The Legitimating Role of Consent in International Law

Matthew Lister*

Abstract

According to many traditional accounts, one important difference between international and domestic law is that international law depends on the consent of the relevant parties (states) in a way that domestic law does not. In recent years this traditional account has been attacked both by philosophers such as Allen Buchanan and by lawyers and legal scholars working on international law. It is now safe to say that the view that consent plays an important foundational role in international law is a contested one, perhaps even a minority position, among lawyers and philosophers. In this paper I defend a limited but important role for actual consent in legitimating international law. While actual consent is not necessary for justifying the enforcement of jus cogens *norms, at least when they are narrowly understood, much of international law is left unaccounted for. By drawing on a Lockean social contract account, I show how, given the ways that international cooperation is different from cooperation in the domestic sphere, actual consent is both a possible and an appropriate legitimating device for much of international law.*

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* Sharswood Fellow in Law and Philosophy, University of Pennsylvania Law School; PhD, Philosophy, University of Pennsylvania, 2009; JD, Penn Law, 2006. An earlier version of this paper was presented at a conference on the philosophical foundations of international law sponsored by the Penn Law Institute for Law and Philosophy in May, 2010. My thanks to Fernando Teson, Larry May, Deborah Pearlstein, George Fletcher, Claire Finkelstein, Jens Ohlin, and Mattias Kumm for their helpful comments at the conference. My thanks as well to Bill Burke-White, Kok-Chor Tan, and, especially, Stephen Burbank for helpful written comments and discussion, and to the students in my seminar on the philosophical foundations of international law at Penn Law for their helpful discussion of the paper. Ben Meltzer provided very valuable help with the footnotes. Remaining mistakes are, of course, my own.

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I. INTRODUCTION

One of the striking features of international law, at least as it has traditionally been understood,[1] is its consensual nature. To a large degree, international law, unlike domestic law, depends on the consent of those (states) that are governed by it. The extent that this is true, even as a descriptive matter, is disputed,[2] but that large and important parts of international law depend on the consent of states is clear. But the role of consent, and the extent to which it is applicable, remains unclear.

In this paper I argue that state consent has an important, although limited, role in establishing the legitimacy of some parts of international law. I argue that certain elements of international law can only be legitimate when consented to by those governed by the law. Here I assume the traditional view that the primary subjects of and actors in international law are states, and that, therefore,

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1 For a classical statement that has resonance with the view presented here (though not in all ways), see Emer de Vattel, *The Law of Nations* 17 (Liberty Fund 2008) ("There is another kind of law of nations [in addition to the law of nature], which authors call *arbitrary*, because it proceeds from the will or consent of nations."). Importantly, Vattel thought that customary international law was also at least sometimes consensual in nature. See id at 77–78. This position is noted as the traditional one by Teson, though he rejects it. See Fernando Teson, *A Philosophy of International Law* 73 (Westview 1998). Teson identified the consensual view with "positivism", but this identification seems obscure to me, and not necessary.

2 See generally Curtis A. Bradley and Mitu Gulati, *Withdrawing from International Custom*, 120 Yale L J (2010) (forthcoming), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523906 (visited Nov 19, 2010) (providing a very helpful and interesting discussion on this point).

state consent is necessary for large parts of international law to be legitimate.[3] In so doing, I defend the legitimating role of consent both from proponents of a strong international law, such as Allen Buchanan,[4] and from (relative) international law skeptics, such as Eric Posner and Jack Goldsmith,[5] each of whom argues that consent has no significant role to play in legitimizing international law, although for quite different reasons.

I shall, in what follows, make use of a Lockean social contract account to show why actual consent is necessary to legitimize large parts of international law. I do not attempt to give an account of all of international law. I shall discuss customary international law only to a small degree (although I think a rather similar account of it could be given), and I will not discuss *jus cogens* norms, which are norms binding on all states, at all. *Jus cogens* norms are, obviously, of extreme importance, but they are only a small part of international law. They have, I believe, a different normative structure and foundation than much of international law, and are best dealt with separately—a task I leave for others.[6] I will focus in particular on consent to jurisdiction before international dispute resolution bodies such as the International Court of Justice (ICJ). Although most of my discussion focuses on the ICJ, a similar story could be told, I believe, about other international bodies, such as the World Trade Organization (WTO).

For the most part, international adjudicative bodies have jurisdiction only in cases where the parties have consented to the court's[7] jurisdiction.[8] This is so,

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3 This is not because I take states to be moral agents in their own right, but rather because states are, or should be, the representatives of individuals at the international level. I cannot defend this position here, but insofar as my account is plausible, it provides indirect support for the claim.

4 Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* 243–52, 301–14 (Oxford 2004).

5 Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* 189–93 (Oxford 2005).

6 I am largely, though not completely, in agreement with the account of *jus cogens* norms given by Larry May in the first two chapters of his book *Crimes Against Humanity: A Normative Account* 3–39 (Cambridge 2005). I would more explicitly cast my account, if I were to give one, in terms of hypothetical consent than does May, but the essential elements would be significantly similar. It seems to me that failure to realize that *jus cogens* norms and laws directly relevant to human rights make up only a small part of international law is a problem in much philosophical discussion of the subject. I shall discuss this point further in relation to Buchanan's critique of consent accounts of legitimation in what follows.

7 In this paper I will often use "court" as a general term for an adjudicative body, even though this is not always strictly accurate. This is done merely for sake of reading ease. I shall use other terms only when necessary to avoid confusions.

8 An obvious exception to this general rule arises in the case of the International Criminal Court ("ICC"), where the court may have jurisdiction in situations where the case is referred to the Prosecutor by the UN Security Council or after an approved preliminary investigation by the Prosecutor. In both situations the ICC may claim jurisdiction over events in a state that has not explicitly consented to the jurisdiction of the court. However, as the ICC has jurisdiction only

for example, for disputes heard by the WTO's Dispute Resolution Body, and for disputes heard by the ICJ. In the case of the ICJ, this consent may be specific—consent to jurisdiction given to the court to decide a particular matter, or a more general one arising from a treaty agreement, giving the court jurisdiction over all disputes under the treaty. Finally, consent to the jurisdiction of the ICJ may be broader still, when a state ratifies the "Optional Clause" of the ICJ, agreeing to give the court jurisdiction over all disputes arising between the ratifying state and any other state that has agreed to similar jurisdiction.[9] However, even in this broadest case the jurisdiction of the ICJ depends on the state in question having agreed to the jurisdiction of the court.

This stands in marked contrast to the situation we find in domestic courts. In domestic courts, the foundation of jurisdiction traditionally was seen as based in power, and consent was neither sought nor thought to be necessary to ground legitimate assertions of jurisdiction.[10] Although something akin to Locke's notion of "tacit" consent[11] may be thought to animate certain relational theories of jurisdiction today, the consent in question is a fiction.[12] The difference between these two situations is stark, and has drawn the attention of both skeptics who wish to argue that international law is not law at all, and those who wish for international law to be still stronger. The latter hold that international courts should have jurisdiction regardless of the consent of the countries that might appear before the court, and that the jurisdiction of international courts should apply directly to individuals within states, as opposed to applying first and foremost to state actors.[13] In this paper I will defend the idea that, at least for the most part, the jurisdiction of international courts should depend on the consent of the parties subject to the court, at least outside of the special area of

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over violations of *jus cogens* norms, this exception to the general rule falls outside my main area of inquiry. See Rome Statute of the International Criminal Court (July 17, 1998), Arts 13, 15, UN Doc No A/CONF 183/9, reprinted in 37 ILM 99 (1998).

9 Statute of the International Court of Justice, Art 36(1), (2), 59 Stat 1055 (1945).

10 For a classical statement of this view in US law, see Holmes's opinion in *McDonald v Mabee*, 243 US 90, 91 (1917) ("The foundation of jurisdiction is physical power[.]"). For discussion of this view, and the way it has changed over time, see Arthur Taylor Von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies, and Practices of Common and Civil-Law Systems* 104–26 (Martinus Nijhoff 2002).

11 See the discussion of this idea in Section II and following.

12 Of course, a party may consent to personal jurisdiction in a forum that would otherwise not have jurisdiction over the party, and parties may select the jurisdiction of a court as a matter of contract, but these are special cases that do not directly bear on the issue in question.

13 Buchanan, for example, calls for the creation of new adjudicative bodies with mandatory jurisdiction in cases of state succession. See Buchanan, *Justice, Legitimacy, and Self-Determination* at 358–60 (cited in note 4). Teson also calls for such courts. See Teson, *A Philosophy of International Law* at 25 (cited in note 1).

jus cogens norms. I shall attempt to show that consent of the parties is the best way to ground the legitimacy of international courts. This is important in that international courts cannot hope to be effective without this legitimacy. I will do this by showing how we can make use of the social contract tradition in political philosophy to account for the nature of international courts, focusing in particular on an account derived from Locke.

Before turning to the details of the Lockean account that I will offer, it is worth considering more carefully the idea of legitimacy, and why it is important for international law. The question of what ought to ground the jurisdiction of international courts is directly connected with their legitimacy. Courts purport to act in the name of law, and to tell actors that they must do or refrain from doing certain things despite the actors' will to do otherwise. As Kelsen notes, all law is inherently coercive in nature, and international law is no exception to this, even if the means by which it exercises its coercive power is less obvious or straightforward than that in domestic law.[14] But, the use of coercive force by courts must be justified if it is to be distinguished from the type of coercive force exercised by bands of robbers or pirates. If the force exercised by international courts is to be distinguished from the sort of force exercised by robber bands or pirates, we must find a ground for such a difference. It is my contention that the consent of those subjected to the jurisdiction of these courts provides the best account of this difference.[15]

Questions about the legitimacy of international courts are not merely academic. By showing how to secure legitimacy for international courts, we can increase support for them.[16] This is important for two reasons. First, if more

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[14] Hans Kelsen, *Principles of International Law* 5 (Rinehart 1959) (positing that all law is inherently coercive in nature).

[15] There are, of course, various other ways to try to answer this question. Some form of utilitarianism or other is usually the most likely candidate, and is perhaps the dominant candidate in English-language political philosophy since the time of Hume's critique of Locke, to be discussed below. The other main alternative is some form of moral intuitionism. (Buchanan's approach in *Justice, Legitimacy, and Self-Determination* seems to me to be an example of intuitionism in Rawls's sense. Buchanan, *Justice, Legitimacy, and Self-Determination* at 358–60 (cited in note 4).) I shall not attempt to give anything like even the barest defense of the claim that a Social Contract approach is superior to utilitarianism or intuitionism. To do so would take me too far afield and, I believe, would not be in any way an improvement on Rawls's argument for the superiority of the social contract approach found in John Rawls, *A Theory of Justice* ch 1 §§ 5, 7 (Belknap revised ed 1999). Therefore, I shall mostly assume that a Social Contract approach is at least a serious contender in this area rather than arguing for this. While I think both that Rawls's work is clearly the most important work in moral and political philosophy in the twentieth century, and that the social contract approach is an essential part of Rawls's work, I shall not spend significant time on Rawls in this paper, focusing rather on Locke, for reasons that I hope shall become clear.

[16] For the classic argument for this position in relation to domestic law, see Tom Tyler, *Why People Obey the Law* (Yale 1990). We should not assume that arguments from the domestic context

people (and hence more countries, we may hope) support international courts, they will be more effective. Second, since international courts largely depend on the goodwill of the parties to enforce their decisions, it is essential for the functioning of the courts that they be seen by the parties to be legitimate. If the power of the court is seen as legitimate, it is more likely to be respected, even by the losers. Therefore, it is an essential exercise to examine what, if anything, grounds the legitimacy of these courts.[17]

The idea that the consent of the governed provides the legitimating foundation for the coercive use of force is an old one, having first taken its modern form in Hobbes's *Leviathan*. It also appeared in different forms in the works of Locke, Beccaria, Rousseau, and Kant, and has returned, again in different forms, in the present works of such philosophers as Rawls and David Gauthier. Despite obvious similarities, all of the thinkers mentioned above work out the idea of a social contract which grounds the legitimate use of coercive force in somewhat different ways. In this paper I will focus primarily on Locke's approach, as I believe that, while it has proven insufficient in the case of domestic law, it captures better than any other account the situation that we find ourselves in and the problems we face in international law. While neither Locke nor any of the classical social contract thinkers[18] attempted to apply their theories to international law or relations to any serious degree, I shall argue that

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transfer seamlessly to the international context, as I will show in another way in what follows. However, I think there is at least some good reason to think that Tyler's basic argument applies at the international level as well.

17 My position here is importantly weaker than that argued for by Thomas Franck in his book *The Power of Legitimacy Among Nations* (Oxford 1990). In that work Franck seems to hold that the *only*, or at least the single most important, reason why states follow international law is that they see it as legitimate. Id at 16, 20–21, 25–26. It seems to me that there are many reasons other than law's legitimacy that states, especially weaker ones, might follow international law, and that as much current international law is, at best, imperfectly legitimate, legitimacy cannot explain why it is followed on its own. But, this need not push us to the opposite extreme, represented by Goldsmith and Posner, which claims that legitimacy as such is irrelevant, and that the only factor that needs to be considered is the "self-interest" of states. See Goldsmith and Posner, *The Limits of International Law* at 165 (cited in note 5). Just as in the domestic context, belief in the legitimacy of the law is not the only reason why people obey the law, but is still an important reason, we have reason to believe, I shall argue, that the legitimacy of the law is an important factor in compliance at the international level, too.

18 Rawls sets out his account of an international social contract in his late book, *The Law of Peoples* (Harvard 1999). I believe this is a very important and largely misunderstood work, but I will not discuss it here at any length, largely because he is working on a different level of abstraction than I am in this paper. I believe that the account I will give here is compatible with his account in that work.

we can make use of Locke's theory to understand the legitimating role played by consent in the jurisdiction of international courts.[19]

II. LOCKE'S ACCOUNT OF THE STATE OF NATURE AND OF CONSENT

I shall now offer a brief sketch of the aspects of Locke's account of the social contract that are most relevant to the argument I will make. I will focus on Locke's account of the state of nature and the legitimating role of consent used therein. Starting with Locke's account of the state of nature, I draw heavily on the work of A. John Simmons. According to Simmons, Locke's state of nature is moral and relational in character. He defines Locke's state of nature thus: "A is in the state of nature with respect to B if and only if A has not voluntarily agreed to join (or is no longer a member of) a legitimate political community of which B is a member."[20] To be in the state of nature *simpliciter* is to not have voluntarily agreed to join in a legitimate political community with anyone.[21]

The first important element of this account of the state of nature is that it is relational. One may be in the state of nature with regard to some but not others. As Simmons puts the point, "Persons who enter civil society . . . leave the state of nature with respect to fellow citizens, but remain in it with respect to all alien nations and with respect to all noncitizens (that is, those still in the state of nature [*simpliciter*])."[22]

The second aspect of this account that is important for us is its use of moral concepts, in particular the idea of legitimacy. This is already a significant difference from Hobbes, whose account of the state of nature at least arguably attempts to make do without moral notions, defining the state of nature as a mere (but extremely serious) lack of security.[23] So, while it is common and often useful to characterize Locke's notion of the state of nature as ". . . the situation that agents are in when there is no common authority over them,"[24] this is not

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19 As I shall discuss to some degree below, all of the classical social contract thinkers did discuss relations between nations to one small degree—that is, to claim that different nations were, in relation to each other, in the State of Nature. Kant goes further than any of the others in trying to apply social contract ideas to international relations in his essay *Toward Perpetual Peace*. I will not discuss this essay, but believe that my account is at least roughly in the spirit of it.

20 A. John Simmons, *Locke's State of Nature*, in Christopher W. Morris, ed, *The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau* 97, 103 (Rowman & Littlefield 1999).

21 Id.

22 Id at 104.

23 Thomas Hobbes, *Leviathan* ch 12 §§ 1–8 at 74–76 (Hackett 1994).

24 Joshua Cohen, *Structure, Choice, and Legitimacy: Locke's Theory of the State*, in Morris, ed, *The Social Contract Theorists* 143, 151 (cited in note 20).

quite right, as not just any authority will do. Those under an illegitimate authority remain in the state of nature, both to each other and to those exercising the authority. One's relations to such authority is like one's relation to a "Thief and a Robber".[25] This is so even if submission to an illegitimate authority has made one in some ways better off for the time being. What makes an authority legitimate on Locke's account will be discussed below.

Finally, it is worth noting that Locke's state of nature is not, like Hobbes's, characterized as a "state of war" of all against all, where life is "poor, nasty, brutish, and short."[26] While war is, of course, possible in the state of nature, and a state of war implies a state of nature, Locke explicitly denies that the two are coextensive.[27] Humans in Locke's state of nature are rational and are capable of following the "laws of nature" even if they do not do so in every case. People in this state of nature can and do conclude agreements and contracts with each other, and have (moral) obligations to fulfill the contracts,[28] as opposed to Hobbes' state of nature, where he holds that there can be no duty to perform first in a contract because one has no guarantee that the other will perform.[29] So, Locke's state of nature is not, like Hobbes's, one to which any government at all is preferable. Rather, only a certain number of governments will be an improvement on the state of nature, and so will garner the consent of the governed. Additionally, as Simmons points out, Locke's state of nature is of indeterminate content—the badness of the state of nature will depend on many various factors, and so we cannot know for certain how bad the state of nature will be without knowing these details.[30]

However, even though the state of nature, on Locke's account, is not a state of war and can be characterized in various different ways, certain "inconveniences" will be found in any state of nature. These include the fact that, even though the law of nature is clear to each man in his heart, "Men, being biased by their interest, . . . are not apt to allow of it as a law binding to them in the application of it to their particular cases."[31] Next, and even more importantly

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25 John Locke, *Two Treatises of Government* § 202 at 418–19 (Cambridge 2d ed 1963) (P. Laslett, ed). I cite Locke by paragraph number, as is customary. Any strange capitalization, punctuation, italics, or other emphasis in a quotation from Locke are his own.

26 Hobbes, *Leviathan* at ch 13 § 9 at 76 (cited in note 23).

27 Locke, *Two Treatises of Government* § 19 at 298–99 (cited in note 25).

28 Id § 14 at 294–95 (importantly Locke here says, "'tis not every Compact that puts an end to the State of Nature between Men, but only this one agreeing together mutually to enter into one Community, and make one Body Politick; other Promises and Compacts, Men may make one with another, and yet still be in the State of Nature.").

29 See Hobbes, *Leviathan* ch 14 § 18 at 84–85 (cited in note 23).

30 See Simmons, *Locke's State of Nature* at 104 (cited in note 20).

31 Locke, *Two Treatises of Government* § 124 at 368–69 (cited in note 25).

for our case in this paper, Locke claims that, "In the State of Nature there wants a *known and indifferent Judge*, with Authority to determine all differences, according to the established Law."[32] Because of this, and Man's partiality noted above, "Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases; as well as negligence, and unconcernedness, to make them too remiss, in other Mens."[33] This want of a common judge, who can interpret and apply the law impartially, and who has authority to decide disputes between parties, is a fact common to all states of nature, and drives reasonable people to seek to exit this state for one where they yield their right of private judgment to a legitimate, authorized, judge.

So, we have seen that the lack of a common judge able to adjudicate disputes with authority is one of the hallmark inconveniences of the state of nature for which we form civil society or government to remedy, that not just any imposition of power or authority is a legitimate one, and that the law is a coercive power. We may here ask which acts by a coercive power are legitimate. Locke gives one form of the answer given by all social contract theorists: it is the consent of the governed that makes the use of coercive power by the state legitimate.

On Locke's account, we start with the idea that humans are "naturally free" and note that, "to be free by nature *is* to have no natural *political obligations*."[34] So, by nature, humans have no political obligations, and do not gain any, Locke says, "till by their own Consents they make themselves Members of some Politik Society."[35] Thus, Simmons argues, "only consent can remove a person from the state of nature" and that Locke is clear that, "by 'consent' he means the actual, personal consent of each individual."[36] The paradigm of consent is actual explicit consent. Locke says that nothing can make people "*Subjects or Members of*

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32 Id § 125 at 369.

33 Id. The third reason Locke gives as an "inconvenience" of the state of nature for which civil society or government is to be a remedy is the want of "*Power* to back and support the Sentence when right, and to *give* it due *Execution*." Id § 126 at 369. This is obviously a problem that, at the present time, most international courts cannot claim to give a very satisfying remedy to. To that degree, the establishment of even an otherwise satisfactory international court may not fully effect a withdrawal from the state of nature on the Lockean account. However, I shall not give much attention to this question in this paper since to do so would take me too far from the question on which I want to focus. I will return to this difficulty only insofar as is necessary in dealing with my main problem.

34 Cohen, *Structure, Choice, and Legitimacy* at 153 (cited in note 24) (emphasis in original). All humans, even those in the state of nature, have moral obligations—those dictated by the laws of nature, but these are not political obligations.

35 Locke, *Two Treatises of Government* § 15 at 295–96 (cited in note 25).

36 A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* 60 (Princeton 1993).

that Commonwealth" except for "actually entering into it by positive Engagement, and express Promise and Compact."[37] Of course few, if any, people in fact give their "express promise and compact" to the society in which they live. In our own time and place the only obvious example of such cases is the oaths sworn by newly naturalized citizens.[38]

Locke's (at least partial) solution to this problem is to offer another form of consent—tacit consent. Tacit consent is given when one lives in a country, subjects one's self to its laws, and enjoys the benefit of the laws, but does not explicitly consent to the government. Obviously, the vast majority of those living in any country will have given at best tacit consent, to the extent they can be thought to have given consent at all. Locke furthermore holds that tacit consent can be withdrawn by leaving the country, but that one who has given her express consent, "is perpetually and indispensably obliged to be and remain unalterably a Subject to it, and can never be again in the liberty of the state of Nature; unless by any Calamity, the Government, he was under, comes to be dissolved."[39] As Simmons points out, however, there is no obvious reason internal to Locke's account, or to the nature of consent in general, that would seem to require that express consent should be as strongly binding as this—Locke's account would seem to imply not just that one cannot decide to no longer support a legitimate government, but also that one cannot emigrate and become a member of a different society if one has given one's express consent.[40] If express consent is especially binding in this way, it must be because of some special feature of the decision made. This will be looked at further in my explicit discussion of consent to the jurisdiction of a court but need not concern us further now.

Importantly, consent derived by force cannot ground obligation. As Locke says:

> It remains only to be considered, whether *Promises, extorted by Force*, without Right, can be thought Consent, and *how far they bind*. To which I shall say, they *bind not at*

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37 Locke, *Two Treatises of Government* § 122 at 367 (cited in note 25).

38 Even these oaths have dubious legal standing. See Peter Spiro, *Beyond Citizenship: American Identity After Globalization* 72 (Oxford 2008), and the naturalization section in my paper, Matthew Lister, *Citizenship, in the Immigration Context*, 70 Md L Rev 56–71 (forthcoming 2010).

39 Locke, *Two Treatises of Government* § 121 at 367 (cited in note 25).

40 See Simmons, *On the Edge of Anarchy* at 82 (cited in note 36). It should be noted that the law in England in Locke's time did not allow for alienation of citizenship. This had been determined by Sir Edward Coke in *Calvin's Case* in 1608. *Calvin's Case*, 7 Coke Report 1a, 77 ER 377 (1608), online at http://www.uniset.ca/naty/maternity/77ER377.htm (visited Oct 22, 2010). For discussion, see Elizabeth F. Cohen, *Carved from the Inside Out: Immigration and America's Public Philosophy of Citizenship*, in Carol M. Swain, ed, *Debating Immigration* 32, 40–45 (Cambridge 2007) and Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 40–48 (Yale 1997).

> *all*; because whatsoever another gets from me by force, I still retain the Right of, and he is obliged presently to restore.[41]

And, while merely refusing to improve another's position by joining with them to form a government is not to harm them, since "it injures not the Freedom of the rest; they are left as they were in the Liberty of the State of Nature,"[42] using the others' weaknesses and needs to force their consent also cannot ground a legitimate authority. As Locke says, "a Man can no more justly make use of another's necessity, to force him to become his Vassal, by with-holding Relief, . . . than he that has more strength can seize upon a weaker, master him to his Obedience, and with a Dagger at his Throat offer him Death or Slavery."[43]

III. HUME'S CRITIQUE OF LOCKE AND SOCIAL CONTRACT THEORY

While Locke's account of the limits of legitimate government, the most important elements of which I have set out above, had an obvious and important impact in England, France (before and during the revolution), and the American Colonies, this influence was relatively short-lived. David Hume's essay, "Of the Original Contract" was seen by many as a decisive blow to social contract theory, and by the early 19th century, at least in the English-speaking world, social contract theory fell out of favor and was supplanted by various forms of utilitarianism.[44] It is my contention that while Hume's objections, which will be discussed momentarily, are devastating against attempts to provide a Lockean account of political legitimacy for the domestic sphere, they do not apply to relations among states, and so provide no limit on our attempt to use Lockean social contract theory to account for the consent requirement for the jurisdiction of international courts.

We can understand the most important (at least for our purposes) of Hume's criticisms of Locke's account, as amounting to the claim that the various

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41 Locke, *Two Treatises of Government* § 186 at 410–11 (cited in note 25).

42 Id § 95 at 348–49. My account here draws on Cohen, *Structure, Choice, and Legitimacy* at 145 (cited in note 24).

43 Locke, *Two Treatises of Government*, § 42 at 188 (cited in note 25). It seems to me that when we note the sort of moral limitations put on consent in the Lockean account, many of the objections raised to it by Buchanan and others fall away, as they apply, at most, to Hobbesian notions of consent, where consent taken by force is binding, for example. See Buchanan, *Justice, Legitimacy, and Self-Determination* at 302–05 (cited in note 4) for examples of worries about consent that do not, I believe, arise under a Lockean account.

44 Kelsen, for example, could say in the 1950s that social contract theories were, "long ago abandoned in the field of national law" and held that they should also be abandoned in international law. See Kelsen, *Principles of International Law* at 316 (cited in note 14). I believe he is wrong on both accounts, as I will try to show.

conditions on and accounts of consent given above cannot cohere. That is, we cannot consistently maintain that government (on the domestic level—the level explicitly discussed by both Hume and Locke) is legitimated only by consent, either tacit or explicit; that consent is given tacitly by enjoying the fruits and protections of the laws; that if one wishes to withhold consent one must leave (i.e. emigrate); that consent cannot be imposed by force; and that taking advantage of the dire need of others is not a legitimate way to gain consent.

Hume starts his attack with the commonplace observation that no actual (domestic) government, either up to his time or in ours, seems to be based on the type of consent that Locke envisioned and required for legitimacy. He puts the point, with his typical sharp wit, thus:

> But would these reasoners [i.e. followers of Locke] look abroad into the world, they would meet with nothing that, in the least, corresponds to their ideas, or can warrant so refined and philosophical a system . . . . [and] [w]ere you to preach, in most parts of the world, that political connexions are founded altogether on voluntary consent or a mutual promise, the magistrate would soon imprison you, as seditious, for loosening the ties of obedience; if your friends did not before shut you up as delirious, for advancing such absurdities.[45]

This is as yet a merely empirical argument—a claim that no such government has existed. The defender of Locke might reply, "All the worse for actually existing governments!" I, in turn, shall argue that we in fact do find an example, not in domestic governments but in the relations between states. But, before moving on, we must look at Hume's deeper, more theoretical objections to the Lockean account.

Having drawn attention to the fact that few, if any, people could rightfully be thought to have explicitly consented to government, Hume next turned to the issue of tacit consent. Recall that Locke had said that tacit consent is given by receiving the fruits and protections of the laws and not leaving, and that if one wishes to withhold consent, one must leave. To this, Hume replies:

> Can we seriously say, that a poor peasant or artizan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.[46]

Though Hume's point is most strongly made for those who are poor, it applies to many well-to-do people as well. In our day, the case is perhaps even more strongly made than in Hume's, since today—even if someone has the

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45 David Hume, *Of the Original Contract, in Essays: Moral, Political, and Literary* 465, 469–70 (Liberty Fund 1985).

46 Id at 475.

desire and means to move to another state and by doing so would withhold consent from her current state of residence—there is no guarantee that she will find a state willing to take her in. In a world where a right to emigrate is not matched with a right to immigrate, the claim that, if one is not satisfied with one's government, then one should leave, rings hollow. But, if consent achieved by taking advantage of the poor and weak, by threatening their ability to exist with even minimal security, cannot ground political obligations, then it seems that tacit consent cannot, at least in the domestic sphere, ground the legitimacy of government. And, without resort to tacit consent, Locke's account quickly becomes implausible when applied to domestic government.

But, the situation is arguably even worse for Locke, for the problem which arose with regard to tacit consent seems to spill back over to the case of express consent. For, if we assume, like Locke, that one must either give express consent or give tacit consent or leave the country, but one cannot leave the country, and tacit consent cannot ground legitimacy, it seems that only express consent is left. So, one must give express consent or else remain in the state of nature. But, those who have formed a civil society are unlikely to allow those who have not joined the society to remain among them. This was largely the problem tacit consent was meant to solve. So, it now seems that express consent is obligatory. But, if express consent is forced in this way, we may yet again doubt whether it can be legitimating. In Locke's own day, forced loyalty oaths were common, and one could be subject to imprisonment if one refused to swear. But this is just an oath made under a threat, which, as discussed above, Locke held to not be binding.

So, we are now left with some doubt as to whether, in the domestic sphere, even express consent can be binding if there is no other real alternative for most people. It might well seem like Locke's theory is hopeless, and this is in fact how most people, at least in the English-speaking world, saw the situation with regard to Locke and the social contract approach more broadly, from the early nineteenth century on, in the face of Hume's attack.

In the domestic sphere, two new forms of social contract theory have appeared, both of which attempt to avoid Hume's criticisms. The most important of these is Rawls's so-called "hypothetical contract" approach, given its most famous formulation in *A Theory of Justice*. David Gauthier, in his books *The Logic of Leviathan* and *Morals by Agreement*, presented a Hobbesian account based on rational choice theory.[47] These approaches have gained widespread interest, but differ from Locke's approach by not attempting to base legitimacy

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[47] David P. Gauthier, *Morals by Agreement* (Oxford 1986); David P. Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford 1969).

on actual (express or tacit) consent. With a few notable exceptions, a Lockean theory has seemed to be closed off as a dead end.[48] Rawls put the point thus:

> No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects. Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed.[49]

The point here is much like Hume's—in the domestic sphere we just find ourselves in an existing society and must live in it. Leaving this society is not generally an option, and the mere abstract option to leave cannot legitimate the use of coercive force by the state. Today we depend on society in a deep way for our lives and well-being. Taking part in it is not optional for us. So, it must be justified in a special way. Rawls's way to do this is to say that society's main institutions must be set up so that we could agree to them no matter what our position is in the actual world. This is the core of "Justice as Fairness."

IV. HUME'S OBJECTIONS TO LOCKE DO NOT APPLY IN THE INTERNATIONAL REALM

I contend that, when we shift from the domestic sphere to the international sphere, we see something quite interesting take place. The need for government to regulate our interactions, and to make our lives possible at all, becomes much less significant. While it would not be wise or perhaps even rational, it would be possible for countries to all largely go their own ways and deal with each other in a much more limited way than we must do in domestic life. States do not just find themselves in the midst of certain social relations in the same way that people are born into an already existing social world with no

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48 See, for example, Robert Nozick, *Anarchy, State, and Utopia* (Basic 1974) (describing Nozick's early phase); A. John Simmons, *The Lockean Theory of Rights* (Princeton 1992); A. John Simmons *On the Edge of Anarchy* (Princeton 1993). It is not clear if Nozick means to present an actual consent account or a hypothetical consent account. Simmons clearly believes that actual consent (or a very special form of tacit consent) is needed to ground legitimacy. Simmons, *On the Edge of Anarchy* at 260 (cited in note 36). His response to Hume is largely to bite the bullet and say that essentially no government now, and only a few possible governments, is legitimate at all, and that a Lockean theory of the sort he supports will lead us to the edge of anarchy, as his book suggests, at least of a "philosophical" sort. Id. While I think Simmons is an important and interesting interpreter of Locke, I take his conclusion to be a near *reductio* of the Lockean position as applied to domestic affairs.

49 Rawls, *A Theory of Justice* ch 1 § 3 at 12 (cited in note 15).

way to leave it.[50] Of course major and important social, economic, and legal relations exist between various states. But, the relation here between states is fundamentally different from that of a person to her national government. I contend that, before forms of international governance are established, the relations between states are like those between individuals in Locke's state of nature, and in this way are unlike those of individuals born into society.[51]

In one way this is not a very surprising claim. Both Locke and Hobbes use the example of relations between states to illustrate the idea of the state of nature.[52] Additionally, the idea that relations between states are anarchic, and that states are in a state of nature one to each other, is a central element of Realism, long the dominant school in international relations.[53] But, most of this work in international relations has assumed that the relations between states are those found in a Hobbesian state of nature.[54] Such a state of nature cannot, we are told, be exited except by the formation of a centralized state with a central government to play the role of sovereign. Since such a government is either

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50 One possible exception to this claim is with the creation of new states. This is a case that Goldsmith and Posner use against consent accounts. See Goldsmith and Posner, *The Limits of International Law* at 189 (cited in note 5). The analogy is not as close as we might at first think, however, as new states are formed from old, and so do not enter the world afresh, as do people. The old ties are often advantageous to the new state, at least in a transition period, and when a right to withdraw from old commitments is included in a proper notion of consent, as I shall shortly argue it should be, this objection loses much of its force.

51 This basic point was noticed by de Vattel, ("But it is easy to perceive that the civic association is very far from being equally necessary between nations, as it was between individuals."), and is essential to his analysis on international law. We need not accept all of his account to appreciate the point. See de Vattel, *The Law of Nations* at 15 (cited in note 1).

52 See, for example, Locke, *Two Treatises of Government* § 183 at 408–09, (cited in note 25) ("[A]ll Commonwealths are in the state of Nature one with another[.]"); Hobbes, *Leviathan* ch 13 § 12 (cited in note 23) ("[I]n all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continual spies upon their neighbors, which is a posture of war."). For a useful critical examination of the idea of the international realm as a Hobbesean state of nature, see Charles R. Beitz, *International Relations as a State of Nature*, in *Political Theory and International Relations* 35–50 (Princeton 1999).

53 See, for example, E.H. Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* 112, 152–53 (MacMillan 1962); Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* 23–24 (Columbia 1977); Jack Donnelly, *Twentieth-Century Realism*, in Terry Nardin and David R. Mapel, eds, *Traditions of International Ethics* 85, 86–87 (Cambridge 1992).

54 A possible, and interesting, exception is Hedley Bull, in his article *Hobbes and the International Anarchy*, where he gives significant consideration to the idea that the state of nature between states is Lockean in form, and attributes this idea to Grotius, Pufendorf, and de Vattel. See Hedley Bull, *Hobbes and the International Anarchy*, in Claire Finkelstein, ed, *Hobbes on Law* 537, 552–53 (Ashgate 2005).

impossible or undesirable,[55] it is claimed, we cannot hope to leave the international state of nature.

But, if the natural relationship between states is not that of a Hobbesian state of nature, but rather of a Lockean one, things look rather different—different in a way that is important for understanding the proper role and function for international governing bodies such as international courts. Recall that a Lockean state of nature is one where war is possible but is not essentially a state of war. Private contracts can be made and have moral, if not, properly speaking, legal force behind them. Moral obligations—the laws of nature—apply and oblige those living in the state of nature to act in particular ways. The Lockean state of nature is one of significant "inconveniences" but not something that must be left at all costs, since only some governments will be preferable to it. Additionally, and importantly, one may be in the state of nature in relation to some but not to others. That is, the property of being in the state of nature is relational. This description of the state of nature is, I hold, quite a good one of the situation that states found themselves in before the advent of international governing bodies in the twentieth century.

Of special interest to us here is the fact that Hume's objections to Locke's account, which were so devastating to the domestic version of Locke's theory, do not seem to have much traction in the international sphere. Recall the essence of Hume's criticisms of Locke. First, Hume held that there was no actual example of a society formed by consent of the governed. Second, he held that, given the first part, Locke had to fall back on the idea of tacit consent, but that this was a sham since people had no real option to leave, or establish themselves elsewhere, or to go their own way. I further argue that this worry leaked over to actual consent, since if one needed society to survive, leaving was not an option, and one had to consent to remain a member of society, then consent could not be free, and so could not be legitimating. But none of these objections applies, at least in the same way, to the international realm. Therefore, simply invoking Hume, as is often done by opponents of a consent view of international obligations, is not sufficient.[56]

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55 This claim goes back at least to Kant, in his 1795 essay *Toward Perpetual Peace*. See Pauline Kleingold, ed, *Toward Perpetual Piece and other Writings on Politics, Peace and History* 67–71 (Yale 2006) (David L. Colclasure, trans); Immanuel Kant, *Political Writings* 113–14 (Cambridge 1991) (H. Reiss, ed).

56 See, for example, Goldsmith and Posner, *The Limits of International Law* at 190 (cited in note 5). Goldsmith and Posner have other objections to a consent view, some of which will be discussed, directly or indirectly, below. It is worth noting that they differ from most opponents of a consent view in that they believe that there are no binding international obligations on states other than self-interest, as determined by each state. But they are typical in their careless invocation of Hume's arguments against Locke, and fail to show that they apply at the international level.

In the international realm we have, of course, a number of "societies" that are based on the consent of their members, namely, the states, which have set up and joined the international societies in question.[57] I shall shortly look at the ICJ as a special case of this. So, Hume's first objection is met. And, if we have societies based on actual consent, then we do not have to worry about the difficulties found to apply to the idea of tacit consent. Finally, since it is perfectly possible for countries to "go it alone" and not join these international societies, we cannot say that the choice to join them is forced, and so not legitimating. This is so even if certain obvious benefits will be gained only if a state joins the society in question since, as noted above, Locke held (rightly, I think) that refusal to give a benefit to those who have not joined is not to harm them, since, "they are left as they were in the Liberty of the State of Nature."[58] If this is so, and if Locke's social contract approach to the legitimization of coercive force is an attractive one in principle, then we have some reason to see if we can use it to make sense of some aspects of international law—particular international courts.

This is not to say that just any act of "consent," by any state, to any international obligation, is binding. In our discussion of Locke's domestic social contract account we have already seen several conditions that must be in place before consent can give rise to political or legal obligations. The fact that states are collective entities that persist over time also puts special limits in place as to what sort of acts of consent can obligate the members of a society. It seems plausible, for example, that only states where the government meets at least minimum requirements for representing the population can be thought to consent on the behalf of the population, at least in many cases. To the extent this is so, such factors place a moral limit on consent theory in addition to the ones discussed above. Such factors can and should be put in place by international bodies.[59] But it is important not to confuse plausible limits on

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57 Buchanan is, therefore, wrong when he says, against a consent view of legitimacy, that "there [are] no existing entities or any that are likely to come about that will ever enjoy the consent of most of their citizens," if we take states to be the members of international bodies. See Buchanan, *Justice, Legitimacy, and Self-Determination* at 243 (cited in note 4). This is one of many instances where opponents of consent theories have not done the needed work to see if the objections that apply to an actual consent account apply at the international level as well.

58 Locke, *Two Treatises of Government* § 95 at 348–49 (cited in note 25).

59 Consider, for example, the requirements put on states to join the Council of Europe. For a very brief overview of the requirements on states in the Council of Europe, see *The Council of Europe: An Overview* *6 (2010), online at http://www.coe.int/AboutCoe/media/interface/publications/tour_horizon_en.pdf, (visited Oct 22, 2010). How representative a government must be before its consent is binding on the state (for example, is it enough to have something like the "decent consultation hierarchy" envisioned by Rawls in *The Law of Peoples* 71–77 (cited in note 18), or is full democracy required?) is not a question I can answer in this paper.

consent with attacks on the idea that consent may be legitimating at all.[60] I shall discuss below several limits on consent, and the ways these limits actually help make consent legitimating.

V. A LOCKEAN LOOK AT THE ICJ

For Locke, recall that one of the defining features of the state of nature—one that, more than many others, gave us reason to want to move out of it—was the lack of a common judge with authority to decide disputes.[61] If we are to leave the international state of nature, we need bodies that can act as authoritative and impartial judges for settling disputes between parties. But, if we want these courts to be legitimate, they will have to be structured in certain ways. I cannot hope to look at every aspect of how international courts should be set up, and do not claim that social contract theory can answer all of these questions. But, I argue that Locke's account gives us a good explanation for the role played by consent in deciding the jurisdiction of courts such as the ICJ. While I focus on the ICJ in what follows, this is only an example, and a similar argument could be made for many other international bodies and regimes. Many of the morals I draw have, I believe, a general application.

It is useful to contrast the jurisdiction of the ICJ with the jurisdiction of state and federal courts in the US. These courts extend their jurisdiction to actors who have not in any way explicitly consented to the jurisdiction of the court. The fact that someone has not consented to the jurisdiction of the court is immaterial to the court.[62] This is so even if the person in question had publicly

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60 Buchanan seems to me to engage in this confusion, as do some of the criticisms of consent made by Goldsmith and Posner. See Buchanan, *Justice, Legitimacy, and Self-Determination* at 246 (cited in note 4); Goldsmith and Posner, *The Limits of International Law* at 189–90 (cited in note 5).

61 Buchanan accepts a Lockean description of the situation in which states find themselves before the development of international institutions, but does not follow through with a Lockean account of how such institutions could be legitimate. See Buchanan, *Justice Legitimacy, and Self-Determination* at 293–99 (cited in note 4). Some of this is due to his incorrect application of Humean arguments to the international realm, discussed above. Another reason that Buchanan rejects the Lockean solution that I offer is his, I believe, incorrect view that consent must be not to various international legal bodies or acts, but to the international legal system as a whole. Id at 299. I am, for reasons developed by Hart, quite skeptical that we should think of international law as making up a single system that could be consented to, or legitimated on other grounds, as a whole. See H.L.A. Hart, *The Concept of Law* 233–37 (Oxford 2d ed 1994). I shall develop this point further below.

62 Different justifications have been given for the jurisdiction of domestic courts over time. See, for example, the discussion in Von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies, and Practices of Common and Civil-Law Systems* 27–67 (cited in note 10) for a small sample. Richard Cappalli, in an intriguing article, has tried to offer a Lockean justification for the jurisdiction of domestic courts. See generally Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of* In Personam *Jurisdiction*, 43 Case W

announced, long before the cause of action in consideration, that she did not accept the jurisdiction of the court and would not appear before it. (We might here imagine survivalists who do not recognize the authority of the federal courts. Of course the courts do not let this stop them from making such people appear if they are a party to a case over which the court would otherwise have jurisdiction.) Furthermore, we do not generally think that explicit consent to the jurisdiction of the court is necessary for the actions of the court to be legitimate.[63] If the system as a whole is at least largely legitimate, we do not consider it to be a problem that jurisdiction of the courts is not based on actual consent.[64] To the extent this is so, we do not follow a Lockean approach.

A. Consent to Jurisdiction and the ICJ

Cases may come before the ICJ in two main ways, corresponding to clauses one and two of Article 36 of the Statute of the International Court of Justice. The first involves specific references of cases to the court and treaty agreements that contain clauses requiring disputes to be referred to the court. Here we have a fairly straightforward form of explicit consent to jurisdiction, but of a quite limited sort, since only specific cases are referred under this clause. Usually we can expect this sort of case not to raise many problems of interpretation or application, although sometimes such problems will arise, as in the dispute as to whether the ICJ had jurisdiction in the dispute between the US and Nicaragua, "Military and Paramilitary Activities In and Against Nicaragua" (the Nicaragua case) via the Treaty of Friendship, Commerce, and Navigation of January 21, 1956. This treaty explicitly required that disputes under it be referred to the ICJ, but there was some dispute as to whether the claims of Nicaragua involved any violation of this treaty. Here the majority of the court held that the treaty did ground jurisdiction, despite Nicaragua not having invoked any specific

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Res L Rev 97 (1992). For reasons discussed above, I do not believe that a Lockean account can work in the domestic sphere, and would suggest that a better approach would be to investigate which account of jurisdiction best fits with a Rawlsian hypothetical consent view, but I cannot develop this point here.

63 Even in cases where someone does consent to the jurisdiction of a state court, for example, where a resident of one state comes to a different one to take part in a case, even though the courts of the second state could not have jurisdiction over her so long as she was outside the second state, we still do not have consent to jurisdiction in the same sort of way we get in international courts. To see this we need only note that if the person in question came in to the second state for any reason at all the courts in that state would exercise jurisdiction. That jurisdiction may have a territorial limit, and that one can avoid jurisdiction by staying outside that limit, does not mean that the jurisdiction is consensual, only that it has limits in other ways. (It should be admitted, however, that such exercises of jurisdiction may be controversial.)

64 We might think of this on the grounds of a Rawlsian hypothetical contract approach or some sort of utilitarian approach. I will not worry about this here.

clauses of the treaty as having been violated.[65] While this is perhaps not an unreasonable way to understand the situation, it is, to my mind, certainly not a required reading. We do not here need to address whether this was the proper ruling or not, but we do see that, even in cases where there is clear express consent to the jurisdiction of the court for some disputes, there may be disagreement as to whether the dispute in question is one for which consent has been given.

The second way for the ICJ to gain jurisdiction is more interesting. The so-called "optional" clause gives the ICJ "compulsory" jurisdiction over any dispute relating to "the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation."[66] Importantly, this compulsory jurisdiction applies only between states "accepting the same obligation."[67] That is, there is reciprocity of obligation built in to the statute. There are a number of questions about this compulsory jurisdiction that, I hold, a Lockean approach can shed light on, help us in understanding, and give us guidance as to how we should apply the rules. I will start first with the question of why we should require the "reciprocity" clause and what it should be taken to mean.

When states accept the optional clause, they are agreeing to limit their behavior in certain ways by giving up their private right of judgment in particular disputes and agreeing to submit in such disputes to the judgment of the ICJ. Such an agreement has certain obvious similarities to the types of agreements that, on Locke's account, remove parties from the state of nature. We can assume that the parties to such agreements are individually rational.[68] This is to say, the parties seek to improve their own social situation, understood in terms of safety and material well-being. We secondly assume that the parties have

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65 See *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v US*), *Jurisdiction and Admissibility*, 1984 ICJ REP 392, 440–41 (Nov 26, 1984) (Judgment on Jurisdiction and Admissibility); *International Court of Justice*, Summary 1984/5: Summary of the Judgment of 26 November 1984, § I(C), online at http://www.icj-cij.org/docket/files/70/6487.pdf (visited Oct 22, 2010).

66 Statute of the International Court of Justice, Art 36(2)(a)–(d) (cited in note 9). I put "compulsory" in scare-quotes here to acknowledge the point, made by Kelsen and others, that, given the ability to make reservations, so-called "compulsory jurisdiction" falls short of what we might expect. As I will make clear, I do not fully agree with Kelsen that the ability to make such reservations should be thought to leave the declarations of such states without "almost all practical value." See Kelsen, *Principles of International Law* at 392 n 68 (cited in note 14). In what follows I shall leave the scare-quotes off of "compulsory" unless it is for some reasons especially needed.

67 Statute of the International Court of Justice, Art 36(2) (cited in note 9).

68 Here I draw on Cohen, *Structure, Choice, and Legitimacy* at 154–57 (cited in note 24).

equal moral freedom.[69] That is, no party is naturally subject to another, each party's interests count, and no party has natural political obligations to another.[70] Given these conditions, parties will enter into an agreement that binds them only if, by entering this agreement, they expect to be made better off than they would be without it. That is, parties will enter into an agreement to accept a common judge only if they will be better off with such an agreement than they would be in the state of nature.

However, to open one's self up to the jurisdiction of the court without others accepting the same jurisdiction would be to make one worse off than one would be without the court. Given this, some sort of reciprocity requirement is necessary for it to be rational for parties in a Lockean state of nature to agree to the jurisdiction of the court. Without this, it would be irrational for the parties to give their consent, since they could not expect their interest to be protected, and so they would never leave the state of nature.

The most basic type of a reciprocity requirement would be to require states to either accept the optional clause without reservation or not to accept it at all. This would ensure equality of obligations among parties and would limit interpretive difficulty. But, there is reason to reject this solution. We see this when we note that some states, perhaps a significant number, if given only the choice of accepting the optional clause without reservation or rejecting it all together, will reject it, even though these states would, by their own calculation, be better off if they could accept the optional clause with some reservations. Whether to allow such reservations is the next important question. Here we see a role both for rationality and moral equality.

The text of Article 36 section 2 says nothing one way or another about allowing reservations. But, the clause has been read so as to allow for reservations with the requirement that, as per the reciprocity requirement, the reservation must be reciprocally effective. That is, if State A has a reservation in

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69 See id at 153–54. We may wonder if states, the "parties" at issue here, can have "moral freedom" at all. I agree that states *as such* do not have "moral freedom" but think that we can here consider them as proxies for the moral freedom of their citizens, keeping in mind the minimal representation requirement discussed above. If consent is to be legitimating in the way discussed here, we also must accept some degree of equality among states, such that each is allowed to make its own choice as to whether to consent in the relevant cases or not.

70 This must be qualified in two ways. First, moral obligations exist between states even when political obligations do not. It is at least arguable that these moral obligations, in some circumstances, include an obligation to enter into certain political relations. Buchanan argues that a "natural duty of justice" exists between states that requires them to develop an international legal system. See Buchanan, *Justice Legitimacy, and Self-Determination* at 290–99 (cited in note 4). I am sympathetic to this claim, but would give it much more narrow scope, limiting it to institutions dealing with the enforcement of *jus cogens* norms and, perhaps, minimum subsistence rights. This leaves the area of interest in this paper open.

its optional clause declaration, any state X that A brings a suit against can invoke the reservation in A's declaration for its (X's) own defense.[71] This rule respects both equality and rationality. We can see that the rule respects equality since it keeps powerful nations from giving themselves a better deal. Without the reciprocity requirement here, there would be a strong temptation for powerful nations to impose an exceptionless optional clause on weaker nations, while taking *de facto* exceptions for themselves. This would have the effect of saddling weaker nations with obligations not respected by the strong. Reciprocity, then, helps preserve equality.

The reciprocity requirement also respects rationality, since it allows for Pareto improvements over the state of nature that would otherwise not be possible. The court, we might assume, is more useful to the parties with more rather than with fewer states as members. But, some states will not join if they cannot make certain reservations. If the states that are already members allow the prospective member P to join with a reservation, but do not have the option to take such a reservation themselves, they may be made worse off than if they had kept P out. But, if they allow P to join with the reservation, while having recourse to the same reservation themselves, all will be better off than under the other options. Therefore, the reciprocity requirement allows for a Pareto improvement over the situation where such a clause is not available. The point of this argument is not to make the sort of claim that might be found in a hypothetical consent argument—that reservations should be allowed because they would be desired in a Lockean state of nature—but rather to show that allowing reservations helps make consent rational and reasonable, and therefore can increase the legitimacy of international courts.

B. Questions of Competence

The next question is, who has the competence to decide if the court has jurisdiction? This is important both for answering questions about reservations, and for more general questions about competence. As an abstract inquiry, several answers are possible. Kelsen, for example, claims that there is a principle such that, "he who has to apply a legal norm is competent to interpret the norm, [so] each contracting party is competent to interpret the treaty . . . insofar as that party has to apply the treaty by executing the decisions of the tribunal."[72] Additionally, "the tribunal, too, is competent to interpret the treaty . . . since it

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71 This reading is supported by the Vienna Convention on the Law of Treaties (May 23, 1969), Art 21(1)(b), 1155 UN Treaty Ser 331, reprinted in 8 ILM 679 (1969).

72 Kelsen, *Principles of International Law* at 396 (cited in note 14).

has to apply the treaty by making the decision of the tribunal."[73] This implies that, absent an express agreement stating otherwise, all parties, including the court, have the ability to decide if the court has competence to hear a particular case. This shows, Kelsen says, that in such a case the execution of a decision depends on the good will of the parties.[74]

But this cannot be quite right. Rather, in such a case we have not in fact established a common judge, since each of the disputing parties has a right, and not just the ability, to set aside a decision or to refuse to appear at all. In such a case we have not yet left the state of nature and so have not established any political obligations (since to be in the state of nature with regard to someone is to not have political obligations to them). But, if there are no political obligations between the parties, there cannot be legal obligations. There may well be moral obligations for parties to perform (obligations playing much the same role as Locke's "Laws of Nature"), but these are pre-political and so pre-legal.[75] In such a case the court does not merely depend on the goodwill of the parties for its effectiveness (to some degree, *all* international courts, even ones not set up in this way, rely on the goodwill of the parties for their effectiveness, since they usually have no independent enforcement ability), but rather, in such a case we have failed to form a court in any serious sense at all.

This does not, of course, mean that any particular court must have the competence to decide its own competence, at least as a final matter. Such questions might be left to higher courts or to other bodies. Whether the ICJ has jurisdiction in a certain case, for example, could be decided by majority vote in the UN General Assembly. What is important, though, if we are to have a court at all, is that someone other than the parties before the court must have the final say as to whether the court has jurisdiction or otherwise has competence to hear the case in question. If this is not the case, we have not left the state of nature.

Here we might worry, though, that we are just undermining our earlier claim that the consent of the parties to the jurisdiction of the court was a necessary element for the legitimacy of the court. Does not giving a court the power to decide its own competence and jurisdiction give it the power to haul

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73 Id.

74 Id.

75 This claim is obviously somewhat more controversial than my bald statement of it here would suggest. Kelsen, for example, seems to think that states are *legally* bound by customary international law even absent any tradition on the part of a particular state in recognizing this custom, in the absence of any agreement accepting the custom as law, and absent any body with the right to adjudicate disputes relating to the matter. Consider id at 406–19 (cited in note 14). I must admit that I find his discussion uncommonly dark and unconvincing. For useful discussion on related points, see generally Bradley and Gulati, *Withdrawing from International Custom* (cited in note 2).

non-consenting bodies before it? While it is true that the approach will give the court the power to hear cases relating to parties who do not wish to be in front of the court in this particular instance, this is not the sort of consent that is important for legitimacy on a Lockean account. Recall that Locke held that express consent, once given, could not be revoked.[76] Even if we do not follow Locke this far (as I think we should not), we can see that consent in the relevant sense is not violated here. Once consent to the jurisdiction of the court is given, the court must have the ability to decide if this is an instance of the sort where consent applies, or else it will not be able to perform the role for which it was set up by the parties. This was known by the parties before they established the court, and so a party who does not wish to be in court on a particular instance cannot refuse to recognize the competence of the court to decide these issues. How such rules work in relation to a right to withdraw consent will be discussed below.

C. The Role of Reservations

Next, we must look at how reservations in a state's declaration to the optional clause should relate to the court's ability to decide its jurisdiction. To some degree this issue is dealt with by the reciprocity clause. What we want to avoid here is giving one state an unfair advantage by letting it avoid jurisdiction when it is a defendant before the court, but asserting jurisdiction when it brings a suit. As noted, the effect of reservations and the reciprocity clause will be to greatly limit the consent to jurisdiction of many countries. This is undesirable from a "global" perspective, since the situation as a whole would be better if all (or at least more) countries would join without reservation. But, from the perspective of legitimacy, so long as reciprocity is respected, such reservations do not raise a serious barrier, since no state will be given an unfair advantage. To make sure that we maintain legitimacy while having the most effective court possible, the court should make use of the following rule in interpreting the reservations in a state's declaration.

When a state X, who is a defendant in a case brought by Y, invokes a reservation found in Y's declaration, the court should give a broad reading to this reservation, accepting the exception if it is at all plausible to do so. But, if X, as part of its defense against a claim brought by Y, invokes a reservation in its own (that is, in X's) declaration, the court should give this a strict or narrow interpretation, and not accept the exception to jurisdiction unless it is clearly and obviously required by the reservation.

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[76] See Section II.

Such a rule will have several desirable results. First, it will help ensure that a state cannot make use of its own reservations to gain unfair advantages over other states, since its reservations will be read more strictly when it invokes them on its own behalf. Second, such a rule will give the court as broad a jurisdiction as possible while still respecting the conditions needed to assure legitimacy via consent. Finally, this approach will encourage states to limit their use of reservations, since such a rule puts serious limits on the number of cases where a reservation will be to a state's advantage, while respecting a state's ability to decide when such a reservation is ultimately needed. This rule ensures that no unfair advantage can be gained by taking reservations, and as such encourages states to take reservations only when they think they are absolutely necessary for their self-interest. This promotes expanded jurisdiction of the court (which is desirable from the global perspective) while maintaining the Lockean limits on consent.

D. Withdrawing Consent

The next question of interest to us is whether (and if so, when) a party should be able to withdraw consent to jurisdiction. As noted several times, Locke held that express consent, once given, could not be withdrawn.[77] But, as also noted above, there is no reason due to the very logic of consent, or to Locke's argument that legitimacy is grounded on consent, to hold that consent can never be withdrawn. But, there must be some lower bound on the ability to withdraw consent. If a party can withdraw consent at any time, then we have not yet left the state of nature, as no one will need to be bound when it is inconvenient. It seems, then, that one has to look at particular details of the agreement in question to see what sorts of limits on withdrawing consent are reasonable for that type of agreement.[78]

In a situation like that considered here—consent to the jurisdiction of the ICJ—the ability to withdraw consent by a state is important for two reasons. First, changed conditions may make an agreement that was rational at one time irrational at later times. But, if consent cannot be withdrawn, states either will not join at all (since doing so when they expect they might want to withdraw later would be irrational) or else would refuse to comply with the court when

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[77] See Section II.

[78] As noted above, in this paper I focus on treaty law (and in particular on consent to the jurisdiction of international courts). The question of whether a state may withdraw from customary international law at all is a more controversial one, and not one that I can discuss in this paper. However, I am convinced by the account given by Bradley and Gulati in their forthcoming paper, *Withdrawing from International Custom*, that a general prohibition on withdrawing from customary international law is neither plausible nor desirable. Bradley and Gulati, *Withdrawing from International Custom* at 34–62 (cited in note 2).

faced with negative decisions. Both of these options would weaken the court and give us pragmatic reasons to allow for withdrawal of consent at least in certain situations. I shall consider those situations below.

More importantly, from a Lockean perspective, not allowing withdrawal under any circumstances would greatly lessen the legitimacy of the court, because of a particular effect of consent peculiar to consent given by a government. Governments represent different people over time. If a government consented to the jurisdiction of the court in the 1950s, the great majority of those who voted for this, and even many who were alive then, are now dead. If consent cannot be revoked under any condition, after some time all citizens of a state will be living under an obligation that they did not consent to and which they cannot change. If one is ruled by the "dead hand of the past," one is not self-ruling, and so one is not free in the way that the Lockean consent theory was meant to protect. Since the role of governments is to protect the rights of their citizens,[79] and states have rights only insofar as we think that having states is necessary to protecting the citizens of those states,[80] it seems that the consent of states must be allowed to change in a way so as to protect the rights of the citizens. But, since the citizens and the government of a state change over time, they must have the ability to revoke consent given in the past.[81]

We can see this even more clearly in the case of countries that were, at the time of their ascension to the treaty in question, not democratic. To not allow such countries, when they have undergone a transition to a democracy, to withdraw consent (even with certain limitations discussed below), would be to render consent meaningless as a legitimating tool. Although the case is clearer for countries in transition from dictatorship to democracy, the problem is essentially the same in either case. So, if consent by a state is to be legitimating, it must be possible to withdraw, at least within certain boundaries.[82]

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79 Buchanan argues for something like this with his notion of "recognitional legitimacy." See Buchanan, *Justice, Legitimacy, and Self-Determination* at 266–68 (cited in note 4). I do not agree with all of Buchanan's account, but find it instructive.

80 See, for example, David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* 112 (Johns Hopkins 1996); Michael Ignatieff, *Human Rights as Politics and Idolatry* 23 (Princeton 2001).

81 Allowing states to withdraw consent, contingent on factors I discuss below, seems to me to sufficiently answer many of the worries raised by Goldsmith and Posner about consent imposing obligations on people who were not alive at the time consent was given. See Goldsmith and Posner, *The Limits of International Law* at 191–92 (cited in note 5).

82 This leaves open the question as to whether consent to membership in a state, given by an individual, should be irrevocable, as Locke thought, since essential facts about the agreement are different. I do not find Locke's argument here, so far as he has one, persuasive, but this issue is at best tangential to the topic in this paper and so will be ignored. For discussion on this point, see

So, what boundaries should be placed on withdrawal from consent in a case like the one at issue here? A Lockean (or any philosophical) approach cannot give a fully determinate answer as to what limits should be placed on the right to withdraw here, since this will depend on various empirical considerations and will thus require work by political scientists and other non-philosophers. But, we can derive some general guidelines from a Lockean approach.

The first principle we can derive is that a country must not be able to use the right to withdraw in order to be the judge in its own case, since if this were possible, there would be no effective withdrawal from the state of nature. Second, the right to withdraw consent cannot be allowed in a way that gives an unfair advantage to one state when another has relied on the consent of the first in a way that the reciprocity condition cannot remedy. This condition strongly implies that immediate withdrawal should not be allowed, since in many cases one state will have done something that would give rise to a cause of action by another state, but the second state will not yet have had time to bring a case to the ICJ. If immediate withdrawal (or the immediate introduction of a new reservation) were allowed, then the offending state could, as soon as it knew a case would soon be brought, withdraw from the court or assert a new reservation, thereby circumventing justice and unfairly burdening the first country.

We can gain a more concrete view of this issue by looking at three related issues in the Nicaragua case: first, the attempt by the US to change its reservation unilaterally, with immediate effect; second, the claim by the US that since Nicaragua had no express withdrawal clause, it (Nicaragua) could withdraw immediately, and thus the US should have the option to withdraw immediately as well; and finally, the proper way to understand withdrawal clauses like the US's six-month notice clause.

I start first with the US's attempt to change its reservation with immediate effect. The court in the Nicaragua case rejected this, and was right to do so, since allowing such a change would have allowed the US to commit a wrong and then refuse to accept jurisdiction (to which it had apparently previously assented).[83] While we cannot give a hard rule as to what sort of time period is needed in a case like this, it is at least clear that when a state invokes a reservation or withdrawal from consent so as to avoid jurisdiction for a past wrong for which a case may be, but has not yet been brought before the court,

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Lister, *Citizenship, in the Immigration Context*, 70 Md L Rev 56 (cited in note 38); Cohen, *Carved from the Inside Out* 40–45 (cited in note 40).

[83] *Nicaragua v US*, 1984 ICJ REP at 441 (cited in note 65); ICJ, *Summary 1984/5* at § I(B) (cited in note 65).

such a withdrawal cannot be allowed because it would give an unfair advantage to the withdrawing party.

The ICJ was also correct to reject the claim by the US that, because Nicaragua had no explicit withdrawal clause in its declaration, it was free to withdraw at any time, and thus the US should be free to do the same.[84] Much of the same reasoning as above applies here. To allow immediate withdrawal would be to allow for one party to have an unfair advantage—to commit a wrong and then to escape the jurisdiction of the court. Allowing such withdrawals would not be rational for the parties making such an agreement. It is more reasonable to suggest that, where a state does not have an express withdrawal clause, it is bound by the rule in the Vienna Convention on Treaties, giving a default rule of one-year's notice before withdrawal from a treaty is effective.[85] This would allow states to tailor more flexible withdrawal clauses if so needed (within certain bounds), but would make clear that the default rule is that withdrawal may not be effective immediately.

Finally, clauses allowing for withdrawal, such as the US's six-month notice rule, should be read so as to protect the interests of the state not making the motion to withdraw consent. This can best be done by requiring that withdrawal would only be prospective—that is, a state that has withdrawn consent from the court would still be liable for any wrongs done before the effective date of its withdrawal, even if the claim against the state in question is brought after the effective date of withdrawal. This, too, will be necessary to keep states from using withdrawal to take unfair advantage of other states. It is also especially necessary to protect poorer states from richer and more powerful ones, since we may assume that it will take poor and weak states longer to be able to bring claims before the ICJ than stronger and wealthier ones.

VI. SUMMARY AND CONCLUSION

In the above discussion I have shown how a Lockean social contract approach can help explain the role of, and the limits on, consent as a legitimating element in international law. Though I have focused on consent to international courts, particularly the ICJ, I believe that the general approach is applicable to much of international law, at least when we avoid the twin errors of thinking that *jus cogens* norms make up all or the most important part of international law, and that international law forms a single "system" that must be consented to all together or not at all. Furthermore, I contend that following the model set out in

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84 Id.

85 Vienna Convention on the Law of Treaties, Art 56(2) (cited in note 71).

this article could help international courts, and international law more generally, be more legitimate, and thereby better serve their role.