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Global Justice and the New Regulatory Regime

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Résumé de l'article

Dans cet article, nous interrogeons le rôle de l'accord dans l'ordre global en discutant les modes courants de constitution des lois internationales au sein de cet ordre. Nous prétendons que les fonctions de l'accord étatique en loi internationale s'écartent substantiellement de celles assumées par les théoriciens de l'ordre libéral, qui souscrivent, dans la plupart des cas, à la conception réaliste de l'action étatique. Contre ces théoriciens, nos posons que l'État consent à des mesures coercitives, et que le rôle de l'État d'effectuer celles-ci a cessé d'être central dans l'explication de la loi globale. Nous concluons que la loi internationale – souvent pensée comme une loi hors de l'État – a maintenant étendu son spectre jusqu'aux individus et corporations, et que ce changement a d'importantes ramifications que les théories globales de la justice devraient considérer.

GLOBAL JUSTICE AND THE NEW REGULATORY REGIME

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ABSTRACT:

In this paper we challenge the role of consent in the global order by discussing current modes of international law making in the global order. We contend that the features of state consent in international law depart substantially from those assumed by theorists of the liberal order, who subscribe, in most cases, to the realist conception of state action. We argue, against those theorists, that state consents to coercive measures, and the state's role in carrying them out, has ceased to be central to an account of global law. We conclude that international law—often thought of as law beyond the state—now has expanded its scope to reach individuals and corporations, and that this change has important ramifications for theories of global justice.

RÉSUMÉ :

Dans cet article, nous interrogeons le rôle de l'accord dans l'ordre global en discutant les modes courants de constitution des lois internationales au sein de cet ordre. Nous prétendons que les fonctions de l'accord étatique en loi internationale s'écartent substantiellement de celles assumées par les théoriciens de l'ordre libéral, qui souscrivent, dans la plupart des cas, à la conception réaliste de l'action étatique. Contre ces théoriciens, nos posons que l'État consent à des mesures coercitives, et que le rôle de l'État d'effectuer celles-ci a cessé d'être central dans l'explication de la loi globale. Nous concluons que la loi internationale – souvent pensée comme une loi hors de l'État – a maintenant étendu son spectre jusqu'aux individus et corporations, et que ce changement a d'importantes ramifications que les théories globales de la justice devraient considérer.

A prominent feature of liberal, and also most republican, theories of global justice is that they begin from consent.[1] The nature, scope, and content of that consent is not uniform, however, but rather multifaceted in most theories of global justice. Two particular usages are prominent in the literature: consent to the domestic order and consent to the global order. On those accounts, the domestic order is distinguishable from the international order by the fact that individuals, rather than states, grant their consent to the domestic order, whereas states, through international treaty making and others legal procedures, grant their consent to the international order. Liberal theories of global justice—and here we use the term broadly—are distinguishable in particular by the fact that they begin from the consent of state actors to the global order. In this paper we argue that the concept of consent to the global order masks a considerable amount of ambiguity in how the concept is deployed, as the features that define state consent as a matter of law depart substantially from those assumed by theorists of the liberal order, who subscribe, in most cases, to the realist conception of state action.[2] Moreover, the consequences of that consent, most notably the directly coercive power of the state versus the (purportedly) non-coercive power of the international order, are under-theorized.

With respect to the importance of consent for the legitimation of normative orders, Michael Blake, for instance, argues that "it is the autonomy-restricting character of the state that demands special justification in terms of a conception of social equality."[3] On Blake's telling, because states use coercive mechanisms to enforce their laws, most notably by means of criminal sanctions, taxation, and systems of property rights, in ways that other (generally international) institutions do not, they are unique *loci* for justice. For Thomas Nagel, otherwise hardly a friend of the cosmopolitan theorists, it is "our joint authorship of coercively backed laws that generates a concern for equality."[4] Absent joint authorship, which obtains only inside a democratic polity, the concerns of justice do not apply.

The idea that consent, coercion, and joint authorship are properties that obtain at the level of states, and neither above or below it, is essential to the realist conception of the state. Even many cosmopolitan theorists, whom one might expect to have been sensitive to this trap, have made this same mistake.[5] Why most liberal theorists remain partisans of realist conceptions of international law is a question best left for intellectual historians. Clearly, a liberal view of the relations of states is imbedded in the curriculum of most graduate programs in political science and international law, even if by now the inadequacy of that account has become clear.[6] When studying the legitimacy of the global legal order, the first thing students of international law learn is that all international law is formed by the consent of states.[7] Where this view has been challenged, philosophers have focused on issues related to the formation of customary international law and the emergence of peremptory norms, which may bind states against their consent.[8] However, the existence of *jus cogens* norms is not the only possible, and arguably not the most severe, problem with the liberal theory of global justice. Instead, the liberal theory of state consent assumes the existence of a unitary state, a simplification that pervades theories of global justice.

The assumption that states are monolithic entities clearly makes it easier to address issues of global justice within the liberal framework. The downside, we will argue in this paper, is that it ignores serious challenges to the working assumptions surrounding consent in the global system. We will proceed in this paper by developing the classical models of consent to the global system, then suggesting ways in which it has been undermined by the recent developments of treaty law. We close by suggesting that the model of global justice in the theories of Blake, Risse, Nagel, and others is severely outdated.

CONSENT IN INTERNATIONAL LAW

Classic theories of international law view *jus gentium* as ultimately derivable from natural law.[9] However, by at least the early 20th century, the dominant view had changed. The Permanent Court of International Justice, in the Lotus Case, held that international law emanates from state consent alone.[10] Insofar as international law is assumed to rise from state consent, it is assumed that only the acts of duly appointed members of the executive can bind a state. There are two different components of international law that are ultimately derivable from state consent: treaty law and customary international law.[11]

The Vienna Convention on the Law of Treaties (VCLT) provides the clearest formulation of the definition of treaties and the consensualist doctrine of treaty law.[12] For the purposes of the VCLT, although the definition is generally considered to apply more generally, save for a few specific exceptions that are not of import here, a "'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation."[13] The consent theory of international law impregnates the modern conceptualization of treaty law. Under treaty law, states are bound by international agreements only when they consent to be so bound. In particular, they only consent when a duly appointed or authorized member of the executive provides a state's consent.[14] That consent is static; what a treaty initially meant, absent certain very specific conditions derivable from the nature of a state's consent, is what it continues to mean. Finally, they consent on behalf of their citizens, such that only the state, as a normatively unique institution, can impose coercive measures on its citizens.

On the other hand, unlike treaty law, customary international law does not require explicit state consent. Instead, once there is widespread state practice coupled with *opinio juris*, states become automatically obliged to conform their respective positions to these new rules.[15] Customary international law is composed of two elements: state practice and *opinio juris sive necessitatis*.[16] The former includes those actions that states actually undertake, while the latter includes those statements, made by states, that they are actually required by law to undertake those actions. However, there increasingly is evidence that many of the recent sources of customary international law do not directly emanate from state consent but rather from the work of super-state actors in a world of increas-

ingly disaggregated state action.[17] In other words, a state's executive and legislative branches are no longer the final say with respect to evidence of *opinio juris*. Instead, international institutions and international courts have interpreted rules of jurisdiction to grant national courts increasingly greater rights over non-nationals. The change in jurisdiction means that states no longer need consent for sanctions to be imposed on their citizens, nor are citizens co-authors, in Nagel's sense, of the law which govern them.

THE EVOLUTION OF TREATY DESIGN

As a general proposition, a state's signature to a treaty does not automatically bind that state.[18] In general, under the VCLT, while there are some cases where a simple signature is enough to bind a state, treaties require ratification by the country's parliament, along with the passing of the appropriate implementing legislation at the domestic level. Any introductory text on international law will likely divide treaties into contract treaties and law-making treaties. Although useful from a pedagogical point of view, the definition is largely one of ideal types, as it is difficult, if not impossible, in practice to draw a hard and fast division between the two. Contract treaties (*traités-contrats*) create an arrangement between states to undertake an act (for instance, to set in place a commercial arrangement). Contract treaties include a lesser type of treaties, dispositive treaties, whereby one state "creates in favor of another [state], or transfers to another, or recognizes another's ownership of, real rights, rights *in rem*, for instance, in particular treaties of cession including exchange."[19] Conversely, law-making treaties (*traités-lois*) serve to create new international rules for the law of nations (common examples include the international covenants and other human rights treaties).[20]

Law-making treaties, however, have become increasingly complicated, signaling an emerging problem for theorists of the legitimacy of international law.[21] At the same time, they have become increasingly vague as to what states are actually required to do. Prominent examples of this change can be found in international environmental law. So-called framework conventions do not produce specific binding rules, leaving the promulgation of specific standards to subsequent negotiations between the parties. For instance, the United Nations Framework Convention on Climate Change provides general principles for the reduction of greenhouse gas emissions without specifying manners in which these will be accomplished, leaving the details to subsequent meetings of the Conference of Parties.[22] Similarly, the Montreal Protocol on Substances that Deplete the Ozone Layer grants the Conference of Parties the right to set limits on, and exceptions to, the use of methyl bromides, after state ratification of the Protocol.[23]

Underlying this change in treaties is the emergence of global administrative law. Global administrative law comprises those principles and practices that underlie the international institutions created by law-making treaties.[24] It emerges from the various transnational systems of regulation that have been set up under treaty

law and comprises the mechanisms put in place to bind states through dispute resolution and the issuing of binding regulations. As Benedict Kingsbury and others have argued, as part of a detailed study of the phenomenon:

> "[u]nderlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees. "[25]

Faced with increased interdependence, states have chosen to enact interstate agreements designed to put in place to address common problems amongst nations, most notably in trade law—where effective trade regimes require coordination between states—and in international security law.

Administrative law differs from treaty law (and for that matter other forms of international law) as it operates "below the level of highly publicized diplomatic conferences and treaty-making."[26] *In toto*, administrative law regulates vast spaces of the international economy. It includes not only legislation (through the drafting of regulations) and adjudication (through dispute resolution mechanisms), mechanisms where were common not only to older treaties that created international organizations such as the League of Nations and the United Nations, but also the development of "standards and rules of general applicability adopted by subsidiary bodies."[27]

In the following sections, we will discuss ways in which the emergence of global administrative law poses challenges to consensualist model of international law. We will focus on those bodies of administrative law that have achieved the most thorough treatment by international legal scholars: market regulation, and anti-terrorism, and security law.[28] These fields represent areas of international law that challenge state consent and put lie to the claim that only states are involved in making decisions that directly regulate and control the choices of individuals.

ANTI-TERRORISM AND SECURITY LAW

Critiques of decision making in international organizations are often framed in terms of the so-called democratic deficit inside those organizations.[29] The democratic deficit can exist in many ways—for example, through the creation of treaty law, which, although initially (arguably) dependent on state consent, become undemocratic, or is substantially modified through the growth of administrative law. In the following sections, we consider not the broad case of the existence of the so-called democratic deficit, but specific ways in which law making occurs outside the consensualist model of international law. Beginning in this section

with a discussion of anti-terrorist law, we will discuss the diminution of state consent in emerging fields of public and private international law.

Article 24 of the Charter of the United Nations (hereinafter Charter) permits the United Nations Security Council (UNSC) authority to protect the peace, and grants it sole responsibility to determine what constitutes such a threat.[30] Although the events of September 11, 2001 increased awareness of both the risks of global terrorism and the efforts of governments to control it, efforts to regulate terrorism under Article 24 predate the current century.[31] Nevertheless, since the attacks on New York and Washington in September, 2011, the UNSC has been increasingly active in attempting to lead the war against terror and in its efforts to control transnational violence. In particular, the UNSC has adopted a series of resolutions designed to control the activities that make terrorism possible: the financial systems that support terrorism and the spread of weapons of mass destruction. The actions of the UNSC have led many critics to ask whether an imperial UNSC has become an instrument for the imposition of a hegemonic international law.[32] In contradistinction, our question is not whether the UNSC is acting as an imperialist agent, but how its actions have transformed the nature of states' underlying consent to the United Nations.

Immediately following the events of September 11, 2001, the UNSC passed Resolution 1373, which in many respects marked a radical departure from its previous acts.[33] First, unlike most of the UNSC's actions, this resolution was not made with respect to a well-defined situation or to a well-defined threat to international peace, at least not according to traditional understandings of threat or peace.. Instead, Resolution 1373 departed from previous UNSC practice insofar as it contained "far-reaching, general obligations for states to prevent and combat terrorism" and effectively turned the UNSC into a legislative body.[34] The first operative clause of the resolution required all states to adopt laws preventing the financing of terrorism, to criminalize the collection of funds designed to support terrorism (either on their territory or by their nationals), to prosecute individuals involved in the collection of such monies, and to freeze all funds on their territory that might be used to support terrorist activities.[35] Further, the resolution also requires states to adopt information-sharing mechanisms to prevent future terrorist activities, and to deny weapons and safe haven to members of terrorist groups. Finally, it enables, under clause 6, the Rule 28 Committee to monitor the implementation by states of the rules contained in the resolution.[36] Resolution 1373, in effect, made mandatory what was until then a treaty structure, the International Convention for the Suppression of the Financing of Terrorism, to which states were free to become (or not become) state parties. It also created a framework for the promulgation of future administrative law through the work of the Rule 28 Committee.

Naturally, law does not operate in a vacuum. As Hans Kelsen remarked as early as 1950, the UNSC can make new law by characterizing as illegal the acts of other states.[37] However, the characterization of the illegality of acts is markedly different from the imposition of certain requirements on states that no member state of the United Nations would be entitled to impose on its own.[38]

However, Resolution 1373 is not wholly without precedent. In many respects, it represents the end stage of the development of law making by the UNSC. Following the end of the First Gulf War, the UNSC, under Resolution 687, engaged in law making of its own, albeit on a more limited scale. It required Iraq to respect the disputed border with Kuwait.[39] Subsequently, under both that resolution and Resolution 692, the UNSC held that Iraq, contrary to normal procedures for determining liability and restitution, which would require negotiations or at least adjudication, was responsible for the losses incurred by Kuwait during the Gulf War and that it was obligated to pay, from its petroleum exports, restitution.[40]

Next, following the bombing, over Lockerbie, Scotland, of Pan Am flight 103 and the bombing, over Niger, of UTA flight 772—both in 1988—the UNSC purported to override, through Resolution 748, individual states' obligations under the Montreal Convention.[41] In particular, that resolution required Libya to extradite those intelligence agents suspected in the two bombings, rather than permitting their trial in domestic courts.[42] In both these situations, the UNSC would appear to have gone beyond its powers under the Charter, which limited the powers of the Security Council **"**in conformity with the principles of justice and international law."[43] By adjudicating borders and apportioning liability, with respect to the First Gulf War, and by overriding treaty rights, with respect to Libya's refusal to extradite suspects, it would appear to have engaged in law making and adjudication of a sort not intended by either Libya or Iraq when they became members of the United Nations.

Finally, with the rise of the Taliban Regime, the UNSC created an early version of the Article 28 Committee.[44] Resolution 1267, passed in 1999, contained many similar, although substantially narrower, restrictions.[45] Resolution 1267, at least initially, addressed support offered by the Taliban Regime in Afghanistan to suspected terrorists. Under that resolution, all states were required to freeze the assets of individuals associated with the Taliban and Al Qaeda, to prevent the entry into or transit through their territories by designated individuals, and to prevent the sale of arms and similar material to the Taliban and Al Qaeda.

Resolutions 1267 and 1373 are unique as they did not name specific targets of the sanctions regime. In fact, neither resolution named the individuals who were to be prevented from travelling, or whose assets would be frozen. Instead, much like municipal laws that create space for the promulgation of regulation, both resolutions left the creation of that list to the original Rule 28 Committee of the UNSC, which was tasked with developing procedures to enforce the embargo against members of the Taliban.[46] Soon, the resolution was "expanded into a complex smart sanction regime adopting measures against anyone anywhere associated with the Taliban, Osama bin Laden, or Al Qaeda."[47]

Several resolutions have since followed Resolution 1373,[48] all of which have determined the fate of state consent. Resolution 1540, passed in 2004, sought to block non-state actors from acquiring WMDs.[49] That resolution required, in part,

states to adopt specific legislative mechanisms, including criminal and civil penalties to control the export and transshipment of certain goods that could lead to the production of WMDs and on funds which could be used to aid proliferation.[50] Moreover, Resolution 1540 regulates activities such as export and transshipment that would contribute to proliferation. It also required states to establish end-user controls and criminal or civil penalties for violations of such export control laws and regulations.

The question at this juncture thus becomes what these Resolutions mean for the consensual model of international law. In general, insofar as Resolution 1373 and 1540 portend an emerging UNSC practice involving active legislating by the five permanent members of the UNSC, it appears, as Jean Cohen has suggested, to mark the emergence of a global constitutional order, and a radical threat to the constitutional orders of those states that are not permanent members of the UNSC.[51] However, we see it in a slightly different light. The creation of the Article 28 Committee, first, challenges the consensualist model of international treaty and second, means that, for one of the first times, global governance institutions direct their commands at specific individuals, with only the slightest of mediation by states.

First, the recent actions of the Security Council appear to have changed the enforcement model under Chapter VII of the Charter of the United Nations to a legislative model, a fact not lost on member states during the debate over the adoption of Resolution 1540.[52] Actions under the Charter must be proportional to the aim sought (i.e. to maintain international peace and security) and, if those actions constitute the enactment of legislation, to be of a temporary and emergency nature.[53] Now, instead of an interpretation of the UNSC's powers that emphasizes its unique role in policing and enforcement, the move to legislative power not only enshrines a dual model of states under international law—where the permanent members enjoy an enhanced legislative power—but also entails an alteration of the original conditions of consent provided by states to the Charter.[54]

Generally, organs of the United Nations are permitted to delegate a right to make binding decisions.[55] However, generally, such a delegation must be express and within the original rights of the organ performing the delegation.[56] And it is unlikely that the member states of the United Nations intended to grant the Security Council such rights, derogable or not.

Second, as Benedict Kingsbury has noted, instead of previous acts of the UNSC, under the new security regime, now, "the U.N. Security Council and its committees, which adopt subsidiary legislation, take binding decisions related to particular countries (mostly in the form of sanctions), and even act directly on individuals through targeted sanctions and the associated listing of persons deemed to be responsible for threats to international peace."[57] In this respect, state consent to coercive measures, and the state's role in carrying them out, ceases to be central to an account of global law, undermining Blake's thesis.

MARKET REGULATION AND PUBLIC GOODS

If the emergence of anti-terrorist law undermines the consensualist account of international law, the regulation of shared resources and activities (such as the environment or the marketplace) brings with it a similar risk. As we have argued elsewhere, contemporary international law has developed in such a way so as to expand a state's jurisdiction.[58] While several fields of international law lend themselves to the study of state jurisdiction, market regulation provides one of the clearest examples of how the acts of other states can bind citizens of third states, absent any consent by those third states themselves.

In a world of increased interdependence (be it economic, environmental, or social), the classical view of international law has created a situation that has made the consensualist model of international law virtually untenable. While states have traditionally had many different solutions available to them to solve collective action problems, global interconnectedness appears to have pushed the situation toward a breaking point. As result, several scholars, most notably Nico Krisch, have argued that the legal order has begun to undergo another substantial transformation.

The argument proceeds as follows. Classically, it has been thought that the effective and sustainable use of global public goods can only be achieved through the cooperation of states.[59] However, state cooperation has proven ineffective in tackling many of the most urgent public problems of our day (this is a question not only for legal scholars of terrorism, but also for scholars of regulatory law and environmental law, to name a few).[60] Thus, states have increasingly moved to a model of law that finds its legitimacy not in the consent of those individuals bound by a legal order (as Blake and others would have it), but through the recognition, by those affected, of the legitimacy of new laws and regulations insofar as they serve the popular good. This change in legitimation amounts to an attack on the consent theory of international law insofar as it has led to a "shift in the discourse about the legitimacy of global governance—a shift from input to output legitimacy. The urgency of solving global problems, expressed in the notion of global public goods and reflected in the shift to output legitimacy, has placed consent and sovereign equality under ever greater strain."[61]

Terrorism, as we discussed above, poses one such problem. However, more mundane spheres of law, including antimonopoly law, which we will discuss here, have developed to grant extraterritorial jurisdiction to states. While the idea that states may regulate commercial acts beyond their territories may seem novel or perhaps even illegal, it is actually well-settled law, at least in the Anglo-Saxon world, that they may. First, in the 1945 *Alcoa Decision*, the US Federal Courts accepted the effects doctrine with respect to the regulation of market activities.[62] The effects doctrine, well known to students of criminal law, holds that an action on one state's territory may fall under the jurisdiction of another state if the effects of the criminal act extend to that state's territory.[63]

The *Alcoa Decision* dealt with the question of whether or not American anti-trust laws could be applied to companies outside American territory. In *Alcoa*, the US Federal Government filed a civil suit against an American aluminum manufacturer, Alcoa, whose Canadian subsidiary had entered into an arrangement with several European companies to limit the supply of aluminum to the United States. That arrangement was not, however, entered into on American soil. In its decision, the Court could have held that it had jurisdiction due to the fact that Alcoa was headquartered in the United States, and hence licensed in the United States. Instead, the Court held that while customary international law might, in a few cases, limit the scope of power a state may exercise beyond its borders,[64] "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[65] In subsequent cases, courts have continued to apply the doctrine. In *Continent Ore Co. v. Union Carbide & Carbon Corp.*, the Supreme Court held: "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act [i.e. Anti-Trust Law] just because part of the conduct complained of occurs in foreign countries."[66] In other words, US Courts held that international law permits states to exercise jurisdiction over cases even where aliens have not intended to enter into acts on the territory of those states.

Although many states initially rejected *Alcoa* and its progeny, the extension of jurisdiction that the decisions signaled quickly became part of the international legal order.[67] In a series of rulings in the 1960s and after, the European Commission (EC) and European Courts would effectively adopt the jurisprudence of the US Federal Courts.[68] In *The Dyestuffs Cases*, the Court of Justice of the European Communities held that actions to infringe freedom of trade or to create monopoly pricing in the European Economic Community, even if entered into by companies headquartered in Switzerland and Britain (which were outside the reach of the court at the time), might be sanctioned by the Courts of the European Communities if those companies subsidiaries operated inside the European Economic Community.[69] The Court argued that Swiss and English companies and nationals could be held responsible for violating Article 85 of the Treaty of Rome.[70]

The principle was applied again in subsequent cases, such as in *Re Wood Pulp Cartel*, where the European Economic Commission filed suit against non-European Community producers of wood pulp. The EC alleged that non-EU wood pulp producers had engaged in various activities that sought to negatively affect trade in the EU common market.[71] Conversely, the defendants had argued that the suit against them should not stand, as they were wholly located outside the jurisdiction of the EC, and also as the application of European Economic Community competition rules in that very case would violate the basic tenants of public international law (in particular the principle of non-interference).[72] However, the European Court of Justice (ECJ) held that the EC had jurisdiction over firms located outside the EC if the firms in question implemented regimes (in particular, price fixing) that had effects within the EU, even if, presumably,

none of the firms were headquartered in the EU, provided that their commercial activities, viz., selling directly through intermediaries or directly to consumers, affected the market in the EU.[73]

As such, it now seems to be well established under international law that states may exercise "liberal extraterritorial jurisdiction" not only under criminal law, but in many different realms of law.[74] Not every state, of course, can compel corporations in other states to act in certain ways. Only large states or large trading blocs (such as the European Union) can actually force corporations beyond their borders to act in certain ways. However, the international regulatory environment is increasingly taking on the appearance of a world order where certain states "provid[e] the global public good in question [e.g., anti-trust law to ensure fair competition] in a 'hegemonic' mode, very much in line with classical hegemonic stability theory."[75] The effects of this expansion of anti-trust law therefore appears to be one more way in which state consent, and even individual consent through the state, to laws in force has been minimized by the extraterritorial application of laws, and allows individuals to be sanctioned by states other than their own.

CONSEQUENCES FOR THEORIES OF GLOBAL JUSTICE

In our introduction to this text, we suggested that liberal models of global justice are unable to account for the emerging complexity of issues of consent and jurisdiction in international law. We singled out, in particular, the work of Blake and Nagel. Blake, as is well known, argued that it is by virtue of the ability of states—and only states—to exercise coercive power over individuals absent their consent that certain stringent principles of justice apply at the domestic level, but need not apply at the global level. Nagel argued that it is by virtue of the fact that laws that apply at the domestic level are products of citizens' consent, that principles of justice apply at the domestic level and not at the global level (where, if consent is obtained, it is by virtue of state and not individual, consent). The persons so affected, suffice it to say, have never consented to these laws. However, as we have shown here, those suppositions are no longer true, if they ever were. International law now directly coerces individuals through the specific acts of the UNSC absent meaningful control or oversight by most states.[76] Similarly, individuals and corporations may now be brought before foreign tribunals if their actions indirectly affect economic activity in third states or with supranational institutions.

It has been argued that state consent might not be as static as we have supposed, and that states consent, on behalf of their citizens, by acquiescing to the acts of the other states or of the United Nations.[77] However, our argument does not hinge on state consent *per se*. Rather, we have argued that not only has the basis of consent to the acts of the UNSC under Chapter VII changed in ways that it is doubtful states ever intended or could even have predicted, individuals are now directly targeted by sanctions regimes or by laws of foreign countries. The former put a lie to the theory that individuals are not coerced by supranational

institutions; the latter, that they are subject only to legal regimes to which they themselves have consented (either democratically, by immigration, by travelling, or through some other overt act). Similarly, the extension of extraterritorial economic jurisdiction signals that, in an increasingly economically interdependent world, any individual may be brought under a foreign state's jurisdiction.

Thus, states' monopoly on coercive acts appears therefore to have been severely weakened. The takeaway is that international law—often thought of as law beyond the state—now goes deeper than national law, reaching individuals and corporations.

NOTES

[1] Kant, Immanuel, "Perpetual Peace," *in* H. Reiss (ed.), H. B. Nisbet (trans.), *Political Writings*, Cambridge, Cambridge University Press, 1977, pp. 93-130, 103. For representative liberal theories, see Rawls, John, *The Law of Peoples*, Cambridge, Harvard University Press, 2001; Dworkin, Ronald, "A New Philosophy for International Law," *Philosophy & Public Affairs*, vol. 41, no. 1, 2013, pp. 2-30; Nagel, Thomas, "The Problem of Global Justice," *Philosophy & Public Affairs*, vol. 33, no. 2, 2005, pp. 113-147; Held, David, *Democracy and the Global Order*, Cambridge, Polity Press, 1995. For republican theories, see Bohman, James, "Republican Cosmopolitanism," *The Journal of Political Philosophy*, vol. 12, no. 3, 2004, pp. 336-352.

[2] Representative realist discussions of the relationship between state consent and international law include Morgenthau, Hans, *Politics Among Nations: The Struggle for Power and Peace*, 2nd edition, New York, McGraw-Hill Companies, 1954, and Waltz, Kenneth, *Theory of International Politics*, Long Grove, Waveland Press, 2010 [1979].

[3] Sangiovanni, Andrea, "Global Justice Reciprocity and the State," *Philosophy & Public Affairs*, vol. 35, no. 1, 2007, pp. 3-39, 8; Blake, Michael, "Distributive Justice, State Coercion, and Autonomy," *Philosophy & Public Affairs*, vol. 30, no. 3, 2001, pp. 257-296, 265. See also Moellendorf, Darrel, *Cosmopolitan Justice*, Boulder, CO., Westview Press, 2002, p. 30ff; Wenar, Leif, "Contractualism and Global Economic Justice," *in* Thomas Pogge and Darrel Moellendorf (eds.), *Global Justice*, Oxford, Blackwell, 2001; Beitz, Charles R., *Political Theory and International Relations*, Princeton, Princeton University Press, 1999.

[4] Sangiovanni, "Global Justice Reciprocity and the State," *op. cit.*, p. 8; Nagel, Thomas, "The Problem of Global Justice," *Philosophy & Public Affairs*, vol. 33, no. 2, 2005, pp. 113-147. Bohman, James, "Republican Cosmopolitanism," *The Journal of Political Philosophy*, vol. 12, no. 3, 2004, pp. 336-352.

[5] Accounts that do begin with sensitivity to the problem of consent either focus on the actions of individuals in perpetuating an unjust global order (Young, Iris M., *Responsibility for Justice*, Oxford, Oxford University Press, 2011) or focus on the hegemony of powerful states, as, for instance, in Pogge's discussion of the coercion of international economic order (Pogge, Thomas, *Politics as Usual*: *What Lies Behind the Pro-Poor Rhetoric*, Cambridge, Polity Press, 2010) or his discussion of the global borrowing privilege (Pogge, Thomas, "'Assisting' The Global Poor," www.princeton.edu/rpds/seminars/pdfs/pogge_assistingpoor.pdf).

[6] For important criticisms of the realist account, see Chayes, Abram and Antonia Handler Chayes, *The New Sovereignty Compliance with International Regulatory Agreements*, Cambridge, Harvard University Press, 1995; Franck, Thomas M., *Fairness in International Law and Institutions*, Oxford, Oxford University Press, 1995; Koh, Harold H., "Why Do Nations Obey International Law?," *Yale Journal of International Law*, vol. 106, 1997, pp. 2599-2659; Koh, Harold H., "Transnational Legal Process," *Nebraska Law Review*, vol. 75, no. 181, 1996.

[7] Crawford, James, *Brownlie's Principles of Public International Law*, 8th edition, Oxford, Oxford University Press, 2012; Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (hereinafter VCLT).

[8] Vidmar, Jure, "Norm Conflicts and Hierarchy in International Law," *in* Erika De Wet and Jure Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, Oxford University Press, 2012.

[9] Grotius, Hugo, *De iure praedae commentaries*, *in* Ger. Hamaker (ed.), Paris, Thorin, 1868.

[10] SS Lotus Case (France v. Turkey), 1927 P. C. I. J. (ser. A) No. 10, (Sept. 18), 7. In that case, the Permanent Court of International Justice held: "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." See also North American Dredging Company (USA) v. Mexico 4 RIAA 26 at 29-30 (1926).

Corbett, P. E., "The Consent of States and the Sources of International Law," *BYBIL,* vol. 6, 1925, pp. 20-30.

[11] For the sake of this article, we simplify the sources of international law listed in the Statute of the International Court of Justice at Article 38.

[12] VCLT, art. 7; art. 8.

[13] VCLT, art. 2(1)a.

[14] Under Article 7, an agent is authorized to represent a state if that agent produces appropriate credentials to that effect, or if, under international law, such an agent of the state is presumed to have the authority to act for a state. Under the VCLT, presidents, heads of governments, ministers of foreign affairs, and, in some cases, diplomats are presumed to automatically possess such credentials.

[15] The only way a state may not be bound to principle of customary international law is if that state enjoys persistent objector status. See Stein, Ted L., "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law," *Harvard International Law Journal*, vol. 26, no. 2, 1985, pp. 457-482.

[16] North Sea Continental Shelf Case (Germany v. Netherlands/Denmark) ICJ Reports, 1969.

[17] Slaughter, Anne-Marie, "Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks," *Government and Opposition*, vol. 39, no. 2, 2004, pp. 159-190.

[18] The VCLT, Article 11, provides that "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." In practice, however, ratification and accession are the most common forms of treaty consent.

[19] A. McNair, Law of Treaties (2nd ed., 1961), 740.

[20] The ICCPR and the ICESCR are such treaties. The ICJ also stated that the League of Nations Mandate system was such a treaty. See the South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), ICJ Reports, 1966, at 266. The ECtHR found that the European Convention of Human Rights was such a treaty (European Court of Human Rights, Case of Loizidou vs. Turkey (Preliminary Objections), Judgment of 23 March 1995, Series A, no. 310, p. 25, § 84). For a more detailed discussion, see Brölmann, Catherine M., "Law-Making Treaties: Form and Function in International Law," *Nordic Journal of International Law*, vol. 74, 2005, pp. 383-404.

[21] Kingsbury, Benedict, Nico Krisch and Richard Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems*, vol. 68, no. 15, 2005, pp. 15-61, at 15 (hereinafter Kingsbury et al.).

[22] United Nations Framework Convention on Climate Change, 1771 UNTS 107 / (1994) ATS 2 / 31 ILM 849 (1992).

[23] Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 29 (1987). We leave aside the question of whether or not municipal courts are likely to view such delegations as constitutionally permissible. See, for instance, Natural Resources Defense Council, Petitioner v. Environmental Protection Agency and Michael O. Leavitt, Administrator, U.S. Environmental Protection Agency, Respondents Methyl Bromide Industry Panel of the American Chemistry Council, Intervenor, 464 F.3d 1 (D.C. Cir. 2006).

[24] Kingsbury et al., "The Emergence of Global Administrative Law," *op. cit.*, p. 17.

[25] *Ibid.*, p. 16.

[26] *Ibid.*, p. 17

[27] *Ibid.*.

[28] Other potential areas we could have chosen include the certification of products by the Kyoto Protocol Clean Development Mechanism, the work of the UNHCR to develop regulations to determine refugee status, and the certification of NGOs by UN agencies as being specifically authorized to participate in their internal policy debates. Even ISO standards, which are nominally elements of private international, may be required to be implemented in national law.

[29] Dahl, Robert A., "Can International Organizations Be Democratic? A Skeptic's View," *in* Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Edges*, Cambridge, Cambridge University Press, 1999.
[30] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art. 24; Sarooshi, Dan, *United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford, Clarendon Press, 2000, p. 3.
[31] Notably, this includes the International Convention for the Suppression of the Financing of Terrorism 2178 UNTS 197, adopted in 1999.
[32] Johnstone, Ian, "Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit," *The American Journal of International Law*, vol. 102, no. 2, 2008, pp. 275-308, 275.
[33] Resolution 1373 UNSC S/RES/1373 (2001).
[34] Cohen, Jean L., *Globalization and Sovereignty Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge, Cambridge University Press, 2012, p. 272.
[35] Resolution 1373 UNSC S/RES/1373 (2001), cl. 1.
[36] In so doing, it empowered the committee, previously created—presumably under Article 7 of the Charter—to monitor sanctions against the Taliban.
[37] Kelsen, Hans, *The Law of the United Nations*, Clark, NJ, The Lawbook Exchange, 1950, p. 737ff; Arangio-Ruiz, G., "On the Security Council's "Law-Making," *Rivista di diritto internazionale*, vol. 3, 2000, pp. 609-725.
[38] On a consensualist reading of international law, the United Nations possesses only those powers possessed by its member states and so delegated.
[39] UNSC Resolution 687 (1991) S/Res/687. The resolution arguably imposed an international border on two states, in violation of Article 1(1) of the Charter of the United Nations. A more charitable reading would perhaps hold that Iraq was merely being required to uphold its treaty obligations, as laid out in the Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters (Signed at Baghdad 4 October 1963 and registered with the United Nations and published as document 7063, UNTS 1964).
[40] UNSC Resolution 687 provides, in relevant part, that "16. … Iraq … is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait; 17. … that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demands that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt; [and] 18. [that the UNSC will] create a fund to pay compensation for claims that fall within paragraph 16 … and to establish a Commission that will administer the fund."
[41] UNSC Resolution 731 (1992) S/RES/731 and UNSC Resolution (1992) 748 S/RES/748.
[42] UNSC Resolution 748, cl. 1, which made Clause 3 of Resolution 731 mandatory on Libya, requiring the extradition of suspects in the two bombings, instead of permitting trial in Libya's courts. The Montreal Convention would, instead, appear under Article 7, to permit extradition or prosecution (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 UNTS 178).
[43] Charter, art. 1(1).
[44] The same committee which would come to prominence under Resolution 1373.
[45] Cohen, *Globalization and Sovereignty, op. cit.,* p. 272.
[46] UNSC Resolution 1267 (1999), art. 6.
[47] Cohen, *Globalization and Sovereignty, op. cit.,* p. 272.
[48] These includes Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011), 2083 (2012), and 2161 (2014).
[49] UNSC Resolution 1540 (2004) S/RES/1540.
[50] UNSC Resolution 1540 (2004), cl. 3.
[51] Cohen, *Globalization and Sovereignty, op. cit.,* p. 274.

[52] *Ibid.*, p. 277.
[53] Krisch, Nico, "The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council," *in* Christian Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Berlin, Springer-Verlag, 2003, pp. 879, 883. Cited in Talmon, Stefan, "The Security Council as World Legislature," *The American Journal of International Law*, vol. 99, 2005, pp. 175-193, 184.
[54] The UNSC appears to have no interest in relinquishing its new powers. In its most recent acts, it has required states to adopt and enforce law against their citizens going abroad to join ISIS under Resolution 2178. S/RES/2178 (2014).
[55] Effects of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion) ICJ Reports (1954), 47; 56-7.
[56] Schermers, Henry and Niels Blokker, *International Institutional Law,* Leiden, Brill Publishers, 1995; Meroni v. High Authority (1957-58) ECR 133, 149-150.
[57] Kingsbury et al., "The Emergence of Global Administrative Law," *op. cit.*, p. 21.
[58] Gray, Kevin and Kafumu Kalyalya, "Overcoming Statism from Within: The International Criminal Court and the Westphalian System," *Critical Horizons*, forthcoming.
[59] Krisch, Nico, "The Decay of Consent: International Law in an Age of Public Goods," Available at: www.ssrn.com/abstract=2335938, 3-4.
[60] For a representative account, see Esty, Daniel, "Good Governance at the Supranational Scale: Globalizing Administrative Law," *Yale Law Journal*, vol. 115, no. 7, 2006, pp. 1490-1562.
[61] Krisch, "The Decay of Consent: International Law in an Age of Public Goods," *op. cit.*, p. 6.
[62] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), at 444.
[63] Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 7th Edition, London, Routledge, 1997, p. 152; "Criminal Competence of States in Respect of Offences Committed outside their Territory," *The American Journal of International Law*, vol. 20, no. 2, 1926.
[64] United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945).
[65] United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945).
[66] Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 704 (1962).
[67] Krisch, "The Decay of Consent: International Law in an Age of Public Goods," *op. cit.*, p. 12.
[68] *Ibid.*, *in* Re Wood Pulp Cartel (1985), CMLR 3 (1985), 474.
[69] Imperial Chemical Industries Ltd. v. Commission of the European Communities, Case 48/69, [1972] C.M.L.R. 557. The official decision is published in *Journal Officiel des Communautés européennes* of Aug. 7, 1969 L195/11. Cited in F. A. Mann, "Dyestuffs Case in the Court of Justice of the European Communities," *The International and Comparative Law Quarterly*, vol. 22, no. 1, 1973, pp. 35-50. In this respect, the ECJ arrived at the opposite conclusion to that of the ICJ in the Barcelona Traction decision. (Case Concerning The Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain) ICJ Reports (1970) 3).
[70] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957; Mann, "Dyestuffs Case in the Court of Justice of the European Communities," *op. cit.*, p. 42.
[71] Re Wood Pulp Cartel: A**.** Ahlstrom Oy v. EC Commission, Joined Cases 89, 104, 114, 116, 117 & 125-129/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901, 938; Friend, Mark, "The Long Arm of Community Law," *European Law Review*, 1989, pp. 169-172; Mann, F. A., "The Public International Law of Restrictive Practices in the European Court of Justice," *International and Comparative Law Quarterly*, vol. 38, no. 2, 1989, pp. 375-377; Breibart, Evan "The Wood Pulp Case: The Application of European Economic Community Competition Law to Foreign Based Undertakings," *Georgia Journal of International and Comparative Law*, vol. 19, no. 1, 1989, pp. 149-173; Vedder, Cristoph "A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law," *European Journal of International Law*, vol. 1, no. 1, 1990, pp. 365-377.
[72] Re Wood Pulp Cartel: A**.** Ahlstrom Oy v. EC Commission, Joined Cases 89, 104, 114, 116, 117 & 125-129/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901, 939-940.

[73] Re Wood Pulp Cartel: A**.** Ahlstrom Oy v. EC Commission, Joined Cases 89, 104, 114, 116, 117 & 125-129/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901, 941.

[74] Krisch, "The Decay of Consent: International Law in an Age of Public Goods," *op. cit.*, p. 12.

[75] *Ibid.*, p. 13.

[76] The cases of Kadi v. Council and Commission, 2005 E.C.R. II-3649, Case T-315/01, and Yusuf & Al Barakaat International Foundation v. Council and Commission, 2005 E.C.R. II-3533, Case T-306/01, are notable exceptions, in that they triggered a review of the listing procedures by the UNSC. Ultimately, Kadi was delisted from the sanctions established under SC Resolution 1287.

[77] States may make law for their citizens not only by actively consenting under treaty or customary international law, but also by acquiescing to new legal regimes. Sometimes this takes the form of acquiescing, or failing to object, to emergent custom (Continental Shelf Case (Libya v Malta) ICJ Reports (1985) 29; Fisheries Case (United Kingdom v. Norway), ICJ Reports (1951) 116, p. 131 & 138; Malanczuk, *Akehurst's Modern Introduction to International Law*, *op. cit.*. Other times, this may occur where they legitimate new interpretations of treaties or adopt treaties where treaty language is designed to evolve (Dispute regarding Navigational and Related Rights (Costa Rica/Nicaragua) ICJ Reports (2009) 213; Bjorge, Eirik, *The Evolutionary Interpretation of Treaties*, Oxford, Oxford University Press, 2014; Letsas, George, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press, 2008; Rosenne, Shabtai, *Developments in the Law of Treaties, 1945-1986*, Cambridge, Cambridge University Press,1989.