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Lea Ina Schneider

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I. Introduction

International law is based on the foundation of state consent.¹ Some scholars have even gone so far as to claim that without consent a state cannot be bound by international law.² In practice, international legal obligations are never imposed on states without their consent.³

However, in today's globalised world with pressing global challenges, the strict commitment to state consent is double-edged. On the one hand, the principle of state consent protects sovereignty and the interests of states. On the other hand, it can present an obstacle to effective decision-making and cooperation in a world of vastly diversified opinions and priorities. Thereby, it can prevent the solving of the most pressing global challenges, such as climate change.⁴

This paper aims to delve deeper into the problematic aspects of this principle of state consent. In the literature, two opposing camps regarding the principle of state consent can be identified; while the first stresses that international obligations can result from state consent only, the second is characterised by a growing disregard for a strict commitment to state consent.⁵ This paper is dedicated to a mediating approach between these two opposing groups. I will argue that the critics of the consent principle are right in the sense that a strict understanding of the principle of state consent hinders the solving of today's global problems. Climate change, nuclear weapons and poverty require global cooperation which is almost made impossible when sticking to a strict concept of state consent. Therefore, I argue that the traditional non-consensual forms of international law along with soft law should be encouraged. However, both do not question the principle of state consent. In the case of traditional non-consensual forms of international law, there are overriding principles, explaining why they do not require consent. Also, soft law as the new form of non-consensual international law does not

1 ANTHONY AUST, *Handbook of International Law*, 2nd ed., Cambridge 2010, p. 3; LOUIS HENKIN, *International Law: Politics and Values*, The Hague 1995, p. 27.

2 ANTONIO CASSESE, *International Law in a Divided World*, Oxford 1986, p. 169; GENNADY MIKHAILOVICH DANILENKO, *Law-Making in the International Community*, Dordrecht/Boston 1993, p. 7; HENKIN (n. 1), p. 9, p. 27.

3 LIAM MURPHY, *What makes Law*, Cambridge 2014, p. 179.

4 ANDREW T. GUZMAN, *Against Consent*, *Virginia Journal of International Law* 52 2012, pp. 747-790, p. 749.

5 DANIEL BODANSKY / J. SHAND WATSON, *State Consent and the Sources of International Obligation*, *American Society of International Law Proceedings* 86 1992, pp. 108-113.

challenge the consensual approach of international law as it evolves at the periphery of the international legal order, especially through informal channels.⁶

This paper takes a mediating stance between the two opposing camps in the literature as it claims that consensual and traditional non-consensual forms of international law have always co-existed. The main reason for a strict state consent principle is the compliance deficit of international law, which is a result of the lack of centralised enforcement mechanisms in international law.⁷ Hence, weakening the principle of state consent weakens the compliance, stability and acceptance of international law and its legitimacy—showing that its underlying thoughts are too vital to be abandoned. Furthermore, I argue that there is no reasonable alternative to the principle of state consent.

First, I will state what is meant by state consent and outline the underlying thoughts and reasons for this principle which stress its importance. Then, I analyse its most vital challenges, such as its lack of effectiveness and that it promotes the self-interest of states. Third, I will analyse the traditional non-consensual forms of international law. Then, I will examine the development of state consent, showing that non-consensual forms of international law have become increasingly important. Subsequently, I will discuss soft law as a new form of non-consensual international law.

II. The Principle of State Consent

1. Mapping the Terrain—Definition of State Consent

As a starting point, it must be clear what is meant by state consent and international law. Defining consent is not a simple task; most international legal scholars do not state what they mean by it.⁸ “Consent” in international law

6 ARMIN STEINBACH, *The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective*, *European Journal of International Law* 27 2016, pp. 643–668, p. 645.

7 DAVID J. BEDERMAN, *Counterintuiting Countermeasures*, *American Journal of International Law* 96 2002, pp. 816–832, p. 818; LAURENCE R. HELFER, *Nonconsensual International Lawmaking*, *University of Illinois Law Review* 2008, pp. 71–125, p. 73; DUNCAN SNIDAL, *Coordination versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes*, *American Political Science Review* 79 1985, pp. 923–942, p. 926.

8 E.g. GUZMAN (n. 4); HELFER (n. 6); DUNCAN B. HOLLIS, *Why Consent Still Matters—Non-State Actors, Treaties and the Changing Sources of International Law*, *Berkeley Journal of International Law* 23 2005, pp. 137–174; NICO KRISCH, *The Decay of Consent: International Law in the Age of Global Public Goods*, *American Journal of International Law* 108 2014, pp. 1–40.

refers to both; the “free will” of states and their “acceptance” of international law.⁹ One further conceptual point must be emphasised: the object of state consent which is usually reduced to consent regarding state interests and hence to self-interested consent.¹⁰ Second, this paper’s understanding of international law must be clear. For the purpose of this paper, a positivistic understanding of international law is applied; it is defined as the law originating from the sources described in Art. 38 (1) ICJ-Statute.

2. Origin of the Principle of State Consent

In a much-quoted passage of the *Lotus Case*, the Permanent Court of International Justice holds that rules binding states “[...] must emanate from their own free will”¹¹. The following section aims to examine the underlying ideas of the principle of state consent which are at the same time the strongest arguments in favour of this principle.

a) Equality, Sovereignty and Legitimacy

The concept of state consent can be traced back to three core ideas of which the first two are closely interlinked: the equality of states, their sovereignty and the legitimacy of international law.

The equality of states is protected by having their consent as a requirement in international law-making. Thereby, a way for small and weak states is provided to resist the domination of large and powerful states or coalition of states.¹² Furthermore, the states’ equal consent protects the individual members of those states’ right to an equal voice in the collective decision-making

9 P.C.I.J., Case of the S.S. *Lotus* (France versus Turkey), 7 September 1927 (ser. A) No. 10, p. 18; ICJ, *Barcelona Traction, Light and Power Company* (Belgium versus Spain), 5 February 1970, Rep. 3, para. 47; ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua versus The United States), 27 June 1986, Rep. 14, para. 135.

10 GUZMAN (n. 4), p. 747, pp. 754–5; HELFER (n. 6); JOEL P. TRACHTMAN, *The Future of International Law*, Cambridge 2013. However, BESSON argues that if consent is central to international law-making, it should apply to the whole range of objects of international law without restrictions, including moral-political issues such as human rights and climate justice, BESSON (n. 21), p. 296.

11 P.C.I.J., Case of the S.S. *Lotus* (France versus Turkey), 7 September 1927 (ser. A) No. 10, p. 18.

12 JAN KLABBERS, *Law-making and Constitutionalism*, in: Jan Klabbers / Anne Peters / Geir Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford 2012, pp. 81–125, p. 114; EYAL BENVENISTI / GEORGE W. DOWNS, *The Empire’s New Clothes, Political Economy and the Fragmentation of International Law*, *Stanford Law Review* 60 2007–2008, pp. 595–631.

process they are participating in through their states.¹³ The principle of equal consent underlines and reinforces the equality between states and postulates that a state cannot be bound by any law to which it has not given its consent.¹⁴

Additionally, the consent requirement is an important safeguard against encroachment on sovereign spheres and political priorities.¹⁵ The reason for a consent-based system builds on the understanding of the role of the state in the global system:¹⁶ states possess sovereign equality, meaning non-subordination to other states.¹⁷ They remain the most important political unit in today's world, act on behalf of their populations, enter into agreements and claim exclusive control over their territory.¹⁸ From these considerations, it follows that consent is necessary for them to be bound by international law.

Furthermore, the principle of state consent fosters the legitimacy and henceforth the stability of international law.¹⁹ State consent amounts to a justification for the legitimate authority of international law so produced.²⁰ In the case of democratic states, the democratic accountability to their people need to be taken into account in international law-making, especially in the circumstances of widespread and persistent reasonable disagreement that prevail among and within democratic states regarding international law. This is best done by respecting the sovereign equality of democratic states and hence their consent as the way to grant an equal voice to their people.²¹

13 THOMAS CHRISTIANO, *Climate Change and State Consent*, in: Jeremy Moss (ed.), *Climate Change and Justice*, Cambridge 2015, pp. 17-38; from a constitutional perspective JAN KLABBERS, *International legal positivism and constitutionalism*, in: Jörg Kammerhofer / Jean d'Aspremont (eds.), *International Legal Positivism in a Post-Modern World*, Cambridge 2014, pp. 264-290, p. 285.

14 ARNOLD D. MCNAIR, *Equality in international law*, *Michigan Law Review* 26 1927, pp. 131-152, p. 146, p. 152.

15 JUTTA BRUNNÉE, *Consent*, in: Rüdiger Wolfrum (ed.), *Max Planck encyclopedias of public international law*, Oxford 2010, para. 4.

16 ANDREW T. GUZMAN, *The Consent Problem in International Law*, *Berkeley Program in Law and Economics, Working Paper Series* 2011, pp. 4-63, p. 8.

17 JULIANE KOKOTT, *States, Sovereign Equality*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford 2011, para. 28.

18 GUZMAN (n. 17), p. 5.

19 BRUNNÉE (n. 16), para. 4; ASHLEY S. DEEKS, *Consent to the Use of Force and International Law Supremacy*, *Harvard International Law Journal* 54 2013, pp. 1-60, p. 49; MATTHEW J. LISTER, *The Legitimizing Role of Consent in International Law*, *Chicago Journal of International Law* 11 2011, pp. 663-691.

20 SAMANTHA BESSON, *State consent and disagreement in international law-making, Dissolving the Paradox*, *Leiden Journal of International Law* 29 2016, pp. 289-316, p 300.

21 BESSON (n. 21), p. 316.

b) Compliance

One of the signature features of international law is its lack of enforcement mechanisms. This reality makes compliance with international law a matter of constant concern.²² Thus, the consent requirement aims to reduce the frequency of non-compliance by limiting international law rules to those that states have agreed to accept.²³ As international law lacks authoritative institutions to produce objectively valid rules, it is not in a position to adopt an approach to rule formation that might be at variance with the conclusions reached by the participants in the process.²⁴

3. Problematic Aspects of State Consent

Although, as shown, there are important reasons for the principle of state consent, it also faces criticism which will be examined next.

The most common critique depicts state consent as a tool fostering the state's own interests and welfare,²⁵ leading to international law-making which is not focused on promoting global public goods.

However, Besson argues against this by claiming that states are institutional constructs that can be designed to decide in a non-self-interested fashion.²⁶

Furthermore, the principle of state consent is criticised for its lack of efficiency, as multilateral treaty-making is a slow and cumbersome process. Especially when it requires the approval of the world's nearly two hundred nations.²⁷ A major difficulty consists in ensuring that all states affected by international problems become parties to international agreements that

22 ANDREW T. GUZMAN, *How International Law Works*, Oxford 2008.

23 BODANSKY/WATSON (n. 5), p. 110; GIORGIO GAJA, Discussion, in: Antonio Cassese / Joseph H.H. Weiler (eds.), *Change and Stability in International Law-Making*, Oldenbourg 2010, pp. 16-17, p. 16; GUZMAN (n. 4), p. 752; HELFER (n. 6), p. 73; ALAIN PELLET, *The Normative Dilemma: Will and Consent in International Law-Making*, *Australian Yearbook of International Law* 12 1988-1989, pp. 22-53, p. 37.

24 BODANSKY/WATSON (n. 5), p. 110.

25 JONATHAN I. CHARNEY, *Universal International Law*, *American Journal of International Law* 87 1993, pp. 529-551; BRUNO SIMMA, *From Bilateralism to Community Interests in International Law*, *Recueil des cours de l'Academie de droit international* 250 1997, pp. 217-384; CHRISTIAN TOMUSCHAT, *Obligations arising for states without or against their will*, *Recueil des cours de l'Academie du droit international* 241 1993, pp. 195-374.

26 BESSON (n. 21), p. 312.

27 GEOFFREY PALMER, *New Ways to Make International Environmental Law*, *American Journal of International Law* 86 1992, pp. 259-283.

seek to resolve those difficulties.²⁸ As this often does not work, international law is seen as increasingly incapable of providing much-needed solutions for the challenges of a globalised world. As countries become increasingly interdependent and vulnerable to global challenges, an international order that safeguards states' freedoms at the cost of common policies is often seen as anachronistic.²⁹

Insisting on the consent of states to the creation of new norms puts a rather strict limit on the degree of creativity available to commentators,³⁰ whereby creating an extremely conservative regime with a powerful preference for the *status quo*.³¹ Dissatisfaction with a consent-based order is perhaps strongest among those that focus on problems demanding large-scale collective action, as in the case of climate change, where the inability to proceed by majority rule is increasingly seen as untenable in light of the challenge.³² According to this view, what is needed is a turn to non-consensual law-making mechanisms.³³

III. Traditional Non-Consensual Forms of International Law

Given the importance and significance of the principle of state consent, the impression could be created that international law is always based on consent. However, some of the traditional pillars of international law, namely, customary international law, *jus cogens* and the resolutions of the UNSC cannot be fully explained on the basis of state consent.³⁴ In this section, it will be examined why these forms do not require consent.

28 GEORGE W. DOWNS et al., *Managing the Evolution of Multilateralism*, International Organization 52 1998, pp. 397-419, p. 398; SCOTT BARRETT, *Environment and Statecraft*, Oxford 2003, pp. 195-220.

29 KRISCH (n. 8), p. 1.

30 BODANSKY/WATSON (n. 5), p. 108.

31 GUZMAN (n. 17), p. 5, p. 14.

32 JUTTA BRUNNÉE / STEPHEN J. TOOPE, *Legitimacy and Legality in International Law*, Cambridge 2010, p. 215; DANIEL C. ESTY/ANTHONY L. I. MOFFA, *Why Climate Change Collective Action Has Failed and What Needs to Be Done Within and Without the Trade Regime*, Journal of International Economic Law 15 2012, pp. 777-791, p. 779.

33 See GUZMAN (n. 4); HELFER (n. 6); TRACHTMAN (n. 10).

34 CHARNEY (n. 27), pp. 536-542; J. PATRICK KELLY, *The Twilight of Customary International Law*, Virginia Journal of International Law 40 2000, pp. 449-544, pp. 508-516; TOMUSCHAT (n. 27), pp. 278-290; WEIL (n. 55), pp. 433-434; STEPHEN HALL, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, European Journal of International Law 12 2001, pp. 269-307.

1. Customary International Law, Jus Cogens and UN Security Council Resolutions

By contrast to treaties, customary international law is often regarded as less “consensual”, at least to the extent that the practice and *opinio juris* need only be general and not unanimous for a custom to arise. Even though the two elements; convergent practice and *opinio juris*, are still consent-oriented,³⁵ consent does not need to be secured completely for custom to arise.

As a result, customary international law seems to bind some states without or even against their consent.³⁶ Importantly, however, this is only the case provided a state does not object expressly and persistently to the emerging consensus (*persistent objection*).³⁷ It may therefore dissent, and thereby can withdraw the consent it was otherwise giving tacitly.³⁸ Some scholars argue in favour of a consent-based understanding of *persistent objections* in the formation of customary international law.³⁹ Custom is thus more than just practice; it is tolerated practice, practice with the consent of other states.⁴⁰ However, the majority of scholars argue against this and see customary international law as an exception to a strict commitment to state consent.⁴¹

A *jus cogens* norm is a norm that is thought to be so fundamental that no derogation from it is allowed, whether through state behaviour or treaty, and applies to all states regardless of their consenting to it.⁴² Hence, *jus cogens* norms present a real challenge to the state consent-based understanding of the authority of international law.⁴³ Unlike rules of customary international

35 PHILIP ALLOTT, The Concept of International Law, *European Journal of International Law* 31 1999, pp. 31–50, p. 39.

36 GUZMAN (n. 17), p. 32.

37 BESSON (n. 21), p. 315.

38 E.g. MICHAEL BYERS, *Custom, Power and the Power of Rules*, Cambridge 1999, pp. 142–146; JAMES CRAWFORD, *Chance, Order, Change: The Course of International Law*, Leiden 2014, p. 247; JAN KLABBERS, *The Concept of Treaty in International Law*, The Hague u.a. 1996, pp. 113 ff.; WEIL (n. 55), pp. 433–434.

39 BESSON (n. 21), p. 315; MICHAEL WOOD, Special Rapporteur, Third Report on identification of customary law, 27 March 2015, UN Doc. A/CN.4/682 paras. 61–69.

40 BODANSKY/WATSON (n. 5), p. 111.

41 GUZMAN (n. 4), pp. 775 ff.; JOHN TASIOLAS, Custom, Jus Cogens and Human Rights, in: Curtis Bradley (ed.), *Custom's Future*, Cambridge 2016, pp. 95–116; PATRICK DUMBERY, Incoherent and Ineffective: The Concept of Persistent Objector Revisited, *International and Comparative Law Quarterly* 59 2010, pp. 779–802; HOLNING LAU, Re-thinking the Persistent Objector Doctrine in International Human Rights Law, *Chicago Journal of International Law* 6 2005, pp. 495–510.

42 DAN DUBOIS, The Authority of Peremptory Norms in International Law: State Consent or Natural Law?, *Nordic Journal of International Law* 78 2009, pp. 133–175, p. 135.

43 DUBOIS (n. 45), p. 134.

law, *jus cogens* norms do not acknowledge *persistent objectors*.⁴⁴ By definition, *jus cogens* norms apply to all states regardless of whether or not they object to being subject to its rule.⁴⁵

The United Nations Security Council (UNSC) with its 15 members has the authority under Chapter VII of the UN Charter to impose legally binding measures on all UN member states.⁴⁶ Hence, the UNSC has the authority to enact non-consensual yet binding rules on all UN member states.⁴⁷ However, the UNSC's authority is limited to actions taken to maintain international peace and security and has difficulties with its consent-based veto powers.⁴⁸

2. Overriding Principles as Justification for the Traditional Forms of Non-Consensual International Law

As examined in Chapter III.1, while consent still plays a role in the formation of customary international law, this is not true for *jus cogens* and UNSC resolutions. The last two both have a very narrow application range and are justified by overriding principles. I argue that both traditional forms of non-consensual international law do not require consent because they are justified by overriding principles:⁴⁹ human dignity in the case of *jus cogens*⁵⁰ and international security in the case of the UNSC resolutions. Only in these two cases, consent's underlying ideas as state sovereignty⁵¹ must take a back seat to these overriding principles and state consent is not required. Hence, both do not call into question the principle of state consent. Taking this thought further, one might wonder whether international law regulating climate change might also be justified by overriding principles and hence would not require state consent. However, it remains unclear who decides when the consent principle is not needed, as law-making in a certain area can be justified by overriding principles. Generally, in international law-making, especially when there is political flexibility, state consent is required as no overriding principles can be applied.

44 CHRISTOS ROZAKIS, *The Concept of Jus Cogens in the Law of Treaties*, Amsterdam 1976, p. 78.

45 DUBOIS (n. 45), p. 137.

46 GUZMAN (n. 17), pp. 39-40.

47 GUZMAN (n. 17), p. 40.

48 NEIL FENTON, *Understanding the UN Security Council*, Aldershot 2004.

49 GENNADY M. DANILENKO, *International Jus Cogens: Issues of Law-Making*, *European Journal of International Law* 2 1991, pp. 42-65, p. 42.

50 THOMAS WEATHERALL, *Jus Cogens*, Cambridge 2015, pp. 19-106.

51 Examined in Chapter II.2.

IV. Development of State Consent—Questioning the Strict Commitment to State Consent

To understand the significance of the principle of state consent today, it is helpful to look briefly at the development of the criticism of this principle.

Historically, international law has been viewed as a body of rules produced through a consent-based procedure.⁵² However, both in theory and in practice, this understanding of international law is changing. On the theoretical side, scholars have begun to question the negative implications of relying exclusively on consent-based mechanisms to produce international law.⁵³ In practice, the EU provides the most prominent example of an institution that produces non-consent-based supranational law.⁵⁴

Many international lawyers with an internationalist mind-set have harboured variants of the consent principle since the early twentieth century. This critique is strongly aligned with the idea of an international community, which was especially prominent in the 1990s.⁵⁵ However, the scepticism of the principle of state consent is also not universally shared. Anti-consensual arguments have themselves been under heavy critique from the perspective of national autonomy, democracy, and sovereign equality. For these critics, “[...] anything else [than a consent-like criterion] would be dictatorial”⁵⁶ as non-consensual international law-making is not seen as legitimate due to its non-democratic origins.⁵⁷ Critics of soft law also stress that soft law is mainly used as a means by powerful states to defend their interests.⁵⁸

However that may be, the attack on consent seems to have gained strength and salience through the increased urgency of global cooperation

52 REYNOLDS et al., Attitudes toward Consent-Based and Non-Consent-Based International Law in a Regional Power Context, *International Interactions* 44 2018, pp. 661-680, p. 662.

53 KRISCH (n. 8), p. 5.

54 REYNOLDS et al. (n. 51), p. 662.

55 CHARNEY (n. 27); SIMMA (n. 27); TOMUSCHAT (n. 27).

56 KLABBERS (n. 13), p. 114; PROSPER WEIL, Towards Relative Normativity in International Law?, *American Journal of International Law* 77 1983, pp. 413-442.

57 IAN JOHNSTONE, Legislation and Adjudication in the UN Security Council: Bringing down the Deliberative Deficit, *American Journal of International Law* 102 2008, pp. 275-308; JONAS TALLBERG, Delegation to Supranational Institutions: Why, How, and with What Consequences?, *West European Politics* 25 2002, pp. 23-46; MICHAEL ZÜRN, Global Governance and Legitimacy Problems, *Government and Opposition* 39 2004, pp. 260-287; MICHAEL ZÜRN / MATTHEW STEPHEN, The View of Old and New Powers on the Legitimacy of International Institutions, *Politics* 30 2010, pp. 91-101.

58 ABBOTT/SNIDAL (n 73), p. 63-65; MILES KAHLER, Conclusion: The Causes and Consequences of Legalization, in: Judith L. Goldstein et al. (eds.), *Legalization and World Politics*, Cambridge 2001, pp. 661-683, p. 672-674.

problems.⁵⁹ Hence, the classical, central place of consent in international law has been increasingly eroded by considerations of effectiveness.⁶⁰

To describe the diminishing importance of the principle of state consent, scholars refer to the decreasing number of treaties since the 1990s and to the fact, that a lot of the treaties concluded since then have third-party effects and that customary international law, judicial law, and international organisations' law are becoming more and more majoritarian and less consensual in the way they are produced.⁶¹ However, these changes identified are located at the periphery or arguably outside of international law, the way it is understood in this paper:⁶² it suffices to think of the development of soft law.⁶³ Thus, although there are new non-consensual means of international cooperation, none of them is (yet) regarded as sources of international law *stricto sensu*. The latter are all still consent-based.⁶⁴

At the same time, one witnesses a radical expansion of global regulation in general.⁶⁵ This expansion often comes in other forms than formal law—especially through informal norms and institutions, which by all accounts have grown rapidly over the last few decades.⁶⁶ The combined effect of a decrease in new multilateral treaties and a significant increase in informal regulation is certainly a shift away from classical, formal consent-based international law.⁶⁷

59 KRISCH (n. 8), p. 6.

60 KRISCH (n. 8), p. 6-7.

61 BESSON (n. 21), p. 293; KRISCH (n. 8), p. 35.

62 KRISCH (n. 8), p. 2, p. 26 ff., p. 34. International law was defined in Chapter II.1.

63 HELFER (n. 6); JOOST PAUWELYN / RAMSES A. WESSEL / JAN WOUTERS, *Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable*, in: Joost Pauwelyn / Ramses Wessel / Jan Wouters (eds.), *Informal International Lawmaking*, Oxford 2012, pp. 500-537; ANNE PETERS, *Global Constitutionalism Revisited*, *International Legal Theory* 11 2005, pp. 39-68.

64 BESSON (n. 21), p. 293.

65 See e.g. JOHN BRAITHWAITE / PETER DRAHOS, *Global Business Regulation*, Cambridge 2000; WALTER MATTLI / NGAIRE WOODS, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, in: Walter Mattli / Ngaire Woods (eds.), *The politics of global regulation*, Princeton/Oxford 2009, pp. 1-43.

66 MARIE-LAURE DJELIC, *International Competition Network*, in: Thomas Hale / David Held (eds.), *Handbook of Transnational Governance*, Cambridge/Malden 2011, pp. 80-87; PAUWELYN/WESSEL/WOUTERS (n. 61), pp. 39-68; ANNE-MARIE SLAUGHTER, *A New World Order*, Princeton/Oxford 2004; STEFAN VOIGT, *The Economics of Informal International Law: An Empirical Assessment*, in: Joost Pauwelyn / Ramses Wessel / Jan Wouters (eds.), *Informal International Lawmaking*, Oxford 2012, pp. 82-104.

67 KRISCH (n. 8), p. 36.

V. Ways forward: Promoting Soft Law as A New Non-Consensual Form of International Law

As examined in Chapter V, it is not new to international law that some parts of it are based on non-consensual law-making. Hence, by seeking to promote non-consensual forms of international law, one does not introduce a mechanism hitherto unknown to international law. Nevertheless, the suggestion proposed as alternative to these traditional forms of non-consensual international law, namely soft law, go further than these traditional non-consensual forms of international law. The latter are restricted to very limited areas.

Soft law is used here in juxtaposition with formal international law-making and not considered legally binding.⁶⁸ It is understood as law that dispenses with certain formalities traditionally associated with international law, as the consent-principle,⁶⁹ and thus is not readily cognizable as international law proper.⁷⁰ Soft law is used to describe principles, rules, and standards governing international relations which are not considered to stem from one of the sources of international law enumerated in Art. 38 (1) ICJ-Statute.⁷¹

Soft law has gained greater prominence in recent years as it allows for greater speed and flexibility in the establishment, design, and operation of rule-making processes.⁷² For states willing to act on global challenges yet facing obstacles in the formal paths of international law-making, these alternatives present opportunities for effective action.⁷³

68 EVA KASSOTI, *Beyond State Consent? International Legal Scholarship and the Challenge of Informal International Law-Making*, *Netherlands International Law Review* 63 2016, pp. 99-131, p. 102; JOOST PAUWELYN, *Informal international lawmaking: framing the concept and research questions*, in: Joost Pauwelyn / Ramses Wessel / Jan Wouters (eds.), *Informal International Lawmaking*, Oxford 2012, pp. 13-34, p. 16; DANIEL THÜRER, *Soft law*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford 2009, paras. 6, 9.

69 OLUFEMI ELIAS / CHIN LIM, "General Principles of Law", "Soft" Law and the Identification of International Law, *Netherlands Yearbook of International Law* 28 1997, pp. 3-49, pp. 3-6.

70 KASSOTI (n. 66), p. 102.

71 THÜRER (n. 68), para. 5.

72 KRISCH (n. 8), p. 8.

73 See e.g. KENNETH W. ABBOTT / DUNCAN SNIDAL, *Hard and Soft Law in International Governance*, *International Organization* 54 2000, pp. 421-456; ANDREW T. GUZMAN / TIMOTHY L. MEYER, *International Soft Law*, *Journal of Legal Analysis* 2 2010, pp. 171-225; KAL RAUSTIALA, *Form and Substance in International Agreements*, *American Journal of International Law* 99 2005, pp. 581-614; GREGORY C. SHAFFER / MARK A. POLLACK, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, *Minnesota Law Review* 94 2010, pp. 706-799; SLAUGHTER (n. 64).

I argue that these new forms of non-consensual law-making do not present a formal challenge to the consent element in international law, as it takes place outside the classical international legal order, especially in the informal realm.⁷⁴ Hence, the status of consent as a vital principle in international law is not questioned by encouraging soft law as a new form of non-consensual law. As international law and soft law present two different regimes, whereby the latter lacks binding force, but produces significant legal effects nevertheless,⁷⁵ the lack of the consent-requirement of soft law neither presents an inconsistency with the principle of state consent in international law nor does it need to be explained by overriding principles.

The principle of state consent is crucial in terms of the sovereign equality between states, which reduces the ubiquity of power disparities between states,⁷⁶ and the legitimacy of international law. Furthermore, there is no reasonable and practicable alternative to the principle of state consent.⁷⁷ Therefore, the maintenance of the principle of state consent is essential. Also, as the potentially increased relevance of adapting and softening international law's insistence on consent is likely to come at the cost of losing its appeal for the many countries for whom consent and sovereign equality were precisely what distinguished international law from other forms of international politics.⁷⁸

Hence, to provide solutions to the pressing global challenge, such as climate change, and avoid the strong *status quo* bias of international law produced by consent, soft law as a new form of non-consensual law-making which acts outside of the traditional public international law framework should be encouraged.

VI. Conclusion

The principle of state consent is crucial as it is essential for the stability and legitimacy of international law. Henceforth, the principle is not questioned;

74 KRISCH (n. 8), p. 10.

75 THÜRER (n. 68), paras. 19-23, 37.

76 NICO KRISCH/BENEDICT KINGSBURY, Introduction: Global Governance and Global Administrative Law in the International Legal Order, *European Journal of International Law* 17 2006, pp. 1-13, p. 11.

77 FABIÁN AUGUSTO/CÁRDENAS CASTAÑEDA, A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin, *Anuario Mexicano de Derecho Internacional* 13 2013, pp. 355-403, pp. 363-367.

78 KRISCH (n. 8), pp. 39-40.

neither by the traditional non-consensual forms of international law which are justified by overriding principles nor by soft law which acts outside the periphery of the traditional international legal order.

Even though the principle of state consent remains untouched, due to its strong *status quo* bias and its lack of efficiency, the current global challenges will not be resolved when only sticking to consensual international law-making. Thus, soft law as a new form of non-consensual law-making should be encouraged, alongside the traditional non-consensual forms of international law.

APARIUZ XXII UNTER GLEICHEN

Die diesjährige XXII. Ausgabe der Schriftenreihe APARIUZ greift mit ihrem Titel «Unter Gleichen» programmatisch das 2021 anzusetzende fünfzigste Jubiläum eines der bedeutendsten rechtshistorischen und politischen Ereignisse der Schweiz auf: die Einführung des allgemeinen Frauenwahl- und Stimmrechts.

Ausgehend von diesem in seiner gesellschaftlichen und juristischen Tragweite kaum zu übertreffenden Meilenstein untersuchen die dreizehn Beiträge dieses Sammelbandes, verfasst von Nachwuchswissenschaftlerinnen aus allen juristischen Fachbereichen, verschiedenste Fragen zum komplexen und vielschichtigem Verhältnis von Recht, Gleichheit und Gerechtigkeit.