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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

* Many thanks to Louis Hill for his editorial assistance.

[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.

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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.

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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),

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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

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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

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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.

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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.

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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.

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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:*

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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.

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