Symposium "Beyond state consent to international jurisdiction – from courts to law" foreword

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BRILL | NIJHOFF

THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 22 (2023) 459–461

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Symposium: Beyond State Consent to International Jurisdiction – From Courts to Law

Foreword

The well-functioning of international law depends, at least in part, on the operation of adjudicatory mechanisms to settle disputes. These, in turn, depend on whether States are willing to grant to an "external force", such as an international court or tribunal, the power to judge whether they have complied with their obligations. In legal terms, the question is one of "State consent to international jurisdiction". After the increase in number and expansion of international adjudicatory mechanisms in recent decades, States now seem to be restricting the scope of their consent (e.g., investment arbitration) or even withdrawing it altogether (e.g., from the International Criminal Court and the European Court of Human Rights). States often justify such restrictions by allegations that these courts are unduly limiting State sovereignty.

The *State Consent to International Jurisdiction* (*SCIJ*) project (funded by the Research Council of Norway) was conducted from 2018 to 2022 by a team of researchers at the PluriCourts Centre (Oslo University), including Prof. Dr. Freya Baetens (principal investigator), Dr. Emma Brandon and Dr. Nicola Strain. The fundamental tension examined in this project was that, on the one hand, States presumably wish to maintain "manoeuvring space" to avoid being sued before an international court, while on the other hand, they presumably wish to restrict the behaviour of other States by ensuring that international rules can be enforced through an adjudicatory system. As such, the *SCIJ* project provided an up-to-date analysis of how international law accommodates this fundamental tension by regulating when, how and with which legal consequences States confer, modify or terminate their consent to the jurisdiction of an international court or tribunal. In turn, this enabled the identification of

 | DOI:10.1163/15718034-12341502

systematic policy patterns and strategies to improve State accountability at the international level.

For its closing conference, the team wished to transcend the scope of the project, in order to look *Beyond State Consent to International Jurisdiction – From Courts to Law*. This conference took place on 29 and 30 September 2022, and was organised in cooperation with the American Society of International Law (ASIL) Interest Group on International Courts and Tribunals. The aim was to investigate how the research findings of the *SCIJ* project could be extrapolated in order to scrutinise State consent to international law more broadly. In this context, the conference considered questions relating to jurisdiction, as opposed to applicable law; the interrelationship between jurisdiction, applicable law and interpreting consent; cooperation and State consent to jurisdiction and international law; unique aspects of the specific courts that impact States' willingness to consent not only to jurisdiction but also to relevant law; and (re)designing consent and international law reform.

Two papers were selected for publication in a mini-symposium. The first paper was written by Irene Miano and titled "Jurisdiction in the Practice of The International Court of Justice: A Tool to Trespass on or to Protect States' Consent?". Evidently, the jurisdiction of the International Court of Justice (ICJ) is based on consent. However, the ICJ has affirmed that it possesses an inherent jurisdiction, a set of powers not expressly conferred to it by its constitutive or regulatory documents but, nevertheless, available due to its intrinsic nature. Born in the context of domestic adjudication, the concept of inherent jurisdiction can raise suspicion when applied at the international level. Its contours and definition being unclear, inherent jurisdiction can be easily employed to circumnavigate State consent, giving too much flexibility to the ICJ. Departing from these premises, Miano's contribution analyses how the ICJ has framed and used the concept of "inherent jurisdiction" in its case law. Does the ICJ use the concept of inherent jurisdiction to trespass on States' consent? Or, looking closer, is the ICJ, by emphasizing the limits of inherent jurisdiction, using it to protect States' consent?

The second selected paper was written by Veronica Botticelli and titled "'Between a (Procedural) Rock and a (Substantive) Hard Place'? Exploring Strategies and Current Trends of States' Acceptance and Compliance with Human Rights Treaty Obligations". She examines how international law has been characterised by two interconnected and yet opposite trends. On the one hand, from World War II onwards, States have demonstrated an increasing commitment to human rights by concluding several multilateral treaties. Along with substantive provisions, these conventions have also established courts and quasi-judicial bodies charged with monitoring compliance by

States Parties. Given the impact of these supervising mechanisms, States Parties have often refrained from expressing their consent to the treaty-based petition systems. On the other hand, far from benefiting from a special legal regime, human rights treaties are governed by the general principles of the law of treaties. As a result, States Parties can enter reservations, understandings and declarations (RUDS) to avoid certain treaty obligations. To this purpose, using an approach based on the statistical data available, Botticelli analyses the two main "strategies" to which States Parties can resort in order to partially circumvent their obligations, assessing their possible impact *vis-à-vis* States' compliance rates with human rights provisions.

A final word of thanks is due to the Research Council of Norway, which generously funded the *SCIJ* project for four years, as well as to the PluriCourts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, at Oslo University, which formed a welcoming and thought-provoking home.

Freya Baetens
Oxford, September 2023