Customary Law, Consent, and the Status Quo Paradox

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According to the traditional understanding of international law, states cannot be bound by a legal rule against their will. This also applies to customary international law. The emergence of a customary rule requires a general practice accompanied by opinio iuris. General practice does not mean that every state has to participate actively in this practice. But a state cannot be bound by a customary rule if it explicitly resists its emergence.

This traditional view has been challenged in the legal scholarship of the last two decades. The critique of traditional custom has been both descriptive and normative. On a descriptive level, scholars have observed that international courts and tribunals increasingly refrain from detailed analyses of the state practice and instead recur to interpretative methods of identifying customary law. Normatively, there are several accounts that try to justify such an approach. A number of scholars argue that customary norms can emerge even in the absence of a uniform practice of states, relying predominantly on opinio iuris.

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5 See Bin Cheng, On the Nature and Sources of International Law, in INTERNATIONAL LAW. TEACHING AND PRACTICE 203, 222-229 (Bin Cheng ed., 1982); Andrew T. Guzman, Saving Customary
Other authors propose to apply some kind of majority rule to the *opinio iuris* requirement under certain circumstances.\(^6\)

Looking at the scholarship on the so-called “modern” customary international law, it seems that the consent requirement is an element of the past, i.e. that states can be bound by customary international law even against their will. However, this conclusion might be too fast. This contribution will analyze the case law of the International Court of Justice and show that it is too early to disband consent as a necessary requirement of customary international law. What might seem to be a turning away from consent is instead often a functionally necessary move of the Court to salvage some of the conceptual inconsistencies of the traditional conception of custom.

The argument will proceed in three steps. First, we will have a look at the justification of the consent requirement. The consent requirement was originally introduced to abandon natural law conceptions of customary law, which conceived state practice only to be a discovery of some deeper underlying truths. In contrast, a positive understanding of customary law requires formal criteria of identifying customary law, and state consent seems to be the most logical linkage point.

The second part will highlight some of the problems and inconsistencies of the consent-based conception. If there is a situation in which no particular rule is supported by a sufficiently broad state practice and *opinio iuris*, courts have to deal with the question of how to fill the void. I will show that the *Lotus* principle, which is supposed to be the fallback rule, has severe limitations. The third part addresses strategies of the International Court of Justice to deal with this problem. I will show that the Court either tries to establish normative

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\(^7\) The term was coined by Roberts, *supra* note 5.
preconception through functional arguments or deductive argumentation, or recurs to equitable principles. The fourth part concludes.

### 1. The Justification of the Consent Requirement

In its early days, the law of nations was predominantly based on natural law principles.8 Under a natural law conception of customary law, practice was a mere manifestation of a discovery process that was supposed to unearth truth about legal principles.9 The turn towards a positive conception of international law started with the writing of Francisco Suárez in the early 17th century.10 Suárez relied on the will of states in the formation of customary law in order to dissolve international law from its natural law origins.11 International law was no longer derived from pre-conceived principles, but based on a formal process characterized by practice and state consent.

Now, consent by all legal subjects is not the only logically possible way to create positive legal rules. In modern democratic nation states, laws are predominantly made on the basis of majority decision-making. However, if we look at the justification of democracy in political theory and political philosophy, the majority rule is not a self-evident element of democracy. If we consider every individual to be a free human being, the rule of the majority over the minority has to be justified. The most common attempt to justify majority rule is the idea of a social contract between all citizens.12 This social contract is, of course, only a fiction. The normative basis of social order in modern democratic states is not consent of every citizen, but hypothetical consent. However, it is important to note that hypothetical consent is the normative foundation even of our modern democratic nation states. It is thus not surprising that consent is also the basis of the positivist conceptualization of international law.

At the same time, it is much more difficult to transpose the idea of the social contract to the international level. While the law-making process within the nation-state is centralized and formal, the formation of customary international law is decentralized and informal. Recourse to a kind of majority rule is much more difficult in such an informal setting because there is no voting process as such. Furthermore, it is not self-evident to transfer the one-man-one-vote rule to the international context. The principle of sovereign equality enshrined in Art. 2 (1) of the UN Charter is logical in a system in which we require consent. However, if we wanted to shift to majority rule, we would have to deal with normatively difficult questions, such as whether countries with a large population should indeed have the same weight as countries with a small population.13

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8 David J. Bederman, Custom as a Source of Law 138 (2010).
10 Francisco Suárez, Tractatus de Legibus ac deo legislatore (1612).
11 Bederman, supra note 8, at 138-140.
12 See Wolfgang Kersting, Die politische Philosophie des Gesellschaftsvertrags (1994).
13 International organizations often account for differences between countries through weighted voting mechanisms. See, e.g., Treaty on European Union, art. 16 (4) (establishing a
For this reason, it is difficult to abandon the consent requirement as a starting point for the formation of customary international law. However, the legal doctrine and the practice of international courts and tribunals have developed certain doctrines to lower the high decision costs that the consent requirement imposes on the law-making process. On the one hand, consent does not have to be explicit. States are bound by a customary rule if they have not opposed this rule during the time of its emergence. Furthermore, the overwhelming majority of academic commentators today accept the persistent objector doctrine.\footnote{See supra note 3.} Under a strict consent requirement, the explicit resistance of even one state would already impede the emergence of a new customary norm. However, with the persistent objector doctrine, the resistance of one state or a small group of states does not frustrate the establishment of the norm.\footnote{See Michael Akehurst, \textit{Custom as a Source of International Law}, 47 BYIL 1, 26-27 (1974); David J. Bederman, \textit{Acquiescence, Objection and the Death of Customary International Law}, 21 DUKE J. COMP. & INT’L L. 31, 34-35 (2010) (interpreting the consistent objector doctrine as a means to lower decision-making costs). See also Curtis A. Bradley & Mitu Gulati, \textit{Withdrawing from International Custom}, 120 YALE L. J. 202, 237-38 (2010) (commenting on this position).}
The resisting states are not bound by the newly emerging customary norm, but it is valid law for the majority of the international community.

2. \textit{Lotus} and the \textit{Status Quo} Paradox

If rules have high decision-making costs, such as in the case of customary international law, the focus turns to the \textit{status quo}. What happens if no rule of international law is applicable to a legal dispute between states? According to which standards should an international court or tribunal decide a case? The starting point of the analysis is usually the \textit{Lotus} principle established by the Permanent Court of International Justice:

\begin{quote}
"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 in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." \footnote{Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).}
\end{quote}

This passage has been interpreted as according a general freedom of action to states.\footnote{See Albert Bleckmann, \textit{Das Souveränitätsprintip im Völkerrecht}, 23 ARCHIV DES VÖLKERRECHTS 450, 464-68 (1985). See also Bederman, supra note 8, at 148 (arguing that for this reason "Lotus has proven to be a most problematic case for international lawyers").} \textit{Prima facie}, \textit{Lotus} thus establishes an analogy to the liberal political philosophy, which regards individual freedom to be a normative cornerstone of every social order. However, this freedom is not unlimited. Instead, it can only exist to the extent that it can "coexist with the freedom of every other in accordance with a universal law".\footnote{Immanuel Kant, \textit{The Metaphysics of Morals} 393 (Mary J. Gregor ed. & tr., 1996).} If we transpose this idea to the international qualified majority voting for certain decisions that takes the size of the member states into account); IMF Articles of Agreement, art. XII Section 5 (establishing a weighted voting system that depends on financial contributions).
level, the freedom of every state is limited by the freedom of every other state. As every legal dispute between states is arguably a dispute about the extent of competing freedoms of action, the Lotus principle does not do any normative work if the real issue is about the delimitation of competing claims of freedom.¹⁹

Let me demonstrate this idea with one example. In the 1974 Fisheries Jurisdiction cases, the ICJ had to decide about the extent of Iceland’s exclusive fishing zone.²⁰ While Iceland was claiming an exclusive fishing zone of 50 nautical miles, the United Kingdom and Germany were arguing that the exclusive fishing zone did not extend beyond 12 nautical miles. The practice at the time of the judgment was inconclusive.²¹ While most states adhered to the 12-mile-rule, others were claiming much broader exclusive fishing zones – some of them even up to 200 miles.²²

On the face, the Lotus principle thus seems to play in favor of Germany and the United Kingdom. In the absence of a uniform practice to the contrary, these two states should have the freedom to fish outside of the established 12-mile-zone. However, any fishing activity of German and British fishing vessels close to the Icelandic coast also impedes Iceland’s ability to fish in its coastal waters. As fish stocks migrate, fishing in the coastal waters of Iceland – even beyond the 12-mile-boundary – has the effect of reducing the fish stock even within the 12-mile-zone.²³ Germany’s and the United Kingdom’s freedom to fish thus impedes Iceland’s ability and freedom to fish in the future. The parties to the dispute thus have competing claims of freedom that cannot be resolved without recurring to a prior normative baseline that is distinct from the Lotus principle.

3. The Reaction of the International Court of Justice

The ICJ employs several strategies to deal with this problem. On the one hand, the Court establishes normative preconceptions to shift the burden of proving custom to one of the parties. It usually derives these pre-conceptions either from functional considerations or from structural principles of the international legal order.²⁴ On the other hand, the Court may refer to principles of equity if the first strategy does not work.

An example for the burden-shifting strategy is the 2002 Arrest Warrant case.²⁵ In this case, Belgium had issued an arrest warrant against the acting foreign minister of the Democratic Republic of Congo. The DRC challenged this arrest

²¹ See Niels Petersen, Lawmaking by the International Court of Justice – Factors of Success, 12 German L. J. 1295, 1313-1314 (2011).
²³ On the problem of reducing fish-stocks, see Guzman, supra note 6, at 768.
²⁴ See also Geiger, supra note 4, at 692-694 (arguing that the Court derives most of its customary principles from „general „first principles“ of international law“).
warrant before the ICJ. It argued that the warrant had violated the foreign minister’s immunity. Belgium countered that the immunity of foreign ministers did not extend to war crimes or crimes against humanity.

There were two ways of framing the inquiry. First, the Court could have framed it as a question of the extent of the principle of immunity. Does the immunity of foreign ministers also extend to acts of war crimes or crimes against humanity? Under this framing, the DRC would have had to prove a uniform practice of applying the principle of immunity even in cases where the concerned person had committed war crimes or a crime against humanity. The second possibility was to frame the problem as a question of principle and exception. The Court would then have imposed a burden on Belgium to prove a uniform practice that there is an exception to the immunity principle in cases of war crimes and crimes against humanity.

The ICJ chose the second avenue. It did not analyze state practice and *opinio iuris* to establish the general principle of immunity. Instead, it made a functional argument:

“in the performance of these functions, [the foreign minister] is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. [...] The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.”

The Court thus established a normative preconception of a full immunity principle on functional grounds. It then went on to analyze the state practice on whether there was an exception for the case of war crimes and crimes against humanity. However, it was unable to find a uniform practice in this respect. For this reason, it held that the Belgian arrest warrant violated the immunity principle.

In some cases, it seems difficult to establish a normative preconception. Here, the Court often refers to principles of equity. The most famous example is probably the North Sea Continental Shelf case. In *North Sea Continental Shelf*, the Court had to deal with the delimitation of continental shelf areas between Germany and Denmark as well as the Netherlands. The Court found that there was no customary rule supported by sufficient state practice governing the case. The predominant equidistance principle had not been sufficiently supported by state practice and *opinio iuris*. In order to resolve the case, the Court referred to equitable considerations. It imposed a procedural obligation to negotiate on the parties and gave some directions for these negotiations.

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26 *Id.*, at ¶¶ 53-54.
27 *Id.*, at ¶ 58.
29 *Id.*, at ¶ 82.
30 *Id.*, at ¶¶ 83-99.
These examples show that, in a legal system without the possibility of a non liquet, the consent requirement for the formation of rules of customary law has limits. Courts have to decide even in the absence of a uniform state practice and an accompanying opinio iuris. For this reason, the ICJ often turns to interpretive approaches by deriving legal principles from functional considerations or structural principles of the international legal order. To turn it differently, it would not be possible for the Court simply to adhere to the traditional approach of identifying customary law because of its inherent limitations. “Modern” customary law is thus a child of functional necessities.

4. Conclusion

International law scholarship has identified two diverging approaches in identifying customary international law. One approach is the traditional one, which relies on a uniform state practice accompanied by opinio iuris in order to establish norms of customary international law. This traditional approach is contrasted with a modern approach, which mainly relies on interpretive tools of identification. This modern approach seems to depart from the consent requirement of the traditional approach.

However, this contribution has tried to show that the two approaches are complementary. In some cases, the ICJ needs to rely on more interpretive methods of identification because the traditional approach of basing customary law exclusively on consensual state practice would lead to a dead end. At the same time, the Court shows due respect to the consent requirement even if it recurs to the interpretive approach. To my knowledge, the Court has never used the interpretive approach to extend a conventional rule to a state, which is not member of the respective treaty and which has explicitly opposed the rule contained in the treaty. It is true that the Court has in certain cases applied treaty rules even to states not directly bound by the respective treaty. However, in these cases, the concerned state usually explicitly agreed with the customary nature of the treaty rule in question.

Any predictions of the demise of the consent requirement are thus premature. It is the nature of disputes that courts cannot base their judgments exclusively on legal rules that all parties to the dispute have agreed upon. However, the traditional conception of customary international law and the consent


requirement still very much inform the jurisprudence of the International Court of Justice.