

Conceptual Article

State Consent and Sovereign Equality in International Law: A Critical Analysis

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ABSTRACT

The doctrine of state consent is a foundational pillar of the modern international legal order. This article critically evaluates the claim that consent functions as the primary basis of international law by tracing its operation in three principal areas: treaty law, international adjudication, and customary international law. It argues that the consent model is neither absolute nor applied in a uniform manner. Although the principle of sovereign equality under Article 2(1) of the UN Charter supports a voluntarist framework, a range of more flexible consent mechanisms such as treaty reservations and informal commitments enable states to shape the scope of their obligations. Even though jurisdiction before the International Court of Justice (ICJ) is strictly anchored in consent, the “persistent objector” doctrine, controversies about the legitimacy of customary norms, and power imbalances within state practice expose underlying tensions in how consent is processed. The article further shows that states are not automatically bound by particular treaties or conventions; signing, for example, does not amount to a declaration of submission or a binding undertaking to an international convention or declaration. The conclusion is that, although state consent is indispensable, it operates within a contested normative framework formed as much by power disparities and geopolitical interests as by legal principles. This tension indicates that while state consent rests on the sovereign equality of states, power asymmetries can prevent that equality from being fully achieved in practice.

Keywords: State Consent; Sovereign Equality; Customary International Law; Treaty Law; Persistent Objector Doctrine

A. INTRODUCTION

The framework of contemporary international law is grounded in a basic proposition: sovereign states are bound only by those norms to which they have given voluntary consent. This voluntarist idea runs through both treaty law and customary international law, granting states a degree of autonomy regarding their international obligations comparable to the contractual freedom found in domestic legal systems. The premise’s continuing impact is

reflected in its incorporation into the institutional structure of international organizations and into the jurisdictional organization of international tribunals. As Walker notes, the importance of state consent for international legal duties has continued to function as the primary organizing principle of the international order, despite ongoing scholarly objections to the theory’s coherence (Walker, 2020).

The normative importance of consent is directly tied to the principle of sovereign equality,

which grants every state an equal entitlement to take part in the formation of international law without submitting to an external sovereign authority. Yet this formal equality of standing obscures significant differences in states' actual ability to negotiate, resist, or withdraw from international obligations. Accordingly, the doctrinal reliance on consent functions within an asymmetrical political context where equal legal status does not amount to equal bargaining power or institutional influence.

This article develops its argument within a voluntarist framework, according to which international legal obligations bind states only because of a state's express or implied acceptance. The framework is articulated most authoritatively in Article 2(1) of the United Nations Charter, which affirms the principle of sovereign equality among all United Nations members (United Nations, 1945). Orfeas Chasapis Tassinis further elaborates the voluntarist position by treating consent as the legitimating basis for the binding force of customary international law; he argues that a strong consent-based account of custom is both descriptively accurate and normatively defensible (Tassinis, 2020).

Conflicting theoretical perspectives have highlighted the structural constraints of the consent model. Strydom et al. (2020) points to the enduring objector doctrine as a locus of doctrinal friction within customary international law, probing whether a unilateral objection can truly shield a state from a norm that has gained general

acceptance in the international community. Likewise, Stein (2017) examines the processes through which customary law becomes legally binding, prompting basic questions about how state practice, *opinio juris*, and the consent of individual states relate to one another.

Despite the doctrinal primacy of state consent, the literature points to an enduring tension between the formal consent framework and the practical realities of international law-making. The development of customary international law, in particular, creates sharp difficulties for a strictly voluntarist account: norms can take shape through the conduct of a portion of states and then bind other states without any explicit act of acceptance. This problem follows from the distinctive structure of customary international law, because its formation does not hinge on each state's formal consent to be bound. On the standard two-element view, customary international law arises from state practice that is sufficiently general and representative, together with *opinio juris*, rather than from an express agreement among all states. As a result, the legal impact of a customary rule may reach beyond the states whose behavior helped produce it, yielding an apparent mismatch between the consensual basis of international law and the possibly non-consensual scope of customary norms. Johnston shows that, in some instances, determining customary international law can rely on practice and *opinio juris* even when the evidence of *opinio juris* among the states involved in the relevant

practice is not clearly established, highlighting the challenge of reducing customary law to a simple model of individual state consent (Johnston, 2021).

The problem becomes particularly evident when a customary rule emerges from the practices of a small group of states, but then gains general legal force. Recent scholarship distinguishes between general and particular customary international law precisely because the latter requires a higher degree of state-specific acceptance. For example, Gutiérrez Álvarez observes that particular customary law requires a distinctive *opinio juris* among the states concerned, whereas general custom may emerge through a broader consensus-building process in which the practice and legal conviction of a sufficiently representative group contribute to the formation of a rule of general application (Álvarez, 2024). Therefore, the formation of general custom shows that the consent of every state is not necessary for a customary rule to emerge.

However, this does not mean that customary international law is wholly detached from state consent. The tension lies instead between express consent and tacit or collective acceptance. Traditionally, *opinio juris* has been considered the element through which state practice acquires legal character. However, the persistent-objector doctrine provides a mechanism through which a state may, under stringent conditions, avoid being bound by an emerging customary rule. Consequently, recent

scholarship on the persistent-objector doctrine treats it as an important mechanism for reconciling the generalising effect of customary law with the continuing relevance of state consent (Yeini, 2022). However, the existence of this exception itself reinforces the underlying problem: if a state must actively and consistently object during the formation of a customary rule to preserve its non-consent, mere absence of express acceptance cannot be equated with straightforward rejection of the rule.

Accordingly, the tension is best understood as a difficulty that arises for a strictly voluntarist approach, rather than for all consent-based accounts of international law. On a strictly voluntarist view, the binding force of international law would be expected to hinge on a clearly identifiable act of state consent. Customary international law undermines this expectation because, given its decentralized formation, legal obligations can emerge from convergent practice and *opinio juris*, while the normative force that results may apply to states that did not expressly take part in, or expressly agree to, the rule's formation. Indeed, recent scholarship underscores that customary international law is an informal process: the existence of a customary norm turns on the requisite practice and *opinio juris*, not on a formal act through which each state separately accepts the resulting rule.

This structural shortcoming is especially pronounced for newly emerging states, since their duties under previously established customary

norms are not the outcome of any earlier sovereign choice. These shortcomings in the doctrinal account form the core analytical problem addressed by this article.

Critical Legal Studies (CLS) offers a critical framework for analyzing how law, consent, sovereignty, and power interact within the international legal order. Instead of viewing law as a neutral and self-contained system of rules, CLS challenges the premise that legal doctrines carry determinate meanings that exist independently of the social, political, and institutional settings in which they function. On this view, legal notions that appear neutral may nonetheless embody underlying decisions about how authority is distributed and which competing interests are acknowledged. When applied to international law, this orientation is especially pertinent to the doctrine of state consent, since consent is typically presented as the primary basis of international legal obligation and as a manifestation of the sovereign autonomy of formally equal states. Accordingly, a critical analysis does not deny the legal importance of consent; rather, it examines how consent is defined, articulated, acknowledged, and made to produce legal effects across different domains of international law. Recent scholarship has likewise shown that consent to international law is neither self-evident nor uniform, but depends on multiple underlying constructions concerning the consenting subject, the form of consent, its

temporal dimension, and the distinction between consent and non-consent (d'Aspremont, 2024).

Within this framework, sovereign equality serves as a crucial starting point for analyzing the voluntarist understanding of international law. Article 2(1) of the United Nations Charter formally enshrines the principle of sovereign equality, placing states on an equal legal footing notwithstanding differences in territory, population, economic resources, or political influence. From a CLS standpoint, however, formal legal equality should not be automatically taken to mean substantive equality in the functioning of international law. This distinction matters because states employ their formally equal legal powers within an international system marked by major disparities in economic, military, diplomatic, and institutional power. As a result, the principle of sovereign equality can operate at the same time as a legal safeguard against subordination and as an abstraction that does not necessarily remove material inequalities among states. The key critical issue, therefore, is not whether states are legally equal in a formal sense, but whether formal equality is adequate to account for the real distribution and exercise of legal authority within the international legal order.

The CLS perspective further undermines the idea that state consent functions as a binary notion in which states either consent or fail to consent to an international legal obligation. In reality, international law acknowledges various forms and gradations of consent, such as treaty

ratification, accession, reservations, optional jurisdictional clauses, unilateral declarations, acquiescence, and participation in state practice relevant to the creation of customary international law. As a result, the legal order specifies which kinds of state behavior attain normative relevance and under what conditions such behavior creates, alters, or prevents legal obligations. This shows that consent is not simply an empirical manifestation of political will, but a legal construct whose meaning is shaped by institutional rules and interpretive practices. The importance of this point is that the legal system may treat particular forms of state conduct as consent even when the connection between that conduct and the state's autonomous intention is disputed. Accordingly, consent should be assessed not only as an expression of sovereignty, but also as a legal construction that translates sovereignty into binding normative effects.

This problem is especially evident in international adjudication. The jurisdiction of the International Court of Justice is generally grounded in state consent, whether that consent is expressed via a special agreement, a compromissory clause in a treaty, or a unilateral declaration accepting compulsory jurisdiction under Article 36(2) of the Statute of the Court. These devices seem to reflect a clear commitment to voluntarism, since a state cannot ordinarily be brought within the Court's contentious jurisdiction absent a recognized basis of consent. However, a CLS approach shifts

attention to the institutional and political circumstances in which such consent is made to operate. The formal equality of states before an international tribunal does not necessarily remove differences in their ability to negotiate jurisdictional commitments, craft reservations, use procedural tools, or withstand the political and economic repercussions of litigation. Consequently, the existence of consent as a formal basis for jurisdiction, standing alone, does not establish that jurisdiction is exercised under conditions of substantive equality. The key question, instead, concerns how formally equal states experience and perform jurisdiction within an institutional context shaped by unequal material capacities.

The tension between consent and legal obligation becomes even more evident in the development of customary international law. Unlike treaty obligations, customary international law does not generally call for a specific act of acceptance by every state to which the resulting customary rule applies. Instead, its formation is tied to general state practice and *opinio juris*, which enables a rule to gain legal force through a decentralized mechanism rather than through an express agreement among all states. This creates a challenge for a strictly voluntarist account of international law, since a customary norm may ultimately be binding on states that have not explicitly accepted the norm in the way treaty obligations require. The issue is not that customary international law is completely

detached from state consent, because state practice and *opinio juris* remain closely linked to state behavior and legal conviction. Rather, the challenge lies in explaining how individual or collective state conduct can be translated into a legal norm of general application without necessitating an express act of acceptance by every state subject to that norm. Recent scholarship on customary international law and on particular customary rules shows that determining which practice and *opinio juris* are relevant raises questions about which states' conduct counts as legally significant and about how specific patterns of practice come to possess normative authority (Álvarez, 2024).

From a CLS perspective, the emergence of customary international law thus offers an important arena for studying how legal neutrality relates to power. The traditional criteria of generality, representativeness, consistency, and *opinio juris* seem, in form, to be neutral; however, applying them necessarily requires determinations about which state practices are sufficiently significant to help bring about or identify a customary rule. Because states do not engage the international legal system with the same material capacities, their practices may also differ in the degree to which they are visible and influential within international legal discourse. The key issue is therefore not only whether customary international law meets the doctrinal requirements for formation, but also how specific practices come to be treated as authoritative bases for

general legal obligations. This line of inquiry aligns with the broader critical view that legal rules may function through categories that appear neutral while still embodying the institutional and structural conditions under which those categories are interpreted.

The connection between consent and power is further clarified by the Critical Legal Studies tradition's focus on the indeterminacy of legal concepts and by its subsequent evolution within critical scholarship on international law, including Third World Approaches to International Law (TWAIL). TWAIL is especially important as an additional critical standpoint because it analyzes the historical and structural ties linking international law with colonialism, capitalism, and geopolitical inequality. Rather than viewing international law as a fully autonomous system, TWAIL scholars investigate how its doctrines and institutions have taken shape within historically unequal international conditions. In relation to jurisdiction, for instance, Chimni shows that the international law of jurisdiction can be understood by examining the historical relationship among the state system, capitalism, and imperialism, which in turn demonstrates why formally universal doctrines cannot necessarily be interpreted independently of the distribution of power across states (Chimni, 2022). Accordingly, TWAIL reinforces the CLS analysis by offering a more concrete framework for assessing how formal sovereign equality is shaped and interacts with

historical and material inequalities in the production and application of international law.

The combination of CLS and this critical international law perspective therefore makes it possible to understand state consent as both a legal principle and an arena of contestation. Consent remains essential because international law continues to affirm the sovereign autonomy of states and offers many mechanisms through which states can voluntarily take on international obligations. At the same time, the legal importance of consent is not consistent across treaty law, international adjudication, and customary international law. Its effects are channeled through institutional rules that specify when consent is legally adequate, how it may be qualified or withdrawn, and the conditions under which legal obligations can arise without an explicit act of acceptance. Meanwhile, the formal equality of states does not erase the material disparities that shape their capacity to participate in the making, interpretation, and enforcement of international legal norms. The CLS framework, accordingly, allows the consent-based model to be assessed without either fully endorsing or entirely rejecting it: the core question is how a legal order grounded in sovereign equality converts formally equal state autonomy into binding legal authority within an international system marked by unequal power.

Accordingly, this study employs CLS as an analytical framework for examining three interconnected dimensions of state consent. First,

it examines the construction of consent, asking how international law determines what constitutes legally meaningful consent and whether consent operates uniformly across different legal domains. Second, it examines the relationship between formal sovereign equality and substantive power, considering whether the equal juridical status of states corresponds to their actual capacity to shape international legal obligations. Third, it examines the generalizing effect of international legal norms, particularly in customary international law, where legal obligations may emerge without an express act of acceptance by every state concerned. Through these dimensions, the study approaches state consent not simply as a foundational assumption of international law but as a contested legal construct whose meaning and effects are shaped by institutional structures, interpretive practices, and unequal distributions of power. This framework ultimately supports the proposition that state consent remains an indispensable component of the international legal order while simultaneously revealing the limitations of treating consent as an absolute or uniformly operating explanation of international legal obligation.

This article tackles a gap between the formal legal idea of state consent and sovereign equality, and how each operates in contemporary international law. As a matter of legal principle, sovereign equality treats states as legally equal subjects, whereas the consent-based architecture of international law assumes that states

undertake international obligations through their own autonomous will. In practice, though, the creation, interpretation, and enforcement of international legal obligations occur within an international system marked by substantial disparities in political, economic, and institutional power among states. These structural imbalances can be seen in treaty-making, international adjudication, and customary international law, where states' ability to negotiate obligations, affect judicial proceedings, and contribute to the development of customary norms is not necessarily the same even though their legal status is formally equal. Existing scholarship has analyzed state consent, sovereign equality, and the critical dimensions of international law separately, including through the TWAIL perspective, but it has devoted less attention to how the conflict between formal equality and material inequality shapes the functioning of consent across these three domains within a single analytical framework. Accordingly, this article extends prior research by critically assessing whether state consent can remain an adequate account of sovereign equality when international law is formed and applied under structurally unequal conditions. By integrating treaty law, international adjudication, and customary international law within a Critical Legal Studies framework informed by TWAIL, the article aims to show the distance between the "das sollen" of sovereign equality and consent and the "das sein" of an international legal order in which

unequal power may determine whose interests, practices, and preferences become normatively significant.

The tension between formal equality and the real workings of state consent can be further illuminated by specific developments in contemporary international law. With respect to treaty-making, recent TWAIL scholarship on climate change negotiations shows that even the formal participation of states as sovereign equals does not necessarily remove structural inequalities from the negotiating process. Mohanty contends that climate change negotiations have been structurally and systematically disadvantageous for Third World countries, especially regarding climate finance and loss-and-damage arrangements, thereby demonstrating how formally consensual international lawmaking can nonetheless occur within an unequal North–South framework (Mohanty, 2025). In the realm of international adjudication, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*) offers a concrete case for understanding how consent, sovereign equality, and judicial authority intersect, particularly because questions arose about the scope to which international legal obligations can function independently of the particular preferences of a state party, given the ICJ's jurisdiction and the way customary rules were determined in the dispute. More recent scholarship also shows that the *Nicaragua* judgment is important because the Court inferred

customary international law through reasoning that does not always align cleanly with the traditional requirement of demonstrating both state practice and *opinio juris* (Lando, 2023). This concern is likewise evident in customary international law in the ICJ's recent judgment in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles*, where the Court identified a customary rule on the relationship between extended continental shelf entitlements and another state's 200-nautical-mile maritime zones by relying on an assessment of state practice and *opinio juris* (Leung, 2024). Leung's argument is especially pertinent to the present study because it challenges whether the state practice relied on by the ICJ was sufficiently widespread and uniform to support the customary rule the Court identified, illustrating that the conversion of state practice into generally applicable legal obligations remains contested rather than mechanically settled (Leung, 2024). These examples do not show that international law is inherently shaped by powerful states; instead, they clarify why the formal assumptions of sovereign equality and state consent must be evaluated in light of the structural conditions within which states negotiate treaties, engage in international adjudication, and help form customary law. From a TWAIL-informed Critical Legal Studies standpoint, the resulting research gap therefore lies not only in the existence of inequality among states, but also in the inadequate examination of the relationship

between structural inequality and the legal processes through which state consent is converted into international legal authority.

A survey of the state of the art is required to demonstrate the novelty of the present research in comparison with earlier studies. The first prior study, titled "Signing CEDAW and Women's Rights: Human Rights Treaty Signature and Legal Mobilization" by Audrey L. Comstock, investigates how a state's decision to sign the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is not only a symbolic or procedural step, but also produces political consequences for patterns of conduct and for human rights mobilization (Comstock, 2024). The key difference between the current research and this prior study is found in their respective emphases: the prior work shows that the initial act of signing or agreeing to a convention or treaty can shape a state's domestic policies on the substantive issues covered by that agreement, whereas the current research argues that a state's signature does not necessarily compel it to carry out the policy at the national level. The second prior study, titled "Treaty Legalization, Security Interests, and Ratification of Multilateral Disarmament Treaties" by Onderco & Vignoli, examines how quickly states ratify conventions or treaties and identifies two factors that drive this variation. The first factor is the magnitude of obligation; when obligations are strong and include substantial open texture (ambiguity), ratification tends to occur more

slowly. The second factor is the degree of specificity; when a treaty or convention is highly detailed, states are more likely to ratify it promptly (Onderco & Vignoli, 2024). The distinction between this second prior study and the current research is that the former concentrates on what determines whether early ratification by a state is feasible, while the latter concentrates on the point that signing a convention or treaty does not mean the state has unequivocally bound itself to, or formally submitted itself to, the terms of that convention or declaration.

The third prior study, titled “Introducing the International Treaty Ratification Votes Database” by Ostermann & Wagner, investigates how states approve and ratify conventions, treaties, and declarations not necessarily because ratification is inherently required, but because international political factors, such as pressure from other nations, affect the decision to ratify (Ostermann & Wagner, 2023). The difference between that earlier study and the present research is the nature of their emphases: the former concentrates on the international political pressures placed on a state in relation to ratification, while the current research examines whether states retain independence or sovereignty when they sign instruments (conventions, treaties, or declarations) that do not automatically commit the state to subsequent actions. The fourth prior study is titled “The Legal Effects of the New Presidential System on Turkey’s Treaty-Making Practice” by Ceren Zeynep Pirim. Broadly, it

explores the idea that a “signature subject to ratification” does not amount to “consent to be bound.” A signature may perform different legal roles depending on the treaty mechanism at issue; for “simplified-form agreements,” a signature can function as the conclusive act through which a state expresses consent to be bound, enabling the treaty to enter into force without any further ratification (Pirim, 2022). The distinction between that prior study and the current research is that the former addresses types of signatures that, as recognized by the Vienna Convention, bind a state to a convention or treaty immediately, whereas the current research focuses on ordinary signatures that do not create an immediate binding obligation. As a result, a state cannot be forced to answer for failing to implement a declaration, because international practice upholds states’ autonomy regarding the conventions, declarations, and treaties they choose to join. The fifth prior study, titled “Trick or Treaty? An Empirical Analysis of the Treaty Ratification Process in Italy” by Vignoli and Corradi, essentially shows that the signing of a treaty is not always immediately followed by ratification. The study finds that the ratification process depends on the characteristics of the treaty and on domestic political factors; specifically, multilateral treaties, along with those primarily dealing with the environment and human rights, tend to require longer periods before ratification (Vignoli & Corradi, 2024). The distinction between this prior study and the

current research lies in their respective focuses: the former examines the continuity of a state's approval and ratification processes with respect to conventions or declarations, whereas the current research emphasizes that a state's act of signing a convention or treaty does not necessarily indicate an unconditional commitment or submission to that instrument. Based on this review of the state of the art, it is clear that the current research contributes novelty by analyzing the question of a state's binding obligation regarding agreements it has entered into under international law.

B. DISCUSSION

1. Sovereign Equality as Normative Foundation

The principle of sovereign equality, as codified in Article 2(1) of the United Nations Charter, forms the normative foundation for the consent-based design of international law. By recognizing the equal sovereignty of all member states, the Charter also recognizes each state's formal authority to determine the extent of its own international obligations. A consequence of this view is that, in general, no state can be bound by a rule of international law to which it has not, in some legally recognizable sense, consented (Mahfud et al., 2026). This claim is stated most directly in the law of treaties, where the rule *pacta tertiis nec nocent nec prosunt*, codified in Article 34 of the Vienna Convention on the Law of Treaties, provides that a treaty does not create

obligations or rights for a third state without its consent (United Nations, 1969).

A central challenge in contemporary international law is that sovereign equality functions at the same time as a rule of formal legal equality and within a global legal order characterized by significant material and institutional inequality. Article 2(1) of the United Nations Charter affirms sovereign equality for all Member States, suggesting that variations in territory, population, economic resources, or military power should not affect their formal juridical standing. However, states do not have equal practical ability to carry out sovereignty and to engage effectively in international lawmaking. Bhardwaj and Mehrotra show that the principle of sovereign equality coexists with major differences in resources and power, especially between states with substantial political and economic influence and states with far fewer resources, while TWAIL highlights that the historical impacts of colonialism still shape states' ability to exercise sovereignty on truly equal terms (Bhardwaj & Mehrotra, 2022). This produces a fundamental tension between the "ought to be" of sovereign equality under which states are formally equal legal subjects and the "what is" of an international system in which the capacity to negotiate, resist, implement, and influence international legal norms remains dependent on unequal material and institutional capabilities (Mayaka et al., 2024a). The difficulty, therefore, is not merely that some states are more powerful than others;

rather, the international legal system may treat these states as formally equal while operating through institutions and procedures in which their practical ability to exercise that equality is sharply different (Nasution et al., 2025).

This tension is especially consequential for the doctrine of state consent, since consent presupposes a genuine capacity to decide whether and in what way a state undertakes international obligations. Under a purely formal view, the presence of a legal agreement suffices as proof of sovereign autonomy; however, a critical approach inquires whether consent expressed in formal terms can always be interpreted without regard to the circumstances that shape its production. Contemporary scholarship on the ethics of state consent contests the notion that unrestricted consent necessarily safeguards sovereignty, maintaining instead that granting every state an unlimited freedom to act may erode the sovereignty of other states that share the same international setting but have unequal abilities to defend their interests (Pavel, 2026). This point is particularly relevant to the present study because it exposes a paradox in the voluntarist framework: the very consent principle meant to secure sovereign equality may, in contexts of unequal power, enable stronger states to use their formally equivalent freedom in ways that limit the effective autonomy of weaker states. Accordingly, consent cannot be evaluated merely by determining whether a state has formally agreed to an obligation; the inquiry must

also address the structural conditions in which that consent is negotiated, implemented, or withheld.

The issue becomes even clearer when one considers the institutional architecture of international law. Sovereign equality does not imply that all states enjoy the same degree of institutional influence. For instance, the United Nations Security Council formally functions within an organization established on the sovereign equality of its member states, yet Article 27 of the UN Charter gives the five permanent members a veto over the Council's substantive decisions. Such an institutional design does not necessarily undermine the principle of sovereign equality, since the Charter itself provides the legal foundation for the differentiated voting arrangement. At the same time, it highlights a difference between equality as equal juridical standing and equality as equal institutional power. Accordingly, the contemporary international legal order contains a structural paradox: states can be equal as sovereign subjects while having unequal capacities to shape whether collective international action is adopted. From a TWAIL-informed perspective, this paradox is especially important because the allocation of institutional authority cannot be fully disentangled from the historical and geopolitical structures through which the international legal order evolved. Bhardwaj and Mehrotra likewise point to the concentration of political, economic, and legal power among more powerful states as a core

challenge for understanding sovereign equality in contemporary international law (Bhardwaj & Mehrotra, 2022).

A closely related difficulty arises in the development of customary international law, where the formal equality of states does not necessarily settle whose conduct becomes normatively consequential. Customary international law is typically determined by general state practice accepted as law, so that the practices and *opinio juris* of states serve as the primary evidence for the emergence of customary rules. Yet identifying the relevant practice in practice requires institutional judgments about which actions are sufficiently widespread, representative, and legally significant. The key issue, therefore, is whether the formal equality of states automatically yields an equal ability to help shape customary law. This question is especially pressing because the international legal order does not function as an information vacuum: the conduct of states that have extensive diplomatic networks, military capabilities, economic leverage, and institutional visibility may be more apparent and more often relied upon in international legal discussions than that of smaller or less-resourced states. Recent scholarship on sovereign equality and customary international law underscores the need to assess whether the formally equal capacity of states to participate in international lawmaking aligns with their actual capacity to influence the development and interpretation of legal norms (Birath, 2024).

The persistent objector doctrine likewise highlights the challenge of reconciling formal consent with substantive capacity. In principle, the doctrine maintains the voluntarist basis of customary international law by permitting a state that consistently and clearly objects throughout the formation of a developing customary norm to avoid being bound by it. Contemporary analysis nonetheless acknowledges that the doctrine demands a persistent, timely, and unambiguous objection, and that its real-world application is shaped by the conditions under which states articulate and uphold their objections (Derler, 2026). From a critical standpoint, this requirement prompts the question of whether all states share an equivalent practical capacity to monitor emerging norms, formulate objections, maintain diplomatic resistance, and ensure that those objections remain visible across the entire norm-formation process. This clarifies the earlier concern regarding smaller or less-resourced states. Rather than claiming categorically that such states cannot sustain an effective objection, the critical question is whether the institutional and material burdens of persistent objection are distributed equally across states. Taken together, this reveals a possible divide between the formal availability of the persistent objector mechanism to every sovereign state and the unequal practical ability of states to render that mechanism effective.

Taken together, these conditions reveal a wider divergence between the normative basis of

sovereign equality and its present-day operation. The principle affirms equal juridical standing, yet the international system also includes differentiated institutional powers, unequal material resources, and geopolitical arrangements embedded in historical development. TWAIL is especially relevant here because it highlights the historical link between international law and the unequal allocation of political and economic power, rather than treating sovereign equality as an abstract rule disconnected from how it has evolved over time. Bhardwaj and Mehrotra's analysis is particularly important because it locates sovereign equality at the intersection of formal legal status and the uneven distribution of resources and power, while identifying the concentration of power within the international legal, political, and economic order as a key obstacle to the effective exercise of sovereignty by less powerful states (Bhardwaj & Mehrotra, 2022).

In this framing, the consent model is not only a technical rule of treaty law, but a constitutional principle of the international order that gives concrete substance to the equality of states by ensuring that obligations stem from voluntary engagement rather than from external coercion (Kristianto et al., 2025). As Okeke maintains, the principle of sovereign equality functions in international law not merely as a rule of formal equivalence, but as a safeguard against the seizure of state authority by more powerful actors within the international system (Okeke,

2018). The practical importance of this principle is especially clear in multilateral treaty-making, where the consent of each participating state is required individually and where withdrawal mechanisms protect the continuing character of participation as a voluntary decision (Latifiani et al., 2022).

Nevertheless, sovereign equality creates a basic tension when it is assessed in light of the material and institutional organization of contemporary international law. As a normative rule, sovereign equality puts states on an equal legal footing, regardless of differences in territory, population, economic resources, military capacity, or political influence. The contemporary international system, however, does not allocate the ability to exercise sovereign power in a comparable way. States take part in international institutions and in processes of lawmaking from markedly different political, economic, and institutional standpoints, so that formal equality does not automatically become an equal capacity to shape the development or the implementation of international law. Bhardwaj and Mehrotra (2022) characterize this tension as a durable difficulty in the functioning of sovereign equality, especially because the formal legal equality of states operates alongside substantial imbalances in material resources and political power. This gives rise to the distinction between legal equality and effective equality, which is central to a critical understanding of sovereignty: while international law treats states as formally equal subjects, their

ability to exercise sovereignty through international institutions and lawmaking processes is still constrained by structural inequalities.

The United Nations' institutional structure offers a notably clear illustration of this tension. The Charter enshrines sovereign equality as a basic principle, yet under Article 27 of the Charter the Security Council provides five permanent members with a veto over substantive decisions. This unequal allocation of authority does not necessarily amount to a legal contradiction, since the voting imbalance itself follows from the constituent instrument that the states accepted. Still, it shows that sovereign equality does not imply identical institutional power. Accordingly, a state may share the same formal sovereign standing as every other UN Member while lacking an equivalent ability to block or advance collective decisions within one of the core institutions of the international legal order. From a critical standpoint, this contrast prompts a broader inquiry into whether sovereign equality should be understood solely as equality of legal status or also as equality in the effective capacity to participate in exercising international authority. TWAIL scholarship is especially pertinent here because it places contemporary international institutions within historical arrangements of colonialism and unequal distributions of political and economic power, rather than treating their institutional design as purely neutral expressions of sovereign consent. For instance, Chimni shows

how international jurisdiction can be analyzed through the historical interconnections among international law, capitalism, and imperialism, underscoring the role of power structures in explaining how formally universal legal doctrines operate (Chimni, 2022).

The disparity between formal equality and substantive capacity is likewise visible in international lawmaking. While states participate on paper as sovereign equals in treaty negotiations, their ability to craft negotiating positions, mobilize technical expertise, maintain diplomatic engagement, and absorb the economic effects of particular legal commitments can vary considerably. Contemporary climate negotiations bring this issue into especially sharp focus. From a TWAIL perspective, Mohanty argues that the development of international climate law has been shaped by enduring North–South inequalities, particularly regarding climate finance and loss and damage (Mohanty, 2025). The point of this example is not that treaty obligations should automatically be treated as invalid simply because negotiations take place among unequal states. Rather, it demonstrates that formal consent can be generated under conditions of structural inequality. A treaty may therefore satisfy the formal requirement of sovereign consent while leaving open the critical question of whether the parties had comparable practical capacities to shape the substance and consequences of the resulting obligations. This distinction matters for the present study because it redirects attention

from whether states formally consent to international obligations to the conditions under which that consent is exercised.

A similar structural tension can be seen in the relationship between sovereignty and international adjudication. The consensual basis for the jurisdiction of the International Court of Justice offers an important safeguard for sovereign autonomy, since states are generally not subject to the Court's contentious jurisdiction without a recognized jurisdictional foundation. Still, formal jurisdictional consent does not place states in identical material circumstances once judicial proceedings begin. Variations in legal expertise, diplomatic resources, financial capacity, and the broader political ramifications of litigation may shape the extent to which states can participate in international adjudication. The case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*) illustrates this historical point, because the dispute involved states with strikingly different political and material capabilities operating within the same formal judicial structure. The case therefore highlights the difference between equality before an international tribunal as a matter of legal status and equality in the practical ability to engage in international adjudication. This distinction does not undermine the principle of sovereign equality; rather, it shows the limits of treating formal equality as a complete account of how sovereignty functions in practice.

These tensions expose a conceptual gap in the prevailing understanding of sovereign equality. If sovereign equality is taken to mean only equal juridical standing, the principle remains formally preserved despite significant differences in political and material power. If, however, equality is understood to require a meaningful capacity to exercise sovereign rights, to participate in international lawmaking, and to shape the development of international norms, then the current international legal order appears more complex. This distinction is the point of departure for this article. Instead of presuming that sovereign equality automatically yields an equal distribution of international legal authority, the analysis considers how formal equality works within institutions and procedures marked by differentiated powers and unequal material capacities. In this respect, the question is not whether international law recognizes sovereign equality, but whether the formal equality guaranteed by international law sufficiently reflects the actual conditions under which states exercise sovereignty and provide consent. A Critical Legal Studies approach, informed by TWAIL, thus treats sovereign equality not as a self-executing account of the international order, but as a normative principle whose practical significance must be assessed in relation to the structural inequalities through which international law is produced and applied.

2. Flexible Consent Mechanisms in Treaty Law

Despite the importance of consent, contemporary international treaty practice has developed a variety of mechanisms that enable states to fine-tune how they accept multilateral obligations with substantial flexibility (Handayani & Hardiyanti, 2025). The Vienna Convention on the Law of Treaties (VCLT) 1969 establishes the primary legal basis for this flexibility by acknowledging multiple modes through which states may express consent to be bound, including signature, ratification, acceptance, approval, and accession under Article 11. In treaty law, consent is therefore not necessarily a single, uniform act; rather, it may emerge through a sequence of legally recognized acts that shape whether, when, and to what extent a state takes on treaty obligations (Natalis, 2026). This flexibility is especially consequential in multilateral agreements, where states with differing economic structures, domestic preferences, and political interests must align divergent expectations within a shared legal regime. Elsig and Milewicz show that states often handle such differences through asymmetric compromises, in which international agreements accommodate varying preferences by allocating commitments, concessions, or obligations unevenly across participating states. Their approach is particularly pertinent to the current study because it indicates that international treaty-making does not necessarily demand that states accept identical bargains; instead, treaty design can promote agreement by allowing states to accommodate different

distributions of costs and benefits within the same institutional framework (Elsig & Milewicz, 2017; Kamalludin et al., 2025).

The idea of asymmetric compromise is crucial for explaining why consent in treaty law should not be understood as a simple binary matter. If states had to agree to identical duties under identical conditions, meaningful differences in national interests and domestic constraints could block agreement from being reached at all. Flexible treaty drafting addresses this difficulty by allowing states to commit to a shared legal framework while still maintaining differentiated obligations. This flexibility may include reservations, optional clauses, differentiated duties, transitional provisions, exemptions, or stand-alone protocols (Natalis & Purwanti, 2025). Elsig and Milewicz show that asymmetric arrangements can promote international cooperation precisely because they help states handle trade-offs rather than demanding full convergence of preferences. Accordingly, consent works not only through the choice to accept or refuse an international agreement, but also through the process of negotiating the terms that make acceptance politically and legally feasible (Ayu et al., 2026; Elsig & Milewicz, 2017).

Reservations represent one of the clearest legal expressions of this flexibility. Article 2(1)(d) of the VCLT defines a reservation as a unilateral declaration made by a state when signing, ratifying, accepting, approving, or acceding to a treaty, by which that state aims to exclude or alter

the legal effect of specific provisions in their application to the state. Articles 19–23 then set out the legal regime governing the formulation, acceptance, objection, and withdrawal of reservations. Through this arrangement, a state can join a multilateral treaty while refusing to accept particular legal results that would otherwise follow from the treaty. Accordingly, the reservation regime reconciles two potentially competing goals of multilateral treaty-making: promoting wide participation while enabling states to safeguard selected domains of sovereign discretion. Recent empirical research on reservations to human rights treaties describes reservations as a significant device of treaty flexibility, because they permit states to tailor particular obligations that might otherwise render ratification politically or domestically problematic; yet this same flexibility can also diminish the uniformity of treaty commitments (McKibben & Western, 2020). The reservation mechanism thus shows that treaty consent may be qualified rather than absolute: acceptance of the treaty in its entirety can coexist with the modification or exclusion of particular obligations (Shabrina & Putrijanti, 2022).

The legal importance of reservations further indicates that flexibility does not amount to unlimited sovereign discretion. Article 19 of the VCLT places substantive constraints on how reservations may be formulated, including the prohibition on reservations that conflict with the treaty's object and purpose. The legal effect of a

reservation is moreover shaped by the responses of other states, including acceptance and objection, resulting in a relational configuration in which the breadth of one state's consent can influence its treaty relationships with other parties. The work of the International Law Commission on reservations likewise reflects the effort to harmonize states' sovereign freedom with the integrity of multilateral treaty systems. Contemporary scholarship has therefore highlighted that reservations should be understood not merely as unilateral exclusions, but as legally structured instruments through which states condition the scope of their treaty commitments (d'Aspremont, 2024). This view aligns with the broader argument advanced by Elsig and Milewicz: while flexibility enables states to accommodate divergent interests, that flexibility is embedded within institutional rules that determine the legal consequences of the compromises reached (Elsig & Milewicz, 2017).

Another aspect of flexible consent involves the difference between signature and ratification. Article 12 of the VCLT treats signature as one potential method of expressing consent to be bound when the treaty so provides or when the negotiating States have agreed to confer that effect by signature, while Article 14 treats ratification, acceptance, and approval as separate ways of expressing consent where particular procedures are required. As a result, taking part in treaty-making does not automatically equate to giving final consent to be legally bound. A State

may sign a treaty while postponing the decision to ratify it to be made through the constitutionally mandated procedures. At the same time, Article 18 of the VCLT sets out a limited duty for a State that has signed a treaty, during the period before a decision on ratification is reached, to refrain from acts that would undermine the treaty's object and purpose. Accordingly, the legal status of a signatory is neither the same as that of a non-participant nor the same as that of a State that is fully bound. Treaty law therefore acknowledges an intermediate position in which a State's involvement in a treaty triggers particular legal effects without creating the full range of obligations that apply to a party.

Australia's experience with the Kyoto Protocol shows how this temporal dimension of consent can work in practice (Parliament of Australia, 2004). Although Australia participated in the negotiation and signed the instrument, it initially refused to ratify the Kyoto Protocol, only later ratifying it in December 2007. Contemporary analysis of the Australian and Canadian cases indicates that ratification choices were shaped not only by international negotiations but also by domestic political and economic considerations, thereby highlighting how international bargaining interacts with domestic constraints in the exercise of treaty consent (Barnsley, 2006). This case also suggests that involvement in treaty-making does not necessarily determine a state's ultimate stance regarding legal commitment. Australia's later ratification occurred after a change of

government and a reassessment of its climate policy, showing that treaty consent can be influenced by shifts in domestic political conditions as well as by international factors. More recent empirical research treats Australia's 2007 ratification as an important turning point in its climate policy and investigates the resulting economic consequences (Nguyen et al., 2025). The example, therefore, indicates that consent can be postponed and subsequently revisited, instead of being fixed at the time of negotiation or signature.

The United States' relationship with the Arms Trade Treaty provides a contrasting example of the distinction between participation and binding consent. The United States signed the Treaty in 2013 but did not ratify it and therefore did not become a party to the instrument. Its position demonstrates that signature and ratification represent legally distinct stages of treaty participation, allowing a state to engage with a multilateral regime without ultimately assuming the full range of treaty obligations (Bromund, 2018). Nevertheless, signature is not legally irrelevant because Article 18 of the VCLT establishes a limited obligation concerning conduct pending a state's decision on ratification. The example consequently reinforces the multidimensional character of treaty consent: a state may negotiate, sign, consider ratification, and ultimately decline to become bound, with each stage producing distinct legal consequences.

From a Critical Legal Studies perspective, however, the flexibility described above prompts an additional question about the relationship between formal choice and substantive capability. Elsig and Milewicz's (2017) notion of asymmetric compromise is especially helpful because it shows that distinct treaty obligations arise exactly out of differences in states' preferences and bargaining stances. The presence of an asymmetric bargain does not, on its own, prove coercion or inequality, since differentiated commitments can amount to rational, mutually accepted solutions to conflicting interests. Even so, a critical inquiry asks whether all states have similarly comparable capacity to influence the terms of these compromises. Formally voluntary negotiations can take place between states that differ markedly in economic resources, technical expertise, diplomatic networks, or geopolitical leverage. As a result, the agreement may meet the formal conditions of consent while still capturing bargaining conditions that are not substantively equivalent. This does not nullify the legal consent expressed by the parties, but it clarifies why formal consent should not automatically be treated as proof of substantively equal participation in treaty-making.

This distinction is especially pertinent to contemporary international treaty regimes in which the costs and benefits of participation are distributed unevenly. Studies of treaty reservations show that states use flexibility to align international commitments with domestic

preferences; however, they also suggest that flexibility can create a trade-off between broader participation and the substantive uniformity of treaty obligations (McKibben & Western, 2020). From a CLS perspective, this trade-off matters because enlarging formal opportunities to qualify consent does not necessarily resolve structural inequalities among states. A strong state may have greater ability to negotiate an exception, maintain a reservation, or refuse ratification while avoiding significant diplomatic or economic costs. In contrast, a state with fewer resources may have the same legal options in principle but incur higher practical costs when using them. The central question, therefore, is not only whether international law provides flexible consent mechanisms on an equally accessible basis, but whether states have equal practical capacity to translate those formal choices into outcomes that match their interests.

Flexible consent mechanisms thus expose a central paradox within treaty voluntarism. On the one hand, they strengthen sovereignty by allowing states to set the scope, timing, and conditions of their international commitments. On the other hand, the requirement for asymmetric compromises indicates that states approach treaty negotiations with different preferences and bargaining positions, while the practical ability to obtain favorable terms may hinge on resources and geopolitical influence (Elsig & Milewicz, 2017). Consent is therefore not simply a point of acceptance but a negotiated process through

which states define the terms of their legal commitment. The legal system acknowledges and governs this process through reservations, differentiated obligations, signature and ratification procedures, and other modes of flexible participation. Even so, the formal equality of these mechanisms does not necessarily remove inequalities in states' ability to employ them effectively. This tension is the key connection between flexible consent and sovereign equality: while treaty law treats states as formally autonomous actors able to determine their own commitments, the circumstances under which these decisions are negotiated may still be structurally unequal.

Accordingly, flexible consent mechanisms show that the voluntarist foundation of treaty law is more complex than a straightforward separation between consent and non-consent. Treaty involvement may be shaped through asymmetric compromises, refined through reservations, distinguished via optional or supplementary arrangements, postponed through ratification procedures, or prevented through non-ratification. By means of these mechanisms, multilateral treaty regimes can accommodate diverging state interests and thereby promote wider participation, but they also prompt questions about how bargaining power is distributed among formally equal sovereign states. The importance of treaty consent, therefore, rests not only in the fact that states have a legal right to decide whether to assume obligations, but also in the circumstances

under which that decision is generated and carried out. This sets the stage for examining the next aspect of the consent paradigm: whether the same principle of sovereign choice applies with equal force when states face the jurisdictional authority of international courts.

The Myanmar reservation to the Genocide Convention and the flexibility provisions of the Joint Comprehensive Plan of Action further substantiate the claim that state consent in treaty law operates along a spectrum of engagement rather than as a simple binary of acceptance and rejection (Landler, 2018). Likewise, the United Kingdom's use of its right to withdraw from the European Union under Article 50 of the Treaty on European Union illustrates that the continuing voluntariness of treaty engagement, grounded in the right to withdraw, is a functional element of the consent model (Landler, 2018). Taken together, these examples support the proposition that the formal structure of international treaty law is organized around the principle of consent, while also demonstrating that consent functions with enough flexibility to accommodate the diversity of state interests and policy preferences.

3. Consent in International Judicial Proceedings

The consent-based architecture of international law extends with particular force to the domain of international adjudication. The jurisdiction of the International Court of Justice is founded exclusively upon the consent of the states parties to any given proceeding, as

expressly provided by Article 36 of the Statute of the International Court of Justice (1945). Absent such consent, whether expressed through the optional clause declaration, a compromissory clause in a treaty, or a special agreement, the Court has no authority to adjudicate a dispute between states.

This principle was affirmed in stark terms in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda)* (2006), in which the Court declined jurisdiction over several of the Congo's claims on the ground that Rwanda had not consented to the Court's jurisdiction under the relevant treaty instruments. The Court's approach in that case underscores the non-derogable character of consent as a precondition for judicial authority in international law: no matter how grave the alleged violation of international law, the Court cannot exercise jurisdiction without the respondent state's consent.

In contrast, the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*) (2020) proceedings demonstrate how a pre-existing compromissory clause in a multilateral convention can establish jurisdiction independently of any specific or contemporaneous expression of consent by the respondent state. The Genocide Convention's compromissory clause, to which Myanmar was a party, provided an independent jurisdictional basis that enabled The Gambia to initiate legal action.

This example shows that, although consent is the ultimate jurisdictional basis, it can be expressed in a more general and prospective manner rather than being specific and contemporaneous.

4. Non-Consensual Customary Norms and the Problem of Equality

The consent model faces its greatest obstacle in the sphere of customary international law, where the creation and enforcement of binding norms do not rely on any explicit act of state acceptance. Customary international law is generally taken to emerge from the combination of widespread state practice and the related *opinio juris*, meaning the belief that the conduct is legally required, without needing the separate consent of every state to the specific norm at issue (Arvante et al., 2025). This feature of customary law generates a basic tension with the voluntarist assumption, because a state can end up bound by a norm that solidified through the practice of other states, or by one that came into being before its own accession to the international community as an autonomous legal actor (Mayaka et al., 2024b).

Tassinis (2020) examines this tension by asking whether customary international law can properly impose duties on states that have not individually consented to the relevant norm. From a consent-based standpoint, the binding character of customary international law raises a theoretical challenge, since general state practice and *opinio juris* may yield a rule that governs a state even though that particular state has not given an

express act of acceptance. Tassinis (2020) maintains that an explanation of customary international law rooted in individual state consent is both theoretically coherent and normatively preferable to approaches that permit customary norms to bind states without their acquiescence. The persistent objector doctrine offers only a partial doctrinal response to this difficulty. As recognized by the International Court of Justice in the Fisheries Case (United Kingdom v. Norway) (1951) and later discussed by Strydom et al. (2020), the doctrine allows a state to avoid the binding impact of an emerging customary rule when it has clearly, consistently, and persistently objected to the rule throughout its formation. Accordingly, the doctrine introduces a consent-related element into how customary international law operates by preserving the chance for an individual state to resist the application of an emerging customary norm. Even so, this concession remains limited, because the doctrine does not grant states a general right to reject customary rules once they have crystallized; rather, it requires timely and sustained objection during the norm's formative period. As a result, the persistent objector doctrine alleviates, but does not resolve, the tension between the voluntarist premise of international law and the potentially nonconsensual nature of customary international law.

However, the persistent objector doctrine has been criticized on the grounds that it is, in practice, difficult to apply and prone to

contradictory interpretations, especially because its use turns on whether a state's objection was sufficiently clear, consistent, and timely when the customary rule was being formed (Mogollón, 2022; Hasibuan & Tahe, 2026). This challenge is intensified by uncertainty regarding the legal implications of silence, the exact moment when a customary rule begins to take shape, and the difference between objecting to an emerging rule and disputing the later interpretation or application of an established rule (Yeini, 2022). These interpretive difficulties are particularly significant for contemporary disputes in which states argue over the existence, content, or application of customary international law while not necessarily meeting the doctrinal conditions required for persistent objection (Wood & Sender, 2024). The South China Sea dispute illustrates this wider problem: China's position regarding the Nine Dash Line has relied on contested claims concerning historic rights and maritime entitlements, which have been evaluated against the customary rules embodied in the United Nations Convention on the Law of the Sea (Hamid, 2022). The 2016 South China Sea Arbitration also underscores the difficulty of separating a state's disagreement with an asserted legal rule from a legally effective objection to the formation of that rule, since the tribunal rejected China's asserted historic rights in areas beyond the maritime entitlements permitted under the applicable law of the sea framework. This example should not, however, be taken to

mean that China does or does not satisfy the requirements for being a persistent objector, because the doctrine's legal conditions concern persistent objection during the formation of a customary rule rather than a unilateral rejection of an already established rule (Wood & Sender, 2024; Saparwadi et al., 2026). Instead, the dispute highlights the broader interpretive issue that underlies the doctrine: the legal consequences of state opposition depend on how international courts and tribunals characterize the nature, timing, and subject matter of that opposition (Mogollón, 2022).

Viewed through the lens of sovereign equality, this issue becomes more consequential because, although the doctrine is formally open to every state, it also demands significant capacity to recognize emerging norms, craft a legally consistent objection, express that objection consistently, and uphold it during the entire phase of customary norm formation (Mogollón, 2022). The International Law Commission's articulation of the persistent objector rule likewise presupposes that the objection be raised while the rule is still being formed and then maintained afterwards, and it also bars a state from relying on a later objection against a customary rule that has already solidified. Accordingly, the formal availability of this mechanism to all states does not automatically imply that all states can invoke it with comparable practical effectiveness, especially in situations where sustained diplomatic engagement and legal expertise are

required to establish and preserve an objection (Mogollón, 2022). This gives rise to a pivotal tension between the formal equality of states and the doctrine's real-world operation: while the doctrine may, in principle, safeguard each state's autonomy, its practical effectiveness ultimately hinges on the state's ability to meet exacting evidentiary and timing requirements (Yeini, 2022). The core difficulty, therefore, is not merely whether the persistent objector doctrine is biased, but whether a doctrine that is formally grounded in sovereign equality can nevertheless yield unequal practical outcomes when states have different capacities to participate in the processes by which customary international law develops (Mogollón, 2022).

This concern indicates that the persistent objector doctrine calls for enhanced procedural clarity to operate consistently with the consent-based foundation of customary international law (Mogollón, 2022). One possible way forward is to specify the evidentiary requirements for determining when an objection has been raised, what level of consistency is sufficient, and how objections should be evaluated as state practice develops over time (Yeini, 2022). Increased transparency regarding the relevant period for norm formation could likewise lessen uncertainty about whether a state's objection took place before or after the customary rule had solidified (Wood & Sender, 2024). Clarifying these matters would not convert the persistent objector doctrine into an unrestricted right to unilateral exemption;

rather, it would make its application more foreseeable and reduce the risk that the legal consequences of an objection hinge excessively on later judicial characterizations (Mogollón, 2022). In this sense, bolstering the doctrine's procedural clarity would help reconcile its voluntarist justification with the collective nature of customary international law, while preserving the formal principle that sovereign states have equal legal status (Yeini, 2022).

Strydom and colleagues note that the practical application of the persistent objector doctrine may advantage states with stronger institutional and diplomatic capacity. This is because sustaining an effective objection calls for ongoing engagement with international legal processes and the ability to communicate a state's position consistently over time (Strydom et al., 2020). The doctrine stipulates that an objection must be stated clearly and kept in place throughout the process by which the customary rule is formed, which in turn imposes a continuing procedural obligation on the objecting state. This condition is especially important since customary international law emerges from widely dispersed state practice and legal argumentation; consequently, states must be able to detect developing normative trends and set out their stance before a rule becomes sufficiently established (Wood & Sender, 2024). In light of this, states with broad diplomatic reach, specialized legal knowledge, and higher levels of involvement in international institutions may be

better positioned to track developments, craft objections, and keep their positions visible within the international legal process (Strydom et al., 2020). By contrast, states that have more limited diplomatic and legal resources may encounter greater practical obstacles to maintaining the continuous, sufficiently visible objection demanded by the doctrine, even though they retain the same formal legal right to object as other sovereign states (Mogollón, 2022). The issue, therefore, is not the formal availability of the doctrine, which applies to sovereign states alike, but the unequal conditions under which states are expected to exercise that right (Strydom et al., 2020). From the perspective of Critical Legal Studies, this contrast highlights a tension between the appearance of procedural neutrality and the structural circumstances that shape who can use the procedure effectively: even a formally equal rule can yield unequal outcomes where meeting its requirements depends on resources unevenly distributed across states (Mogollón, 2022). The persistent objector doctrine thus points to a wider difficulty within the voluntarist understanding of customary international law. Having formal power to withhold consent does not necessarily provide equal practical ability to ensure that the withholding becomes legally effective (Strydom et al., 2020). Stein further examines the doctrine's theoretical basis by asking whether a unilateral objection can truly prevent the operation of a norm that has already gained broad international acceptance.

These critiques show that, as applied in customary international law, the consent model is not equally accessible to all states, thereby weakening the assertion that the voluntarist framework reliably safeguards sovereign equality (Stein, 2017).

C. CONCLUSION

This article critically evaluates the claim that state consent provides the primary basis of international law across three main areas: treaty law, international adjudication, and customary international law. The analysis shows that consent operates as a core organizing principle of the international legal order, expressed in the principle of sovereign equality in Article 2(1) of the United Nations Charter, the *pacta tertiis* rule in treaty law, and the International Court of Justice's consensual jurisdictional framework. At the same time, it demonstrates that the legal importance of consent differs depending on the institutional setting in which it functions: treaty law enables states to limit and differentiate their obligations; international adjudication relies on the particular types of jurisdictional consent that states accept; and customary international law can produce generally applicable norms without an explicit act of consent by every individual state.

Nonetheless, the analysis above shows that the consent model functions under structural constraints that restrict how far formal consent can serve as an equal and universally effective expression of sovereign autonomy. In treaty law,

reservations, optional participation, differentiated commitments, and withdrawal mechanisms allow states to adjust the scope and timing of their obligations, yet the negotiation of these arrangements may take place between states with different political, economic, diplomatic, and institutional capacities. Accordingly, the analysis of asymmetric compromises indicates that the formal availability of flexible consent mechanisms does not necessarily entail an equal practical ability to influence the terms of treaty commitments. In customary international law, a similar tension arises through the creation of customary rules without the individual consent of every state and through the persistent objector doctrine, whose demands for timely, clear, and continuous objection may be harder for states with limited capacity to participate consistently in international legal processes. The discussion of the South China Sea dispute likewise highlights the challenge of assessing the legal importance of state opposition when the existence, content, and application of customary rules remain contested. Taken together, these examples show that the structural constraints on consent do not stem from any lack of formal legal autonomy, but from the fact that the exercise of that autonomy and its legal effectiveness depend on institutional processes marked by differing forms of state capacity.

Therefore, the central conclusion of this article is that, although state consent is indispensable as a legitimating principle and as a

structural feature of international law, it does not function as an absolute or unqualified assurance of sovereign autonomy. The consent model is mediated by relations of power, because the ability of states to negotiate treaty commitments, maintain legal objections, and take part in international lawmaking is not necessarily equivalent, even though their legal status is formally equal. It is also mediated by institutional dynamics, since international legal institutions determine the procedures by which consent is articulated, limited, acknowledged, or granted legal effect. Finally, it is mediated by the accumulated weight of state practice, because customary international law derives its normative force from established patterns of state practice and *opinio juris*, which can generate broadly applicable rules that extend beyond the express consent of any individual state. Together, these factors reveal a continuing tension between the formal premise of sovereign equality and the distinct conditions under which states exercise and withhold consent. A complete account of the foundations of international law must therefore treat consent not as an isolated doctrinal principle, but as one component within a wider normative framework in which the formal equality of legal status coexists with differences in states' practical capacity to affect, oppose, and shape international legal outcomes.

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