Consenting to International Law

An Introduction

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On 23–24 June 2022, a conference entitled *Consenting to International Law* was held at the Collège de France.[1] The painting illustrating the programme was *Divisio* from the *Allegory of Bad Government* by Ambrogio Lorenzetti. *Divisio*'s serene appearance is deceptive. With her saw, she is slowly, but surely dividing the city or civic body in two (as you can see from the 'Si' and 'No' on her robe). This representation of *Divisio* reminds us about how divided our world is and, by extension, the international community of States and peoples.

The representation also reminds us of the formidable, and much more painful, challenge we face every day when pressed to address issues of common concern, be it climate change, pandemics or peace. The challenge of adopting that kind of common law in circumstances of persistent disagreement is actually made even greater at the international level because of a central feature of international law-making: the requirement of State consent to international law. That requirement is the topic of the present volume.

The volume gathers the fifteen chapters presented at the conference or commissioned thereafter. It is the first edited volume dedicated entirely to consent to international law in the English language and the first one that brings international legal philosophers and international lawyers into a dialogue on the topic. This introduction sets the stage for the book's argument: first, it clarifies the relevance of the issue and the reasons that led to putting this collection of essays together; second, it introduces the main conceptual

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[1] Collège de France, 'Consenting to International Law' (23–24 June 2022). Available at: www.college-de-france.fr/fr/agenda/colloque/consenting-to-international-law, last accessed 7 December 2022.

and normative challenges addressed in the volume and explains what it hopes to achieve; third, it provides some information about how the book is structured; and, finally, it sketches out the content of its successive chapters and their articulation.

1 THE BACKGROUND TO THE VOLUME

'Private' law analogies were prevalent in the international law of the seventeenth and eighteenth centuries. They contributed in a central manner to the construction of what became known only much later as 'public' international law.[2]

One of those private law analogies was States' consent to international law or, more accurately, States' consent to 'be bound' by international law. According to the liberal and anthropomorphic approach to inter-State relations that was prevalent at that time, indeed, international treaties between States were commonly conceived of as contracts.[3] Drawing on that contractualist analogy, States were, and sometimes still are, depicted as free to consent to international treaties that would bind them, in the same way private persons are considered free to consent to a contract that would bind them following that exchange of consents. A further, albeit related, analogy between individual free will and State sovereignty actually explains how later on, and as epitomized by one of the dicta of the Permanent Court of International Justice in *The S.S. "Lotus"*,[4] State consent to international law became associated with a voluntarist approach to State sovereignty and, by extension, with a voluntarist brand of legal positivism.[5]

Today, those contractualist and voluntarist readings of international law are mostly considered as relics of a bygone era. Interestingly, however, the

[2] Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Clark, NJ: The Lawbook Exchange, 2013 (London: Longmans, Green and Co., 1927)).

[3] For a critique, see Chemillier-Gendreau, Chapter 13 in this volume; d'Aspremont, Chapter 5 in this volume.

[4] *The Case of the S.S. "Lotus" (France* v. *Turkey)* (Judgment) [1927] PCIJ Ser. A No. 10, p. 18.

[5] For a historical discussion, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006), p. 310; Catherine Brölmann, *The Institutional Veil in Public International Law* (Oxford: Hart, 2007), p. 71; Richard Collins, 'Classical Legal Positivism in International Law Revisited', in Jörg Kammerhofer and Jean d'Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), pp. 23–49; Matthew Craven, 'The Ends of Consent', in Michael J. Bowman and Dino Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge: Cambridge University Press, 2018), pp. 103–135.

obligations stemming from international treaties, but also from international legal sources in general, together with the jurisdiction of international courts and tribunals, are still predominantly considered as being 'based'[6] on (State) consent.[7] This is the case in spite of the numerous normative[8] and descriptive[9] (especially quantitative) arguments for its demise in contemporary international law-making. To that extent, international law differs from domestic law, where consent has long been considered peripheral or irrelevant to the obligations arising from law-making – by contrast to its growing relevance in domestic private or criminal law where it has become more pervasive than ever, for example, to ground all sorts of obligations or, at least, liabilities arising from contracting or promising.[10] In domestic law and domestic legal theory, indeed, consent is not or, at least, no longer considered as a criterion of legal validity or as a ground or justification of the legitimate authority of law.[11]

[6] On the polysemic term 'based' on consent, see Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29(2) *Leiden Journal of International Law* 289–316, at 290, footnote 5.

[7] See, for example, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, paras. 18, 21; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)* (Merits) [1986] ICJ Rep. 14, para. 135. See Jan Klabbers, 'Law-Making and Constitutionalism', in Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), pp. 81–125, pp. 100, 114. See also the numerous textbooks that start by discussing consent, often critically, as a basis of international legal obligation, but that, independently from their conclusion in that first section, then invariably end up presenting and defending a consent-based account of international law-making: see, for example, James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019); Andrew Clapham, *Brierly's Law of Nations. An Introduction to the Role of International Law in International Relations*, 7th ed. (Oxford: Oxford University Press, 2012).

[8] See, for example, Laurence R. Helfer, 'Nonconsensual International Law-Making' (2008) 1 *University of Illinois Law Review* 71–125; Andrew T. Guzman, 'Against Consent' (2012) 52(4) *Virginia Journal of International Law* 747–790; Gregory Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23(3) *European Journal of International Law* 669–693; Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) *European Journal of International Law* 733–763.

[9] See, for example and most recently, Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012), pp. 13–34; Nico Krisch, 'The Decay of Consent: International Law in the Age of Global Public Goods' (2014) 108(1) *American Journal of International Law* 1–40.

[10] For a critique, see Muriel Fabre-Magnan, *L'institution de la liberté* (Paris: Presses Universitaires de France, 2018), pp. 53–108.

[11] See, for example, on consent and legal validity, Herbert L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), pp. 225–228; Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (New York: Cambridge University Press, 2014),

Of course, (State) consent to international law (short for consent to 'be bound by' international law in what follows) is an old chestnut in international legal theory. As just mentioned, its central role in international law has been heavily discussed and criticized, especially since the second half of the twentieth century.[12] Despite many of its original conceptual and normative flaws, consent is a chestnut that still puzzles or fascinates many international lawyers today, including the most critical ones.[13] It has actually become the

p. 179. See, on consent and legitimate authority: John A. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979); Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 88–93; Joseph Raz, 'Government by Consent' (1987) 29 *Nomos* 76–95, at 85; Leslie Green, 'Law, Legitimacy, and Consent' (1989) 62(6) *Southern California Law Review* 795–825, at 814; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, 2nd ed. (Oxford: Oxford University Press, 1995), pp. 80–94; Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90(4) *Minnesota Law Review* 1003–1044, at 1028–1029, 1037–1040.

[12] See, for example, James Leslie Brierly, 'The *Lotus* Case' (1928) 44 *Law Quarterly Review* 154–163; Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in Frederick M. van Asbeck (ed.), *Symbolae Verzijl* (Leiden: Martinus Nijhoff, 1958), pp. 153–176; Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77(3) *American Journal of International Law* 413–442; Bruno Simma, 'Consent: Strains in the Treaty System', in Ronald Saint John Macdonald and Douglas Millar Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Leiden: Martinus Nijhoff, 1983), pp. 485–511, p. 503; Gaetano Arangio-Ruiz, 'Voluntarism versus Majority Rule', in Antonio Cassese and Joseph H. H. Weiler (eds.), *Change and Stability in International Law-Making* (Berlin: Walter de Gruyter, 1988), pp. 102–108; Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1992) 12(1) *Australian Yearbook of International Law* 22–53; Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990); Daniel Bodansky and James Shand Watson, 'State Consent and the Sources of International Obligation' (1992) 86 *Proceedings of the Annual Meeting (American Society of International Law)* 108–111; Christian Tomuschat, 'Obligations Arising for States without or against Their Will' (Volume 241) *Collected Courses of the Hague Academy of International Law*, 1993, pp. 195–374; Shabtai Rosenne, *An International Law Miscellany* (Leiden: Martinus Nijhoff, 1993), pp. 357–377; Shabtai Rosenne, 'Consent and Related Words in the Codified Law of Treaties', in *Mélanges offerts à Charles Rousseau* (Paris: Pedone, 1974), pp. 229–248; Olufemi A. Elias and Ching Len Lim, *The Paradox of Consensualism in International Law* (Leiden: Brill, 1998); Philip Allott, 'The Concept of International Law' (1999) 10(1) *European Journal of International Law* 31–50; Ellen Hey, *Teaching International Law: State-Consent as Consent to a Process of Normative Development and Ensuing Problems* (The Hague: Kluwer Law International, 2003).

[13] See, for example, Duncan B. Hollis, 'Why State Consent Still Matters: Non-State Actors, Treaties and the Changing Sources of International Law' (2005) 23(1) *Berkeley Journal of International Law* 137–174; Malgosia Fitzmaurice, 'Consent to Be Bound: Anything New under the Sun?' (2005) 74(3) *Nordic Journal of International Law* 483–508; Maurice Kamto, 'La volonté de l'État en droit international' (Volume 310) *Collected Courses of the Hague Academy of International Law*, 2004, pp. 19–428; Jutta Brunnée, 'Consent' (last updated January 2022), in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008). Available at: https://opil.ouplaw.com/display/10

object of renewed legal philosophical interest as of late, with a flurry of new publications on the topic and of attempts to provide justifications for the role of consent to international law in practice.[14] This is partly due to the rekindling of the philosophy of international law tradition in the last twenty years or so,[15] but also to the growing concerns about international law's democratic

.1093/law:epil/9780199231690/law-9780199231690-e1388, last accessed 13 December 2022; Timothy Meyer, 'From Contract to Legislation: The Logic of Modern International Lawmaking' (2014) 14(2) *Chicago Journal of International Law* 559–624; Besson, fn. 6; Eva Kassoti, 'Beyond State Consent? International Legal Scholarship and the Challenge of Informal International Law-Making' (2016) 63(2) *Netherlands International Law Review* 99–131; Werner G. Wouter, 'State Consent as Foundational Myth', in Catherine Brölmann and Yannick Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham: Edward Elgar, 2016), pp. 13–31; Yota Negishi, 'Opinio Juris as (the Ultimate) International Secondary Rule of Recognition: Reconciling State Consent and Public Conscience' (2016) 7(4) *European Society of International Law (ESIL) 2016 Research Forum* 1–25. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911989, last accessed 7 December 2022; Evangeline Reynolds, Amâncio Jorge Silva Nunes de Oliveira, Janina Onuki and Matthew S. Winters, 'Attitudes toward Consent-Based and Non-Consent-Based International Law in a Regional Power Context' (2018) 44(4) *International Interactions* 661–680; Stephen C. Neff, 'Consent', in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Cheltenham: Edward Elgar, 2019), pp. 127–140; Catherine Brölmann, 'Capturing the Juridical Will', in Sufyan Droubi and Jean d'Aspremont (eds.), *International Organizations, Non-State Actors, and the Formation of Customary International Law* (Manchester: Manchester University Press, 2020), pp. 42–61.

[14] See, for example, Matthew Lister, 'The Legitimating Role of Consent in International Law' (2011) 11(2) *Chicago Journal of International Law* 663–691; Besson, fn. 6; Liam Murphy, 'Law beyond the State: Some Philosophical Questions' (2017) 28(1) *European Journal of International Law* 203–232; Samantha Besson, 'Law beyond the State: A Reply to Liam Murphy' (2017) 28(1) *European Journal of International Law* 233–240; Richard Collins, 'Consent, Obligation and the Legitimate Authority of International Law', in Patrick Capps and Henrik Palmer Olsen (eds.), *Legal Authority beyond the State* (Cambridge: Cambridge University Press, 2018), pp. 206–236; John Tasioulas and Guglielmo Verdirame, 'Philosophy of International Law', in Edward N. Zalta and Uri Nodelman (eds.), *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edition). Available at: https://plato.stanford.edu/archives/sum2022/entries/international-law/, last accessed 7 December 2022.

[15] See, for example, Samantha Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31(3) *The Sydney Law Review* 343–380; John Tasioulas, 'The Legitimacy of International Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 97–116, p. 101; Samantha Besson, 'Theorizing the Sources of International Law', in Besson and Tasioulas, fn. 15, pp. 163–185; Timothy A. Endicott, 'Sovereignty: The Logic of Freedom and Power', in Besson and Tasioulas, fn. 15, pp. 245–259; Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) *Ethics & International Affairs* 405–437; Brad R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (Oxford: Oxford University Press, 2011); Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41(1) *Philosophy & Public Affairs* 2–30; Jörg Kammerhofer and Jean d'Aspremont, 'Introduction: The Future of International Legal Positivism', in Kammerhofer

legitimacy that has come with a special attention for self-determination and hence consent in international law-making.[16]

Importantly, those contemporary philosophical and doctrinal debates about consent to international law do not merely repeat earlier ones. Nor, by extension, do they repeat the latter's mistakes. They have (mostly) moved away from the original (and misguided) identifications between consensualism and contractualism or between consensualism and voluntarism.[17] They have also (mostly) realized how consent may not be considered as a criterion of international legal validity, a ground of the legitimacy of international law or a condition of State sovereignty.[18] Luckily, they have also (mostly) shifted away from the later (and often unhappy and Manichean) oppositions between 'objective' and 'subjective' international law, between 'communitarian' and 'individualistic' conceptions thereof, or between the 'public' and the 'private' in international law in which State consent was usually wrongly assimilated with and then reduced to the 'subjective', the 'individualistic' or 'self-interested' and the 'private' end of international law.[19] Of course, and as should be the case with an essentially contestable concept and especially with a legally constructed one such as consent,[20] new critiques may arise and be said to afflict contemporary versions of the notion and role of consent to international law.[21]

and d'Aspremont, fn. 5, pp. 1–20; Samantha Besson, 'Sovereign States and their International Institutional Order: Carrying Forward Dworkin's Work on the Political Legitimacy of International Law' (2020) 2(2) *Jus Cogens* 111–138; David Lefkowitz, *Philosophy and International Law: A Critical Introduction* (Cambridge: Cambridge University Press, 2020); Carmen E. Pavel, *Law beyond the State: Dynamic Coordination, State Consent and Binding International Law* (Oxford: Oxford University Press, 2021).

[16] See, for example, Thomas Christiano, 'Democratic Legitimacy and International Institutions', in Besson and Tasioulas, fn. 15, pp. 119–137; Thomas Christiano, 'Climate Change and State Consent', in Jeremy Moss (ed.), *Climate Change and Justice* (Cambridge: Cambridge University Press, 2015), pp. 17–38; Thomas Christiano, 'Legitimacy and the International Trade Regime' (2015) 52(5) *San Diego Law Review* 981–1012; Besson, fn. 6, at 305–309; Samantha Besson and José Luis Martí, 'Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation' (2018) 9(3) *Jurisprudence* 504–540; Craven, fn. 5.

[17] Besson, fn. 6, at 298–305; Pellet, Chapter 1 in this volume.

[18] See for an overview of those critiques: Besson, fn. 6, at 298–305; Lefkowitz, Chapter 2 in this volume.

[19] On the consequences of some of those oppositions in international treaty law, see, for example, Vassilis Pergantis, *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives* (Cheltenham: Edward Elgar, 2017).

[20] On the role of disagreement in the law, see Samantha Besson, *The Morality of Conflict. Reasonable Disagreement and the Law* (Oxford: Hart, 2005).

[21] See, for example, d'Aspremont, Chapter 5 in this volume. Most chapters in this volume are actually critical in one way or another and articulate various revision proposals to improve our theory and practice of consent in international law.

Besides or, rather, together with those re-ignited philosophical discussions of consent, the question has also regained in relevance in the recent practice of international law. This is the case in at least three respects: the sources of international law, international adjudication and the subjects of international law.

Thus, and starting with the sources of international law, the notions of consent and agreement have remained curiously informal and difficult to grasp in international treaty law, at all stages of treaty-making and treaty-interpreting. Recently, this has revived the discussion around the differences between treaties and other fast-developing forms of State commitments based on consent, such as inter-State 'contracts' or other international albeit non-legal 'agreements' like the increasingly common 'political commitments' of States.[22] Further, new consensual techniques are being experimented in multilateral treaty-making processes, especially in international environmental law,[23] and could be exported into law-making processes pertaining to other international public goods (such as health or peace) in the future. Turning to custom, one should also mention the vexed place of consent in the formation of customary international law, giving rise to new questions about the end of consent and the legality of so-called withdrawals from customary law.[24]

[22] See, for example, Jan Klabbers, 'Not Re-Visiting the Concept of Treaty', in Alexander Orakhelashvili and Sarah Williams (eds.), *Forty Years of the Vienna Convention on the Law of Treaties* (London: British Institute of International and Comparative Law, 2010), pp. 29–40; Jan Klabbers, 'The Validity and Invalidity of Treaties', in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties*, 2nd ed. (Oxford: Oxford University Press, 2020), pp. 545–567; Duncan B. Hollis, 'Defining Treaties', in Hollis, *The Oxford Guide to Treaties*, fn. 22, pp. 11–45; Timothy Meyer, 'Alternatives to Treaty-Making – Informal Agreements', in Hollis, *The Oxford Guide to Treaties*, fn. 22, pp. 59–81; Curtis A. Bradley, Jack L. Goldsmith and Oona A. Hathaway, 'The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis' (in press, 2023) 90 *University of Chicago Law Review*; Hollis, Chapter 6 in this volume; Kassoti, Chapter 12 in this volume.

[23] See, for example, Jutta Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' (2002) 15(1) *Leiden Journal of International Law* 1–52; Jutta Brunnée, 'Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements', in Rüdiger Wolfrum and Volker Röben (eds.), *Developments of International Law in Treaty Making* (Berlin: Springer, 2005), pp. 101–126; Brunnée, Chapter 8 in this volume.

[24] See, for example, Chin Leng Lim and Olufemi Elias, 'Withdrawing from Custom and the Paradox of Consensualism in International Law' (2010) 21(1) *Duke Journal of Comparative & International Law* 143–156; Curtis A. Bradley and Mitu G. Gulati, 'Withdrawing from International Custom' (2010) 120(2) *The Yale Law Journal* 202–275; Niels Petersen, 'Customary Law and Public Goods', in Curtis A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (Cambridge: Cambridge University Press, 2016), pp. 253–274; Aymeric Hêche, 'L'élément subjectif dans la coutume internationale', in Samantha Besson, Yves Mausen and Pascal Pichonnaz (eds.), *Le consentement en droit* (Zurich: Schulthess, 2019), pp. 31–53.

Moreover, and unexpectedly given some of the original descriptions of soft and/or informal law *qua* 'non-consensual' law,[25] the question of consent has recently resurfaced, together with other private law analogies such as contracts, promises or pledges, in debates pertaining to the sources of the specific 'normativity' of international soft or informal law.[26] This development raises the question of what it is, if not consent, that makes that informal or soft law normative or even 'binding', albeit in a non-formal or non-legal way, and, by contrast, what this means for the specificity of consent to international law itself and especially, as will be argued in Section 2, for its institutional dimension. It also sheds a new light on the issue mentioned before of the distinction between binding treaties and so-called informal or non-binding agreements that are based on mutual consent like treaties, but allegedly do not bind like them or, at least, not legally. The development of such agreements calls for an inquiry into the normative or binding role of consent under contemporary international law and for a broader discussion about what makes international law 'law'.[27]

Turning to international adjudication, second, the consensual jurisdiction of international courts and tribunals has also attracted renewed attention lately. This has followed the assertive development of some international tribunals' case law pertaining to the interpretation of both their consent-based jurisdiction[28] and consent-based sources of international law.[29] In a mirroring exercise, certain States have reacted through withdrawals or, at least, qualifications of their jurisdictional clauses. After being maybe too quickly considered as outdated,[30] State consent to jurisdiction seems to have remained foundational and will be pivotal to the future of international adjudication.[31] In international responsibility law, consent works as an exception to another

[25] See, for example, Helfer, fn. 8; Guzman, fn. 8; Pauwelyn, fn. 9; Pauwelyn *et al*., fn. 8; Krisch, fn. 9.

[26] See, for example, Melissa J. Durkee, 'The Pledging World Order' (2023) 48(1) *Yale Journal of International Law* 1–54.

[27] On some of these questions, see Kassoti, Chapter 12 in this volume; Radi, Chapter 15 in this volume.

[28] See Tams, Chapter 3 in this volume; Boisson de Chazournes, Chapter 10 in this volume.

[29] See Nolte, Chapter 9 in this volume.

[30] See, for example, Cesare P. R. Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' (2007) 39(4) *New York University Journal of International Law and Politics* 791–872.

[31] See, for example, Clément Marquet, *Le consentement étatique à la compétence des juridictions internationales* (Paris: Pedone, 2022); Rejla Radović, *Beyond Consent: Revisiting Jurisdiction in International Investment Treaty Arbitration* (Leiden: Brill, 2021); Tom Sparks, 'Reassessing State Consent to Jurisdiction: The Indispensable Third Party Principle before the ICJ' (2022) 91(2) *Nordic Journal of International Law* 216–252.

State's or international organization's responsibility. Lately, that exception has raised numerous questions in the context of the use of force and regarding the identity of the consenting subject and the limits to State consent.[32]

Finally, the right to consent to international law seems to have been extended to other subjects and institutions than States in the international institutional order. Thus, it is now common to refer to the 'consent' of international organizations (hereafter IOs), including with respect to the law adopted by them[33] or, at least, by States within them,[34] even if the legal regime and normative implications of that consent still differ from those of State consent and require reverting to those organizations' Member States' consent. One should also mention the increasing inclusion of private persons, such as non-governmental organizations (hereafter NGOs), in international law-making processes, sometimes vesting them with similar rights to consent to international obligations. For instance, they are considered as 'participants' alone or alongside consenting States, in so-called multi-stakeholders agreements, and their participation rights often emulate the modalities of State consent.[35]

2 THE AIMS OF THE VOLUME

Although the topic has been addressed quite regularly in the form of articles and chapters,[36] there have been, surprisingly for such a central topic, few monographs on consent to international law in general and no edited volume, if one excludes major commentaries and textbooks on the international law of treaties.[37]

[32] See, for example, Federica Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Justification for the Use of Force' (2020) 7(2) *Journal on the Use of Force and International Law* 227–269; Aurélie Galetto, 'Des formes du consentement étatique et de ses limites: Analyse au regard de l'excès de mandat par des forces armées étrangères', in Besson *et al.*, fn. 24, pp. 256–278.

[33] See, for example, Brölmann, fn. 13; Brölmann, Chapter 4 in this volume; Bordin, Chapter 11 in this volume; Kassoti, Chapter 12 in this volume.

[34] See, for example, Brölmann, Chapter 4 in this volume; Besson and Martí, Chapter 14 in this volume.

[35] See, for example, Hollis, fn. 13; Melissa Loja, *International Agreements between Non-State Actors as Source of International Law* (London: Hart, 2022); Kassoti, Chapter 12 in this volume.

[36] See, for example, the references in fn. 7–9, 12–14.

[37] See, for example, Jan Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer Law International, 1996); Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Brill, 2009); Orakhelashvili and Williams, fn. 22; Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties:*

Moreover, the existing monographs on consent to international law are not general in scope. There have been quite a few monographs published recently on the topic, but they pertain to specific sources or regimes of international law, and especially either to international treaty law or to the jurisdiction of international courts and tribunals.[38] Regarding consent itself, they do not usually expand beyond the odd definitional pages, and certainly do not address the many issues pertaining to the notions, roles, objects, types, subjects and institutions of consent to international law. There have been at least two exceptions, of course. However, the two general monographs are already twenty years old and are either focused on sources for one or relatively succinct for the other.[39]

For all the reasons identified earlier, and especially its current philosophical and practical relevance, it is important to re-examine the issue of consent to international law in depth and in the contemporary circumstances of international law. The best way to do so in a rich and nuanced way is to give a voice to many authors at the same time on the matter, and this is the purpose of the present volume.

The volume has at least two aims: a first, conceptual aim, and a second one, more normative and critical. Both aims are intertwined in any legal argument, of course, and this is confirmed in almost all the chapters of the volume.

The primary, conceptual aim of this collection of essays is to address and reflect over three groups of issues one may identify in the current scholarship about the consent to international law and in its practice: the notions and roles of consent; the objects and types of consent; and the subjects and institutions of consent. Note that those issues are not exclusive, either mutually or in themselves. Moreover, they should not be read to detract from the legal nature of consent itself: consent is best constructed as a legal right or power, on the one hand, and the consenting subject or institution is instituted legally as such

A *Commentary* (Oxford: Oxford University Press, 2011); Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2013); Robert Kolb, *The Law of Treaties: An Introduction* (Cheltenham: Edward Elgar, 2016); Brölmann and Radi, fn. 13; Bowman and Kritsiotis, fn. 5; Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties:* A *Commentary*, 2nd ed. (Berlin: Springer, 2018); Hollis, *The Oxford Guide to Treaties*, fn. 22.

[38] See, for example, Pergantis, fn. 19; Katharina Berner, *Subsequent Agreements and Subsequent Practice in Domestic Courts* (Berlin: Springer, 2017); Irina Bugua, *Modification of Treaties by Subsequent Practice* (Oxford: Oxford University Press, 2018); Alexis Marie, *Le silence de l'État comme manifestation de sa volonté* (Paris: Pedone, 2018); Marquet, fn. 31; Radović, fn. 31.

[39] See Elias and Lim, fn. 12; Hey, fn. 12.

before or while it is given that right or power to consent to international law, on the other hand.

First of all, the notions and roles of consent in contemporary international law need to be clarified.

To start with the *notions* of consent to international law, one may approach consent as a descriptive or as a normative concept.[40] It suffices here to review the range of terms used to refer to it: a practice or a state, on the one hand, and a right, a power, an axiom or a principle of international law, on the other hand. More specifically, indeed, consent may be understood both as an intentional state and/or an expression thereof and as the normative right or power to alter one's own normative position and, by extension, another's in most cases, for instance, by incurring obligations or liabilities. Finally, consent may be approached not only as a process – as it is the case in this volume as *per* its title – but also as its outcome, and hence, by extension or not, as form, but also as content.[41]

Turning to the *roles* of consent in contemporary international law, they are mostly normative. Consent has, rightly or wrongly, been related, even if it cannot be reduced to them as explained in Section 1, and in various and very distinct ways, to the validity of international law and/or to its legitimacy.[42] It has also been said to be an expression of sovereignty or, depending on the subject, of autonomy[43] and self-government.[44] This is how it came to be related to other distinctive notions such as 'will',[45] 'intention',[46] 'agreement',[47] 'consensus', 'convention', 'contract', 'commitment', 'acceptance',[48] 'self-government', 'participation' or 'veto',[49] all notions whose exact relationship to consent, however, remains a topic of controversy in contemporary international law and scholarship.[50] The same may be said of the related limits to consent to international law: if consent is justified by reference to autonomy[51] or

[40] See Lefkowitz, Chapter 2 in this volume.
[41] See Zarbiyev, Chapter 7 in this volume; Brölmann, Chapter 4 in this volume.
[42] See Lefkowitz, Chapter 2 in this volume; Besson and Martí, Chapter 14 in this volume; Chemillier-Gendreau, Chapter 13 in this volume.
[43] See Radi, Chapter 15 in this volume.
[44] See Besson and Martí, Chapter 14 in this volume.
[45] See Pellet, Chapter 1 in this volume.
[46] See Zarbiyev, Chapter 7 in this volume.
[47] See Hollis, Chapter 6 in this volume.
[48] See Besson, fn. 6, at 295.
[49] On consent, 'veto' and 'participation', see Besson and Martí, Chapter 14 in this volume.
[50] See d'Aspremont, Chapter 5 in this volume.
[51] See Radi, Chapter 15 in this volume.

self-determination,[52] the original legal institution of the latter also implies inherent legal limits thereto.[53] This is the case, for instance, of the egalitarian limits to consent, but also of all those other features that are constitutive of that autonomy legally and considered as inherent limits to consent in international law, as exemplified by imperative rights and duties under international human rights law.[54]

Second, the objects and types of consent to international law also need to be clarified.

Starting with the *objects* of consent, indeed, consent pertains to 'obligations' or 'liabilities' arising from different sources of international law, such as treaties or custom, and arguably unilateral acts.[55] It also pertains to such obligations or liabilities arising from adjudication, thereby giving rise to a controversy about the differences between consent to obligation and consent to jurisdiction (i.e. a third-party's power to adjudicate) over those obligations[56] and about the importance of who controls both kinds of consent and their objects.[57] As explained in Section 1, the normative or binding dimension of the object of consent when it is consent to international 'law' calls for a distinction from other 'norms' as in inter-State 'contracts' or 'political commitments', and from other forms of promises or pledges one usually classifies as informal or soft law in international law.[58]

Turning to the *types* of consent in contemporary international law, consent is usually understood through binary oppositions:[59] it may be considered individual or institutional, individual or collective,[60] unilateral or mutual, tacit or explicit, single or continuous, unique or fragmented,[61] domestic or international,[62] and original or subsequent.[63] One also opposes consent as a

[52] See Besson and Martí, Chapter 14 in this volume.
[53] See Fabre-Magnan, fn. 10.
[54] See Besson and Martí, Chapter 14 in this volume.
[55] See Lefkowitz, Chapter 2 in this volume.
[56] See Tams, Chapter 3 in this volume; Nolte, Chapter 9 in this volume; Boisson de Chazournes, Chapter 10 in this volume.
[57] See Tams, Chapter 3 in this volume; Kassoti, Chapter 12 in this volume.
[58] See Hollis, Chapter 6 in this volume; Brunnée, Chapter 8 in this volume; Kassoti, Chapter 12 in this volume.
[59] For a critique of those binary oppositions, see d'Aspremont, Chapter 5 in this volume.
[60] See Brunnée, Chapter 8 in this volume; Pellet, Chapter 1 in this volume; Radi, Chapter 15 in this volume.
[61] See Brunnée, Chapter 8 in this volume.
[62] See Brunnée, Chapter 8 in this volume.
[63] See Nolte, Chapter 9 in this volume.

threshold to substantive consent, for interpretation purposes for instance,[64] or consent to rule to consent to regime.[65]

Third, and finally, the subjects and institutions of consent to international law are also in need of clarification.

The *subjects* of consent may be individual persons or, more commonly, groups of persons such as peoples – whether they have been instituted into States or other public institutions or into civil society organizations, such as NGOs and transnational corporations. Their *institutions* may also consent to international law. The latter's power or right to do so for their peoples under international law and hence to represent them actually contributes to instituting them as such.[66] Those institutions encompass States, of course, but also IOs,[67] cities or regions.

This distinction between the subjects and institutions of consent to international law is not always sufficiently clear in contemporary discussions, and deserves to be addressed more clearly in the future. Of course, it comes with complexities, and especially important limitations to the analogy between individual and institutional consent, vexed questions of (especially, but not only democratic) representation of the subjects,[68] and difficult issues of attribution of the consent of individual agents, or further institutions, to their institutions.[69] Further difficulties arise also when the subjects and/or institutions consenting to one another are not of the same kind, as with informal 'arrangements' or 'agreements' between States and non-State actors or between IOs such as the European Union (hereafter EU) and non-State actors.[70] More generally, the institutionalized context of contemporary international law-making affects the nature and role of consent.[71]

From the perspective of those primary, conceptual goals, the proposed study of the legal regime of consent in international law may be described as a study in general international law. It proceeds from the identification and comparison of general or generalizable features of consent across various special regimes of international law and across different international institutions.

[64] See Zarbiyev, Chapter 7 in this volume; Nolte, Chapter 9 in this volume.
[65] See Tams, Chapter 3 in this volume; Zarbiyev, Chapter 7 in this volume, by reference to Neff, fn. 13.
[66] See Besson and Martí, Chapter 14 in this volume; Kassoti, Chapter 12 in this volume; d'Aspremont, Chapter 5 in this volume.
[67] See Bordin, Chapter 11 in this volume.
[68] See Besson and Martí, Chapter 14 in this volume.
[69] See Besson, fn. 6, at 295–296; Brölmann, Chapter 4 in this volume; Bordin, Chapter 11 in this volume.
[70] See Kassoti, Chapter 12 in this volume; Hollis, Chapter 6 in this volume.
[71] See Brölmann, Chapter 4 in this volume; Brunnée, Chapter 8 in this volume; Radi, Chapter 15 in this volume.

The recent debates about the notions and roles of consent, about its objects and types, and about its subjects and institutions may indeed be observed in all regimes of international law, but especially in international environmental law,[72] international human rights law[73] and international humanitarian law.[74] The various specialists of international law and the philosophy of international law invited to contribute to this volume have been asked to explore those issues in the regimes mentioned, but also in many others.

The volume also has a secondary, more normative and critical aim. The exploration of the notions, roles, objects, types, subjects and institutions of consent to international law should indeed also shed light on the increasingly vexed questions of the origins of the normativity and authority of international law *qua* 'law' by contrast to the many other types of consensual 'norms' that increasingly apply within contemporary international relations. Tying the question of consent to international law more closely to its subjects and institutions could also contribute to clarifying the issue of the legitimacy of international law as the law of public institutions by contrast to mere 'actors' of international law.

Indeed, even if the time of anthropomorphism and of the related private law analogies is long past in international law, and even if legal positivism is no longer wedded to voluntarism, consensualism has undoubtedly retained some of its private law flavour. If unattended (and this volume's second aim is precisely to attend to this), the current consolidation of the normative role

[72] See, for example, Malgosia Fitzmaurice, 'Expression of Consent to Be Bound by a Treaty as Developed in Certain Environmental Treaties', in Jan Klabbers and René Lefeber (eds.), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (Leiden: Martinus Nijhoff, 1998), pp. 59–80; Brunnée, 'COPing with Consent', fn. 23; Brunnée, 'Reweaving the Fabric of International Law?', fn. 23.

[73] See, for example, Curtis A. Bradley and Jack L. Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149(2) *University of Pennsylvania Law Review* 399–468; Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11(3) *European Journal of International Law* 489–519; Ryan Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent' (2002) 96(3) *American Journal of International Law* 531–560; Jan Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations', in Ineta Ziemele (eds.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony and Reconciliation* (Leiden: Martinus Nijhoff, 2004), pp. 149–182; Lea Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements' (2006) 77(1) *British Yearbook of International Law* 163–202; Samantha Besson, 'Human Rights Waivers and the Right to Do Wrong under the ECHR', in *Mélanges for Dean Spielmann* (Nijmegen: Wolf Legal Publishers, 2015), pp. 23–35.

[74] See, for example, Eliav Lieblich, 'Why Can't We Agree on When Governments Can Consent to External Intervention? A Theoretical Inquiry' (2020) 7(1) *Journal on the Use of Force and International Law* 5–25; Paddeu, fn. 32.

of consent outside the formal sources of international law may contribute to the ongoing process of privatization of public international law.[75] How, indeed, could a legal order that began by treating public institutions by analogy with private persons now resist their privatization and, conversely, the treatment of those private persons by analogy with public institutions and their publicization?[76]

It is, for instance, in a private law guise that consent features in recent discussions pertaining to the normativity of international soft and/or informal law.[77] States are simply assimilated to other 'actors', public or private, when they consent to those soft and/or informal norms, and vice versa.[78] This assimilation of States to private individuals reduces States to their governments. In so doing, it dispenses State consent from representing that State's people's consent, and hence from any requirements of attribution and from additional domestic law requirements of parliamentary or popular approval. The equal role recognized to State consent and that of other 'non-State actors' in those contexts contributes to undermining the specificity of the consent of States *qua* public and sovereign institutions representing their peoples in international law-making. In turn, those new normative practices also exclude States' consent from the scope of protection of the international legal framework that usually applies and actually vests that consent with the normative power to bind under international law in the first place, and especially under international treaty law. This leaves weaker States unprotected from stronger ones, or (States)peoples unprotected from powerful private 'stakeholders'. The erosion of the right not to consent to soft law of certain States, weaker than others, actually epitomizes the problem.[79]

The privatization of consent does not stop with States, however. One may observe a similar 'personification' of IOs in the debates pertaining to their autonomous 'will' or 'consent' in international treaty-making or customary

[75] Samantha Besson, *The Public-Private Relation and International Law* (Leiden: Brill, in press, 2024); Anne Peters, 'Privatisation under and of Public International Law', Hersch Lauterpacht Memorial Lectures 2017 (7–10 March 2017). Available at: www.mpil.de/files/pdf5/0_Handout_Lauterpacht_07032.pdf, last accessed 7 December 2022; Frédéric Mégret, 'Are There "Inherently Sovereign Functions" in International Law?' (2021) 115(3) *American Journal of International Law* 452–492.

[76] For a full argument, see Besson, fn. 75.

[77] This applies to 'agreements' between States and non-State actors (see, e.g., Kassoti, Chapter 12 in this volume), as much as to 'agreements' between non-State actors themselves (see, e.g., Loja, fn. 35).

[78] For a general critique, see Samantha Besson, *Reconstructing the International Institutional Order* (Paris: OpenEdition Books/Éditions du Collège de France, 2021).

[79] See, for example, Lorenz Langer, 'Implications of Soft Law Regimes for Small States: The Experience of Switzerland and Liechtenstein' (2020) 30(2) *Swiss Review of International and European Law* 235–264.

practice.[80] The focus on IOs' legal personality in that debate and the legal analogies between States and IOs have actually kept international lawyers from addressing the far more pressing institutional questions of the multiple and continuous representation of the same peoples by IOs and their Member States.[81] In turn, the prevalence of the functionalist understanding of IOs and their law-making powers and its contribution to the latter's privatization may be a cause of additional concern in this respect.[82] It could, indeed, lead to understand consent by IOs, but also by extension by States in IOs, as any other type of individual consent, and not as that of a public institution representing (States)peoples.

What one may coin the 'private return of consent' in international law implies that the alleged rise of 'non-consensual' international law,[83] far from signalling the demise of consent, may actually only have marked the demise of States' consent (and arguably other public institutions') *qua* public institutions' consent in international law-making. Keeping consent in place while displacing States (and those other public institutions), the inadequately called 'non-consensual' international law has in fact contributed to the ongoing process of recontractualization of international law-making and to its privatization,[84] at the price of its publicness and of the international rule of law.[85]

This process has actually been facilitated by the parallel albeit dubious reduction, in international law scholarship, of State consent to a subjective, individualistic, self-interested and private posture, as mentioned before. This reduction has led to the promotion, instead, of an objective, collective, communitarian and public conception of international law, a conception that has been, however, severed from State consent rather than constructed around it.[86] In turn, this has left those new processes of 'regulation' of alleged

[80] See Brölmann, fn. 13; Brölmann, Chapter 4 in this volume; Bordin, Chapter 11 in this volume; Kassoti, Chapter 12 in this volume.

[81] See Samantha Besson, 'Book Review: Fernando Lusa Bordin: The Analogy between States and International Organizations' (2020) 31(2) *The European Journal of International Law* 771–776; Besson, 'Sovereign States and Their International Institutional Order', fn. 15.

[82] On the privatization of IOs through functionalism and on the privatization of Member States by those IOs by extension, see Samantha Besson, 'The International Public: A Farewell to Functions in International Law' (2021) 115 *American Journal of International Law Unbound* 307–311.

[83] See, for example, Helfer, fn. 8; Guzman, fn. 8; Shaffer, fn. 8; Pauwelyn, fn. 9; Pauwelyn *et al.*, fn. 8; Krisch, fn. 9.

[84] See, for example, Peters, fn. 75; Mégret, fn. 75; Besson, fn. 75; Durkee, fn. 26.

[85] See Besson, fn. 75. For a more general critique of the institutional blind spot of contemporary international law, see Besson, fn. 78.

[86] For a critique, see Samantha Besson, 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?', in Eyal Benvenisti and Georg

international public goods entirely in the hands of 'private actors', of insufficiently institutionalized and uncontrolled 'trustees', of unchecked 'judges' or, even worse, of a handful of powerful States using the now largely inegalitarian and privatized institutional structures of IOs[87] or soft law mechanisms to rule over weaker ones.

Of course, as we all know from the ticking clock of climate change and the many other public goods such as health, peace or science, in urgent need of protection by international law, international law-making is often paralyzed by disagreements among States and hence by the withholding of a few States' consent. This may explain why so many today are ready to dispense with State consent despite the lack of opposability of new norms, both internationally in terms of the formal sources of international law and domestically in terms of respect of the requirements of foreign relations law.

One may, however, beg to differ with the argument many draw from this observation against the role of State consent in international treaty-making or in IOs. It is true that giving States a veto or, at least, refusal rights in international law-making has become part of the problem. However, abandoning State consent altogether is too high a price to pay and the consent of (States) peoples has to be part of any legitimate solution to those challenges. One should protect all self-determining (States) peoples' right to equal consent, albeit as a right that is duly revised so as to become more egalitarian, inclusive and participative.[88] This is the only way to strengthen international law as the kind of public, hard and representative law one may not only deem more effective, but also democratically legitimate.

Breaking away from the pragmatic resignation that often prevails among international law scholars on the question of State consent,[89] it is time therefore for international lawyers to turn to the reform of international institutions and procedures so as to enforce a new, and especially more democratic, conception of State consent that enables States, and arguably other public institutions,[90] to represent all peoples and their public interests

Nolte (eds.), *Community Interests across International Law*, online ed. (Oxford: Oxford University Press, 2018), pp. 50–69.

[87] See Samantha Besson, 'Democratic Representation within International Organizations: From International Good Governance to International Good Government' (2022) 19 *International Organizations Law Review* 489–527; Besson and Martí, Chapter 14 in this volume.

[88] See Besson and Martí, Chapter 14 in this volume; Chemillier-Gendreau, Chapter 13 in this volume.

[89] See Besson, fn. 6, at 315.

[90] See Besson and Martí, 'Legitimate Actors of International Law-Making', fn. 16.

effectively in international law-making.[91] Such an account of democratic State consent would not only fit and justify the contemporary practice of the formal sources of international law, where consent retains a central albeit changing role. With its revised understanding, justification and limits, such an account may also contribute to bringing States and their peoples back to these sources in the future, and away from informal and soft law-making processes. This would not only enhance the accountability of international law to all peoples, but also benefit domestic democracy by protecting it from populism and from the sirens of other forms of withdrawal and exit.

3 THE STRUCTURE OF THE VOLUME

To reflect the three dimensions of the process of consenting to international law, identified in Section 2, this volume is divided into three parts. Part I pertains to the notions and roles of consent to international law, Part II to its objects and types, and Part III to its subjects and institutions. Those three parts correspond to the three dimensions of consent that are discussed the most, as explained before, in current debates in international law.

Each of those three parts comprises five chapters written by international lawyers and philosophers of international law (some authors qualify and consider themselves as both). This mixed authorship avoids a common but fake opposition between the theory and practice of international law, and makes the exchanges more fluid between the two groups of authors. This edited volume is indeed the first one to open a dialogue, and hopefully a fruitful one, between international lawyers and legal philosophers on the topic of consent to international law. The issues raised by consent to international law are notably difficult, indeed. They pertain to the nature, validity and legitimate authority of international law, and to its interpretation, as well as to the sovereignty of States and their sovereign equality, international legal personality and international institutional representation. Such issues are not usually addressed together and in all their philosophical complexity by existing international law accounts of consent. Those issues cannot, however, be solved in an informed way by legal philosophers alone either. The latter often tend to overgeneralize and fail to grasp the sheer complexity of the practice of international law-making, whether it pertains to sources of international law, to international adjudication or to IOs.

[91] See Besson, fn. 6, at 305–312.

Coming back to the tripartite structure of the volume, there may be overlaps between some of those parts' topics and the respective chapters therein, as it is often the case when addressing complex international law issues. It is difficult, indeed, to classify any given argument about consent to international law as pertaining only to its nature or role and not to its objects and types, and vice versa. This is why some of the chapters in Part I pertain to consent to treaties and jurisdiction, two topics that are also addressed in Part II. By contrast to the latter, however, the former focus on the nature of consent and its role therein.[92] In the same vein, the subjects of consent affect the role it may have in international law, and especially its contribution to the legality and the legitimacy of international law, and vice versa. That is why some of the chapters in Part I pertain to IOs and, more generally, the institutionalized context of international law-making, albeit from the perspective of the nature of consent,[93] and not only from that of its subjects and institutions as in the chapters in Part III. This is also why, conversely, some chapters in Part III draw conclusions from the increasingly private subjects of consent to international law for the role of consent as a criterion for the legality of international law in the first place.[94] Importantly, however, those overlaps have been identified, and have been addressed in the relevant chapters.

Of course, the idea has not been to ask contributors in the later parts to endorse what was said in earlier ones (as a matter of fact, most contributors disagree on many of the issues discussed in the other chapters), but to ask them to refer to those arguments provided their own argument required them to do so and to explain how they agreed or disagreed with what was said earlier in the volume. Chapter 15 that closes the volume actually reverts to some of those shared objects of contention and to the open controversies between contributors. It also identifies the remaining open questions and a few directions for future research.

As it is the case in any edited volume, and especially on a topic like consent to international law, there are many issues that were identified as the project went along and could not be covered. They will have to be addressed in future research. Many of those issues are mentioned at the end of the respective chapters. Among them, however, two need to be singled out here.

First of all, even if Part III addresses people as the ultimate subjects of their States and other international institutions' consent to international law,[95] the

[92] See Tams, Chapter 3 in this volume; by contrast to Boisson de Chazournes, Chapter 10 in this volume.
[93] See Brölmann, Chapter 4 in this volume; by contrast to Bordin, Chapter 11 in this volume.
[94] See Kassoti, Chapter 12 in this volume; by contrast to Hollis, Chapter 6 in this volume.
[95] See especially Besson and Martí, Chapter 14 in this volume; Chemillier-Gendreau, Chapter 13 in this volume.

notion and role of individuals' direct consent to obligations or liabilities under international law would need to be addressed more specifically and for itself. This is the case in international human rights law in particular, but individual consent is a fast developing practice in almost all regimes of international law that have individuals as direct subjects. Second, the domestic or internal law dimension of States' or IOs' consent would also need to be discussed in more detail, especially through the lenses of comparative foreign relations law. This does not only matter for democratic legitimacy purposes when linking our institutions' international consent to the peoples they represent, as discussed in Part III,[96] but also, more generally, to identify new ways of protecting the autonomy of consenting subjects in international law, for instance, through further limits on State or other public institutions' consent.[97]

4 THE CONTENTS OF THE VOLUME

As mentioned before, this volume is divided in three parts: Part I pertains to the notions and roles of consent in international law; Part II to its objects and types; and Part III to its subjects and institutions.

Part I is composed of five chapters and pertains to the notions and roles of consent in international law. Those chapters address different aspects of the question. Whereas Chapter 1 delineates consent from other related concepts and Chapter 2 addresses in what sense consent may contribute to the legitimacy of international law, Chapter 3 pertains to how control over consent has become the new focus of the practice of international dispute resolution and Chapter 4 addresses the way in which the institutionalization of international law has affected both the concept of consent and its relevance. Chapter 5 takes stock of the debate and assesses its theoretical underpinnings critically.

In Chapter 1, 'Consenting Is Not Willing', Alain Pellet argues that 'will' and 'consent' are different. According to him, no State's will is entirely free. However, this does not preclude its consent from being valid. State consent displays different shades of will: while unilateral acts are the epitome of 'willing consent', the degree of willingness required when accepting a treaty is weaker, until it almost disappears in the case of custom, or general principles of law. The author argues that *opinio juris* and consent are also different notions: you may feel legally bound even if consent is very remote. However, whatever role 'will' plays in the formation of rules, once the rules exist, States

[96] Besson and Martí, Chapter 14 in this volume; Chemillier-Gendreau, Chapter 13 in this volume.
[97] Radi, Chapter 15 in this volume.

are, according to Alain Pellet, bound and their will is trapped. The author makes the argument that if neither will nor consent explains the basis of a State's obligation when it is no longer willing to implement it, they nonetheless have a stabilizing and legitimizing role. He argues that consent makes the acceptability of the obligation stronger, by comforting its legitimacy, which also makes its implementation more effective.

In Chapter 2, 'State Consent and the Legitimacy of International Law', David Lefkowitz argues that while State consent does contribute to international law's legitimacy, it does not do so by providing a justification for it. States are not bound to obey international law because they have chosen to submit to its authority. Rather, international law provides them with a reason for action, and indeed they have a moral duty to obey it, if and only if they will do better at realizing justice if they act as the law directs them to act than if they act on their own judgment. As a means for crafting international law, State consent is, according to the author, valuable insofar as it yields international legal norms that satisfy this condition. He argues, that in a few cases, it may also constitute an intrinsically valuable expression of trust in the international political community or an international institution that exercises political authority.

In Chapter 3, 'Controlling Consent: Insights from Binding Dispute Settlement', Christian Tams assesses the role of consent in processes of binding dispute resolution before international courts and tribunals. He seeks to demonstrate that – notwithstanding its general relevance across wide fields of international law – 'consent' has a particular role in binding dispute resolution. According to him, this particular role derives from the special nature of binding dispute resolution processes. These processes are intrusive and characterized by their uncertain outcome: the implications of State consent to the dispute resolution process crucially depend on decisions of an independent entity, namely an international court or tribunal. Because this is so, States insist on the need for consent, as a precondition of any binding dispute resolution process. What is more, consent is typically formal, explicit and directly expressed, reflecting continued State control over binding dispute resolution. At the same time, once consent has been given, control shifts to the competent international court or tribunal. As far as the scope of consent is concerned, the decisions of this court or tribunal are binding on the State concerned. States renounce control over the scope of consent and have to accept the court's or tribunal's decision, as well as its application and interpretation of the applicable law in particular disputes. Moreover, by virtue of their decision-making authority, many international courts and tribunals have managed to assert at least a persuasive influence over proper construction

of the legal rules at stake, extending beyond the cases immediately pending before them. The chapter traces these peculiarities and – by reference to two pen pictures – examines how the tension between State and courts' authority plays out in particular disputes.

In Chapter 4, 'International Organizations and the Disaggregation of Consent', Catherine Brölmann examines how 'consent', traditionally taken as a foundational element in international law, fares in the context of IOs. The central argument is that IOs, both as actors consenting to international law and as institutional spaces for other actors doing so, have changed the operation or even the nature of consent in international law as they have made the components of the act of consent disaggregate. Catherine Brölmann argues that the IO's expression of consent has become detached from the psychological or 'intentional' state that is presumed to be underlying in the legal subject. Where the organization appears as an institutional space for the consent of others, the object of consent in many instances is detached especially in substance from the normative effect created for the consent-giver.

In Chapter 5, 'Consenting to International Law in Five Moves', Jean d'Aspremont seeks to unpack five of the main discursive moves witnessed in the literature and case law pertaining to the question of consent to international law. He argues that these five specific discursive moves are performed by almost anyone engaging with the question of consent to international law, be such engagement on the more orthodox side or on the more critical side of the argumentative spectrum. The author claims that these five discursive moves correspond to the reproduction of a very modernist understanding of authority, the constitution of the very subject that is consenting, the anonymization of the author of consent, the reversal of the temporality of the legal discourse on consent and the adoption of very binary patterns of thought. This chapter shows that discursive moves made by international lawyers around the idea of consent bears heavily upon the type of political legitimacy, the type of geography, the type of responsibility, the type of temporality and the type of hermeneutics that international law is serving.

Part II is dedicated to the objects and types of consent in international law. It is comprised of five chapters. Those chapters address different aspects of the question, by focusing, for the first three chapters, Chapters 6 to 8, on consent in international treaty law-making and treaty interpretation and, for the next two chapters, Chapters 9 and 10, on consent to international adjudication or within international adjudication.

In Chapter 6, 'Do International Agreements Have a Consent Problem?', Duncan B. Hollis explores how consent functions as commitment, content and constitution for international agreements. He argues that consent

constructs all forms of international commitment, not just those governed by international law (treaties), but those governed by national law (contracts), and those not governed by law at all (political commitments). According to him, consent elucidates an agreement's contents – what the agreement 'is' in terms of scope and substance. Consent can also function as a constitution – delimiting not only 'primary' rules encapsulated by an agreement's existence and contents, but 'secondary rules' determining who can make agreements, how they must do so, and ways to recognize, adjust and end them. The author further argues that, for all these functions, consent remains an under-examined and undifferentiated concept. Today, almost any of consent's functions can be established by almost any formal or informal means. This leaves ample room for inconsistent understandings, unaligned expectations, and disputes about the existence of treaties or other forms of international agreements, their contents, and their relevant constitutive rules. Alongside existing proposals (presumptions/defaults and content-based criteria), this chapter proposes that international law should pursue more – and different – formalities for consent. Having different forms of consent follow its different functions may, according to the author, improve the efficacy of consent and with it the efficacy of international agreements overall.

In Chapter 7, 'Consenting to Treaty Commitments: Endorsing Rules or Endorsing a Regime of Discursive Commitments?', Fuad Zarbiyev examines the place of consent in treaty interpretation at the time of the marginalization of the role of the intention of the parties. Whether the characterization of international law as a legal system grounded in State consent has ever been empirically true is, as he argues, open to discussion. For him, the law of treaties, however, is commonly seen as 'a bastion of consensualism'. This sense of confidence has, however, never sat easily with treaty interpretation. The author claims that, despite the lip service sometimes paid to the fiction of the common intention of the parties, the official doctrine of treaty interpretation rests on the primacy of the terms of the treaty.

In Chapter 8, 'State Consent in the Evolving Climate Regime: Individual and Collective Aspects', Jutta Brunnée examines the interplay between the individual and collective dimensions of treaty-based law-making and standard-setting processes in the United Nations climate regime, which boasts a broad spectrum of approaches to regime development. They range from formal consent to its component treaties or amendments to these treaties and standard-setting by plenary bodies to recourse to non-binding commitments. The reason why the author attempts to elucidate the interplay between the individual and collective dimensions of treaty-based law-making is that multilateral treaties have been the main anchors for international

environmental law-making. In this context, State consent not only has individual effects, but also feeds into a collective process. The chapter begins by exploring the United Nations Framework Convention on Climate Change and the Kyoto Protocol. It then turns to the Paris Agreement and the shift to what has been described as a 'bottom-up' approach. The perhaps most striking feature of this approach is its reliance on non-binding, 'nationally determined contributions' (hereafter NDCs) that each party must 'prepare, communicate and maintain'. The author argues that, from the vantage point of State consent, the most significant consequence of the Paris Agreement's NDC approach is a shift away from the anchoring of consent to climate action in treaty-based processes, and hence from the linkages that adoption and entry into force requirements establish between multiple parties' individual expressions of consent.

In Chapter 9, 'Consent and Sources: The European Court of Human Rights and the International Law Commission', Georg Nolte's starts by observing that discussions about the foundations and the limits of the powers of international courts, including those of the European Court of Human Rights (hereafter ECtHR), turn around the aims of achieving legal certainty, ensuring legitimacy and justice, and avoiding conflicting obligations that may emanate from different regimes of international law. The chapter reflects on these aims from the perspective of consent as the common basis of the main sources of international law, listed in Article 38 of the Statute of the International Court of Justice. Proceeding from the case law of the ECtHR, the chapter explores how the recent work of the International Law Commission conceives the role of consent in respect of the main sources of international law, and whether the jurisprudence of the ECtHR remains within the framework of general international law so enunciated.

In Chapter 10, 'Variations around the Notion of Consent in Investment Arbitration', Laurence Boisson de Chazournes seeks to illustrate the multiplicity of thoughts and varied techniques deployed in interpreting consent in investment arbitration. The jurisdiction and right to adjudicate of international courts and tribunals is based on the consent and agreement of the subjects, that is, litigants. Given the clear terms in which international courts and tribunals have formulated and upheld the principle of consent, it could be expected that this principle would not evoke confusion or extensive discussion. However, this chapter shows that the steady rise of varied international disputes has generated significant debate about the interpretation and application of the principle of consent. International courts and tribunals are being increasingly criticized by States for their jurisdictional overreach. The underlying problem, as the author sees it, may well be whether the contours of

consent to arbitration are clear. Investment arbitration tribunals while dealing with the question of State consent have shown sharp divisions on the notion of consent. The varied approaches taken by arbitral tribunals to State consent highlights the indeterminacy of the contours of consent. The chapter finds support for its argument in a case study of the issue of State consent in the context of the interpretation of Most-Favoured Nation clauses.

Part III pertains to the subjects and institutions of consent in international law. It comprises five chapters. Those chapters address different sides of the issue, by focusing, for the first two chapters, Chapters 11 and 12, on consent by IOs and by so-called non-State actors' and, for the third and fourth chapters, Chapters 13 and 14, on the democratic legitimacy of State consent to international law within or outside IOs and hence on (States) peoples as the primary subjects of that consent. The fifth and final chapter of Part III, Chapter 15, concludes the volume by reverting to some of the conceptual questions it opened with and especially the issue of the autonomy of the consenting subject and the limits that autonomy places on consent to international law.

In Chapter 11, 'The Consent of International Organizations in the Making of General and Conventional Rules of International Law', Fernando Lusa Bordin attempts to answer the following question: in an international legal system of which States are no longer the only subjects, what is the role that the consent of IOs plays in the creation of rights and obligations that apply on the international plane? The chapter reflects on the legal agency that IOs enjoy, *qua* subjects of international law, in the process of formation of general international law and in the acquisition of treaty rights and obligations. In so doing, it advances two claims. The first is that even though IO practice can and should be taken into account in the identification of customary rules, it is not a necessary element in the process of formation of those rules. As a result, the applicability of custom to IOs is not premised upon their participation in the customary process. The second claim of the chapter is that, under current law, IOs can only be bound by treaty rules to which they have consented, which may give rise to problematic gaps between the treaty obligations of IOs and the treaty obligations of their members. In pursuing those claims, the chapter offers some reflections on the systemic and normative implications of the formal involvement of IOs in the making of rules of general and conventional international law.

In Chapter 12, 'Consent and Informal Law-Making: The View From the Court of Justice of the European Union', Eva Kassoti explores how the Court of Justice of the European Union (hereafter CJEU) has dealt with issues of consent as a trigger of commitment in the context of treaty-making by focusing

on its practice pertaining to informal arrangements concluded between the EU and third parties aimed at replacing international agreements. The main arguments advanced in the chapter are: (a) that the Court has largely followed mainstream international legal thinking by identifying consent as the 'objective' common intention of its authors to be legally bound – as this is manifested on the basis of an instrument's actual terms and the circumstances attending its making; and (b) that the Court has acknowledged the constitutive function of consent when it comes to treaty-making with non-State actors. The chapter also illustrates an important blind spot in the current debate on consent. The examination of the CJEU's case law shows that political factors may have a bearing on the ascertainment of the consent to be legally bound. This, in turn, entails, the author argues, that attempts at theorizing how international law can remain sociologically clever and keep pace with current developments on the ground should be cognizant of the danger of over-relying on judicial practice.

In Chapter 13, 'Consent as a Guarantee of the Democratic Legitimacy of International Law', Monique Chemillier-Gendreau makes the case for a new understanding of the role of consent in international law. She begins by noting that the question of consent should be as central to international law as it is in other fields of law because legal norms give rise to power relations and impose constraints upon those to whom they apply, and those in power want these constraints to be accepted. Yet, the question of consent was, as the chapter claims, never raised in the classical era when State sovereignty made it possible for States to adopt international norms without their subjects' consent. With the Enlightenment, however, the people's consent through representation became the foundation of domestic law. Yet, most of the time, representation is, according to the author, formal and serves to justify the law as if it were produced by the general will. Because international law reflects the fickle concurrence of States' wills, the world community's law does not rely on popular consent. The world community is confronted with difficult challenges, and it needs, more than ever, norms that can meet this moment. For the author, the international system, as it is currently conceived around the central notion of sovereignty, is unable to effectively address such challenges. Institutional innovations will be crucial to confronting such challenges, but they have yet to be imagined.

In Chapter 14, 'From Equal State Consent to Equal Public Participation in International Organizations: Institutionalizing Multiple International Representation', Samantha Besson and José Luis Martí begin by observing that most obligations of international law are still regarded as 'based' on State consent even if, strictly speaking, consent can neither be a condition of that

law's validity nor amount to a moral reason to comply with it. There are, the authors argue, good reasons for this, especially from a democratic legitimacy perspective. Still, the principle of State consent, even in its qualified version of 'democratic State' consent, suffers from important shortcomings that call for correctives or, at least, for complements in terms of international democratic representation. The chapter focuses on State consent in IOs. It starts by accounting for the democratic value of State consent in IOs before addressing some of its democratic deficits. It then articulates several institutional proposals to correct or, at least, complement the role of equal State consent in the institution, the operation and the control of IOs. While being aware of the high complexity and diversity of IOs, the authors develop a non-ideal normative argument for the latter's political re-institution to enhance their democratic legitimacy, drawing on the case of the World Health Organization (WHO). That re-institution has to start, the chapter argues, with the replacement of the principle of equal State consent by that of equal public participation in IOs: this does not only avoid reducing State consent in IOs to State veto or refusal rights, but it also extends the personal scope of those participatory rights to other non-State public institutions. The chapter's proposal should be read as one dimension of the institutionalization of a system of multiple representation of the world's peoples *qua* multiple instituted publics.

In Chapter 15, 'Autonomy in International Law: About the Legal and Societal Limits to the Exercise of Consent', Yannick Radi attempts to unravel the close conceptual and practical connection between consent and autonomy. The chapter argues that consent is the vehicle of autonomy, vehicle through which States give themselves their own rules, both primary rules and secondary rules. Because the exercise of autonomy in the international society faces contextual limits, linked to the self (*auto*) and to the law (*nomos*), it is claimed, that consent appears not only to be characterized by power, but also by limitations. This holds true for consent in international law-making as much as for consent in international dispute settlement. The chapter focuses on both categories, discussing the theory of sources and institutional law-making with respect to the former and jurisdictional matters and applicable law with respect to the latter. It concludes – prospectively – with some thoughts on the future of autonomy and consent in international legal theory and practice.