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# Some Ways that Theories on Customary International Law Fail: A Reply to László Blutman

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## Abstract

*This brief comment seeks to clarify a foundational concept inherent in any discussion of customary international law (CIL): consent. Any serious attempt to construct a coherent theory of CIL must resolve the fundamental tension between non-consensual rulemaking and international law's formal commitment to the principle of consent. As a matter of observation, states rarely accept non-consensual laws or external norms as binding. Yet it is also undeniable that CIL serves and persists as a fundamental building block of international law. Therefore, in order to coherently theorize CIL, we must – at the very least – provide a plausible explanation for why rationally self-interested states would take CIL and other non-consensual laws seriously.*

## 1 Introduction

László Blutman's 'Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail'<sup>1</sup> is a sobering look at the state of scholarship on customary international law (CIL). The article's primary contribution is to pose a serious challenge to CIL scholars. Blutman draws our attention to some significant conceptual stumbling blocks that bedevil scholars' efforts to make sense of CIL. Furthermore, he raises weighty concerns about whether any theory can ever explain CIL in a way that is consistent with current legal principles and practice while remaining logically coherent.

While we agree that current CIL practice and scholarship is riddled with contradictions, we disagree with the contention that there will never be a satisfactory theoretical approach to CIL. Instead, we take the spirit of Blutman's article to be that to

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<sup>1</sup> 25 *EJIL* (2014) 529.

proceed we must do sufficient conceptual groundwork to examine and explain the foundational concepts that make up any theory of CIL.

Consistent with this suggestion, this brief comment seeks to clarify one such concept: consent. Any serious attempt to construct a coherent theory of CIL must resolve the fundamental tension between non-consensual rulemaking and international law's formal commitment to the consent principle. As a matter of observation, states rarely accept non-consensual laws or external norms as binding law. Yet it is also undeniable that CIL serves and persists as a fundamental building block of international law. Therefore, in order to coherently theorize CIL, we must – at the very least – provide a plausible explanation for why rationally self-interested states would take CIL and other non-consensual laws seriously.

Such an endeavour requires us to construct both an explanation of the mechanisms by which CIL affects state behaviour as well as a normative justification for non-consensual law. As for the mechanics, Andrew Guzman has previously argued for an explanation that challenges the traditional understandings of CIL's *opinio juris* and state practice requirements.<sup>2</sup> First, when considering the content of CIL, the meaning of *opinio juris* must be the sense of legal obligation felt by states other than the acting state. This explanation means that while CIL is created by states (or by the beliefs of states) it is not within the control of the acting state and is therefore a non-consensual source of international law. Second, state practice is entirely unnecessary as an element. Instead, state practice is best interpreted as evidence that there is *opinio juris* among the states observing the acting state.

Normatively, it is clear that though CIL has many failings as a source of law, its potential to bind rational states (however weakly) against their will is not one of them. Of course, CIL is not powerful enough as a legal form to consistently overthrow consent's position at the heart of international law. Furthermore, while it is clearly false to assert that no obligation can emerge without a state's consent, non-consensual rulemaking is actually quite rare. So much so, in fact, that it is not unusual for commentators to declare that international law 'is based on the express or implied consent of states'.<sup>3</sup> From time to time, one even sees learned writers, overtaken with an enthusiasm for consent, going so far as to say that a state cannot be bound without its consent.<sup>4</sup>

<sup>2</sup> Guzman, 'Saving Customary International Law', 27 *Michigan Journal of International Law* (2005) 115.

<sup>3</sup> A. Aust, *Handbook of International Law* (2005), at 4. See also Restatement (Third) of the Foreign Relations Law of the United States, pt I, ch. 1 (1987), at 18 (introductory note); I. Brownlie, *Principles of Public International Law* (6th edn., 1995), at 4; L. Henkin, *International Law: Politics and Values* (1995), at 28. But see Schachter, 'Towards a Theory of International Obligation', in S.M. Schwebel (ed.), *The Effectiveness of International Law Decisions* (1971), at 9–10 (citing 11 other possible sources of international obligation).

<sup>4</sup> See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, ICJ Reports (1986) 14, at 135 ('[I]n international law there are no rules, other than such rules as may be accepted by the states concerned, by treaty or otherwise'); A. Cassese, *International Law in a Divided World* (1987), at 169.

Yet despite consent's decidedly important role in the international system, the presence of non-consensual forms of rulemaking – such as CIL – is essential. Indeed, aside from the power of the Security Council to make binding international law, CIL represents the only way states can be formally bound without their consent.<sup>5</sup> Such a legal tool has tremendous potential for resolving intractable cooperation problems. This is all the more important as states increasingly find themselves in a world without a hegemonic state power that can effectively coerce states to cooperate on problems that require solutions on a global scale. As such, we should consider embracing this non-consensual form of rulemaking because strict adherence to the consent doctrine may impose heavy costs in terms of actual outcomes.

## 2 The Non-Consensual Nature of CIL

CIL is certainly the oldest form of non-consensual international law. It is non-consensual in the sense that a state can be bound by CIL even if it has not agreed to or accepted the rule.<sup>6</sup> The familiar requirements for CIL are that there be *opinio juris* (sense of legal obligation) and a sufficiently general practice of states.<sup>7</sup> Neither of these requirements explicitly requires consent, and although attempts have been made to argue that CIL satisfies conventional notions of consent, those arguments cannot sustain even mild scrutiny.<sup>8</sup>

If *opinio juris* required that the acting state itself felt a sense of legal obligation, it would begin to approach a notion of consent. However, it would still not be enough. Perceiving a legal requirement as obligatory is the same as consenting to that requirement. For example, a public corporation in the USA can recognize an obligation to disclose certain information under the Securities Act, yet this recognition does not imply that the firm has consented to this obligation.<sup>9</sup> Similarly, a sense of legal obligation might reflect to a state, among other things, an understanding of the norms of the international community even if the state does not and would not consent to such norms.

In any event, the dominant view on the meaning of *opinio juris* is that the sense of legal obligation must be felt by states generally and not by the acting state in particular. The International Court of Justice (ICJ) reflects this view in the *North Sea Continental Shelf Cases*. In describing CIL, the ICJ writes that '[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation.'<sup>10</sup>

<sup>5</sup> This statement might be a mild overstatement if one pushes hard on the source of law, such as general principles.

<sup>6</sup> Akehurst, 'Custom as a Source of International Law', 47 *British Yearbook of International Law* (1977) 1, at 23.

<sup>7</sup> For a more detailed discussion, see Guzman, *supra* note 2, at 141–145.

<sup>8</sup> *Ibid.*

<sup>9</sup> Securities Act, 15 USC § 77a.

<sup>10</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, ICJ Reports (1969) 3, at 44.

Despite the tenuous connection between CIL and consent, the commitment to consent within international law is so strong that some commentators have felt compelled to seek a reconciliation of the two. The most common argument is based on ‘inferred consent.’<sup>11</sup> The ‘inferred consent’ argument relies on the persistent objector doctrine to conclude that if a state fails to object to a rule of CIL, then this failure to object can be taken as support for the rule.<sup>12</sup> Whatever one might think of the persistent objector doctrine, it provides far too narrow an exception to support the inferred consent argument. First, the failure to object to a norm is not at all the same thing as consent.<sup>13</sup> A state might fail to object for any number of reasons having nothing to do with consent. For example, it may prefer to avoid objecting for political reasons, it may not feel that the norm is changing into custom – making objection unnecessary – or it may simply not be sufficiently affected by the rule to bother objecting. The inferred consent theory also fails to explain why objections brought after a CIL rule is established are insufficient to satisfy the persistent objector doctrine and why new states, which could not possibly have objected at the time CIL rules were being formed, are not able to take advantage of the persistent objector doctrine.

Some writers have attempted to rescue the notion of consent in CIL by arguing that states have consented to ‘secondary’ rules of CIL.<sup>14</sup> The idea here is that states have consented (at some unspecified moment in the past) to the way in which CIL rules change over time, including a rule under which CIL can arise without a state’s affirmative consent.<sup>15</sup> At best, this approach amounts to a sort of consent once removed. On its own terms, the argument is flawed because it is simply a fiction to claim that states consented to the rules governing the creation of CIL. The argument does not (and could not) claim that states ever gave explicit consent to a set of secondary rules governing custom formation. Even if one does not demand explicit consent (though without such a demand the argument seems empty), the rules governing the formation of CIL were overwhelmingly developed by a few European states. The vast majority of states did not play any significant role in the development of the rules governing CIL. It is perhaps even more problematic that there is no scope for any state to withdraw its consent to the secondary rules of CIL – or even for a new state to withhold its consent to such rules.

### 3 The Benefits of Non-Consensual CIL

At present, CIL is neither a particularly powerful form of international law nor is it something that the community of states can effectively manipulate in pursuit of policy objectives. To the extent one wishes to evaluate the normative case for CIL, these features are important. Although CIL is surely not the ideal form of non-consensual

<sup>11</sup> M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), at 142–146.

<sup>12</sup> Stein, ‘The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law’, 26 *Harvard International Law Journal* (1985) 457, at 458.

<sup>13</sup> Byers, *supra* note 11, at 143.

<sup>14</sup> Lowe, ‘Do General Rules of International Law Exist?’ 9 *Review of International Studies* (1983) 207, at 208–210.

<sup>15</sup> A.A. D’Amato, *The Concept of Custom in International Law* (1971), at 42–44.

rulemaking, it is almost certainly better than nothing. The consent-based system of international law creates a powerful status quo bias that makes it difficult for the law to adapt as circumstances change. CIL introduces some, albeit modest, flexibility into this system, both by allowing the emergence of some rules without the consent of some states and by allowing other rules to change over the objections of some states. Our claim here is simply that this is a good thing.

States are, within reason, sovereign within their own territories. For this reason, issues tend to emerge at the international level only when they implicate the interests and concerns of two or more states.<sup>16</sup> We can think of these issues as problems demanding some form of cooperation, and we can think of international law as a tool to facilitate that cooperation. The way in which states respond to a particular challenge has two distinct consequences.

The first consequence, which can be called the 'efficiency effect', affects the total value generated by the actions of states. For example, going to war destroys value and, in this sense, poorly affects the efficiency dimension; improved management of a commons such as global fisheries represents an improvement in efficiency. The second consequence is distributional. Whatever value is generated, alternative approaches may distribute the resulting value differently. While states rarely (if ever) go to war to increase the total value generated by state interactions, they frequently fight in pursuit of a larger share of that value. Similarly, agreements on fisheries are impeded by the difficulty in overcoming objections to the resulting distributional implications.

In an ideal Coasian world (that is, one without transaction costs), consensual law-making would be sufficient to achieve the highest value outcomes in efficiency terms. The particulars of an agreement would affect distribution, but transfers could be constructed to ensure that states always agree on the most efficient outcome. We observe efforts in this direction whenever states enter into treaties.

We do not, however, live in a Coasian world. States often struggle to reach agreements that maximize the total value generated, and identifying appropriate transfers can be extremely difficult. In a consent-based system, the result is often paralysis. Where a group of states (or even a single one) refuses to consent, no agreement can be reached.<sup>17</sup> The consequence of a pure consent-based system is that agreement is impossible unless every affected state benefits. There is simply no way to adopt a rule over the protests of an objecting state. Needless to say, this scenario represents an extreme form of decision making in which many value-increasing agreements will be rejected because one (or a few) states do not benefit.

CIL offers some modest relief in certain circumstances. If a large majority of states support a particular rule and believe that the rule is legally required, then the rule comes to bind even those states that are unwilling to consent and those that do not yet exist.<sup>18</sup> It is true that a state can, at least in principle, be a persistent objector. However,

<sup>16</sup> One can think of this as issues that involve some form of externality.

<sup>17</sup> This assumes, of course, that the state is essential to the agreement. Agreements can, of course, be formed by subsets of states that are supportive of a particular legal rule.

<sup>18</sup> I put aside for now the usual questions about how many states are enough, how to identify the requisite sense of legal obligation and so on.

the requirements to maintain this status are extraordinarily demanding and only the most vehement objector is likely to succeed. Indeed, it is so difficult to be a persistent objector that some commentators argue that the doctrine is essentially irrelevant.<sup>19</sup>

What remains, then, is the normative question. Would states find it normatively acceptable to be bound in this way? In this case, the normative good is intimately tied to the functional purpose. Do we prefer a world in which one or more states will be legally bound against their will (or at least without their consent) when many others believe a rule exists? There is no doubt that consent provides a valuable bulwark against coercion and value-reducing agreements. The cost of this protection, however, is a powerful status quo bias.

It seems far more likely that the non-consensual potential of CIL improves rather than harms the international legal system. The alternative – an international legal system in which consent represents the only way to deploy international law to further cooperation – would rule out arrangements that impose modest costs on one state and large benefits on all others. It would also invite holdout behaviour by states, even if they stand to benefit from a proposed rule. These are extreme results that invite paralysis: a firm commitment to consent is a sufficiently extreme rule. Indeed, it is difficult to think of many important forms of governance that rely so heavily on consensus. It is no accident that national legislatures, homeowners' associations, corporate boards, and academic faculties do not operate in this way.

We must keep in mind, though, that any non-consensual rule will almost by definition impose costs on some states. While non-consensual rulemaking has the potential to generate rules that provide large benefits to most states and small costs to one or a few states, it can also lead to rules that provide modest benefits to many states and impose enormous losses on one or a few others. The normative desirability of the system, then, turns on the relative frequency and importance of these two outcomes. We may also be concerned with distributional consequences of a non-consensual system if rules consistently favour some states at the expense of others.<sup>20</sup>

These are legitimate concerns. But it is hard to imagine that CIL would cause either of these problems. Only a very particular and unusual cooperative problem would present the situation in which a plausible solution would impose large losses on a few states while benefiting all others. Furthermore, it is unlikely that a rule of CIL would emerge that has these effects. Those who would suffer large losses would have every incentive to object to such a rule and make the point that the distributional consequences are unjust. The required sense of legal obligation must include the most affected states and, in this example, those states would reject the notion that there is any such obligation, arguably preventing CIL from emerging.

There is a theoretical possibility that some states could consistently be among those that are harmed. In practice, however, this result seems unlikely. CIL is deployed in a

<sup>19</sup> D'Amato, *supra* note 15, at 233–263; Stein, *supra* note 12, at 457.

<sup>20</sup> A persuasive case could be made that customary international law (CIL) has often been used in the past to bolster the priorities and preferences of powerful states, especially European ones, to the detriment of others. This is far less likely today both because there are many more independent states outside of Europe and because they can no longer be ignored by commentators or courts.

wide range of international law areas, and there is no reason to think that the winners and losers will always be distributed in the same way. It would be a cruel accident if a particular country was consistently harmed by legal rules that deliver net benefits to the globe in areas as diverse as environment, war and peace, human rights, business and so on.

There is no doubt that a non-consensual system could be dangerous if consent is ignored too easily. Domestic legal systems respond to this concern by providing elevated protections for certain rights, often through constitutional provisions. It strains credibility, however, to think that a tiny step away from consent, as provided by CIL, represents a serious concern along these lines. It is far more accurate to focus on the fact that CIL provides some modest relief from the oppressive status quo bias that impedes so much international cooperation.

## 4 Conclusion

The international legal system is, at its heart, an amalgam set of rules that facilitate cooperation among sovereign state actors. While consent is undoubtedly a bedrock principle, there must also be escape valves for those times when strict application of the principle will derail beneficial cooperative ventures. A system of non-consensual CIL represents the smallest of steps away from this scenario. It opens the door, ever so slightly, to high-value cooperation that does not benefit every single state. Given the difficulty with which CIL comes about, it will most likely only be successfully invoked for extraordinary problems. The end result is far more likely to be good, from a global perspective, than bad.<sup>21</sup>

<sup>21</sup> I also note, without further development here, that the costs of non-consensual rules are limited by the fact that states are able to violate international legal rules. No rule of CIL can impose costs beyond the cost of violating the rule.