

FROM CONTRACT TO STATUS:  
A COMMENT ON NICO KRISCH'S THE DECAY OF CONSENT

*Tom Ginsburg\**

In the mid-nineteenth century, the great anthropologist Henry Sumner Maine observed that legal systems tended to move over time from “status to contract” by which he meant that rights and duties were increasingly determined by consent rather than social or demographic factors. Maine’s thesis might have been applied to international law during the long era of high positivism, in which consent became the dominant principle after the Peace of Westphalia. Formal equality of states meant that formal treaties—“contract”—were the main mode of interaction. Even in the post-World War II era, consent played a major role, in part because the Security Council—the chief vehicle for legal exercise of “status”—was anemic. International organizations served as vehicles for the development of multilateral treaties of increasing scope and depth. Status and power were hidden rather than acknowledged elements of the system.

In “The Decay of Consent,” Krisch uses the language of public goods to help us understand the subtle shift away from consent in international law in recent years. As he puts it, treaty law is “increasingly sidelined through recourse to institutional lawmaking, informal forums, and unilateral action.” Krisch begins his piece by noting the pressures on the system in recent years, in which consent is giving way to output-based legitimacy, and is being challenged by the apparent inability of traditional structures to grapple with our most pressing international problems. Since the standard solution to public goods problems—a single government—is untenable at the international level, we observe increasing resort to unilateral action, to institutionally produced soft law, and to informality. These modes of interaction may be effective under certain circumstances. The rise of the Security Council as a lawmaker and regulator is another response to the underproduction of public goods.

Unilateral action obviously does not require consent on the part of other states; neither, of course, does coercion by the Security Council. We thus see the shift back to status and power from contract and consent.

By unpacking the different types of public goods into single best effort goods, aggregate efforts goods, and weakest link goods, Krisch gives us a useful normative framework for figuring out when non-consensual approaches are warranted. But he also recognizes that one cannot avoid power in the analysis. Only in the rare instance in which powerful actors identify a problem and work to generate a cooperative response, such as his examples of weakest-link public goods, will we likely observe international action using the new tools.

Krisch’s three case studies help to make the case for his analytic framework. The bad news is most apparent in climate change. I think the problem is even worse than he thinks. While Krisch characterizes climate change as an aggregate efforts public good, the problem of carbon leakage lends it an aspect of a weakest link good. Carbon leakage has bedeviled efforts to negotiate a global solution. The basic problem is that if, say, China and the U.S. were to conclude a comprehensive bilateral treaty to limit climate change, any reduction in carbon emissions in those two countries might simply lead to greater emissions elsewhere, as factories

*\* Tom Ginsburg is Leo Spitz Professor of International Law at the University of Chicago Law School.*

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move to weaker regulatory jurisdictions. If it is a weakest link good, rather than an aggregate efforts good, climate change is an even more intractable problem than we might think. An optimist might hope that unilateral action, as with the inclusion of international flights in the EU emissions-trading scheme, would result in a kind of race to the top. But there are limits to unilateral action in a world of free trade, as states are constrained from exporting their environmental regulations. Our successful resolution of one public goods problem has exacerbated another.

Even as we observe the decline of consent, the shift from contract to status in international law is incomplete. Many institutional lawmakers are exercising power *sub-rosa*, whereas the Security Council is an arena of high power in every sense of the word. Status exists, but power in the new era is more epistemic than coercive. Those actors who can understand and maneuver through the complexities of international norm production will have the greatest impact. What is surely beyond dispute is that the classical structures, unable to cope with our current level of interdependence in the production of public goods, are increasingly irrelevant.