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The Legitimacy of International Law:

Re-examining the Theory of State Consent

David van Rooyen

January 2019

**A thesis submitted to the School of Government & International Affairs,
Durham University, for the Degree of Doctor of Philosophy**

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Abstract

With the post-WWII acceleration of globalisation and the proliferation of transnational concerns (such as nuclear armament, financial instability, climate change, the spread of diseases etc.), there has been a concomitant increase in international laws and institutions designed to regulate this activity and facilitate international cooperation. This widening and deepening of international law brings to the fore normative concerns about how and from where international law derives its legitimacy. Indeed, international legal institutions have been suffering a 'crisis of legitimacy' in recent years: from the 1999 'Battle of Seattle' to Brexit. This thesis aims to contribute to the philosophical literature on the political legitimacy of international law. In particular, it seeks to morally evaluate the traditional theory of international legal legitimation: 'state consent'.

After conducting an in-depth conceptual analysis of three key concepts (international law, political legitimacy, and state consent), the thesis will consider six arguments against the proposition that state consent is either sufficient or necessary for the legitimacy of international law. I conclude that state consent is not 'sufficient' as – to properly legitimate international law – state consent would need to fulfil the additional necessary requirement of being 'authorised' by the individuals within the state; arguably through a process of deliberative democratic decision-making. I also conclude, however, that state consent may be 'necessary' for the legitimacy of a certain category of international law; namely, the international law of 'cooperation' (as opposed to 'coexistence'). The thesis ends by tentatively suggesting proposals for how international law may increase its claim to legitimacy under the existing state-consent model: first, by incentivising a process of internal democratisation, and second, by establishing an international 'harm principle' that better protects third-parties from indirect harm.

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INTRODUCTION

The subject of this thesis is the legitimacy of international law. International laws are those that govern the interrelationships of sovereign states.¹ Legitimacy (in a political context) is a type of moral justification that applies specifically to formal institutions and is thus concerned with institutional design. To have legitimacy – as I understand it – means to have the right to be obeyed for ‘content-independent’ reasons (i.e., for reasons relating to the design of the institution promulgating the rules rather than the content of the rules themselves).² The question of the legitimacy of international law, then, is a question of whether or not those subject to international law have a content-independent obligation to obey it.

To be legitimate, international law – as with any law – will need to satisfy certain conditions. Of what these conditions consist, and how they can be satisfied in practice, is a matter of great dispute. One traditional answer, however, is that – to achieve legitimacy – international laws require the consent of states (specifically, the consent of those states over whom those international laws claim jurisdiction).³ It is on this proposed requirement of ‘state consent’ that this thesis will focus. In this regard, I will consider two related and overarching questions:

1. Is state consent *sufficient* for the legitimacy of international law?
2. Is state consent *necessary* for the legitimacy of international law?

If state consent is sufficient, then it provides for the legitimacy of international law on its own. This would not preclude, however, the possibility that there exist other sufficient means by which to legitimate international law. On the other hand, if state consent is ‘necessary’, then international law cannot be legitimate without it. In this scenario, it may also be the case that there exist other necessary requirements that need to be satisfied alongside state consent.

¹ International law can also – more rarely – govern the activities of individuals and other actors. See chapter one and section 5.1 for relevant discussions.

² See chapter two for a full explanation and justification.

³ See chapter three for a full discussion.

The arguments made throughout this thesis all culminate in my conclusion that state consent is not sufficient, but is arguably necessary, for the legitimacy of (some types of) international law. I also conclude, however, that state consent *may* be sufficient when given by (sufficiently) democratic states. Filled, as it is, with caveats, this conclusion does not provide the ‘neatness’ that we as philosophers are often at pains to provide. What I believe this conclusion *can* claim to its advantage, however, is to be compatible with our intuitions about the natural right to self-determination; albeit self-determination of a particular kind. Whereas traditional international law focuses on the self-determination of ‘states’, my conclusion reflects an emphasis on the self-determination of *peoples*. In other words, the legitimacy of international law is contingent on its not diminishing the autonomy of individuals (organised as collectives) rather than of states *per se*. As such, state consent is sufficient as a method of legitimating international law only to the extent that it can, or helps to, achieve this.

Idealistically, my conclusions are cautious. In other words, I take as my starting position the international legal system as it is currently structured, and work from there. I do not, as others have done, formulate abstract theories from a ‘blank slate’. Having said that, my conclusion is still committed to the idea that international law does indeed need to satisfy moral demands; mere dominance in power relations or *realpolitik* is not satisfactory. As a result – toward the end of the thesis – I offer practical suggestions of how international law might evolve, from its current state, toward a position of increased legitimacy. This consists, first, of incentivising a process of internal democratisation within states and, second, by establishing an international ‘harm principle’ that better protects third-parties from indirect harm.

As will become apparent, this thesis is an exercise in moral and political philosophy. It is not an empirical study, nor is it a contribution to social or political science. To the extent that it ‘is’ descriptive, it is only to inform normative discussions. Put simply, it presents an argument for what *ought* to be case. It does not offer a description or explanation for why the world is the way it is, or why agents behave as they do. As a consequence, this thesis is the product only of secondary research and philosophising. No primary data has been collected.

It is also important to note that, although this is essentially an exercise in moral philosophy – it does not presuppose any particular moral framework; be that consequentialism, deontology, or virtue ethics. Instead, I shall follow theorists such as Michael Huemer in adopting an approach of ‘moral intuitionism’. In other words, I will base my discussion on morally intuitive and uncontroversial premises (i.e., those that theorists of all moral and political persuasions would want to accept). From these premises, I will attempt to reason my way to conclusions about the points of contention. My reason for taking this approach is the same as that given by Huemer: ‘political philosophy’, argues Huemer, ‘is a difficult and disputed field. One who hopes to make progress cannot begin from a contentious moral theory, still less from a contentious political ideology. One’s premises should be things that, for example, both liberals and conservatives would typically find obvious at first glance’.⁴ Although not often stated as explicitly, I’ve found that this is the approach adopted by most theorists who have written on this and similar topics.

The rest of this introduction will attempt to provide some context for my research question, and provide a justification for why such a question is worth asking. I will explain both the historical context of my research question, and also how this thesis fits within the wider academic discussion. I will end the introduction with a brief overview of how the thesis will be structured and its primary contents.

Historical Context

The question of political legitimacy is not new. Indeed, as Barker declares: ‘the identification of the conditions which justify government and require obedience has always been at the centre of political enquiry: What is meant by legitimacy or legitimate authority? That is the master question of politics’.⁵ Having said that, it has also not been around forever – or at least not in the sense in which we shall be discussing it. The question of political legitimacy is only ostensibly compelled to life during the ‘Age of Enlightenment’. This is because the concept only really becomes intelligible alongside certain basic assumptions about the individual and

⁴ Huemer, M. (2013) *The Problem of Political Authority*: p.15

⁵ Barker, R. (1990) *Political Legitimacy and the State*: p.4; see also: Crick, B. (1959) *The American Science of Politics*: p.150

political society; assumptions that first found widespread currency in Enlightenment thinking. To explain:

Prior to the Enlightenment era – which arguably began in seventeenth-century Europe – government was not seen to require any special justification, but was instead invariably justified with reference to the ‘divine right of kings’.⁶ The doctrine of St. Paul was nearly universally accepted, by political theorist and layman alike: ‘Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment’.⁷ As Simmons explains, ‘the political authority of Kings was believed to be granted by God, and the duties of citizens toward their king were imposed by God. Neither the conduct of kings nor the behavior of individual citizens played any part in the generating of political bonds or authority’.⁸

Fundamental to Enlightenment thinking, however, was the idea that the individual is ‘born free’ and is subject to no natural political obligations; whether that be to a divinity or any other temporal agent.⁹ From this starting point, and in the face of political hierarchies and obligations, one is compelled to ask, by what ‘special’ right does one individual rule over another? Any attempt to rule over another is *prima facie* impermissible and thus stands in need of further justification.¹⁰ This is the question of political legitimacy, which was expressed beautifully in the opening lines of Jean-Jacques Rousseau’s *The Social Contract* when he observes: ‘Man is born free, but everywhere he is in chains... how did this change come about? I do not know. What can make it legitimate? That question I think I can answer’.¹¹

Theories of political legitimacy were originally developed to justify the existence and actions of nation-states. One of the earliest attempts to justify state power came from those theorists within the ‘social contract’ tradition.¹² This ‘voluntarist’ account began to develop, arguably, in the mid-seventeenth-century with the writings of Thomas Hobbes¹³, and soon

⁶ See, for example: Peter, F. (2014) ‘Political Legitimacy’

⁷ Romans 13:1 & 2; See also: Simmons, J.A. (1979) *Moral Principles and Political Obligations*: p.58

⁸ Simmons, J.A. (1979) *Moral Principles and Political Obligations*: pp.58-9

⁹ Lister, M. (2011) ‘The Legitimizing Role of Consent in International Law’: p.671

¹⁰ See: Valentini, L. (2011) ‘Coercion and (Global) Justice’.

¹¹ Rousseau, J.J. (2004) [1762] *The Social Contract*.

¹² Huemer, M. (2013) *The Problem of Political Authority*: p.20

¹³ Hobbes, T. (2013) [1642] *De Cive*; and Hobbes, T. (1968) [1651] *Leviathan*.

after continued by John Locke¹⁴ and the aforementioned Jean-Jacques Rousseau.¹⁵ For the majority of history since Hobbes, the concept of the state has been the central object of political analysis.¹⁶ In addition to these voluntarist accounts, there have been bids made to assess the legitimacy of the state on teleological¹⁷ as well as deontological¹⁸ grounds.¹⁹

The reason the state has been the centre of such extensive normative analysis, of course, is that states typically make a number of morally significant claims over those whom they govern. For example, states claim the exclusive right to issue commands, within a given territory, and to enforce those commands with, if necessary, 'physical violence'.²⁰ This ability to affect human well-being in such a fundamental way renders the state an object of considerable moral significance.

Since at least the end of the Second World War, however, there has been an interesting and profound development in the distribution of political power. The ability of the state to affect human well-being, although still dominant, seems to be in relative decline. Instead, a whole host of global and international actors appear to be playing a larger and more prominent role in how human lives are governed.²¹ This 'shift'²² in the exercise of power from the state to the 'global' has been driven – primarily – by the forces of 'globalisation'.

Globalisation refers to the 'widening, intensifying, speeding up and growing impact of worldwide interconnectedness'²³ and has, in large part, been brought about by a 'revolution in technology and communications.'²⁴ This revolution, of course, has made it is easier for

¹⁴ Locke, J. (1924) [1690] *Two Treatise of Government*.

¹⁵ Rousseau, J.J. (2004) [1762] *The Social Contract*.

¹⁶ Held, D. (1983) 'Introduction' *States & Societies*: p.2

¹⁷ See, for example: Bentham, J. (1988) [1776] *A Fragment on Government*; Hume, D. (1965) 'Of the Original Contract'; and Hare, R.M. (1976) 'Political Obligation'.

¹⁸ See, for example: Kant, I. (1981) *Kant's Principles of Politics*; Kant, I. (1999) *Practical Philosophy*; Rawls, J. (1964) 'Legal Obligation and the Duty of Fair Play'; Rawls, J. (1971) *A Theory of Justice*; and Pitkin, H. (1972) *The Concept of Representation*.

¹⁹ For a general overview of the different philosophical traditions of state justification, see: Horton, J. (1990) *Political Obligation*.

²⁰ Weber, M. (1994) [1919] 'The Profession and Vocation of Politics'; and Buchanan, A. (2010) 'The Legitimacy of International Law': p.82

²¹ Hale, T. & Held, D. (2011) 'Editors' Introduction: Mapping Changes in Transnational Governance': p.1

²² Dicken, P. (2013) *Global Shift*.

²³ Held, D. & Maffettone, P. (2016a) 'Globalization, Global Politics, and the Cosmopolitan Plateau': p.2; see also: Held, D. *et al.* (1999) *Global Transformations*.

²⁴ Woods, N. (2002) 'Global Governance and the Role of Institutions': p.25

political, social, and economic actors to operate transnationally.²⁵ More specifically, as Held & Maffettone delineate, globalisation embraces at least four distinct types of change:

‘First, it involves a stretching of political, social and economic activities across frontiers, regions and continents. Second, globalization is marked by the growing magnitude of networks and flows of trade, investment, finance, culture and so on. Third, globalization can be linked to a speeding up of global interactions and processes, as the development of worldwide systems of transportation and communication increases the velocity of the diffusion of ideas, goods, information, capital and people. And, fourth, it involves the deepening impact of global interactions and processes such that local events can come to have enormous global consequences. In this particular sense, the boundaries between domestic matters and global affairs become fuzzy.’²⁶

Although globalisation brings with it many potential benefits and opportunities for the improvement of human well-being, it also presents us with a number of new challenges; challenges that are not confined to the borders of any particular nation-state. These include, but are not limited to: financial instability and systemic crisis, climate change, nuclear proliferation, extremist terrorist networks, the global spread of diseases, cyber-crime, and so on.²⁷ In such an interdependent and globalised world, ‘no individual state, no matter how competent, can address [such] transnational issues’ on its own.²⁸ As Hale & Held put it, attempting to resolve these issues using solely state institutions is ‘essentially using 17th-century institutional technology to confront 21st-century challenges.’²⁹ Thus, globalisation has created a demand for, and led to the proliferation of, a multitude of new governance institutions and international laws that operate at the transnational level; beyond the state.³⁰

²⁵ Ibid.

²⁶ Held, D. & Maffettone, P. (2016a) ‘Globalization, Global Politics, and the Cosmopolitan Plateau’: p.2

²⁷ Hale, T. & Held, D. (2011) ‘Editors’ Introduction: Mapping Changes in Transnational Governance’: p.3; and Sell, S.K. (2014) ‘Who Governs the Globe?’: p.73

²⁸ Hale, T. & Held, D. (2011) ‘Editors’ Introduction: Mapping Changes in Transnational Governance’: p.3

²⁹ Ibid.

³⁰ Woods, N. (2002) ‘Global Governance and the Role of Institutions’: pp.28-9. It should be stressed at this point that contemporary international law has its origins far further back – arguably in the seventeenth century. This was the time of the Treaty of Westphalia and the birth of the modern sovereign state (see chapters one and three). Concomitantly, international laws began to develop to regulate the interactions between these new

It is important to note that the shift from 'state' to 'global' governance has been partial and by no means complete. Indeed, the state arguably remains the primary governance actor and the 'pivotal entity of interest aggregation, legitimation and control.'³¹ However, in the words of Joost Pauwelyn, it is clear that states are increasingly 'supplemented, assisted, corrected and continuously challenged by a variety of other actors.'³² The proliferation of international institutions and laws in terms of sheer numbers goes some way to demonstrating this shift. For example, from the beginning to the end of the twentieth-century, 'the number of intergovernmental organisations had grown from a handful to more than 2,000.'³³ Likewise, the number of 'multilateral and bilateral treaties have also increased, now standing at around 3,000 and 27,000, respectively.'³⁴ However, not only have 'the number and range of activities that are shaped or regulated by international and transnational institutions skyrocketed in the last five decades', but 'their role and the pervasiveness of their influence in the internal politics of most nation-states' is also widely acknowledged.³⁵ As Henriksen observes, 'international regulation is actually everywhere around us. It is present in the cars we drive, the phone calls we make, the food we eat, the wine we drink, the clothes we wear, the movies we watch, the medicine we use and so on and so forth.'³⁶ Indeed, to get some sense of the ubiquity of international law, it is worth browsing the American Society of International Law's '100 Ways Project' which describes one hundred practical ways in which international law shapes our everyday lives.³⁷

The Current Crisis of Legitimacy

On the positive side, international laws and institutions have the potential to manage many of the problems thrown up by globalisation. They can, for example: help alleviate poverty;

states. The post-WWII era of globalization, however, marked a significant turning point in the acceleration and proliferation of international laws and institutions.

³¹ Pauwelyn, J. (2012) 'An Introduction to Informal International Lawmaking': p.20

³² Pauwelyn, J. (2012) 'An Introduction to Informal International Lawmaking': p.20

³³ Hale, T. & Held, D. (2011) "Editors' Introduction: Mapping Changes in Transnational Governance": p.5; see also: Held, D. *et al.* (1999) *Global Transformations*.

³⁴ Hale, T. & Held, D. (2011) 'Editors' Introduction: Mapping Changes in Transnational Governance': p.5; and Simmons, B. (2010) 'Treaty Compliance and Violation'.

³⁵ Held, D. & Maffettone, P. (2016a) 'Globalization, Global Politics and the Cosmopolitan Plateau': p.12

³⁶ Henriksen, A. (2017) *International Law*: p.2

³⁷ 'International Law: 100 Ways it Shapes Our Lives' (2018) *American Society of International Law*. [Online].

combat climate change³⁸; engender economic stability and growth³⁹; facilitate peaceful resolutions to conflict⁴⁰; institutionalise human rights⁴¹; promote corporate good practices⁴²; and prevent the global spread of diseases.⁴³ However, the existence of these international laws and institutions brings forth the same fundamental problem of legitimacy that the Enlightenment philosophers raised in relation to the nation-state. As Thomas notes, international laws and institutions now wield ‘powers with deeply intrusive implications for the autonomy of states and individuals.’⁴⁴ Thus, as international law becomes a more prominent part of our everyday lives – and in some cases takes over the traditional functions of domestic law – it is equally reasonable to ask what legitimates international law.⁴⁵ As Steffek rightly notes:

‘The globalization debate of the last decade has drawn public attention to the fact that states are ceding more and more competences to international organizations, and in turn have become dependent upon their rules and decisions. As a consequence, a quite extensive debate about the *legitimacy* of such governance ‘above’ or ‘beyond’ the nation-state has emerged.’⁴⁶

The need to assess the legitimacy of international laws is evident in practice from the growing criticisms levelled against a number of international actors in the last two decades in particular.⁴⁷ ‘Since the “battle in Seattle” in 1999’, writes Steffek, ‘many international

³⁸ For example, the 2015 Paris Climate Agreement.

³⁹ For example, the International Monetary Fund and the World Bank.

⁴⁰ For example, the UN Security Council and UN Charter more broadly.

⁴¹ For example, the 1948 Universal Declaration of Human Rights.

⁴² For example, the Basel III banking regulations.

⁴³ For example, the World Health Organisation.

⁴⁴ Thomas, C.A. (2014) ‘The Uses and Abuses of Legitimacy in International Law’: pp.729-30. In justifying this statement, Thomas explains that: ‘states may now be pressured under WTO rules to change their health or environmental policies; they may be required to align their economies with the policies remotely dictated by the World Bank in exchange for funds; the UN Security Council may impose sanctions that target individuals directly’.

⁴⁵ The debate over the extent to which the state has diminished in power relative to international authorities is hotly contested, and has resulted in many essays and volumes of work. (See, as just two examples: Ohmae, K. (2009) ‘The End of the Nation State’; and Strange, S. (2009) ‘The Declining Authority of States’). I do not intend to take any strong position within this debate; I only claim that international laws and institutions have developed *some* governance capabilities (previously undertaken by states), and, to that extent, expose themselves to challenges of legitimacy.

⁴⁶ Steffek, J. (2003) ‘The Legitimation of International Governance’: p.252

⁴⁷ Woods, N. (2002) ‘Global Governance and the Role of Institutions’: p.25

organizations... have become subject to critical public review.’⁴⁸ Machida adds to this that ‘protesters have condemned policies of major intergovernmental organizations (IGOs) such as the... IMF, the World Bank and the WTO, claiming that they lack democratic accountability’⁴⁹ and that they act in the interests of hegemonic states and big business, and not in the interests of the global community at large.⁵⁰ Indeed, in addition to protest by civil society actors, the legitimacy of international legal institutions has been questioned by academics, practitioners⁵¹, governments⁵², and even other international institutions.⁵³ It is not an uncommon view, therefore, that – as expressed by Lefkowitz – ‘at present international law enjoys less, and perhaps far less, legitimacy than it claims (or that some claim on its behalf).’⁵⁴

Indeed, since I began work on this thesis, one seismic event in particular has brought the question of the legitimacy of international laws and institutions to the fore once again. This was, of course, the decision of the United Kingdom to cease its membership of the European Union (EU) in June 2016. As I interpreted it, the electorate’s decision to leave the EU, was – in large part – a reaction to the EU’s perceived illegitimacy.⁵⁵ My reading of the situation was that most of those who voted to leave the EU were not doing so based (solely or necessarily) on a dislike of particular policies or laws; as might be the case when voting to replace a domestic government with that of another. Instead, they voted as such based on a rejection of the institution itself.

⁴⁸ Steffek, J. (2003) ‘The Legitimation of International Governance’: p.249; see also: Kaldor, M. (2000) ‘Civilising Globalisation?’.

⁴⁹ Machida, S. (2009) ‘Globalization and the Legitimacy of Intergovernmental Organizations’: p.371; see also: Stiglitz, J.E. (2002) *Civilization and its Discontents*; Bruner, L. (2003) ‘Global Governance and the Critical Public’; and Howse, R. & Nicolaidis, K. (2003) ‘Enhancing WTO Legitimacy’.

⁵⁰ Woods, N. (2002) ‘Global Governance and the Role of Institutions’: p.25

⁵¹ Perhaps the most famous example of a practitioner criticizing GGIs (specifically the World Bank and the IMF) is Joseph Stiglitz. Stiglitz is a Nobel Prize Laureate and former Chief Economist of the World Bank. (For an example of his criticisms see Stiglitz, 2002). Another notable example would be Dore Gold’s criticism of the United Nations in his book *Tower of Babel: How the United Nations Has Fueled Global Chaos* (see: Gold, 2005). Gold is a former Israeli Ambassador to the United Nations.

⁵² See, for example, Argentinian President Cristina Fernandez’s criticism of the IMF (Today’s Zaman, 2012). More generally, as noted by Woods (2002), ‘many developing countries are increasingly concerned that [the] growing intervention [of GGIs] in the realms of politics, human rights and security is a strictly one-way affair which carries overtones of a new imperialism’.

⁵³ A recent example was IMF criticism of the austerity measures imposed on Greece by the European Union (specifically the European Commission and European Central Bank). See, for example: BBC News (2015) ‘Greece debt crisis: IMF attacks EU over bailout terms’.

⁵⁴ Lefkowitz, D. (2016) ‘The Legitimacy of International Law’: p.114

⁵⁵ I do not intend to take a position in this thesis as to whether the EU is, or is not, legitimate, or whether the vote to leave was justified on these terms.

It is important here to recognise the difference between the concept of legitimacy and other normative evaluations such as 'good/bad', 'right/wrong', 'advantageous/disadvantageous' and so on. The difference can be illustrated as follows: in the domestic sphere, for example, it is perfectly rational and consistent for an individual to, on the one hand, be extremely condemnatory of a particular government and their policies but, on the other, recognise their right to govern and create laws. In other words, they can still recognise that government's 'legitimacy'. This, I submit, was not the case with the EU. The primary grievance was one of institutional design. It was not fundamentally about *what* laws were being imposed, but *how* and by whom those laws were made.

This reading of 'Brexit' as one primarily to do with legitimacy is borne out by analysing the rhetoric of those who argued most prominently and vociferously in favour of leaving. Daniel Hannan – often described as the 'architect behind Brexit'⁵⁶ – complained that: 'The EU is run, extraordinarily, by a body that combines legislative and executive power. The European Commission is not only the EU's 'government'; it is also, in most fields of policy, the only body that can propose legislation. Such a concentration of power is itself objectionable enough; but what is truly extraordinary is that the twenty-eight commissioners are unelected'.⁵⁷ In a similar vein – and with similar reference to the institutional design of the EU – notorious Brexiteer Nigel Farage argued on the eve of the referendum vote that:

'Leaving would mean that we would be taking back control. That those we elect as MPs would be the ones who make and decide our laws, rather than a bunch of unelected old men in Brussels who most people cannot name and who we cannot vote for or remove. Leaving the European Union would revitalise our democracy and mean that the big decisions were made by us instead of for us. I believe we're big enough and good enough to govern our own country.'⁵⁸

⁵⁶ For example, see: Bosotti, A. (2018) 'Architect of Brexit shares brilliant solution to Government's negotiation woes'.

⁵⁷ Hannan, D. (2016) *Why Vote Leave*: p.39

⁵⁸ Farage, N. (2016) 'Nigel Farage: Why you should vote for Brexit this Thursday'.

Many other prominent leave campaigners expressed similar sentiments.⁵⁹ This line of thinking is further supported by the fact that the single biggest reason that Leave voters (49%) gave for their decision was ‘sovereignty’.⁶⁰ Even the other substantive reasons given for leaving – such as ‘immigration’ and the ‘economy & trade’ – were framed in terms of ‘taking back control’. Indeed, this official slogan (‘take back control’) of the ‘Vote Leave’ campaign suggests, again, that the grievance was one of legitimacy; one based on *how* and *where* laws were made, and not of *what* they consisted.

The reason the perception of the illegitimacy of the EU was greater in Britain than in other member states was – so the argument has been made – because the constitutional procedures that are recognised as legitimating the imposition of laws in the British domestic sphere are very different to those of the EU. This cannot be said of the constitutional make-up of most other continental member states – whose constitutional arrangements and processes of legitimation are invariably reflected at the EU level. For example, the EU, as with most other member states, but unlike the UK: has proportional representation at legislative elections; has a Parliament whose primary role is to amend rather than propose legislation; has a system whereby a written constitution is supreme, rather than parliamentary supremacy; and has executive ministers who are appointed rather than elected.⁶¹

Academic Context

Brexit, however, was just a reaction to the increasing imposition of international laws and institutions that – as mentioned – started at pace after the Second World War. However, for a long time, the question of the legitimacy of international law remained neglected and is, even now, arguably ‘under explored and under scrutinised’.⁶² In his essay ‘The Uses and Abuses of Legitimacy in International Law’, Chris Thomas offers a number of reasons for this

⁵⁹ Boris Johnson, for example, argued that through Brexit, ‘[w]e would be able to take back control of our democracy’ and that ‘[w]e’d be able to set our own laws’ (Johnson, B. (2016) ‘Boris Johnson’s 8 Reasons Why Britain Should Leave the EU’). Michael Gove argued that Brexit would be a ‘vote for democracy’, as UK membership of the EU ‘prevents us from being able to change huge swathes of law’ (Gove, M. (2016) ‘EU Referendum: Michael Gove Explains Why Britain Should Leave the EU’). See also: Airas, I. (2017) ‘A Neo-Gramscian Analysis of Brexit’.

⁶⁰ Ashcroft, L. (2016) ‘How the United Kingdom Voted on Thursday... and Why’.

⁶¹ Hannan, D. (2016) *Why Vote Leave*: pp.103-115

⁶² Thomas, C.A. (2014) ‘The Uses and Abuses of Legitimacy in International Law’: p.730

historic neglect.⁶³ Just one of the plausible explanations he offers is that ‘it is only comparatively recently that philosophers and social scientists have recognized the relevance of legitimacy to justifying forms of public power not explicitly based on violence. International law’s traditional lack of coercive sanctions [therefore] effectively excluded it from earlier investigations.’⁶⁴

It was only (arguably) after the publication of Thomas Franck’s seminal work *The Power of Legitimacy among Nations* in 1990,⁶⁵ that the academic literature experienced what Ian Clark called ‘a veritable renaissance of international legitimacy talk’.⁶⁶ However, the exact focus of this literature tends to vary. Thomas Christiano, for example, has written multiple essays on the legitimacy of ‘international institutions’.⁶⁷ Alternatively, Buchanan & Keohane, and Held & Maffettone have focused on the legitimacy of ‘global governance’ or ‘global governance institutions’.⁶⁸ Elsewhere, Buchanan, as well as others such as David Lefkowitz, have produced essays on the legitimacy of ‘international law’.⁶⁹ As will be obvious from the title of this thesis, I will be opting for the latter approach in focusing on the legitimacy of ‘international law’. My reasons for this choice are as follows:

First, a focus on ‘international institutions’ would not get to the heart of our normative concerns. This is because – for the most part – international institutions derive their powers from (and are simply a manifestation of) the international legal treaties that led to their creation.⁷⁰ As such, the object of most normative significance is actually the ‘constituent treaty’ that creates the institution, and not the international institution itself. This does not mean that this thesis will not refer to the ‘legitimacy of international institutions’ – indeed it

⁶³ Ibid.: pp.730-1

⁶⁴ Thomas, C.A. (2014) ‘The Uses and Abuses of Legitimacy in International Law’: p.730; see also: Wellman, C. (1996) ‘Liberalism, Samaritanism, and Political Legitimacy’: p.211

⁶⁵ Franck, T.M. (1990) *The Power of Legitimacy among Nations*; see also: Thomas, C.A. (2014) ‘The Uses and Abuses of Legitimacy in International Law’: p.731

⁶⁶ Clark, I. (2005) *Legitimacy in International Society*: p.12

⁶⁷ See, for example: Christiano, T. (2010) ‘Democratic Legitimacy and International Institutions’; Christiano, T. (2011) ‘Is Democratic Legitimacy Possible for International Institutions’; and Christiano, T. (2012) ‘The Legitimacy of International Institutions’.

⁶⁸ See, for example: Buchanan, A. & Keohane, R.O. (2006) ‘The Legitimacy of Global Governance Institutions’; and Held, D. & Maffettone, P. (2016b) ‘Legitimacy and Global Governance’.

⁶⁹ Buchanan, A. (2008) ‘Human Rights and the Legitimacy of the International Legal Order’; Buchanan, A. (2010) ‘The Legitimacy of International Law’; and Lefkowitz, D. (2016) ‘The Legitimacy of International Law’.

⁷⁰ For example: the UN is a manifestation of the 1945 Charter of the United Nations; the IMF is a manifestation of the 1945 Articles of Agreement of the International Monetary Fund; and the EU is a manifestation of the Treaty on European Union and Treaty on the Function of the European Union.

will. However, it should be recognised that such a reference will invariably be an assessment of the international legal document (i.e. treaty) on which that institution is constituted. Additionally, a focus on international institutions would be unduly narrow. This is because many other international laws exist that do not establish international institutions but are nevertheless of at least equal moral significance. This includes most bilateral treaties, customary international law, and general principles of international law (see chapter one).

Conversely, a focus on 'global governance' – in general – is unnecessarily wide. As a consequence (and as I will argue in chapter two) it does not lend itself to assessments of legitimacy. This is for two reasons: first (as has been mentioned) legitimacy is primarily a question of institutional design. The problem, then, is that much global governance doesn't come in an 'institutional package'. Indeed, as James Rosenau correctly points out, the broad concept of global governance 'refers to more than the formal institutions and organizations through which the management of international affairs is or is not sustained'.⁷¹ Instead, global governance should be conceived 'to include systems of rule at all levels of human activity – from the family to the international organization – in which the pursuit of goals through the exercise of control has transnational repercussions'.⁷² Second (and again as I will argue further in chapter two) legitimacy is specifically about justifying the imposition of *obligations*. Many global governance actors and institutions, however, do not attempt to impose obligations on 'subjects', whereas all international laws (by definition) do.⁷³

Notwithstanding the literature to which I have just referred, I agree with Held & Maffettone when they say that the issue of legitimacy – particularly in relation to international law – 'has not received the attention that it deserves within mainstream debates. The global political theory literature' they go on to say, 'has poured considerable amounts of ink on the scope of egalitarian distributive principles, yet, with the exception of debates addressing the desirability of global democracy,⁷⁴ it has paid comparatively less

⁷¹ Rosenau, J.N. (2005) [1995] 'Governance in the Twenty-First Century': p.45

⁷² Ibid.

⁷³ A good example of such an institution would be the 'Basel Committee for Banking Supervision' (BCBS). Although the BCBS posit 'rules' relating to global standards for the prudential regulation of banks, they demand no obligation of obedience; the rules are merely voluntary. As it says in the Basel Committee Charter: 'The BCBS does not possess any formal supranational authority. Its decisions do not have legal force. Rather, the BCBS relies on its members' commitments'.

⁷⁴ See, for example: Held, D. (1995) *Democracy and the Global Order*; and Marchetti, R. (2008) *Global Democracy: For and Against*.

attention to the more specific questions pertaining to legitimacy and institutional design'.⁷⁵ This thesis, then, in its own modest way, aims to reduce the deficit of attention that has been paid to the legitimacy of international law. However, I will not attempt to formulate any new standard of legitimacy against which international law should be assessed. Nor will I attempt to review every proposed standard of legitimacy that has hitherto been put forward. Instead, I shall confine myself to a consideration of just one potential standard for the legitimacy of international law: that of 'state consent'. At its simplest, this is the theory that says international law is legitimate when states consent to that law (although see chapter three for a more in-depth exposition). My reasons for focusing solely on state consent as a potential standard for the legitimacy of international law are four-fold:

The first is simply a matter of 'space'. As Christiano sets out in his essay 'The Legitimacy of Institutions', there are – in contemporary thought – at least three main categories of theories of what makes international law (or institutions) legitimate.⁷⁶ These are: state consent; democratic decision-making; and 'instrumental' theories in which legitimacy is based on the quality of outcomes.⁷⁷ I have judged that focusing on two or all of these main theories would – given the limited space I have available to me – diminish the quality and depth with which I could analyse any one theory in particular.

My second reason is that the theory of state consent is the one most frequently assumed to be correct in actual international legal practice (see more below). Thus, although this thesis undertakes a normative analysis of specifically state consent, to the extent that international law is the product of state consent in practice, it is also a normative analysis of the current international legal system. Third, there is a serious lack of normative consideration of the state consent theory of international legal legitimacy in the literature – both in terms of quantity and depth. Of the theorists who have addressed this topic, most afford it no more than a few pages and, as far as I am aware, there exists no book-length analysis devoted specifically and entirely to this question. Andrew Guzman also seems to notice this problem when he writes that 'the normative implications of our consent-centric

⁷⁵ Held, D. & Maffettone, P. (2016a) 'Globalization, Global Politics and the Cosmopolitan Plateau': p.12

⁷⁶ Christiano, T. (2012) 'The Legitimacy of International Institutions': p.382

⁷⁷ Ibid.

approach to international law have not been adequately addressed and, in my view, are not well understood.’⁷⁸

My fourth reason is perhaps the most intellectually and academically interesting. This is to do with the fact that there is an obvious – and seemingly irreconcilable – oppositional difference in the way that the theory of state consent is viewed by, on the one hand, political philosophers, and on the other, international lawyers. Held & Maffettone, in reviewing the existing philosophical literature on the legitimacy of international law observe that all hitherto theorists ‘share something in common, namely, the refusal to accept a background picture in which states are sovereign in the traditional Westphalian sense of the term, and consequently, see their international obligations as only justifiable through voluntariness or consent.’⁷⁹ They go on to paraphrase Rawls (1999) in saying that ‘we now live in a (normative) world where states are no longer considered the originators of all their powers. The upshot is that it is untenable to evaluate international institutions and regimes through the lenses of state consent alone.’⁸⁰ Held & Maffettone also very much subscribe to this view.

By contrast, most international lawyers (especially legal ‘positivists’) will want to portray all – or nearly all – international legal obligations as derived from the consent of states. Louis Henkin expresses this view, for example, when he says that a ‘state is not subject to any external authority unless it has voluntarily consented to such authority’.⁸¹ For people like Henkin, the international legal order is premised on the Westphalian notion of state sovereignty in which states can only be legitimately bound through their own consent. As any basic or introductory text on the international law will tell you, international law is fundamentally a consent-based system.⁸² Indeed, the International Court of Justice (formerly the PCIJ) has expressed this principle in a famous paragraph:

‘International law governs relations between independent States. *The rules of law binding upon States therefore emanate from their own free will* as expressed in conventions or by usages generally accepted as expressing principles of law and

⁷⁸ Guzman, A. (2011) ‘The Consent Problem in International Law’: p.5

⁷⁹ Held, D. & Maffettone, P. (2016a) ‘Globalization, Global Politics and the Cosmopolitan Plateau’: p.12

⁸⁰ Ibid.

⁸¹ Henkin, L. (1989) ‘International law: politics, values and functions’: p.27

⁸² See, for example: Klabbers, J. (2013) *International Law*: p.21; and Henriksen, A. (2017) *International Law*: p.22

established to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims [emphasis added]. Restrictions upon the independence of States cannot therefore be presumed.’⁸³

In addition, and although international lawyers tend to be hesitant about straying from interpretive to normative analysis, private conversations that I’ve had with international lawyers (both academic and practicing) have suggested that the state consent model of legitimacy is not only an accurate description of the reality of international legal practice, but is morally preferable to any other model.⁸⁴

Summary

I began this introduction by setting the parameters of this thesis and making clear that its contents will build towards the conclusion that mere state consent is insufficient, but arguably necessary, for the legitimacy of international law. This conclusion is largely compatible with our intuitions about the moral importance of the self-determination of peoples. This is because state consent is – in the current international legal system – a necessary means to achieve such self-determination; but not a sufficient one.

It was also emphasised that this thesis is an exercise in moral and political philosophy; and not a contribution to social or political science. I noted further that, in writing this thesis, I do not presuppose any particular moral framework – be that consequentialism, deontology, or virtue ethics. Instead, I shall adopt an approach of ‘moral intuitionism’ in that I will base my discussion on morally intuitive premises and then attempt to reason from these premises to conclusions about the contested questions that are of interest. The primary purpose of this introduction, however, has been to provide some context – both historical and academic – for the question my thesis seeks to answer. It has also tried to demonstrate why a thesis-length analysis of this question is valuable – both in terms of contributing to the academic literature, and also in helping to understand and address contemporary global events.

⁸³ *SS Lotus, The (France v Turkey)* [1927] PCIJ Ser A No 10.

⁸⁴ One such conversation in which this view was expressed was with an English Judge at the International Court of Justice – Sir Christopher Greenwood.

I began by explaining how the question of political legitimacy began to take root during the 'Age of Enlightenment'. This was because the Enlightenment brought with it the notion that individuals are 'born free' and thus not subject to any natural political obligations. Thus, any authority that sought to impose political obligations stood in need of special justification – or rather 'legitimacy'. The question of legitimacy was initially confined – predominantly – to the nation-state and the justification of domestic law. However, as new forms of authority began to emerge above and beyond the nation-state, the question of legitimacy also naturally extended to these new international laws and institutions. This shift from the domestic to the global was nowhere more apparent than in the post-WWII era of globalisation.

I then showed how the increasing pervasiveness and relevance of international laws and regulations in our everyday lives has provoked discussion as to their political legitimacy, and led many to the conclusion that many such laws are illegitimate (and thus constitute unjustified impositions). This began, most overtly, with criticism of the preeminent international financial institutions (such as the IMF, WTO, and World Bank) in the 1990s and early 2000s, and culminated, most recently, in 'Brexit'. These events have led to a noticeable increase in academic interest on the legitimacy of international law. As I noted, however, this literature is still relatively scant compared to the vast literature on both political and distributive justice. This thesis, then, aims to help reduce the deficit of attention that has been paid to the legitimacy of international law.

I have also tried, in this introduction, to highlight the limitations of what this thesis hopes to achieve. Specifically, it does not attempt to propose any grand theory of the legitimacy of international law. Instead, it focuses attention on just one (increasingly controversial) theory – the theory of state consent. My reasons for this are various – but my main motivation is derived from noticing the vastly different positions adopted by philosophers on the one hand, and international lawyers on the other.

By affording this one theory in-depth and nuanced consideration, I hope to dissect those elements of the theory that are morally attractive from those that need amending or discarding altogether. In this way, I hope this thesis will convince other theorists that the choice facing them is not whether to accept or reject the state consent theory of legitimacy. Instead, it is to understand when and under what circumstances this theory may be applicable.

Structure of Thesis

In navigating this thesis, it will be useful for the reader to see it as falling into two halves. The first half will be the ‘conceptual analysis’ in which I consider the three main concepts relevant to this thesis: ‘international law’, ‘political legitimacy’, and ‘state consent’. Explanations as to these terms are provided in chapters one, two and three respectively. The second half of the thesis (chapters four, five and six) will consist of the discussion in which I will attempt to answer the research question – in other words: the extent to which state consent provides for the legitimacy of international law. This, in turn, will be broken down into the question of whether state consent is ‘sufficient’ for the legitimacy of international law (chapters four and five), and whether it is ‘necessary’ (chapter six).

Chapter one of this thesis will give an overview of the structures and function of international law. In other words, it will give a descriptive account of the current international legal order. It will explain the way in which international law is fundamentally different to domestic law in terms of the structure of authority. The chapter will also give an overview of the way in which different types of international laws are created. Providing this basic understanding of the disparate structure of international law will be essential for any nuanced discussion of whether state consent is necessary or sufficient for the legitimacy of international law. This is because, as will be shown, state consent does not relate to all types of international law in the same way. Simply asking the question ‘does state consent legitimate international law’ begs the question as there is no ‘one’ type of international law.

Chapter two will analyse the concept of political legitimacy. This is a notoriously elusive concept to pin down, and it has been attributed various different meanings in the literature. I will make clear in this chapter that I am using the term legitimacy in its normative – as opposed to descriptive – sense. The primary tasks of this chapter will be to propose a particular ‘moral function’ of legitimacy (i.e., the difference in normative standing between a legitimate and illegitimate institution), and also to identify the ‘basis of legitimacy’ (i.e., those features of a political institution that one ought to assess when determining legitimacy). Finally, I will make clear the difference between the concept of legitimacy, and that of ‘justice’.

Chapter three will analyse the notion of ‘state consent’ and consent in general. It looks at: consent’s normative function; the way in which it legitimates law; and the criteria for

‘valid’ consent. It will also be looking at how the doctrine of state consent has evolved in international law, and the necessary assumptions that one must hold about the international system before accepting a state consent theory of legitimacy. Finally, this chapter will briefly consider the extent to which state consent claims to be able to legitimate international law in practice.

As mentioned, chapters four to six (the second half of the thesis) will comprise our normative evaluation of state consent as a method of legitimating international law. I will be dividing this analysis into, first, whether state consent is ‘sufficient’ to legitimate international law (chapters four and five), and second, whether state consent is ‘necessary’ (chapter six). My approach will be to consider those arguments I believe to be the most convincing against the proposition that state consent is necessary and/or sufficient for the legitimacy of international law.

Chapter four considers the problems of ‘non-voluntary state consent’ (section 4.1) and ‘uninformed state consent’ (section 4.2). These two arguments focus on instances where purported state consent may be ‘invalid’ (and thus insufficient to legitimate international law). This is simply because – according to consent theory – consent must be both ‘free’ & ‘informed’. The two sections in this chapter argue that ‘ostensible’ state consent is insufficient to legitimate international law, and that other criteria must be fulfilled to ensure that any instance of state consent is both free and informed.

Chapter five will consider the problem of ‘authorisation’ (section 5.1) and also the problem of ‘immoral state consent’ (section 5.2). The problem of authorisation argues that state consent is insufficient for the legitimacy of international law because – to give normatively significant consent – states must be authorised to do so by their citizens (which, it is argued, they seldom are). In this way, the problem of authorisation essentially criticizes the theory of state consent for assuming that our unit of primary moral concern is the state rather than the individuals within that state. This section will go on to argue that only sufficiently democratic states can properly be authorised to consent to international legal obligations. The problem of immoral state consent, on the other hand, is essentially an argument against the idea that a purely procedural view of the legitimacy of international law – such as state consent – can be sufficient. To be sufficient, goes the argument, the content or ‘substance’ of international law must also meet morally acceptable standards.

Of all the four arguments considered against the sufficiency of state consent in chapters four and five, I will find the ‘problem of authorisation’ (section 5.1) to be the most convincing; and the one which ultimately renders state consent insufficient for the legitimacy of international law.

Chapter six will look at two problems for the proposition that state consent is necessary for the legitimacy of international law. Section 6.1 covers the problem of ‘immoral state *non*-consent’, and section 6.2 the ‘problem of non-consensual international law’. The ‘problem of immoral non-consent’ says that the non-consent of states to some cooperative activity can – in some instances – create negative externalities severe enough to constitute an injustice. Accordingly, any proposed international law that attempts to rectify these injustices is legitimate; with or without the consent of states. The problem of non-consensual international law, on the other hand, is an *argumentum ad consequentiam* (argument to the consequences). This is an argument that concludes a hypothesis to be either true or false based on whether the premise leads to desirable or undesirable consequences. The reason this is a problem for the necessity of state consent is that there already exist many international laws that – although we perceive them to be legitimate – do not derive from state consent. Thus, holding to the position that state consent is necessary for the legitimacy of international law will lead to the undesirable consequence that many of the laws we assumed to be legitimate, are not.

As mentioned, however, we turn now to chapter one, which aims to unpack and explain the concept of ‘international law’.

THE INTERNATIONAL LEGAL SYSTEM

This chapter seeks to set-out a broad picture of how the international legal system operates. It is not intended to be a novel contribution or provide any special insights that do not already exist in other basic texts. Instead, it will help set the context for later discussions for those without a background in international law. This chapter, unlike much of the ones to follow, will be largely descriptive. In other words, I will merely attempt to describe the structure of the current international legal system as best I understand it, without (for now) passing judgement on the merits or otherwise of that system. This descriptive overview, although elementary, will prove to be vital in informing and shaping the scope and parameters of our discussion on the state consent theory of international legal legitimacy.

This chapter will attempt to provide answers to the following questions: what is the structure of the international legal system; how does international law differ from domestic law; why does international law exist; and how is international law created? It will not, however, focus specifically on state consent, nor on the historical development of international law as these topics will be discussed further in chapter three.

1.1 *The Structure of the International Legal System*

A preliminary distinction ought to be made between ‘public’ and ‘private’ international law. Private international law is the law that ‘regulates individual conduct with a transboundary element’ (e.g. international contracts, international marriages or international traffic accidents etc.).¹ Public international law, however, is ‘the system of law that regulates the interrelationship of sovereign states’.² This thesis is concerned only with *public* international law (from herein just ‘international law’). A more comprehensive definition of international law is offered by Professor Shearer:

¹ Klabbers, J. (2013) *International Law*: p.3; see also: Henriksen, A. (2017) *International Law*: p.1

² Henriksen, A. (2017) *International Law*: p.1

‘International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with one another, and which includes also:

- (a) The rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and
- (b) Certain rules of law relating to individuals and non-states so far as the rights or duties of such individuals and non-state entities are the concern of the international community.’³

A good starting point for understanding the organisational structure of the international legal system is to compare it to something with which people are more familiar: domestic (or ‘municipal’) law. In (most) domestic legal systems, there exists a legislative body (in the UK this would be Parliament) that creates laws. These laws are then applied to, and enforced on, legal subjects (such as individuals) by an executive body (in the UK this would be Her Majesty’s Government). Finally, judicial bodies (such as Courts and tribunals) will interpret the application of the law in particular cases. These three branches (the legislature, executive, and judiciary) may often overlap or take different forms in different states, but they are usually conceptually discernible.

The most striking difference with domestic legal systems, then, is that the international legal system has no legislative or executive body.⁴ Similarly, as Henriksen explains, ‘although a number of international courts have been created over the years, there is no mandatory and well-established procedure for the settlement of legal disputes.’⁵ The reason for this fundamental organisational difference is that the international system has no single overarching authority.⁶ Consequently, unlike domestic systems, there exists no vertical or ‘top-down’ application of the law. Instead, international law is a horizontal or *decentralised*

³ Shearer, I.A. (1994) *Starke’s International Law*: p.3; see also: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.6

⁴ Henriksen, A. (2017) *International Law*: pp.2-3

⁵ *Ibid.*: p.3

⁶ Klabbbers, J. (2013) *International Law*: p.9

system ‘in which it is primarily up to the legal subjects themselves to create, interpret and enforce the law.’⁷ The primary international legal subjects – states – are not recipients of the law in the same way that individuals might be within the nation-state; they are (in theory) the creators of the law that they then apply directly to themselves.

This decentralised structure is a corollary of the notion that each individual state is sovereign. Law can only exist in a society of sovereign states if it is created by those states themselves. If law were created by authorities other than states, then states, by definition, would cease to be sovereign. As Klabbers explains: ‘since states are considered to be sovereign, it follows that there is no authority above them; and if there is no authority above them, it follows that law can only be made with their consent – otherwise the system would be authoritarian. Hence, international law is often said to be a consent-based (or consensual) system.’⁸ The ICJ (then the PCIJ) expressed this principle when it stated that:

‘International law governs relations between independent States. *The rules of law binding upon States therefore emanate from their own free will* as expressed in conventions or by usages generally accepted as expressing principles of law and established to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims [emphasis added]. Restrictions upon the independence of States cannot therefore be presumed.’⁹

This peculiar nature of the international legal system has led some to deny that international law is really ‘law’ at all.¹⁰ If one chooses to define law – in part – as that which emanates from a single sovereign (as did, for example, nineteenth-century legal-scholar John Austin) then international law starts to look something more akin to a ‘positive morality’.¹¹ Although ‘more recent theorists do not hesitate to refer to international law as “law” proper’, Austin’s position is certainly intuitively appealing.¹² As Klabbers notes, it is perfectly reasonable to ask: ‘how, indeed, does international law function if it has no sovereign authority? How are its

⁷ Henriksen, A. (2017) *International Law*: p.3

⁸ Klabbers, J. (2013) *International Law*: p.21

⁹ *SS Lotus, The* (France v Turkey) [1927] PCIJ Ser A No 10.

¹⁰ See: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.3

¹¹ Austin, J. (1995) [1832] *The Province of Jurisprudence Determined*: p.124; see also: Klabbers, J. (2013) *International Law*: p.10

¹² Klabbers, J. (2013) *International Law*: p.10

rules made, in the absence of a legislator, and, perhaps even more puzzlingly, how can the system work in the absence, by and large, of a police force, a Department of Justice, a set of prosecutors and all the other characteristics we usually associate with legal systems?’¹³ The debate over whether international law is properly ‘law’, however, is one discussed in the field of analytic jurisprudence, and not one that is necessary for this thesis to confront.¹⁴ Indeed, for our purposes, what one chooses to call ‘it’ is far less important than understanding what it does, and how it is made.

Another useful way to view international law is to see it as a ‘supplement’ or a ‘complement’ to national law.¹⁵ In other words, international law does (or rather, has the potential to do) what national law is unable to do. As Henriksen explains, ‘national law is perfectly adequate to regulate the vast majority of legal disputes that merely involve the relationship between citizens of a sovereign state or between citizens and the state. But mutual respect for sovereignty dictates that national law is ill-suited to a situation where the interests of more than one sovereign state collide.’¹⁶ Any attempt to unilaterally apply national law internationally would be to impose upon the jurisdiction of another state (thereby undermining their sovereignty). To maintain the sovereign independence of each state, any interaction or dispute between two or more states needs to be regulated or resolved by a mutually recognised set of rules: i.e., ‘international law’. In this way, the scope of international law is arguably determined by the inadequacy of national law.¹⁷

As mentioned, the role of international law is to regulate the interaction between sovereign states. However, states interact with one another in two broad ways. Consequently (and correspondingly) there exist two broad substantive structures of international law; one to govern each type of interaction. These two broad structures of international law are: the international law of ‘coexistence’, and the international law of ‘cooperation’.¹⁸

¹³ Klabbers, J. (2013) *International Law*: p.10; see also: Henkin, L. (1979) *How Nations Behave: Law and Foreign Policy*.

¹⁴ For a discussion on the status of international law, see, for example: D’Amato, A. (1985) ‘Is International Law Really ‘Law’?’: p.1295

¹⁵ Henriksen, A. (2017) *International Law*: p.10

¹⁶ The relationship between national and international law will be discussed further below.

¹⁷ Spiermann, O. (2005) *International Legal Argument in the Permanent Court of International Justice*: pp.46-48; see also: Henriksen, A. (2017) *International Law*: p.10

¹⁸ It should be noted that Alina Kaczorowska-Ireland posits a third substantive structure: the ‘international law of conflict’ (Kaczorowska-Ireland, A. (2015) *Public International Law*: pp.4 & 17). I, however, would argue that this third category could be subsumed within the broader category of ‘the international law of coexistence’.

The international law of coexistence are the rules that enable states to coexist peacefully with one another.¹⁹ As Henriksen explains, ‘the mere fact that international society is composed of a multitude of sovereign states with different interests’ necessitates a minimum set of rules that allow that system to exist at all.²⁰ Laws relating to coexistence are often referred to as ‘general international law’. These laws will contain ‘the answers required to separate the powers of the sovereign states and thereby uphold peaceful coexistence.’²¹ International laws relating to coexistence include: ‘issues related to the delimitation of – and title to – territory, the criteria for statehood and the recognition of new states and governments, jurisdiction and immunity, the use of force, the conduct of armed hostilities and neutrality in times of armed conflict. Also included are the international principles of treaty law and the secondary legal principles on state responsibility.’²²

The international law of cooperation, on the other hand, are the rules that govern cooperative activity between states that goes beyond mere coexistence.²³ States are naturally interdependent in many ways, and international law can help facilitate the cooperation that this interdependence sometimes demands.²⁴ Cooperation exists when two or more states agree to turn an issue – that would otherwise have been dealt with by national law – into one of an international character.²⁵ Examples and areas in which states cooperate include: international human rights law, the majority of international environmental law and international economic law, the creation and maintenance of an international postal system, eradicating disease by means of common rules as to vaccination, and in combating international terrorism.²⁶ EU law is a particularly good example of a legal regime solidly situated in the international law of cooperation.²⁷ Under EU Treaties, ‘member States have transferred important powers to EU institutions. In some areas, e.g. the Common Commercial

¹⁹ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.17

²⁰ Henriksen, A. (2017) *International Law*: p.10

²¹ Ibid.

²² Ibid. For views on the scope of the international law of coexistence, see also: Spiermann, O. (2005) *International Legal Argument in the Permanent Court of International Justice*: pp.83-87; and Bull, H. (1977) *The Anarchical Society: A Study of Order in World Politics*: pp.66-67

²³ The international law of cooperation has also been referred to as the ‘international law of governance’. See, for example: Kumm, M. (2004) ‘The Legitimacy of International Law’: p.915

²⁴ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.17

²⁵ Henriksen, A. (2017) *International Law*: p.10

²⁶ See both: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.17; and Henriksen, A. (2017) *International Law*: pp.10-11

²⁷ Henriksen, A. (2017) *International Law*: p.11

Policy and the Common Agricultural Policy, the EU has exclusive powers, i.e. the EU alone is entitled to act at both internal and international level with regard to these areas.’²⁸

Henriksen explains that the international law of cooperation is much ‘younger’ than that of coexistence:

‘In the period immediately after the end of the Second World War states began to create organizations that were given competence to deal with issues that had until that time been considered to be of an entirely national interest. The result was the emergence of a new structure of international law involved in the promotion of a variety of ‘societal’ goals. International law thereby began to be concerned with the manner in which sovereign authority was exercised within individual states.’²⁹

Perhaps the clearest way to differentiate the international law of coexistence from that of cooperation is that the former is primarily concerned ‘with the manner in which sovereign states interact with... each other’, whereas the latter is more ‘preoccupied with how sovereign authority is constituted or exercised in relation to the citizens within the state.’³⁰

As Henriksen points out, ‘it is also important to note that, the international law of coexistence is... not concerned with binding states closer together... it merely seeks to ensure that states can pursue their different and separate interests... in a way that respects the sovereignty of other states.’³¹ This is in contrast with the law of international cooperation which often involves states giving-up a degree of independence so as to achieve some further goal in partnership with other states. Finally, ‘it is important to understand that states are only inherently bound by the international law of coexistence and that they must agree to all other international legal obligations. The international law of cooperation is therefore ‘optional’ in the sense that states decide for themselves if they want to turn a matter previously dealt with by national law into a matter of international law.’³²

²⁸ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.17

²⁹ Henriksen, A. (2017) *International Law*: p.11; see also: Friedmann, W. (1964) *The Changing Structure of International Law*: pp.61-71; and Friedmann, W. (1962) ‘The Changing Structure of International Law’: p.1147

³⁰ Henriksen, A. (2017) *International Law*: pp.10-11

³¹ Ibid.: p.11

³² Ibid.

This distinction between the international law of coexistence and cooperation will be central when asking (in chapter six) whether state consent is necessary for the legitimacy of international law. After all, if – as Henriksen states above – states are ‘inherently bound’ by the international law of coexistence, then the consent of states in relation to that law is rendered unnecessary. This is not true, however, for the international law of cooperation which, as explained above, is ‘optional’.

1.2 *The Relationship between International and National Law*

Before we move on to look at the processes by which international law is created, it will be useful to consider the relationship between international law and national legal systems, and to what extent the two overlap.

As explained above, there exist two substantive structures of international law: law relating to ‘coexistence’ and law relating to ‘cooperation’. The international law of coexistence doesn’t seem to pose much of a problem for municipal law as they operate within two separate spheres. As mentioned, the law of coexistence, from the perspective of the state, deals with ‘outward-facing’ issues (such as the law of war). Municipal law, on the other hand, deals with ‘inward-facing’ issues, such the rights and obligations that individuals hold in relation to each other and the state. In theory, then, each can operate without necessarily imposing on the other.

The international law of *cooperation*, however, creates a tension with municipal law. As stated above, cooperation exists when two or more states agree to turn an issue – *that would otherwise have been dealt with by national law* – into one of an international character.³³ By its very nature, then, international law of cooperation ‘collides’ (or perhaps ‘mixes’) with municipal law. This relationship between the international law of cooperation and municipal law has given rise to two competing theories as to how the two interrelate.

³³ Henriksen, A. (2017) *International Law*: p.10

These are the doctrines of ‘monism’ and ‘dualism’.³⁴ Although there exist many variations of monism and dualism, the essential features of each are set out below.³⁵

Monism holds that ‘international law and national law essentially form a single legal order’ and that ‘international law can be applied directly in the national legal systems of states.’³⁶ In other words, when a state, for example, signs a treaty, or a new law of customary international law develops, that new international law will be *directly applicable* in domestic law without the need for further legislative action. This is also called the doctrine of ‘incorporation’ as international law is immediately incorporated into domestic law and the two form a single legal order.³⁷ Thus, when municipal courts assess the law to adjudicate a dispute, they will consider all law; whether it has domestic origins or international origins. If there is a conflict between the two, international law will prevail. It is worth noting that monism, as a doctrine, is mainly embraced by civil law countries, such as France and Germany.³⁸ The most famous exponent of monism was Hans Kelsen.³⁹

In contrast with monism, ‘dualism’ says that ‘international law and national law are two separate legal systems that operate independently.’⁴⁰ Dualism holds that international law is ‘the law applicable between sovereign States, and that municipal law applies within a state to regulate the activities of its citizens’.⁴¹ According to this view, ‘neither legal system has the power to create or alter rules of the other.’⁴² This is not to say that international law cannot have *indirect* effect in municipal law, only that international law – to have such effect – must first be ‘transformed’ into domestic law according to the procedures through which domestic law is ordinarily created (e.g. an Act of Parliament). Once transformed, international law will look no different to other examples of domestic law as it will sit alongside other domestic law in a state’s statute book; the only difference will be its origin. Thus, a municipal

³⁴ Some commentators claim that the traditional doctrines of monism and dualism have lost their significance and suggest new approaches, such as ‘legal pluralism’ and ‘constitutionalism theory’. See, for example: Preshova, D. (2013) ‘Legal Pluralism: New Paradigm in the Relationship between Legal Orders’: p.288; and Kumm, M. (2004) *The Legitimacy of International Law: Constitutionalist Framework of Analysis*: p.907

³⁵ See, for example: Dupuy, P.M. (2011) ‘International Law and Domestic (Municipal) Law’.

³⁶ Henriksen, A. (2017) *International Law*: p.14

³⁷ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.129

³⁸ *Ibid.*: p.130. For further examples of monist states, see: Crawford, J. (2012) *Brownlie’s Principles of Public International Law*: pp.88-109

³⁹ Henriksen, A. (2017) *International Law*: p.14

⁴⁰ *Ibid.*

⁴¹ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.129

⁴² *Ibid.*

court will only look to municipal law, and not international law, when adjudicating domestic disputes.

Dualism is mainly practised in traditional 'common law' countries such as the United States.⁴³ In practice, however, many countries will operate under both doctrines (monism and dualism). The United Kingdom is a case in point. The UK is essentially a dualist state, however, as with most dualist states, English Courts will directly apply rules of customary international law, unless the customary rule specifically conflicts with an Act of Parliament or the UK Constitution does not allow it.⁴⁴ Additionally, although most international law needs to be transformed into UK municipal law (as explained above), certain types of European Union law (primarily regulations) have direct effect in UK law without needing to be transformed into domestic law by, for example, an Act of Parliament.⁴⁵

This distinction between 'monism' and 'dualism' has moral implications that will be discussed later in this thesis. This is because, in monist states, the ability of international law to impose obligations on citizens is dependent only (or primarily) on the actions of the executive. In dualist states, however, it is dependent on the actions of the legislature. This is morally relevant since executives and legislatures usually derive their own legitimacy through different means.

Finally, it should be emphasised that, as a general rule, international law asserts its own supremacy over national law.⁴⁶ This is true whether a state adopts a monistic or dualistic system. Article 13 of The Draft Declaration on the Rights and Duties of States, for example, asserts that: 'Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitutions or its laws as an excuse not to perform this duty'.⁴⁷ Article 27 of the Vienna Convention on the Law of Treaties makes the same point in respect of treaties, providing: 'A

⁴³ For further examples of dualist states, see: Crawford, J. (2012) *Brownlie's Principles of Public International Law*: pp.62-87

⁴⁴ There are a number of other unique scenarios in which English Courts will not incorporate customary international law. See, for example: Kaczorowska-Ireland, A. (2015) *Public International Law*: pp.139-40

⁴⁵ This is possible by virtue of Section 2(1) of the European Communities Act 1972.

⁴⁶ See, for example: Vienna Convention on the Law of Treaties (1969): Art. 27

⁴⁷ See: Kelsen, H. (1950) 'The Draft Declaration on Rights and Duties of States'. It should be noted that The Draft Declaration on the Rights and Duties of States was submitted by the International Law Commission to the General Assembly of the United Nations in 1949, who subsequently commended it without actually formally adopting it (mainly because of a lack of interest on behalf of States).

party may not invoke the provision of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to art. 46.’ Article 46 outlines an exception to this rule, namely, a treaty can be invalidated when an international law manifestly violates ‘a rule of... internal law of fundamental importance’.⁴⁸

1.3 Sources of International Law

Thus far, we have looked at the function of international law, its substantive structure, and its relationship to domestic law. But how is international law actually made? The simple answer is: through a ‘source’. ‘Sources’ of international law refer to the instruments through which valid international law can be created. Thus, when we want to discover the content of international law, we need to consult the sources of international law.⁴⁹ These legal sources enable us to ‘distinguish between norms of a legal character and those of a “merely” political, moral or ethical nature.’⁵⁰ As explained previously, the international legal system is decentralised. As such – and unlike most domestic systems – ‘legal obligations may derive from more than one particular source.’⁵¹

These sources are commonly identified with reference to Article 38(1) ICJ Statute. Article 38 is not a document specifying how international law can/must be made (no such document or treaty exists). Instead, the statute of the ICJ contains a listing of instruments that the Court may apply in deciding cases, and it is this listing that is often used as a starting point for a discussion of the sources of international law.⁵² Article 38(1) ICJ provides as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a.) International conventions, whether general or particular, establishing rules expressly recognized by the consenting states;
- b.) International custom, as evidence of a general practice accepted as law;
- c.) The general principles of law recognized by civilized nations;

⁴⁸ See also: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.131

⁴⁹ Henriksen, A. (2017) *International Law*: p.21

⁵⁰ Ibid.: p.22

⁵¹ Ibid.: p.21

⁵² Klabbers, J. (2013) *International Law*: p.21

- d.) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

To restate it simply, then, Article 38(1) says that the ICJ will recognise international law when its origin lies in: (a) an international convention (i.e. treaty); (b) international custom; (c) a general principle of law; or (d) a judicial decision or 'teachings of publicists'. There is also an incidental source of international law – 'equity' – which appears in subsection 2 of Article 38. Article 38(2) states that: 'This provision [i.e. Article 38(1)] shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto'. *Ex aequo et bono* means 'according to the right and good' or 'from equity and conscience'.

Article 38(1) also distinguishes between primary and secondary sources of law. Conventions, custom, and general principles are viewed as primary sources of law. Judicial decisions and teachings of publicists, however, are described as 'subsidiary means for the determination of rules of law' (i.e. secondary sources). The distinction between primary and secondary sources is made because the former are law *creating* (i.e. they create new rights and obligations) whereas the latter are law *identifying* (i.e. they merely apply or clarify the content of existing law).⁵³

It is worth noting that there is nothing to suggest that these sources represent an exhaustive list of the available sources of international law.⁵⁴ The ICJ is not the arbiter of what constitutes a valid source of law and what does not. Through Article 38(1), the ICJ has not intended to 'create' or authorise sources of law, but merely to codify existing practice. Article 38(1) is also the target of much criticism for a number of reasons. For example, the concept of *jus cogens* (discussed later in this chapter and also chapter six), which arguably plays a fundamental role in modern international law, is not mentioned.⁵⁵ I will now look at each source of international law and explain what they mean and how they operate in practice.

⁵³ Klabbers, J. (2013) *International Law*: p.23

⁵⁴ *Ibid.*: p.21

⁵⁵ For further discussion regarding the criticisms levelled against Article 38(1), see: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.27

1.3.1 *International Treaties*

‘Treaties’ (along with customary international law, see below) are one of the two main sources of international law.⁵⁶ Indeed, Lord McNair, author of *The Law of Treaties*, described treaties as ‘the only, and sadly overworked workhorses of the international legal order.’⁵⁷ Kaczorowska-Ireland explains that ‘the expression “treaty” is used as a generic term to cover a multitude of international agreements and contractual engagements concluded between States. These international agreements are called by various names including treaties, conventions, pacts, declarations, charters, concordats, protocols, covenants, or by even less formal names such as “exchange of notes” and “memorandum of agreement”.’⁵⁸

The simplest way to think about treaties is to view them as contracts.⁵⁹ Just as individuals within the domestic sphere may contract to create or exchange rights and obligations, so do states in the international sphere. Treaties are actually the *only* way that states can enter into a legal relationship with one another.⁶⁰ As Klabbers explains: ‘if states want to make a deal (say, exchange territory), the only instrument at their disposal is the treaty. Likewise, they can effectively only use the treaty form if the ambition is legislative in nature (e.g. to protect against climate change or to guarantee human rights). The only instrument available to set up an institution such as the UN is, again, the treaty’.⁶¹

Treaties can either be ‘bilateral’ or ‘multilateral’. Bilateral treaties are the ones that most resemble domestic contracts and are concluded by two states. Bilateral treaties often set out the law governing a particular issue of mutual interest, such as trade between two states or the construction of joint infrastructure.⁶² Multilateral treaties, on the other hand,

⁵⁶ See, for example: Cali, B. (ed.) (2010) *International Law for International Relations*: p.94

⁵⁷ McNair, A.D. (1961) *The Law of Treaties* (cited in Klabbers, J. (2013) *International Law*: p.25).

⁵⁸ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.69

⁵⁹ It should be noted, however, that a distinction has been made between ‘law-making treaties’ (normative treaties) and ‘treaty contracts’. The former are created for ‘general or universal application and are intended for future and continuing observance’, whereas the latter are more like domestic contracts that deal with a particular matter (such as a construction project) (see: Kaczorowska-Ireland, A. (2015) *Public International Law*: pp.28-9). I have not included this distinction in the text, however, as it is a distinction regarding the content of the treaty at not the procedure as to how the treaty is made, i.e., ‘the binding force of a treaty comes from the consent of the parties, not from the subject matter or from the treaty’ (Kaczorowska-Ireland, A. (2015): p.28).

⁶⁰ Henriksen, A. (2017) *International Law*: p.24

⁶¹ Klabbers, J. (2013) *International Law*: p.25

⁶² Henriksen, A. (2017) *International Law*: p.24

are those concluded between larger groups of states (three or more). They will ‘often have general application and possess “law-making” features’.⁶³

As mentioned above, treaties can be used to create international organisations. These treaties are referred to as ‘constituent treaties’.⁶⁴ They can be either bilateral or multilateral, but are usually the latter. Constituent treaties are interesting because they usually confer on the international organisation a power (or ‘competence’) to create further legally binding instruments. For example, The Charter of the United Nations – the constituent treaty of the UN – gives the Security Council the competence to adopt resolutions that legally bind all member states.⁶⁵

Over time, international legal rules have developed regarding international treaties. These rules specify, for example, how treaties should be concluded, how they can be terminated, the conditions under which they are valid, how they are to take effect and be applied and so on.⁶⁶ These rules can be found in the 1969 Vienna Convention on the Law of Treaties (VCLT).⁶⁷ The rules in this Treaty evolved through customary international law (see below) and were merely codified by the International Law Commission (ILC) in the VCLT.⁶⁸ The VCLT applies only to treaties concluded between states.⁶⁹

1.3.2 International Custom

Put simply, customary international law (CIL) is law that evolves through, and reflects, how states behave (i.e. their ‘custom’).⁷⁰ The idea, roughly, is that legal rights and obligations can

⁶³ Henriksen, A. (2017) *International Law*: p.24. Examples of such multi-lateral treaties would include the Charter of the United Nations and the Treaties of the European Union.

⁶⁴ Ibid.

⁶⁵ Charter of the United Nations (1945): Art. 25, and Chapters V, VI & VII; see also: Thirlway, H. (2014) *The Sources of International Law*: pp.33-34

⁶⁶ Klabbers, J. (2013) *International Law*: pp.25-26

⁶⁷ See: Dörr, O. & Schmalenbach, K. (2012) *Vienna Convention on the Law of Treaties, A Commentary*.

⁶⁸ The International Law Commission was established in 1947 with the primary purpose of promoting the ‘progressive development of international law and its codification’. Among other things, the Commission selects topics and makes proposals for draft conventions and codifications. In turn, this may lead to the adoption of important conventions. See: Henriksen, A. (2017) *International Law*: p.33; see also: Boyle, A. & Chinkin, C. (2007) *The Making of International Law*: pp.183-200.

⁶⁹ Klabbers, J. (2013) *International Law*: p.26. For a more in-depth discussion on the law of treaties in general, see: Aust, A. (2013) *Modern Treaty Law and Practice*.

⁷⁰ See: Akehurst, M. (1974-75) ‘Custom as a Source of International Law’.

develop from norms. Thus, when identifying international law, the ICJ will consider the previous behaviour of the disputing states (or perhaps of states more generally).

However, not all or any state practice can create international legal obligations. As seen above, Article 38(1) ICJ Statute defines CIL as ‘evidence of a *general practice accepted as law*’. This definition, notes Klabbers, contains two main requirements: (1) ‘there must be a general practice’, and (2) ‘this general practice must be accepted as law’ or accompanied by ‘a sense of legal obligation.’⁷¹ This latter element is referred to as ‘the *opinion juris sive necessitates*, or just *opinio juris*’.⁷² The ‘general practice’ requirement is ‘objective’ in that one merely needs to observe the actual practice of states. The additional requirement that the state believes the practice to be legally binding, however, is ‘subjective’.⁷³

As Kaczorowska-Ireland explains, general practice ‘is normally constituted by the repetition of certain behaviour on the part of States for a certain length of time’ regarding a particular matter.⁷⁴ There seem to be at least four complications with the notion of ‘general practice’, or, at least, questions that need to be answered. The first is that it assumes that state practice is, to some degree, consistent. What happens, for example, if states breach an existing custom? ‘Does this’, as Klabbers asks, ‘imply that the existing rule is weakened and possibly a new one is being formed?’. The second difficulty is that general practice is, on its own, morally indifferent. What if, for example, the practice of states is morally lacking? Again, Klabbers asks: ‘if many states commit acts of torture, is the conclusion then inevitable that torture is allowed under customary international law, or can it still be said that torture is not permissible under customary international law?’⁷⁵ Third, there is the question of ‘duration’.⁷⁶ At what point does behaviour become custom? In other words, how long does it take for the actions of a state to become ‘general practice’? Placing any particular length of time on this would seem arbitrary. Finally, how ‘general’ must the ‘general practice’ be in order to bind

⁷¹ See: Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) [2012] ICJ Rep 99: para.55; and North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands) [1969] ICJ Rep 4: para.77. See also: Klabbers, J. (2013) *International Law*: p.26

⁷² Kaczorowska-Ireland, A. (2015) *Public International Law*: p.30

⁷³ See: Henriksen, A. (2017) *International Law*: p.25. See also: Neff, S.C. (2014) *Justice Among Nations: A History of International Law*: pp.252-253.

⁷⁴ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.31

⁷⁵ Klabbers, J. (2013) *International Law*: p.31; see also: Beckett, J. (2010) ‘Customary International Law’: p.122-3; and Bederman, D.J. (2010) *Custom as a Source of Law*.

⁷⁶ North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands) [1969] ICJ Rep 4: para.77

third states?⁷⁷ CIL has the potential to bind all states, whether or not their behaviour contributed to the development of the customary rule. To do so, however, the behaviour of states must be sufficiently general. But how many states are 'sufficient'? It is beyond the scope of this thesis to discuss the answers to these questions, but they are points worth bearing in mind in our later discussions.⁷⁸

The second requirement of *opinio juris* (that a state must believe its actions to be legally required) 'plays the useful role of separating law from other normative control systems, such as etiquette or morality, or of separating legally warranted behaviour from merely politically expedient behaviour.'⁷⁹ As Klabbers points out, 'there are many practices which are deemed useful or pleasant in one way or another, but which it would be silly to try and enforce in a court of law, or to ask for compensation upon violation'.⁸⁰ *Opinio juris*, however, presents its own difficulties for the international lawyer. This is because identifying *opinio juris* involves ascertaining the belief of a state; i.e., does a state believe its actions to be legally required or optional? The problem here, of course, is that 'states rarely explain why they act or refrain from acting as they do'.⁸¹

By pointing out the difficulties associated with CIL, I do not mean to pass judgement on its merit as a source of international law, nor am I suggesting that these difficulties are intractable. I merely mean to explain why many consider CIL to be 'controversial', and what sort of considerations need to be made when identifying CIL.⁸² Indeed, CIL is also thought to have many benefits. For example, as Klabbers argues, because customary law is based on social practices, it has the advantage that 'it is usually deeply ingrained in the everyday life of that society' and is thus more likely to be respected and obeyed.⁸³

⁷⁷ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.32

⁷⁸ For a more in-depth discussion relating to the issues surrounding 'general practice', see: Kaczorowska-Ireland, A. (2015) *Public International Law*: pp.31-4

⁷⁹ Klabbers, J. (2013) *International Law*: p.28

⁸⁰ Ibid.

⁸¹ Henriksen, A. (2017) *International Law*: p.27

⁸² See, for example: Kammerhofer, J. (2011) *Uncertainty in International Law: A Kelsian Perspective*: pp.59-86

⁸³ Klabbers, J. (2013) *International Law*: p.26

1.3.3 General Principles of Law

General principles of law are not directly legislated, but are rather ‘inferred’; typically by courts. Their ‘generality’ can refer to two different things. First, they could be principles of law that ‘form part of most, perhaps all, legal systems of the world’.⁸⁴ In this way, the ICJ, when deciding a case, could infer the content of these principles from principles widely observed in municipal law.⁸⁵ Second, general principles can be inferred from the nature of the international community itself.⁸⁶ In this case, the content of the principles would be determined by the rules that are pre-requisite for a functioning international legal system made up of sovereign states to exist at all.

Henrikson explains that general principles were inserted into Article 38(1) because the drafters⁸⁷ ‘were concerned that treaties and custom were insufficient to provide all the legal answers needed. General principles of international law would prevent the Court being unable to decide a dispute due to a shortage of applicable law – so-called *non liquet*.’⁸⁸ In this way, general principles can be viewed as “gap fillers” ‘that only needed to be consulted when a dispute could not be resolved on the basis of a treaty or customary international law.’⁸⁹

Examples of general principles include: the notion of good faith; the principle that no one shall be judge in their own cause; that people shall not be sentenced twice for the same act; and that there shall be no crime without a law.⁹⁰ General principles are not, in any direct sense, ‘adopted’ or ‘legislated’; however, given their ‘generality’ (or ‘universality’), they are also fairly uncontroversial. As mentioned, it could be argued that general principles are necessary in that they constitute those principles without which a justice system could not exist. As Klabbers points out, it is ‘difficult to conceive of a legal order based on bad faith, or one where double jeopardy was the norm’.⁹¹ Another good example of a ‘necessary’ general principle would be *pacta sunt servanda* (that international agreements are binding).⁹² The

⁸⁴ Klabbers, J. (2013) *International Law*: pp.34-5

⁸⁵ Kaczorowska-Ireland, A. (2015) *Public International Law*: pp.48-9

⁸⁶ Ibid.

⁸⁷ The drafters of the original Article 38(1) were the Commission of Jurists.

⁸⁸ Lauterpacht, H. (1970) *International Law*: p.69. See also: Cali, B. (ed.) (2010) *International Law for International Relations*: p.94; and Klabbers, J. (2013) *International Law*: p.34

⁸⁹ Henriksen, A. (2017) *International Law*: p.30

⁹⁰ Cheng, B. (1953) *General Principles of Law as Applied by International Courts and Tribunals*: pp.103-160; see also: Klabbers, J. (2013) *International Law*: pp.34-5

⁹¹ Klabbers, J. (2013) *International Law*: pp.34-5

⁹² Henriksen, A. (2017) *International Law*: p.30

whole notion of treaties, for example, would be rendered meaningless if this principle were not to apply.

1.3.4 Judicial Decisions and 'Teachings of Publicists'

The final sources of law recognised by Article 38(1) are 'judicial decisions' and 'teachings of publicists'. As explained previously, these sources are considered to be 'secondary' sources as they do not create law as such, but interpret existing law.

This first thing to note with regards judicial decisions is that Article 38(1)(d) of the Statute of the ICJ states that the Court may use them as a subsidiary means for the determination of rules of law '*subject to the provisions of Article 59*'. Article 59 of the Statute of the Court provides that: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. As Kaczorowska-Ireland explains: 'there is, therefore, no binding authority of precedent in international law, and international court and tribunal cases do not make law. Judicial decisions are not, therefore, strictly speaking a formal source of law.'⁹³

Although judicial decisions are supposed to play a mere interpretative function, there often exists a fine line between merely 'identifying' and *developing* or *creating* law.⁹⁴ What happens, for example, if there is no law to interpret? 'If an international tribunal is unable to discover an existing treaty or customary rule relevant to a dispute, any rule which the tribunal adopts in deciding the case will, in theory at least, form a new rule of international law.'⁹⁵ As Helfer explains, 'rulings that clarify ambiguities and fill in gaps in treaty texts are usually consistent with states' expectations. At the margins, however, expansive interpretations can fundamentally change treaty bargains—as when international jurists find a treaty reservation to be invalid, sever the reservation, and apply the challenged treaty provision to the reserving state.'⁹⁶

⁹³ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.51

⁹⁴ Henriksen, A. (2017) *International Law*: p.31

⁹⁵ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.51

⁹⁶ Helfer, L.R. (2008) 'Nonconsensual International Lawmaking': p.75

In this way, the ICJ has introduced several innovations into international law which have subsequently achieved general acceptance.⁹⁷ 'Interpretation' will also inevitably involve a degree of flexibility. As such, some courts have been accused of interpreting the law in a way that is politically partisan or motivated, i.e. 'judicial activism'.⁹⁸ One frequent recipient of such accusations is the European Court of Justice (ECJ).⁹⁹ The most famous example of ECJ judicial activism is perhaps the creation of the principle that European Union law has supremacy over the national law of member states.¹⁰⁰

Another arguable instance of ECJ activism was when it *de facto* incorporated the UK into the EU's jurisdiction in relation to social policy and employment law – even though the UK had negotiated a *de jure* opt-out. As Hannan explains:

'Because Britain had an opt-out on social and employment policy, they [the EU] reintroduced the main pillar of that policy – a directive regulating paid holidays, maximum weekly working times and the like – as a 'health and safety' measure (the 1993 Working Time Directive)... the British government protested that the measure was plainly social policy rather than health and safety – it allowed employees to work more than forty-eight hours a week, provided they were given overtime – but the ECJ decided that health and safety didn't just mean being safe at work: it also meant looking after the "social well-being" of employees.'¹⁰¹

⁹⁷ For example, see: *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174. In this case, the ICJ arguably created the following new general principles of international law: the principle of functional protection of an IGO; the principle of implied powers; and the principle of the objective legal personality of the UN. See also: Kaczorowska-Ireland, A. (2015) *Public International Law*: pp.51-2

⁹⁸ For more discussion on judicial discretion and activism in general, see both: Ford, C.A. (1994) 'Judicial Discretion in International Jurisprudence'; and Ginsburg, T. (2005) 'Bounded Discretion in International Judicial Lawmaking'.

⁹⁹ See, for example: De Waele, H. & Van der Vleuten, A. (2011) 'Judicial Activism in the European Court of Justice – The Case of LGBT Rights'; Freitas, L.V. (2015) 'The Judicial Activism of the European Court of Justice'; and Rasmussen, H. (1986) *On Law and Policy in the European Court of Justice*.

¹⁰⁰ See: *Costa v ENEL* Case 6/64 [1964] ECR 585.

¹⁰¹ Hannan, D. (2016) *Why Vote Leave*: pp.106-7

To this end, Hannan claims that the ECJ ‘was behaving as a legislative rather than a judicial body’.¹⁰²

There is also a view that judicial decisions are responsible for the development of *jus cogens* norms of international law. *Jus cogens* norms are extremely important in international law as (as is explained below) they are *peremptory* norms that apply to all states regardless of their consent. The view that these norms find their source in judicial decisions has been put forward by – among others – Mary O’Connell.¹⁰³ It should be stressed, however, that the argument here is not that *jus cogens* norms are ‘created’ by judicial decisions *per se*, but merely ‘identified’. This is because – according to O’Connell – *jus cogens* are pre-existing principles of ‘natural law’. (This discussion will be extended in chapter six).

The second subsidiary source of law recognised by Article 38(1)(d) is ‘the teachings of the most highly qualified publicists of the various nations’. Many international courts (other than the ICJ) and municipal courts ‘often refer to scholarly works to support their decisions’.¹⁰⁴ The ICJ itself very rarely makes reference to such works, although some infrequent examples exist.¹⁰⁵ Although ‘learned writings’ may have influence in the development of the content of future laws, they do not directly provide for the legal validity of existing laws, and as such should not be thought of as a formal source.¹⁰⁶

1.3.5 Other Sources of International Law

There are a few other arguable sources of international law not mentioned in Article 38(1). Two of these are: ‘unilateral declarations’ and ‘secondary law of international governmental organisations’.¹⁰⁷

¹⁰² Hannan, D. (2016) *Why Vote Leave*: p.107. Hannan goes on to argue that the ECJ has, since then, ‘repeatedly extended the scope of the Working Time Directive, most recently ruling, in 2015, that the time spent travelling to and from your place of work must count towards your forty-eight hours’.

¹⁰³ O’Connell, M.E. (2012) ‘*Jus Cogens*: International Law’s Higher Ethical Norms’.

¹⁰⁴ See, for example: Bohlander, M. (2003) *The Influence of Academic Research on the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*.

¹⁰⁵ For examples, see: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.54

¹⁰⁶ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.53

¹⁰⁷ Some would argue that *jus cogens* obligations should also be included as a formal source of international law. I explain why I do not treat it as such further below.

Regarding 'unilateral declarations', the ICJ has previously ruled that statements or promises made by, for example, heads of state or foreign secretaries, can legally bind those states.¹⁰⁸ It is important to note, however, that these unilateral statements – as with the other subsidiary sources of law – cannot create law in themselves, but are merely used to help 'judges clarify the precise meaning of a contested or unclear piece of treaty or custom.'¹⁰⁹ Clearly, as Klabbers explains 'not all unilateral declarations will come to have binding effect. Some statements are best seen as declarations of fact or expressions of political opinions, such as an act of recognition'.¹¹⁰

Another potential source of law is the 'secondary law of intergovernmental organisations'.¹¹¹ As mentioned above, treaties can be used to create intergovernmental organisations (IGOs). Some notable examples would be the United Nations, the International Monetary Fund, the World Bank, and the World Trade Organisation. The constituent treaties that create such organisations sometimes enable the organisation to create further legislation. As Buchanan notes, various IGOs, 'though created and sustained through treaties made by states, are increasingly taking on law-making functions.'¹¹² 'In this respect', notes Kaczorowska-Ireland, 'it is important to make a distinction between primary and secondary law of IGOs. Primary law refers to the founding treaties i.e. a treaty establishing the relevant IGO. Secondary law, however, refers to acts adopted by IGOs on the basis of primary law.'¹¹³ There is disagreement about whether these secondary legal obligations created by IGOs are foundational as a source of law.¹¹⁴ My own opinion is that they are not. Although these secondary laws accrue the same status as other types of international law, they cannot exist independently from an IGOs founding treaty. As such, it is the founding treaty that is the true source of this secondary law.

¹⁰⁸ See, for example: *Legal Status of Eastern Greenland (Denmark v Norway) (Judgment) [1933] PCIJ Rep Ser A/B No 53.*

¹⁰⁹ Cali, B. (ed.) (2010) *International Law for International Relations*: p.94

¹¹⁰ Klabbers, J. (2013) *International Law*: p.35; see also: Eckart, C. (2012) *Promises of States Under International Law*.

¹¹¹ See: Alvarez, J.E. (2005) *International Organizations as Law-Makers*.

¹¹² Buchanan, A. (2010) 'The Legitimacy of International Law': p.80

¹¹³ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.56

¹¹⁴ *Ibid.*

1.4 Hierarchy of Sources

The existence of multiple sources of international law raises the question of hierarchy: are some sources more important than others, and what happens when two or more sources conflict?¹¹⁵ The standard position is that, notwithstanding the distinction between primary and subsidiary sources of international law made in Article 38(1), there is no hierarchy between sources. In other words, conventions, custom, and general principles are all 'deemed to have the same normative status.'¹¹⁶ This is not to say that, in any particular case, one source of law is not more central in establishing the content of the law than the others. Instead, normative equality between the sources merely entails that the source used to decide the content of the law will depend on the facts of each individual case, and not the normative superiority of the source.

There are, however, some potential exceptions to the general presumption of normative equality.¹¹⁷ The first is that of *jus cogens* obligations.¹¹⁸ As mentioned above, *jus cogens* laws are 'peremptory norms of international law [that] apply to all states regardless of their consent to the treaties or conventions or practices that contributed to their creation'.¹¹⁹ It is this peremptory status that gives *jus cogens* obligations their normative superiority. *Jus cogens* norms are described in the Article 53 of the Vienna Convention on the Law of Treaties as a 'norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'¹²⁰ Such norms are generally thought to include the general prohibition of: aggressive war; genocide; torture; piracy; slavery; and other crimes against humanity.¹²¹ The superior status of *jus cogens* obligations was demonstrated in the *Aloeboetoe Case (Judgment)*.¹²²

¹¹⁵ Weil, P. (1983) 'Towards Relative Normativity in International Law?': p.413

¹¹⁶ Henriksen, A. (2017) *International Law*: p.34

¹¹⁷ See: International Law Commission (2006) 'Conclusions of the Study Group on the Fragmentation of International Law': paras.324-409

¹¹⁸ See: Orakhelashvili, A. (2006) *Peremptory Norms in International Law*; and Christenson, G.A. (1988) 'Jus Cogens: Guarding Interests Fundamental to International Society'.

¹¹⁹ Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: p.190

¹²⁰ See also: Christiano, T. (2012) 'The Legitimacy of International Institutions': pp.387-8

¹²¹ Voyiakis, E. (2010) 'International Treaties': p.104; see also: Christiano, T. (2012) 'The Legitimacy of International Institutions': p.387

¹²² *Aloeboetoe Case (Judgment)* IACtHR Series C No 15 (10 September 1993): paras.56-57

Some would argue that *jus cogens* obligations are sources of international law in themselves, and thus ought to be recognised independently in Article 38(1) of the ICJ Statute. In other words, their legal validity – it is argued – is derived, not from the process by which they were made, but simply due to the substantive content of the *jus cogens* obligation. Although I have chosen not to include it as a source of law in its own right in this chapter, the debate about the true nature of *jus cogens* is expanded upon in chapter six.

The second exception to the principle of normative equality is ‘obligations *erga omnes*’.¹²³ Obligations *erga omnes* are obligations owed to the international community as a whole, rather than any one state in particular. It is in this sense that these laws are normatively superior to others.¹²⁴ Thus, in practice, and unlike other obligations, breaches of obligations *erga omnes* ‘can be invoked by any state and not just by those which are the immediate beneficiaries of the obligation’.¹²⁵ Reference to the concept of obligations *erga omnes* was made by the ICJ in the *Barcelona Traction* case:

‘An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *ergas omnes*.’¹²⁶

Obligations *erga omnes* are closely related to *jus cogens* obligations in the sense that all *jus cogens* obligations will be obligations *erga omnes*. The reverse, however, is not true as not all obligations *erga omnes* will be peremptory. So, for example, although all obligations protecting basic human rights are obligations *erga omnes*, some are not *jus cogens* obligations, e.g. the right to a fair trial, or the right to respect for private and family life.¹²⁷

¹²³ See: Ragazzi, M. (2000) *The Concept of International Obligations Erga Omnes*; and Tams, C.J. (2005) *Enforcing Obligations Erga Omnes in International Law*.

¹²⁴ Henriksen, A. (2017) *International Law*: p.35

¹²⁵ *Ibid.*: p.36

¹²⁶ Case Concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (New Application 1962) (Second Phase) [1970] ICJ Rep 3: para.33

¹²⁷ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.47

‘The third and final category of privileged norms’ notes Henriksen, ‘is that of obligations under the UN Charter’.¹²⁸ Specifically, Article 103 of the UN Charter provides that: ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’. When read with Article 25 of the Charter – which provides that ‘Members of the United Nations agree to accept and carry out the decisions of the Security Council’ – the practical effect of Article 103 is that ‘states must comply with the Council’s resolutions even if it means that they thereby violate other international legal commitments.’¹²⁹

1.5 Summary

In this chapter, we have seen how international law is fundamentally different to domestic law in not having a single central authority from which laws emanate. Instead, international laws are primarily developed through the interrelations between multiple authorities, i.e. states. This ‘horizontal’ system of law creation is necessary if states are to have equal sovereignty. We further noted that ‘international law’ is not a homogenous concept, and can thus be separated between the law of ‘coexistence’ and ‘cooperation’. The former governs the way states (and possibly other entities) relate to one another. The latter governs instances whereby states use international law to address an issue formerly dealt with by domestic law. This chapter has also explained and summarised the primary sources of international law, including treaties, customary international law, and general principles.

A basic understanding of how international law is structured, and an appreciation that international law has multiple sources, will be essential for any nuanced discussion of whether state consent is necessary or sufficient for the legitimacy of international law. This is because, as we will discover, state consent does not relate to all types of international law in the same way.

The following two chapters will continue with the conceptual analysis of our other two key concepts: ‘political legitimacy’ and ‘state consent’ respectively. It is only once these

¹²⁸ Henriksen, A. (2017) *International Law*: p.36

¹²⁹ Ibid. The exception to this would be that the Security Council could not oblige a member state to violate a *jus cogens* obligation.

concepts are properly understood that we will be in a position to adequately address our overarching question of whether state consent provides for the legitimacy of international law.

POLITICAL LEGITIMACY

This chapter seeks to undertake a conceptual analysis of the key normative concept with which this thesis is concerned: legitimacy. It is important make clear at this early stage, however, that – as we are interested in the legitimacy of international law – we will be concerned with ‘political’ legitimacy; rather than legitimacy in general.

Political legitimacy is that which pertains, ultimately, to political institutions or systems – i.e. those institutions or systems which – by various means and to various ends – attempt to coordinate human behaviour through issuing ‘rules’. The reason for this clarification is that legitimacy/illegitimacy is also frequently used to describe ‘events’ or ‘actions’. For example, it was very common to hear the 1999 bombing of Kosovo, or the 2003 invasion of Iraq, described in these terms.¹ This is not the sense in which we will be analysing the term. As this chapter will demonstrate, however, this initial clarification does little to shed light on the myriad of ways in which the concept of legitimacy – in the political sense – is used.²

Section 2.1 explains the difference between descriptive and prescriptive legitimacy – noting that this thesis is focused on the latter. Section 2.2 considers the question of the ‘moral function’ of legitimacy. In essence, this is the question of how the moral status of a legitimate institution differs from one that is illegitimate. Finally, section 2.3 explores the ‘basis’ of legitimacy. This is the question about which aspect of an institution one is actually evaluating in a legitimacy assessment; the ‘content’ of the rules it issues, or the internal ‘process’ by which those rules are made.

¹ See both: Coleman, K.P. (2007) *International Organisations and Peace Enforcement: The Politics of International Legitimacy*: pp.20–23; and Thomas, C.A. (2014) ‘The Uses and Abuses of Legitimacy in International Law’: p.746

² Herein, any reference to ‘legitimacy’ should be taken to mean *political* legitimacy.

2.1 *Descriptive vs Prescriptive Legitimacy*

If one were to scan the fields of political science and political philosophy for mention of the term ‘legitimacy’ (as I have, to a considerable extent, now done), one will notice vast discrepancies in how the term is used. Indeed, as Fallon observes, ‘those who appeal to legitimacy frequently fail to explain what they mean or the criteria that they employ’.³ It is not so much that they apply the term incorrectly, it is that there exist a number of things to which legitimacy may refer. As Steffek has also noted, ‘legitimacy is an opaque and elusive concept... and the literature fully reflects this ambiguity’.⁴ He further notes that this ambiguity is particularly prevalent in discussions surrounding international politics’.⁵ Thomas gives us a sense of the problem when he notes that:

‘Legitimacy has many meanings. It has been deployed by actors at all levels of the international system, from activists to academics, from politicians to the press, from judges to bureaucrats, each of whom ascribe different meanings to the word. Indeed, it is not unusual for any given author to use the word multiple times in the one setting while ascribing different meanings to it every time. The plurality of these meanings, and the frequency with which the word itself is used, make it a difficult concept to systematize.’⁶

Part of the confusion surrounding the concept – as noted by Steffek and others – is that there are ‘two completely different ways of approaching legitimacy’.⁷ Legitimacy can either be used ‘descriptively’ or ‘prescriptively’ (i.e. ‘normatively’).⁸ If one uses legitimacy descriptively, they are attempting to *describe* some fact about the world. If one uses it prescriptively, however, they are making a *moral* claim.

³ Fallon, R.H. (2005) ‘Legitimacy and the Constitution’: p.1790

⁴ Steffek, J. (2003) ‘The Legitimation of International Governance’: p.251

⁵ Ibid.: pp.251-2

⁶ Thomas, C.A. (2014) ‘The Uses and Abuses of Legitimacy in International Law’: p.733

⁷ Steffek, J. (2003) ‘The Legitimation of International Governance’: p.253

⁸ This dichotomy between ‘descriptive’ and ‘prescriptive’ legitimacy has been variously – but synonymously – referred to as the difference between: ‘empirical’ and ‘normative’ legitimacy (see: Hurrelmann, A. *et al.* (2007) *Legitimacy in an Age of Global Politics*); ‘de facto’ and ‘de jure’ legitimacy (see: Vinx, L. (2007) *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy*: p.60); and ‘descriptive’ and ‘moral’ legitimacy (see: Applbaum, I.A. (2004, working paper) ‘Legitimacy in a Bastard Kingdom’: p.76).

Descriptive legitimacy is usually equated with ‘sociological’ legitimacy (although, as I argue below, there is another – legal – sense in which legitimacy can be used descriptively).⁹ As the name suggests, sociological legitimacy is the sense in which sociologists would use the term. Sociologists – amongst other things – observe and report on attitudes held by groups and individuals towards political institutions. Thus, for sociologists, legitimacy is a social fact about an institution: if those over whom the institution governs believe or *perceive* the institution’s rules to be normatively binding, then it is legitimate.¹⁰ This is the type of legitimacy Hurd is talking about when he says, for example, that ‘*legitimacy*... refers to the normative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor’s *perception* of the institution.’¹¹ The renowned sociologist Max Weber referred to these normative beliefs about an institution as ‘*Legitimitätsglaube*’, and argued in a similar way to Hurd that ‘the basis of every system of authority... is a belief, a belief by virtue of which persons exercising authority are lent prestige’.¹²

Put simply, then, if legitimacy is interpreted descriptively in the sociological sense, ‘it refers to people’s beliefs about political authority’, or, as Buchanan puts it, ‘calling an institution legitimate in the sociological sense is a misleading way of saying that it is widely *believed to have the right to rule*.’¹³ This descriptive and sociological approach to legitimacy ‘does not aim to privilege certain social arrangements over others and as such is a “value-free” – concept.’¹⁴ To say that an institution is legitimate in this way is not to say that it ‘ought’ to command obedience for moral reasons, only that it *does*. This is contrary to the normative variant of legitimacy (discussed further below).

Before moving on to consider legitimacy in the normative sense, however, there is a second type of descriptive legitimacy that is less often discussed than the sociological variant.

⁹ Allen Buchanan, for example, states that ‘“Legitimate” has both a sociological and normative meaning’. See: Buchanan, A. (2010) ‘The Legitimacy of International Law’: p.79

¹⁰ See, for example: Steffek, J. (2003) ‘The Legitimation of International Governance’: p.253; Buchanan, A. (2010) ‘The Legitimacy of International Law’: p.79; Peter, F. (2014) ‘Political Legitimacy’; Machida, S. (2009) ‘Globalization and the Legitimacy of Intergovernmental Organizations’: p.373; and Beetham, D. (1991) *The Legitimation of Power*: pp.5-6

¹¹ Hurd, I. (1999) ‘Legitimacy and Authority in International Politics’: p.381

¹² Weber, M. (1964) *The Theory of Social and Economic Organization*: p.382; see also: Peter, F. (2014) ‘Political Legitimacy’.

¹³ Buchanan, A. (2010) ‘The Legitimacy of International Law’: p.79

¹⁴ Steffek, J. (2003) ‘The Legitimation of International Governance’: p.253

This is legitimacy in the ‘legal’ sense.¹⁵ Legal legitimacy is when a law (or rule) is legitimate with reference to a particular structure of law creation. For example, a UK Act of Parliament would have legal legitimacy if it were passed in accordance with the constitutional law-making procedures of the UK (e.g. it was debated, scrutinised, amended, and voted for by simple majority in both Houses of Parliament and subsequently given Royal Assent by the reigning Monarch). Legal legitimacy, then, is a matter of descriptive fact; either a law has been created in accordance with the correct law-making procedures, or it has not.

Legal legitimacy – as with sociological legitimacy – is descriptive rather than normative since the mere fact that a law has been created through the established procedure does not automatically entail that it *ought* to be obeyed (as the procedure itself, for example, could be morally deficient). Of course, legal legitimacy could inform normative legitimacy as the mere status of valid ‘law’ may give a rule normative weight; but this is not necessarily the case. Although both descriptive, however, legal legitimacy is distinct from sociological legitimacy as it is perfectly possible for a law to be legally valid and yet also for subjects to believe that they hold no moral obligation to obey it (and vice versa).¹⁶

Unlike either form of descriptive legitimacy (above), those who use legitimacy in the ‘prescriptive’ (or normative) sense are not attempting to describe any fact about the world – whether it be the beliefs of those subject to political institutions or the validity of rules in relation to established procedures.¹⁷ Instead, they are making a moral evaluation.¹⁸ They are saying that certain institutions (i.e. those deemed legitimate) *ought*, in some way, to be obeyed or respected as such. It is with prescriptive, rather than descriptive, legitimacy that this thesis will be concerned.

¹⁵ David Beetham and Chris Thomas have also noted (separately) that legitimacy can be used in this ‘legal’ sense, as well as in the ‘sociological’ and ‘normative’ senses. See: Beetham, D. (1991) *The Legitimation of Power*: pp.3-6; and Thomas, C.A. (2014) ‘The Uses and Abuses of Legitimacy in International Law’: p.729

¹⁶ It will be noted that I am using the terms ‘legal legitimacy’ and ‘legal validity’ interchangeably. One should bear in mind, however, that some legal theorists make a distinction between them; whereby the former implies some normative quality, whereas the latter does not. For a more detailed explanation, see: Thomas, C.A. (2014) ‘The Uses and Abuses of Legitimacy in International Law’: p.737

¹⁷ The exception here would be moral realists who do, in fact, believe that moral claims are attempts at describing some objective fact about the world. For a more in-depth discussion see: Sayre-McCord, G. (2017) ‘Moral Realism’.

¹⁸ Buchanan, A. (2010) ‘The Legitimacy of International Law’: p.80

Institutions are prescriptively legitimate if they have achieved some theorised ‘benchmark of acceptability or justification of political power or authority’¹⁹, or, as Beetham puts it, are ‘justifiable according to rationally defensible normative principles’.²⁰ In this way, prescriptive legitimacy is most commonly the preserve of political philosophers as it is the task of the political philosopher to theorise this ‘benchmark of acceptability’ that institutions ought to meet. Of what this benchmark ought to consist is a topic of much debate, and will likely alter depending on the type of institution in need of legitimisation. This, however, is a topic that will be discussed further below. For now, it is simply important to understand that a prescriptively legitimate institution is one that *deserves* the predicate ‘legitimate’ whether it not it is widely believed to be legitimate.²¹ Of course, as Swift notes, the reasons why an institution might tend to be perceived as legitimate have a lot to do with the reasons why it might indeed be legitimate.²² As Swift also correctly stresses, however, this fact shouldn’t lead us to ‘blur the distinction between legitimacy and perceived legitimacy. A regime could be regarded as legitimate by those subject to it even if it was not in fact of a kind where they had good reason to do so.’²³

It may be useful, at this point, to reflect briefly on the assumptions underlying the very concept of ‘normative legitimacy’. As mentioned in the introduction to this thesis, the idea of normative legitimacy only really makes sense if one assumes that political hierarchies are *unnatural*, and thus in need of special justification. The now common intuition that those who rule ought to possess a right to do so may seem uncontroversial to most, but this has not always been so. The question of political legitimacy only really surfaced – or even became intelligible – when individuals began to question the ‘naturalness’ of hitherto political order and political hierarchy. There exists a verse in the Anglican Hymn ‘All things bright and beautiful’ which, I find, is useful in understanding how – in general – pre-Enlightenment political society was conceived:

‘The rich man in his castle,
The poor man at his gate,

¹⁹ Peter, F. (2014) ‘Political Legitimacy’

²⁰ Beetham, D. (1991) *The Legitimation of Power*: p.5

²¹ Steffek, J. (2003) ‘The Legitimation of International Governance’: p.252

²² Swift, A. (2014) *Political Philosophy*: p.228

²³ *Ibid.*: p.229

God made them high and lowly,
And ordered their estate.'²⁴

In other words, the fact that some people were rich and others poor, or some rulers and others rule-takers, was simply a reflection of the (divinely ordained) natural order of things. As soon as one arrives at the (liberal Enlightenment) position that no one rules by natural or divine right, and that all individuals are born with an equal moral status, then one is compelled to ask, by what 'special' right does one individual rule over another? Any attempt to rule over another is *prima facie* impermissible and thus stands in need of further justification.²⁵ Those (institutions) who have established this further justification are said to be normatively legitimate. As Richard Flathman has also noted:

'In the form now most familiar, legitimacy as a distinct issue traces to the seventeenth century when... assumptions [about the divine or natural state of human affairs] were challenged by the view that human beings... are, by nature or before God, free and equal in at least one respect: no human being has natural or divinely ordained authority to rule them. In this picture, the only unproblematic authority is each person's authority over herself. Government of any kind... demands justification'.²⁶

This understanding also broadly accords with Applebaum's research which suggests that the normative notion of 'legitimate government' (as conceptually distinct from lawful government) materialised in France only in the late sixteenth century.²⁷

Returning to our previous discussion, although it is often clear that an author is referring to legitimacy in the normative – rather the descriptive – sense, many crucial questions are often left unresolved. Very often, an author will refer to an institution as legitimate when wanting to award that institution some measure of 'moral justifiability',

²⁴ The hymn was first published in 1848 in Mrs Cecil Alexander's *Hymns for Little Children*.

²⁵ See: Valentini, L. (2011) 'Coercion and (Global) Justice'.

²⁶ Flathman, R.E. (1993) 'Legitimacy': p.527

²⁷ Applebaum, I.A. (2004, working paper) 'Legitimacy in a Bastard Kingdom': p.82; see also: Thomas, C.A. (2014) 'The Uses and Abuses of Legitimacy in International Law': p.734

‘goodness’ or ‘correctness’.²⁸ However, a full account of the normative legitimacy of an institution will need to be able to provide, at a minimum, answers to the following three questions:

1. What is the *moral function* of legitimacy? (I.e. in what way does the appellation ‘legitimate’ alter the moral status of an institution?)
2. What is the *basis* of legitimacy? (I.e. what features of an institution are relevant in determining its legitimacy?)
3. What is the moral standard (benchmark) against which the legitimacy of an institution is determined?

My own answers to questions one and two will be set out in sections 2.2 and 2.3 respectively below. As for question three, this thesis does not attempt to provide a conclusive answer. Instead, I will be considering one potential standard of legitimacy (i.e. ‘state consent’) in relation to one particular type of institution (i.e. international law). What this thesis does *not* attempt to do is formulate a sufficient and necessary standard of legitimacy against which all international law can be judged.

2.2 *The Moral Function of Legitimacy*

When we ask: ‘what is the moral function of legitimacy’, we are essentially asking how the moral status of a legitimate institution differs from one that is illegitimate. As noted by Held & Maffettone, the traditional view is that legitimacy gives political institutions the ‘right to rule’.²⁹ For example, Buchanan & Keohane write simply that: ‘to say that an institution is legitimate in the normative sense is to assert that it has *the right to rule*’.³⁰ Likewise, Christiano states that ‘an institution has legitimacy when it has a right to rule over a certain set of issues.’³¹ Conversely, this would straightforwardly imply that an illegitimate institution lacks the right to rule. (It is also worth noting that an institution’s right to rule is usually

²⁸ See, for example: Moran, M. (2014) ‘Global Philanthropy’: p.380; Esty, D.C. (2002) ‘The World Trade Organization’s Legitimacy Crisis’; and Gray, C. (2007) ‘A Crisis of Legitimacy for the UN Collective Security System’.

²⁹ Held, D. & Maffettone, P. (2016b) ‘Legitimacy and Global Governance’: p.117

³⁰ Buchanan, A. & Keohane, R.O. (2006) ‘The Legitimacy of Global Governance Institutions’: p.405

³¹ Christiano, T. (2011) ‘Is Democratic Legitimacy Possible for International Institutions’: p.69

thought to correlate to a subject's duty or obligation to obey that institution).³² This account of the moral function of legitimacy has been repeated by multiple different authors.³³

Although there is often agreement that legitimacy entails the right to rule, rival theories of legitimacy differ on what that right to rule consists.³⁴ Traditionally, however, the right to rule has been interpreted as approximately the right to perform the functions of the modern state. This is unsurprising as – as noted by both Peter and Buchanan separately – historically, the philosophical literature on institutional legitimacy has been preoccupied, above all else, with the legitimacy of one kind of institution: the state.³⁵ This is consistent with many of the definitions given for the right to rule. Buchanan, for example, in his early writings on this subject, states that the right to rule means the right to 'attempt to achieve supremacy in the making, application, and enforcement of laws within a jurisdiction'³⁶. Again, for Huemer, it is 'the right... to make certain sorts of laws and enforce them by coercion against the members of its society.'³⁷ These definitions are very similar to Max Weber's famous conception of the state as an entity that claims 'the monopoly of the legitimate use of violence within a given territory.'³⁸

However, with the rise of alternative forms political power – especially those beyond the nation-state (i.e. international political institutions) – this conception of legitimacy as the right to rule has started to appear unduly narrow.³⁹ This is because there increasingly exist institutions that, although seemingly open to evaluations of legitimacy/illegitimacy, do not share the characteristics or functions of the state. Held & Maffettone explain this development as follows:

'From NGOs to transnational public and private bodies that issue standards and regulations, to the various UN agencies and the pillars of the international economic

³² See: Lefkowitz, D. (2016) 'The Legitimacy of International Law': pp.99 & 102; and Huemer, M. (2013) *The Problem of Political Authority*: p.6

³³ See, for example: Flathman, R.E. (1993) 'Legitimacy': p.527; Huemer, M. (2013) *The Problem of Political Authority*; Buchanan, A. (2010) 'The Legitimacy of International Law'; Lefkowitz, D. (2016) 'The Legitimacy of International Law'; Tasioulas, J. (2010) 'The Legitimacy of International Law, Democratic Legitimacy and International Institutions'.

³⁴ Buchanan, A. (2010) 'The Legitimacy of International Law': p.79

³⁵ Peter, F. (2014) 'Political Legitimacy'. See also: Adams, N.P. (2018) 'Institutional legitimacy': p.84; and Buchanan, A. (2013) *The Heart of Human Rights*: p.174

³⁶ Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: p.145

³⁷ Huemer, M. (2013) *The Problem of Political Authority*: p.5

³⁸ Weber, M. (1994) [1919] 'The Profession and Vocation of Politics'.

³⁹ See: Adams, N.P. (2018) 'Institutional legitimacy': p.84; and Peter, F. (2014) 'Political Legitimacy'.

order such as the IMF and the WTO, the array of characteristics displayed by the institutions in question cannot be fully captured by traditional ideas concerning the exercise of political power. Many such institutions do not claim a right to rule, most cannot really attach penalties to their commands, the vast majority make no claim to exclusive jurisdiction, while even those institutions that come close to claiming a right to rule and attach some form of enforcement mechanism to their rulings do not rely on the use of coercion or, at least, do so in a very decentralized and/or indirect fashion.’⁴⁰

Held & Maffettone go on to recognise that ‘while these institutions have different constituencies, different goals and different ways of advancing such goals, we nonetheless portray them as legitimate or illegitimate.’⁴¹ In recognition of this, some have tried to expand the scope of legitimacy so as to include a broader range of institutions. One such attempt comes from Buchanan in his 2010 essay ‘The Legitimacy of International Law’. In it, Buchanan presents the idea that there exist ‘stronger and weaker senses’ of the right to rule.⁴²

The ‘strong’ sense is that which has traditionally been associated with the functions of the state. In this sense, then, the right to rule would consist of (amongst other things): the institution’s right to use coercion to secure compliance with the institution’s rules; the institution’s right to exclusive jurisdiction; the institution’s right to use coercion to prevent others from attempting to engage in governance activities in its domain; and the fact that the institution generates a moral *obligation* for subjects to obey its rules, rather than just moral *reasons*.⁴³

However, by noting that there exist institutions ‘which do not rule in this robust way and do not even claim to do so’ (such as most international legal institutions), Buchanan develops a second ‘weaker’ conception of the right to rule.⁴⁴ This weaker right would, broadly, give legitimate institutions the right to issue rules and seek to secure compliance with them through attaching costs to non-compliance and/or benefits to compliance (although not

⁴⁰ Held, D. & Maffettone, P. (2016b) ‘Legitimacy and Global Governance’: p.132; see also: Adams, N.P. (2018) ‘Institutional legitimacy’: p.84

⁴¹ Held, D. & Maffettone, P. (2016b) ‘Legitimacy and Global Governance’: p.132

⁴² Buchanan, A. (2010) ‘The Legitimacy of International Law’: p.81

⁴³ Ibid.: p.82

⁴⁴ Ibid.

necessarily coercively nor with exclusive jurisdiction).⁴⁵ Such legitimate institutions would also only generate moral *reasons* for subjects to obey its rules, and not necessarily moral *obligations*.⁴⁶

Buchanan, then, seems to be promoting a 'dualist' account of legitimacy.⁴⁷ In other words, when we speak of the legitimacy of the 'state' and the legitimacy of most 'international legal institutions', we are actually referring to two different concepts. The legitimacy of the former entails the right to rule in the strong sense, whereas the legitimacy of the latter entails only a right to rule in the weak sense.

There are a number of objections that could be levelled against Buchanan's account. The first comes from John Tasioulas. Tasioulas' concern is that Buchanan's dualist account undermines international law's status as 'fully-fledged law'.⁴⁸ He argues that, 'if it belongs to the essence of law to claim authority, and if the authority claimed by [international law] is a diluted version of that claimed by domestic law, [international law's] status as the poor relation of domestic law is confirmed.'⁴⁹ This seems to come down to the fact that, under Buchanan's account, domestic law generates *prima facie* moral *obligations* of obedience, whereas international law generates only moral *reasons*. As such, international law lacks the same normative force as domestic law. For me, Tasioulas' objection is convincing. International law may often differ in its *content* to domestic law (i.e. whether it asserts exclusive jurisdiction or an entitlement to use coercion), but the *normative status* it claims (i.e. the generation of a *prima facie* moral obligation to obey) remains the same.⁵⁰ (Indeed, as seen in chapter one, international law actually asserts its own supremacy over domestic law).

There is another – related – problem I have with the approach that Buchanan has taken to rectify the traditionally narrow interpretation of legitimacy. This is that, instead of broadening the definition of legitimacy so as to incorporate a greater variety of institutions, Buchanan has simply created another unduly narrow concept. We are now left with two unduly narrow concepts rather than one. Buchanan has thus failed to overcome the initial

⁴⁵ Buchanan, A. (2010) 'The Legitimacy of International Law': pp.83-84

⁴⁶ Ibid.: p.84

⁴⁷ This is the way in which Tasioulas refers to Buchanan's position in: Tasioulas, J. (2010) 'The Legitimacy of International Law': p.98

⁴⁸ Tasioulas, J. (2010) 'The Legitimacy of International Law': p.98

⁴⁹ Ibid.

⁵⁰ Ibid.

problem as it is unlikely that Buchanan's strong and weak conceptions of legitimacy will incorporate all those institutions that we appropriately assess in terms of legitimacy. Many institutions, for example, could fall between the two. For example, they might generate obligations, but not claim an entitlement to use coercion (such as the World Trade Organisation), or may claim an entitlement to use coercion, but not claim an exclusive jurisdiction (such as the UN Security Council), or may even claim exclusive jurisdiction (within certain competences), but not claim an entitlement to use physical coercion (such as the European Union).

Buchanan's approach would thus seem to inevitably lead us down the path of developing a unique conception of legitimacy to match the differing functions of each and every institution. This would be messy to say the least, and would rid the concept of legitimacy of any common meaning. This would lead to the extended problem that reasonable comparison between institutions would be impossible. To say, for example, that the UK legislature and the UN Security Council are both legitimate would be not only to acknowledge that they perform different functions (which they do) but also to make two entirely different moral evaluations with differing moral implications. This is because the former would be legitimate in some stronger sense, and the latter in something weaker. Buchanan seems to have acknowledged this flaw himself as, only a few years after proposing this dualist approach, he observes the need to develop 'a *general* account of institutional legitimacy that would apply both to the state and to other institutions, including international ones.'⁵¹

A separate attempt to deal with the traditionally narrow definition of legitimacy is made by Held & Maffettone in their 2016 essay 'Legitimacy and Global Governance'. They begin by noting that the traditional narrow concept of legitimacy – in which, 'political legitimacy is often understood as the claim of an agent to have a right to rule over some other agent with respect to a given domain – is one that is 'employed in technical discussions within political philosophy'.⁵² Held & Maffettone state that they, instead, will refer to legitimacy in 'the broader definition of the term'.⁵³ Legitimacy in this broader sense, they say, 'confers a certain standing on institutions. There are different ways of portraying the precise nature of

⁵¹ Buchanan, A. (2013) *The Heart of Human Rights*: p.174; see also: Adams, N.P. (2018) 'Institutional legitimacy': p.85

⁵² Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.117

⁵³ Ibid.: p.118

this standing, but we think that it is best to conceive it as a kind of respect for institutional directives'.⁵⁴

This broad definition of legitimacy has the advantage of unequivocally incorporating all political institutions, but also the major disadvantage of being uninformative as to how having 'legitimacy' would practically alter the moral relationship between an institution and its subjects. Simply being 'respect-worthy' doesn't obviously necessitate any particular action in relation to those directives. One might respect the Roman Catholic Church, for example, but still feel no moral obligation to obey its teachings or even take them into consideration when making judgements as to how to behave. As such, it is not clear what the practical difference would be between a legitimate and illegitimate institution.

Our understanding of the shortcomings of both Buchanan's and Held & Maffettone's different accounts helps to focus our attention on the central problem in formulating a useful and general conception of legitimacy. That problem is this: on the one hand, the conception needs to be broad enough to incorporate a whole range of relevant institutions, but on the other, be sufficiently informative as to how legitimacy alters the moral status of those institutions in relation to its subjects. The key to solving this problem, I believe, is in separating the 'substance' of an institutional directive, from that directive's 'normative status'.⁵⁵

The substance of a rule would include: the particular action that the directive is permitting, demanding, forbidding, encouraging etc.; the jurisdiction that it claims for itself; and any punishment, incentive or cost that it attaches for compliance/non-compliance. These substantive features of a directive, however, can be separated from the directive's normative status. The normative status of a directive indicates the normative demands placed on those over whom the institution claims jurisdiction. For example, are those toward whom the directive is aimed under an 'obligation' to comply, or some weaker ask, such that they ought to consider the directive a good 'reason to act'⁵⁶, ought to 'refrain from interfering'⁵⁷ with the relevant institution, or ought simply to treat it with 'respect'?⁵⁸

⁵⁴ Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.117

⁵⁵ This same useful distinction is made by Tasioulas, see: Tasioulas, J. (2010) 'The Legitimacy of International Law': p.98

⁵⁶ Lefkowitz, D. (2016) 'The Legitimacy of International Law': p.99

⁵⁷ Buchanan, A. & Keohane, R.O. (2006) 'The Legitimacy of Global Governance Institutions': p.407

⁵⁸ Buchanan, A. (2013) *The Heart of Human Rights*: p.184

We can see this distinction more clearly if we consider again the traditional moral function of legitimacy: that of altering the moral status of an institution such that it has a 'right to rule'. In this concept of 'right to rule' we can locate both the substantive element (i.e. 'ruling') and also the normative element (i.e. having a 'right' to do so).

'Ruling' is the substance of what the institution is actually doing. As we saw above, however, there is not only debate over what ruling consists, but also over whether some institutions can really be said to 'rule' at all.⁵⁹ The 'right' to rule is the normative status that the institution is claiming for itself in relation to whatever it is doing (whether that is actually 'ruling' or something else). As mentioned, having a 'right' to something usually involves others having a corresponding 'obligation'. Again, however, as we saw previously, there are some who argue that not all institutions claim this type of normative status. In other words, not all institutions claim that others owe them obligations.⁶⁰

Hitherto, philosophers have – for the most part – written about legitimacy as if its moral function were not just to alter the normative status of an institution's directives, but also to give some indication as to what the *substance* of those directives can or can't be. This, I argue, is the wrong approach. As I see it, legitimacy alters the normative status of an institution's directives *regardless of the substance of those directives*.

The reason for this comes down to why we think institutions are in need of legitimacy in the first place. In essence, institutions are in need of legitimacy, not because of the content of what they say or how they think others ought to behave, but because of the *actual normative demands* that they place on others. Institutions that merely request that others give their directives 'respect', or that they consider them as constituting a moral 'reason' for action are not, I would argue, morally significant enough to necessitate a special justification (whatever the actual substance of its directive). The need for special justification only really

⁵⁹ Most non-state-based actors in global governance do not attempt to rule in any traditional sense. Instead, they seek to influence or inform the rule-making of others. For example: 'civil society actors and NGOs' (see: Scholte, J.A. (2014) 'Civil Society and NGOs'); 'credit-rating agencies' (see: Sinclair, T.J. (2014) 'Credit Rating Agencies'); and 'think tanks' (see: McGann, J.G. (2014) 'Think Tanks and Global Policy Networks').

⁶⁰ A good example of such an institution would be the 'Basel Committee for Banking Supervision' (BCBS). Although the BCBS posits 'rules' relating to global standards for the prudential regulation of banks, they demand no obligation of obedience; the rules are merely voluntary. As it says in the Basel Committee Charter: 'The BCBS does not possess any formal supranational authority. Its decisions do not have legal force. Rather, the BCBS relies on its members' commitments'.

arises when that institution begins to claim that others *must* (i.e. are under an obligation to) comply with their directives.

It is worth noting at this point that I consider an obligation to be something that is *owed* to another *as of right*, and thus ‘could’ justifiably be enforced, whether or not a means of enforcement is practically available. This raises a further problem, however, because there are multiple ways in which an obligation could be enforced; some more morally permissible than others. We’d be unlikely to accept, for example, that *any* means of enforcement were permissible. My response to this problem is two-fold. First, in an ideal world, the institution to whom the obligation is owed will also have rules stipulating mechanisms for enforcement and possibly punishment. If the rules of the institution are legitimate, then these latter rules regarding enforcement – whatever they happen to be – will also be legitimate.

Second, if the institution does *not* have rules relating to enforcement, then any enforcement of the right would be illegitimate. However, this is not to say that enforcement would not be morally justifiable. This is because – as I will argue momentarily – a legitimate law or action is one that finds its normative status with reference to content-*independent* features (i.e. how the law is made and not of what the law consists).⁶¹ Thus, if enforcement action were taken in the absence of legitimate rules specifying the form that that action should take, then that action would need to refer to content-*dependent* features for its moral permissibility. Needless to say, it is not within the scope of this thesis to assess the criteria that action aimed at enforcing an obligation must satisfy to qualify as morally justifiable.

My conclusion, then, would be that the moral function of legitimacy is to alter the moral status of an institution in such a way that that institution now has a *right* to do ‘whatever it claims a right to do’. Correspondingly, those over whom the legitimate institution claims jurisdiction have an obligation to do whatever it is the institution claims they have an obligation to do. The two key things to remember are that: 1.) it doesn’t matter (for the purposes of legitimacy) ‘what’ an institution is actually trying to do, and 2.) an institution is only in need of legitimacy if it claims a special ‘right’ to do something (with corresponding special obligations for those over whom it claims jurisdiction).

⁶¹ See, for example: Flathman, R.E. (1993) ‘Legitimacy’: p.527

2.3 *The Basis of Legitimacy*

In the section above, we looked at what it would mean – morally – for an institution to be legitimate rather than illegitimate. What we have yet to consider, however, is how one would make a determination as to a particular institution's legitimacy. In other words, how can we judge whether an institution is – in actual fact – legitimate.

As mentioned earlier, one would ultimately need to develop a moral standard against which to judge an institution. If the institution fulfilled that moral criteria, then it would be legitimate, and hence justifiably demand the requisite rights and obligations. For example, one might say that, for an institution to achieve legitimacy, it should demonstrate certain democratic qualities or, perhaps, uphold a minimal level of human rights. However, before one begins to formulate their standard of legitimacy, they need to make a decision as to what aspect of the institution their standard will relate. In other words, which aspect of the institution is of moral relevance, and thus under moral consideration? This question has been referred to by Thomas as 'the basis for legitimacy'.⁶² There seem to be at least two broad choices available.

First, one could examine the *content* or *substance* of the rules that the institution creates, or the values realised by the institution more broadly.⁶³ This approach, then, would be indifferent to the way in which those rules were made, and concern only the consequence of those rules on others. This 'substantive' basis for legitimacy, therefore, is 'interested in the aim served by the object of legitimation'.⁶⁴ Ernst Haas presents a substantive basis for legitimacy when he claims that '[o]rganizational legitimacy exists when the membership values the organization and generally implements collective decisions because they are seen to implement the members' values'.⁶⁵ This also seems to be the position of Ngaire Woods, who says that an institution's 'legitimacy in large part depends on the quality of the outcomes they produce, that is, if they do their job well or not'.⁶⁶ She goes on to add that 'results not

⁶² Thomas, C.A. (2014) 'The Uses and Abuses of Legitimacy in International Law': p.749

⁶³ Peter, F. (2014) 'Political Legitimacy'

⁶⁴ Thomas, C.A. (2014) 'The Uses and Abuses of Legitimacy in International Law': p.751

⁶⁵ Haas, E. (1990) *When Knowledge is Power: Three Models of Change in International Organizations*: p.87; see also: Thomas, C.A. (2014) 'The Uses and Abuses of Legitimacy in International Law': p.751

⁶⁶ Woods, N. (2002) 'Global Governance and the Role of Institutions': p.34

process matter most, or to express it in the language of some political scientists, the quality of the outputs matter more than... inputs.⁶⁷

Others, however, argue that standards of legitimacy should focus not on *what* the primary rules of an institution are, but on *how* those rules are made within the institution. In other words, one should be more concerned with the *procedural* features of an institution that underlie the decisions made.⁶⁸

Barker, for example, is of this view when he says that an institution's legitimacy depends on 'the procedures which they follow in taking or exercising power, rather than from the substance of what they do or what they say they wish they do.'⁶⁹ Buchanan agrees and says that, although we often speak of the legitimacy of 'rules and laws' as though they are separate from the institution from which they derived, 'institutional legitimacy is primary in so far as the legitimacy of particular laws... depends on the legitimacy of the institutions that make, interpret, and apply the laws.'⁷⁰ The view that legitimacy assessments should be based on the 'procedural' rather than 'substantive' qualities of an institution is shared by many other theorists.⁷¹

In reality, when focusing on 'institutional process' as the basis of legitimacy, one is actually referring to the 'secondary rules' of an institution (rather than 'primary'). These are the 'constitutional-type' rules which determine the 'making, changing and destruction of [primary] laws'.⁷² As Thomas Franck explains: 'a process, in this sense, is usually set out in a superior framework of reference, rules about how laws are made, how governors are chosen and how public participation is achieved.'⁷³

Some theorists, however, clearly don't believe a dichotomous choice between a 'procedural' and 'substantive' basis for legitimacy is necessary, and instead opt for a hybrid

⁶⁷ Woods, N. (2002) 'Global Governance and the Role of Institutions': p.34. Another example would be Charlotte Ku who writes that 'authority... must be earned with an increased emphasis on performance as a basis for legitimacy' (see: Ku, C. (2014) 'The Evolution of International Law': p.37).

⁶⁸ Peter, F. (2014) 'Political Legitimacy'; see also: Thomas, C.A. (2014) 'The Uses and Abuses of Legitimacy in International Law': p.749

⁶⁹ Barker, R. (1990) *Political Legitimacy and the State*: p.23

⁷⁰ Buchanan, A. (2010) 'The Legitimacy of International Law': pp.79-80

⁷¹ See, for example: Friedman, L.M. (1977) *Law and Society — An Introduction*: p.139; Christiano, T. (2010) 'Democratic Legitimacy and International Institutions': p.120; Swift, A. (2014) *Political Philosophy*: p.207; and Huemer, M. (2013) *The Problem of Political Authority*: p.6

⁷² Thomas, C.A. (2014) 'The Uses and Abuses of Legitimacy in International Law': pp.749-50

⁷³ Franck, T.M. (1990) *The Power of Legitimacy among Nations*: p.17

approach. Barnett and Finnemore, for example, argue that ‘the legitimacy of most modern public organizations depends on whether their procedures are viewed as proper and correct (procedural legitimacy) *and* whether they are reasonably successful at pursuing goals that are consistent with the values of the broader community (substantive legitimacy)’ [emphasis added].⁷⁴ Similarly, Peter states that ‘political legitimacy is a virtue of political institutions *and* of the decisions—about laws, policies, and candidates for political office—made within them’ [emphasis added].⁷⁵

My own position is that legitimacy assessments ought to focus solely on the *procedural* aspects of an institution. Consequently, I believe that standards of legitimacy ought to be criteria pertaining to the way in which rules are made within an institution, and not the substance of the rules themselves. It is worth pointing out from the outset, however, that this does not mean that I consider the content of rules to be of no moral significance whatsoever. All it means is that I do not consider it to be of moral significance when making an assessment of *legitimacy*. (What I mean by this will become clear in the paragraphs below).

My preference for procedural over substantive legitimacy is based on a deeper belief of why I think legitimacy is a valuable attribute for an institution to possess. At its simplest, legitimacy is valuable because it – to a greater or lesser extent – solves the problem of disagreement in collective decision-making. Collective decision-making is crucial for any political enterprise. If individuals made decisions separately, they would never be able to achieve the type of coordinated behaviour that is necessary to achieve certain collective goods.⁷⁶ Decision-making thus needs to be collective.

However, experience shows us that collective decision-making is plagued by disagreement, both in terms of *which* collective goods should be aimed for, and *how* they should be attained. Without some sufficient level of agreement, it is hard to see how moral-based support for any particular collective decision could be achieved. (I stress *moral*-based support as individuals who disagree could be forced into compliance. I will take it for granted,

⁷⁴ Barnett, M. & Finnemore, M. (2004). *Rules for the World: International Organizations in Global Politics*: p.166

⁷⁵ Peter, F. (2014) ‘Political Legitimacy’

⁷⁶ See: MacCallum, G.C. (1987) *Political Philosophy*: pp.91-2

however, that – wherever possible – it is better for individuals to be persuaded to cooperate for moral reasons rather than due to fear of punishment or use of force).⁷⁷

It is because of the problem outlined above that legitimate decision-making institutions are valuable, and why legitimacy should pertain to the ‘procedure’ of that decision-making and not the ‘outcome’. As Christiano explains: ‘the moral function of the legitimacy of decision-making processes is to confer morally binding force on the decisions of the institution within a moral community *even for those who disagree with them and who must sacrifice* [emphasis added].’⁷⁸ In other words, ‘subjects have moral reasons to go along with the legitimate authority even when they disagree with it. This enables societies to pursue basic moral purposes in a coordinated fashion.’⁷⁹ Having a legitimate ‘procedure’ creates a moral reason for individuals to support a decision-making institution even when a decision does not create a moral reason by virtue of its content. The underlying assumption here is that it is easier to reach agreement for the moral justifiability of a decision-making *procedure* than it is for the content of a decision. I believe this assumption is justified.

Thus, writes Christiano, the substantive approach to legitimacy cannot serve the public function of legitimacy as well as the procedural approach as, in the former, ‘authority is based on the quality of the outcomes, which are precisely the subject of disagreement among the members’.⁸⁰ Jeremy Waldron makes the same point acutely when he writes that, ‘any theory that makes authority depend on the goodness of political outcomes is self-defeating, for it is precisely because people disagree about the goodness of outcomes that they need to set up and recognise an authority.’⁸¹

⁷⁷ Buchanan argues that there are also instrumental (rather than intrinsic) advantages to moral-based support over mere force. He says that: ‘moral reason-based support can enable an institution to function successfully when there are lapses in its ability to coerce and during periods when there is reason for some to doubt that it is indeed advantageous for all relative to the non-institutional alternative’. He goes on to add that, ‘moral reason-based support can reduce the costs of achieving compliance, which might be prohibitively high if the threat of coercion were the only reason for compliance. See: Buchanan, A. (2010) ‘The Legitimacy of International Law’: p.81. See also: Swift, A. (2014) *Political Philosophy*: p.228; and Cromartie, A. (2003) ‘Legitimacy’: p.93

⁷⁸ Christiano, T. (2011) ‘Is Democratic Legitimacy Possible for International Institutions’: p.69; see also: Christiano, T. (2010) ‘Democratic Legitimacy and International Institutions’: p.120; and Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.382

⁷⁹ Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.382; see also: Buchanan, A. (2010) ‘The Legitimacy of International Law’: p.81

⁸⁰ Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.382

⁸¹ Waldron, J. (1999) *Law and Disagreement*: p.245

The position that institutional legitimacy depends on decision-making procedures and not outcomes does not mean that there are not better or worse outcomes. What is important from the standpoint of legitimacy, however, is not the quality of the outcomes, but that those outcomes are justified to people, even when they disagree with them. The fact that the decision may be 'right' or 'wrong' does not – by itself – justify the imposition of that decision on others. As Swift explains, 'knowing what would be the right law is quite consistent with recognizing that others disagree in a way that would make it illegitimate for you to impose your view on them. The very fact that people disagree about what's right, and yet all are to be ruled by the laws that are made, means that we need a mechanism for dealing with disagreement. That mechanism must itself be morally justified'.⁸²

In a similar way, it is important not to confuse legitimacy with the concept of (political) 'justice'.⁸³ Although these two concepts are similar in that they concern moral evaluations of institutions, they are nevertheless distinct. As Held & Maffettone explain, 'the difference between the two lies in the fact that legitimacy seems to allow more latitude, so to speak, compared to justice. In other words, legitimacy is often thought to be a less demanding standard of evaluation for institutions and political arrangements'.⁸⁴ They go on to say that 'justice is about what we think is ideal, while legitimacy is closer to what we think we can accept morally speaking: institutions may be considered to be legitimate even if we do not deem them to be fully just'.⁸⁵ This general understanding of legitimacy as a 'less demanding' institutional quality than justice is one that was first delineated by Rawls⁸⁶ and one that has subsequently been adopted by multiple authors.⁸⁷

The consequence of holding this view (together with our earlier discussion as to the moral function of legitimacy) is that some institutions (i.e. those that are legitimate) are owed an obligation of obedience, even when they are not fully just. Some may be perturbed by the idea that we can have a moral obligation to obey a rule, even though we believe it to be

⁸² Swift, A. (2014) *Political Philosophy*: p.211

⁸³ I say 'political' justice here only to contrast it with the concept of 'distributive' justice. See: Held, D. & Maffettone, P. (2016a) 'Globalization, Global Politics and the Cosmopolitan Plateau': p.11

⁸⁴ Held, D. & Maffettone, P. (2016a) 'Globalization, Global Politics and the Cosmopolitan Plateau': p.11

⁸⁵ Ibid.: p.12

⁸⁶ Rawls, J. (1993). *Political Liberalism*.

⁸⁷ See, for example: Buchanan, A. (2010) 'The Legitimacy of International Law': p.81; Buchanan, A. & Keohane, R.O. (2006) 'The Legitimacy of Global Governance Institutions': p.409; Lefkowitz, D. (2016) 'The Legitimacy of International Law': p.115

contrary to the requirements of justice. However, as Buchanan & Keohane explain, there are at least two very good reasons why we should not cling to the notion that only just institutions can exact from us an obligation of obedience:

‘First, there is sufficient disagreement on what justice requires that such a standard for legitimacy would thwart the eminently reasonable goal of securing coordinated support for valuable institutions on the basis of moral reasons. Second, even if we all agreed on what justice requires, withholding support from institutions because they fail to meet the demands of justice would be self-defeating from the standpoint of justice itself, because progress toward justice requires effective institutions. To mistake legitimacy for justice is to make the best the enemy of the good’.⁸⁸

Notwithstanding the above (which I think is broadly correct) there exists a more fundamental difference between the concepts of legitimacy and justice. Justice, although interested in institutional design, also seems to be focused on ‘outcomes’. In other words, for a law or set of laws to be just, they would need to produce morally good – if not ideal – outcomes. In this way, justice is *content-dependent*; it matters what the laws actually say in their substance and the effect they have upon the world. Legitimacy, however – as I have argued above – is *content-independent*. The legitimacy of a law depends on how that law was made, and not on what that law actually says. This is why legitimacy helps solve the problem of disagreement that plagues considerations of justice: it is easier to agree on morally justified processes through which laws are made than it is to agree on the morality of the content of the law.⁸⁹

For this reason, it is also important to point out that legitimacy does not offer us a complete picture of when we have obligations to obey institutions. Instead, it only tells us when we have a *content-independent* obligation to do so. In this way, legitimacy is sufficient for the creation of obligations, but not necessary, for the simple reason that obligations may also be created for *content-dependent* reasons.

⁸⁸ Buchanan, A. & Keohane, R.O. (2006) ‘The Legitimacy of Global Governance Institutions’: p.412

⁸⁹ Defining legitimacy as referring to a ‘content-independent’ justification to obey, however, can lead to moral difficulties. For example, what if a subject has a content-independent obligation to obey an institution, but at the same time a *content-dependent* obligation to disobey that same institution? In such circumstances, the subject would seemingly have both an obligation to obey and an obligation to disobey (just for different reasons). This dilemma will be discussed (and hopefully adequately resolved) in section 5.2.

What legitimacy does do, however, is offer us a complete picture of when obligations are owed to an institution *simply because it is 'that' institution*. Legitimacy-based obligations derive not from 'what' they say, but from 'where' they come (i.e. a legitimate institution). All other obligations that may be owed to institutions (say, because of reasons of justice) are merely 'instrumental'. In other words, the obligation is not owed 'to' the institution *per se*, but (for example) to one's fellow citizens. In this case, the institution is simply acting as a vehicle through which one can fulfil their pre-existing obligations to others.

2.4 Summary

This chapter began by making clear the distinction between 'descriptive' and 'prescriptive' (or normative) legitimacy – noting that the sense in which this thesis will use the term is the latter. As explained, political institutions are prescriptively legitimate if they have achieved some theorised 'benchmark of acceptability' of political power or authority. Any use of legitimacy in this normative sense should be able to provide a conception of: the 'moral function' of legitimacy; the 'basis' of legitimacy; and also the moral 'benchmark' by which legitimacy is assessed.

I made it clear that this thesis does not attempt to formulate any novel moral benchmark for political legitimacy. Instead, it takes just one purported benchmark (i.e. state consent) and asks whether that benchmark is necessary or sufficient to legitimate one particular type of institution (i.e. international law). As such, this chapter did not concern itself with this latter consideration. It did, however, argue for a particular conception of the moral function of legitimacy, and also identify those features of an institution that need to be assessed when determining the legitimacy of that institution.

As for the moral function of legitimacy, I argued that that traditional understanding of legitimacy as giving an institution a 'right to rule' in a 'strong' sense was outdated and unhelpful when assessing the legitimacy of many new institutions; especially those operating in the international sphere. I also observed that, very often, other writers on this subject have written about legitimacy as if its moral function were not just to alter the normative status of an institution's directives, but also to give some indication as to what the *substance* of those directives can or can't be. This, I argued, is the wrong approach and, instead, legitimacy should be seen as altering the normative status of an institution's directives *regardless of the*

substance of those directives. My conclusion followed that the moral function of legitimacy is to alter the moral status of institution in such a way that that institution now has a *right* to do whatever it claims a right to do. Correspondingly, those over whom the legitimate institution claims jurisdiction have an obligation to do whatever the institution claims that they have an obligation to do.

The final section in the chapter considered which aspect of an institution was of moral relevance when making a legitimacy judgement. I made the argument that, in determining legitimacy, one should consider the ‘process’ by which an institution develops its rules rather than the actual content of those rules *per se*. The reason for this is based on why legitimacy is of value as a moral concept in the first place. At its simplest, legitimacy is valuable because it helps institutions solve the problem of disagreement in collective decision-making. Legitimacy confers moral obligations on subjects to obey rules, even when they disagree with the content of those rules (which they inevitably will). Thus, legitimacy cannot depend on the content of those rules, for to do so would be to rid legitimacy of its value.

The analysis of the concept of legitimacy that we have conducted in this chapter will help to focus on, and remove ambiguity from, the discussions to follow (particularly in chapters four to six). One may disagree with how I’ve chosen to conceptualise legitimacy in this chapter and, as a result, may disagree with some of the conclusions I draw later in this thesis that are consequent on this conceptualisation. At the very least, however, it will be clear for those people from where their disagreement derives. I also hope that this chapter has helped to clarify some of the existing confusion in the literature about the concept of legitimacy, and will help others more clearly formulate their own conceptions of legitimacy – even if they differ from mine.

The next chapter will analyse the last of our three key concepts: state consent (as well as consent more generally). Chapters four to six will then attempt to consider the central question of this thesis: the extent to which state consent is necessary or sufficient for the legitimacy of international law.

CONSENT & STATE CONSENT

For centuries, the dominant and traditional view¹ on the legitimacy of the international legal system has been ‘state consent’.² In other words, international law is legitimate if and only if it is created by the consent of states.³ Under my conception of legitimacy (as discussed in chapter two), therefore, the state consent theory of legitimacy holds that agents (typically states) have a moral obligation to obey international law (whatever its content) if that law has received the consent of relevant states.

As we will discover, the dominance of the theory of state consent is not without challenge. Notwithstanding this dissent, consent is seen to be a ‘fundamental principle’ of international law – the ‘enduring force’ of which, notes Helfer, is demonstrated in: the ‘The Vienna Convention on the Law of Treaties’⁴; the writings of august commentators⁵; and the frequent reassertions of state control over the creation of new legal obligations^{6,7}. Louis Henkin exemplifies the state consent view of international legal legitimacy when he writes that a ‘state is not subject to any external authority unless it has voluntarily consented to such authority’.⁸ Even those – such as Guzman – who distance themselves from the type of categorical approach expressed by Henkin still acknowledge ‘the fundamental role that consent plays in the international legal system’.⁹

It is important to note that state consent may be communicated in different ways and (as we saw in chapter one) used to create different types of international law. As Buchanan usefully explains, ‘the legitimacy of treaty law is assured by the explicit consent of states, the

¹ By ‘dominant and traditional’ I mean the one that is, and has traditionally been, applied in practice (not the one that most philosophers endorse).

² Buchanan, A. (2011) ‘Reciprocal Legitimation’: p.6. (Note that Buchanan & Keohane call this view the ‘International Pedigree View’, see: Buchanan, A. & Keohane, R.O. (2006) ‘The Legitimacy of Global Governance Institutions’: p.413).

³ Buchanan, A. & Keohane, R.O. (2006) ‘The Legitimacy of Global Governance Institutions’: p.412

⁴ Especially Article 34.

⁵ See, for example: Henkin, L. (1995) *International Law: Politics and Values*: p.28; and Simma, B. (1986) ‘Consent: Strains in the Treaty System’: pp.485 & 494

⁶ See: *Review of the Multilateral Treaty-Making Process* (1985) UN: pp.148-58

⁷ Helfer, L.R. (2008) ‘Nonconsensual International Lawmaking’: p.72

⁸ Henkin, L. (1989) ‘International Law: Politics, Values, and Functions’: p.27

⁹ Guzman, A. (2011) ‘The Consent Problem in International Law’: p.5

legitimacy of customary international law is assured by a kind of implicit consent inferred from the behaviour of states, and the legitimacy of law generated by global governance institutions is assured by their being created and sustained by state consent'.¹⁰

Chapters four, five, and six of this thesis will be devoted to critiquing the claim that state consent is either sufficient or necessary for the legitimation of international law. Before that, however, a number of important issues in relation to (state) consent will need to be clarified and explained. First (section 3.1), I will seek to explain the moral foundations of consent in general; that is, the way in which giving consent can alter the normative standing of an agent in relation to others. Second (section 3.2), I consider the doctrine of *state* consent, and the current relationship between state consent and international law. Finally (section 3.3), I consider the extent to which state consent underpins international law in practice. First, then, I turn to consider the moral foundations of consent theory in general.

3.1 Consent and Normative Standing

Broadly, our consent to the actions of others 'conveys to them special rights to do what would otherwise be prohibited – thus justifying those actions – while generating for us a special obligation to permit or assist their actions.'¹¹ In this way, when one consents to something, one can be thought of as being involved in a transaction of rights and obligations: 'A', through consenting, gives 'B' the right to do 'Ψ'. In transferring this right to 'B', 'A' places upon him or herself an obligation to allow for B's exercise of that right.

An important aspect of a consent transaction that it is worth emphasising is the fact that consent allows agents to do something that – minus the consent – would not have been morally permissible.¹² If it *had* been permissible without consent, then the giving of consent would have been superfluous. What makes something permissible (at least in the rights-based conception of morality that I adopt) is whether one has the right to do it, and, as mentioned,

¹⁰ Buchanan, A. (2010) 'The Legitimacy of International Law': p.90

¹¹ Simmons, A. J. (2010) 'Political Obligation and Consent': p.315; see also: Dworkin, G. (1988) *The Theory and Practice of Autonomy*: p.86

¹² See, for example: Miller, F.G. & Wertheimer, A. (2010) 'Preface to a Theory of Consent Transactions'; Kleinig, J. (2010) 'The Nature of Consent': p.4, 6, & 10; Simmons, A. J. (2010) 'Political Obligation and Consent': p.306; Dworkin, G. (1988) *The Theory and Practice of Autonomy*: p.86; and Edmundson, W.A. (2011) 'Consent and Its Cousins': p.336

the right to do something is exactly what a consent transaction transfers from 'A' to 'B'. As a basic example, in most value-systems, 'A' is thought to need to consent to sexual relations with 'B' precisely because 'B' does not have a general right to have sexual relations with 'A'. 'B' needs to obtain a 'special' right to do so. This special right can only be given to 'B' by an agent already in possession of that right, namely 'A'. This transfer of the special right is what we call 'consent'.

It is also crucial to point out at this point that, although consent can create 'special rights', consent theory is not a 'foundational' theory of morality or of 'rights' *per se*. This is clear from the definition of consent as 'conveying to others special rights to do *what would otherwise be prohibited*'. This means that consent operates 'within' or 'on top off' a pre-existing notion of which types of action would be morally permissible in relation to other agents. In this sense, consent presupposes some form of 'natural rights' that can only be altered through consent.¹³

In practice, a consent transaction may take many forms; whether it be a promise, a contract, an authorisation, and so on.¹⁴ Whatever the form, however, consent will always be a 'deliberate... performance of acts or omissions whose conventional or contextual point is to communicate to others the agent's intention to undertake new obligations and/or convey to others new rights (with respect to the agent).'¹⁵ Following the Hohfeldian analytical system, it is also worth recognising that the right transferred, created, or forgone in a consent transaction could take a number of different forms, for example: a privilege (i.e., a 'liberty'); a claim; a power; or an immunity.¹⁶

Although consent is often intuitively morally appealing (as in the case of sexual relations outlined above), we need to pinpoint exactly the normative function that consent is playing. In his essay 'Informed Consent', Nir Eyal offers seven possible answers to this

¹³ Of what these 'natural rights' consist precisely, and how they came to exist, is beyond the scope of this thesis. For our purposes, it is enough to recognise that consent theory does, in fact, presuppose the existence of such things. Having said that – and given the values that consent seeks to protect – consent theory does seem to presuppose a version of natural rights centred around the concept of 'individual autonomy'. This, however, is discussed further in the main text of the thesis.

¹⁴ Simmons, A. J. (2010) 'Political Obligation and Consent': pp.305-6

¹⁵ Ibid.: p.306

¹⁶ These four basic components of rights – privileges, claims, powers, and immunities – are known as 'the Hohfeldian incidents' after Wesley Hohfeld (1879–1918), the American legal theorist who discovered them. See: Hohfeld, W. (1919) *Fundamental Legal Conceptions*. See also: Bergelson, V. (2010) 'Consent to Harm': p.169; and Wenar, L. (2015) 'Rights' for a delineation of how each of these incidents manifest in practice.

question.¹⁷ Although informative, discussing all seven would be to go beyond the scope of this essay. Instead, I will focus on the dichotomous choice presented by Thomas Beauchamp. In his essay 'Autonomy and Consent', Beauchamp argues that, broadly, consent can be viewed as fulfilling one of two normative functions: 'autonomy protection' or 'harm prevention'.

If justified in terms of autonomy protection, the moral force of consent derives from the simple premise that, if one agrees to be subject to a particular action, that action cannot be wrong. This notion is adequately expressed by a maxim of private law: *volenti non fit injuria* ('the willing person is not wronged').¹⁸ This premise is a classically liberal one, which – in direct opposition to paternalism – views individuals as rational and autonomous, and capable of deciding for themselves what is in their own best interests. Put simply, theorists advocating this position prioritise the formal 'freedom' or 'liberty' of the individual above that individual's 'well-being' (as judged by anyone other than the relevant individual). There are those, however, who disagree that the value of consent derives primarily from its protection of autonomy. Instead, they believe that consent's moral force comes from its ability to protect agents from *harm* (needless to say, 'harm', in this context, cannot be interpreted merely as a 'violation of autonomy' or else it would be substantially the same as the 'autonomy protection' position; only semantically different).¹⁹ Onara O'Neill, for example, argues that 'consent is a way of ensuring that those subjected to invasive interventions are not abused, manipulated or undermined, or wronged in comparably serious ways'.²⁰

The requirement of consent on the basis of autonomy protection is an 'intrinsic' argument as it protects a quality we find intrinsically valuable (i.e. autonomy). The requirement of consent on the basis of harm prevention, however, is an 'instrumental' argument. This is because consent achieves beneficial outcomes (i.e. the prevention of harm). The consensus among consent theorists is that, although consent *often* serves the well-being of the consenting individual, consent is fundamentally justified in terms of autonomy protection.²¹ For example, the National Commission for the Protection of Human Subjects

¹⁷ Eyal, N. (2012) 'Informed Consent'. The seven justifications for consent that Eyal discusses are: protection; autonomy; preventing abusive conduct; trust; self-ownership; non-domination; and personal integrity.

¹⁸ Simmons, J.A. (1979) *Moral Principles and Political Obligations*: p.66; see also: Hobbes, T. (2013) *De Cive*: ch.III, sec.7; and Hobbes, T. (1968) *Leviathan*: ch.15.

¹⁹ Beauchamp, T.L. (2010) 'Autonomy and Consent': p.59

²⁰ O'Neill, O. (2007) *Rethinking Informed Consent in Bioethics*: p.82

²¹ Miller, F.G. & Wertheimer, A. (2010) 'Preface to a Theory of Consent Transactions': p.83

‘stated emphatically that the purpose of consent provisions is the protection of autonomy and personal dignity.’²² This strikes me as the more plausible of the two options. Those who argue that consent is justified in terms of harm prevention do so – I contend – because they want to allow for the possibility that, in cases where one’s consent ostensibly harms that individual, that consent can be ignored. But such a position allows for a type of paternalism where others can claim to know what constitutes harm to an individual better than the individual for themselves. Given that this is exactly the type of paternalism that consent theory seeks to reject, consent must primarily be justified in terms of autonomy protection; not harm prevention. Having said that, I also agree with Miller & Wertheimer when they say that ‘the tension between these values is overstated’.²³ They go on to argue that ‘the value we ascribe to autonomy is strongly tied to the agent’s well-being. If human beings consistently made choices that did not advance their interests, it is hard to imagine that we would come to value what we call their autonomy or their right to make such decisions.’²⁴

‘Autonomy’ is an ‘essentially contested’ concept that has been used in a number of competing ways.²⁵ What follows, then, is just one possible interpretation of the concept; although it is the one I believe to be the clearest and most intuitive. Autonomy literally means ‘self-rule’. However, there are multiple ways in which an individual can be ‘self-ruling’, and consent only protects a certain type of self-rule. Thus, consent only protects one aspect of autonomy; not autonomy as a whole (or rather, not autonomy in all its possible guises).

Autonomy has two distinct, yet related, components. The first is to do with one’s ability to be in control of the *formulation* of one’s desires or how one chooses to act. This has been referred to as ‘personal’ autonomy.²⁶ The second is to do with one’s ability to be in control of the *realisation* of those desires. To make the contrast with personal autonomy, I have labelled this ‘public’ autonomy.

To have personal autonomy, one’s desires need to be an expression of their ‘authentic self’.²⁷ Thus, in formulating those desires, or deciding how to act, one should be free from

²² Cited in: Beauchamp, T.L. (2010) ‘Autonomy and Consent’: p.59

²³ Miller, F.G. & Wertheimer, A. (2010) ‘Preface to a Theory of Consent Transactions’: pp.83-4

²⁴ Ibid.

²⁵ See, for example: Christman, J. (2015) ‘Autonomy in Moral and Political Philosophy’. See also: Gallie, W.B. (1955) ‘Essentially Contested Concepts’.

²⁶ Dworkin, G. (1988) *The Theory and Practice of Autonomy*: pp.34–47

²⁷ Christman, J. (2015) ‘Autonomy in Moral and Political Philosophy’.

‘manipulative’ or ‘self-distorting’ influences. These could come in the form of ‘internal’ manipulative influences, such as a pathology affecting the brain, or a severe addiction. It could equally come in the form of ‘external’ manipulative influences, such as emotional manipulation from another agent.

Public autonomy is distinct from personal autonomy because, although one may be able to ‘formulate’ their desires autonomously, they may not be able to *realise* those desires in the real world. One could have (or lack) public autonomy in a ‘positive’ or ‘negative’ sense.²⁸ If one has ‘negative’ public autonomy, one is free from – or at least in control of – external ‘barriers, obstacles or constraints’.²⁹ Such constraints could, for example, take the form of legal obligations or physical coercion. If one has ‘positive’ public autonomy, however, one has the ‘possibility of acting’ in the sense that they have the resources enabling them to act (such as education, wealth, or natural talent).³⁰ This distinction between negative and positive public autonomy has also been referred to as the difference between ‘formal’ and ‘effective’ freedom respectively.³¹

It is important to understand that consent can only protect autonomy in terms of ‘negative public autonomy’, and not ‘positive public autonomy’ or ‘personal autonomy’ (either internal or external). In other words, consent prevents against the ‘arbitrary’ imposition of external constraints; it does not equip one with the resources necessary to realise their desires, nor does it ensure that one has formulated their desires ‘authentically’. Having said this, it is still important to remember that consent is designed to prevent the arbitrary imposition of external constraints that would otherwise restrain the realisation of one’s ‘personal autonomy’. If one has little or no personal autonomy to realise (say, because they are heavily under the influence of some drug) then that agent’s consent would have no moral force as it would not be fulfilling its function of helping to realise the agent’s authentic desires. Thus, although consent does not increase the personal autonomy of an agent *per se*, it does ensure that only those who are sufficiently ‘personally autonomous’ can give consent. Take the example of employment. The requirement of consent to employment contracts

²⁸ This distinction roughly corresponds to the well-known distinction between ‘positive’ and ‘negative’ liberty. See, for example: Berlin, I. (1958) *Two Concepts of Liberty*; and Carter, I. (2016) ‘Positive and Negative Liberty’.

²⁹ Carter, I. (2016) ‘Positive and Negative Liberty’.

³⁰ Ibid.

³¹ Swift, A. (2014) *Political Philosophy*: pp.61-65

means that individuals cannot be forced to work, and that any work in which individuals do participate will be consistent with their personal autonomy. Young children are not able to consent to employment contracts precisely because they are not thought to have sufficient personal autonomy. The requirement that one needs to consent to employment contracts (or any other potential external imposition), however, cannot protect one's positive public autonomy as, for example, it cannot force an employer to offer them employment in the first place.

In sum, autonomy can be divided into two broad components: personal and public. Personal is the ability to *formulate* desires, whereas public is the ability to *realise* desires. Public autonomy can further be divided into positive and negative halves. Positive public autonomy is broadly one's access to resources, such as natural talents, wealth, education etc. Negative public autonomy is to be free from, or in control of, arbitrary or unwanted external interference in the realisation of one's desires (e.g. from government or other individuals). Consent protects one's public negative autonomy. Thus, all future references to consent protecting autonomy, or freedom, will be referring to this particular aspect of autonomy. Further, in their overriding concern for autonomy protection, consent theorists necessarily assume that individuals are naturally morally free agents. As morally free agents, individuals are only legitimately bound by the 'unnatural' demands of others because of a free and voluntary undertaking to be so bound. (I emphasise 'unnatural' here because – as mentioned above – consent theory does not deny the existence of 'natural' rights and obligations. Most obviously – and although born 'morally free' – all agents must logically accrue a natural moral obligation not to violate the natural autonomy of others). It follows that, 'since the individual is the author of his or her own special obligations, such obligations in no way impair the moral autonomy of the person.'³² As Christiano puts it, by consenting, an agent is, in a real sense, imposing an obligation on themselves, and thus the obligation cannot be thought of as a violation of their autonomy.³³

With its concern for the autonomy protection of *all*, consent also derives normative force from another value: equality. This is so because no one is more justified than anyone else in imposing obligations on another against their will. Consent thus precludes the

³² Horton, J. (1990) *Political Obligation*: p.25

³³ Christiano, T. (2012) 'The Legitimacy of International Institutions': p.382

possibility of natural hierarchies (at least amongst those with sufficient personal autonomy) as everyone has an equal right to autonomy. This is consistent with the idea that autonomy 'is considered a criterion of political status, in that autonomous agency is seen as [a] necessary... condition of equal political standing.'³⁴ Autonomy, however, only protects equality in this minimal or 'formal' sense described above (i.e. equal political status). It does not, on its own, protect or promote equality of 'outcome' (such as equal levels of wealth), nor (in itself) any of the various conceptions of equality of 'opportunity'.³⁵

In sum, consent's normative appeal derives from its premise of all as being 'free and equal'. I will refer to this justification for consent many times throughout this chapter and rest of the thesis, although it should be remembered exactly to what this refers: free = negative public autonomy, and equal = formal equality.

It is worth pointing out at this juncture that, now that we know the values and assumptions on which consent theory rests, it is easier to observe why some may choose to reject consent theory as a satisfactory basis on which to conduct relations between moral agents. To briefly state a few of these reasons without discussing them in depth, one may not be convinced by the normative significance of consent theory because: one believes paternalism to be morally justified (either in general or in specific circumstances); it preserves only 'formal' autonomy and not 'effective' autonomy; one rejects the notion that individuals are naturally morally free agents (as many religious traditions tend to hold); or because consent theory preserves only 'formal' equality (i.e. equality of political status) and not equality of 'opportunity' or 'outcome'. I present this non-exhaustive list of objections simply to assist others in navigating their objections to consent theory or, conversely, to inform those who wish to defend consent theory against the objections to which they will need to develop answers.

An appreciation of the normative underpinnings and assumptions behind consent theory (and the objections to them) is crucial for understanding the arguments made against state consent theory in the second half of this thesis. For example, in concerning itself with 'autonomy protection', consent theory presupposes the existence of agents with autonomy

³⁴ Christman, J. (2015) 'Autonomy in Moral and Political Philosophy'. See also: Feinberg, J. (1986) *Harm to Self: The Moral Limits of the Criminal Law* (Volume 3).

³⁵ See, for example: Arneson, R. (2015) 'Equality of Opportunity'.

worth protecting. The central argument made in section 5.1 (the ‘problem of authorisation’) is that states *are not* agents with autonomy worth protecting. As such, consent theory is ill-suited to conducting relations between states. Similarly, the fact that consent theory is ‘uninterested’ in achieving ‘effective freedom’ or ‘equality of opportunity’ or ‘outcome’ lead many to criticise it as resulting in impermissible *unfairness*. This is the objection to consent theory considered in section 5.2 under the heading ‘the problem of immoral state consent’.

3.2 *Valid consent*

Of course, consent can only have the type of normative force set out in this section if it is *valid*.³⁶ In other words, ‘putative’ consent does not automatically entail that a right has – in a moral sense – been created or transferred. Invalid consent, therefore, would not be ‘morally efficacious’.³⁷ As far as I can determine, there are just two general criteria for valid consent; both of which must necessarily be fulfilled.³⁸ These two criteria are that:

1. The giving of consent must be sufficiently *voluntary* (i.e. the consenter must be ‘free’); and,
2. The consenter must have sufficient *knowledge* about to what it is they are consenting (i.e. the consenter must be ‘informed’).

Each of these criteria are designed to guarantee the autonomy of the consenting agent. As explained above, if consent does not protect autonomy, then it is not fulfilling its normative function.

The condition that consent ought to be given voluntarily protects one’s autonomy straightforwardly.³⁹ To say one acted voluntarily is to say, at the very least, that they acted in the absence of coercion. Of course, as Horton notes, it is ‘notoriously a matter of vigorous

³⁶ Simmons, A. J. (2010) ‘Political Obligation and Consent’: p.318

³⁷ Huemer, M. (2013) *The Problem of Political Authority*: p.25

³⁸ See, for example: Feinberg, J. (1986) *The Moral Limits of Criminal Law: Harm to Self*: p.316; Huemer, M. (2013) *The Problem of Political Authority*; Horton, J. (1990) *Political Obligation*; Flathman, R. (1972) *Political Obligation*; Simmons, J.A. (1979) *Moral Principles and Political Obligations*; Bix, B. H. (2010) ‘Contracts’: p.253; Gillon, R. (1985) ‘Consent’: p.1700; Bergelson, V. (2010) ‘Consent to Harm’: p.175; Frohock, F.M. (1989) ‘Liberal Maps of Consent’; Kleinig, J. (2010) ‘The Nature of Consent’: p.13; and The Vienna Convention on the Law of Treaties (1969): Art. 48-52.

³⁹ Beauchamp, T.L. (2010) ‘Autonomy and Consent’: p.69

dispute as to what is to count as an instance of coercion.’⁴⁰ Indeed, some theorists would want to go further and argue that the ability of an agent to act voluntarily can be undermined by more than just coercion, and could also be encumbered by, for example, moral and social pressures, internal compulsions, and even a lack of reasonable alternatives.⁴¹ My own position as to what constitutes coercion, and as to what type of action limits voluntarily behaviour, will be discussed in chapter four (section 4.1). However interpreted, there is little disagreement to the general rule that one cannot be acting autonomously and also non-voluntarily.

The condition that the consenter must have sufficient *knowledge* about to what it is they are consenting also straightforwardly protects the autonomy of the consenter.⁴² If, for example, a person is deceived or has crucial information withheld from them, then their consent to an obligation-generating act does not appear to be an expression of their true will. Again, however, there are different levels of knowledge, and as such there is much debate as to what constitutes a ‘sufficient’ level of knowledge for consent to be valid.⁴³ This will be analysed in greater depth in chapter four (section 4.2).

It is important to make clear that an agent can give voluntary but uninformed consent, and also informed but non-voluntary consent. In the first instance, one may voluntarily sign a contract, but be deceived or misled as to its meaning and implications. In the second instance, one can involuntarily hand over their wallet to a thief with a gun, but be completely informed as to what they are doing and the consequences of thereby (not) doing it. In both these examples, the consent given would be invalid.

Other necessary conditions – besides ‘voluntariness’ and ‘knowledge’ – have been proposed for valid consent. One, put forward by Beauchamp, is that the consenter must have the *intention* of consenting.⁴⁴ Another, put forward by Hyams, says that the consenter must be able to *communicate* their consent using an appropriate method.⁴⁵ Although both

⁴⁰ Horton, J. (1990) *Political Obligation*: p.31

⁴¹ Kleinig, J. (2010) ‘The Nature of Consent’: p.15; see also: Olsaretti, S. (1998) ‘Freedom, Force and Choice’.

⁴² Kleinig, J. (2010) ‘The Nature of Consent’: p.16

⁴³ Bix, B. H. (2010) ‘Contracts’: pp.253-4

⁴⁴ Beauchamp, T.L. (2010) ‘Autonomy and Consent’: pp.65-68

⁴⁵ Hyams, K. (2008) ‘Political Authority and Obligation’: pp.13-14

reasonable conditions, I will briefly explain why I don't believe it is necessary to add them to the list of criteria for valid consent.

The intention condition can be read in one of two ways. First, it could refer to 'intending to communicate consent'. Second, it could refer to 'intending the consequences of the consent'. I'll begin with the former. My contention is that 'intention', read in this way is, in practice, the same as the voluntariness condition. Although one could intend to give non-voluntary consent (e.g. handing one's wallet to the gunman), it seems impossible for one's consent to be voluntary, yet unintentional. Say an office worker stretches his hands in the air at the exact moment – unheard by him – the boss asked those volunteering to work late that evening to raise their hands. The 'consent' given here is entirely unintentional. Although the worker 'voluntarily' put his hands in the air, he didn't voluntarily put his hands in the air with an understanding of its significance; i.e. he didn't voluntarily consent. Thus, if 'intention' is interpreted as 'intending to communicate consent', then it can be subsumed with the 'voluntariness' condition.

The second interpretation of the intention condition could be 'intending the consequences of the consent'. This is the sense in which Beauchamp discusses it. Beauchamp argues that 'intention' should not be confused here with 'desire'.⁴⁶ According to Beauchamp – and I agree – intending the consequences of an action should mean having foresight that they will occur, even if they are undesired.⁴⁷ For example, one may not desire to be scarred by surgery, but consenting to the surgery – with the knowledge that scarring will occur – means that one intends to be scarred. What is important here is the knowledge that one will be scarred.⁴⁸ Thus, given Beauchamp's interpretation, there seems to be no obvious reason why this condition of valid consent could not fall within the broader 'knowledge' condition; for, if one does not intend an outcome, it means they didn't know that that outcome would occur (not merely that they didn't desire it). My argument here, then, has been that 'intention' matters when consenting, but only to the extent that intention is evidence of either 'voluntariness' or 'knowledge'. There is thus no need to include 'intention' as a condition of valid consent in its own right.

⁴⁶ Beauchamp, T.L. (2010) 'Autonomy and Consent': p.67

⁴⁷ Ibid.

⁴⁸ Ibid.: p.68

The condition of the consentor being able to *communicate* their consent using an appropriate method is very rarely a problem with express consent. With tacit consent, however, since the consentor is, by definition, not making any active expression of consent, it is often harder to determine whether this condition has been fulfilled. As outlined by Huemer, there are a number of ways in which tacit consent could be communicated. ‘In some situations’, says Huemer, ‘one expresses agreement to a proposal simply by refraining from opposing it. I call this “passive consent”.’⁴⁹ ‘In other cases’, he continues, ‘one commits oneself to accepting certain demands by soliciting or voluntarily accepting benefits to which those demands are known to be attached. I call this “consent through acceptance of benefits”.’⁵⁰ Huemer also acknowledges the possibilities of tacit consent through ‘presence’ (i.e. by remaining in some location) and also through ‘participation’ (i.e. by participating in the practice for which consent should be given).⁵¹

What is important to note is that, with tacit consent, the method of communication, or act of consent, is decided *for* the consentor. The consentor is effectively told: ‘If you do, or do not do, action ‘X’, you thereby consent to ‘Y’’. The consentor can thus communicate their consent through actions that would not usually be taken to be a sign of consent (such as raising one’s hand to signal consent). Because the method of communication is decided for the consentor, it has been argued by some – such as Keith Hyams – to be crucial that the act must be one to which the consentor would *not have been permitted to perform anyway* (had the act not been specified as consent).⁵² As Hyams explains, this requirement allows us to get around the problem that arises from useful acts – or indeed acts to which we have a moral right – counting as consent. As such, the consentor ‘has nothing to lose by that act’s being specified as an act of consent.’⁵³ This is one of the key objections to Locke’s famous ‘residence as tacit consent’ argument. Briefly – and perhaps crudely – Locke argued that, by residing within the territory of a state, one is tacitly consenting to obey the laws of that state.⁵⁴ But Locke’s position assumes that the state otherwise has a moral right that we do not take

⁴⁹ Huemer, M. (2013) *The Problem of Political Authority*: p.22

⁵⁰ Ibid.

⁵¹ Ibid.: p.23

⁵² Hyams, K. (2008) *Political Authority and Obligation*: p.13

⁵³ Hyams, K. (2008) *Political Authority and Obligation*: p.13

⁵⁴ Locke, J. (1924) [1690] *Two Treatise of Government*: p.177

residence within the state (without thereby consenting to its laws).⁵⁵ Given that most people are born into their country of residence, it is far from clear that states do have this moral right.

I agree with Hyams' above argument entirely. That said, the condition of 'appropriate communication' seems to be subsumed within the more general condition that consent be voluntary. For example (going back to Locke's example) if the state does not have a moral right that we do not reside within the state, but nevertheless reinterprets our residence as a sign of consent, then the state is effectively coercing us to obey the law, especially if the costs of leaving the state (both financially and socially) are unreasonably high. Thus, to the extent that consent under these conditions can be seen to be given at all, it is not given voluntarily. For this reason, I think it unnecessary to make 'communication' a further condition of valid consent.

In sum, therefore, the conditions of 'voluntariness' and 'knowledge' are not only necessary, but also sufficient conditions for valid consent. The next section considers the way in which consent has developed, from being a means by which domestic law is justified in relation to individuals, to a means by which international law is justified in relation to states and the individuals within those states.

3.3 State Consent, Sovereignty and International Law

Consent theory, in its political form, developed with considerations about the legitimacy of domestic law in relation to individuals. As explained in the introduction to this thesis, the Enlightenment assumption that the individual is naturally free compelled many to ask by what 'special' right one rules over another. In other words, how are political obligations consistent with this fundamental conception of the individual? One of the earliest attempts to resolve this tension came from the consent theorists; notably Hobbes, Grotius, Locke and Pufendorf.⁵⁶ In the consent-based approach to legitimacy, 'an institution [traditionally the state] is legitimate... only if its subjects-to-be have consented to it... The basic idea is that

⁵⁵ Hyams, K. (2008) *Political Authority and Obligation*: p.14

⁵⁶ Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.118; see also: Simmons, A.J. (2001) *Justification and Legitimacy*; and Hampsher-Monk, I. (1993) *A History of Modern Political Thought*.

what binds us to an institution is the voluntary acceptance of its authority.⁵⁷ Consent theory accounts for the legitimacy of institutions straightforwardly. If a person agrees to be subjected to a particular institution, then that person has an obligation to obey that institution's rules.⁵⁸

The consent approach to legitimacy provided a dramatic transformation in the way the political sphere was conceived.⁵⁹ Under the consent view, it is those who are ruled that determine the political obligations owed to the ruler(s); and not the rulers themselves.⁶⁰ Also ingrained in the liberal Enlightenment conscience of the time was a fear of misplaced paternalism. In his essay, 'An Answer to the Question: What is Enlightenment?', Immanuel Kant 'expresses many of the tendencies shared among Enlightenment philosophies of divergent doctrines.'⁶¹ Kant defines 'enlightenment' as humankind's release from its self-incurred immaturity; 'immaturity is the inability to use one's own understanding without the guidance of another.'⁶² The Enlightenment, explains William Bristow, was thus seen – at least in part – as 'the process of undertaking to think for oneself, to employ and rely on one's own intellectual capacities in determining what to believe and how to act.'⁶³ This general antipathy toward paternalism is a central motivation for the development of consent theory as consent protects against unwanted interference.⁶⁴ It is important to note, therefore – as has been noted previously – that consent theory does not necessarily prioritise an agent's well-being, but rather their *autonomy* (in the sense outlined above). As J.A. Simmons explains: 'the method of consent protects the individual from becoming bound to any government which he finds unpalatable, be it a good one or a bad one, one which injures him or one which *protects* him from injury. What is protected, then, is not primarily the individual himself, or his interests, but rather his freedom to *choose* whether to become bound to a particular government'.⁶⁵

⁵⁷ Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.118

⁵⁸ Huemer, M. (2013) *The Problem of Political Authority*: p.20

⁵⁹ Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.118

⁶⁰ Ibid.. For historical discussions of autonomy, see: Schneewind, J. B. (1998) *The Invention of Autonomy*; and Lindley, R. (1986) *Autonomy*.

⁶¹ Bristow, W. (2011) 'Enlightenment'.

⁶² Kant, I. (1996) [1784] 'An answer to the question: What is enlightenment?'. See also: Bristow, W. (2011) 'Enlightenment'.

⁶³ Bristow, W. (2011) 'Enlightenment'.

⁶⁴ Simmons, J.A. (1979) *Moral Principles and Political Obligations*: p.68

⁶⁵ Simmons, J.A. (1979) *Moral Principles and Political Obligations*: p.69

‘As the process of state formation gathered force in the sixteenth, seventeenth, and eighteenth centuries, the principle of government by consent gradually gained ground by being invoked repeatedly by a series of groups who sought to obtain a share of emerging state power.’⁶⁶ By the end of the eighteenth century, the idea of consent as the basis of political legitimacy had been widely accepted in the Western world. The U.S. Declaration of Independence (1776), for example, argues that the just powers of government derive solely from ‘the consent of the governed.’⁶⁷ The French Declaration of the Rights of Man and Citizen (1789) states essentially the same thing in Article III: ‘The principle of any sovereignty resides essentially in the Nation. No body, no individual can exert authority which does not emanate expressly from it’.

The focus of this thesis is, of course, the *state* consent theory of the legitimacy of international law. The simplest way of viewing this theory is to transpose the traditional consent-based view of legitimacy (within the domestic sphere) to the international sphere. According to this account, international law is legitimate if it has been created via the consent of the states over which it rules. It is important to note that this account is not merely normative in the sense that it is a proposal for what *ought* to be the case. It is also largely *descriptive* of the way that international law is purported to be created and legitimated in practice.⁶⁸ (This is in contrast to ‘domestic consent theory’ which is arguably *not* descriptive of the process by which laws are made and legitimated).

This section, therefore, aims to give a brief account of how we got to where we are today; in other words, how and why it is that state consent is the primary means by which international law is created and legitimated. It is important to note that the doctrine of state consent was not hypothesised by philosophers, from abstract principles, at any one moment in time. Instead, the doctrine evolved over hundreds of years in response to historical circumstance. As Kaczorowska-Ireland confirms: ‘The basic structure, and many principles, of international law, are deeply rooted in history.’⁶⁹ It is thus important to review that history if we want to understand how and why we got to where we are today.

⁶⁶ Johnston, D. (2010) ‘A History of Consent in Western Thought’: p.32

⁶⁷ Simmons, A. J. (2010) ‘Political Obligation and Consent’: p.305

⁶⁸ As we will come to see, a portion of international law is not seemingly made with the consent of states. Nevertheless, this is the exception rather than the norm.

⁶⁹ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.6

While some of the basic concepts of international law can be observed as existing between political communities thousands of years ago, the modern system of international law is traced back only 400 years; alongside the development of the modern sovereign state.⁷⁰ International law, as we think of it today, is essentially the law that regulates conduct between independent and sovereign states.⁷¹ The idea that state consent is the basis of international law only becomes intelligible when one appreciates the development of three distinct, yet overlapping, concepts: the *sovereign* state; the state as an *artificial person*; and *positive* law (as opposed to 'natural' law).

There are two elements to the concept of the 'sovereign state': the 'state' itself, and the notion that it is 'sovereign'. There are many competing theories as to how, why, and when the 'state' actually developed.⁷² This is, however, not a discussion that will be had here. What concerns us more is the idea that the modern state came to be thought of as 'sovereign'. The idea of sovereignty developed against the backdrop of the religious wars that followed the onset of the Protestant Reformation in Europe (1524-1648). These wars were characterised by a struggle for authority between religious factions. Reflecting on these wars, the French philosopher, Jean Bodin, reasoned that 'the conflict would be solved only if it was possible both to establish the existence of a necessarily unrestricted ruling power'⁷³ with the competency 'to overrule all religious and customary authorities'.⁷⁴ Bodin 'viewed the problem of order as central and did not think that it could be solved through outdated medieval notions of a segmented society'.⁷⁵ Rather, 'an "ordered commonwealth" depended upon the creation of a central authority that was all-powerful'.⁷⁶ This was essentially the basis of sovereignty: 'that there must be within every political community or state a determinate sovereign authority whose powers are decisive and whose powers are recognized as the rightful or legitimate basis of authority.'⁷⁷

⁷⁰ Shaw, M.N. (2008) *International Law*: p.14; see also: Bederman, D.J. (2001) *International Law in Antiquity*.

⁷¹ Shaw, M.N. (2008) *International Law*: p.21

⁷² For an analysis of a number of theories as to the origins of the modern state, see: Bobbitt, P. (2002) *The Shield of Achilles: War, Peace and the Course of History*, esp.: Book 1, Part 2.

⁷³ Hinsley, F. H. (1986) *Sovereignty*: pp.124-5

⁷⁴ Held, D. (1995) *Democracy and the Global Order*: p.39

⁷⁵ Philpott, D. (2016) 'Sovereignty'

⁷⁶ Held, D. (1995) *Democracy and the Global Order*: p.39

⁷⁷ Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.119

As explained by Held & Maffettone, the doctrine of sovereignty developed in two distinct dimensions:

‘The first [is] concerned with the “internal,” and the second with the “external” aspects of sovereignty. The former involves the claim that a person, or political body, established as sovereign rightly exercises the “supreme command” over a particular society. Government – whether monarchical, aristocratic, or democratic – must enjoy the “final and absolute authority” within a given territory. The latter involves the assertion that there is no final and absolute authority above and beyond the sovereign state. In the traditional conception of external sovereignty, nothing but the will of the sovereign can effectively bind the state.’⁷⁸

The distinguishing mark of sovereignty was not only that it demanded supreme authority within a defined territory, but also that it was a quality of the ‘state’, and not of any particular individual ‘sovereign’ ruler. This distinction is explained clearly by Skinner: ‘while the sovereign is the rightful head of the state, he is so by virtue of his office not his person. A ruler exercises power in the light of his possession of sovereignty, which is a temporary ‘gift’ and not a personal attribute’.⁷⁹

It is easy to understand why Bodin saw this distinction as crucial. Bodin was keen to establish permanence and stability. Sovereignty held by individuals would be precarious and fragile and would last only as long as the individual survived or as long as they could command authority (as was often the case in medieval Europe). This gave effect to the idea that the authority of the state was distinct from the authority of the ruler, and thus the state was – as Hobbes was later to phrase it – an ‘Artificiall Man’.⁸⁰ The idea that the state could have an agency of its own would be fundamental in the application of consent theory to the international sphere as we recognise it today. Public international agreements are not concluded between individuals, but between ‘states’ as artificial persons. The individuals who actually sign the agreements are merely representatives of the sovereign state. Thus, the

⁷⁸ Ibid.; see also: Hinsley, F. H. (1986) *Sovereignty*; and Cassese, A. (1995) *Self-Determination of Peoples: A Legal Reappraisal*.

⁷⁹ Skinner, Q. (1989) ‘Lecture 2: The Idea of the Modern State’; see also: Held, D. (1995) *Democracy and the Global Order*: p.40

⁸⁰ Hobbes, T. (1968) *Leviathan*: p.81; see also: Held, D. (1995) *Democracy and the Global Order*: p.40

death of any one signatory does not entail the termination of the agreement, as it might within ordinary domestic contracts between individuals.

One of first formal and lasting recognitions of state sovereignty was established during the Peace (or Treaty) of Westphalia in 1648.⁸¹ The Treaty, which brought an end to the Thirty Years' War in Europe, 'was an attempt to limit the devastation and wars that came about as a result of external intervention.'⁸² The signatories believed that recognition of sovereignty 'would serve as a mechanism of peace by creating "territorial states" which were in control of their own domestic affairs.'⁸³ Almost three hundred years later, in 1945, the principle of sovereign equality was enshrined in Article 2(1), of the *Charter of the United Nations*. In effect, 'a sovereign state is empowered... to exercise exclusive and total jurisdiction within its territorial borders, and other states have the corresponding duty not to intervene in its internal affairs.'⁸⁴

The idea of sovereignty in the Westphalian sense also presupposes a theory of 'positive', as opposed to 'natural', international law. The early theorists of international law – i.e. those theorists who believed that international conduct ought to be regulated in some way – were invariably advocates of natural law.⁸⁵ These (mostly Spanish) theorists – such as Francisco Vitoria (1492 – 1546) and Francisco Suarez (1548 – 1617) – believed that the Spanish wars of conquest ought to adhere to divine and natural laws, even though such activity was being conducted outside of any (recognised) jurisdiction.⁸⁶ The Dutch scholar, Hugo Grotius (1583 – 1645) – who is often cited as the father of international law – later excised theology from international law whilst maintaining the natural law approach.⁸⁷ For him, the law of nature was founded exclusively on reason.⁸⁸ Thus, Grotius believed that states and other entities ought to abide by natural law – deciphered through the use of reason – when interacting with one another. Following Grotius, however, 'a split can be detected and two different schools identified. On the one hand, there was the traditional 'naturalist' school,

⁸¹ Sens, A. & Stoett, P. (2009) *Global Politics: Origins, Currents, Directions*: pp.47-48

⁸² Ibid.: p.48

⁸³ Ibid.

⁸⁴ Evans, G. & Sahnoun, M. (2002) 'Responsibility to Protect'.

⁸⁵ Shaw, M.N. (2008) *International Law*: p.22

⁸⁶ Ibid.

⁸⁷ Ibid.: p.24

⁸⁸ Ibid.

exemplified by Samuel Pufendorf'.⁸⁹ On the other, there were the exponents of 'positivism'. One of the principal initiators of the positivist school was the English Judge, Richard Zouche.⁹⁰ It was also later enunciated and developed by, among others, Auguste Comte, John Austin and Jeremy Bentham.⁹¹

Positivism essentially argues that international laws are not 'discovered' or 'reasoned', according to some natural law, but are rather created by states through their interactions with one another. According to the positivists, 'agreements and customs recognised by the states were the essence of the law of nations'.⁹² A strict Westphalian view of sovereignty necessitates such a positivist approach, for if states are truly sovereign, then they cannot be subject to any higher law, divine or otherwise. The only laws to which a sovereign state can coherently be subject – the theory goes – are those that arise from the exercise of their own sovereignty, i.e. their consent.

Although the doctrine of state consent developed in theoretical form during the seventeenth and eighteenth centuries, it only really began to be asserted in practice in the nineteenth century. The rapid development of trade and communications in the nineteenth century necessitated the proliferation of international law to help coordinate the new links and relations between states.⁹³ In turn, the proliferation of international law necessitated an agreed upon and recognised source of that law, and the dominant theory, state consent, became that recognised source. Additionally, the nineteenth century, 'with its business-oriented philosophy, stressed the importance of the contract as the legal basis of an agreement freely entered into by both (or all) sides'.⁹⁴ Given that, by this time, states were considered to be independent and free 'agents', the relations between them naturally mimicked the relations between individuals in the domestic sphere. The only difference between individuals and states, in this sense, was that states were truly sovereign. Thus, not only did international agreements take the form of contracts, but the nature of those contracts could not be bound or determined by any higher law or authority.⁹⁵

⁸⁹ Shaw, M.N. (2008) *International Law*: p.24

⁹⁰ Ibid.: pp.24-5

⁹¹ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.3

⁹² Shaw, M.N. (2008) *International Law*: p.25

⁹³ Ibid.: pp.27-8

⁹⁴ Ibid.: p.9; See also: Freidmann, W. (1967) *Legal Theory*: pp.573-6

⁹⁵ See, for example: Jellinek, G. (1905) *Allgemeine Rechtslehre*; and Shaw, M.N. (2008) *International Law*: p.9

This section, then, has provided a brief overview of how and why the state consent theory of legitimacy came to be the dominant model of international law. Although this has been a descriptive account, it is useful to understand what assumptions are being made in practice when we come to engage in the normative analysis of state consent (in the following chapters). For example, the current system is based on the assumptions that: states are 'sovereign'; that they are 'artificial persons'; and that a 'positivist' approach (rather than a 'naturalist' one) is the 'correct' basis of law.

We are now approaching a point where we can critically evaluate the claim that state consent is either necessary or sufficient for the legitimacy of international law. First, however, I will briefly consider the extent to which state consent is the basis of international law *in practice*.

3.4 *Is State Consent the Basis of International Law?*

At this point in the thesis, I feel it is important to pre-empt the following objection: 'It is all very well looking at whether or not state consent would legitimate international law' the argument may run, 'but your discussion is based on the unsubstantiated premise that current international law does, in fact, derive from state consent'. This is a legitimate objection which deserves proper attention. In chapter six, I will talk at greater length about those types of international law that arguably hold the strongest claim *not to* be the product of state consent. In the following paragraphs, therefore, I will cover only very briefly the different types of law and the extent to which they can be said to derive from state consent.

In chapter one, I explained that there were – at least according to Article 38(1) ICJ, four primary sources of international law: treaty law, customary international law, general principles, and judicial decisions. Of these sources of international law, the treaty is the one most unequivocally based on the consent of states. As expressed clearly in Article 34 of the Vienna Convention of the Law of Treaties, no state can be bound by treaty obligations without their prior consent. Consent to treaties is given explicitly; usually in the form of a signature by a state representative. The fact that treaty law derives from state consent, therefore, is essentially uncontested.

Customary international law (CIL) is also thought to rest of the consent of states. However, unlike with treaties where that consent is explicit, 'a state's consent to custom is thought to be tacit or implied' through that state's actions.⁹⁶ This is because CIL develops through the general practice of states. Thus, if a state notices a customary international law developing, but does not wish to be so bound, it can make its opposition known. If opposition is not demonstrated, then states can reasonably be thought to have consented to that customary law. As I will discuss in section 6.2.2, however, there are examples where states have become bound by CIL, even when it is not reasonable to assume that they gave their tacit consent (notably in the case of 'newly-formed' states).

If treaties and custom are traceable to a state's consent to be bound, this is less obvious with general principles.⁹⁷ This is because general principles are often used by courts to adjudicate a dispute when there is a paucity of relevant treaty or customary law. Since these principles are not adopted or legislated, they cannot easily be traced back to expressions of state consent. It is also worth noting, however, that the ICJ 'has never decided a case solely and expressly on the basis of a general principle of law'.⁹⁸ This is very likely for the reason that to do so would be to 'render it vulnerable to the critique that the state losing out never accepted the principle in question, and this is something the Court is no doubt keen to avoid.'⁹⁹ This, then, adds weight to the notion that state consent is considered the normal method by which to accrue international legal obligations. I do, however, believe that many general principles would be legally binding on states whether or not states accepted those principles or gave their consent. The reason for this is explained in chapter six.

Finally, judicial decisions are – in themselves – clearly not direct expressions of state consent. That said, however, to the extent that a state had consented to the jurisdiction of the court making the decision, judicial decisions could arguably be conceived as enjoying indirect state consent. This debate, however, is superfluous in so far as – as explained in chapter one – judicial decisions should not be thought of a *creating* law *per se*. Instead, they *interpret* existing law, and to the extent that judicial decisions are 'innovative', they are still

⁹⁶ Klabbers, J. (2013) *International Law*: p.30

⁹⁷ Cali, B. (ed.) (2010) *International Law for International Relations*: p.94; Klabbers, J. (2013) *International Law*: p.34

⁹⁸ Klabbers, J. (2013) *International Law*: p.35. See also: Cheng, B. (2006) *General Principles of Law as Applied by International Courts and Tribunals*.

⁹⁹ Klabbers, J. (2013) *International Law*: p.35

constrained by the parameters of existing law in a way that the other sources of law are not. It is not clear, therefore, that judicial decisions would need to be derived directly from state consent in order to be legitimate.

An additional point I want to address in this section is one made by Jan Klabbers. Klabbers writes that 'the old system' of state consent 'is losing vitality in the wake of the emergence of actors other than states and with "network governance" complementing traditional diplomatic intercourse.'¹⁰⁰ He goes on to explain that:

'The two major sources of international law, custom and treaty, both work on the assumption of regular, formalized contract between regular, formalized entities: states... [However] it is also clear that much authority is exercised by entities that are not related to states; this applies to large companies, but equally to non-governmental entities that may have no formal authority but whose authority rests on their expertise on a given topic, or on the fact that they are known as principled actors who may command some form of respect. The big challenge for international lawyers is to come to terms with the activities of such actors and, somehow, to decide when their work gives rise to international law, and when it does not'.¹⁰¹

Whilst I am in general agreement with the sentiment of Klabbers' writing, an important distinction needs to be made between the power to influence the composition of international law, and the power to 'create' it. It is certainly true, as Klabbers observes, that entities such as large companies and NGOs are exerting greater authority on the international stage, but this is not the same as saying that international law finds its source in their actions. These entities are still obliged to lobby states when seeking to influence the creation of international law because, ultimately, states are still the actors that create it.

In sum, my own conclusion is that, although it is disputed the extent to which state consent acts as the source of legal obligations in practice, it is clear that it plays *some* role for most international law (again, see chapter six for a more detailed discussion). I also want to emphasise that, although this thesis assumes the significance of state consent in creating and

¹⁰⁰ Klabbers, J. (2013) *International Law*: p.40; see also: Van Hoof, G.J.H. (1983) *Rethinking the Sources of International Law*.

¹⁰¹ Klabbers, J. (2013) *International Law*: p.37; see also: Slaughter, A-M. (2004) *A New World Order*.

legitimizing international law, its value (i.e. the value of the thesis) is not dependent on proving the proposition that all or even most international law derives from state consent. The purpose of this thesis is merely to ask: *to the extent* that state consent is the source of international legal obligations, is it necessary and/or sufficient? It is for others to decide ‘the extent’, and thus, perhaps, the relevance of this thesis. For me, the normative part of the question is valuable regardless of the descriptive analysis.

The final point worth considering (when asking the extent to which the legitimacy of international law is based on state consent theory) is a semantic one. When one refers to ‘state consent’, it is important to separate ‘purported’ state consent from ‘ideal’ state consent. In other words, an ostensible act of state consent may not be a morally efficacious instance of state consent. We have already seen, for example, that consent should be sufficiently ‘free’ and ‘informed’ to hold normative significance. Thus, although we may observe that state consent was given to an international law, that state consent may have been non-voluntary or uninformed. Additionally – as has been pointed out – consent theory (in an ideal form) assumes certain ‘background’ conditions; such as the existence of moral agents with autonomy worth protecting, and a normative framework (possibly of natural rights) that helps us determine when consent is necessary. Again, although we may observe that state consent has ostensibly been given, any absence of these background conditions may diminish the normative significance of that consent.

The distinction between ‘purported’ and ‘ideal’ state consent, then, is crucial – especially when considering the objections made to state consent theory (as is done in the following chapters). This is because, when assessing an objection, we should always ask: is the objection arguing that a particular instance of state consent does not satisfy the conditions of consent theory, or that (state) consent theory is – even when ‘ideal’ – a theory incapable of legitimating (international) law?

3.5 *Summary*

This chapter began by examining the way in which consent – in general – alters the normative standing of an agent in relation to others. Simply put, a consent transaction transfers, creates or forgoes a right to perform/not perform an action that would otherwise have been

impermissible. In this way, I argued that the normative function of consent is to protect the autonomy of the consenting agent. More specifically, I argued that consent seeks to protect what I call the 'public negative autonomy' of an agent. As a corollary, consent also protects the formal equality of agents (understood as equal political standing). I also argued that, for consent to be morally efficacious (i.e. to actually alter the normative standing of agents) it needs to be 'free and informed'.

Consideration was then given to the way in which political consent has developed, from being a means by which domestic law is justified in relation to individuals, to being a means by which international law is justified to states and the individuals within those states. A brief account was offered of how and why it is that state consent came to be the primary means by which international law is created and legitimated. I explained that the notion of state consent as the basis of international law only becomes intelligible when one appreciates the historical development of three distinct, yet overlapping, concepts: the *sovereign* state; the state as an *artificial person*; and *positive* law.

Finally, this chapter considered the extent to which state consent can claim to be the basis of international law in practice. I noted that the answer to this question largely depends on the source of a law. International laws created through treaties, for example, are almost always based on the explicit consent of states. International law which finds its source in 'general principles', however, is unlikely to be the product of state consent.

This chapter, along with the two preceding chapters (chapters one and two) have been concerned with a conceptual analysis of the key terms employed in this thesis: 'international law', 'political legitimacy', and 'state consent'. We have thus built a solid base from which we can move to assess the normative question of whether state consent does, in fact, provide for the legitimacy of international law. This normative analysis will take up the remaining three chapters of the thesis (chapters four, five, and six).

THE SUFFICIENCY OF STATE CONSENT (PART 1)

For the remainder of the thesis (chapters four, five and six), I will be evaluating the extent to which – if at all – state consent legitimates international law. First, I will consider whether state consent is *sufficient* for the legitimacy of international law (chapters four and five); that is to say, is state consent, *on its own*, able to legitimate international law. Second, I consider whether state consent is *necessary* for the legitimacy of international law (chapter six). If state consent is necessary, then it is just one condition – of potentially many – that must be satisfied if international law is to be legitimate. If state consent is *unnecessary*, then international law can be legitimate without the consent of states. I will start, however, by looking at the sufficiency of state consent.

There are multiple arguments for why state consent should not be thought sufficient for the legitimacy of international law. The current chapter and the next will critically engage with those arguments I believe to be the most challenging to the theory of state consent. These are: the problem of ‘non-voluntary’ state consent (section 4.1); the problem of ‘uninformed’ state consent (section 4.2); the problem of ‘authorisation’ (section 5.1); and the problem of ‘immoral’ consent (section 5.2). This chapter will consider the first of these two arguments which pertain specifically to the ‘validity’ of state consent.

Before discussing these arguments, there is an important distinction (mentioned in the previous chapter) that is worth re-stating: The statement ‘state consent is insufficient for the legitimacy of international law’ could mean one of two things. First, it could mean that *purported* state consent (i.e. state consent ostensibly given in practice) is (often) insufficient to legitimate international law. Second, it could mean that *valid* state consent is insufficient to legitimate international law. The first position holds that valid state consent *could* be sufficient to legitimate international law, but valid state consent is often not given in practice. The second position holds that, even if valid, state consent is not sufficient to legitimate international law.

I will now turn to the first argument for the insufficiency of state consent in legitimating international law; that of ‘non-voluntary’ state consent.

4.1 The Problem of Non-Voluntary State Consent

The claim is often made, by theorists such as Buchanan, that ‘what currently counts as consent is not sufficiently voluntary’ to legitimate international law.¹ For example, says Buchanan, ‘when the losers in a war sign a peace treaty literally at gun-point, this can count as state consent under international law’.² Elsewhere, Buchanan & Keohane make a similar point about the involuntariness of consent by claiming that, for a weak or small state, ‘the consent given to global governance institutions such as the WTO is hardly voluntary, since the state would suffer serious costs by not participating’.³

This argument is one that challenges the validity of state consent.⁴ As was discussed earlier (in chapter three), the primary function of consent is to protect the autonomy of the consenter, and the requirement that consent should be voluntary is fundamental to autonomy protection. It would be a contradiction to say that an agent acted involuntarily yet autonomously.⁵ It is also important to note that Buchanan’s argument (and that of others) is not claiming that state consent *cannot* legitimate international law, only that, in practice, it often does not (due to its being insufficiently voluntary).

In this section, I will consider three general scenarios under which state consent to international law may be said to be involuntary; and thus invalid. These are, state consent given under conditions of: (1) physical/military force; (2) political or economic pressure; and (3) asymmetric bargaining positions between states. In the first scenario, the consent state A gives to state B is arguably involuntary because of military force exerted by state B on state A (in order to illicit A’s consent). In scenario two, the consent state A gives state B is arguably involuntary because state B has made state A’s enjoyment of certain political or economic benefits (not directly related to the immediate agreement) conditional upon state A’s consent to the current agreement. Finally, in the third scenario, the consent state A gives to state B is

¹ Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: p.187

² Ibid.

³ Buchanan, A. & Keohane, R.O. (2006) ‘The Legitimacy of Global Governance Institutions’: p.414. See also: Steinberg, R.H. (2002) ‘In the Shadow of Law or Power? Consensus-based Bargaining and Outcomes in the GATT/WTO’.

⁴ Legally, non-voluntary consent (i.e. consent obtained under duress) is void *ab initio*. See: Bergelson, V. (2010) ‘Consent to Harm’: p.175

⁵ Olsaretti would disagree that voluntariness is necessary for autonomy, although this is premised on her particular conception of ‘voluntariness’, which I will argue against in this section. See: Olsaretti, S. (1998) *Freedom, Force and Choice*: p.73

arguably involuntary because state A is far more dependent on the success of the agreement than state B. State B thus 'forces' state A to consent to a particular arrangement though the 'threat' of withdrawal from negotiations altogether. Before we go on to consider these scenarios, however, it is necessary to say something about the nature of 'voluntariness'.

4.1.1 Voluntariness vs Freedom

To improve clarity in our present discussion, the first point that needs addressing is the relationship between the concepts 'voluntariness' and 'freedom'.⁶ Some authors appear to be using the terms interchangeably, whereas others propose a clear distinction. Nozick, for example, falls within the former camp. He does not use 'voluntariness' and 'freedom' synonymously as such, but, for him, the two terms are conceptually inseparable.⁷ In other words, one acts voluntarily when they are free, and involuntarily when they are unfree. More specifically, Nozick argues that one's freedom is impinged when another unjustifiably interferes with their action.⁸ ('Unjustified', here, would refer to the fact that the 'interferer' has not acted within their rights). All subsequent actions made by the recipient of the interference in relation to that initial unjustified interference are involuntary.⁹ For example, imagine one is forced, by their parents, to get married, but are given the 'freedom' to choose exactly to whom they get married. For Nozick, this latter choice regarding whom to marry would be involuntary as they do not have the freedom not to get married at all. Thus, voluntariness is dependent on freedom.

Olsaretti, on the other hand, accuses Nozick of conflating 'voluntariness' and 'freedom', and wants to make a clear distinction between the two.¹⁰ Essentially, whereas Nozick refers to a prior state of freedom to determine the voluntariness of a choice, Olsaretti argues that voluntariness should be determined by considering the nature of the choice in

⁶ For the purpose of the following discussion, 'freedom' is defined broadly as 'free from coercive external interference'.

⁷ Nozick, R. (1974) *Anarchy, State and Utopia*

⁸ Ibid.: p.262

⁹ Ibid.

¹⁰ Olsaretti, S. (1998) *Freedom, Force and Choice*: p.69

isolation.¹¹ As a consequence, one can be unfree yet act voluntarily at the same time (and vice versa). She gives the following two examples to demonstrate her point:

- (1) C is the inhabitant of a city, located in the middle of a desert, which she is free to leave. However, C, who would wish to leave, knows with absolute certainty that if she leaves the city she will not be able to survive the hardship of the desert and she will die. Her choice to remain in the city is not a voluntary one.
- (2) C1 is the inhabitant of an insurmountably walled city which she is unfree to leave. However, her city has all that anyone could ever ask for and C1, aware of this, has no wish to leave it. She voluntarily remains in her city.¹²

Olsaretti points out that 'in the first example, freedom does not suffice for voluntariness; in the second, unfreedom does not undermine voluntariness'.¹³

Olsaretti's account, in itself, looks fairly convincing, but she is using the term 'voluntary' to mean something fundamentally different to the way it is used in most discussions about consent theory. Olsaretti is using voluntariness descriptively, or, put another way, her conception of voluntariness is 'non-moralised'. For her, voluntariness is a descriptive fact about the choices available to an agent, relative to that agent's preferred choice, and *independent of the actions of others*. Nozick's conception of voluntariness, however, is moralised. For Nozick, two scenarios could be identical in terms of the choices available to an agent and their desires, yet one may be voluntary, and the other not, depending on *why* they are in the position there are in. Consider the following two scenarios:

- (1) D, who does not want to die, is being threatened at gun point to hand over his wallet to a thief. D agrees to hand over his wallet in exchange for not being killed.
- (2) D1, who also does not want to die, is a starving worker who needs to find employment to survive. An employer comes along and offers him a job. D1 agrees to work for the employer in exchange for money, so he can buy food to survive.

¹¹ Ibid.: p.65

¹² Olsaretti, S. (1998) *Freedom, Force and Choice*: p.71

¹³ Ibid.

For both Nozick and Olsaretti, D, in scenario 1, is neither free nor acting voluntarily. It is the status of D1, however, on which they disagree. For Olsaretti, although D1 may be free, his decision to accept the job would not be voluntary as there are no other reasonable alternatives. In terms of voluntariness, then, Olsaretti argues that there is no difference between D and D1.¹⁴ Nozick, however, says D1 acts voluntarily precisely because he is free. The employer acts within his rights and causes no harm by offering D1 a job (if anything, the employer does a moral good).

We should remember that the question we are asking is whether consent is voluntary *such that* we should recognise that consent as having the moral force required to alter the normative relationship between the agent giving consent, and the one receiving it. Intuitively, there seems to be a fairly clear moral distinction between the two scenarios outlined above. At the very least, the bindingness of the agreement between the worker and the employer seems more convincing than that between the victim and the thief – precisely because of the difference in behaviour between the employer and the thief. This tells us that we *do* need a moralised conception of voluntariness, and, unlike Olsaretti's approach, we should not judge the voluntariness of consent independently of the behaviour of the agent to whom the consent is being given. Using voluntariness in this moralised sense is also consistent with the way in which the term has been used in the literature on consent theory. I will thus continue on this basis; referring to voluntariness as dependent on freedom.

4.1.2 Constraints on Freedom

Although the above discussion has argued for the dependency of voluntariness on freedom, it does not yet tell us what exactly constitutes a restraint on freedom (and thus voluntariness) itself. There appear to be three categories of things that could potentially constrain one's freedom: (1) internal influences; (2) external influences; and (3) circumstantial facts. Explaining these potential forms of constraint will help to inform our discussion as to the voluntariness of state consent in the three different scenarios outlined in the introduction to this chapter.

¹⁴ Olsaretti, S. (1998) *Freedom, Force and Choice*: p.72

In terms of influences – at a very general level – an individual could act involuntarily due to both internal and external reasons (relative to the individual). An example of an internal reason could be that a person is under the influence of some drug, or has a brain tumour that affects their behaviour. In such instances, such individuals are often considered not to be self-governing, and are unfree as they are being ‘controlled’ by something other than their ‘authentic selves’¹⁵; even if only by internal constraints. Any consent given under such circumstances would thus not be considered normatively binding. An example of an external influence, on the other hand, could be locking someone in a dungeon or holding a gun to their head, forcing them to act in a particular way. An individual subject to such an influence would clearly not be self-governing and would be unfree to act according to their authentic selves. Since we are interested in *state* consent, I will only consider *external* influences that may affect voluntary behaviour. This is simply because internal influences do not seem to apply to states in the same way they do to individuals.

It is important to note that ‘not all [external] influences exerted on another person are controlling. Many influences are resistible, and some are welcomed. The category of [external] influence includes acts of love, threats, education, lies, manipulative suggestions, and emotional appeals, all of which can vary dramatically in their impact on persons.’¹⁶ Beauchamp suggests a useful categorisation of external influences. These are: persuasion, manipulation, and coercion.¹⁷ Persuasion, understood here, is when ‘a person comes to believe something through the merit of reasons another person advances. This is the paradigm of an influence that is not controlling and also warranted.’¹⁸ Thus, persuading an agent or a state to consent would not limit the autonomy of that agent and would not, therefore, invalidate the consent.

Manipulation lies somewhere between persuasion and coercion, and ‘involves getting people to do what the manipulator wants through a non-persuasive means that alters a person’s understanding of a situation and motivates the person to do what the agent of influence intends.’¹⁹ Propaganda would be a good example of manipulation. Whether or not

¹⁵ Swift, A. (2014) *Political Philosophy*: p.67

¹⁶ Beauchamp, T.L. (2010) ‘Autonomy and Consent’: p.69

¹⁷ Ibid.; see also: Faden, R.R. & Beauchamp, T.L. (1986) *A History and Theory of Informed Consent*: ch.10

¹⁸ Beauchamp, T.L. (2010) ‘Autonomy and Consent’: p.69

¹⁹ Ibid.: p.70

manipulated consent would be invalid is difficult to answer, and, I think, would ultimately depend on the facts of each individual case. In any event, manipulation seems to have the potential to render an act of consent 'uninformed' rather than 'involuntary' (see section 4.2). If one consents to an action on the basis of propaganda or misinformation, their autonomy (in general) may be compromised, but it is difficult to see how their freedom (specifically) is challenged. After all, the agent is still at perfect liberty not to consent.²⁰ The issue of manipulation will be returned to, therefore, in the following section on 'uninformed' consent.

Whereas manipulation alters one's *understanding* of a situation, 'coercion' alters the situation itself, and in such a way that the number of options available to an agent, as to how to act, are narrowed. Actual coercion will always invalidate consent as it forces one to act in a way contrary to their wishes, or in a way that they otherwise would not have acted. It thus robs them of their autonomy. In many circumstances, however, it is 'notoriously a matter of vigorous dispute as to what is to count as an instance of coercion.'²¹ By way of explanation, Horton asks:

'When are the unpleasant consequences of an action to be understood as simply following from the action and when as coercively induced? When does persuasion become coercion? For example, labour contracts within a capitalist economic system are characteristically viewed as coercive exchanges by Marxists while defenders of the free-market typically see them as paradigmatic instances of free exchange.'²²

Coercion, then, is clearly the most morally problematic form of external influence, as well as, arguably, the most ambiguous. Although theorists may disagree as to what constitutes an instance of coercion, all (to my knowledge there are no exceptions) would agree that actual coercion limits an agent's freedom and thus their ability to give valid consent.

Some theorists, however, whilst still agreeing that coercion limits freedom, argue that coercion is not exhaustive of those things that limit freedom. For example, many would want to argue that 'circumstantial facts' could also limit freedom in so far as they limit the number

²⁰ We must assume here, for the sake of argument, that the misinformation was not such as to make the agent believe that their freedom had been compromised and that they had no reasonable option but to consent.

²¹ Horton, J. (1990) *Political Obligation*: p.31

²² Ibid.

of choices available to someone.²³ Circumstantial facts are not the result of the (direct) interference of other agents. A circumstantial fact often thought to diminish one's freedom is a lack of resources. Without sufficient resources, one is not free to do many of the things they otherwise might. For example, there may be no external agent forcibly preventing one from going to school, but if one lacks the money to pay for school, then they are not 'free' to attend.

On the one hand, then, we have those who argue that only coercion constitutes a constraint on freedom. On the other, we have those who hold the additional belief that circumstantial facts can also constitute a constraint on freedom. This debate, for the sake of analytical clarity, can usefully be viewed as a debate between two competing schools of thought: 'classical' and 'modern' (sometime called 'social') liberalism. Classical liberals – such as Robert Nozick, Friedrich Hayek and Isaiah Berlin (drawing on the older work of people like Adam Smith and Wilhelm von Humboldt)²⁴ – are generally of the opinion that, for something to count as a constraint on one's freedom, it must be: 'physical' in character; 'external' to the agent whose freedom is being diminished; and a 'deliberate intentional' action.²⁵ Someone like Thomas Beauchamp sums up the classical liberal position well when he says that there exists a constraint on freedom 'if and only if one person [or agent] intentionally uses a credible and severe threat of harm or force to control another.'²⁶ Conversely, modern liberals – such as T.H. Green, Leonard Hobhouse, and J.A. Hobson²⁷ – believe that non-physical, non-external, and non-intentional things could also be considered an abridgement of freedom; such as poverty or lack of education. The reason for including these 'circumstantial' features as constraints on freedom is – modern liberals would argue – because freedom is meaningless unless one has the *effective* (rather than merely 'formal') ability to enjoy it.²⁸

²³ See, for example: Olsaretti, S. (1998) *Freedom, Force and Choice*: p.72

²⁴ See, for example: Nozick, R. (1974) *Anarchy, State and Utopia*; Hayek, F. (1944) *The Road to Serfdom*; Berlin, I. (1958) *Two Concepts of Liberty*; Smith, A. (1776) *The Wealth of Nations*; and Von Humboldt, W. (1792) *The Limits of State Action*.

²⁵ Vincent, A. (2010) *Modern Political Ideologies*: p.37

²⁶ Beauchamp, T.L. (2010) 'Autonomy and Consent': p.69; see also: Nozick, R. (1969) 'Coercion'.

²⁷ See, for example: Green, T.H. (1882) *Lectures on the Principles of Political Obligation*; Hobhouse, L. (1893) *The Labour Movement*; and Hobson, J.A. (1909) *The Crisis of Liberalism*.

²⁸ Swift, A. (2014) *Political Philosophy*: p.61

4.1.3 *When is State Consent Non-voluntary?*

The conceptual analysis of 'voluntariness' and 'freedom' above means we are now in a better position to analyse the three general scenarios under which – it has been argued – a state's consent could be rendered non-voluntary (or 'unfree'). These were: (1) physical/military force; (2) political or economic pressure; and (3) asymmetric bargaining positions.

Coercion of a state to consent through physical or military force is clearly an abrogation of that state's autonomy, and any consent procured by such a means would be non-voluntary and thus invalid. Both classical and new liberals would agree on this point as both acknowledge that coercion is a constraint on freedom. International law is, itself, unambiguous on this issue. Articles 51 and 52 of the Vienna Convention on the Law of Treaties state that any treaty concluded on the basis of such coercion (or threat of coercion) to a state or its representatives shall be void.²⁹ Here we can return to Buchanan's example of peace treaties being signed at gun-point. Take, for example, the Treaty of Versailles (1919) that formally brought WWI to an end, and set the post-war conditions for the defeated Germany. The Treaty was primarily drafted by the British, French, and Americans. The German's were not consulted as to the terms of the Treaty at all. Among many other terms, the Treaty stipulated that Germany must admit guilt for starting the War, pay significant reparations (mainly to France and Belgium), give up vast swathes of territory to various surrounding countries (including crucial industrial territory), and was forced to severely limit the size and capability of her military forces. Once the Treaty had been drafted, the Germans were given two 'choices': 1.) sign the Treaty, or, 2.) be invaded by the Allies. Needless to say, Germany signed the Treaty.³⁰ Putting to one side one's views as to the justifiability of the Treaty itself, it would be a stretch to think of Germany's consent to this Treaty as being 'voluntary'.

This leaves us with a problem, however, because the Treaty of Versailles is commonly thought to be a legitimate example of international law.³¹ Given our conclusion regarding the

²⁹ Article 52 VCLT states that: 'a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'.

³⁰ Trueman, C.N. (2016) 'The Treaty of Versailles'.

³¹ It should be noted however – as is noted by Kaczorowska-Ireland – that the 'modern' rule against the use of force 'does not operate retroactively. If a treaty was procured by force before the use of force was made illegal the validity of the treaty is not affected by this subsequent change in the law' (see: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.101). This explains why the Treaty of Versailles is still considered by lawyers to be legitimate. My main concern here, however, is with 'moral' legitimacy and not necessarily legal legitimacy or 'validity'. It is thus still useful to use the Treaty of Versailles as an example.

invalidity of physically coerced consent, we must choose between one of two options: First, we can argue that, since the consent given by Germany to the Treaty was invalid, the Treaty itself is not legitimate international law. Alternatively, we could maintain that the Treaty *is* legitimate law, but that it is so by virtue of some other means, and not by state consent. The first option preserves the sufficiency of state consent as a method of legitimation, but is intuitively unappealing. Conversely, the second option is more appealing, but would entail that state consent had no part to play in its legitimation.³² This does not entail, however, that state consent is insufficient for the legitimacy of international law; only that it may not be necessary. After all, state consent could be just one of multiple sufficient means by which to legitimate international law.

My response to the above is moulded by my conception of legitimacy as set out in chapter two: because I believe legitimacy creates only content-independent obligations, I would argue that the Treaty of Versailles was not legitimate in relation to Germany, but its imposition was nevertheless (plausibly) morally justifiable. In other words, Germany is still morally obliged to abide by the terms of the Treaty, but not because of ‘how’ the treaty was made (i.e. not because it is legitimate), but because of ‘what’ the Treaty says. As I argued in chapter two, legitimacy is not the only source of obligation; it is just the only source of ‘content-independent’ political obligation. Germany’s obligation to obey is thus not a legal one, but a moral one dependent on the content of those obligations.

It could also be argued that the Treaty *is* legitimate under the state consent model (even though consent was not given) because the Treaty was necessary in re-establishing international public order; order that is pre-requisite for a system of voluntary association based on state consent. On this view, to insist that the Treaty is illegitimate without state consent is self-defeating as a system of state consent could not exist without it. (This line of thinking will be developed further in chapter six). Notwithstanding the complexities surrounding the Treaty of Versailles and similar such treaties, I maintain it is uncontroversial to propose that state consent elicited through physical coercion – or the threat of it – is *prima facie* non-voluntary and invalid.

³² It could be noted here, however, that if the defeated state had either explicitly or tacitly consented to laws regulating post-war conduct, (such that victors could impose obligations on the defeated), then treaties such as the Treaty of Versailles could, in fact, be legitimated with reference to state consent.

I move now to the second proposed form of coercion, that of economic and political pressure. The issue of how to evaluate the effect of economic and political pressure on the voluntariness of state consent is trickier than blatant physical coercion. For instance, as Klabbers asks, 'how does one rate the scenario in which state A threatens to withhold development aid unless state B opens its markets, accepts a new boundary or joins a military alliance? Or what if state A threatens to withhold development aid unless B ratifies a human rights convention?'³³ A recent actual example of such pressure relates to a (possible) forthcoming agreement between the United Kingdom and the European Union. In her letter to the President of the European Council – Donald Tusk – which triggered 'Article 50' and the process of the UK leaving the EU, Prime Minister Theresa May wrote the following:

'The Government of the United Kingdom wants to agree a deep and special partnership between the UK and the EU, taking in both economic and security cooperation. At a time when the growth of global trade is slowing and there are signs that protectionist instincts are on the rise in many parts of the world, Europe has a responsibility to stand up for free trade in the interest of all our citizens. Likewise, Europe's security is more fragile today than at any time since the end of the Cold War. Weakening our cooperation for the prosperity and protection of our citizens would be a costly mistake.'³⁴

This statement was interpreted by some as being a 'blatant threat' to end British crime and security co-operation with the EU if the EU fails to 'give' the UK a free-trade deal after Brexit.³⁵ The 'blatantness' of this 'threat' may be up for dispute, but this example is indicative of the type of political or economic pressure that may be put on one state (or group of states) by another in the negotiation of new international law.³⁶

³³ Klabbers, J. (2013) *International Law*: p.60

³⁴ May, T. (2017) *Prime Minister's Letter to Donald Tusk Triggering Article 50*: p.6. ('Article 50' refers to article 50 of the Treaty on European Union; the clause that allows member states to withdraw their membership).

³⁵ Waugh, P. (2017) 'Theresa May Accused Of "Blatant Threat" To End EU Security Links If Brussels Fails To Agree Trade Deal'.

³⁶ It should be noted that, in a speech Theresa May gave on 17 February 2018 in Munich, she said: 'Europe's security is our security. And that is why I have said – and I say again today – that the United Kingdom is unconditionally committed to maintaining it'.

The debate as to whether such economic and political pressure should constitute coercion was a contentious issue at the 1969 Vienna Convention (where the Vienna Convention on the Law of Treaties (VCLT) was concluded). Developing states, in particular, argued that such cases also constituted coercion.³⁷ Indeed, '19 Asian, African and Latin American countries proposed an amendment to the VCLT aimed at ensuring that treaties concluded through the exercise of economic or political pressure were invalid'.³⁸ However, the end result was that article 52 of the Vienna Convention limited coercion to military pressure, on the theory that, 'if it were also to take economic and or political pressure into account, there would be very few valid treaties left. To soften the blow, a declaration was attached to the 1969 *Final Act of the Vienna Conference* holding that exercising economic and political pressure was to be condemned, but without this leading to tangible legal consequences.'³⁹ The text of the declaration condemned: 'The threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and the freedom of consent.'⁴⁰

I hesitate here to make any pronouncement as to whether – as a rule – economic and political pressure should be thought of as a form of coercion or, more generally, whether it constrains the type of freedom needed to give valid consent. Part of the difficulty is that economic and political influence can come in many different forms; some more obviously coercive than others. What I will emphasise, however, is that what we are interested in presently is not whether political or economic pressure is 'moral', but whether it actually diminishes a state's reasonable choices to such an extent that their consent can no longer be considered voluntary. For example, we may not think it ethical for state A to threaten to withdraw its defence spending on state B unless state B signs a preferred trade deal with state A, but that doesn't necessarily render state B's consent involuntary.

One may be tempted to take a Nozickian approach and argue that political and economic pressure is only a constraint on freedom *if* the state exerting that pressure does

³⁷ See: Yasseen, M.K. (1968) *Report on the Ninth Session of the Asian-African Legal Consultative Committee*.

³⁸ See: *United Nations Conference on the Law of Treaties* (1968) UN: pp.269-92 & 328-29.

³⁹ Klabbers, J. (2013) *International Law*: p.60

⁴⁰ *United Nations Conference on the Law of Treaties* (1968) UN: p.329

not act within their rights.⁴¹ This can't seemingly refer to legal rights, however, as international legal rights (under a positivist view) are only created through state consent; and thus the argument becomes circular. If, instead, we are referring to moral (or natural) rights, then it seems we still have all our work ahead of us in agreeing what those moral rights include. Drawing on the previous example, we would need to answer such questions as: does the UK have the right to withdraw from defence cooperation with the EU? Put another way, does the UK have a moral obligation to cooperate on defence with the EU? If so, why, and why only the UK and not other states? If the UK does not have a moral obligation to cooperate, under what circumstances might it have such an obligation, and when do those circumstances apply? As I say, this is not a problem that I can hope to solve here but, as a rule, the closer political and economic pressure resembles coercion (i.e. interference that is physical, external, and intentional),⁴² then the more likely it is to undermine the freedom of consenting states to give valid consent.

The final potential restriction of freedom (that I will consider) is when two negotiating parties have vastly unequal bargaining positions, and thus the stronger party is able to 'coerce' the weaker party into accepting the stronger party's preferred deal. 'The basic idea', explains Christiano, is that 'two states may arrive at an agreement whose benefits are highly asymmetric between those states because one state is credibly able to threaten withdrawal from the arrangement while the other is not'.⁴³ A number of theorists – including Held & Maffettone – hold the view that asymmetric bargaining could, in fact, render state consent involuntary: 'if consent must be "free" in order to be valid, the large imbalances in economic and political power between negotiating parties clearly cast a shadow on its validity.'⁴⁴ David Lefkowitz also takes this position when he argues that: 'In light of the costs their citizens are likely to suffer if they refuse, the consent of economically and militarily weak states to bilateral or multilateral treaties frequently fails to qualify as voluntary.'⁴⁵

One should be clear at this point about how bargaining asymmetries differ as a potential form of coercion from that of economic and political pressure. In the latter case (as

⁴¹ Nozick, R. (1974) *Anarchy, State and Utopia*.

⁴² Vincent, A. (2010) *Modern Political Ideologies*: p.37

⁴³ Christiano, T. (2010) 'Democratic Legitimacy and International Institutions': p.125

⁴⁴ Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.121

⁴⁵ Lefkowitz, D. (2016) 'The Legitimacy of International Law': p.108

was discussed above), state A will *intentionally* attach formal or informal costs to an agreement in an attempt to pressure state B into consenting. Asymmetric bargaining, however, is simply a matter of circumstance whereby state A is less reliant on the consent of state B (for achieving its goals) than state B is on state A. Of course, the distinction between these two potential forms of coercion may be blurred in practice, but the difference can still be appreciated in conceptual terms.

The question of whether bargaining asymmetries constitute a constraint on freedom brings the debate between classical and new liberalism (discussed above) to the fore. As a broad generalisation, classical liberals would reject that bargaining asymmetries undermine the freedom of the consenting state as no actual coercion is involved. A weaker state may be faced with limited options, but this is not the result of physical, external, and intentional action by another state; it is merely a circumstantial fact. Of course, one may want to argue that stronger countries *are* 'physically' and 'intentionally' responsible for the relative inequality of states in that they have moulded the international system to be as such.⁴⁶ In other words, asymmetric bargaining is a result of *previous* intentional, external, and physical action, and should consequently not be thought of as merely an arbitrary or circumstantial fact. Although I am sympathetic to this position, given the causal complexity that would likely be involved, it is a very challenging position to prove. This difficulty only increases when one considers that most of those individuals responsible for present-day bargaining asymmetries in the international system are no longer alive, or at least no longer in office. In this way, one could make the case that *current* state representatives of stronger states are no more responsible for present inequalities than are the representatives of weaker ones.

This, however, is not the argument that new liberals necessarily want to make. Instead, they would want to return to the argument that what matters is the simple fact that the weaker state has few or no options but to consent, and not *why* it has such few options. (This was the essential point being made by Olsaretti earlier in this chapter). Having few options itself reduces voluntariness, and any consent given by a state in such a limited position should not be considered morally binding as no real choice was made.

⁴⁶ See, for example: Pogge, T. (2010) 'The Role of International Law in Reproducing Massive Poverty'.

Personally, I think that bargaining asymmetries should *not* constitute a constraint on freedom. This is not, I should be clear, because I think bargaining asymmetries are not an issue of moral concern; I think they are. I merely think that they should not be considered a threat *specifically* to 'voluntariness'. In this way, I agree with Berlin when he argues that liberty should not be confused with the conditions under which it is exercised.⁴⁷ It is my contention that, on the whole, modern liberals – at least in the context of this debate – are confusing freedom with considerations of 'fairness'. They are making the mistake of concluding that, because consent is being given to an unfair arrangement, it is unfree. Consent theory, as we saw previously, is not conditional upon fairness; its purpose is to protect autonomy. Thus, under consent theory, institutions are made legitimate, not because they are fair, but because they preserve – or are consistent with – the autonomy of those over whom they rule. As far as I can see, it is no contradiction to say that voluntary consent was given to an unfair agreement. To quote Berlin once more: 'liberty is liberty, not equality, not fairness'.⁴⁸ Modern liberals, therefore, would do better to critique the fundamental premise of consent theory rather than the procedural validity of consent. The real question, then, is whether one should reject consent theory as a method of legitimation because it is indifferent to fairness. This will be discussed further below (see section 5.2).

Even if one were to concede, however, that bargaining asymmetries constitute a constraint on weaker states' voluntariness, there exist a couple of practical issues as to how one should respond. First, although we might consider the relative disadvantage of weaker states in a bargaining process as a constraint on voluntariness, the consequence would be to judge all agreements made between strong and weak states as invalid. This option seems only to restrict the autonomy of weaker states further. There may be a strong case for reforming the international system so as to reduce structural inequalities, but invalidating the consent of weaker nations doesn't seem to be the way to achieve this.

The second response is a point made by Judge Richard Posner. In considering whether to allow for the rescission of contracts whenever contracting parties are in such dire economic circumstances that they have no practical alternatives to entering the agreement, he pointed out that doing so may actually be 'contrary to the interests of the parties in bad economic

⁴⁷ Berlin, I. (1969) [1958] 'Two Concepts of Liberty': pp.122-25

⁴⁸ Berlin, I. (1969) [1958] 'Two Concepts of Liberty': p.125

circumstances. If a poorly situated party could always get out of such agreements, few other parties would enter agreements with it.⁴⁹ This is another example of how one might inadvertently diminish the future autonomy of weak states in an attempt to increase it.

4.1.4 Summary

In sum, of the three categories of external influence, 'coercion' is the only one that undermines the 'voluntariness' of a consent transaction. Of the three potential forms of coercion discussed, physical/military force is the only one that – in my opinion – clearly diminishes a state's freedom. This gives rise to a problem, however, since we can point to examples of (arguably) legitimate international law that were the result of physical coercion. As explained, however, this problem did not show that state consent was insufficient for the legitimacy of international law; only that it may be unnecessary. Finally, I argued that, although 'bargaining asymmetries' are potentially morally problematic, they should not be considered as constraining specifically the 'voluntariness' of states to consent/not to consent.

The general argument made in this section, then, is not that state consent – when valid – cannot legitimate international law, but that, in practice, state consent is sometimes invalid and yet still claims to legitimate international law. I consider this to be a criticism primarily directed towards the international legal system (rather than state consent theory *per se*) and its occasional failure to abide strictly by its own principles. One could, I suppose, interpret this section as a criticism of state consent as well. For example, one may argue that the nature of the international system is such that consistently achieving 'voluntary' state consent is not possible. In this way, we may need to opt for a model of international legal legitimacy that is more conducive to the current nature of the international system. I am not, however, convinced by such an argument.

⁴⁹ Bix, B. H. (2010) 'Contracts': p.256

4.2 The Problem of Uninformed State Consent

Another criterion of valid consent is that the consenting agent should have knowledge, or be 'informed', about to what it is they are consenting.⁵⁰ Like 'non-voluntary' consent, it is a necessary requirement to preserve the autonomy of the consenter. One's consent cannot be autonomous if they do not have an appropriate understanding of the thing to which they are consenting or have some reasonable expectation about the consequences of such consent.⁵¹ As Simmons states, 'an individual cannot become obligated unless he... performs an obligation-generating act with a clear understanding of its significance.'⁵² This is precisely the reason why we often view the consent of young children to be invalid; children do not (always) have a sufficient understanding of the relevant facts that would make their consent autonomous.

In the case of state consent, it has been argued that, when participating in international agreements, poorer developing countries can often only assemble small delegations with limited expertise.⁵³ As a consequence, say Held & Maffettone, some states are 'simply unable to process all the relevant information that would allow them to be fully informed about the agreements they are subscribing to.'⁵⁴ Their consent to those agreements are thus insufficiently informed to be a true exercise of autonomy and thus to validate their consent. (Indeed, this was the claim made by Libya in relation to a treaty it had signed with France in 1955.⁵⁵ 'Libya argued that this treaty should be interpreted favourably to Libya because, at the time of negotiation, Libyan negotiators lacked experience compared to that of the French').⁵⁶ Again, like 'non-voluntary' consent, this argument is not claiming that state consent *cannot* legitimate international law, only that, often, it does not due to it being insufficiently informed.

Before we make any conclusions about whether an argument such as this is convincing, we need to ask some basic questions about 'knowledge' and its relation to

⁵⁰ Legally, consent given by a person who cannot understand the nature of that to which he consents is void *ab initio*. See: Bergelson, V. (2010) 'Consent to Harm': p.175

⁵¹ Beauchamp, T.L. (2010) 'Autonomy and Consent': p.68

⁵² Simmons, J.A. (1979) *Moral Principles and Political Obligations*: p.64

⁵³ : Held, D. (2004) *Global Covenant: The Social Democratic Alternative to the Washington Consensus*: pp.95-96

⁵⁴ Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.121

⁵⁵ See: Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad) [1994] ICJ Rep.

⁵⁶ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.102

consent. For example, how much knowledge/information is sufficient for valid consent? What if the information possessed by each party to an agreement is unequal? Who is responsible for ensuring the consenter is informed? What type of information is morally relevant? What type of action constitutes 'deception', and is all deception enough to invalidate consent? And finally, can an agent consent to an agreement to which it is impossible to know the consequences, or even impossible to know in advance what obligations may arise?

4.2.1 'Sufficient' Knowledge, and the Responsibility to be Informed

In relation to the question of how much knowledge is sufficient for valid consent, Beauchamp writes that, 'at a minimum, persons understand only if they have acquired pertinent information and have relevant beliefs about the nature and consequences of their actions.'⁵⁷ He goes on to say that, 'their understanding need not be *complete*, because a grasp of the *material* facts is generally sufficient, but in some cases a person's lack of awareness of even a single risk or missing fact can deprive him or her of adequate understanding.'⁵⁸

Although it is easy to agree with Beauchamp that a grasp of the material facts would be sufficient, it is not obvious that a grasp of the material facts is always necessary. As Kleinig explains, 'some people may choose to consent irresponsibly by refusing to inform themselves about the circumstances under which they are giving their consent. A may consent to enter into a business partnership with B without looking carefully at its financial prospects.'⁵⁹ In this example, one intuitively feels inclined to conclude that, although A was not 'informed', this was A's own fault, and thus the consent should still be considered valid. What seems to be of moral relevance, then, is not necessarily whether an agent *is* informed, but whether there existed the reasonable possibility that the agent *could have been* informed had they attempted to inform themselves. This makes sense if one remembers (as discussed in chapter three) that the purpose of consent is autonomy protection, and not necessarily the well-being of the consenter.

The above example also tells us that some knowledge is more morally relevant than others. In other words, the knowledge that A was entering into a business agreement with B,

⁵⁷ Beauchamp, T.L. (2010) 'Autonomy and Consent': p.68

⁵⁸ Ibid.

⁵⁹ Kleinig, J. (2010) 'The Nature of Consent': p.16

and that there may be some financial consequences (either good or bad), was sufficient for the consent to be 'informed'.⁶⁰ Additional information as to the precise nature of those financial consequences was not necessary to validate the consent because there was (for the sake of argument) nothing preventing A from acquiring that knowledge.

But what if an agent *wanted* to acquire additional information relevant to their consent, but were unable to do so due to their own inability to process or gather the information? This was the concern raised by Held & Maffettone above in relation to state consent. To set the context, they explain that:

'Having a seat at a negotiating table in a major international organisation or at a major conference does not ensure effective representation; even if there is a parity of formal representation. It is often the case, for example, that developed countries have large delegations equipped with extensive negotiation and technical expertise while poorer developing countries often depend on one-person delegations, or even have to rely on the sharing of a delegate.'⁶¹

The first point to make in response to this problem is that the *relative* lack of information held by poorer states (compared to their richer negotiating partners) does not seem to present any moral concern *in and of itself*. 'Knowledge' is not – what philosophers like to call – a 'positional good'; a good whereby giving more to some necessarily entails giving less to others.⁶² In other words, the simple fact that rich states possess a lot of information does not necessarily detract from the ability of poorer states to acquire information; or, equally, it doesn't affect the value of the information already held by poorer states. This is all merely to point out that our concern should not be with the 'relative' inequality of information when looking at 'informed consent' (although it could be relevant when looking at 'asymmetrical bargaining' as was done above). Instead, we should be solely concerned with the 'absolute' level of information held by states and whether it is sufficient to validate consent. Put simply, we should take a 'sufficientarian', rather than an 'egalitarian', approach to knowledge.

⁶⁰ Bergelson, V. (2010) 'Consent to Harm': pp.175-6; see also: Westen, P. (2004) *The Logic of Consent*: pp.290-1

⁶¹ Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.121; see also: Held, D. (2004) *Global Covenant*: pp.95-6

⁶² Swift, A. (2014) *Political Philosophy*: p.124

I have already argued that – for consent to sufficiently protect autonomy – the information possessed by an agent does not need to be comprehensive, although the agent does need to be aware of the essential facts of the agreement to which their consent is being given. It is difficult to give an account of what the ‘essential facts’ would be without studying a specific example. However, in the case of international agreements, I would say that an accurate representation of the agreement in treaty or written contract form – as is usually the case – is a sufficient level of information. I would go so far as to say that a state’s *understanding* of the contract is not necessarily a morally significant factor when it comes to the knowledge condition. After all, as we saw previously, this lack of knowledge and understanding could be the result of choices that the consenter has or hasn’t made themselves. One cannot force an agent to take in or understand information. Indeed, forcing them, in itself, would be a violation of their autonomy. If the agent wants more knowledge, or wants to understand, but can’t because of a lack of resources, then that agent would be irresponsible to give their consent given their circumstances. Of course, one could envisage a situation whereby a weaker state was not in a position to ‘non-consent’ on the basis of limited information due to other constraining circumstances. I am completely sympathetic to this, although this would be a problem specifically with the ‘voluntary’ nature of the consent (as discussed above), and not a problem pertaining to the lack of information. In sum, it is important – if we are to preserve autonomy – that the responsibility for the acquisition of knowledge, and the understanding of that knowledge, should fall primarily with the consenter themselves.

4.2.2 Deception

Having said all this – and although I would argue that no other agents have an obvious obligation to ensure that the consenter is informed – there does seem to exist a clear obligation to ensure that information is not *intentionally* withheld from the consenter, or that the consenter is not ‘deceived’. Lack of knowledge through deception – as being grounds for invalidating consent – is already established in international law. Article 49 of the Vienna Convention on the Law of Treaties states that: ‘If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty’.

The meaning of ‘deception’ itself, however, is not always so clear-cut. As Kleinig explains, ‘deceptive knowledge failures may affect consent in more than one way. An old – albeit problematic – legal distinction between “fraud in the *factum*” and “fraud in the inducement” suggests how misinformation may sometimes negate consent but at other times not do so yet nevertheless provide the consenter with a significant cause for complaint’.⁶³ ‘Fraud in the *factum*’ is likely to be very rare in the concluding of international agreements as one party would need to be deceived *as to the very fact* of what the agreement was about.

‘Fraud in the inducement’, however, may be more common. This would involve one party giving spurious reasons, for example, as to why the agreement would be advantageous to the other party. It is hard to tell – without consulting the facts of a particular case – whether such deception would be enough to invalidate consent due to a lack of knowledge. If, for example, state B withheld crucial information from state A – information such that the meaning or primary purpose of the agreement would’ve altered had it been known – then we could say that the consent given to such an agreement is invalid. If, however, state B published the estimated increase to state A’s GDP as a result of the forthcoming trade deal between them – and those estimates turned out to be wrong, even badly wrong – I don’t think this is enough to invalidate the consent previously given. (It is worth pointing out that I don’t think this latter case would be an example of ‘fraud in the inducement’ unless state A produced those estimates in bad faith, i.e., in full knowledge that they were spurious). Even then, however, I am hesitant to conclude that the resulting consent would be invalid, as we would be making the assumption that state B had no choice but to accept those estimates as fact. Given that the estimates were produced by the opposing side in the trade negotiation, one would expect state B to note the clear conflict of interest and thus treat the estimates with some caution.

4.2.3 Open-ended Agreements

The final issue I will discuss in relation to the knowledge condition is whether it is possible to consent to – what might be called – an ‘open-ended’ agreement. This is similar to the case of ‘fraud in the inducement’ in so far as it concerns a lack of information as to the consequences

⁶³ Kleinig, J. (2010) ‘The Nature of Consent’: pp.16-7; see also: Perkins, R.M. (1969) *Criminal Law*: pp.964-66

of consent, but different in that, in this case, the lack of information is not as a result of intentional action. An 'open-ended' agreement would be such that neither party could know in advance to what obligations the agreement could give rise. Lefkowitz explains how this might be the case when he says that 'states increasingly consent to general frameworks that are then filled in by treaty-based but partly autonomous bodies that exercise quasi-legislative and/or quasi-judicial powers. As a consequence, states may find themselves subject to obligations they did not intend nor even suspect they would acquire when they consented to the original framework.'⁶⁴ The Treaties of the European Union are the most obvious current example of this in international law.⁶⁵ In signing the Treaties, member states are transferring vast legislative powers – albeit within certain competency areas – to the EU Commission and other EU institutions. It is thus impossible for member states to know in advance the future obligations to which they may be subject.

The problem of open-ended agreements could be taken in two different directions. On the one hand, we may want to allow agents to consent to such agreements as they presumably have 'knowledge' about the lack of information regarding future obligations. In this way, their autonomy remains intact. On the other hand, the greater one's ignorance over such matters 'the less compelling it will be to describe the agent's consent as the exercise of control over [their] life rather than as an abdication of control to another.'⁶⁶ In this way, their consent would be an act of relinquishing the very thing that it is supposed to protect: their autonomy. Consent would then lose its justification as a method of legitimation as it is no longer fulfilling its role of autonomy protection.

My instinct is to opt for the former position. This is because the purpose of the knowledge condition is to ensure that the consenting agent is aware of what they are actually – and currently – giving their consent; it is not about whether we think the giving of consent was wise. As long as the agent is aware that future unknown obligations may arise, or that they are consenting for another agent to have decision-making power over them, then that consent is still informed. (I should caveat, however, that I think consent given to an

⁶⁴ Lefkowitz, D. (2016) 'The Legitimacy of International Law': p.108; see also: Kumm, M. (2004) 'The Legitimacy of International Law': p.914

⁶⁵ By 'Treaties' it is meant both the 'Treaty on the Functioning of the European Union' (a.k.a., the Treaty of Rome 1957) and the 'Treaty of European Union' (a.k.a., the Maastricht Treaty 1992).

⁶⁶ Lefkowitz, D. (2016) 'The Legitimacy of International Law': p.108

arrangement from which one can never withdraw – such as slavery – is invalid. However, this is for reasons of the ongoing ‘voluntariness’ of that consent, rather than of whether it was informed).

4.2.4 Summary

In reading this section, one may be concerned that I have set the bar too low in terms of what counts as informed – and thus valid – consent. I acknowledge that, compared to other writers on this issue, I am less protective of ‘poorer’ states with limited information, and generally believe that only essential information is sufficient for valid consent. I justify my position, however, with reference to an underlying concern as to the consequence of the alternatives. Although one may sympathise with the position of poorer and developing states (as set out by Held & Maffettone above), the alternative appears even less appealing, i.e., refusing to recognise their consent and thus denying them the possibility of signing international agreements at all. Refusing to deal with some states because they are, in some sense, lacking in competence, is akin to the justification for not recognising – as morally efficacious – the consent of children. Even with good intentions, we are in danger of infantilising weaker states. Such a position would also go against the grain of international law – and thus the sovereign equality of states – which states that ‘every state possesses capacity to conclude treaties’.⁶⁷ Similarly, allowing such states to rescind their consent after an agreement has come into effect – due to a lack of information – may encourage such behaviour even when it is not warranted. This might also dissuade richer states from dealing with poorer states at all as their consent – and therefore the bindingness of the agreements entered into – is more temperamental. Again, this would not be to the advantage of developing nations.

In conclusion, then, as with ‘non-voluntary’ state consent, the problem of uninformed state consent is not necessarily arguing against the sufficiency of state consent in theory; only that existing state consent is sometimes invalid. I have argued that, to be sufficiently informed to give valid consent, a state need only be aware of the essential facts and meaning of the agreement to which their consent is being given. I have also argued that – with the exception of instances of deception – states are primarily responsible for their own acquisition of

⁶⁷ Vienna Convention on the Law of Treaties (1969): Art. 6

knowledge. As the essential facts and meaning of international laws are usually set out in easily accessible treaty-form, therefore, I argue that it is very unlikely that state consent will be given without sufficient knowledge.

4.3 Chapter Summary

In this chapter, I have considered just two arguments for why state consent may not be sufficient for the legitimacy of international law; both relating to the purported invalidity of that consent. As explained in chapter three, for consent to be valid (i.e. alter the normative standing of an agent in relation to another) then it must be both 'free' & 'informed'.

In the first section (on the problem of 'non-voluntary' state consent), I considered three general scenarios under which state consent to international law may be said to be involuntary; and thus invalid. These were: (1) physical/military force; (2) political or economic pressure; and (3) asymmetric bargaining positions. I argued that only the first of these scenarios would limit the voluntariness of state consent. This was, I argued, because it is the only scenario that properly constitutes an instance of 'coercion'. In turn, coercion (in contrast to 'persuasion' or 'manipulation') is the only type of external influence that violates the voluntariness of a consent transaction.

The first section also argued for a 'moralised' (as opposed to 'non-moralised') conception of voluntariness. In relation to consent, this argument led to the conclusion that we should not judge the voluntariness of consent independently of the behaviour of the agent to whom the consent is being given. In other words, even if one has a very limited number of choices as to how to act, as long as that limitation is not the product of the direct or intentional action of another, one's actions are still voluntary. As a consequence, any consent given in such circumstances would be – *ceteris paribus* – valid and morally efficacious. The implications of this for the state consent theory of legitimacy in relation to international law is as follows: if an international law has received state consent, and if that consent was not the result of the coercion of another state, then (*ceteris paribus*) that consent would be sufficient to legitimate that international law, even if that state felt as though they were 'compelled' by circumstance to give their consent.

In the second section (on the problem of ‘uninformed’ state consent), I argued that, to be sufficiently informed to give valid consent, a state need only be aware of the essential facts and meaning of the agreement to which their consent is being given. As long as this threshold is reached, the inequality of information or knowledge between the parties involved in the consent transaction should not influence or determine the validity of the consent given. I have also argued that – with the exception of instances of deception – states are primarily responsible for their own acquisition of knowledge. The implications of this for the state consent theory of legitimacy in relation to international law is as follows: if an international law has received state consent, and if that consent was not the result of deception, then (*ceteris paribus*) that consent would be sufficient to legitimate that international law, even if that state was only aware of the essential facts and meaning of that to which they were consenting.

It is my general conclusion that, to be sufficient for the legitimation of international law, it is necessary that state consent is free and informed (i.e. valid). The problems of free and informed consent do not undermine the state consent ‘theory’ of legitimacy as the theory itself posits that consent must be valid. They do, however, tell us that the mere ‘appearance’ of state consent in practice is not necessarily sufficient and that we should ensure that that consent is valid. Given the meanings I have attributed to the terms ‘free’ and ‘informed’, my own position has been that achieving valid state consent (and thus potentially legitimate international law) is less demanding than many other theorists writing on this subject have hitherto suggested.

THE SUFFICIENCY OF STATE CONSENT (PART 2)

The previous chapter considered the problem of both non-voluntary and uninformed state consent as two arguments against the sufficiency of state consent to legitimate international law. This chapter looks at the second two arguments against the sufficiency of state consent that this thesis will consider: the problem of 'authorisation' and the problem of 'immoral state consent' respectively.

Whereas the problems of non-voluntary and uninformed consent are applicable to consent theory in general, the problem of authorisation is an issue specifically relevant to consent when given by states rather than individuals. This is because – as seen in chapter three – consent functions to protect the autonomy of moral agents. However, individuals are a very different type of moral agent than states; if the latter are moral agents at all. Thus, the normative function of consent is less obvious when given by states, and – as the argument goes – the consent given by states is therefore not sufficient to legitimate law in the same way that it might be when given by individuals. This is, in essence, the argument levelled by the problem of authorisation, which will be discussed directly below in section 5.1.

The problem of immoral state consent is a problem that goes to the heart of consent theory and is one that applies equally to the consent of states as that of individuals. It is also a problem that threatens to undermine the concept of legitimacy as I have defined it in chapter two. This is because the problem of immoral state consent claims that the legitimacy of international law (and law in general) must depend – at least in part – on the *content* of any particular international law. Since state consent is a purely procedural means by which to legitimate law (i.e., is concerned only with 'how' a law is made and not 'what' that law says), it cannot be sufficient for the legitimacy of international law. The problem of immoral consent will be considered in the latter half of this chapter in section 5.2. First, however, we turn to the problem of authorisation.

5.1 The Problem of Authorisation

As stated earlier (in chapter three, section 3.1), when consenting, one is involved in a transaction of rights and obligations: 'A', through consenting, gives 'B' the right to do 'Ψ'. The reason B needs to obtain A's consent to do 'Ψ' is because 'Ψ' places an obligation on A. Imposing an obligation on A, without consent, would be to undermine A's autonomy and formal equality. Thus, A's consent is needed to reconcile A's autonomy and formal equality with the imposition of the new obligation. If 'Ψ' were also to impose an obligation on 'C', then, for the same reason, C's consent would additionally be required. If C did not consent, then only A, and not C, would be under any new obligations as A (presumably) does not have the right to consent on C's behalf. This logic is straightforward and intuitively appealing, but is worth restating for the discussion below.

In international law, a state has full legal personality. As such, it has the capacity to enter into legal relationships and, importantly, to incur international legal obligations – as well as rights.¹ Given this status of states as full legal personalities, their ability to consent to the 'imposition' of international legal obligations is seen as unproblematic. In the same way that individuals in the domestic sphere may unproblematically contract with one another to accrue rights and obligations, states have the same capacity internationally. Indeed, traditionally, states were considered to be the only actors with international legal personality.² Within the last century, however, this has changed.

'Individuals' (along with other entities)³ are now also considered as having their own international legal personalities – albeit 'partial personality'. (The reason for this partiality is that 'the extent of their rights and obligations... are ultimately controlled by States').⁴ The notion that individuals may have obligations deriving directly from international law was recognised for the first time by the Permanent Court of International Justice (PCIJ) in the 1928 *Case Concerning Competences of the Courts of Danzig* (Advisory Opinion).⁵ It was held in this case that 'an exception to the principle that individuals are not subjects of international law

¹ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.166

² Ibid.

³ Such as Intergovernmental Organisations. See: *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

⁴ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.166

⁵ *Case Concerning Competences of the Courts of Danzig* (Advisory Opinion) [1928] PCIJ Rep Ser B No 15. See also: Kaczorowska-Ireland, A. (2015) *Public International Law*: pp.194-5.

arises if the intention of the contracting parties was to adopt a treaty which creates rights and obligations for individuals'.⁶ The direct relationship between individuals and international law was then confirmed by the infamous 1946 Judgment of the International Military Tribunal (IMT) at Nuremberg, which read, in part: 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.⁷

There are now multiple examples of obligations directed towards individuals in international law.⁸ These obligations tend to find their source either in the treaties that establish international courts – such as the 1998 Statute of the International Criminal Court⁹ – or stand-alone treaties – such as the 1948 Genocide Convention.¹⁰ Perhaps the most extensive example of the application of international law to individuals is EU law. In a famous case (*Costa v ENEL*), the ECJ confirmed that: 'By creating a Community... the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law that binds *both their nationals and themselves* [emphasis added]'.¹¹ In other words, the international legal obligations of the EU fall on the individuals within the members states as well as the member states themselves. From the above examples, then, it is clear that – at least in some instances – both individuals and states accrue obligations under international law.¹²

However, whereas states incur obligations under international law by consenting on behalf of themselves, individuals do not. Instead, individuals also incur their obligations through the consent of the state in which they reside. This development poses a serious

⁶ Case Concerning Competences of the Courts of Danzig (Advisory Opinion) [1928] PCIJ Rep Ser B No 15.

⁷ 'Judgement of the Nuremberg International Military Tribunal 1946' (1947): p.221

⁸ Henriksen, A. (2017) *International Law*: pp.306-8

⁹ Another example would be the 1945 London Agreement that created the International Military Tribunal at Nuremberg (see: Henriksen, A. (2017) *International Law*: p.308)

¹⁰ Other important treaties include the 1949 Geneva Conventions and the 1977 Additional Protocols I and II, and the various universal human rights conventions. As Henriksen argues, 'mention should also be made of the numerous treaties that authorise and/or oblige state to prosecute certain offences, such as the 1984 Convention against Torture and the numerous 'counter-terrorism' conventions, including the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1979 Convention against the Taking of Hostages and the 1999 Convention for the Suppression of Financing Terrorism' (see: Henriksen, A. (2017) *International Law*: p.308)

¹¹ *Costa v ENEL* Case 6/64 [1964] ECR 585.

¹² For an in-depth analysis of the position of individuals in relation to international law, see: Parlett, K. (2011) *The Individual in the International Legal System*.

problem for any straightforward theory of consent. As explained above, it is not ordinarily possible for one entity to consent on another's behalf. *Ceteris paribus*, for a state to consent on an individual's behalf is for the individual not to have consented at all. Thus, those individuals within a state are having obligations imposed on them without their consent which, needless to add, undermines their autonomy and formal equality. The fact that individuals reside within the state should not distort our reasoning on this issue. So far as the theory of consent is concerned, those individuals are third parties. Thus, in the same way that a state cannot ordinarily consent on behalf of another state, they cannot consent on behalf of those individuals.

This reasoning tells us that, although international laws may be legitimate in relation to 'states' (who purportedly give their consent), they are not legitimate in relation to individuals (whose consent is non-existent). It is difficult to see how this is not a hammer blow for the proposition that state consent is (in itself) sufficient for the legitimacy of international law (at least in relation to individuals).

Before we go on to consider some of the responses to this problem, it is worth noting that, for some, this problem goes deeper. For them, this problem is not confined to those situations when international law imposes obligations directly on individuals. Instead, it extends even to situations whereby the only entity incurring obligations is the state itself.

To explain: those who argue that state consent is sufficient for the legitimacy of international law (at least in relation to states themselves) are making the assumption that states, as with individuals in the domestic sphere, have the intrinsic right to give consent. According to Buchanan and many others, however, this assumption is false. The problem, says Buchanan, is that the theory of state consent subscribes to the view that Charles Beitz calls the 'Autonomy of States'.¹³ This is the 'discredited and erroneous' treatment of states 'as if they were moral persons in their own right, rather than merely being institutional resources for human beings'.¹⁴

The central point here is that it is not possible to separate – in practice – the autonomy of the state from the autonomy of the individuals within it (in the same way that we can

¹³ Beitz, C. (1979) *Political Theory and International Relations*: p.71

¹⁴ Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: pp.304-5

separate the autonomy of distinct individuals). Although states are considered separate legal entities from individuals, they are not separate moral entities. Indeed, they are not moral entities at all; they have no intrinsic moral status that can be undermined by the imposition of obligations. Rather, states are morally significant only insofar as they are instrumental in preserving the autonomy of the individuals within. This is perhaps why Jeremy Waldron argues that individuals should be considered the 'true' subjects of international law, in moral if not formal terms.¹⁵

This conflation between the 'legal' and 'moral' status of states has likely arisen with – as discussed in chapter three – the historic conception of states as 'artificial persons'. Although states mimic the actions of individuals in developing 'contracts', they should not be considered as having the same moral status. Thus, it is wrong to think of states as having the 'right' to consent as if they were moral entities. Instead, the state is merely a tool or mechanism through which the individuals comprising that state can project their autonomy collectively and internationally. As Kumm puts it: 'The state... is just the institutional framework within which citizens govern themselves. Anything that imposes constraints on states also imposes constraints on citizens and how they govern themselves'.¹⁶ Consequently, even international obligations directed specifically at a state are of moral significance only (or at least primarily) with reference to the individuals within the state. It would thus seem – following the logic of consent theory – that if consent is needed at all (and I think it is in this case) then it is ultimately needed from those individuals, and not the 'state' acting separately from those individuals. It is for this reason that I agree with Christiano when he concludes: the legitimacy of international law 'must ultimately be grounded in the interests of individuals, not of states.'¹⁷

This argument, then, as with the previous one above, leads us to the conclusion that state consent (in itself) is insufficient to legitimate international law; in the previous case because some international laws create obligations directly for individuals, and in this case because, even when an obligation ostensibly binds only a 'state', that obligation has moral

¹⁵ Cited in: Thomas, C.A. (2014) 'The Uses and Abuses of Legitimacy in International Law': p.747. See: Waldron, J. (2011) 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?': pp.325-27

¹⁶ Kumm, M. (2004) 'The Legitimacy of International Law': p.910

¹⁷ Christiano, T. (2011) 'Is Democratic Legitimacy Possible for International Institutions': p.82

significance only for the individuals within the state, and thus also seemingly requires, ultimately, the consent of those individuals.

It should briefly be caveated that the problems just outlined are ones primarily for 'monist' states; rather than those that are 'dualist' in relation to international law. As explained in chapter two, when a monist state consents to international law, that international law automatically binds the relevant legal entities within the state. The same is not true for dualist states. Legal entities in (purely) dualist states cannot be bound directly by international law – only domestic law. Thus, any international law to which a dualist state gives its consent must first be converted into domestic law through the ordinary domestic legislative process. Legal entities in the dualist state are therefore technically only ever obeying domestic law (even though the text of that law may have had its origins in an international agreement). Thus, as long as the domestic law-making process is legitimate, then that law is legitimate. Whether or not the dualist state's consent had the effect of legitimating the original international agreement is morally superfluous as that law is anyway legitimated through a domestic law-making procedure.¹⁸ Having said this, very few states are entirely dualist in practice (even if they claim, constitutionally, to be so). The problems highlighted above, then, would still seem to apply to nearly all states to varying degrees.

It would therefore appear that, in both cases, state consent could only have the ability to legitimate international law if individuals somehow authorised their states to consent on their behalf. Afterall, as Lefkowitz correctly states: 'one agent may consent on another's behalf only if the latter authorizes him to do so, since only then will the resulting obligations be properly characterized as a product of the obligated agent's control over his life'.¹⁹ State consent should, therefore, be viewed as a type of 'proxy' consent.²⁰ Understood from this perspective, when states transfer rights and obligations through state consent, they are doing so on behalf of their citizens. Consequently, state consent is only valid to the extent that it is

¹⁸ The moral question here would then become whether the domestic law-making procedure was necessary or sufficient to legitimate that law – but that is a separate issue that would apply equally to all domestic law, and one that goes well beyond the scope of this thesis.

¹⁹ Lefkowitz, D. (2016) 'The Legitimacy of International Law': pp.107-8

²⁰ I will not look here at the possibility that individuals may directly consent to international law, rather than authorising states to do so on their behalf. This is because this thesis aims merely to examine the theory of 'state' consent; not 'individual' consent.

an adequate proxy for the consent of its citizens. The question then becomes, how is this authorisation given?

5.1.1 *Authorisation of State Consent through Individual Consent*

The intuitive answer to the above question, from the viewpoint of consent theory, is simply for individuals to ‘consent’ to the state’s ability to consent on their behalf. This would be something akin to the ‘lasting power of attorney’ legal mechanism in the United Kingdom.

The opening and most glaring problem with this solution, however, is that citizens have not, in fact, consented for their states to act as their proxy in relation to international law. This is essentially the same problem that has plagued the theory of consent in relation to domestic law-making procedures. As Horton explains, ‘the central problem for consent theorists, as with all voluntarist theories, has been to discover any action in the personal history of most individuals which meets the conditions necessary for the ascription of political obligation; that is, to discover any act registering the appropriate consent’.²¹ The point here is that we are born into our political communities, and most people (save perhaps ‘naturalised’ citizens) have never formally consented to the power that their governments possess, nor the obligations that they are under as a consequence. This was a criticism made as early as the eighteenth century by David Hume: ‘my intention’ said Hume, ‘is not to exclude the consent of the people from being one just foundation of government where it has place. It is surely the best and most sacred of any. I only pretend, that it has very seldom had place in any degree, and never almost in its full extent’.²² It is for this reason that Michael Huemer admonishes traditional consent theory as having ‘an impudent disregard for reality’.²³ He goes on to say that:

‘No one has ever been presented with a contract describing how the government operates and asked for a signature. Few have ever been in a situation in which a verbal or a written statement of agreement to have a government would have been

²¹ Horton, J. (1990) *Political Obligation*: pp. 26 & 33

²² Hume, D. (1965) [1748] *Of the Original Contract*; cited in: Hyams, K. (2008) ‘Political Authority and Obligation’: p.12

²³ Huemer, M. (2013) *The Problem of Political Authority*: p.21

appropriate, let alone have actually made such a statement. When do the social contract theorists think this event happened?’²⁴

As mentioned, although the authors above are referring to the traditional theory of consent as a legitimator of domestic law, the same problem applies to the notion that individuals have given their consent for their states to act as their representative proxies when acceding to international law. Of course, many consent theorists have tried to argue that individuals have given such consent – even if only consenting tacitly through their actions. The most famous exponent of this position was perhaps John Locke.²⁵ I do not, however, find these theories convincing, and it would be well beyond the scope of this thesis to delineate their merits or otherwise.

If it is the case that only the consent of individuals can authorise a state to act as their proxy, and if – as I believe is clear – individuals have not so consented, then we are left with the difficult conclusion that most – if not all – international law is illegitimate. Fortunately, I do not believe the first premise to be true. In other words, it is not obvious that the only means through which a state can become a proxy is the consent of its citizens. In fact, a far more popular proposition is that a state can acquire a right of proxy if it is sufficiently democratic.

5.1.2 Authorisation of State Consent through Democracy

Before I discuss democratic decision-making as a means by which states could be authorised to consent on behalf of their citizens, it is important to address the following question which is likely, at this point, being begged: How can consent claim to legitimate international legal obligations but not domestic legal obligations? Surely, if the theory is sound, it will legitimate the imposition of *all* obligations – whether domestic or international? There are two related reasons why I do not believe it is a contradiction to say that the theory of consent might legitimate international law, but not domestic.

²⁴ Ibid.

²⁵ Locke, J. (1924) [1690] *Two Treatise of Government*; see also: Plamenatz, J.P. (1968) *Consent, Freedom and Political Obligation* for another notable proposal of how citizens might be thought of as consenting to their states tacitly.

First, different models of legitimacy may be better suited to different institutions. For example – and as explained above – one of the main issues with consent as the model of legitimacy for domestic law is that it hasn't been given. This is not the case for most international law as – very often – state consent is given (whether morally efficacious or not). Thus, there is at least one good reason to believe that consent may be an appropriate method of legitimacy for international law, but not domestic law.

Second, and perhaps most important, is the distinction that needs to be made between the 'act' of consent, and the 'values' that the act represents. It should be understood that consent's (purported) legitimating force is not the overt display of consent in itself, but the intrinsic values that this consent is meant to protect – e.g. autonomy and formal equality. What is ultimately important is the preservation of these values. Thus, if a different mechanism – such as democratic decision-making – could also preserve these values, then having one does not preclude the moral efficacy of the other; they are just two different ways of achieving the same desired outcome. In this way, consent is sufficient for the legitimacy of law, but not necessary. What this does tell us, however, it is that – to be consistent – the form of democratic decision-making used to authorise state consent must, in fact, preserve those same values.

It may be argued, however, that, even if a state is sufficiently democratic, collective decision-making will inevitably result in some individuals having laws imposed on them against their will. Having a democratic state, therefore, will not ensure that the formal autonomy and equality of 'every' citizen is protected. To think about the problem in this way, however, is mistaken. When consenting to international law, the state is not acting as a 'pure' delegate for its citizens in the sense that it is merely relaying their direct will at the international level. Instead, the state is a *representative*. Through domestic democratic procedures, citizens are authorising their states, not to implement their *exact* will at the international level, but to judge and make those international decisions on their behalf. What we should be looking for, then, is sufficient 'authorisation' to act, not necessarily direct instruction as to how to act. It is perfectly conceivable that a citizen could authorise their state to act, even if that state acts in a way that is deviant from the way that citizen would've acted themselves (had they been pulling the levers of the state). The process of authorisation also need not be direct (as direct individual consent might be). Instead, the authorisation could be

a moral consequence of the process by which state representatives come to hold their positions (e.g. by free and fair election).

It could also be argued that democratic decision-making, although not providing each individual with the level of autonomy otherwise achieved through a consent-based system, nevertheless maximises autonomy; which is the best we can hope for.²⁶ In other words, if we are to achieve collective decision-making at all (something unanimous individual consent is unlikely to do), then arriving at those decisions democratically is the best way of ensuring that each individual preserves as much autonomy as possible; even if not the ideal amount. This is essentially the principle that one should not make the perfect the enemy of the good.

It is not within the scope of this thesis to consider whether democratic decision-making can, in theory, have the desired moral effect of authorising a state to consent on behalf of its citizens. Instead, I am happy to go along with the vast majority of popular opinion and assume that it can.²⁷ As Christiano observes, for example, there is good reason to think that non-democratic states 'will be much less responsive to their populations than are democratic states', and thus their claim to be a proxy for the consent of their citizens is less convincing.²⁸ This position, I suggest, is uncontroversial – and in any case is not one that I will defend here. The more interesting question for the purpose of this thesis is what features a democracy would need to possess to properly authorise state consent, and how many states actually meet this democratic threshold.

5.1.3 Criteria for Democratic Authorisation

In his essay 'Democratic Legitimacy and International Institutions', Christiano posits three democratic criteria a state would need to satisfy to be sufficiently authorised to consent on behalf of its citizens.

²⁶ Swift, A. (2014) *Political Philosophy*: p.219

²⁷ I say this fully conscious of the '*argumentum ad populum*' logical fallacy. I do not, however, invoke consensus to prove the correctness of the proposition; I believe it to be correct for independent reasons. Instead, I invoke consensus only to demonstrate the argument's relative uncontroversiality and thereby justify my decision not to defend it here.

²⁸ Christiano, T. (2010) 'Democratic Legitimacy and International Institutions': p.125; see also: Przeworski, A., *et al.* (2000) *Democracy and Development*.

The first requirement is that a state be democratic in the traditional sense by seeking to represent its majority population; rather than dictating the will of a minority in an authoritarian fashion.²⁹ Christiano explains simply why such authoritarianism is a problem when he says that: 'when states that are not democratic negotiate with states that are democratic with an eye towards creating international law that impinges on the domestic legal systems of the society, it seems that we may describe this as a kind of imposition of international law on the populations that are not participating in their political societies.'³⁰ This argument (that the consent of non-democratic states cannot legitimate international law) has been repeated by most key theorists writing on this issue.³¹

The second requirement is that – as well as being led broadly by the majority – a state needs to represent the interests of *all* its citizens, not just those from whom it receives votes. In practice, this translates to sufficient and equal human rights protections being afforded to all citizens. This requirement acknowledges that, although democratic states may represent their majorities, they 'do not always represent their minorities very well, in particular indigenous peoples and insular minorities'.³² This criterion of democratic authorisation is also advocated by Lefkowitz who state that: 'The existence of persistent minorities challenges any state's claim to the standing to acquire obligations on behalf of all its subjects.'³³

The final requirement posited by Christiano is that a state's 'executive' branch – and not just its 'legislative' branch – needs to be democratically accountable. Christiano explains the need for this requirement by noting that 'traditionally, the branch of government most responsible for relations with other states has been the executive branch. And the exercise of its foreign-policy functions has been relatively non-democratic. Such functions often occur in secret and it is often the case that citizens in democratic societies have paid less attention to foreign affairs than to domestic affairs'.³⁴ Christiano's overall point is that, for state consent to legitimate international law, 'the foreign policies of states must become more

²⁹ Christiano, T. (2010) 'Democratic Legitimacy and International Institutions': p.124; see also: Buchanan, A. (2010) 'The Legitimacy of International Law': p.91

³⁰ Christiano, T. (2011) 'Is Democratic Legitimacy Possible for International Institutions': p.91

³¹ For example, see: Lefkowitz, D. (2016) 'The Legitimacy of International Law'; Christiano, T. (2011) 'Is Democratic Legitimacy Possible for International Institutions'; Buchanan, A. & Keohane, R.O. (2006) 'The Legitimacy of Global Governance Institutions'; and Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance'

³² Christiano, T. (2010) 'Democratic Legitimacy and International Institutions': p.125

³³ Lefkowitz, D. (2016) 'The Legitimacy of International Law': p.108

³⁴ Christiano, T. (2010) 'Democratic Legitimacy and International Institutions': p.125

democratic'.³⁵ (It is unclear, exactly, whether Christiano is advocating the democratisation of the executive branch of government, or arguing that foreign-policy decisions ought to be made by the legislative branch, which is (usually) more democratic. This may be a distinction without a difference from a moral point of view, but will obviously be significant in practice).

In sum, Christiano argues that, for state consent to act as an adequate proxy for the consent of individual citizens (and thus before state consent is sufficient to legitimate international law) a state should:

- 1.) Have liberal democratic institutions for majority decision-making;
- 2.) Adequately represent minorities; and
- 3.) Ensure its foreign-policy establishments are, in some sense, democratic.³⁶

Although written in general terms – and therefore open to a broader range of interpretation – I think Christiano's requirements push in the right direction. However, although perhaps necessary, I would hesitate to conclude that these requirements are sufficient.

As explained above, the primary concern of consent theory is protecting the autonomy and equality of moral agents (understood as negative public autonomy and formal equality). Thus, if it is posited that democratic decision-making is sufficient to authorise state consent, then – to be consistent with the theory of consent – we need to ensure that this democratic decision-making maintains the autonomy and equality of individuals. It is not clear to me that Christiano's requirements fulfil this fundamental demand – or, at least, they are not formulated explicitly with this consideration in mind. Christiano's requirements are thus in need of expansion or – more charitably – clarification.

My main concern is that, in setting out his requirements, Christiano seems to be taking 'social choice' approach to democracy. The social choice approach worries about how the state should aggregate individual preferences or interests.³⁷ In this way, the state treats its citizens equally in a superficial sense by giving 'all their preferences equal weight in the

³⁵ Ibid.

³⁶ Christiano, T. (2011) 'Is Democratic Legitimacy Possible for International Institutions': p.82

³⁷ Swift, A. (2014) *Political Philosophy*: p.219

process of aggregation to form a collective decision'.³⁸ It also takes a shallow view of autonomy whereby autonomy is equated roughly with individuals getting what they want or having their preferences satisfied.

My own preferred approach is to view democracy, not merely as a 'means of turning preferences into policies', but as a 'means of transforming preferences themselves'.³⁹ In other words, I believe the autonomy and formal equality of individuals is more thoroughly served by taking a 'deliberative' approach to democracy. As explained by Swift, 'through a process of democratic debate, argument, reflection, hearing other people's point of view and responding to objections, democracy can, and should, be a way of changing – and improving – people's views, not just registering and combining them.'⁴⁰

More emphasis, then, should be added to Christiano's requirements, about the ability of individuals to influence the interests of others, and not merely for the state to recognise the interests of individuals. In practice, this would take the form of, for example: less intrusive laws relating to free speech; an independent press; unbiased legal and political structures that don't use the state apparatus to promote any one partisan view; and transparent state institutions that provide individuals with the accurate information necessary for a meaningful debate about the operation of those institutions. These additional requirements would go some way to ensuring the autonomy of individuals by enabling them to have a greater capacity to shape the laws under which they live; rather than merely registering their approval/disapproval for those laws. They would also help to improve formal equality by ensuring that it is harder for some individuals to gain an unfair advantage over others in having their interests heard or represented.

Again, I do not claim that any of these additional requirements are ones that Christiano would not himself endorse, only that they should be asserted more forthrightly in his discussion. I also do not claim that these additional requirements would create the ideal scenario whereby the autonomy and equality of *all* citizens is accounted for. I do claim, however, that they would increase the chances that such values were realised which, as I have argued, is the best we can do.

³⁸ Ibid.

³⁹ Swift, A. (2014) *Political Philosophy*: p.219

⁴⁰ Ibid.

It would be useful, at this point, to take stock of where our discussion has led us. If we are to recognise that state consent to international law often imposes obligations on individuals as well as states, and even those obligations incurred by states are only morally relevant to the extent that they affect individuals within the state, then state consent – on its own and *ceteris paribus* – cannot be sufficient to legitimate international law. To be (potentially) sufficient, the consenting state should be authorised to do so by its citizens. The most likely mechanism by which to achieve this authorisation is for the state to be democratic (in a deliberative sense).

When we look to the states of the world, however, we notice that very few achieve the level of democracy necessary to ensure that their consent to international law – on behalf of their citizens – is legitimate. The uncomfortable consequence of this, of course, is that most international law should not be considered legitimate (at least in relation to those states). As Buchanan and Keohane argue, ‘given that many states are non-democratic and systematically violate the human rights of their citizens... state consent cannot transfer legitimacy for the simple reason that there is no legitimacy to transfer’.⁴¹ It should also be noticed that, as a rule, there is nothing in the existing practice of international law which stipulates that only democratic states can enter into international legal agreements.⁴² This means that – under this theory – the international legal system, as an institution, does not demand the conditions for its own legitimacy.

5.1.4 The Problem of Undemocratic States

Having said all this – and without detracting from it – there are still a number of reasons why one might still want to recognise the consent of undemocratic states. The first is that, if we adopt the position that undemocratic states cannot participate in, or be subject to, international law, then we run the risk of derogating the autonomy of the citizens within those states even further.⁴³ Excluding those citizens could effectively be to deny them the option of

⁴¹ Buchanan, A. & Keohane, R.O. (2006) ‘The Legitimacy of Global Governance Institutions’: p.413

⁴² This is different from saying, however, that it is a pre-condition of joining a specific agreement that a state is democratic – as is the case with the European Union. See: Treaty on European Union: Articles 2 & 49.

⁴³ Christiano, T. (2011) ‘Is Democratic Legitimacy Possible for International Institutions’: p.71; see also: Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.385

alternative authorities; ones that could counter or temper that of their own, undemocratic governments.

Relatedly, allowing undemocratic states to consent to international law could actually *increase* their own legitimacy. This was a point made by Buchanan in his essay 'Reciprocal Legitimation: Reframing the Problem of International Legitimacy'.⁴⁴ Buchanan argues that, under the right conditions, cooperation between international institutions and states could result in a type of reciprocal legitimation. By submitting themselves to certain international legal obligations, states could render themselves more legitimate in relation to their own citizens. Think, for example, of states acceding to human rights treaties. It would be an odd position to argue that some undemocratic states could not consent to such treaties because they had previously violated the human rights of their citizens. If anything, this would be all the more reason to recognise their consent. More subtly, if it were the case that, by allowing an undemocratic state to participate in a trade deal the lives of their citizens would improve, then one should take seriously the position of accepting their consent even though that consent in no way derives from – or is authorised by – the citizens themselves.⁴⁵

Recognising the consent of undemocratic states, however, would need to be done on a case-by-case basis, and not become the norm (as is current international practice). There are, for example, real moral concerns about allowing illegitimate states to participate in international agreements *as if* they were legitimate. Sanctifying illegitimate rule in this way could have detrimental consequences for a state's own domestic population. Someone like Leif Wenar, for example, might argue that we should distance ourselves from grossly illegitimate states (at least in terms of importing their resources) so as to incentivise an internal legitimation process.⁴⁶

The reader, at this stage, will be forgiven for believing that I am committing a contradiction. On the one hand, I am arguing that the consent of undemocratic states cannot

⁴⁴ Buchanan, A. (2011) 'Reciprocal Legitimation'.

⁴⁵ This is basically the position that 'paternalism' is justified when the 'would-be consenter' is unable to consent. A classic example of this would be that of family members paternalistically making decisions for a coma patient. However, this type of paternalism would only be justifiable under consent theory if the person making decisions for the 'would-be consenter' does so on the basis of what the 'would-be consenter' mostly likely would've done (had they been able to consent), and not what the decision-maker would necessarily do themselves.

⁴⁶ See, for example: Wenar, L. (2011) 'Clean Trade in Natural Resources'.

legitimate international law, but on the other, that we should nevertheless (at least in some circumstances) recognise the consent of undemocratic states. This apparent contradiction can be resolved by clarifying ‘who’ the relevant actors are in each scenario, and by reminding ourselves of my definition of legitimacy.

First, when I argue that ‘the consent of undemocratic states cannot legitimate international law’, what I am really saying is that the consent of an undemocratic state puts the citizens of that state under no (political) obligation to obey any relevant international law. To be clear, this does not mean that those citizens ought not to obey international law *if they so choose*. It also does not preclude the possibility that some other factor – other than state consent – is creating an obligation to obey international law for those citizens. Rather, the problem of authorisation simply states that the very fact of the undemocratic state’s consent – on its own – does not create any obligations for those citizens.

Second, when I argue that ‘we should – at least in some circumstances – recognise the consent of undemocratic states anyway’, I am not making a claim about the ‘legitimacy’ of international law in relation to the citizens of undemocratic states. It is no contradiction to believe that there are good moral or prudential reasons to act ‘as if’ the consent of an undemocratic were valid, and also that that consent has no normative significance for the citizens of the undemocratic state. There is no necessary reason to presume that the imposition of international law on non-consenting citizens is any worse than the imposition of domestic law; especially if it is a choice between the two. If the choice is between a domestic government that does not recognise the interests of its own citizens, and international law that does, then extending the influence of the international community over those citizens seems the morally preferable option. Again, however, this says nothing about the political obligations that those citizens may or may not be under in relation to international law or the international community.

5.1.5 Summary

In conclusion, the problem of authorisation presents a serious problem for any straightforward theory of state consent; especially for states that are – in whole or in part – monist in relation to international law. This is simply because our primary concern ought to

be the autonomy and equality of individuals; not of states. States are only instrumental in ensuring the autonomy and equality of the individuals within them, and can only be effective in this instrumental capacity if they are sufficiently authorised by those individuals to consent on their behalf.

As a consequence, I have argued that the problem of authorisation shows that only the consent of deliberatively democratic states could be sufficient to legitimate international law. This fact should not automatically entail that undemocratic states are denied participation in the international legal system altogether. This is because participation could increase the legitimacy of such states and be a benefit to their citizens.

Ultimately, the problem of authorisation for state consent demonstrates that the traditional theory of state consent is insufficient to legitimate international law. To be plausibly sufficient, we could amend the traditional theory with the proviso that consenting states ought to be democratic. In other words, a ‘theory of *democratic* state consent’ stands a better chance of being sufficient for the legitimacy of international law. However, as mentioned, this thesis aims to assess the theory of state consent *as it is*; not as it might be.

5.2 The Problem of Immoral State Consent

The above sections analysing the sufficiency of state consent (sections 4.1, 4.2, and 5.1) have primarily discussed concerns as to whether requirements of valid and morally efficacious consent (i.e., consent that is free, informed, and authorised) could be satisfied in the context of a state consenting to international law. These requirements were designed to preserve the autonomy of the consenter (or of those on whose behalf the consenter was consenting). It is important to note that these previous arguments were all consistent with the idea that *if* state consent could satisfy the requirements of valid consent, then it would be sufficient for the legitimacy of international law. Their main concern was only that valid consent is *not* being, or could not be, achieved at the international level. It is equally important to remember that state consent attempts to legitimate international law in an entirely *procedural* way. This is to say that it indicates no ‘substantive’ requirements for the ‘content’ of legitimate law. As long as a law has received valid consent, it is legitimate, irrespective of its content.

This section, however, considers the claim that, to be legitimate, international law must satisfy some substantive requirements. It is not enough, on this view, to look at the procedure by which a law was made; one must also analyse the content of that law to evaluate its legitimacy. State consent – being only procedural – is therefore insufficient for the legitimacy of international law. The main concern here is that, within consent theory, there is nothing preventing an agent from consenting to immoral agreements; and an immoral agreement, say some, cannot be legitimate. (It needs to be stressed that ‘immoral’, in this context, is referring to ‘something for which we have a moral *duty* not to do’. In this sense, it is a matter of *justice*, and can be used synonymously with the term ‘unjust’. I use the word ‘immoral’ only to be consistent with the existing literature). The logic behind the ‘immoral state consent’ objection is simple: an international law cannot be legitimate if we have a moral duty not to obey it. This would remain true whether or not that law had received state consent. To argue against this would be contradictory as it would imply that we can have a moral duty to obey an international law, and also a duty not to obey that same law.

Horton holds to the immoral consent argument when he explains that, ‘there are some actions which a person does not have the right to do, even if that person promises, contracts or consents to do them. Consent cannot normally create an obligation to do that which is seriously morally wrong.’⁴⁷ Horton is not alone. Indeed, such a view is commonplace. Christiano asserts straightforwardly that consent must not be given to ‘obviously and seriously immoral commands’.⁴⁸ Held & Maffettone agree when they say that to conceive of consent as sufficient for legitimacy ‘may be deeply counter-intuitive if what is consented to is grossly immoral.’⁴⁹ For example, if an institution receives widespread support from its members, but at the same time violates basic human rights, we would be hesitant to bite the bullet and accept that the mere fact of consent is sufficient for the legitimacy of that institution. This problem, affirm Held & Maffettone, ‘tells us that a completely procedural view of the legitimacy of an institution based on consent intuitively runs counter to our considered convictions about... sufficient... conditions for legitimacy.’⁵⁰

⁴⁷ Horton, J. (1990) *Political Obligation*: p.43

⁴⁸ Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.383

⁴⁹ Held, D. & Maffettone, P. (2016b) ‘Legitimacy and Global Governance’: p.119; see also: Estlund, D. M. (2009) *Democratic Authority: A Philosophical Framework*.

⁵⁰ Held, D. & Maffettone, P. (2016b) ‘Legitimacy and Global Governance’: p.120

There are two interpretations of the problem of immoral state consent: 1.) immoral state consent as ‘harm to others’, and 2.) immoral state consent as ‘self-harm and unfairness’. I will begin by considering the former.

5.2.1 *Immoral Consent as Harm to Others*

It is clearly the case that consent transactions have the capacity to cause significant harm to other agents. Horton, for example, points to the idea of a ‘contract to kill’ a third-party.⁵¹ Merely consenting to such an agreement does not seem to make it legitimate. Another – fairly intuitive – example is when an *obligation* is imposed on an agent not party to the consent transaction. Having external obligations imposed on another is the very antithesis of autonomy and is precisely what consent is meant to protect against. Thus, being subject to obligations against one’s will is a harm in the sense that one’s negative public autonomy has been violated. International legal practice already recognises the forcible imposition of obligations as a harm significant enough to invalidate international law. Article 34 of the Vienna Convention on the Law of Treaties states that ‘a treaty does not create either obligations or rights for a third state without its consent’.⁵² This general rule is known by the maxim *pacta tertiis nec nocent prosunt*.⁵³

As mentioned, the wrongness of imposing obligations on a third-party without their consent is fairly intuitive, and the prohibition against it is to be expected as it is consistent with the principle of state sovereignty. Other examples, however, are less clear, and the problem of ‘harm caused’ to third-party states is more nuanced in practice. Voyiakis, for example, notes that ‘an economic alliance between states A and B may not create *obligations* for state C, but it may limit the market for that state’s exports’ [emphasis added].⁵⁴ To borrow

⁵¹ Horton, J. (1990) *Political Obligation*: p.43

⁵² It should be noted that the VCLT refers only to harms caused to other ‘states’, however, I see no reason why this should not extend to other agents, including individuals. It should also be noted – as explained by Kaczorowska-Ireland – that whether there are ‘any exceptions to the general rules that treaties are only binding on contracting parties exist is a matter of controversy’. See: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.104. Views differ, for example, as to whether Article 2(6) of the UN Charter imposes obligations on states who are not members of the UN. Article 2(6) provides: ‘The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security’.

⁵³ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.104. For a more in-depth discussion see: Fitzmaurice, M. (2002) ‘Third Parties and the Law of Treaties’.

⁵⁴ Voyiakis, E. (2010) ‘International Treaties’: p.113

a term from economics, this problem – highlighted by Voyiakis – could be labelled a problem of ‘negative externalities’.

In economics, ‘externalities occur in an economy when the production or consumption of a specific good impacts a third party that is not directly related to the production or consumption.’⁵⁵ Externalities can be either positive or negative, although *negative* externalities, by definition, are the ones that are cause for moral concern. An example of a common negative externality would be ‘pollution emitted by a factory that spoils the surrounding environment and affects the health of nearby residents.’⁵⁶

Negative externalities are readily acknowledged in the domestic sphere, and domestic law often makes provision to mitigate against them. One such example in UK law are the planning obligations set out in section 106 of the *Town and Country Planning Act 1990*. These planning obligations (commonly known as s106 agreements) are a mechanism that help to mitigate the negative externalities of new property development. As Smith explains:

‘Concerns about new infrastructure are sometimes met by the local council imposing planning obligations on developers. New developments in a particular area may bring with them wider impacts on the local area... New facilities may therefore need to be built or upgraded to cope with this extra demand and this needs to be paid for. Section 106 of the *Town and Country Planning Act 1990* (as amended) allows developers to enter into “planning obligations” with a local authority in order to secure planning permission for a development... [These] obligations may be either in cash or kind, to undertake works, provide affordable housing, or provide additional funding for services.’⁵⁷

In relation to international law, we can say that a negative externality occurs when the realisation of an international legal agreement (negatively) impacts a third party.⁵⁸ Negative

⁵⁵ Investopedia (2017) ‘Externality’ [Online]

⁵⁶ Ibid.

⁵⁷ Smith, L. (2016) ‘Planning for onshore wind’.

⁵⁸ As noted by Kaczorowska-Ireland, Article 2(1)(h) VCLT defines a third-party State as a State not party to a treaty. Accordingly, a State may participate in the negotiation of a treaty, have some important connection with the intended contracting States but not become a contracting party unless it ratifies the treaty. See: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.104

externalities arise from state consent simply because states do not interact with one another in isolation.⁵⁹ Due to the processes of globalisation, states have become increasingly intertwined as people, goods, services, money, and information flows between them at greater speeds, in greater volumes, and with fewer restrictions. Keohane and Nye have labelled this situation as being one of 'complex interdependence' between states.⁶⁰ The problem of complex interdependence raises a number of normative concerns for traditional conceptions of sovereignty and state independence. For example, Hurd observes that, 'since changes in one state's monetary policy such as the interest rate can have large and immediate effects on the economic conditions in other states, it is not self-evident how to draw the line between the rights of one state to set its own interest rates and the rights of others to be independent from outside influence.'⁶¹

The same problem can occur when states consent to international law. For example, when the countries of the EU (then the EEC) committed to establish the EU Customs Union in 1957, all parties bound by that common external tariff gave their valid consent (to the Treaty of Rome).⁶² From the viewpoint of the international lawyer, therefore, the international law establishing the Customs Union was (and is) legitimate. However, the formation of this Customs Union arguably produced negative externalities for third-party states (states not signatory to that agreement).⁶³

Most straightforwardly, all other export markets (exporting into the EU) were put at an immediate competitive disadvantage. Given the tariffs they were having to pay to gain access to the Customs Union, the goods made by non-EU producers were relatively more expensive within the EU compared with like-for-like EU producers. As one can imagine, this particularly affects the economic growth of less-competitive developing economies who are net-exporters, and who thus rely heavily on the revenue generated from their exports for economic growth (e.g. Vietnam, Equatorial Guinea, and the Republic of the Congo).⁶⁴ But the

⁵⁹ See: Bodansky, D.M. (1999) 'The Legitimacy of International Law: A Coming Challenge for International Environmental Law'; and Christiano, T. (2011) 'Is Democratic Legitimacy Possible for International Institutions': p.90

⁶⁰ Keohane, R.O. & Nye, J.S. (2001) [1977] *Power and Interdependence*.

⁶¹ Hurd, I. (2011) *International Organizations*: p.8

⁶² The Treaty of Rome (1957). See, esp.: Art. 3(b).

⁶³ Juma, C. (2015) 'How the EU starves Africa into submission'. See also: Juma, C. (2015) *The New Harvest: Agricultural Innovation in Africa*.

⁶⁴ World Bank Data (2018) 'Exports of Goods and Services (% of GDP)'.

impact of these external tariffs, argues Calestous Juma, 'goes well beyond lost export opportunities. They [also] suppress technological innovation and industrial development among [in Juma's example] African countries'.⁶⁵ Juma gives the following example. The tariff charged on unprocessed roasted coffee exported into the EU is 7.5%. The tariff charged on *processed* cocoa products like chocolate bars or cocoa powder is 30%. These higher charges for processed goods 'denies the continent [Africa] the ability to acquire, adopt and diffuse technologies used in food processing.'⁶⁶ The extended effects of this are perhaps even worse. Juma explains that 'usually, the know-how accumulated from processing exports such as coffee could be adopted for use on other crops and in other sectors. This in turn would help to stimulate industrial development and generate employment'.⁶⁷ Thus, the pressure on these African countries to export raw materials rather than processed goods 'undermines technological innovation in the wider economy, not just in agriculture'.⁶⁸

This example, then, shows that (even seemingly benign) international consent transactions have the capacity to cause negative externalities. The real question, however, is whether these externalities are harmful enough to delegitimize the international law that created them. This will ultimately depend on how we think about our pre-existing moral obligations since – as noted earlier – a law cannot be both legitimate and unjust. If we are under pre-existing moral obligations not to cause certain types of harm, then we are not at moral liberty to consent to international law that inflicts that harm. The case of the EU Customs Union seems to be a moral grey area in this regard. We may agree that inadvertently stunting the economic development of African countries is undesirable or bad, but is it a matter of (in)justice? Are we *duty bound* to refrain from any activities that may cause this to happen? Does it make a difference if this harm is an unintended consequence, rather than the primary purpose, of that action? I don't intend to adjudicate on this particular example, as it would require a far more in-depth and careful analysis. However, it isn't difficult to imagine far more clear-cut examples whereby the harm inflicted upon third-parties is so severe as to render it morally impermissible.

⁶⁵ Juma, C. (2015) 'How the EU starves Africa into submission'.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

All this seems to point to the conclusion that state consent is not sufficient for the legitimacy of international law. This is because the content of the law, to be legitimate, must be such that it does not constitute an injustice for a third-party. As the theory of state consent is purely procedural, and makes no requirement for the content of international law, it cannot be sufficient (in all instances) for its legitimacy.

This argument, however, does not quite follow. It is perfectly true to argue that the injustice of an international law would preclude that law's legitimacy. However, it does not follow that state consent is therefore insufficient to legitimate international law. The confusion arises, I think, in the ambiguous statement that state consent is a purely 'procedural' theory of legitimacy. It is wrong to assume that consent theorists are unconcerned with the substance of a proposed law. After all, if they were unconcerned, how could they make a determination as to whether that law required consent for its legitimacy? Consent theory is only procedural in the sense that once consent *has* been given, then that consent is sufficient for the legitimacy of that law.

The problem of immoral state consent – or at least this first version of it – therefore represents a flaw in the operation of the current international legal system, and *not* in the theory of state consent *per se*. This is because the grievance that state consent can cause severe negative externalities for third-party states is not an argument against state consent as such, but a complaint that state consent is not being obtained from all relevant parties. If state consent *were* to be received from all those states incurring sufficiently harmful externalities, then any resulting international law would be legitimate. So, on this view, if African countries (and anyone else) sufficiently harmed by the EU Customs Union also consented to its establishment, then, as a piece of international law, it would be legitimate irrespective of the 'harm' caused to those countries. In fact, from the consent theorist's perspective, the very fact of consent would entail that the 'negative' externalities would no longer constitute a harm. After all, as the consent theorist would say, 'the willing person is not wronged'.

The proposition that consent ought to be obtained from third-party states – because they are 'harmed' by international agreements – is a radical departure from domestic contract

law (at least in the UK).⁶⁹ This departure, however, may be justifiable. In the UK, a court will not find a contract to be illegitimate (void) simply because a third-party is sufficiently harmed. In other words, there exists no requirement that contracts do not harm third-parties. Crucially, however, there *is* a requirement that domestic contracts be *legal*. In other words, the terms of a contract cannot violate pre-existing UK primary or secondary legislation. Thus, to the extent that UK primary and secondary legislation protects individuals from harm, valid domestic contracts are *unable* to harm third-parties. However, little comparable primary or secondary legislation exists at the international level, and thus there is very little protection available against harm for third-party states.⁷⁰ Given this, requiring the consent of those sufficiently harmed by international law, and not merely those party to the international legal agreement, may be a reasonable means by which to compensate for the lack of primary and secondary legislation. In keeping with consent theory's maxim that 'the willing person is not wronged', those adopting this position would be ensuring that all those 'wronged' are willing.

5.2.2 Immoral Consent as Self-Harm and Unfairness

Some, however, would dispute even this, i.e., that international law is unharmful (and therefore legitimate) just because all relevant parties have given their valid consent. In other words, they would want to claim that 'the willing person *may* be wronged'. This brings us to the second strand of the problem of immoral state consent. Whereas the first argued that some consent transactions were immoral because they failed to obtain the consent of all those harmed (a position consistent with state consent theory), the second strand argues that some consent transactions are immoral irrespective of any consent that has been given (a position *inconsistent* with state consent theory). Christiano, for example, argues that even exchanges entered into voluntarily and knowingly might still be morally quite defective.⁷¹ The 'most serious problem' with the state consent theory of legitimacy, he says, is that it allows

⁶⁹ For a discussion of the key differences between international agreements and domestic contracts, see: Christiano, T. (2011) 'Is Democratic Legitimacy Possible for International Institutions': pp.86-90

⁷⁰ Arguable exceptions to this might include those 'general principles' or '*jus cogens*' norms that act as constitutional-type laws in the international sphere. See section 6.2 for an in-depth discussion.

⁷¹ Christiano, T. (2012) 'The Legitimacy of International Institutions': p.385; see also: Christiano, T. (2010) 'Democratic Legitimacy and International Institutions': p.126

for severe ‘bargaining asymmetries’ or ‘hard bargaining’, which can create ‘a great deal of unfairness’.⁷²

The problem of asymmetric bargaining was considered previously in section 4.1 as a potential threat to the voluntariness (and therefore validity) of state consent. In that section, however, I argued that bargaining asymmetries should not be thought of as a problem of voluntariness, but should instead be used to point out that consent theory has very little concern for standards of fairness. To remind ourselves: bargaining asymmetries occur when two negotiating parties have vastly unequal bargaining positions. The stronger party is at a distinct advantage because they are ‘credibly able to threaten withdrawal from the arrangement while the other is not’.⁷³ This may result in ‘treaties which are ‘unequal’ either because of their substance (e.g. because they impose on one party only obligations and grant to others only rights, or they impose extreme restrictions on the sovereignty of one party only), or because of the unequal procedure (e.g. they are concluded under political, or economic coercion)’.⁷⁴ Thus, says Kumm, ‘it is doubtful that much legitimating value can be placed on a state’s consent to a treaty when the state is confronted with a take it or leave it option and the costs of not participating are prohibitively high’.⁷⁵

Christiano claims that ‘asymmetrical bargaining has been by far the most serious objection to the claim of international institutions to legitimacy. Complaints about the [UN] Security Council, the International Monetary Fund (IMF), the World Bank, and the World Trade Organisation (WTO) are all instances of this phenomenon.’⁷⁶ The IMF, in particular, is a frequent target of this criticism. One of the primary functions of the IMF is to act as a ‘lender of last resort’. As Hurd explains, IMF loans are made in response to an unsustainable situation in a member state’s balance-of-payments or foreign exchange positions.⁷⁷ The paradigmatic instance of this is when foreign investors lose confidence in the stability of a local currency causing a ‘run’ on that currency. ‘The IMF’s lending program is intended to greatly increase a government’s access to foreign currency, with which it can buy the local currency being sold

⁷² Christiano, T. (2010) ‘Democratic Legitimacy and International Institutions’: p.125

⁷³ Christiano, T. (2010) ‘Democratic Legitimacy and International Institutions’: p.125

⁷⁴ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.101

⁷⁵ Kumm, M. (2004) ‘The Legitimacy of International Law’: p.914

⁷⁶ Christiano, T. (2010) ‘Democratic Legitimacy and International Institutions’: p.126; see also: Pauwelyn, J. (2000) ‘Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach’: p.335; and Hathaway, O. and Hongju Koh, H. (eds.) (2005) *Foundations of International Law and Politics*: p.283.

⁷⁷ Hurd, I. (2011) *International Organizations*: p.74

by fleeing investors.⁷⁸ This is what happened, for example, during the 1997 Asian Financial Crisis. The IMF, however, will make the loan conditional on the borrowing government implementing certain economic policies which, in theory, are aimed at rectifying the underlining problems that led to the balance-of-payments crisis. These conditions attached by the IMF often include 'structural adjustment' programmes, such as privatisation of industries and deregulation. They may also include changes to the country's tax policies, monetary policy, and banking regulations.⁷⁹

Given the function of the IMF, then, one could argue that the legal arrangement negotiated between the borrowing country and the IMF is necessarily *characterised* by bargaining asymmetries. The borrowing country is in crisis, and, as such, must effectively accept the terms of the IMF's offer on a 'take-it-or-leave-it' basis.⁸⁰ As a result, many countries are 'forced' to consent to deals they believe to be unfair, and, in many cases, deals that have turned-out to be harmful. For example, in 2001, Argentina was forced by the IMF (it is argued) into a policy of fiscal restraint which 'led to a decline in investment in public services which arguably damaged the economy'.⁸¹

From a strict consent theorist point-of-view, there is nothing problematic about the legitimacy of the agreements made between the IMF and borrowing countries. Both parties give explicit consent to the terms of the agreement, and thus each retain their autonomy and formal equality. However, it is precisely because the consent theorist finds nothing problematic that people like Christiano question whether state consent is sufficient for the legitimacy of international law. Intuitively, we feel as though there *is* something morally problematic about such agreements; and state consent theory fails to address this concern.

Christiano believes that, to meet requirements of fairness, agencies such as the IMF, must ensure that desperate borrower countries have an 'adequate voice in the process of structuring the loans.'⁸² In general, he thinks unfair asymmetric bargaining can be held in check by diminishing economic inequalities among the negotiating parties, and by

⁷⁸ Ibid.

⁷⁹ Ibid.: pp.74-5

⁸⁰ It should be noted that, technically, the IMF does not make an 'offer' as, to initiate the negotiations, the borrower must approach the IMF.

⁸¹ Pettinger, T. (2012) 'Criticism of IMF'.

⁸² Christiano, T. (2012) 'The Legitimacy of International Institutions': p.392

‘establishing independent standards of fairness in the process of forming agreements, which are then implemented in international agreements.’⁸³

The doctrine of unequal treaties has also been written about by Soviet and Chinese writers and has received considerable support from post-colonial states.⁸⁴ These authors point primarily to the allegedly unequal bilateral treaties ‘concluded in the second half of the nineteenth century and the first half of the twentieth century between Western countries, the US and some Latin American countries, on the one hand, and Asian States and African States, on the other.’⁸⁵ One notable legal example from this period was the *Case Concerning The Territorial Dispute (Libyan Arab Jamahiriya v Chad)*. In this case, ‘Libya argued that a treaty negotiated in 1955 between itself and France, although valid, should be interpreted favourably towards Libya because, at the time of negotiation, Libya lacked experience in the negotiation of international agreements especially compared to the experience of the French negotiators’.⁸⁶ As it happened, the ICJ rejected Libya’s reasoning, and the doctrine of unequal treaties appeared to have lost some relevance.⁸⁷

Although we might agree with Christiano and others that international agreements are often plagued by unfairness, the real question we need to answer is whether this unfairness constitutes an injustice *such that* the resulting international law is illegitimate. It is important to remember that we are not looking to evaluate international law in terms of justice, but in terms of legitimacy. The fact that some international law may not achieve some ‘thicker’ understanding of international justice – as proposed by, for example, by Thomas Pogge⁸⁸ – does not necessarily entail that it is illegitimate. Indeed, as explained in chapter two, the concept of legitimacy is useful for us precisely when we disagree about what constitutes justice, or when full justice is unattainable. Standards of legitimacy, therefore, must necessarily be ‘weaker’ than those of justice. The contention set-out at the beginning of this section was not that law failing to meet standards of justice cannot be legitimate, but

⁸³ Christiano, T. (2010) ‘Democratic Legitimacy and International Institutions’: p.128

⁸⁴ See, for example: Tunkin, I. (1986) *International Law: A Textbook*: pp.48-9; Fung, E.S.K. (1987) *The Chinese Nationalists and the Unequal Treaties 1924-1931*; and De Jonge, A. (2014) ‘From Unequal Treaties to Differential Treatment: Is There a Role for Equality in Treaty Relations’: p.125

⁸⁵ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.101

⁸⁶ Ibid.: p.102

⁸⁷ Ibid.

⁸⁸ Pogge, T. (2008) *World Poverty and Human Rights*.

that laws that are *unjust* cannot be legitimate. There seems to be some significant moral distance between international laws that are ‘not perfectly just’, and those that are ‘unjust’.

With this in mind, we shouldn’t rule out the possibility that international law can be both legitimate and – to some degree – morally defective. Thus, just because we observe unfairness in an international agreement does not mean we should jump straight to the conclusion that each party to that agreement does not have a moral obligation to obey the resulting international law. Although setting high moral standards for the legitimacy of international law may seem like an attractive idea, it will also have its unintended consequences. Christiano himself points out what these might be. If, for example, ‘symmetric’ bargaining was made a pre-condition for legitimate international law, then wealthier states may simply refrain from negotiating agreements with poorer states entirely.⁸⁹ If, as Christiano accepts, agreements with more equitable distributions of the goods exchanged are spurned in favour of other agreements, ‘then we will have equity but greater poverty.’⁹⁰

One may agree with the notion that morally defective agreements may still be legitimate, but nevertheless point-out that strictly adhering to the ‘sufficiency of state consent’ position would lead to moral absurdities. For example, would an agreement whereby a state consented to be the recipient of war or genocide really be legitimate, just because that state gave valid consent? This, after all, seems to be the logical conclusion of the state-consent theorist’s position. The *jus cogens* norms of international law already prohibit such acts of self-harm. However, since international law is supposed to be premised on the state consent model, are such prohibitions not contradictory? There are two brief points that could be made in response to this apparent *argumentum ad absurdum*.

First, the *jus cogens* prohibitions on state’s consenting to severe self-harm might be explained with reference to, what Kleinig calls, ‘practical policy reasons’.⁹¹ In other words, the ostensible irrationality of such an act would give ‘reason to doubt the genuineness of consent to self-harm, and it may be difficult to sort out those cases in which the consent is both genuine from those in which it is not.’⁹² Put simply, consent to self-harm might lead one to be suspicious that the ordinary requirements of valid consent – such as ‘voluntariness’ and

⁸⁹ Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.386

⁹⁰ Ibid.

⁹¹ Kleinig, J. (2010) ‘The Nature of Consent’: p.21

⁹² Ibid.

‘knowledge’ – are not being satisfied. This, however, would be to make a different argument about the ‘validity’ and not about the ‘immorality’ of consent.

There is also the argument that a state consenting to ‘self-harm’ should not be thought of as ‘self’-harm at all. The confusion arises with the mistaken belief of states as ‘autonomous’ or ‘artificial persons’ (as discussed previously under the ‘problem of authorisation’ in section 5.1) and the poor analogy that is often made between states and individuals. States, unlike individuals, are not unitary agents; they are a collection of individuals. Thus, when an individual consents to be harmed, they are only harming themselves (which, under consent theory, is justifiable). When a state consents to be harmed, however, it is unlikely to be an actual instance of ‘self-harm’. What is usually taking place is that state representatives are consenting to arrangements that harm other citizens within the state. This, then, is not necessarily a problem about the substance or ‘immorality’ of state consent, but actually refers back to the problem of authorisation (section 5.1) and the ‘validity’ of state consent.

Thus, although this second strand of the problem of immoral state consent highlights the fact that ‘legitimacy’ is not synonymous with ‘morally just’ or ‘desirable’, it does not demonstrate – on its own – that state consent is insufficient for the legitimacy of international law.

5.2.3 Summary

In sum, the problem of immoral state consent is essentially an argument against the idea that a purely procedural view of the legitimacy of international law – such as state consent – can be sufficient. To be sufficient, goes the argument, the content or ‘substance’ of international law must also meet morally acceptable standards.

What I have shown in this section, however, is that the ‘problem of immoral state consent’ can actually be separated into two different arguments. First, there is the argument that ‘international-law-creating’ state consent transactions are ‘often’ immoral because not all relevant states have given their consent. This argument is directed, not towards the theory of state consent, but the application of that theory in the international legal system. As such, it is actually not an argument against the sufficiency of state consent. Instead, it implicitly argues that state consent could be sufficient if applied properly; the problem is simply its

misapplication. Needing to obtain the consent of parties harmed by – but not party to – an agreement is not common in domestic law, but such a requirement could possibly be justified in international law as the latter does not have an underlying framework of laws protecting against such harms. A strong case could therefore be made about the need to establish some type of ‘harm principle’ in international law. This principle would help determine when states are at moral liberty to create international law, or when the consent of third parties is required. (This proposed ‘harm principle’ will be expanded upon in the conclusion to this thesis). This does not alter the fact, however, that this first version of the problem of immoral consent is, in practice, not a problem of the ‘immorality’ of the consent at all, but a defect in the procedure through which the consent was given.

The second strand of the immoral state consent argument is that international law can be immoral *even when* the theory of state consent has been applied correctly. This latter argument *is* an argument against the sufficiency of state consent to legitimate international law. My instinct was to caution against this position. When one looks closely at the reasons why states ought not to consent to ‘self-harm’, the defect tends to lie in that consent being invalid rather than immoral. In other words, there is something wrong with the procedure of that consent rather than the content of the international law *per se*. I also argued that we should be careful not to confuse standards of legitimacy with standards of justice; we should not conclude that international law is illegitimate just because it doesn’t conform to a conception of justice. We should, instead, be more lenient with our evaluations of what constitutes legitimate law, especially as we are unlikely to achieve international justice in an environment in which obedience to international law is infrequent.

My conclusion is, therefore, that the problem of immoral state consent – in either version – does not demonstrate that state consent is insufficient for the legitimacy of international law. What it does do, however, is draw our attention to the fact that, in many cases, it is questionable whether state consent theory is being applied ‘ideally’ in practice.

5.3 *Summary: The Sufficiency of State Consent*

We have now arrived at the end of our discussion on the sufficiency of state consent in legitimating international law. This discussion, spanning both chapters four and five, has

considered four potential objections: the problem of non-voluntary state consent; the problem of uninformed state consent; the problem of authorisation; and the problem of immoral state consent.

As was made clear, it is the third of these problems – that of authorisation – that I find to be the most damaging to the proposition that state consent is sufficient for the legitimacy of international law. This is because our primary concern ought to be the autonomy and equality of individuals; not of states. This is not something the standard theory of state consent takes into consideration. States are only instrumental in ensuring the autonomy and equality of the individuals within them, and can only be effective in this instrumental capacity if they are sufficiently authorised by those individuals to consent on their behalf. However, there is nothing in the theory of state consent, or indeed in most international legal practice, which suggests that such authorisation is prerequisite for state consent to have its intended effect of legitimating international law. The problem of authorisation, therefore, leads to the general conclusion that state consent is *not sufficient* for the legitimacy of international law. This is because there exists the further necessary requirement that states should be authorised to give consent by their citizens. In my view, this authorisation could be acquired by states instituting a system of sufficiently deliberative democracy.

This conclusion, however, is in need of at least two important caveats. The first is that the problem of authorisation does not seem to apply to states that are constitutionally ‘dualist’ in relation to international law. As explained in chapter one, a dualist country is one in which international law must be transposed into domestic legislation for it to have legal effect in that country. Thus, once transposed, international law will look no different to other examples of domestic law in that country’s statute book. Accordingly, this becomes an issue about the legitimacy of domestic law rather than international law – and not the subject of this thesis. The second caveat is that undemocratic states (i.e., states unauthorised to consent on behalf of their citizens) should not necessarily be prohibited from participating in the international legal system. This is because participation could encourage or incentivise the democratisation of such states, or be of material benefit to their citizens.

Ultimately, however, the problem of authorisation shows that the traditional theory of state consent is insufficient to legitimate international law. To be plausibly sufficient, we could amend the traditional theory with the proviso that consenting states ought to be

democratic. In other words, a 'theory of democratic state consent' stands a better chance of being sufficient for the legitimacy of international law. Suggestions as to how this might be realised in practice are set out further in the conclusion to this thesis.

I found the other three arguments against the sufficiency of state consent less convincing. To start, the problems of non-voluntary and uninformed consent – as seen in chapter four – were less arguments against the sufficiency of state consent in 'theory', and more about the consent of states in practice. Even then, I found that – in practice – these issues pose less of a problem than is often portrayed by others. This is not because others in any way misrepresent the facts of how the international system operates, but merely because they place a greater moral importance on some of these descriptive facts than I do.

Similarly, and although I recognise its strong intuitive appeal, I concluded that the problem of immoral consent does not – on its own – undermine the notion that state consent is sufficient as a means of legitimating international law. This is because, when we look closely, the problem of immoral consent is invariably not one relating to the content of the law, but the procedure by which it came to apply to a state or its people. I also argued that we should be careful not to confuse standards of legitimacy with standards of justice. In other words, we should not conclude that international law is illegitimate just because it doesn't conform to a conception of justice. We should be more lenient with our evaluations of what constitutes legitimate law, especially as we are unlikely to achieve international justice in an environment in which obedience to international law is infrequent.

The next (and final) chapter considers two arguments against the proposition that state consent is 'necessary' for the legitimacy of international law: the problem of 'immoral state *non*-consent', and the problem of 'non-consensual' international law.

THE NECESSITY OF STATE CONSENT

The previous two chapters dealt with the issue of whether state consent is sufficient for the legitimacy of international law (i.e., whether state consent can legitimate international law *on its own*). As we saw, there are valid reasons to suggest that state consent is *not* sufficient for the legitimacy of international law. This does not entail, however, that state consent is not *necessary*. To say that state consent is *necessary*, but insufficient, is to say that international law cannot be legitimate unless state consent has been given, although other necessary conditions must also be met. Alternatively, if state consent is *unnecessary* for the legitimacy of international law, then international law can be legitimate without receiving state consent at all. This section critically engages with two arguments for why state consent should not be thought of as necessary for the legitimacy of international law: the problem of ‘immoral state *non*-consent’, and the problem of ‘non-consensual international law’.

6.1 *The Problem of Immoral State Non-Consent*

The problem of immoral state *non*-consent, like the problem of ‘immoral state consent’ (discussed above in section 5.2), says that consent must be constrained by considerations of justice. However, this problem considers the flip-side of the previous argument. The problem of immoral consent said that, to what we have a moral duty *not* to do, we cannot give our consent. The problem of immoral *non*-consent, however, says that, to what we have a moral duty *to* do, we cannot withhold consent. Although both problems argue that consent must be bound by considerations of justice, the distinction between the two is important. The immoral consent problem argued that consent was insufficient, meaning that it may be necessary for legitimacy, but that other considerations concerning justice must also necessarily be satisfied. Immoral *non*-consent, however, argues that, when obeying international law is a moral duty, then one’s consent to that law is unnecessary; it is the fact that the international law is a matter of justice, and not the giving state consent, which makes it legitimate. The underlying logic here is that a law cannot both be a matter of justice and illegitimate.

6.1.1 '*Global Public Bads*' and Moral Duties

Lefkowitz presents the problem of immoral *non-consent* clearly as follows: In relation to consent to international law, 'if all individuals necessarily owe certain moral duties to non-compatriots [or all states owe moral duties to other states], and if they can discharge those duties only by treating international law as authoritative, then it follows that they have a moral duty to do so irrespective of whether they have consented to comply with those international laws.'¹ Framed differently, this problem could be thought of as a problem of creating negative externalities through *non-consent* (as opposed to creating negative externalities through *giving consent* – see section 5.2).² Thus, argue Held & Maffettone, 'the state consent theory of legitimacy becomes increasingly less tenable to the extent that withholding consent may have severe externalities.'³

The negative externalities created by non-consent are largely caused for the same reasons as those caused by giving consent (again, as seen in section 5.2). In the modern world, with its processes of globalisation and the advancement of production and technology, there have arisen multiple problems that do not confine themselves the borders of states. These problems – also referred to as 'global public bads' – include: climate change, pandemics, financial instability, difficulties in international trade, and nuclear proliferation.⁴ 'In our increasingly interconnected world', explains Held, 'these global problems cannot be solved by any one nation-state acting alone. They call for collective and collaborative action.'⁵ The same point is made by Guzman who argues that: 'we... live in a world with nuclear weapons, a warming climate, vanishing fisheries, grinding poverty, and countless other problems whose solutions require a high level of cooperation among states. Unless we change how we view the role of consent, it will be almost impossible to address these problems.'⁶ The severity of these global public bads, argues Christiano, means that general cooperation that aims to prevent or alleviate these bads is 'morally mandatory'.⁷ The state consent view of legitimacy, however, would seem to give 'unlimited opting-out powers' to states and, yet, given the global collective action problems we currently face, withholding consent from even

¹ Lefkowitz, D. (2016) 'The Legitimacy of International Law': p.110

² Kleinig, J. (2010) 'The Nature of Consent': p.9

³ Held, D. & Maffettone, P. (2016b) 'Legitimacy and Global Governance': p.123

⁴ Ibid.; see also: Christiano, T. (2012) 'The Legitimacy of International Institutions': p.388

⁵ Held, D. (2004) *Global Covenant*: pp.11-12

⁶ Guzman, A. (2011) 'The Consent Problem in International Law': p.6

⁷ Christiano, T. (2012) 'The Legitimacy of International Institutions': p.388

reasonable attempts at their solution may imply imposing severe costs on others.’⁸ This problem has been noted by many others.⁹

The basic argument here, then, against the necessity of state consent as a means to legitimate international law, is this: if proposed international law is necessary to address ‘global public bads’, and if addressing global public bads is a moral duty, then that proposed international law is legitimate whether or not states have given their consent. Again, this is based on the assumption that international law cannot be both a requirement of justice (i.e. morally mandatory) and illegitimate.

To add a practical dimension to our discussion, we can focus on two of the ‘global public bads’ mentioned by Held & Maffettone above (nuclear proliferation and climate change), and look at two recent real-world examples of when states have seemingly refused to cooperate in addressing these issues.

On 7 July 2017, a Treaty on the Prohibition of Nuclear Weapons was drafted and adopted at a United Nations Conference. As noted by Mills and Culpin, it was ‘the first multilateral, legally-binding, instrument for nuclear disarmament to have been negotiated in 20 years.’¹⁰ In overview, the treaty prohibits signatories from ‘developing, testing, producing, manufacturing, acquiring, possessing, stockpiling, transferring or receiving control over nuclear weapons or other nuclear explosive devices. It also prohibits them from using, or threatening to use such weapons.’¹¹ 122 out of 124 countries participating at the UN Conference voted in favour of the treaty (with The Netherlands voting against and Singapore abstaining).¹² Many saw this Treaty as crucial in achieving the goal of nuclear disarmament with the representative for Brazil declaring that the treaty could be ‘the missing piece in the puzzle’ of nuclear disarmament.¹³

However, many countries did not participate in the drafting or adoption of the Treaty, including – crucially – the nine states that actually possess (or are thought to possess) nuclear

⁸ Held, D. & Maffettone, P. (2016b) ‘Legitimacy and Global Governance’: p.123

⁹ See, for example: Helfer, L.R. (2008) ‘Nonconsensual International Lawmaking’: p.74; and Jackson, J.H. (2003) ‘Sovereignty-Modern: A New Approach to an Outdated Concept’: pp.782 & 795

¹⁰ Mills, C. & Culpin, L. (2017) ‘A Treaty on the Prohibition on Nuclear Weapons’: p.4

¹¹ Ibid.

¹² *United Nations General Assembly* (2017) ‘Draft Treaty on the Prohibition of Nuclear Weapons’; See also: Mills, C. & Culpin, L. (2017) ‘A Treaty on the Prohibition on Nuclear Weapons’: p.4

¹³ Cited in: Mills, C. & Culpin, L. (2017) ‘A Treaty on the Prohibition on Nuclear Weapons’: UK: p.3

weapons. Many of these states, including the United Kingdom, have stated that they have no intention of consenting to this Treaty. As such – under the existing state consent model of international law – they will be under no legal obligation to obey the Treaty or any of its provisions.

Moving to our second example, in December 2015 at a conference in Paris, representatives of 196 countries reached a historic agreement to reduce greenhouse gas emissions. The resulting Paris Climate Agreement commits parties to hold ‘the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.’¹⁴ The Agreement requires all parties to ‘put forward their best efforts through nationally determined contributions (NDCs) and to strengthen these efforts in the years ahead. This includes requirements that all Parties report regularly on their emissions and on their implementation efforts.’¹⁵ This agreement marked the first time that both developed and developing countries have committed to tackling greenhouse gas emissions.¹⁶

The United States signed the Agreement on 22 April 2016 and ‘accepted’ on 3 September 2016. The Agreement entered into force on 4 November 2016. However, on 1 June 2017, President Trump announced that the United States would be pulling out of the Paris Climate Agreement, stating: ‘as of today, the United States will cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country’.¹⁷ This included, he went on to say, ending both the implementation of the nationally determined contribution and US contributions to the Green Climate Fund.¹⁸

¹⁴ Paris Climate Agreement (2015): Article 2

¹⁵ Ibid.: Article 4. (It should be stressed that the specific climate goals are voluntary and thus politically encouraged rather than legally bound. Only the processes governing the reporting and review of these goals are mandated under international law).

¹⁶ Ares, E. & Hirst, D. (2015) ‘Paris Climate Change Conference’: p.3

¹⁷ Trump, D. (2017) ‘Statement by President Trump on the Paris Climate Accord’.

¹⁸ As per Article 28 of the Paris Agreement, the US is only legally allowed to withdraw from the Agreement three years from the date on which the Agreement entered into force. This will be just before the end of President Trump’s first term in office.

6.1.2 *Problems of Disagreement*

Those endorsing the problem of immoral state non-consent, then, may very well argue that, in the examples above, the Treaty on the Prohibition of Nuclear Weapons and the Paris Climate Agreement (given that they express an attempt to achieve morally mandatory outcomes) create legitimate legal obligations for all states, whether or not they choose to give their consent.

There are, however, a number of points that advocates of state consent might want to make in response to the above, and reasons for why we should be hesitant to dismiss the idea that state consent is necessary for the legitimacy of international law. As mentioned, the argument behind the problem of immoral non-consent is that: to what we have a moral duty *to do*, we cannot withhold consent. The first response by the consent theorist, therefore, might be to contest the notion that we actually know what we have a moral duty to do. Indeed, the usefulness of the concept of legitimacy – as discussed chapter two – stems precisely from the fact that it gives us moral obligations to obey the law *even when we disagree* as to whether that law is a matter of justice.

Whilst acknowledging the difficulty in agreeing upon requirements of justice in general, however, Held & Maffettone nevertheless argue that:

‘At least for a central class of cases that are at the heart of global governance [and international law], such as climate change, prudential financial regulations and nuclear proliferation, the types of externalities involved would, in the absence of cooperation, have important implications for the basic interests of humankind. Accordingly, they would be part of any plausible account of the kind of externalities we are not allowed to impose on others.’¹⁹

In other words, although we may not have a complete picture of the requirements of justice, there exist some potential harms so great that a failure to attempt to prevent them would clearly constitute an injustice.

Christiano, although agreeing with Held & Maffettone that a certain class of negative

¹⁹ Held, D. & Maffettone, P. (2016b) ‘Legitimacy and Global Governance’: p.123

externalities put states and individuals under a moral obligation to cooperate, does not agree that this necessarily renders state consent unnecessary. He explains that, although 'we are morally required to cooperate in solving these fundamental moral problems, there is a great deal of uncertainty as to *how* these problems can be solved' [emphasis added].²⁰ 'This type of uncertainty', he continues, 'provides a reason for supporting a system of state consent with freedom to enter and exit arrangements because it supports a system which allows for a significant amount of experimentation in how to solve the problems.'²¹ In other words, although we can agree that a failure to act in certain instances may cause an injustice, we may reasonably disagree as to how we should act to resolve or prevent that injustice. This reasonable disagreement, argues Christiano, leaves room for state consent. This being the case, we should be hesitant to force states to obey international law because we cannot be certain that any proposed international law will be the best means by which to solve a problem. Indeed, the proposed international law may produce unintended and counter-productive consequences. Thus, failing to recognise the consent of states, and effectively forcibly imposing obligations on them, would potentially be an unproductive means by which to achieve morally mandatory aims.

Indeed, in the two practical examples we looked at above, we find that, as Christiano pre-empted, the states in question refuse to give their consent, not because they (openly) disagree with *what* the laws are trying to achieve, but because they disagree with *how* those laws propose to achieve it. The British Government made a statement explaining that it was not going to sign the 2017 Treaty on the Prohibition of Nuclear Weapons because it: 'cannot and will not work'. Britain's Ambassador to the UN went on to state that:

'The British government firmly believes that the best way to achieve the goal of global nuclear disarmament is through gradual multilateral disarmament, negotiated using a step-by-step approach and within existing international frameworks [specifically the 1968 Nuclear Non-Proliferation Treaty]. A step-by-step approach to global nuclear disarmament is what we need to build trust and confidence. It will provide for tangible steps towards a safer and a more stable world where countries with nuclear weapons feel able to relinquish them. Finally... a ban on nuclear weapons will not in itself improve the international security environment, or increase trust and transparency

²⁰ Christiano, T. (2012) 'The Legitimacy of International Institutions': pp.388-9

²¹ Ibid.: p.389

between nuclear weapon possessor states and it will also not address the technical and procedural challenges of nuclear disarmament verification.’²²

Again, in the speech announcing the US’s withdrawal from the Paris Climate Agreement, President Trump did not refer to the general aims of the agreement as a reason for withdrawal (even though many suspect this might’ve been the case).²³ Indeed, in the speech he professes that he is ‘someone who cares deeply about the environment’ and actually admonishes the Paris Agreement for failing ‘to live up to our environmental ideals’.²⁴ Instead, he argues that the Treaty is unfairly and disproportionately burdensome for the United States because of its ‘onerous energy restrictions’ and the consequences it may bring for economic growth and jobs.²⁵

At this point, it is important to point out that Christiano’s defence of the necessity of state consent is heavily qualified by the consenting state being able to provide an ‘adequate explanation’ as to why the proposed international law would not contribute to solving the problem, and why some alternative might be superior. By ‘adequate explanation’ Christiano means one that ‘is not irrational, unscrupulous or morally self-defeating and that displays a good-faith effort to solve the problem at hand.’²⁶ Briefly, an ‘irrational’ explanation goes against vast majority of scientific opinion. An ‘unscrupulous’ one is one that is selfish in the sense of merely free riding on the efforts of others. A ‘morally self-defeating’ one insists on a different method of coordination, defeating a coordination solution that, in the circumstances, advances everyone’s interests.²⁷ If a state fails to provide such an adequate explanation, says Christiano, then the international law would be legitimate without the consent of that state, and that state may be legitimately forced to cooperate.²⁸

Although Christiano’s ‘adequate explanation’ qualification sounds intuitively

²² Rycroft, M. (2017) ‘A step-by-step approach to global nuclear disarmament is what we need to build trust and confidence’. (A similar justification for non-consent was given by other states. For example, Switzerland stated that: ‘Switzerland is committed to the goal of a world free of nuclear weapons, but also sees risks that this treaty may weaken existing norms and agreements and create parallel processes and structures which may further contribute to polarization rather than reduce it’. See: Sanders-Zakre, A. (2017) ‘States hesitant to Sign Nuclear Ban Treaty’.)

²³ Gustin, G. (2018) ‘Climate Denial Pervades the Trump White House, But It’s Hitting Some Limits’.

²⁴ Trump, D. (2017) ‘Statement by President Trump on the Paris Climate Accord’.

²⁵ Ibid.

²⁶ Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.389

²⁷ Ibid.

²⁸ Ibid.

appealing, it doesn't solve our primary problem of 'disagreement'. There is no reason to believe that states who disagree as to *how* a problem should be solved are any more likely to agree on whether the explanations they offer for this are 'adequate'. At some point, someone would need to make a decision as to whether the proposed international law is legitimate – but it's not clear who that someone should be. This is my central concern with 'the problem of immoral non-consent' – or indeed any theory which determines the legitimacy of international law with reference to its 'content' rather than 'procedure': it doesn't solve the problem of disagreement. This is crucial because – as I argued in chapter two – legitimacy, as a concept, is useful precisely because it (largely) avoids the problem disagreement by referring to the procedure by which a law was made to determine its normative status, and not the content of the law itself.

Given this, I would conclude that the Treaty on the Prohibition of Nuclear Weapons and the Paris Climate Agreement are not examples of legitimate international laws – at least in relation to those states that are unwilling to give their consent. This is not to say, however, that these proposed laws – or any action taken to enforce them – would not be morally justified. This may sound like a contradiction to the reader. However, the contradiction only arises if one assumes that I am using the terms 'legitimate' and 'morally justified' synonymously; which I am not. This ultimately comes down to how I have chosen to define 'legitimacy' in chapter two. A law is legitimate if and only if it derives its moral permissibility from the procedure by which it was made (i.e. is justified with reference to content-independent features of the law). This does not mean that the contents of laws are not morally significant; they are. All I am claiming is that the content of a law does not bear upon the 'legitimacy' of that law.

This point about legitimacy being a content-independent – rather than content-dependent – moral justification has created a fair amount of confusion in the literature. In fact, we see examples of theorists who – like me – have conceived of legitimacy as content-independent, but have still promoted content-dependent criteria for the legitimacy of international law. For example, Buchanan & Keohane argue that legitimacy entails 'that those to whom institutional rules are addressed have content-independent reasons to comply with them', and that 'one has content-independent reason to comply with a rule if and only if one

has a reason to comply regardless of any positive assessment of the content of that rule'.²⁹ However, in the very same essay, they write that institutions 'are legitimate only if they do not persist in violations of the least controversial human rights.'³⁰ This does not follow logically. First, Buchanan and Keohane define legitimacy as a content-independent justification for the right to rule, but then stipulate a content-dependent requirement (i.e. upholding human rights) that ought to be satisfied by an institution before it can claim legitimacy.

6.1.3 Summary

This section started by presenting the 'problem of immoral state non-consent'. In essence, this says that the non-consent of states can – in some instances – create negative externalities severe enough that they create 'global public bads' (such as climate change and nuclear proliferation) and thereby constitute an injustice. Given this – went the argument – proposed international law attempting to rectify those 'bads' are legitimate; with or without the consent of states. If correct, this argument would demonstrate that state consent is not necessary for the legitimacy of international law.

There was an epistemological flaw with this position, however, which was the difficulty of determining what does, and does not, constitute an injustice. Indeed, legitimacy is useful as a concept precisely because we can't often agree on the requirements of justice. Held & Maffetonne responded to this objection by noting that there are certain public bads that clearly fall foul of the requirements of justice. As such, the problem of disagreement is – to a greater or lesser extent – negated. Christiano, however, hits the ball back over the net by pointing out that, although there may be wide-spread agreement in certain instances as to 'what' constitutes a public bad, there is still likely to be disagreement as to *how* public bads should be resolved. This was demonstrated using the practical examples of Britain's objection to the Treaty on the Prohibition of Nuclear Weapons and President Trump's objection to the Paris Climate Agreement.

Having said this, Christiano also stated the need for non-consenting states to provide an 'adequate explanation' for their non-cooperation. This 'adequate explanation'

²⁹ Buchanan, A. & Keohane, R.O. (2006) 'The Legitimacy of Global Governance Institutions': p.411

³⁰ Ibid.: p.420

requirement, however, simply pushed the problem of disagreement back another stage; but did not overcome it. This is because all non-consenting states are likely to believe that their reasons for doing so are adequate. For me, this line of argument demonstrated the problem with theories that attempt to determine the legitimacy of international law with reference to the 'content' of the law rather than the 'procedure' by which it is created. Indeed, this was why – as set-out in chapter two – I defined legitimacy as a content-independent quality of a law: providing a content-independent explanation as to why one has a moral obligation to obey the law solves – to a large extent – the problem of disagreement and, as a consequence, of wide-spread coordination.

In general, the problem of immoral non-consent has shown us that, in such an interconnected global sphere, the refusal of states to cooperate to resolve transnational problems could constitute an injustice. However, the conclusion regarding legitimacy that one draws from this fact varies depending on how one has chosen to conceptualise 'legitimacy'.

If one assumes that 'legitimacy' is broadly synonymous with 'morally justifiable', then one is, in principle, lead to the conclusion that state consent would not be necessary for the legitimacy of international law. This is because, as Held & Maffettone convincingly argued, in certain exceptional circumstances, failing to consent could result in severe harms being inflicted on other states & individuals. It would thus be odd – in this scenario – to conclude that reasonable proposed international laws aimed at preventing this harm were illegitimate.

Having said this, I think this argument, even on its own terms, should be treated with caution. This is because, organising the international legal system based on the principle that state consent is unnecessary for the legitimacy of international law seems to leave weaker states defenceless in the face of the imposition of harms and obligations by stronger states. This is the argument that state consent is a necessary tool to prevent against 'predation' in the international realm.³¹ Thus – even if we were to accept this argument – it should only be in rare and specific circumstances that state consent is considered unnecessary. In this way, I think Buchanan's approach is sensible when he says that (democratic) state consent should be a *presumptive* necessary condition for the legitimacy of international law.³² In other words, the onus is on those states wanting to impose international law to demonstrate why non-

³¹ Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: p.192

³² Buchanan, A. & Keohane, R.O. (2006) 'The Legitimacy of Global Governance Institutions': p.415

consent to such law would constitute an injustice. The point of principle still remains, however, that if legitimacy is defined with reference to the content of a law, then proposed international laws that seek to prevent or rectify an injustice must be – in some basic sense – legitimate.

However, if one chooses (as I have) to define legitimacy as creating a content-‘independent’ obligation to obey the law, then the simple fact of state non-consent creating an injustice does not lead to the conclusion that any international law aimed at rectifying that injustice is ‘legitimate’. This is not to say that any action or proposed law would not be ‘morally justifiable’ in this regard. However – given that legitimacy is determined solely with reference to content-independent features of a law – such proposed laws would have no bearing on ‘legitimacy’ *per se*.

Thus, under my conception of legitimacy, the ‘problem of immoral state non-consent’ does not show that state consent is unnecessary for the legitimacy of international law. What it can claim to do, however, is demonstrate the limitations of the concept of legitimacy. Legitimacy does not offer us a complete picture of when it is or is not morally permissible to impose obligations on others. Instead, it only tells us when content-*independent* obligations exist. In this way, legitimacy is sufficient for the imposition of an obligation, but not necessary, for the simple reason that obligations may also be imposed for content-*dependent* reasons.

6.2 The Problem of Non-Consensual International Law

The final argument that I will consider is the problem of non-consensual international law. This is essentially an *argumentum ad consequentiam* (argument to the consequences). An *argumentum ad consequentiam* is an argument that concludes a hypothesis to be either true or false based on whether the premise leads to desirable or undesirable consequences. Thus, this final argument against the necessity of state consent is one that points to the implications, in practice, of believing that state consent *is* necessary for the legitimacy of international law.

It is simply a matter of fact, argue people like Buchanan and Christiano, that – despite state consent being the dominant model of international legal legitimacy – much of what we

consider to be international law today is not the product of state consent.³³ Here, Buchanan and Christiano are thinking primarily of '*jus cogens*' international law, and customary international law; but these are not the only examples that have been put forward. Similarly, Henriksen argues that it is a 'fallacy to assume that states cannot be bound by an obligation to which they have not consented'.³⁴ Thus, if state consent *were* necessary for the legitimacy of international law, then we would be forced to the (potentially) undesirable conclusion that much of what we currently think of as international law is actually illegitimate.³⁵ Below, I will set-out three sources of international law that are often thought not to be the product of state consent: 'customary international law'; 'general principles'; and '*jus cogens*'.³⁶

6.2.1 Customary International Law

The first source of international law that – it is claimed – often creates legitimate law without the consent of states is 'customary international law' (CIL). Put simply, CIL is law that is borne out of, and reflects, the behaviour (or 'general practice') of states.³⁷ In theory, CIL, although not receiving the explicit consent of states, does receive their *tacit* consent; as demonstrated through the customs (or actions) of states. As Klabbers explains, 'the standard position is this: if a state notices that a new rule of CIL is in the process of being created [through the practice of states generally], and it feels unable to accept it, it should make its opposition known. By objecting persistently, the state can ensure that it does not become bound'.³⁸ This is the 'persistent objector' doctrine.³⁹

³³ Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: p.188; and Christiano, T. (2012) 'The Legitimacy of International Institutions': p.387. See also: Tomuschat, C. (1993) *Obligations Arising for States Without or Against Their Will*: p.241

³⁴ Henriksen, A. (2017) *International Law*: p.22

³⁵ Buchanan, A. (2010) 'The Legitimacy of International Law': p.92

³⁶ This list of non-consensual sources of international law is not exhaustive. Some authors add additional sources, and some label and frame the categories differently. For example, Janis proposes the following three categories: 'General Principles of Law', 'Natural Law', and '*Jus Cogens*' (see: Janis, M.W. (2003) *An Introduction to International Law*). Guzman, on the other hand, includes the categories of: CIL, *Jus Cogens*, and UNSC Resolutions (see: Guzman, A. (2011) 'The Consent Problem in International Law').

³⁷ Klabbers, J. (2013) *International Law*: pp.26-9. (In addition, for a more in-depth discussion relating to the issues surrounding 'general practice', see: Kaczorowska-Ireland, A. (2015) *Public International Law*: pp.31-4

³⁸ Klabbers, J. (2013) *International Law*: p.30. See case study of Anglo-Norwegian Fisheries Case (UK v Norway) [1951], ICJ Rep 116.

³⁹ Stein, T.L. (1985) 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law: p.458

We can observe a practical example of this in the case of the Treaty on the Prohibition of Nuclear Weapons (discussed previously in this chapter). Following the support that this Treaty had received from most world states, France, the United Kingdom and the United States issued a joint statement making known their opposition to this new international law:

‘France, the United Kingdom and the United States have not taken part in the negotiation of the treaty on the prohibition of nuclear weapons. We do not intend to sign, ratify or ever become party to it. Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons. For example, we would *not accept any claim that this treaty reflects or in any way contributes to the development of customary international law* [emphasis added]’.⁴⁰

The reason these three countries felt compelled to issue this statement was because silence could’ve been interpreted as tacit consent to developing norms as set out in the Treaty.

Some, however – including Buchanan and Christiano – argue that CIL is very often not based on the consent of states; even their tacit consent. For one thing, notes Buchanan, ‘many principles of customary international law were developed before many states currently in the world had come into existence.’⁴¹ This particularly applies to the proliferation of former post-colonial states in the post-WWII period. Thus, although new states are bound by the principles of CIL, they were in no way involved in their development, and were unable to persistently object at the time.⁴² As Guzman argues, supposed ‘consent’ to CIL ‘turns out to be a necessary and unavoidable part of becoming a state. This is consent in the same sense that humans consent at birth to breathe in oxygen and breathe out carbon dioxide.’⁴³

This imposition of pre-existing CIL on new states is usually justified, explains Kaczorowska-Ireland, on the grounds that ‘new States, by entering in relations without reservations with other States, show their acceptance of all international law, including its customary rules. Further, to grant them the right to dissent would be highly disruptive to the

⁴⁰ *United States Mission to the United Nations*. ‘Joint Press Statement’ [Online, 7 July 2017]. See also: Mills, C. & Culpin, L. (2017) ‘A Treaty on the Prohibition on Nuclear Weapons’: p.6

⁴¹ Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: p.188; also: Buchanan, A. (2010) ‘The Legitimacy of International Law’: p.92

⁴² Guzman, A. (2011) ‘The Consent Problem in International Law’: p.33

⁴³ *Ibid.*: p.34

conduct of international relations.⁴⁴ The first justification – that new states, by entering into international relations with other states thereby tacitly consent to the entire corpus of CIL – is a weak one. This is because tacit consent to CIL is meant to be demonstrated through the ‘general practice’ of a state and, given that newly-formed states are by definition ‘new’, it is a stretch to suppose that they could’ve already exhibited any sort of ‘general practice’ that would signify their consent. The second justification – that allowing new states to dissent would be ‘disruptive’ – may be true, but it has no bearing on the question of the legitimacy of that international law in relation to state consent. It may also be noticed that the second justification undermines the first. On the one hand, it is said that new states have the ability to consent/non-consent to CIL, and on the other, that we can’t allow new states to non-consent because of the disruption it might cause.⁴⁵

Another argument is that, because CIL is based on the general practice of states – and not their explicit consent – it is not always clear whether or not states have *intended* their actions to be recognised as consent. Article 38 ICJ Statute recognises the significance of intentionality when it says that, to count as tacit consent to international law, the general practice of states must be accompanied by ‘*opinio juris*’; a sense of legal obligation.⁴⁶ In other words, states must intend their general practice to contribute to the establishment of legal norms. Needless to say, interpreting the intention of states and their representatives can be a messy business, and only increases the possibility that states may become bound by CIL without having tacitly consented. Simply relying on the persistent objector doctrine to determine intention (i.e. a sense of legal obligation) is problematic. This is because, as explained by Guzman, ‘a state might fail to object for any number of reasons having nothing to do with consent. 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.’⁴⁷ Guzman makes the related but additional point that, even when a state’s general practice ‘is’ accompanied *opinion juris*,

⁴⁴ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.38. See also: Sinha, S. P. (1965) ‘Perspective of the Newly Independent States on the Binding Quality of International Law’: p.121; and Shaw, M. (2003) *International Law*: p.86

⁴⁵ I should stress that I am not accusing Kaczorowska-Ireland of committing this fallacy as the justifications she presents are not necessarily ones that she would advance.

⁴⁶ See: Klabbers, J. (2013) *International Law*: pp.26-9, for a discussion of these two requirements.

⁴⁷ Guzman, A. (2011) ‘The Consent Problem in International Law’: p.33

simply ‘perceiving a legal requirement is not at all the same as consenting to that requirement.’⁴⁸ He says that: ‘for a state, a sense of legal obligation might reflect (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’.⁴⁹

Finally – and straightforwardly – Christiano points out that, unlike most treaty law, ‘there appears to be no way unilaterally to exit customary international law.’⁵⁰ ‘To be sure’, continues Christiano, ‘the law can be modified particularly through the making of treaties. But this cannot be done unilaterally.’⁵¹ To this extent, it is difficult to see how CIL is the product of ongoing voluntary (and thus valid) state consent.

There is little doubt that CIL plays an important part in the production of international law. If it did not exist, many disputes (in the absence of a treaty) would not easily be resolvable through legal means, and states would be at greater liberty to act capriciously and hypocritically without legal restraint. However, the arguments presented above (in addition to clear practical examples of this taking place) seem to force one to the same conclusion as Michael Akehurst that – at least in some cases – ‘a State can be bound by a rule of customary international law even if it has never consented to that rule’.⁵² It should be stressed that this is not the same as saying that CIL is *never* the product of state consent – in fact, I think it often is. Consider the example presented above of France, the UK and the US making their opposition to a developing norm explicit. The very fact that they felt the need to do this demonstrates that silence on their part – when given every opportunity to object – could reasonably be interpreted as tacit consent. What this section has demonstrated, however, is that the connection between much CIL and state consent is not obvious – if it exists at all.

6.2.2 General Principles of Law

The next type of purported ‘non-consensual’ international law is ‘general principles’. Of all the traditional sources of international law, general principles arguably have the strongest claim *not* to derive from the consent of states. As explained in chapter one, general principles

⁴⁸ Guzman, A. (2011) ‘The Consent Problem in International Law’: p.32

⁴⁹ Ibid.; see also: Guzman, A. (2005) ‘Saving Customary International Law’: pp.141-145

⁵⁰ Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.387

⁵¹ Ibid.

⁵² Akehurst, M. (1977) ‘Custom as a Source of International Law’: p.23

came to be recognised as a source of international law because treaties and custom were occasionally insufficient to provide all the legal answers needed to resolve a dispute. In this way, general principles can be viewed as ‘gap fillers’ that only need to be consulted ‘when a dispute could not be resolved on the basis of a treaty or customary international law.’⁵³ Given that this is the purpose for which they have been recognised, it follows that general principles – almost by definition – cannot stem from the consent of states. As noted by Kaczorowska-Ireland, the recognition of general principles as a source of law ‘can be seen as a rejection of the positivist doctrine, according to which international law consists solely of rules to which States have given their consent, and as affirming the naturalist doctrine whereby if there appeared to be a gap in the rules of international law, recourse could be had to general principles of law, i.e. to natural law.’⁵⁴

However, it is important to note that general principles of international law can be divided into two distinct categories. First, there are general principles that are ‘inherent in legal systems and linked to the structure or operation of the system’.⁵⁵ These principles are necessary insofar as they are integral for the functioning of a particular legal system or legal systems in general. Second, there are general principles of law that are simply found commonly in all (or most) legal systems, even if they are not integral to the system. My contention is that this latter type of general principle could conceivably be interpreted as deriving from state consent, whereas the former could not.

We will start with a consideration of those general principles deriving from the inherent nature of legal systems. ‘The basic notion’, explains Janis, ‘is that a general principle of international law is some proposition of law so fundamental that it will be found in virtually every legal system’.⁵⁶ Examples of such principles – as noted by Klabbers – may include: the notion of good faith; the idea that no one shall be judge in their own cause; the principle that people shall not be sentenced twice for the same act; and the principle that there shall be no crime without a law.⁵⁷ The basic point about these general principles is that it is hard to imagine any legal system – worthy of the name – that did not apply these principles. A system

⁵³ Henriksen, A. (2017) *International Law*: p.30

⁵⁴ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.49

⁵⁵ O’Connell, M.E. (2012) ‘*Jus Cogens*: International Law’s Higher Ethical Norms’: p.83

⁵⁶ Janis, M.W. (2003) *An Introduction to International Law*: p.55

⁵⁷ Klabbers, J. (2013) *International Law*: pp.34-5.

in which contracts were not made in good faith, or where someone could be punished for a crime for which there was no law, sounds more like an anarchical system in which those with power determine the rules inconsistently and in their own favour. Because of their inherent nature, these general principles have been referred to as 'structural general principles'. An example of such a structural general principle being invoked by an international court was the principle of 'self-determination' in the case *The Western Sahara (Advisory Opinion)*.⁵⁸ Again, this was because the Court determined that such a principle was fundamental to the operation of the international legal system. Because these general principles are 'inherent or necessary to a legal system', they 'may be overridden neither by agreement nor by the formation of new rules of custom. Such principles must', concludes O'Connell, 'be explained by using natural law theory, not positivism'.⁵⁹

The second type of general principle are those that are common to most legal systems. As Janis explains, the search for this second type of general principle is primarily 'an exercise in comparative law'.⁶⁰ In other words, courts, such as the ICJ, will 'survey judicial decisions from other states' to discover common principles that are applicable to their own case.⁶¹ As such, I will refer to general principles identified in this way as 'comparative general principles'. An example of the ICJ invoking such a comparative general principle was in the *Corfu Channel Case*⁶², in which the ICJ 'recognised the principle of the admissibility of circumstantial evidence as being a well-established and generally accepted principle of law'.⁶³ The ICJ remarked that 'this indirect evidence is admitted in all systems of law, and its use is recognised by international decisions'.⁶⁴

Unlike structural general principles, one could argue that comparative general principles are based on a type of tacit consent. Because states apply these general principles in their domestic legal systems, they are demonstrating that they recognise them to be

⁵⁸ *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12: para.59

⁵⁹ O'Connell, M.E. (2012) '*Jus Cogens: International Law's Higher Ethical Norms*': p.84; see also: O'Connell, M.E. (2008) *The Power and Purpose of International Law*: p.9

⁶⁰ Janis, M.W. (2003) *An Introduction to International Law*: p.55

⁶¹ *Ibid.* It should be noted that, although rulings from other jurisdictions are not binding as precedent, they do have some persuasive value.

⁶² *Corfu Channel Case (UK v Albania (Merits))* [1949] ICJ Rep 4: p.18

⁶³ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.50

⁶⁴ *Corfu Channel Case (UK v Albania (Merits))* [1949] ICJ Rep 4: p.18. See also: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.50

principles of law in general, and would thus consent to their application in all legal jurisdictions; not just their own.⁶⁵ Although this is plausible, it would only be a credible argument if the state to whom the general principle was being applied (say, by the ICJ) also applied that exact same principle in their own domestic law. In other words, the fact that the general principle was common to many other jurisdictions would have no moral force (from the view point of consent) to a state that didn't choose to apply that principle domestically themselves.

The proposition, then, that general principles – either structural or comparative – are derived from state consent does not appear to be strong. There is one final argument to the contrary, however, offered by Janis, which is that 'the authority to apply general principles of law' derives 'from the provisions of the Statute of the International Court of Justice' to which 'states have explicitly agreed.'⁶⁶ In other words, although states have not consented to each specific general principle, they have explicitly consented to give the ICJ the power to identify and apply general principles. Janis ends up rejecting this argument himself, however, as there are too many examples of other courts drawing upon general principles who haven't been given such explicit authorisation. My own view is that this argument works better in relation to comparative general principles than structural. This is because, given their very nature, most structural general principles would need to be drawn upon by a court even if they did not have the explicit authority to do so.

The final point to stress as a caveat to all of the above is that general principles have very rarely been invoked to modify or reverse existing international law.⁶⁷ Instead, they only tend to be applied by courts when no other applicable law exists (either in the form of custom or treaty). As such, in practice, there have been very few difficulties with states accepting general principles.⁶⁸

⁶⁵ See: Tunkin, (1979) 'General Theory of Sources of International Law': pp.474 & 482; see also: Janis, M.W. (2003) *An Introduction to International Law*: p.56

⁶⁶ Janis, M.W. (2003) *An Introduction to International Law*: p.56

⁶⁷ Ibid.: p.57

⁶⁸ Ibid.

6.2.3 *Jus Cogens*

The final type of (arguably) non-consensual international law (that I will discuss) is '*jus cogens*'.⁶⁹ As explained in chapter one, *jus cogens* norms of international law are distinguished by the fact that they are 'peremptory' (i.e. they trump all competing or contradictory law).⁷⁰ For many, *jus cogens* norms are non-consensual by definition. Buchanan, for example, defines *jus cogens* laws as 'peremptory norms of international law [that] apply to all states *regardless of their consent* to the treaties or conventions or practices that contributed to their creation' [emphasis added].⁷¹ Similarly, Alexander Orakhelashvili argues that these '[p]eremptory norms prevail not because the States involved have so decided but because they are intrinsically superior and cannot be dispensed with through standard inter-State transactions'.⁷²

The existence of *jus cogens* norms seems (although not without controversy) to support a 'natural law' approach to international law, rather than the 'positivist' approach ingrained in the state consent model.⁷³ In other words, this type of international law is legitimate, not because of how the law was made, but because the content of the law conforms to a sense of natural justice. Such norms are often thought to include the general prohibition of: aggressive war; genocide; torture; piracy; slavery; and other crimes against humanity.⁷⁴

As O'Connell correctly observes, *jus cogens* are very often determined through judicial decisions.⁷⁵ However, it is important to stress that, although *jus cogens* norms are invariably 'identified' in judicial decisions, this is not to say that they are 'created' by judicial decisions.

⁶⁹ For more in-depth discussions on *jus cogens* see, for example: Orakhelashvili, A. (2006) *Peremptory Norms in International Law*; and Christenson, G.A. (1988) *Jus Cogens: Guarding Interests Fundamental to International Society*: p.585

⁷⁰ It is worth pointing out (as explained by O'Connell) that, although *jus cogens* norms are 'superior to all other norms, they are also limited in nature. They form a barrier to government action, but they do not compel affirmative action. *Jus cogens* norms void treaties and other rules. However, to the extent that *jus cogens* norms are similar to rights, they act as negative rights, such as the freedom to be free from torture' (see: O'Connell, M.E. (2012) '*Jus Cogens: International Law's Higher Ethical Norms*': p.80).

⁷¹ Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: p.190

⁷² O'Connell, M.E. (2012) '*Jus Cogens: International Law's Higher Ethical Norms*': p.86; Orakhelashvili, A. (2006) *Peremptory Norms in International Law*: p.8

⁷³ Christiano, T. (2012) '*The Legitimacy of International Institutions*': p.388

⁷⁴ Voyiakis, E. (2010) '*International Treaties*': p.104; see also: Christiano, T. (2012) '*The Legitimacy of International Institutions*': p.387

⁷⁵ O'Connell, M.E. (2012) '*Jus Cogens: International Law's Higher Ethical Norms*': p.98

The actual source of *jus cogens* norms is a matter of intense debate, not least because – as mentioned – it appears to introduce an element of natural law into an otherwise consent-based international legal system. Needless to say, those positivists who rely exclusively on state consent for the making of international law want to demonstrate that – if they do exist – *jus cogens* norms are still the product of state consent.⁷⁶ They invariably attempt this by claiming that *jus cogens* is just another form of CIL: If one looks at the definition of *jus cogens* in Article 53 of the Vienna Convention on the Law of Treaties, one will notice it is similar, but crucially different, from the definition given by Buchanan above. Article 53 states that: a *jus cogens norm* is one ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’⁷⁷ As Ragazzi notes, this definition focuses on external tests of identification of *jus cogens* rules (i.e. they must be ‘accepted and recognised’ by the international community), rather than on the substantive values protected by the norm.⁷⁸ In other words, the phrase ‘accepted and recognised’ suggests that states do indeed consent to *jus cogens* – even if only tacitly. In this way, *jus cogens* look something more akin to CIL. The only obvious difference from other CIL – and presumably the reason that it is frequently discussed in its own right – is that *jus cogens* norms are ‘peremptory’.⁷⁹ This simply means that they would trump any other international law if and when they conflicted.⁸⁰

This understanding of *jus cogens* as a branch of CIL is supported by the fact that the ICJ has previously suggested that ‘in order to identify a rule of *jus cogens*, procedures similar to those relating to the identification of any rule of customary international law should be carried out. There must be a widespread practice of States and *opinion juris*.’⁸¹ This also helps to explain the ICJ’s decision in the case *Belgium v Senegal*, in which the Court found that ‘the prohibition of torture, although a rule of *jus cogens*, did not impose on Senegal the

⁷⁶ Janis, M.W. (2003) *An Introduction to International Law*: p.62

⁷⁷ See also: Christiano, T. (2012) ‘The Legitimacy of International Institutions’: pp.387-8

⁷⁸ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.43-4

⁷⁹ Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.387; see also: Klabbers, J. (2013) *International Law*: p.60, for more discussion on how it is decided which norms are peremptory.

⁸⁰ See: *Aloeboetoe Case (Judgment)* IACtHR Series C No 15 (10 September 1993): paras.56-57, for an example of when a treaty was invalidated on the ground of a violation of *jus cogens*.

⁸¹ See: *Case Concerning Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal)* [2012] ICJ Rep.422

obligation to prosecute the alleged perpetrator of acts of torture which had occurred before the entry into force of the 1984 Convention on the Prohibition of Torture and Other Cruel, Inhumane Treatment or Punishment for Senegal.’⁸² It should be stressed, however, that – as mentioned in the section on CIL above – the fact that *jus cogens* may be just another example of CIL does not necessarily entail that it has obtained the consent of states – tacit or otherwise.

Some, however, strongly disagree with the notion that *jus cogens* can be reduced to a type of CIL. Janis, for example, argues that ‘although *jus cogens* is sometimes viewed as a form of customary international law, it is really of a different character. Customary international law is, by its very nature, not an apt instrument for the establishment of non-derogable rules; norms with a potency superior even to treaty rules.’⁸³ The argument Janis is making here is essentially one of logical inference. He starts by noting that treaty law is normally superior to CIL ‘as it derives from explicit consent, and not some uncertain notion of tacit consent derived from *opinion juris* and general practice’⁸⁴. His second premise is that *jus cogens* norms – being, as they are, peremptory – are superior to treaty in all instances. He thus points out that to assume *jus cogens* is a form of CIL is to assert that ‘some aspect of CIL – i.e. *jus cogens* – is superior to treaty in all instances.’⁸⁵ ‘It makes better sense’, he concludes, ‘to view *jus cogens* as a modern form of natural law.’⁸⁶ O’Connell arrives at the same conclusion when she states that ‘*jus cogens* norms are apart from and above the rules and principles derived from the primary, positivist sources of international law, including customary international law.’⁸⁷ She adds that they ‘are not developed in the same way as positive-law rules. *Jus cogens* norms may not be changed by treaty, which is not the case for any other treaty rule or customary law rule. They are not explained in positive law theory. That leaves natural law theory.’⁸⁸

The proposition that *jus cogens* is better understood as natural law (and thus non-consensual law) appears to be supported by the judgment of a number of international

⁸² Kaczorowska-Ireland, A. (2015) *Public International Law*: p.45. See: Case Concerning Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) [2012] ICJ Rep.99

⁸³ Janis, M.W. (2003) *An Introduction to International Law*: p.62

⁸⁴ Ibid.: pp.62-63

⁸⁵ Ibid.

⁸⁶ Ibid. p.63

⁸⁷ O’Connell, M.E. (2012) ‘*Jus Cogens*: International Law’s Higher Ethical Norms’: p.83

⁸⁸ Ibid.: p.93

courts. For example, scholars now generally agree that the organisers of the 1945 International Military Tribunal at Nuremberg, and the drafters of its Charter, 'relied on natural law concepts and *jus cogens* for the proposition that otherwise valid national law could not be raised as a defence at the tribunal if the national law conflicted with higher norms of international law.'⁸⁹ Another example would be the *Aloeboetoe Case*.⁹⁰ 'In this case', explains Kaczorowska-Ireland, 'the Court held that a treaty concluded between the Netherlands and the Saramaka tribe in September 1762 (under which the Saramakas were to sell the Dutch any captured slaves and other prisoners, as slaves)... could not be invoked before any international human rights court as they conflict with *jus cogens* rules... Accordingly, the IACtHR disregarded the 1762 Treaty.'⁹¹ Notwithstanding the moral shortcomings of the 1762 Treaty, this case provides a clear example of *jus cogens* overriding the explicit consent of states. As per the point made by Janis above, it would thus be extremely difficult to claim that the *jus cogens* norm applied in this case was somehow still the product of state consent.⁹²

It is worth pointing out that, among those who agree that *jus cogens* norms derive from natural law, some have different reasons for believing this to be the case than others. On the one hand, you have those who believe it is because *jus cogens* are necessary foundational rules of the international legal system. In this way, *jus cogens* norms are substantially the same as 'structural general principles'.⁹³ On the other hand, you have those who believe it is because *jus cogens* norms are fundamental ethical principles. Whilst this difference of position doesn't change the fact that all those who subscribe to a natural law theory of *jus cogens* believe it to be fundamentally non-consensual, it is important in terms of identifying which norms count as *jus cogens*, and which do not.

Those who believe *jus cogens* norms to be essentially equivalent to 'structural general principles' believe that such norms are necessary to maintain 'international *ordre public*'.⁹⁴ Read in this way, explains Kaczorowska-Ireland, the introduction of *jus cogens* into

⁸⁹ O'Connell, M.E. (2012) '*Jus Cogens: International Law's Higher Ethical Norms*': p.88

⁹⁰ *Aloeboetoe Case* (Judgment) IACtHR Series C No 15 (10 September 1993).

⁹¹ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.45. (The 'IACtHR' is the 'Inter-American Court of Human Rights').

⁹² Further examples of *jus cogens* norms being applied as a natural law by international courts can be observed in the cases: *Prosecutor v Furundzija* ICTY, Case IT-95-17/1 (10 December 1998) (2002) 121 ILR 213; and *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 1) [2001] 1 AC 61.

⁹³ See the section above on general principles.

⁹⁴ Schelb, E. (1967) '*Some Aspects of International Jus Cogens as Formulated by the International Law Commission*': pp.946 & 949

international law 'was inspired by analogy to some national laws which firmly established the hierarchy of legal rules.'⁹⁵ She goes on to note that 'the transposition of this idea into international law entails that some rules of international law are fundamental, or of a higher order, as being rules of international public order.'⁹⁶ Thus, as with structural general principles, *jus cogens* are those 'constitutional' rules that constitute 'a basis for the community's legal system.'⁹⁷ They are therefore non-consensual in the sense that the system could not operate properly without them. Although we looked at some example of these rules in the section on general principles above, other examples might include 'Articles 1 and 2 of the United Nations Charter, which guarantee the sovereignty of states'⁹⁸ or the principle of *pacta sunt servanda* (that contracts between states are binding).⁹⁹

There are some, however, who believe that *jus cogens* have a unique feature that places them in a category distinct from that of structural general principles. As O'Connell explains, although structural general principles [like *jus cogens*] derive from natural law and cannot be overridden, they lack the 'quality of moral superiority that is true of *jus cogens* norms'.¹⁰⁰ In other words, *jus cogens* are not merely those norms that underpin the functioning of the international legal system, they are more 'substantive' ethical norms by which actors within the system must abide. The norm forbidding the use of torture is a good example of a *jus cogens* norm as an ethical imperative rather than a structural general principle. This is because the practice of torture – although perhaps morally deviant or the cause of an injustice – possesses no real threat to the ongoing ability of the international legal system to operate successfully.

O'Connell's advocacy for this ethical-based approach to *jus cogens* seems to derive more from an observation of 'how' *jus cogens* has developed in practice rather than on any normative argument that this 'ought' to be the case. She notes, for example, that 'in judicial decisions since World War II, examples of *jus cogens* involve ethical or moral norms almost exclusively.'¹⁰¹ She also observes that 'little, if anything, is said about how these scholars and

⁹⁵ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.44

⁹⁶ Ibid.

⁹⁷ Janis, M.W. (2003) *An Introduction to International Law*: p.64

⁹⁸ Ibid.

⁹⁹ Ibid.: p.65

¹⁰⁰ O'Connell, M.E. (2012) '*Jus Cogens*: International Law's Higher Ethical Norms': p.84

¹⁰¹ Ibid.

judges know that a norm is a *peremptory* norm... Currently, it appears that judges and scholars simply consult their own consciences when identifying *jus cogens* norms.’¹⁰² The same point was made in a 1966 discussion organised by the Carnegie Endowment for International Peace, in which it was said that ‘*jus cogens* [is] not formulated in precise rules... it [is therefore] left to the judge to extract *jus cogens* limitations from the legal system as a whole by transforming primordial social values directly into legal imperatives.’¹⁰³ For these reasons, O’Connell concludes that ‘the more persuasive view is to include only ethical or moral norms among *jus cogens* norms.’¹⁰⁴

Before we move on, I should note that it is not for me to come down on any particular side of this debate – both arguments have some merit. The reason for highlighting this distinction between *jus cogens* as ‘structural general principles’ or as ‘ethical norms’ is simply to improve the clarity and nuance of the discussion that follows.

In summary of the above, then, there is a strong case to be made that some international law is only loosely derived from the consent of states – if at all. This is particularly the case, I would argue, for ‘structural general principles’ and *jus cogens* norms – in both its forms. To a lesser extent, instances of customary international law could also be included in the category of non-consensual international law; particularly when imposed on newly-formed states. As Janis notes, ‘whatever the theoretical stumbling blocks’, it is hard to avoid the conclusion that, in practice, ‘non-consensual sources play an important role in international law.’¹⁰⁵

However, the impression should not be formed that ‘most’ international law is non-consensual. In fact, the vast majority of international laws derive from treaties which are – with only very few arguable exceptions – clearly derived from explicit state consent. Indeed, Lord McNair – in his day the world’s leading authority on the law of treaties – once described treaties as ‘the only, and sadly overworked workhorses of the international legal order.’¹⁰⁶ There are also many instances of CIL for which it would be extremely tenuous to argue that states had not given their tacit consent. This is perhaps why it is a rarity for states to challenge

¹⁰² O’Connell, M.E. (2012) ‘*Jus Cogens: International Law’s Higher Ethical Norms*’: p.79

¹⁰³ Carnegie Endowment for International Peace (1967) ‘The Concept of *Jus Cogens* in International Law’: p.11

¹⁰⁴ O’Connell, M.E. (2012) ‘*Jus Cogens: International Law’s Higher Ethical Norms*’: p.84

¹⁰⁵ Janis, M.W. (2003) *An Introduction to International Law*: p.54

¹⁰⁶ McNair, A.D. (1961) *The Law of Treaties* (cited in Klabbbers, J. (2013) *International Law*: p.25).

the application of CIL by international courts. I therefore also agree with Guzman that the non-consensual sources of international law discussed above 'are best viewed as exceptions to the general requirement of consent'.¹⁰⁷ He goes on to argue that 'even when taken as a group... they represent no more than a small dent in the consent requirement. Each of the non-consensual approaches is heavily constrained in its ability to influence state behavior, and fall far short of a direct assault on the consensus requirement'.¹⁰⁸

6.2.4 Resolving the *argumentum ad consequentiam*

It should, at this point, be remembered that an *argumentum ad consequentiam* is not an argument against the position that state consent is necessary for the legitimacy of international law *per se*; it only forces us to contend with the consequences of thinking that it is. In this case, it seemingly forces us to choose between two options: 1.) to bite the bullet and say that, contrary to what we thought, some international law is actually illegitimate because it lacks the consent of states, or 2.) concede that state consent is not actually necessary for the legitimacy of international law.

As I will argue below, however, there is a third option; one that says both statements may be partially true. In other words, some international law may indeed be illegitimate as it lacks sufficient state consent, however, other types of international law do not depend on state consent for their legitimacy. Our conclusion would therefore be that state consent is (potentially) necessary for the legitimacy of *some* types of international law; but not all.

To explain how I arrive at this seemingly contradictory conclusion, it is important to make a distinction between those international laws that are integral to the structure of the state-based international legal system as we know it, and those variable laws that exist 'within' the system and can be altered without upsetting the overarching 'rules of the game'.

This distinction broadly mirrors that which was first highlighted in chapter one, i.e., the difference between the international law of 'co-existence', and that of 'cooperation'. As the name suggests, international laws of coexistence are simply those rules that enable states

¹⁰⁷ Guzman, A. (2011) 'The Consent Problem in International Law': p.32

¹⁰⁸ Ibid.

to coexist and interrelate peacefully and orderly with one another.¹⁰⁹ As was stated previously, those international laws relating to coexistence often include: 'issues related to the delimitation of – and title to – territory, the criteria for statehood and the recognition of new states and governments, jurisdiction and immunity, the use of force, the conduct of armed hostilities and neutrality in times of armed conflict. Also included are the international principles of treaty law and the secondary legal principles on state responsibility.'¹¹⁰ These laws are very similar to – if not the same as – those required for the maintenance of international public order (as mentioned above).

On the other hand, the international law of cooperation are those rules governing cooperative activity between states that go beyond mere coexistence. States are naturally interdependent in many ways, and international law can help facilitate the cooperation that this interdependence sometimes demands.¹¹¹ Cooperation exists when two or more states agree to turn an issue – that would otherwise have been dealt with by national law – into one of an international character.¹¹² Examples and areas in which states cooperate include: international human rights law, the majority of international environmental law and international economic law, eradicating disease by means of common rules as to vaccination, and in combating international terrorism.¹¹³

In is my contention, therefore, that consent is arguably only necessary for those international laws relating to 'cooperation', but not those relating to 'coexistence'. In other words, states are 'inherently bound by the international law of coexistence', but in all matters pertaining only to cooperation, their consent may be necessary.¹¹⁴

This conclusion, however, does not diminish the theory of state consent in the way that it may first appear. In fact, it is the only way in which a system of state consent could operate. In other words, a system of state consent – in which sovereign states are not bound by international legal obligations to which they have not consented – can only function properly if a number of 'constitutional' rules are place. These constitutional rules specify the

¹⁰⁹ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.17

¹¹⁰ Henriksen, A. (2017) *International Law*: p.10

¹¹¹ Kaczorowska-Ireland, A. (2015) *Public International Law*: p.17

¹¹² Henriksen, A. (2017) *International Law*: p.10

¹¹³ See both: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.17; and Henriksen, A. (2017) *International Law*: pp.10-11

¹¹⁴ Henriksen, A. (2017) *International Law*: p.11

rules of the 'state-consent game', and therefore cannot themselves be the product of state consent.

It should also be noticed that it is in 'structural general principles' and *jus cogens* that we often find these constitutional-type rules. This, then, would explain why these types of law are not often the product of state consent. Christiano arrives at a similar conclusion when he argues that *jus cogens* and general principles should be thought of as forming a type of unwritten constitution that *facilitates* voluntary association amongst states based on the model of state consent.¹¹⁵ In his own words: 'from a moral standpoint, we can think of the state-consent account of legitimacy as a morally bounded system of voluntary association among peoples. The boundaries of that system reflect the commitment to the fundamental interests of persons that no system of voluntary association may violate.'¹¹⁶

It will be useful here to look at a couple of these so-called unwritten constitutional principles. One example would be the general principle of 'good faith'. Broadly, the principle of good faith stipulates that contracting parties should treat each other honestly and fairly. In addition, those acting in good faith will be concerned with achieving mutual advantage in the creation of a legal agreement, and not attempt to enter a legal agreement for the purpose of disadvantaging the other party. The ICJ has previously referred to good faith as 'one of the basic principles governing the creation and performance of legal obligations, whatever their source.'¹¹⁷ Good faith can be considered a principle of constitutional significance because, in the words of Ziegler and Baumgartner, 'without good faith, social relations would be doomed to fail.'¹¹⁸ Indeed, they go on to say that good faith has a 'primordial social ordering function' which is crucial 'for a peaceful coexistence of individuals and nations'.¹¹⁹ In other words, without good faith, it would almost impossible for states to enter into legal relations with one another, and therefore also to consent to those relations. It is for this reason that the principle of good faith would not require state consent to be legally binding upon states.

¹¹⁵ Christiano, T. (2012) 'The Legitimacy of International Institutions': p.388

¹¹⁶ Ibid.

¹¹⁷ See: Nuclear Tests Case (Australia v France) [1974] ICJ Rep 253: para.46

¹¹⁸ Ziegler, A.R. & Baumgartner, J. (2015) 'Good Faith as a General Principle of International Law: p.9

¹¹⁹ Ibid.

Another interesting general principle that, by definition, cannot derive (in the first instance) from state consent, is that of *pacta sunt servanda* (that pacts must be performed).¹²⁰ This is simply the principle that, when consenting to an agreement, states are bound by their own consent. This principle, of course, cannot be the product of state consent as its application must be assumed for consent to be binding in the first place.

Thus, for a voluntary association of states to function properly – where state consent is the method by which states incur international legal obligations – there must exist some ‘background’ or ‘framework’ rules that establish how that voluntary association is to function. These background rules cannot themselves be the product of state consent. If a state chooses to reject these background rules, they would effectively be rejecting the system of voluntary association altogether. But then, by what standard would they defend their own sovereignty and consequent right to consent? As such, this recognition of sovereignty must be reciprocal. As Henriksen explains, ‘the mere fact that international society is composed of a multitude of sovereign states with different interests’ necessitates a minimum set of rules that allow that system to exist at all.¹²¹

For a state-consent theorist to cling to the idea that state consent is necessary to legitimate *all* international law (including laws of coexistence) would be self-defeating. Any state consent theorist would need to ask themselves what is the primary object of their concern: the mere fact of state consent, or the underlying values (i.e. autonomy and equality) that state consent is meant to protect? The answer, of course, must be the latter. Thus, if certain principles and laws are necessary to ensure the protection of those values, then it is, at best, superfluous to argue that state consent is necessary to bring those principles and laws into existence. Indeed, in such a scenario, refusing to ‘consent’ (or rather, refusing to acknowledge that they are bound by those particular laws) could undermine the autonomy and equality of states.

However, the analysis in the above sections also demonstrated that there exist some types of (arguably) non-consensual international law that don’t seem to be necessary for the maintenance of the state-based system of voluntary association. These would include some

¹²⁰ See, for example: O’Connell, M.E. (2012) ‘*Jus Cogens: International Law’s Higher Ethical Norms*’: p.83; and Janis, M.W. (2003) *An Introduction to International Law*: p.65

¹²¹ Henriksen, A. (2017) *International Law*: p.10

types of CIL, *jus cogens* norms that are purely ethical, and those ‘comparative general principles’ that cannot properly be traced back to implicit state consent. For example, as mentioned earlier, it is difficult to see how the ethical *jus cogens* norm that prohibits torture is integral to the continued existence of an ordered international legal system based on state consent. Under the state-consent theory of legitimacy, therefore, laws like this would be illegitimate as they are neither (in all instances) derived from state consent nor necessary for the operation of the system of state consent. This is not to say, however, that (using our previous example) preventing torture is not morally justifiable for content-‘dependent’ reasons; only that, minus consent, a law prohibiting torture is not legitimate. It is also not to say that an international law ‘mandating’ torture is legitimate even if it received state consent. This is because, as I have argued in other chapters, mere state consent is also not sufficient for the legitimacy of international law, and that the procedural features for valid state consent are unlikely to be met by a law mandating torture. The same argument could apply to a non-consensual norm prohibiting slavery, for example.

Of course, with some laws, not only is it difficult to judge whether they have received state consent, it is also hard to ascertain whether they are of ‘constitutional’ significance, and whether or not they are in need of state consent. Take, for example, the general principle that there should be no crime without a law. On the one hand – as mentioned earlier – it is hard to imagine a legal system operating without this principle as it would likely descend into a state of anarchy in which the powerful ruled at their own discretion. However, if we look at the Nuremburg trials, it was judged that there could indeed be a crime – namely genocide – without (at that point) a law. Thus, breaking this general principle could (and to an extent in this case was) justified on the grounds that, for the sake of continued international public order, a crime needed to be assumed without a law.

It is not for me, however – at least in this thesis – to argue which specific international laws fall into which category (and consequently which international laws require state consent). What is important for our purposes is simply to appreciate that these categories exist.

6.2.5 Summary

Although not an argument against the necessity of state consent *per se*, the problem of non-consensual international law has demonstrated that, if we follow the logic of the position that state is necessary for the legitimacy of international law through to its fullest implications, then we are left with the unwelcome conclusion many international laws we had assumed to be legitimate (e.g. types of customary international law, *jus cogens*, and general principles) are, in fact, illegitimate. This problem therefore forces us to make a decision: between accepting this uncomfortable conclusion, or giving up our original argument that state consent is necessary for the legitimacy of international law.

What I have argued toward the end of this section, however, is that the conclusion that state consent is unnecessary for the legitimacy of international law is only half correct. This is because ‘international law’ is not one homogenous entity. As such, state consent is necessary for the legitimacy of ‘some’ types of international law, but not for others. In particular, I have argued that state consent is *not* necessary for those international laws necessary to maintain the functioning of the state-based international legal system (i.e., laws of coexistence), but *is* necessary for all other international laws that are created and exist within that system (i.e., laws of cooperation). To argue that state consent is also necessary for the former set of rules would be self-defeating as a system in which state consent was necessary could not exist without them.

In sum, the problem of non-consensual international law does not, in itself, show that state consent is unnecessary for the legitimacy of international laws of cooperation, but does help to demonstrate how state consent is not necessary for the ‘constitutional-type’ laws of coexistence. It should be re-emphasised at this point, however, that concluding state consent to be necessary for the legitimacy of most international law – especially the laws relating to ‘cooperation’ – is not to say that it is sufficient. Indeed, for the reasons set out in previous chapters – particularly the section on ‘authorisation’ in chapter five – I do not believe that it is.

CONCLUSION

The post-WWII era of globalisation has seen a proliferation of international laws and institutions that have – to greater or lesser extents – displaced many traditional domestic laws and institutions. This shift and transfer of authority has raised a number of normative questions – particularly regarding the issue of from where these new international authorities derive their legitimacy. This question is not merely abstract. Populations around the world, particularly in Europe and North America, increasingly feel as though their lives are being influenced by rules and authorities outside of their direct and domestic control. This began, most overtly, with criticism of the preeminent international financial institutions (such as the IMF, WTO, and World Bank) in the 1990s and early 2000s, and has, most recently, culminated in the decision of the United Kingdom – as determined in the June 2016 referendum – to sever its 44-year membership of the European Union. The theoretical problem of international political legitimacy, therefore, is beginning to spill-over into practice.

The need to confront this issue within the academic sphere, therefore, is growing, especially as it has hitherto ‘not received the attention that it deserves within mainstream [academic] debates.’¹ Although limited in its scope, this thesis has sought to contribute to this much needed debate. My contribution, however, has not attempted to provide a comprehensive answer to the question of international legal legitimacy (i.e. I have not attempted to formulate novel or comprehensive criteria for the legitimacy of international law). Instead, I have taken the more conservative – but equally important – approach of assessing the current situation. By that, I mean I have taken the current dominant theory of international legal legitimacy (i.e. the theory of state consent) and subjected it to an ‘intellectual stress-test’. Specifically, I have analysed what I consider to be the six most-challenging objections to the proposition that state consent can legitimate international law. These were:

1. The Problem of Non-voluntary State Consent
2. The Problem of Uninformed State Consent

¹ See, for example: Held, D. (1995) *Democracy and the Global Order*; and Marchetti, R. (2008) *Global Democracy: For and Against*.

3. The Problem of Authorisation
4. The Problem of Immoral State Consent
5. The Problem of Immoral State *Non*-Consent
6. The Problem of Non-Consensual International Law

By focusing solely on the theory of state consent, I have tried to achieve a level of nuance that has sometimes been lacking in writings on the same topic. My approach was never either to simply accept or reject the theory of state consent, but to separate those elements that are morally attractive from those that are more problematic. This dissection of the theory has a secondary benefit in that it allows others – even if they disagree with my conclusions – to better navigate this terrain, and better formulate their own arguments.

What I have shown is that, when asking (in general) the extent to which state consent provides for the legitimacy of international law, one is confronted with four logically possible answers:

1. **State consent is both necessary and sufficient.** Those advocating this position would be arguing that a.) without state consent international law cannot be legitimate, and b.) nothing more than state consent is required for the legitimacy of international law;
2. **State consent is sufficient, but not necessary.** Those advocating this position would be arguing that a.) nothing more than state consent is required for the legitimacy of international law, but b.) other sufficient conditions for the legitimacy of international law also exist;
3. **State consent is necessary, but not sufficient.** Those advocating this position would be arguing that a.) without state consent international law cannot be legitimate, but b.) other necessary conditions must also be satisfied before international law can be legitimate; and,
4. **State consent is neither necessary nor sufficient.** Those advocating this position would be arguing that a.) international law can be legitimate without state consent, and b.) state consent would not provide for the legitimacy of international law even when it existed.

A central conclusion of this thesis has been that this question cannot be answered straightforwardly. This is because the question assumes that 'international law' is a singular or uniform institution (in the way that domestic law might be). As I demonstrated in both chapters one and six, however, this is not true. A useful – if perhaps over-simplistic – way to conceive of international law is to separate it into two categories: first, those 'structural' laws that are necessary for a system of voluntary association between sovereign states. I have referred to these as the international laws of 'coexistence'. The second category are those 'cooperative' laws that have replaced pre-existing domestic laws.

As such, it is ambiguous to ask the singular question of whether state consent is necessary and/or sufficient to legitimate 'international law'. Instead, we need to ask two questions:

1. Is state consent necessary and/or sufficient to legitimate the international law of coexistence?
2. Is state consent necessary and/or sufficient to legitimate the international law of cooperation?

My answer to the first question is that state consent is neither necessary nor sufficient. My answer to the second is that it is probably necessary, but not sufficient. Below I briefly recapitulate how I reached these conclusions.

Conclusion 1: state consent is neither necessary nor sufficient for the legitimacy of the international law of coexistence

State consent theory is unnecessary and insufficient for the legitimacy of the international law of coexistence for a very simply reason: it is a theory that presupposes a number of pre-existing imperatives for its operation. For example, it presupposes (among other things): the concept of the sovereign state; the concept of the state as an 'artificial person' capable of entering legal relationships; a normative framework that indicates what type of action necessitates the giving of consent; the concept of a legal system with basic attributes allowing

for impartial application and adjudication; and the normative significance of the act of state consent itself.

These presuppositions necessitate the existence of various ‘structural’ international laws of coexistence that find their legitimacy, not by being the ‘product’ of state consent, but by being a pre-condition for it. These laws might include (among many others): the principle of *pacta sunt servanda*; the principle of ‘good faith’; those laws relating to non-aggression; laws demarcating state boundaries and jurisdiction; the principles of ‘equity’; laws relating to the negotiation and application of treaties; the principle that there cannot be a crime without a law, or a punishment without a ‘crime’; and the legal principles of state responsibility.

I have called these laws the international laws of ‘coexistence’. This is because they are necessary for the sustainable coexistence of sovereign states whose interrelations are based on voluntary association. If any of these international laws were ignored, then the process of legal legitimation through state consent would lose – to greater or lesser extents – its normative significance. These laws should be thought of as ‘framework’ or ‘constitutional’ laws of the current international legal system. They provide the context in which sovereign states can develop international laws relating to cooperation (discussed below).

These ‘constitutional’ laws usually find their source in non-consensual (or, at least, not explicitly consensual) sources of international law such as customary international law, general principles, and *jus cogens*. Given that the theory of state consent presupposes the existence of these constitutional rules, it is unsurprising that they have developed from those sources of international law not directly underpinned by state consent. Even when these constitutional-type laws can be located in treaty law (and therefore based on explicit state consent) we usually find that the relevant treaty is an attempt merely to codify pre-existing customary law or general principles. A good example of this is the Vienna Convention on the Law of Treaties 1969 (or, at least, many of the provisions within it).

Of course – as I pointed out in chapter six – it is not always clear which international laws should be considered as having ‘constitutional significance’. Besides offering a broad definition of these rules (as ‘those rules necessary for the sustainable operation of an international legal system based on a voluntary association model of state consent’) this thesis has not attempted to formulate any comprehensive list. Of course, theorists will likely

disagree as to the contents of this list – but that is a debate for others to have at another time. What is important for the purposes of this thesis is simply an appreciation that such international laws must necessarily exist.

A final important caveat is that many of these constitutional-type rules are only necessarily legitimate in the context of an international legal system based on state consent. Thus, if one wholesale rejects the theory of state consent, then some of these constitutional rules will no longer be ‘constitutional’; and therefore also no longer be necessarily legitimate. For example, international laws prohibiting violations of state sovereignty will clearly not be necessary if one envisages an international (or ‘global’) legal system that is not characterised by the voluntary association of sovereign states. Some theories of global democracy, for example, would not need to presuppose constitutional rules preserving state sovereignty (as states wouldn’t exist).²

In sum, to argue that state consent is necessary for the legitimacy of international laws of coexistence would be self-defeating as a system in which state consent was necessary could not exist without them. I turn now to summarise how and why I arrived at the conclusion that state consent is not sufficient – although is perhaps necessary – for the legitimacy of international laws of ‘cooperation’.

Conclusion 2: state consent is not sufficient, but is perhaps necessary, for the legitimacy of the international law of cooperation

International laws of cooperation are those that go beyond mere peaceful coexistence. Cooperation exists when two or more states agree to turn an issue – that would otherwise have been dealt with by national law – into one of an international character.³ Examples and areas in which states cooperate include: international human rights law, the majority of international environmental law and international economic law, and in eradicating disease by means of common rules as to vaccination.⁴ EU law is a particularly good example of a legal

² See, for example: Kuper, A. (2004) *Democracy beyond Borders: Justice and Representation in Global Institutions*; and Cabrera, L. (2004) *Political Theory of Global Justice: A Cosmopolitan Case for the World State*.

³ Henriksen, A. (2017) *International Law*: p.10

⁴ See both: Kaczorowska-Ireland, A. (2015) *Public International Law*: p.17; and Henriksen, A. (2017) *International Law*: pp.10-11

regime solidly situated in the international law of cooperation.⁵ Under EU Treaties, ‘member States have transferred important powers to EU institutions. In some areas, e.g. the Common Commercial Policy and the Common Agricultural Policy, the EU has exclusive powers, i.e. the EU alone is entitled to act at both the internal and international level with regard to these areas.

It is this category of ‘cooperative law’ that has proliferated so starkly in the post-WII era of globalisation. It is also this type of international law that has raised the strongest normative concerns, and contributed most directly to the crisis of international legal legitimacy that we see today. It is not difficult to see why this is the case. International laws of cooperation – unlike those relating to coexistence – are not necessary for the functioning of the international legal system as a whole. Instead, they supplement and/or replace domestic laws. As Henriksen notes, these laws of cooperation that proliferated after WWII were ‘involved in the promotion of a variety of ‘societal’ goals’.⁶ It was the first time that international law really ‘began to be concerned with the manner in which sovereign authority was exercised within individual states’.⁷ By doing this, these new international laws upset and deviated from theories of domestic legal legitimacy that had already established themselves. From the perspective of an ordinary citizen, new laws were (and are) being introduced that hadn’t followed the domestic processes of legitimation that they had come to recognise. These new laws were often seen as being imposed by a foreign power, or (given that the executive branch typically has competence over foreign policy and international agreements), pushed through by their own governments at the expense of legislative approval or scrutiny.

Given their centrality in igniting the debate about international legal legitimacy, it is these international laws of cooperation that have been the implicit focus of this thesis. My conclusion in relation to this category of international law is that state consent is *insufficient* for its legitimacy, but arguably *necessary* – for reasons I will now briefly delineate.

Of all the arguments considered in this thesis, it was the ‘problem of authorisation’ (section 5.1) that most convincingly argued against the sufficiency of state consent as a means of international legal legitimation. The problem of authorisation highlights a fundamental

⁵ Henriksen, A. (2017) *International Law*: p.11

⁶ Henriksen, A. (2017) *International Law*: p.11; see also: Friedmann, W. (1964) *The Changing Structure of International Law*: pp.61-71; and Friedmann, W. (1962) ‘The Changing Structure of International Law’: p.1147

⁷ Henriksen, A. (2017) *International Law*: p.11

flaw with state consent theory: it assumes that states, as with individuals in the domestic sphere, have the intrinsic right to give consent. In other words, it assumes that states are moral agents in their own right with autonomy and formal equality worth protecting for its own sake. This view, however, is misplaced. Instead, states should only be seen as morally relevant to the extent that they are instrumental in protecting the autonomy of our actual units of moral concern: individuals.

When this realisation is taken in conjunction with the fact that international law often imposes obligations and restrictions on individuals (as well as states), we are led to the conclusion that, for state consent to have any normative significance, it needs to be sufficiently authorised by the individuals within the consenting state. How this authorisation takes place is an open question. I personally argued that it could occur through an internal process of deliberative democracy. Whatever the mechanism, however, we can't escape the moral imperative that such authorisation is necessary.

In its standard form, the theory of state consent does not demand that state consent be authorised. As such, the standard theory is insufficient to legitimate international law. To be plausibly sufficient, we could amend the traditional theory with the proviso that consenting states ought to be sufficiently democratic. In other words, a 'theory of democratic state consent' stands a better chance of being sufficient for the legitimacy of international law. This, however, would be to posit an *additional* necessary condition for the legitimacy of international law.

Three further arguments against the sufficiency of state consent were also considered in this thesis – namely, the problems of 'non-voluntary' and 'uninformed' state consent (section 4.1 & 4.2 respectively) and the problem of immoral state consent (section 5.2). I found these latter arguments, however, to be less convincing than the problem of authorisation. To begin, the problems of non-voluntary and uninformed consent were less arguments against the sufficiency of state consent in theory, and more about the consent of states in practice. In other words, they implicitly argued that *if* valid state consent were given, then *ceteris paribus* it would be sufficient for the legitimacy of international law. The main problem these arguments pointed to was simply that – very often in international legal practice – valid consent is not given (even if putative consent is). Thus, the objection was against the practice and not the theory.

Nevertheless, these arguments could still carry weight if followed by the claim that the international legal system is ill-suited to the conditions required for the giving of valid consent. For example, the international system is characterised by stark bargaining asymmetries and power imbalances that render many instances of state consent either non-voluntary or uninformed (or both). For reasons delineated in chapter four, however, I disagreed with those who extended this line of thinking. My disagreement did not stem from a belief that other theorists had inaccurately characterised the international system, but simply from the fact they placed a greater moral importance on many of the descriptive facts than I did.

I also found the problem of immoral state consent (section 5.2) to be unconvincing. This was the argument that state consent should not be considered sufficient for the legitimacy of international law as there exists another necessary condition, namely: that legitimate international law must not be unjust or immoral in its substance. As the theory of state consent is 'indifferent' to the content of international law, it cannot – went the argument – be sufficient on its own.

When discussing this problem, I noted that the issue of immoral state consent can actually be interpreted in two different ways. First, state consent can be immoral because – in some instances – it may create international law that is harmful to third parties (i.e. states not directly involved in the consent transaction). I showed, however, that this was an argument directed, not towards the theory of state consent, but its application in practice. This is because the consent of those states sufficiently harmed by the newly-created international law should also be obtained. If it were obtained, then the law would be legitimate, irrespective of its content. As such, it is not an argument against the insufficiency of state consent. Instead, it implicitly argues that state consent 'could' be sufficient if properly applied; the issue is simply its misapplication.

The second interpretation of the immoral state consent argument is that international law can be immoral *even when* the theory of state consent has been applied correctly. In other words, state consent can be immoral because – in some instances – it may create international law that is harmful to the consenting states themselves. This latter argument 'is' an argument against the sufficiency of state consent to legitimate international law because it posits that states should not be able to consent to 'self-harm' – something the theory of

state consent does not prohibit. In response, I argued that, when one looks closely at the reasons why states ought not to consent to 'self-harm', the defect tends to lie in that consent being 'invalid' rather than 'immoral'. In other words, there is something wrong with the procedure of that consent rather than the content of the international law *per se*. I also argued that we should be careful not to confuse standards of legitimacy with standards of justice. We should not conclude that international law is illegitimate just because it doesn't conform to a conception of justice. We should be more lenient with our evaluations of what constitutes legitimate law, especially as we are unlikely to achieve international justice in an environment in which obedience to international law is infrequent.

In summary, then – and notwithstanding my rejection of the problems of 'non-voluntary', 'uninformed' and 'immoral' state consent – I concluded that state consent is insufficient for the legitimacy of international law owing to the problem of 'authorisation'. As stated, however, I did not dismiss the possibility that state consent may be 'necessary' for the legitimacy of international law. This was, primarily, because I did not find compelling the arguments against the necessity of state consent discussed in this thesis.

The first such argument was the problem of 'immoral state *non*-consent' (section 6.1). This was the argument that state consent is unnecessary because some international laws are morally mandatory. As such, they would be legitimate irrespective of whether consent had been given. My disagreement with this argument was largely a conceptual one, i.e., although I completely agreed that some laws are morally mandatory, this does not make them legitimate *per se*. This is only because the 'mandatoriness' of the law does not derive from the legitimacy of the legal institution, but from the fact that the content of the international law happens to align with a natural moral obligation. This may appear to be a trivial semantic difference, especially as – in some instances – I agree that international law should be obeyed, even if illegitimate. However, this apparent triviality is important in preserving the concept of legitimacy. Legitimacy does not just generate moral obligations; it generates moral obligations for a particular reason, i.e., that the *procedure* through which that obligation was generated is morally compelling. As such, legitimacy is a quality of institutions; not laws themselves. This is important because the function of legitimacy – as explained in chapter two – is to create moral obligations even when one disagrees with the content of that obligation.

Read in this way, although state consent is not necessary for incurring international moral obligations, it is – arguably – necessary for the legitimacy of international laws.

The second argument against the necessity of state consent was the ‘problem of non-consensual international law’ (section 6.2). This argument argued against the necessity of state consent by pointing to the hard-to-accept consequences of believing that it ‘was’ necessary. Specifically, the necessity of state consent would entail that many of the international laws we had assumed to be legitimate (e.g. types of customary international law, *jus cogens*, and general principles) are, in fact, illegitimate. This is because – in many instances – they are quite clearly non-consensual (hence the ‘problem of non-consensual international law’). This problem thus tried to force us into making a decision: between accepting this uncomfortable conclusion, or giving up our original argument that state consent is necessary for the legitimacy of international law.

My response was to argue that we can actually have our cake and eat it too. In other words, we can accept both that some international laws are non-consensual but nevertheless legitimate, and also that state consent is still necessary for the legitimacy of (some types of) international law. This is achieved by returning to our distinction between the international law of ‘coexistence’ and ‘cooperation’; the former is non-consensual but legitimate (as it is pre-requisite to a theory of state consent), but the latter (arguably) necessitates state consent for its legitimacy.

Having said all this, keen logicians will note that rejecting arguments against the necessity of state consent is not quite the same as a positive affirmation that state consent *is* necessary for the legitimacy of international law. This is true, and is the reason I have been careful to caveat that state consent is ‘perhaps’ or ‘arguably’ necessary; rather than simply asserting that it is. However, I also believe that ‘positive’ arguments for the necessity of state consent do exist. For example, organising the international legal system based on the principle that state consent is unnecessary for the legitimacy of international law seems to leave weaker states defenceless in the face of the imposition of harms and obligations by stronger states. In this way, state consent can be viewed as a necessary tool to prevent against ‘predation’ in the international realm.⁸

⁸ Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: p.192

Additionally, state consent theory – despite our heavy focus on its shortcomings – has many morally attractive features that would arguably be lost if we were to consider it unnecessary. To start, consent theory (in general) has a strong intuitive normative appeal. This is because it has the ability to directly ‘reconcile a conception of agents as morally free and equal with their submission to authority. If an agent chooses to place himself under a duty to another then those duties are the product of the agent’s control over his life, not requirements imposed upon him or a facet of his subjugation to the will of another agent.’⁹ As Edmundson eloquently puts it, ‘accepting political obligation out of fear of anarchy, or dire necessity, for merely strategic reasons – even as mandates of fairness – seems less inspiring than the idea that our political bonds are self-made and self-imposed, that they are expressions of noble rather than servile traits of personality. To consent is to exercise a personal authority that ennobles even as it limits.’¹⁰ Consent also makes it more likely that the well-being of the consenter will be maximised as ‘the costs are borne only by those willing to pay them and are therefore presumably worth it to those individuals.’¹¹ Of course, we are dealing here with states rather than individuals. However, to the extent that state consent is authorised by individuals, the same logic would apply.

Consent – in general – also makes for a relatively uncontroversial form of legitimation; both in terms of why – from a moral point of view – one accrues an obligation, and also in terms of the content of the obligation. As Edmundson explains, ‘the everyday experiences of asking and doing favours, coordinating plans, asking and keeping promises, and forming and performing contracts make vivid to us what it is to submit ourselves to legitimate expectations – moral requirements – that we would otherwise be free of.’¹² Simmons agrees, stating that, ‘voluntary undertakings such as promises and contracts are more readily acknowledged as grounding clear obligations than virtually anything else.’¹³ The content of one’s obligations are also usually less controversial if legitimated through consent. This is so because – at least in most cases of express consent – one agrees to specific terms rather than, as it may be with democratic legitimation, some general and unspecific sense of obligation to obey authority.

⁹ Lefkowitz, D. (2016) ‘The Legitimacy of International Law’: p.107; see also: Christiano, T. (2012) ‘The Legitimacy of International Institutions’: p.383

¹⁰ Edmundson, W.A. (2011) ‘Consent and Its Cousins’: p.338

¹¹ Dworkin, G. (1988) *The Theory and Practice of Autonomy*: p.90

¹² Edmundson, W.A. (2011) ‘Consent and Its Cousins’: p.337

¹³ Simmons, A. J. (2010) ‘Political Obligation and Consent’: p.306

This is even more apparent when *state* consent is given to international treaties. An additional beneficial corollary of this relative uncontroversiality is that moral *responsibility* concomitantly becomes easier to identify. In the eventuality of a dispute as to the nature of one's rights or obligations, the original consented-to text or treaty can be referred to in order to resolve the disagreement.

A final advantage of state consent – that I will mention – is that it (explicitly) recognises states as the most significant actors in the international sphere. This may not sound like an advantage in an 'ideal' world, but in the world as it is actually constructed, it probably is. This is for the simple reason – as noted by Christiano – that 'if states do not have a say and they do not want to do something, the rules of the international system simply won't be observed except by accident since the international system relies on their cooperation'.¹⁴ This seems to be a similar argument to the one made by Guzman, who observes that:

'The signature feature of international law is the lack of coercive enforcement. This reality makes compliance with international law a matter of constant concern. Imposing rules on states without their consent creates the risk that the rules will be ignored. The consent requirement promises to reduce the frequency of non-compliance by limiting international law rules to those that states have agreed to accept. Unanimity ensures, at a minimum, that every affected state prefers the new arrangement to the available alternatives.'¹⁵

This is not merely a pragmatic argument, however. Christiano continues to note that 'the state and, more particularly, the modern democratic state is an extremely sophisticated system for the identification and advancement of the interests of a very broad proportion of its population.'¹⁶ Acknowledging states' central role in the legitimation of international law is therefore justified in moral terms as it is the vehicle through which the interests of persons are most likely to be advanced. This moral justification is, of course, premised on states being/becoming representative of (or rather 'authorised' by) their citizens.

¹⁴ Christiano, T. (2010) Christiano, T. (2010) 'Democratic Legitimacy and International Institutions': pp.123-4

¹⁵ Guzman, A. (2011) 'The Consent Problem in International Law': p.8. For a similar argument see: Helfer, L.R. (2008) 'Nonconsensual International Lawmaking': p.73

¹⁶ Christiano, T. (2010) 'Democratic Legitimacy and International Institutions': p.124

Even taking into account these strong reasons not to dismiss state consent, however, I still think asserting its absolute necessity would be an inadvisably bold statement to make. This is simply because there may well exist other sufficient theories of international legal legitimacy. For example, another (academically) popular theory for the legitimacy of international law is 'democratic rule'.¹⁷ If democratic rule were successfully argued to be sufficient for the legitimacy of international law, then – needless to say – state consent would not be necessary (unless, of course, it were a version of democratic rule that incorporated an element of state consent).

Where does this leave us?

In summary, for the reasons detailed above, state consent is insufficient for the legitimacy of international law, but perhaps necessary for the international law of cooperation; especially given the present structure of the international system. For international law to be legitimate it requires not just state consent – but state consent that has been properly authorised through a process of internal deliberative democracy within the consenting state. But where does this conclusion leave us? Where does this leave the normative status of international law, and how should we respond to the – arguably – illegitimate demands made by much international law? It is quite clear that many – if not most states – are undemocratic. Thus, it would appear that large swathes of cooperative international laws are actually illegitimate. Does this mean we should tear up those laws, or else conclude that many states are not actually under the obligations we previously thought they were? Not quite.

To say that a law is illegitimate is not necessarily to say that one should *disobey* it, or even that one does not have a moral obligation to obey it. To start, people (in this case 'states') may choose to obey a law even if not under a moral obligation. The opposite of having a moral obligation to obey is not having a different obligation to 'disobey'; it is simply having no obligation at all. One could, for example, obey a law for prudential reasons, or out of mere self-interest.¹⁸

¹⁷ See, for example: Kuyper, J. (2016) 'Global Democracy'.

¹⁸ See, for example: Buchanan, A. (2003) *Justice, Legitimacy and Self-Determination*: p.149

Second, just because a moral obligation is not generated from the 'legitimacy' of a law does not mean that a moral obligation does not exist. As explained previously, the legitimacy of an institution generates a content-independent 'political' obligation to obey that institution (because it is legitimate). This political obligation exists *in addition* to the natural obligations we owe to all other moral agents by virtue of their moral status. Thus, if an institution were illegitimate, we would still be left with all our other natural obligations. It may also be the case that fulfilling those natural obligations requires obeying the institution. Crucially, however, those natural obligations would not be owed 'to' the institution – they would be owed to other moral agents. The institution would simply be a 'vehicle' through which we can best fulfil those obligations (say, perhaps, because the institution has the knowledge, resources, and ability to coordinate action that we do not possess individually). In practice, then, we would have an 'instrumental' obligation to follow the rules of the institution, even though it is illegitimate.

We should also be careful not to make the best the enemy of the good. State consent may not be sufficient to legitimate international law, but it may be the method most likely to produce legitimate law currently available to us, or the one most likely to result in successful collective political coordination. It would therefore probably not be wise to throw the baby out with the bathwater. Instead, a more prudential approach may be to improve and build upon the application of consent theory in those areas I've highlighted as morally deficient. Following the conclusions of this thesis, there are at least two practical steps that could be made that would go a long way to increasing the legitimacy of international law.

First, a stronger connection needs to be established between international law and the individual; whereby individuals, rather than states, are recognised as the true originators of international law. It should be acknowledged the extent to which international law affects the lives of individuals and, as a result, individuals should be more central to the authorisation and creation of the international laws to which their state consents. The state should be understood simply as a vehicle through which individuals project their collective political will internationally.

Practically, this can be achieved in two stages. First, within each state, there needs to exist a mechanism through which individuals can influence and authorise state action. My own preference, as stated and argued for in section 5.1, would be a system of deliberative

democracy with a representative legislative body (i.e., 'Parliament'). Without such a mechanism it is – epistemologically – very difficult to determine whether state action on the international level has been authorised by the citizens of that state. A system of deliberative democracy would also preserve – to a large extent – the autonomy and formal equality of individual citizens; thereby reconciling the imposition of international legal obligations with our intuitions about individual and collective self-determination. Less democratic states should thus be incentivised to democratise. Of what precisely these incentives consist is not something I plan to delve into here, although it is not unreasonable to imagine things like trade deals, international loans, or defence contracts being made conditional on democratic reforms. (Such proposals have already been advanced by, among others, Leif Wenar).¹⁹

The second stage – which is an extension of the first – would be to increase the role of the democratically-elected legislative body within a state in the creation of international law. This is a step that ought to be taken even by many of those states we consider to be 'advanced' democracies. Indeed, as I write this, the role of the legislature in international law-making (compared to that of the executive) is being intensely debated in the UK in relation to the treaty that will establish the UK's future relationship with the EU. To be clear, I am not proposing that legislatures take over the role of international negotiation (as negotiations require the type of flexibility that large and inharmonious legislatures are unlikely to be able to provide). However, many of the problems surrounding the problem of 'authorisation' could be solved if legislatures – rather than executives – were the bodies to implement international law. In this way, I prefer the model of implementation for international law adopted by 'dualist' rather than 'monist' states. In practice, this would mean that, for international law to be applicable within a state, it would first need to be incorporated into domestic law by the democratically elected and accountable legislature, rather than directly incorporated by the less accountable executive.

The second step that could be taken to increase the legitimacy of international law (given the finding of this thesis) is for there to be an acknowledgment that international legal agreements are not created in a vacuum. Instead, they are made within a complex and interconnected world. This interconnected world means that actions and their consequences cannot easily be isolated; third parties – to greater or lesser extents – are always prone to

¹⁹ Wenar, L. (2013) 'Fighting the Resource Curse': p.303

experiencing 'negative externalities'. This acknowledgment is important because the international legal system – compared to most domestic legal systems – has a far weaker framework of rules and protections that prevent against this type of indirect harm. Crucially, however, this acknowledgment needs to be institutionalised so that it can be the future basis on which legitimate international law is created. In other words, before international law is created, an 'impact assessment' should be conducted to ensure that no third party will be severely harmed. Where it is found that a third-party would be seriously harmed, then their consent to that harm should be obtained. This step will ensure that states creating new international law are at moral liberty to do so (i.e., the creation of that new international law is consistent with their pre-existing moral obligations not to cause serious harm to non-consenting states). At present (as highlighted in section 5.2), international legal practice assumes that states are at moral liberty to create international law; largely irrespective of potential harm caused to third parties. This, I argued, is not consistent with the assumptions underpinning the theory of state consent and is, therefore, a misapplication (or rather 'incomplete' application) of the theory.

Since I am not – nor claim to be – an international lawyer, I hesitate to speculate on how this proposal might be achieved in practice. However, from my limited knowledge, I can extend two suggestions that may serve as the basis for future discussion. First, such a 'harm principle' could be codified by states into treaty-form. An appropriate place to adopt such a provision would probably be as an amendment to the Vienna Convention on the Law of Treaties (VCLT). As discussed earlier in the thesis, the VCLT is a treaty that specifies rules on the negotiation, ratification, and application of treaties between states. The only provision in the Treaty currently relating to third parties is Article 34, which states 'a treaty does not create either obligations or rights for a third State without its consent'. In addition, the only provision concerning the potential invalidity of a treaty because of its effect is Article 53, which states that: 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. (By 'peremptory norm' it is meant a *jus cogens* norm). It seems to me that either or both of these provisions could be extended to include the harm principle to which I've referred. So, for example, a new provision might read: 'a treaty is void if, at the time of its conclusion, its provisions, either directly or indirectly, causes serious injury to a third State without its consent'.

A second option would be for an international court – such as the ICJ – to recognise this harm principle as a ‘general principle’ of international law. In this case, an international court would need to wait for a state to bring such a case before it, and then rule in its favour citing this principle. By way of justification, the court should make clear in their judgement that a system of state consent presupposes sovereign states with certain basic natural rights (such as to be free from serious injury) that cannot *ceteris paribus* be violated. This includes violations that are intentional and direct, as well as those that are unintentional and indirect.

The advantage of the treaty option is that the principle would be more clearly and visibly established in international law. Having received the explicit consent of states, the principle would also more likely be respected and upheld. The down-side with the treaty option, however, is that the principle would only apply to those states that signed-up to it. The pros and cons of the ‘judicial decision’ option are essentially the reverse. As a general principle of international law, the harm principle would ostensibly have universal application. However, given that it would not have received the explicit consent of states, it is less likely to be obeyed. The court developing (or ‘identifying’) such a harm principle would also be opening itself up to accusations of judicial activism.

With either option, however, I fully acknowledge how fraught with complications constructing such a principle would be in practice. How, for example, would we define what constitutes a ‘serious harm’ or ‘injury’? How would one prove the causal link between the international law and the indirect harm inflicted on the third party? And how – if all this could be established – would we quantify the harm caused so as to achieve legal redress – presumably through financial settlement? I do not claim to know the answers to these questions, nor will I explore them here. The short – perhaps lazy – answer would be to leave it to the discretion of the courts. However, even if we wanted to hand courts such immense judicial discretion and responsibility, we would still – at a minimum – need to give the court some guidelines as a point of reference for making a decision. In principle, however, I do not believe these problems to be impenetrable – especially as these same complexities frequently arise, and are dealt with, at the domestic level.

In sum, although this thesis has concluded that state consent is insufficient for the legitimacy of international law, it does not propose tearing-up all existing international laws. We have natural moral obligations outside of our political obligations, and it may well be that

following existing international laws (although illegitimate) is the best way of fulfilling those obligations. For example, we arguably have an independent moral obligation to preserve international peace and stability, and to maximise predictability for the maintenance of order. If respecting existing international law is likely to achieve this, then we should be cautious about undermining such laws. We should also be mindful not to make the 'ideal' the enemy of the 'good and achievable'. Our current system of state consent may be the best we can presently hope for given the construction of the international system. Thus, for example, although we might believe that – in theory – a global democratically elected and representative legislature would consistently produce legitimate international laws, such an institution is not in the offing, and an attempt to forcibly construct it may lead to more harm than good.

This does not mean, however, that we should not work to reform the international legal system so as to increase its claim to legitimacy. I have offered two proposals for how this might be achieved. The first was to work towards the democratisation of states, and the second to institutionalise a 'harm principle' as a treaty provision or general principle of international law. If these two reforms could be realised, I believe that state consent would have a much stronger claim to be sufficient for the legitimacy of international law.

Andrew Guzman wrote in 2011 that 'the normative implications of our consent-centric approach to international law have not been adequately addressed and, in my view, are not well understood.'²⁰ This thesis has tried to render this claim a little less true. In offering the first 'book-length' moral analysis of state consent as the basis of international legal legitimacy, I have tried to introduce nuance to a debate where little existed before. I have also tried to bridge the divide – referred to in my introduction – between the way this issue is approached by, on the one hand, political philosophers, and on the other, international lawyers. I hope that, in reading this thesis, philosophers will come away with an improved understanding of the structures and complexities of international law, and that international lawyers will apply a more critical eye to the method of legitimation that is (often) taken for granted.

²⁰ Guzman, A. (2011) 'The Consent Problem in International Law': p.5

The value of this thesis should not be read – or not ‘only’ be read – with reference to the ability of its conclusions to achieve consensus or agreement. In undertaking this thesis, I have tried to accomplish something far more useful: to map the terrain of this debate; to deconstruct it into more comprehensible components – so that future contributors may more easily navigate the points of contention and construct their own arguments. The legitimacy of international law is an issue that will only grow more pressing as political, social and economic activity increasingly takes place ‘between’ rather than ‘within’ states. We need to find a way to reconcile our conceptions of political legitimacy with legal structures and authorities that are becoming increasingly distant from the individual. If this thesis has in any way contributed to understanding and resolving this challenge – or helped others to do so – then I consider it a success.

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