who dispute that a subjective factor is a normative element. This is so because, as pointed out above, if a subjective factor is really the normative element, then State practice should *always* correspond to it and this is not likely to occur in inter-State relations, as demonstrated above. Doubts concerning the normative force or role of a subjective factor may also be raised from another perspective. Even if consent could be rightly inferred from State practice, it does not follow that consent alone is that which gives rise to a customary norm.[11] Moreover, as a State's will (subjective factor) in the customary process is always (or mostly) manifested tacitly, and the only way of ascertaining it is through an objective reality (this State's practice), then the former may be discarded as a mere abstraction, since in the "real world" of the customary process it is the practice which in the end counts.[12]

Turning now to another point, the notion of will is closely associated with voluntary behaviour. If a will is indeed valid and capable of producing legal effects only when the corresponding behaviour is voluntary, then no legal effects should be inferred from a behaviour which is involuntary. From a consensualist position, it follows that (a) an act performed by a State under (foreign) compulsion should be regarded as legally sterile; (b) a State which performs an involuntary act should be able to claim afterwards that no legal effects could be derived from it. As regards proposition (a), it seems to be settled that acts performed under compulsion may in some exceptional cases be legally valid and produce legal effects. A notable example is a treaty of peace which is imposed upon an "aggressor" State; its validity, according to the Vienna Convention on the Law of Treaties, is unaffected, notwithstanding the fact that one could not speak of a truly voluntary behaviour on the part of the "aggressor State".[13] In

11. See Oscar Schachter, *International Law in Theory and Practice* (1991), p.12.

12. See e.g. Anzilotti, *op. cit. supra* n.2, at pp.68, 73–76.

13. See Art.75 of the Vienna Convention on the Law of Treaties. This case raises a number of questions, such as the determination of which State was really the aggressor, the means of redress available to the victim State, and so forth. See Julius Stone, *Of Law and Nations* (1974), pp.231–251. One could also think of cases in which the compulsion is not military. Consider e.g. a State which is forced to act by the threat of economic embargo.

relation to proposition (b), suffice it to say that there is no known precedent in the customary process where a State has made any such claim. Of course, one could argue, as Ihering did, that even in the case of physical compulsion it is possible to deduce an act of will.[14] Undoubtedly, there is always an intention behind every act, even when it is performed under compulsion; for example, an intention to preserve oneself. But it seems unwarranted to infer from that that the behaviour in question was truly voluntary.

The second term, "consent", may be regarded as a derivation from "will" in so far as consent constitutes an act of will, that is, one consents as a result of one's will or because one wills to. "Consent" ordinarily means "agreement (to)", and applied to the customary process it would mean a State's agreement to the creation of a customary rule. As pointed out in relation to State will, State consent in the customary process could not mean the agreement of the State to be bound by a particular customary rule, since this would presuppose the existence of the said rule and therefore negate the normative role of consent. Putting it in general terms, consent could not be a mere recognition of a customary rule, for it would be logically contradictory to assign a law-creating role to an act (recognition) which implies the existence of the very rule to be created by it. Bearing in mind what has already been said, the proposition could be put forward that, from a consensualist standpoint, when a State agrees to the creation of a customary rule, it is agreeing either that a given customary rule, which bears no relation to any existing international practice, is to come into existence and be opposable to it, or that a given international practice is to be transformed into or treated as a customary rule. Both meanings are undoubtedly very similar, but a distinction may be drawn between them as follows.

The first option indicates that consent is simply an initial act in a law-creating procedure which is consummated by subsequent State practice. Therefore, both State practice and consent would be necessary law-creating factors in the customary process. The second ascribes to consent an exclusive normative role in the creation of a customary rule; without it the established practice would not represent a custom. Under the first option, consent and practice are regarded as separate or distinguishable elements, each performing its function or role at a distinct phase (or time) of the customary process: consent comes first and practice follows. Under the second, both elements are still seen as distinct but the timing of their operation is the inverse: practice comes first and consent is later expressed. The problem with both meanings is that it is widely claimed by consensualists

14. See *op. cit. supra* n.4, at pp.10–15.

and non-consensualists alike that consent is ascertained and/or expressed in the State practice concerned. It is not difficult to see the reasoning behind this idea: when a State engages in a given practice and behaves as if it reflects a legal rule, its consent to that rule is rightly to be inferred from its conduct. This same reasoning suggests that, if both elements are in reality simultaneous, State practice is what actually functions as the normative element in the customary process. In other words, if "acting" is the same thing as "acting and consenting", it follows that acting is what really matters.

B. Premise 2: The Rule or the Practice to which a State Expresses Its Consent Is Clearly Identifiable or Known

Both State consent and will require an object to which they are to be addressed. Certainly a State has to be consenting to something which is discernible or identifiable by a specific content. It seems unfounded to say that a State's consent "determines the content, scope, and character of a given rule", for at least the content of the rule should be known to, or at least envisaged by, the State before it consents to this rule.[15] The logic of this proposition seems irrefutable: suffice it to mention that, on the contrary, the consenting State could see itself in a difficult position as the evolving rule turns out to be against its immediate interests, having a content to which that State would never have expressed its consent.

If, as has been suggested, consent is necessarily expressed in relation to something whose content is already envisaged, to what is the State consenting? In a treaty process State consent is manifested to a proposed rule, or to a set of rules, whose content has been the subject of negotiations. By contrast, State consent in the customary process could relate only to the content of an international practice. But when a State participates in an incipient international practice it cannot possibly be manifesting its consent to a customary rule which is supposedly being proposed (as would happen in a treaty process), for the reason that one cannot speak of any definite rule at all at that stage. In the early development of any customary process there is no established customary rule: *the "rule" is still gaining expression, definition (a uniform content) and normative force as a result of State interactions*. As a matter of fact, the consenting State cannot be certain whether a customary rule will emerge from the international practice

15. See G. Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement" (1956) 19 M.L.R. 9.

concerned or not. All there is for this State is an international practice and the option of adopting it or not. Thus, State consent in the customary process would merely reflect the attitude of the State concerning an evolving international practice, to the effect that it agrees that such practice be applied to, or pursued by, itself and any other State.

It might be argued, on the other hand, that an evolving customary rule is secondarily (or indirectly) the object of a State's consent so far as the international practice concerned is expressive of this proposed legal rule. Indeed, it seems to be undisputed that at least the contents of the eventual customary rule will emerge from the uniform features of the international practice. Accordingly, an expression of consent to an international practice by a State would indicate that it agrees that a customary rule whose content is identical to that practice should be generally established. This argument seems to be very persuasive, but there are still some questions which it fails to answer.

In a treaty process, the rules are first negotiated and then written down in the form of a treaty. Although those rules are sometimes stated in detail, there may be room for conflicting interpretations regarding their meaning, and this actually occurs from time to time. In the customary process, the definitional problem is aggravated by the possibility that there may be conflicting interpretations even as to whether there is a customary rule at all, or what this rule stipulates, let alone its meaning or scope. Uncertainty as to the existence of a given customary rule is more probable in the initial stages of the customary process, when State interactions, occurring at different times and places, are still developing. At this phase, it may also be hard to identify a uniform pattern of conduct. Given that there is no established rule or any settled and uniform practice in the initial stages of the customary process, one can draw the conclusion that, in an incipient customary process, there is no defined common object to which consent could be expressed. *If State consent is indeed inapplicable in the formative stages of a customary rule, then its law-creating force is open to doubt.* This proposition only adds to the argument that it is inappropriate to have recourse to the idea of consent as part of a law-making procedure.

A final point could be made. A State is more likely to consent to an international practice—or to a future customary rule—only to the extent to which its content corresponds to the substance of its own practice. In other words, if one wishes to ascertain what is covered by a given State's consent, one should look at the content of that State's practice. When, for instance, State X proclaims a territorial sea of 20 miles, it seems incorrect to infer that State X manifested its consent to a customary rule which established anything less than this (like a 10-mile limit for the territorial sea), even if other States had followed such a criterion. Provided that the logic of this argument is not seriously questioned, a general proposition

can be drawn from it as follows: when there is any difference between an international practice (defined as the aggregate of the States' practices) and the practice of a particular State, or, what amounts to the same thing, when its practice is only generally in conformity with the international practice, the resulting rule may not be considered to have received its consent.

It seems inappropriate in this circumstance to refer to the notion of "partial validity" of consent, in the sense that a State's consent covers only the content of the international practice which coincides with the content of its own practice. State consent has to stand and operate in its entirety, unless the consenting State expressly consents to the partial validity of its consent. Otherwise, one would be negating the sovereign equality of States, a postulate which is highly valued by the consensualists. Similarly, it would be unwarranted to suggest that if a customary rule emerges whose content bears only general correspondence with a particular State's practice, then it has to be presumed that the State in question has acquiesced in or consented to whatever is the difference in the rule's content. If this were so, this act of acquiescence or consent to the rule could have come about only *after* the rule had already been created. Thus, the original State's consent could not have had any part in the law-making procedure which led to the customary rule.

The argument may be advanced that it is possible that a State agrees in advance to a rule whose content goes beyond its own claim and practice. For instance, one could envisage a situation where State X, which claims a 20-mile territorial sea, would consent to a rule which permits the establishment of a 40-mile territorial sea. Given that its claim is in accordance with the rule, State X would be prepared to consent to that rule. That is indeed a real possibility;[16] but another possibility is that State X would oppose anything more extensive than what it claims. The reason is simple: in this example, the other States would have a considerably larger area under their sovereignty and jurisdiction than State X. It would seem unjustified to presume that State X would have consented to a rule which benefits other States to the detriment of its own interests.

Having examined the position of a single State, it can be added that this problem is likely to occur in relation to every other State. One should not forget that, by definition, a general custom may be brought about only by a generally uniform international practice, a principle which is supported by the International Court's practice.[17] By the same reasoning, an inter-

16. Especially in those cases where the State cannot possibly claim more than it has. Some Mediterranean States claim e.g. no EEZ, presumably for the reason that their geographical situation does not allow it. In this case, there is not much point in opposing more extensive claims.

17. See *Military and Paramilitary Activities in and against Nicaragua* case, Merits, Judgment, I.C.J. Rep. 1986, 98 (para.186).

national practice which is generally uniform would not be regarded as representative of the consent of the States involved in it.

C. *Premise 3: The Method Is Logically Consistent, Workable and in Fact Operates in the Customary Process*

Leaving aside for the moment the various considerations offered above against the idea of State will or consent being a law-creating factor, some conditions would have to be fulfilled so that the consensualist view might be considered logically consistent. First, in order to bring about a customary rule, a State's will or consent must be accompanied by at least one other State's will or consent whose content is identical. This point has been made by Triepel in the correct realisation that if the (law-creating) wills are dissimilar no common rule could result from them.[18] A minimum of two wills or consents is thought necessary because the simplest type of custom—a bilateral custom—requires the participation of at least two States. Second, bearing in mind that State will or consent is conceded by consensualists to be mostly tacitly manifested, and to be ascertained by the practices concerned, the meaning attached by each State to its own practice and to the practice of others must also be the same, namely, the existence of a common will or consent towards the creation of a particular customary rule. In addition to that, the practices concerned should also be identical or at any rate very similar in content so that a common meaning may be inferred from them. Otherwise one should assume that States could infer the same meaning from disparate practices, which can be possible only in error or through manifest political purposes. If that is admitted, however, State will or consent could not possibly have had any normative role since the *real* will or consent would have had no effect. In short, three main conditions have been described:

(1) identity of wills or consent;
(2) identity of meanings assigned to the individual practices concerned;
(3) material identity of those practices.

In a sense, condition (1) above is determined by condition (2), which in turn is determined by condition (3). Nevertheless, this relationship should not be understood as implying that the verification of condition (3) automatically determines the fulfilment of condition (2) and/or (1). Even if condition (3) is verified, this does not mean that a common meaning will necessarily be attributed to it; it means only that a common meaning *may* be attributed to it. Having said that, it is to be questioned whether such conditions are feasible and indeed occur in the customary process.

18. See Triepel, *op. cit. supra* n.2.

As regards the third condition (a course of conduct being pursued in the same way by all States), it has already been pointed out that in the initial stages of the customary process—where State consent or will is supposed to operate normatively—two practices can hardly be identical. Indeed it is very unlikely that any settled custom will ever be represented by an identical international practice. A general uniformity, on the other hand, seems more feasible in any customary practice, and this is the view to which the majority of writers and the International Court are inclined.[19]

In the event that a given international practice is identical, a common or similar meaning of the corresponding consent or will could be construed from it. But even in such ideal conditions (identical practice), there is a degree of uncertainty as to whether a common will or consent will be identified in the interpretation of each individual practice. Arguably, the same problem would be much more accentuated if such interpretation were based on a body of practices which are only generally uniform. The difficulty in extracting a common consent from an international practice which is generally uniform has already been demonstrated.

The brief discussion above seems to suggest that conditions (2) and (3) could not be fully satisfied. Thus, one could quickly draw the conclusion that, so far as conditions (2) and (3) together are necessary prerequisites of condition (1), the latter could not be fulfilled either. Condition (1) could also be dismissed from another perspective. In a decentralised and uncoordinated process as the customary process, where each State is an egocentric and autonomous participant, it seems very optimistic to suppose that the creation of a specific rule with a specific content will be equally consented to or willed by a significant number of States or all States. This view would describe the customary process as much smoother than it really is, there being no accommodation of diverging interests, no conflicting practices, and so forth.

Setting aside the more general arguments discussed above against the overall logical consistency of the consensualist view, it seems now proper to examine how the customary process would operate if State consent or will were a law-creating factor and contrast the conclusions with the actual operation of the customary process. The first argument about how a "consensualist customary process" should operate would run as follows: whenever the resulting customary rule is universally applicable, all States must have first consented to its creation, *or* (what amounts to the same thing) no rule can be applicable against a State unless that State has first consented to its creation.

In contradistinction to this view, it is widely accepted in doctrine, in judicial and arbitral practice, and in State practice, that general customary

19. See *Nicaragua* case, *supra* n.17.

rules, though resulting from the participation (and consent, some would say) of only the generality of States, are applicable to all States.[20] In order to remedy this discrepancy, one should look for the consent of all States to a majority rule in the customary process. This task, however, seems a little unfeasible. It would be better to assume it, but an assumption cannot prove the existence of a fact (in this case, a collective act of consent). Another option is to say that States behave as though such a rule existed. Indeed, it may well happen that from time to time a large group of States propound the creation (or existence) by majority processes or their consent of a general customary rule. None the less, when and if there are States which contest the law-creating power of a given majority, how can the original agreement to the majority rule be considered established?

It might be argued that, on the other hand, the "consensualist customary process" view seems to be correct in the case of bilateral or sectional customs, where—it is believed by some authors—each State subject to it must have consented to it (even though they do not say precisely what they mean by "consent"). Those authors invoke the case law of the International Court in their support.[21] But the Court's practice would hardly endorse that conclusion: on the contrary, it seems to rely solely on State practice and *opinio juris* in order to find out whether an alleged bilateral or sectional custom exists and applies between the contending States.[22]

As a corrective move, consensualists might put forward that, in the case of a general custom, only the States directly affected by it should be expected to consent to the rule concerned. But what is the criterion for distinguishing between a State directly affected and a State indirectly affected or not affected at all?[23] Supposing that a given State is only

20. See, *inter alia*, Michel Virally, "The Sources of International Law", in Max Sørensen (Ed.), *Manual of Public International Law* (1968), p.132; Sir Humphrey Waldock, "General Course on Public International Law" (1962–II) 106 Hag.Rec. 50–51; L. Calvaré, *Le droit international public positif* (1967), pp.221–222; Michael Akehurst, "Custom as a Source of International Law" (1974–75) 47 B.Y.I.L. 29; Hans Kelsen, *Principles of International Law* (1952), pp.312–313; Paul Guggenheim, *Traité de droit international public* (1953), p.49; Julio Barberis, "Reflexions sur la coutume internationale" (1990) 36 Ann.Fr. de dr.int. 38–39; A. R. Carrión, *Lecciones de Derecho Internacional Publico* (1987), p.181. See also *North Sea Continental Shelf* cases, I.C.J. Rep. 1969, 242 (dissenting opinion of Judge Sørensen), 224 (diss. op. of Judge Lachs); *Gulf of Maine* case, Judgment, I.C.J. Rep. 1984, 293.

21. See Luigi Condorelli, "Custom", in M. Bedjaoui (Ed.), *International Law: Achievements and Perspectives* (1991), pp.206–207; G. Cohen-Jonathan, "La coutume locale" (1961) 7 Ann.Fr. de dr.int. 133, 140; H. Thierry *et al.*, *Droit international public* (1984), pp.119–120.

22. See *Colombian–Peruvian Asylum* case, Judgment of 20 Nov. 1950: I.C.J. Rep. 1950, 276, 316, 333, 370; *Case Concerning Rights of Nationals of the United States of America in Morocco*, Judgment of 27 Aug. 1952: I.C.J. Rep. 1952, 199–200, 221; *Case Concerning Right of Passage Over Indian Territory*, Judgment of 12 Apr. 1960: I.C.J. Rep. 1960, 39.

23. E.g. it could be said that coastal States as opposed to landlocked States are directly interested in the customary rule on the EEZ. Landlocked States, however, may also have direct interests in that zone, such as the exercise of the rights of navigation and overflight.

indirectly affected, should not its consent be required as well? If its consent is not necessary, it follows that a customary rule may be created and operate against a State's interests (even if they are not primary interests) and will, which is supposedly anathema to the consensualist view. It could then be argued that, while only the consent of the States directly affected is considered sufficient to bring about a customary rule, it is the consent of the majority of such States that really counts. This view would only enlarge the number of States which are bound by the customary rule without their having consented to its formation. Furthermore, where a majority decides for the whole group, the consensualist view is proven incoherent.

Another point which could be raised in defence of the consensualist view of the customary process—as described above—is that there is a recognised rule which prescribes that when a State persistently, and from the outset of the customary process, dissents from a customary rule, it either contributes to the impairment of the rule's development or immunises itself against the rule's application. Thus, this "persistent dissenter rule" could be said to corroborate the view that a customary rule may not be applied against a State which has not first consented to it. Now supposing that any such "persistent dissenter rule" really exists—a fact that is disputable—the case may be made that it actually undermines the consensualist view. First, it may be pointed out that the "persistent dissenter rule" is mostly advocated as an exception or counterbalance to the majority rule, thus corroborating the latter. Second, the "objector rule" has a very limited scope: if a State dissents from a rule but not persistently or not from the beginning of the customary process then its dissent is invalid and the customary rule (which came into existence without its consent) applies against it.

An example which has been much discussed in this debate about the "consensualist customary process" concerns the so-called "new States". The revised version of the consensualist view holds, in short, that those new States have tacitly consented to the body of customary law applicable at the time they attained independence.[24] It should be noted, first, that the consent allegedly manifested by the new States is not of a law-creating character, for the general customary rules already existed. It would be better described as an agreement by each new State to the extension of the application of those customary rules to itself. Having said that, it would be questionable whether all such customary rules really received the consent of the new States.[25] That those new States disliked some of the old inter-

24. See Oppenheim, *op. cit. supra* n.2, at p.18.

25. See P. Sinha, "Perspective of the Newly Independent States on the Binding Quality of International Law", in F. Snyder and S. Sathirathai (Eds), *Third World Attitudes Toward International Law* (1987), p.24.

national law is clearly shown by their move towards its reform by means of multilateral and majoritarian law-making procedures.[26] It is difficult to assume that a State has tacitly consented to something which it has openly attempted to modify, unless it is conceded that it was initially compelled to do so.

The consensualist view seems to suggest that a new State would have discretion in consenting to the old customary rule. It is difficult, however, to envisage a sound legal basis for an open challenge. A new State could not challenge the *existence* of the rule, since the other States and possibly the judicial and arbitral bodies (if called into question) would find it unwarranted. Equally, a new State could not prevent the *application* of the old rule against itself by invoking the "persistent dissenter rule", for the requirement that the objection should be manifested from the outset of the customary process could not be satisfied. The fact that new States have not openly challenged the bulk of "old" international law from the start may also be explained without any reference to their consent. Professor Vellas, following Savigny, has put forward the view that those customary rules represented an imperative need of the international society and hence they were obligatory to those new States regardless of their consent.[27] This may be true of some of those rules, but it seems incorrect to ascribe this status to all pre-existing general customary rules.

In addition to the debate over the "new States", another question that has been raised is what happens when a State sees itself in a new situation to which an existing customary rule or set of rules is now applicable.[28] This State supposedly never had the opportunity for or interest in manifesting its consent to the creation of the now applicable customary rule. Again, its consent would mean only the agreement by a State to the extension of the application of an existing rule to itself; thus, this State's consent had no law-creating meaning, since the rule had already been formed.

To be fair to the consensualist view, there are some views put forward by the non-consensualists which are equally objectionable. For instance, some writers have put forward the argument that States recognise the existence of norms which have not been created by formal processes and are independent of State will.[29] Indeed some positivists have conceded

26. See P. Buirette-Maurau, *La participation du tiers-monde a l'élaboration du droit international* (1983), pp.72–84, 87–154. See also *Frontier Dispute*, Judgment, I.C.J. Rep. 1986, 566–567.

27. See P. Vellas, *Droit international public* (1967), pp.93–94.

28. See the examples cited by Kelsen, *op. cit. supra* n.20, at p.312.

29. See, *inter alia*, Ricardo Monaco, *Diritto internazionale pubblico* (1949), p.53; H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp.60–71, and *International Law* (1970), Vol.I, pp.57–58. A typical example given by them is the acceptance by most States of the ICJ Statute, which recognises general principles of law among the applicable rules of international law.

this.[30] But what are those norms? Some refer to general principles of law. The consensualists might argue that they represent a different category of international rules, and even if it is acknowledged that they are involuntary and informally brought about, consent still applies to the creation of conventional and customary norms. In addition, one could follow the line that those principles are general principles of international law and are abstracted from a number of relevant rules which are consent-based. This particular way of envisaging the expression "general principles of law" as embodied in Article 38 of the ICJ Statute was advanced by Professor Schwarzenberger. Yet when he applies this to specific principles, such as the principle of legal sovereignty, he describes, among the underlying rules, the rule that "without its consent, a subject of international law is bound by applicable rules of universal or general international customary law".[31]

Other rules that might be regarded as having been created without reference to the State's consent are those which can be called "secondary rules", that is, superior "rules" which regulate the creation of international rules, their modification and their application. One such rule is the *pacta sunt servanda* rule. Again the consensualists might agree with the existence of such rules and argue that this does not make any difference to their claim so far as one of those rules prescribes that consent is a necessary part of the customary process. But that is an assertion which has to be proved by the investigation of whether States themselves recognise the existence of such a rule.

D. Premise 4: States Recognise Their Consent or Will as a Law-Creating Means

This is perhaps the most important pillar on which the consensualist case could rest. For if it can be demonstrated that, despite all the theoretical and practical difficulties involved in the concept of consent, all States recognise the existence of a type of secondary rule, or a requirement, by which their consent (whatever it may mean) to a customary rule is essential to its creation, then the consensualist view would be upheld by the law-makers themselves. The universality requisite is thought necessary because, if some States fail to recognise the law-making role of State consent in the customary process while others do recognise it, the case of the consensualists would not be entirely satisfactory. In the same vein, of course, it could not be said that the case of the non-consensualists was entirely proved. The reason for this is clear: given the decentralised

30. See Anzilotti, *op. cit. supra* n.2, at p.44; R. Ago, "Positive Law and International Law" (1957) 51 A.J.I.L. 719–729.

31. See Schwarzenberger, *A Manual of International Law* (1967), p.65.

character of the international system, a (secondary) rule which regulates the creation of general international law and has a universal scope *ratione personae* must be recognised as such by *all* the law-makers.

How is the States' recognition of this "secondary rule" ascertained? The obvious answer is to search for instances in which States declare that a given customary rule could not be applied against them because they had not previously consented to the creation of that rule. The first difficulty in this investigation is that some States may be found to hold different positions according to the situation, that is, to the customary rule concerned and the interests which are affected by it. An ambiguous attitude like that serves only to throw doubt upon the existence of the secondary rule. Second, some States and (certainly) some writers who endorse the need for consent may sometimes envisage consent not in the sense that is being pursued here, i.e. as a law-creating factor, but simply as a factor related to the *application* of an established customary rule. Thus, a State may say that a given customary rule cannot be applied as against it without its previous consent. In this case, although consent is certainly being mentioned, this instance has no evidential value regarding the existence of the secondary rule. Incidentally, it has correctly been pointed out that the very idea that consent is a requisite for the application of a customary rule contradicts the legal character of that rule.[32] The third difficulty in the investigation of the existence of the secondary rule is that, in order to know whether the rule has been recognised by the law-makers, one would have to look into the position of all States on this matter. (This condition could be withdrawn only if in the course of the investigation it is found that the opinion of States is divided regarding the existence of the rule or requirement. In that case there is no need to look into the position of every State, since a conclusion could already be drawn.) It is time now to turn to the possible instances of recognition or not of the secondary rule.

The position of newly independent States regarding traditional international law is not really relevant to this enquiry for two reasons. First, those States which defied traditional international law did not question its existence or validity but, rather, its applicability to them. Second, they did not question all international norms but only some of them; at any rate, they did not challenge the "primary systemic rules".[33]

Turning now to the International Court, a pronouncement made by it in the *Lotus* case may be considered to be a recognition of the validity of such a rule. It observed that the rules of law binding upon States "emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law".[34] This statement, however,

32. See Lauterpacht (1927), *op. cit. supra* n.29, at p.56.

33. See Sinha, *loc. cit. supra* n.25; Buirette-Maurau, *loc. cit. supra* n.26; Schachter, *op. cit. supra* n.11, at p.11.

34. See *The SS Lotus* case, Judgment No.9, 7 Sept. 1927, P.C.I.J. Ser.A, No.10, p.18.

makes a relevant qualification when it says that the usages are *generally* "accepted". In the *Fisheries Jurisdiction* case the Court used the expression "generally accepted" again, as did some individual judges in this and in other cases.[35] This expression may have been used with the idea of consent in mind, but one cannot be certain about that. As for States, in the *Fisheries* case both the United Kingdom and Norway noted that only the generality of States need "accept" a general customary rule in order for it to come into being.[36] Thus, there may be some indication as to the recognition of a rule which establishes that the consent of the generality of States is necessary for a general customary rule to be brought about. Does it follow that, according to this basic rule, a general customary rule could be created and applied against the will of a particular State or group of States?

On this issue there is no conclusive evidence. Yet there is some indication to the effect that on certain issues a majority of States would be prepared to claim the creation and application of a customary rule against a State or a group of States regardless of their express dissent. Take, for instance, the controversy surrounding the exploration and exploitation of the sea-bed or ocean floor beyond national jurisdiction. A group of States named the Group of 77 has expressed its legal position regarding the question on the basis of a report prepared by a group of legal experts. It stated, *inter alia*, that the principles set out in UN Resolution 2749(XXV) are expressive of a legally binding custom; and that:[37]

> more than 119 States have reaffirmed their constant support for the respect of customary international law as the basis for the general principles of law that fundamentally apply in the area declared as the common heritage of mankind, and their support for the principles and rules referred to above. This largely representative body of mankind should not be ignored by any one State or by a small number of States purporting to claim a *de facto* authority over all humanity.

35. See *Fisheries Jurisdiction* (*United Kingdom* v. *Iceland*), Merits, Judgment, I.C.J. Rep. 1974, 23, 119–120 (separate opinion of Judge Waldock), 161 (dissenting opinion of Judge Petrén), 58 (sep. opinion of Judge Dillard), and 89 (sep. opinion of Judge De Castro); *North Sea* cases, *supra* n.20, at p.103 (sep. opinion of Judge Ammoun), p.242 (diss. op. of Judge Sørensen), p.229 (diss. op. of Judge Lachs); dissenting opinion of Judge Loder in the *SS Lotus* case, *idem*, p.34; *The SS Wimbledon* case, P.C.I.J., Ser.A, No.1, 1923, p.36 (diss. op. of Judges Anzilotti and Huber); *South West Africa*, Second Phase, Judgment, I.C.J. Rep. 1966, 291 (diss. op. of Judge Tanaka).

36. See *Fisheries* case, Pleadings, Vol.I, p.381, para.255 (Norwegian Counter-Memorial), and Vol.II, p.427, para.161 (UK Reply). The UK, in particular, noted that since the *Lotus* case was decided, "the trend in international relations has been towards an increased regard for majority opinion" (p.428).

37. It has to be noted that this was not the only legal argument advanced in the report. See Letter dated 24 Apr. 1979 from the Chairman of the Group of 77 to the President of the Conference, Doc.A/CONF.62/77, Documents of the Third UN Conference on the Law of the Sea, Eighth Session, pp.81–82. There is no known reaction by other States to this letter.

If one regards the word "support" as meaning "consent", then this group of States seems to be maintaining that the consent of a majority of States is sufficient to bring about a customary rule and this rule applies even against a "small number" of States which may be opposing it.[38] A similar reasoning may (arguably) be seen in the *North Sea Continental Shelf* cases, where the Court, following the suggestion of Denmark and the Netherlands, left the impression that it could have applied to Germany a general customary rule to which Germany had expressed no consent, had one existed.[39] Similarly, the governments of Australia and New Zealand seem to have argued, in the *Nuclear Tests* cases, that a customary rule which prohibited conducting atmospheric nuclear tests applied to France, irrespective of whether or not the latter had consented to it.[40] Thus, one would tentatively gather that, on the basis of this additional indication, the basic rule would require only the consent of the majority of States for the creation of a general customary rule irrespective of any dissenting minority. This last conclusion, however, would hardly be endorsed by all States. Norway and the United Kingdom, in the *Fisheries* case, and India in the *Right of Passage* case, though realising the general consent requirement, also recognised the validity of a persistent dissenter rule.[41] The position of the United Kingdom, however, is also consonant with the line suggested above, since it pointed out that the right of a State to dissent from a customary rule "was not absolute": it was inapplicable where a "fundamental principle" was concerned.[42]

There are also several instances of case law where the judicial or arbitral bodies did not endeavour to demonstrate first the consent of the contending States to the creation of the general customary rule which was being applied to them.[43] This attitude can serve only to disprove the "all con-

38. Interestingly enough, this debate continued within the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. But the legal arguments centred exclusively on the applicability of the regime created by the 1982 Law of the Sea Convention on all States before the Convention comes into force. See UN Docs.LOS/PCN/78, LOS/PCN/74, LOS/PCN/73, LOS/PCN/72, LOS/PCN/71, LOS/PCN/53, LOS/PCN/49, and LOS/PCN/48.

39. See *North Sea* cases, *supra* n.20, at pp.41–45. Prof. Weil is one distinguished authority who maintains this interpretation of the Court's judgment. See P. Weil, "Towards Relative Normativity in International Law?" (1983) 77 A.J.I.L. 437.

40. See *Nuclear Tests* cases, Pleadings, Vol.I, pp.181–182, 184–194, 502–513 (esp. p.511), Vol.II, pp.8, 262–267.

41. See *Fisheries* case, Pleadings, Vol.I, p.380, and Vol.II, pp.428–429; I.C.J. Pleadings, *Case Concerning Right to Passage Over Indian Territory*, Vol.I, p.178.

42. *Fisheries*, *idem*, p.428.

43. See, *inter alia*, *The Case of Regolo Atilo and Other Vessels* (1945) XII Rep. Int. Arbitral Awards (UN) 8–9; *SS Wimbledon* case, *supra* n.35, at p.28; *The Corfu Channel* case, Judgment of 9 Apr. 1949: I.C.J. Rep. 1949, 28 *et seq.*; *Nottebohm* case, Judgment of 6 Apr. 1955: I.C.J. Rep. 1955, 22 *et seq.*; *North Sea* cases, *supra* n.20, at pp.41, 46; *Case Concerning United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Rep. 1980, 33, 41.

sent" rule, and throws some doubt on whether consent is really recognised as a necessary step in the formation of a customary rule.

What conclusion should be drawn from this state of affairs? The first conclusion one could formulate is that there is no rule which prescribes that the consent of all States is a necessary condition to the formation of a general customary rule. The second conclusion is that there is no universally recognised secondary rule which could replace the "all consent" rule. The situation is the following: while for some States a majority consent rule would not allow for dissent, at the very least in those cases where there is a fundamental customary rule at stake, for others a majority rule would be acceptable only on the condition that persistent dissenters to it would be excluded from its binding range, irrespective of the customary rule involved. Those two types of majority rule are plainly incompatible. Furthermore, none of them is clear about what they mean by the "majority of States". Do they refer to a "representative majority" or to any majority? If any majority were adopted, the existence of the required general consent would be a matter of degree. But how many States should be required to express their consent? If, in turn, a "representative majority" is accepted, it is still unclear what is meant by "representative" and by "majority". Should a representative majority include, as Judge Lachs said, "States with different political, economic and legal systems, States of all continents", or simply the most powerful States?[44] Even if representative majority is properly defined, should it apply, as defined, to all cases?

III. CONCLUSION

BEARING in mind everything that has been discussed above, a general conclusion could be drawn to the effect that the concept of State consent (as applied to the customary process), when examined in detail, reveals many theoretical and practical shortcomings. Admittedly, one cannot disregard the fact that the idea of consent (and some consent-based notions, such as acquiescence) is still espoused by some writers, States and international tribunals alike. But the problem is that there is not a common view among the States about the idea of consent and its role in the customary process; indeed, this article has shown that it is not at all clear how precisely each State perceives it. Could this finding justify the complete abandonment of the idea of consent in the understanding of the customary process? If, from a theoretical point of view, that seems advisable, no definite answer can be given to this question until more light is thrown on the subject. It is hoped that this article has provided some useful elements for this long-standing debate.

44. See *North Sea* cases, *idem*, p.227.