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The Demanding Idea of Consent to International Law

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THE DEMANDING IDEA OF CONSENT TO INTERNATIONAL LAW

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ABSTRACT

The concept of consenting to international law is no simple idea. It rests on sophisticated discursive moves. This article seeks to unpack five of the main discursive moves witnessed in literature and case-law discussing consent to international law. This article argues that these five specific discursive moves are performed, as is claimed here, by almost anyone analyzing the question of consent to international law, be such engagement on the more orthodox side or a critique from the argumentative side of the spectrum. These five discursive moves are (1) the reproduction of a very modernist understanding of authority, (2) the constitution of the very subject that is consenting, (3) the anonymization of the author of consent, (4) the reversal of the temporality of the legal discourse on consent, (5) and the adoption of very binary patterns of thought. This article shows that discursive moves made by international lawyers regarding the idea of consent bear heavily upon the type of political legitimacy, geography, responsibility, and hermeneutics that international law serves.

Keywords: International law, consent, consensualism, voluntarism, modernity, enlightenment, performativity, anthropomorphism, law and time, dualism, deferral of meaning.

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INTRODUCTION

Consenting to international law is the subject of very prolific literature and case-law. What consenting to international law possibly means, entails, requires, prescribes, performs, hides, and orders seems to indefinitely call for new studies and scholarly discussions.[1] At the risk of indulging in oversimplification, this article contends that the abundant literature and case-law pertaining to consent to international law can be reduced to five key discursive moves.[2] These five moves are performed, as is claimed here, by almost anyone engaging with the question of consent to international law, be such engagement on the more orthodox side, or critique from the argumentative side of the spectrum. Indeed, whether they hold that consent has always been and still is the foundation of international law;[3] whether they hold that consent has been a criterion of validity and inevitably remains so;[4] whether they hold that consent is receding either as a foundation or as a validity criterion;[5] whether they claim that consent has never played the ultimate role in terms of legal validity;[6] whether they attempt to

1. Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 173 (2005) ("maligned as the doctrine may be, international law needs more scholarship, not less, on the doctrine of consent as a basis of obligation in international law, looking at who is consenting, on whose behalf, and to whom such consent is being given"). *See also* Stephen Neff, *Consent*, *in* CONCEPTS FOR INTERNATIONAL LAW 127, 138 (Jean d'Aspremont & Sahib Singh eds., 2019) ("If there is universal agreement on the importance of consent in international law, there is all too little agreement on anything else about it. It may be considered be a sad comment on the intellectual state of international law that there can be, even now, so much uncertainty on so vital a subject. Putting the matter in the best light, one might say instead that the diversity of views on the subject is a sign of healthy debate within international legal circles.").

2. On the notion of discourse, see generally HAYDEN WHITE, TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM 4–5 (1978).

3. *See* Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 747 (2012); Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1, 3 (2014); Jutta Brunnée, *Consent*, *in* OXFORD PUBLIC INT'L L.: MAX PLANCK ENCYC. PUB. INT'L L. ¶¶ 16-17 (Jan. 2022).

4. Théodore Christakis, *Human Rights from a Neo-Voluntarist Perspective*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 421, 423 (Jörg Kammerhofer & Jean d'Aspremont eds., 2014); Eva Kassoti, *Beyond State Consent? International Legal Scholarship and the Challenge of Informal International Law-Making*, 63 NETH. INT'L L. REV. 99, 100 (2016).

5. *See* Krisch, *supra* note 3, at 3. On the decline of state consent in World Trade Organization Law, see Joost Pauwelyn, *Sources of International Trade Law: Mantras and Controversies at the World Trade Organization*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 1027, 1039 (Samantha Besson & Jean d'Aspremont eds., 2017).

6. *See* H.L.A. HART, THE CONCEPT OF LAW 225 (2d ed. 1994); Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTL. Y.B. INT'L. L. 22, 22 (1989); JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES 21–24 (2011) [hereinafter D'ASPREMONT – FORMALISM]; THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 187 (1990); Jean

redefine the role of consent;[7] whether they claim that consent plays no role within the whole range of international legal rules;[8] whether they seek to promote what they construe as non-consensual lawmaking processes;[9] whether they claim that consent both as a foundation or as a criterion of validity is a myth or conceptually impossible;[10] whether they contend that consent as a foundation and/or a criterion of validity is an actuality that is detrimental to international law and should be cancelled;[11] whether they claim that the role of consent is

d'Aspremont, *Herbert Hart in Today's International Legal Scholarship*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 114, 145-46 (Jörg Kammerhofer & Jean d'Aspremont eds., 2014). On Hart's rejection of consent as a foundation and a criterion of validity, see Dennis Patterson, *Transnational Governance Regimes*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 401, 410–11 (Jörg Kammerhofer & Jean d'Aspremont eds., 2014); Richard Collins, *Sources and the Legitimate Authority of International Law: A Challenge to the 'Standard View'?*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 703, 713 (Samantha Besson & Jean d'Aspremont eds., 2017).

7. *See, e.g.*, O.A. ELIAS & C.L. LIM, THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW, at xi–xii (1998).

8. *See* Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, *in* 241 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 209, 218 (1993); Anne Peters, *Global Constitutionalism Revisited*, 11 INT'L. LEGAL THEORY 39, 66–67 (2005); Bruno Simma, *From Bilateralism to Community Interest in International Law*, *in* 250 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 217, 234–35 (1994); Pellet, *supra* note 6, at 22-23; Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 36 STUD. TRANSNAT'L LEGAL POL'Y 23, 26 (2004).

9. *See* Laurence R. Helfer, *Nonconsensual International Lawmaking*, 1 U. ILL. L. REV. 71, 105 (2008); Guzman, *supra* note 3, at 747-48; JOEL P. TRACHTMAN, THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT 250 (2013).

10. *See* H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 420-21 (1933); J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 38–39 (1928); Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 9 (1956); Gerald Fitzmaurice, *The General Principles of International Law: Considered from the Standpoint of the Rule of Law*, *in* 92 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 45 (1957); Iain Scobbie, *Legal Theory as a Source of International Law: Institutional Facts and the Identification of International Law*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 493, 502–08 (Samantha Besson & Jean d'Aspremont eds., 2017) (discussing Brierly, Fitzmaurice, and Lauterpacht); Wouter G. Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING 13, 13–14 (Catherine Brölmann & Yannick Radi eds., 2016); Samantha Besson, *Sources of International Human Rights Law: How General is General International Law?*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 837, 845–46 (Samantha Besson & Jean d'Aspremont eds., 2017).

11. *See* Peters, *supra* note 8, at 39-40; Guzman, *supra* note 3, at 749; Jan Klabbers, *International Legal Positivism and Constitutionalism*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 264, 286-287 (Jörg Kammerhofer & Jean d'Aspremont et al. eds., 2014); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 529–31 (1993); Ingo Venzke, *Post-modern Perspectives on Orthodox Positivism*, *in* INTERNATIONAL LEGAL

patterned after the variations of the forms of international law-making processes;[12] whether they espouse,[13] or reject,[14] a custom-formatting role for

POSITIVISM IN A POST-MODERN WORLD 182, 187 (Jörg Kammerhofer & Jean d'Aspremont et al. eds., 2014). For a rejection of international law being identified through the past material or historical conditions of its production and a claim to make law derived from characteristics belong to the norms themselves, see generally Roberto Ago, *Positive Law and International Law*, 51 AM. J. INT'L L. 691, 694-95 (1957).

12. *See* Krisch, *supra* note 3, at 2-3; Guzman, *supra* note 3, at 789; Anthony Carty, *Conservative and Progressive Visions in French International Legal Doctrine*, 16 EUR. J. INT'L L. 525, 535 (2005); David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT'L L. & POL'Y 1, 20 (1987); *see also* David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL'Y 335, 355, 365-66 (2000). On the need to distinguish consent and formalism, see also D'ASPREMONT – FORMALISM, *supra* note 6, at 22; Samantha Besson, *Theorizing the Sources of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 163, 166 (Samantha Besson & John Tasioulas eds., 2010); O. A. ELIAS & C. L. LIM, *supra* note 7, at 193; Alain Pellet, *Lotus que de Sottises on Profère en Ton Nom!: Remarques sur le Concept de Souveraineté dans la Jurisprudence de la Cour Mondiale*, *in* MELANGES EN L'HONNEUR DE JEAN-PIERRE PUISSOCHET: L'ÉTAT SOUVERAIN DANS LE MONDE D'AUJOURD'HUI 215, 218 (2008) [hereinafter *Lotus Que de Sottises*].

13. *See* G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 124 (William E. Butler trans., 1974); Charles Chaumont, *Cours Général de Droit International Public*, 129 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE 333, 440 (1970). For an illustration of the occasional resilience of the association between custom and consent in international legal thought, see HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW, 16-17 (2d ed. 2019); John Tasioulas, *Custom, Jus Cogens, and Human Rights*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 95, 103-07 (Curtis A. Bradley ed., 2016); Niels Petersen, *The Role of Consent and Uncertainty in the Formation of Customary International Law*, *in* REEXAMINING CUSTOMARY INTERNATIONAL LAW 111-12 (Brian D. Lepard ed., 2017); Werner, *supra* note 10, at 13; Klabbers, *supra* note 11*,* at 284; Upendra Baxi, *Sources in the Anti-Formalist Tradition: That Monster Custom, Who Doth All Sense Doth Eat*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW, 225, 232 (Samantha Besson & Jean d'Aspremont eds., 2017); José Luis Martí, *Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW, 724, 739 (Samantha Besson & Jean d'Aspremont eds., 2017).

14. *See* Akbar Rasulov, *The Doctrine of Sources in the Discourse of the Permanent Court of International Justice*, *in* LEGACIES OF THE PERMANENT COURT OF INTERNATIONAL LAW JUSTICE 271, 276 (Christian J. Tams & Malgosia Fitzmaurice eds., 2013); H. Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 BRIT. Y.B. INT'L L. 65, 83-4 (1929); BRIERLY, *supra* note 10, at 52-53; Josef L. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 664 (1953); Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT'L L. 177, 185 (1995); Guzman, *supra* note 3, at 775-776; Pellet, *supra* note 6, at 36-37; Krisch, *supra* note 3, at 2-3; J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 473 (1999); Maiko Meguro, *Customary International Law and Non-State Actors: Between Anthropomorphism and Artificial Unity*, *in* NON-STATE ACTORS AND THE FORMATION OF CUSTOMARY INT'L L. (Iain Scobbie & Sufyan Droubi eds., forthcoming 2018) (manuscript at 5-6) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id =3071305 [https://perma .cc/V6NQ-RQDH]).

consent;[15] whether they deem the role of consent in treaty inescapable;[16] whether they lament the poor descriptive virtues of consent when it comes to international law-making processes;[17] whether they foreground the serious shortcomings of consent as a source of legitimacy of international law;[18] etc., most scholars and judges make the discursive moves depicted in this article. The five discursive moves that are discussed in turn in the following sections can be summarized as (1) the reproduction of a very modernist understanding of authority, (2) the constitution of the very subject that is consenting, (3) the anonymization of the author of consent, (4) the reversal of the temporality of the legal discourse on consent, and (5) the adoption of very binary patterns of thought.

Before outlining these five discursive moves made by almost all those that engage with consent to international law, an important preliminary remark about the aim of this article is warranted. Reducing international lawyers' discussions of consent to a handful of discursive moves seeks to show neither that such moves are ridiculous, nor that they are conceptually compelling. In fact, this article has no other ambition than to shed light on what international lawyers do when they mobilize the inscriptions that compose the international legal discourse in their discussion of the question of consent to international law. Instead, the account offered here remains premised on the idea that the discursive moves made by international lawyers around the idea of consent bear

15. For a discussion on the relationship between consent and custom, see generally ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW 68 (2019); Fernando L. Bordin, *A Glass Half Full? The Character, Functions and Value of the Two-Element Approach to Identifying Customary International Law*, 21 INT'L CMTY. L. REV. 283, 291-92 (2019); Brunnée, *supra* note 3, ¶ 15; Neff, *supra* note 1, at 131-34.

16. On the function of consent in treaty law, see generally THIRLWAY, *supra* note 13, at 16; Brunnée, *supra* note 3, ¶ 5; SHABTAI ROSENNE, AN INTERNATIONAL LAW MISCELLANY 357, 357-77 (1993); Matthew Craven, *The Ends of Consent*, *in* CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 103, 106 (Michael Bowman & Dino Kritsiotis eds., 2018); Klabbers, *supra* note 11, at 284; Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, *supra* note 10, at 13.

17. *See* Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, *supra* note 10, at 28; Krisch, *supra* note 3, at 2-3.

18. On the idea that consent cannot be a ground for international law's legitimate authority, see Samantha Besson, *State Consent and Disagreement in International Law-Making.* Dissolving the Paradox, 29 LEIDEN J. INT'L L., 289, 294, 298-301 (2016); *see also* Matthias Goldmann, *Sources in the Meta-Theory of Int'l L.: Exploring the Hermeneutics, Authority, and Publicness of Int'l L.*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 447, 465 (Samantha Besson & Jean d'Aspremont eds., 2017); José Luis Marti, *Sources and the Legitimate Authority of Int'l L.: Democratic Legitimacy and the Sources of Int'l L.*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 724, 739-43 (Samantha Besson & Jean d'Aspremont eds., 2017).

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 serves.

I. MIMICKING MODERN AUTHORITY

The literature and case-law discussing the idea of consent to international law can be read as a crude iteration of the modern model of authority, whereby legitimate and valid authority ought to be grounded in the consent of those subjected to it.[19] From this modernist perspective, consenting to international law boils down not only to securing the consent of those subjected to its rules but also to projecting a contractual image of international law. Indeed, by virtue of the idea of consent, international law comes to mirror the social contract so dear to modern political theorists. In that sense, the modern necessity to consent to international law, and the contractual approach to international law,[20] mutually support one another in projecting an image of a non-coerced,[21] yet humanely produced,[22] international law.

The modern model of authority that informs engagements with consent to international law is certainly tangible in debates on the history of international law, where the 1648 Peace of Westphalia[23] narrative has come to serve no other role than embedding international law in the modern story of the social

19. *See, e.g.*, Martti Koskenniemi, *The Politics of Int'l L.*, 1 EUR. J. OF INT'L L. 4, 4, 24 (1990); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 21-22 (2006); Craven, *supra* note 16, at 105; Neff, *supra* note 1, at 130-31; Collins, *supra* note 6, at 707.

20. On the rise of the contractual approach to international law, see STEPHEN C. NEFF, JUSTICE AMONG NATIONS 153, 156 (2014).

21. *See* Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, *supra* note 10, at 15; *see also* Craven, *supra* note 16, at 131.

22. On the centrality of the idea of human production in modern thought, see MICHEL DE CERTEAU, L'ÉCRITURE DE L'HISTOIRE 27-28 (1975).

23. For Andreas Osiander the birth of the story of Westphalia can be located in the work of Nys. *See generally* Andreas Osiander, *Sovereignty, Int'l Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 251 (2001). For José-Manuel Barreto the origin of this periodization goes back as early as 1845 with Henry Wheaton. *See* José-Manuel Barreto, *Cerberus: Rethinking Grotius and the Westphalian System*, *in* INTERNATIONAL LAW AND EMPIRE 159-160 (2017). For the claim that the myth of Westphalia was created by Leo Gross in the middle of the 20th century, see LUIS ESLAVA ET AL., BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW. 15 (2017); *see also* Jennifer Pitts, *Empire and Legal Universalism in the Eighteenth Century*, 117 AM. HIST. REV. 92, 93 (2012). On the arbitrariness of the choice for 1648, see Matthew Craven, *Introduction: International Law and Its Histories*, *in* TIME, HISTORY AND INTERNATIONAL LAW 2, 8 (2007); *see also* Bardo Fassbender, *Peace of Westphalia (1648)*, *in* 10 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 7, 18-19 (2011).

contract.[24] This modern concept of authority can similarly be witnessed in the scholarly findings about the serious shortcomings of consent as a source of legitimacy of international law and the need for correctives.[25] The care for ensuring non-coerced consent in the law of treaties can also be construed as a continuation of this modern blueprint of submission to authority. The same quest for a modern grounding of authority pervades debates on the consent to jurisdiction of international courts and tribunals.[26]

It must be acknowledged that the modernity of international lawyers' engagements with consent is not only that which pertains to the modern blueprint of authority. The literature and the case-law on consent can also been read as a modern pastiche, for they replicate one of the modern techniques of insertion into the real.[27] In fact, providing a consenting subject to a text, a constitution, a statute, or a treaty is a way to anchor it into the real.[28] From this perspective, international law is even more real—and less a literary construction—once the consent of those subjected to it has been secured and evidenced. In that sense, requiring that international law be consented to is yet another way in which international lawyers have tapped into the modern primacy enjoyed by discourses about the real.[29] The discourse on consent to international law, as it

24. It is important to note that Westphalia is not only a pastiche of modern authority. It is also a historical marker meant to locate the birth of international law in Europe and make the history of international law a part of the history of Western civilization. On the idea that 1648 makes the history of international law so European and Northern and pushes to the margins of the experience of African, Asian, or South American societies, see Craven, *supra* note 23, at 8.

25. On the idea that consent cannot be a ground for international law's legitimate authority, see Besson, *supra* note 18, at 294, 298-301.

26. On the question of consent to jurisdiction, see generally CLÉMENT MARQUET, LE CONSENTEMENT ÉTATIQUE À LA COMPÉTENCE DES JURIDICTIONS INTERNATIONALES (Pedone ed. 2022); *see also* G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970) ("International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."). There is also an abundant case-law on the question of consent to jurisdiction. *See* Autonomy of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23); East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, 105, ¶ 35 (June 30); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30); Chevron Corp. v. Republic of Ecuador, Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, ¶ 4.61 (Arb. Trib. Feb. 27, 2012), https://www.italaw.com/sites/default/files/case-documents/ita0175.pdf [https://perma.cc/ZBY2-B9W7].

27. *But c.f.* Pellet, *supra* note 6, at 23 (describing consent as a 19th century construction meant to give a scientific explanation to international law).

28. *See generally* MICHEL FOUCAULT, L'ORDRE DU DISCOURS 29-30 (1971) (arguing that authorship is what gives a discourse its origin and its coherence while also anchoring it in reality).

29. On the primacy of the real in international law, see generally Jean d'Aspremont, *International Law and the Rage Against Scienticism*, 33 EUR. J. INT'L L. 679 (2022); Jean d'Aspremont, *A Worldly Law in a Legal World*, *in* INTERNATIONAL LAW'S INVISIBLE FRAMES 110 (Andrea Bianchi & Moshe Hirsh eds., 2021). On the modern primacy of discourses about the real over other discourses, see generally HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 57 (1987); MICHEL FOUCAULT, LES MOTS ET LES

is found in the literature and case-law, can thus be read as a many-sided pastiche of modern thought.

II. INVENTING THE CONSENTING SUBJECT

This second discursive move pertains to the constitution of the very subject consenting to international law, its regimes, or its rules. Indeed, each time consent is required, ascertained, evidenced, or contested, a consenting subject is constituted. This is no accident. Because it seeks to reproduce a very modern model of submission to authority whereby those subjected to authority must consent to that authority,[30] the literature and case-law on consent to international law cannot avoid defining the consenting subject, which is the subject that will be subjected to the authority that is consented to. Just like modern political theorists had to define and give a description of the beings consenting to the modern government institutions,[31] the literature and case-law discussing consent must define whom consent must be secured from. In that respect, it is noteworthy—and certainly not benign—that the literature and case-law on consent to international law has always elevated states and international organizations into the consenting subjects rather than, say, the individuals populating the planet, the creatures whose exploitation is legitimized by international law, or the companies benefiting from international legal rules.[32] The literature and case-law on consent thus project an image of the world to which international law applies as a world of states and international organizations.[33] This is nothing new, yet it is determinative of what type of world is constituted by international law.[34] In that sense, the whole discussion

CHOSES 89 (1966) (discussing the ordering dimension of discourses about the real). Foucault later claimed that determining exactly when discourses about the real became the carrier of a truth is irrelevant. *See* MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS, 33 (Michel Senellart & Arnold I. Davidson eds., Graham Burchell trans., Palgrave Macmillan 2004); *see also* BRUNO LATOUR, WE HAVE NEVER BEEN MODERN 24 (Catherine Porter trans., Harvard University Press 1993); JÜRGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY 19 (Frederik Lawrence trans., Polity Press 1987).

30. *See supra* Section I.

31. On Jean-Jacques Rousseau's famous 1755 challenge of Hobbes's humanity, see generally JEAN-JACQUES ROUSSEAU, DISCOURS SUR L'ORIGINE ET LES FONDEMENTS DE L'INEGALITE PARMI LES HOMMES (Gallimard 1985).

32. *See, e.g.*, S.S. "Lotus" (France/Turkey), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims.").

33. On the idea of the discourse on consent as empowering states and international organizations, see generally Craven, *supra* note 16.

34. *See generally* d'Aspremont, *supra* note 29.

on consenting to international law is conductive to a specific spatial definition of the world and a specific geography.[35]

The literature and case-law on consent are not only constitutive of the world of states and international organizations to which international law applies but also of those very states and international organizations that ought to consent to international law.[36] In other words, the literature and case-law on consent comes with a very particular, and often uniform,[37] understanding of what constitutes a state or an international organization. In that regard, one cannot help being struck by the deep irony that permeates the literature and case-law on consent. Indeed, while excluding the human from its spatial representation of the world and providing states and international organizations with the privilege of consenting to international law, the literature and case-law on consent come to define those states—and, to a lesser extent, international organizations—anthropomorphically endowed with a human intellect enabling them to consent.[38] Said differently, the current discourse on consent to international law invites us to think of states—and possibly international organizations—in organic terms as individually autonomous agents capable of promoting, individually or collectively, their views or interests.[39] It is even fair to say that the literature and case-law on consent to international law is where the modern anthropomorphism of the international legal discourse is at its peak.[40] The

35. On the idea that consent projects the territorial division of the world in unitary sovereign states, see Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, *supra* note 10, at 15.

36. *Cf.* the constitution of the human subject through the rise of human sciences. *See* MICHEL FOUCAULT, DITS ET ÉCRITS (1954-1975), at 691 (Gallimard 2001). The constitution of the subject by the frameworks through which it is discussed has been construed as a move typical of structuralism. *See* ETIENNE BALIBAR, PASSIONS DU CONCEPT: ÉPISTEMOLOGIE, THEOLOGIQUE, POLITIQUE ECRITS II 257 (La Découverte ed., 2020). On the idea that international legal thought is very structuralist, see JEAN D'ASPREMONT, AFTER MEANING THE SOVEREIGNTY OF INTERNATIONAL LEGAL FORMS 5, 9 (2021); *see also* Jean d'Aspremont, *Two Attitudes towards Textuality in International Law: The Battle for Dualism*, 42 OXFORD J. OF LEGAL STUD. 963 (2022).

37. On the idea that consent carries the assumption of the consenting subject as a unitary actor, see Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, *supra* note 10, at 15, 27; *see also* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 305 (1999).

38. *Cf.* JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 65 (1996) (claiming that consent "imbues those who conclude agreements with a psychological state they may never really have had").

39. *See* Craven, *supra* note 33, at 106.

40. On anthropomorphic thinking about the state, see generally Jean d'Aspremont, *The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law*, 4 CAMBRIDGE J. INT'L & COMPAR. L. 501 (2015). On anthropomorphic thinking at work in the expression of opinion juris, see JEAN D'ASPREMONT, THE DISCOURSE ON CUSTOMARY INTERNATIONAL LAW 62 (2021).

modern individual, albeit preliminarily excluded by the discourse on consent, is rehabilitated and comes to inhabit those states and international organizations that ought to consent to international law, be it at the price of acrobatic conceptual contortions.[41]

III. DE-AUTHORING CONSENT

The performative effect of the literature and case-law on consent that has been described in the previous section goes beyond that of the constitution of a state-centric, human-minded consenting subject. For instance, it is also constitutive of the space where consent can be expressed, as well as the modes of expressing consent.[42] It would be of no avail to dwell upon these other constitutive effects of the discourse on consent here. What matters is rather to show that the constitution of the consenting subject is, in the literature and case-law on consent, followed by an obliteration of that consenting subject. This is yet another discursive move that informs most of the literature and case-law on consent. Indeed, as soon as it has been constituted by virtue of the discursive move examined in the previous section, the consenting subject is immediately forgotten. Being plunged into the forgotten, the consenting subject is nowhere to be found and consent is left authorless. This discursive move can be described as a move of de-authoring the consent to international law. Said differently, once constituted, and once put at the center of the world according to the second discursive move described above, the constituting subject is pulled out of that world, leaving the process of subjection to international law objectified and uncontested.[43] In other words, by virtue of such a de-authoring move, the consenting subject becomes a central absentee in the name of whom international law can be perpetually deployed, mobilized, interpreted, and re-interpreted.[44]

It must be acknowledged that de-authoring is a move that has been extensively theorized in critical literary theory. Whilst it is widely recognized that the author is a useful category that allows one to give unity and coherence to the text, to provide it with an origin, and even to explain (and accept) the

41. International lawyers have often realized that their constructions of the consenting subject does not work all the way and calls for some ad hoc adjustments. *See* Hollis, *supra* note 1, at 183. For an overview of such scholarly contortions, see generally Jean d'Aspremont, *Non-State Actors in International Law: Oscillating between Concepts and Dynamics*, *in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 1 (Jean d'Aspremont ed., 2011).

42. *See generally* Craven, *supra* note 16.

43. *Cf.* FOUCAULT, *supra* note 36, at 691 (discussing the death of the human in human sciences as a result of human sciences never discovering human nature); *see also* MICHEL FOUCAULT, LES MOTS ET LES CHOSES 398 (1966).

44. On this discursive technique, see FOUCAULT, *supra* note 36, at 19-31; BALIBAR, *supra* note 36, at 256-57.

contradictions perceived in the text,[45] critical literary theory has long shown that any literary work always carries with it the death of its author. Indeed, once a literary work has been produced and released, it is argued in literary theory that the individual having authored the work is condemned to be nothing more than the author of that literary work.[46] This entails that the author of text is bound to always be an extension of the text,[47] and can thus not be the origin thereof any longer.[48]

The way in which consent to international law is reasoned and discoursed in the literature and the case-law is no different. In fact, the consenting subject, just like the author from the perspective of critical literary theory, cannot survive the inscription it is supposed to have engendered. Once the inscription consented to has become an inscription for the sake of the international legal discourse, the consenting subjects are condemned to vanish behind that inscription and become nothing more than an extension of that inscription. Nowhere is such retreat of the consenting subject more tangible than in the law of treaties. This is what I have called elsewhere the "magic descendance" of the treaty.[49] Indeed, once the parties to a treaty have consented to the treaty, the parties consenting to that treaty can only be the parties to the treaty of which they are an extension. As an extension of the treaty, the parties to the treaty are thus dematerialized, de-humanized and, more generally, put out of time and out of space. It is true that

45. MICHEL FOUCAULT, L'ORDRE DU DISCOURS 28 (1971); FOUCAULT, *supra* note 36, at 850 (arguing that the authorship of a discourse or a text is what gives it its origin and its coherence).

46. ROLAND BARTHES, *La Mort de L'auteur*, *in* LE BRUISSEMENT DE LA LANGUE 61, 64 (1984); FOUCAULT, *supra* note 36, at 688, 821. Jonathan Culler speaks of the text being orphaned. *See* JONATHAN CULLER, STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS AND THE STUDY OF LITERATURE 132 (1975).

47. On Derrida's famous claim that there is nothing outside the text, see J. DERRIDA, DE LA GRAMMATOLOGIE 225-226 (1967); *see also* GEOFFREY BENNINGTON, JACQUES DERRIDA 83 (1991); PETER SALMON, AN EVENT PERHAPS 143 (2020). For an emphasis on legal studies, see Pierre Legrand, *Foreign Law: Understanding Understanding*, 6 J. COMPAR. L. 67, 80 (2011); *see also* FOUCAULT, *supra* note 36, at 829.

48. On the idea that the origin of texts always ensues the texts themselves and thus cannot be the origin of that form anymore, see JACQUES DERRIDA, MARGES DE LA PHILOSOPHIE 12-17 (1972); JACQUES DERRIDA, L'ÉCRITURE ET LA DIFFÉRENCE 410 (1967); DERRIDA, *supra* note 47, at 87. On this aspect of Derrida, see Bennington, *supra* note 47, at 3-4; Salmon, *supra* note 47, at 50. In rejecting the common claim of an origin of the sign as being outside the sign, Derrida transposed his criticism of Husserl's phenomenology as resting on preconceptual originary moments to his critique of structuralism. *See generally* JACQUES DERRIDA, MARGES DE LA PHILOSOPHIE 185-207 (1972); JACQUES DERRIDA, LE PROBLEME DE LA GENESE DANS LA PHILOSOPHIE DE HUSSERL (2010); JACQUES DERRIDA, LA VOIX ET LE PHENOMENE: INTRODUCTION AU PROBLEME DU SIGNE DANS LA PHENOMENOLOGIE DE HUSSERL (2016). In the same vein and in relation to the international legal discourse, see JEAN D'ASPREMONT, AFTER MEANING: THE SOVEREIGNTY OF FORMS IN INTERNATIONAL LAW, at vii (2021).

49. Jean d'Aspremont, *Current Theorizations about the Treaty in International Law*, *in* THE OXFORD GUIDE TO TREATIES 46, 55 (Duncan Hollis ed., 2d ed. 2020).

every now and then, the name of the consenting parties must be invoked. For instance, those invoking the treaty will feel the need to refer to the consenting parties when the nature of the treaty as a treaty must be vindicated. Likewise, the consenting parties must also be invoked when content must be given to the text of the treaty. Yet, on such occasions, the consenting parties are not retrieved, traced, or resuscitated but simply invoked without those invoking them in any need for re-creating or re-inventing the consenting parties. In other words, the consenting parties have already vanished the moment they are mobilized or referred to and do not need to be called back.[50]

This discursive move whereby, after constituting the consenting subject, the treaty obliterates them, is not innocent. Indeed, as a result of this disappearance of the consenting parties, the treaty is shrouded in an anonymity of sorts which may be conveniently taken advantage of by those invoking the treaty. Since the consenting parties are absorbed into the treaty of which they are bound to be only an extension, the treaty-making process is actually anonymized. By virtue of such anonymity, the treaty—and all that is claimed under its name—enjoys a life of its own out of time and out of space. As a result of this anonymity and life outside space and time, the treaty brings about non-responsibility: no one is made responsible for the treaty and what is claimed under its name. In other words, the treaty allows the consenting parties to evade responsibility for both the good and the suffering caused in the name of the treaty. Thanks to this perpetual absence of the consenting parties, those invoking the treaty can conveniently present themselves as naïve followers walking the trail blazed by the absent consenting parties.

This third discursive move found in the literature and case-law about consent calls for a final observation of a more epistemological nature. This move whereby the consenting subject that had just been constituted is obliterated can simultaneously be construed as the expression of the modern primacy of scienticism.[51] Indeed, if international law deserves the riveted status of a scientific discipline,[52] it ought to have no identified author, for disciplines,

50. One could object and say that the consenting parties are, to some extent, reconstructed or resuscitated for law-ascertainment and content-determination purposes. But even if this were the case, that would mean that such consented authors had been obliterated or forgotten in a way that requires the subsequent reconstruction. Reconstruction or resuscitation of the consenting parties necessitates an earlier forgetfulness or a disappearance. On this idea, see FOUCAULT, *supra* note 36, at 836-37.

51. *See generally* Jean d'Aspremont, *International Law and the Rage against Scienticism*, 33 EUR. J. INT'L L. 279 (2022).

52. For some classical exposition of international law as a science, see generally L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313 (1908); Roberto Ago, *Science Juridique et Droit International*, 90 RECUIL DES COURS 855 (1956); Frede Castberg, *La Méthodologie du Droit International Public*, 43 Recueil Des Cours 313 (1933); Alexander Somek, *Legal Science as a Source of Law: A Late Reply by Puchta to Kantorowicz*, 13-17 (Jan. 2013) (legal studies research paper, University of Iowa), https://papers.ssrn.com/sol3/

contrary to doctrines, are not meant to have authors.[53] In other words, if international law is meant to be received as a lofty and scientific discourse, it ought to be stripped of its representation as the crude production of self-interested and vile states (or statesman). The consenting subjects that were necessary to uphold the validity and legitimacy of the submission to international law's authority conveniently vanish to ensure that international law, and all that can be invoked under its name, earns its recognition as a scientific discourse.

IV. REVERSING TEMPORALITY

This fourth discursive move pertains to the temporality at work in the discourse on consent. Scholars and judges engaging with the question of consent to international law commonly presuppose that consent pre-exists the international legal order, the jurisdiction, the treaty, the rule, etc., which it gives rises to, validates, or legitimates. In other words, consent is always approached in the literature and the case-law as the origin of what is being consented to. The time of consent is thus a time that begins with the production of consent and ends with the object created by consent. As intuitive as such temporality may appear, it is argued here that, in approaching time this way, scholars and judges actually disarticulate the temporality that accompanies the very idea of consent. Notwithstanding the fact that consent is always construed in the literature and the case law as pre-existing its object, it is submitted here that consent is bound to be apprehended, discussed, or contested *after the coming into being of its object*. In other words, consent cannot be the origin of its object, for it always is secondary to it. Be it the consent to the legal order as a whole, to a regime, to a treaty, or to a rule, consent can only be the consent to that legal order, regime, treaty, or rule. So, contrary to the common presupposition that consent precedes its object, the object of consent always comes to pre-exist the consent that generates, validates, or legitimates it. Said differently, the time of international law, of its rules, of its regimes always comes to precede the time of the consent that engenders them.[54] As a result, the time of consent is thus a time that stretches

papers.cfm?abstract_id=2175235 [https://perma.cc/UYU3-F57C]. On the consolidation of this self-representation, see generally Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 EUR. J. INT'L L. 369 (2014).

53. RÉGIS DEBRAY, LE SCRIBE 161-62 (Grasset et al. eds., 1980). This has not always been the case. In the Middle Age, before the advent of modernity, scientific text had to be attributed to an author whose reputation or status would confer truth status to the text concerned. On the distinction between the role of authorship in scientific discourses and that in non-scientific discourses, see FOUCAULT, *supra* note 28, at 28-30; FOUCAULT, *supra* note 36, at 828-30; BARTHES, *La Mort de l'Auteur*, *in* LE BRUISSEMENT DE LA LANGUE, *supra* note 46, at 61-64.

54. One could even say that all forms always begin before they begin. In other words, the origin of forms always ensues the forms themselves and thus cannot be the origin of that form anymore. *See* JACQUES DERRIDA, POSITIONS 23 (de Minuit ed., 1972); JACQUES DERRIDA,

from the object of consent to an *a posteriori* consent and not the opposite. This is why international lawyers, by construing consent as being the origin of what is being consented to, come to distort the temporality of consent.

That international lawyers engaging with consent put forward a disarticulated temporality is nothing sensational. After all, the temporality brought about by the international legal discourse is always contingent on that discourse.[55] In other words, there is nothing like a natural temporality that would be inherent in the international legal discourse. The distorted temporality that accompanies the literature and case-law on consent is similarly unspectacular, for it remains the expression of a very modern temporality, that is a temporality that is serial, linear, and one-directional.[56] In that sense, the discourse on consent in the literature and case-law is no rupture from the modern temporality that commonly informs the international legal discourse.[57] And yet, the disarticulation of the temporality of consent that is witnessed in the literature and the case-law on consent constitutes a very noteworthy discursive move because it comes to redefine the present into the past and the past into the present. Indeed, the finding or interpretation of consent can only be a present event, one which is provoked or demanded for by a past and already existing legal order, regime, treaty, or rule. As was said, the object of consent can only pre-exist the consent that allegedly generates, validates or legitimates it. The literature and case-law on consent thus offer a wonderful example of redefinition of the past into the present and of the present into the past.[58]

SPECTRES DE MARX 255-56 (Galilée ed. 1993); *see also* BARTHES, *La Mort de l'Auteur*, *in* LE BRUISSEMENT DE LA LANGUE, *supra* note 46, at 74-75.

55. For commentary on time as a social creation, see FRANÇOIS OST, LE TEMPS DU DROIT 21-22, 176-80 (Odile Jacob ed. 1999). For commentary on the idea that law creates the space-time continuum of its application, see BRUNO LATOUR, LA FABRIQUE DU DROIT: UNE ETHNOGRAPHIE DU CONSEIL D'ETAT 299 (La Découverte ed. 2004).

56. On the seriality, linearity, and one-directionality of the temporality of modern thought, see PAUL RICŒUR, LA MEMOIRE, L'HISTOIRE, L'OUBLI 386-401 (Seuil ed., 2000); LATOUR, *supra* note 29, at 99; *see also* CERTEAU, *supra* note 22, at 10-15; FOUCAULT, LES MOTS ET LES CHOSES, *supra* note 29, at 14; HABERMAS, *supra* note 29, at 5. *See generally* FRANÇOIS HARTOG, REGIMES D'HISTORICITE: PRESENTISME ET EXPERIENCE DU TEMPS (Seuil ed., 2003).

57. For an example of a rupture from the modern temporality of international law, see Jean d'Aspremont, *Time Travel in the Law of International Responsibility*, *in* THEORIES OF INTERNATIONAL RESPONSIBILITY LAW 252, 253 (Besson ed., 2022).

58. Such move is not unheard of, for a similar redefinition of the past into the present and the present into the past in the doctrine of customary international law, see D'ASPREMONT, *supra* note 40, at 50-58; s*ee also* Jean d'Aspremont, *The Custom-Making Moment in Customary International Law*, *in* THE THEORY, PRACTICE, AND INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW: THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW 30-39 (Merkouris et al. eds., 2022).

V. DUALIZING THINKING

The discourse on consent is the place of very intense deferral of meaning between a wide variety of forms. Indeed, in the discourse on consent, whether found in the literature or the case-law, meaning is passed between many different words, idioms, aphorisms, and texts.[59] It suffices to mention how common it is to associate consent with voluntarism,[60] legal positivism,[61] formalism,[62] the

59. On the idea that consent itself is an empty signifier that defers meaning to many other forms, see d'Aspremont, *Current Theorizations About the Treaty in International Law*, *in* THE OXFORD GUIDE TO TREATIES, *supra* note 49, at 45; Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, *supra* note 10, at 19-20.

60. Christakis, *Human Rights from a Neo-Voluntarist Perspective*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD, *supra* note 4, at 423-24; Brunnée, *Consent*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 3, ¶ 1; Simma & Paulus, *supra* note 8, at 303. For some criticisms of this association, see D'ASPREMONT – FORMALISM, *supra* note 6, at 21-23; Jean d'Aspremont & Jörg Kammerhofer, *Introduction: The Future of International Legal Positivism*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 1, 5 (Kammerhofer et al. eds., 2014).

61. *See, e.g.*, THIRLWAY, *supra* note 13, at 14; BRUNNÉE, *supra* note 3, ¶ 1; Hollis, *supra* note 1, at 140; Patrick Capps, *International Legal Positivism and Modern Natural Law*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 213, 219 (Kammerhofer et al. eds., 2014). For an attempt to debunk the association between consent and legal positivism, see Besson, *supra* note 18, at 303-04; Besson, *supra* note 12, at 166; Richard Collins, *Classical Legal Positivism in International Law Revisited*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 23-49 (Kammerhofer et al. eds., 2014); Besson, *Sources of International Human Rights: How General is General International Law?*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW *supra* note 10, at 845; d'Aspremont, *Herbert Hart in Today's International Legal Scholarship*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD *supra* note 6, at 145; Duncan Hollis, *Sources in Interpretation Theories: An Interdependent Relationship*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 422, 435-36 (Besson et al. eds., 2017).

62. *See* Krisch, *supra* note 3, at 1-11, 26-40; Guzman, *supra* note 3, at 789-90; Carty, *supra* note 12, at 534-35; Kennedy, *The Sources of International Law*, *supra* note 12, at 20; Kennedy, *When Renewal Repeats: Thinking Against the Box*, *supra* note 12, at 355, 366. For criticism of the association of consent with formalism, see D'ASPREMONT – FORMALISM, *supra* note 6, at 21-24; Besson, *Theorizing the Sources of international Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW, *supra* note 12, at 166; Elias & Lim, *supra* note 7, at 193; CORTEN, *supra* note 12, at 53-54, 58. *See generally Lotus Que de Sottises*, *supra* note 12, at 215-30.

sources of international law,[63] Article 38 of the Statute of the International Court of Justice,[64] with sovereign equality,[65] hard law,[66] or with *pacta sunt servanda*.[67]

Such intense deferral of meaning is certainly not an oddity, for it is the very condition of forms as forms.[68] More striking, however, is the very dualism that dominates the way in which scholars and judges solicit meaning from the many forms of the discourse on consent. In fact, it is not only that meaning is passed between a wide variety of forms. It is also that, in the discourse on consent to international law, the deferral of meaning is guided by very binary patterns.[69] For instance, it is common for those engaging with the question of consent to international law to organize their discourse around a distinction between will and consent,[70] between consent as law-ascertaining form and consent as substance to be interpreted, between consent as discursive construction and consent as an empirical reality, or between normative and descriptive understandings of consent. The findings of contradictions in the discourse on

63. *See* L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 21-24 (1905); Tomuschat, *Obligations Arising For States Without Or Against Their Willsupra*, *in* RECUEIL DES COURS, *supra* note 8, at 216; Christian Tomuschat, *General Course on Public International Law*, 281 COLLECTED COURSES 9, 24 (1999); Karl Zemanek, *The Legal Foundations of the International System*, 266 COLLECTED COURSES 9, 144 (1997). For criticism of the association of consent with the sources of international law, see G.J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 289 (1983); Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SOURCES OF INTERNATIONAL LAW 153, 164 (Nijhoff et al. eds., 1958).

64. *See* Hollis, *supra* note 1, at 142-43.

65. *See* Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, *supra* note 10, at 15, 21-26. For criticism of the association of consent with state sovereignty, see Besson, *supra* note 18, at 305-16.

66. On the idea that soft law mechanisms are alien to consent, see Guzman, *supra* note 3, at 789-90. For a rebuttal of that argument, see Pellet, *supra* note 6, at 27.

67. For some criticisms of the association of consent with *pacta sunt servanda*, see Pellet, *supra* note 6, at 33.

68. *See generally* D'ASPREMONT, *supra* note 36, at 60; *see also* d'Aspremont, *supra* note 36, at 972; Peter Goodrich, *Europe in America: Grammatology, Legal Studies, and the Politics of Transmission*, 101 COLUM. L. REV. 2033, 2059 (2001); FUAD ZARBIYEV, LE DISCOURS INTERPRETATIF EN DROIT INTERNATIONAL, 37-45 (Bruylant et al. eds., 2015); DERRIDA, POSITIONS, *supra* note 54, at 54.

69. The dominance of binary pattern of thought in the discourse on consent is not exclusive of the occasional resort to sophisticated three-pronged distinction. *See e.g.*, Neff, *Consent*, *in* CONCEPTS FOR INTERNATIONAL LAW, *supra* note 1, at 127 (discussing the distinction between consent as commitment, consent as a content, consent as constitution, the distinction between consent as an intentional state, consent as symbolic expression of the intentional state, and consent as the activation of a particular obligation).

70. Craven, *The Ends of Consent*, *in* CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES, *supra* note 16, at 107 (arguing that will is suggestive of power to create law whilst consent evokes the passive idea of acceptance of concession). *See also* Pellet, *supra* note 6, at 41 (arguing that consent can accommodate a certain amount of coercion and that States can consent to a rule even if the rule does not correspond to their will, i.e., what they want).

consent similarly manifest a dualist type of thinking.[71] Surely, such a binary mode of thinking is no surprise at all. After all, like many of the other discursive moves discussed here, the dualism at stake here is primarily inherited from the philosophical tradition associated with the Enlightenment,[72] and which still dominates the English-speaking international legal discourse.[73]

CONCLUDING REMARKS

As this short overview of the main discursive moves that inform the literature and case-law pertaining to the question of consenting to international law comes to an end, a final remark is in order. Whatever their reason for engaging with consent to international law, those mobilizing, contesting, or reforming the discourse on consent all espouse, in one way or another, the discursive moves that have been depicted here. As was said, none of these moves can be reduced to benign social facts. It has been one of the ambitions of this article to stress that such discursive moves cannot be perpetuated without at least some degree of awareness for what they do to the world. Hence, it will be up to all those scholars and judges continuing to mobilize, contest, or reform the discourse on consent to appreciate the consequences of their discursive moves. For now, one is left to admire the splendid sophistications and intricacies of the discourse on consent to international law. Surely, the idea of consent to international law is a very demanding one.

71. Werner, *State Consent as Foundational Myth*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, *supra* note 10, at 30; *see also* Pellet, *supra* note 6, at 41 (arguing that *pacta sunt servanda* means the contrary of voluntarism: whatever its will, the State is bound and must abide by the law).

72. On the idea that modernity generalised modes of thinking articulated around identity and differences, see Timothy Mitchell, *The Stage of Modernity*, *in* 11 CONTRADICTIONS OF MODERNITY 1, 17 (Timothy Mitchell ed., 2000); FOUCAULT, LES MOTS ET LES CHOSES, *supra* note 29, at 68 (arguing that distinctions became a mode of ordering in the modern age).

73. *See generally* d'Aspremont, *supra* note 36 (discussing the impact of hermeneutics and poetics on the international legal discourse); d'Aspremont, *A Worldly Law in a Legal World*, *supra* note 29 (discussing the need to move on from ontological dualism); D'ASPREMONT, *supra* note 36 (questioning the "meaning-centrism" in international legal discourse).