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# REDRAWING THE BOUNDARIES OF CUSTOMARY INTERNATIONAL LAW: A STUDY OF PERSISTENT OBJECTION

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## ABSTRACT

*This study explores how the doctrine of persistent objection functions within the framework of customary international law, offering states a mechanism to dissociate themselves from emerging norms, provided their opposition is consistent and the norm in question does not constitute a peremptory (jus cogens) rule. Structured around four central themes, the paper first examines the conceptual foundations and historical development of the doctrine. It then assesses varying academic perspectives, including both endorsement and critique. The third section outlines the specific legal and procedural conditions that trigger the doctrine's applicability. Lastly, the analysis turns to significant judicial interpretations, with a focus on decisions from the International Court of Justice (ICJ) and findings of the International Law Commission (ILC). The research concludes that persistent objection is broadly accepted in both legal theory and state conduct as a legitimate limitation on the binding force of customary norms. The paper advocates for formal acknowledgment of the doctrine by global institutions such as the United Nations and recommends further scholarly engagement to refine its legal contours and practical implications.*

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**KEYWORDS:** Persistent Objection, Customary International Law, State Practice, Legal Doctrine, ICJ, ILC, Sovereignty.

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## 1. INTRODUCTION

Customary international law is one of the primary sources of public international law, explicitly recognized in Article 38(1)(b) of the Statute of the International Court of Justice (ICJ). As one of the oldest foundations of international legal norms, its authority stems from the consistent and general practice of states, accompanied by the belief that such practice is legally obligatory (*opinio juris*). Once a customary rule becomes established, it is considered binding on all subjects of international law, even on states that did not actively contribute to its formation (Tomuschat, 2021).

At first glance, the binding nature of customary international law might appear absolute, suggesting that no state can opt out of its obligations. However, contemporary developments in both legal theory and state practice have introduced a significant exception to this general rule: the Persistent Objector Rule. This principle allows a state to avoid being bound by an emerging customary norm, so long as it consistently and persistently objects to the rule during its formative stage. If these conditions are met, the rule does not become binding on the objecting state, even after it has crystallized into customary law (Charlesworth & Chinkin, 2022). This mechanism reflects a careful balance between the universal application of customary norms and the sovereign rights of individual states.

Importantly, the persistent objector doctrine reinforces the concept of state sovereignty. It acts as a procedural safeguard, offering states a means to distance themselves from international norms that may conflict with their essential national interests. While the ICJ has addressed this rule in several cases where states invoked it to challenge the applicability of certain customary norms, significant scholarly and judicial debate persists. Much of this debate centers on whether a state's unilateral conduct whether expressed explicitly through objection or implicitly through silence can validly exempt it from otherwise universally binding rules of customary law (Frost & Murray, 2024).

This study seeks to clarify the legal status, conditions of applicability, and broader implications of the Persistent Objector Rule within the framework of international law. Specifically, it examines whether a state's consistent and clear objection can legitimately exempt it from the binding effects of customary international norms, whether such objections can apply to all types of customary rules, and how the International Court of Justice (ICJ) has addressed this principle in its jurisprudence. These questions are central to understanding the tension

between the objective, universal character of custom and the subjective assertion of state will, particularly in evaluating whether the doctrine undermines the coherence and consistency of customary law (Kahraman, Kalyanpur, & Newman, 2020).

To address these issues, the paper employs a descriptive-analytical methodology and is divided into two core sections. Section 2 explores the definition, legal underpinnings, and the specific criteria a state must meet to invoke the Persistent Objector Rule successfully. Section 3 examines the legal effects of the rule in practice, especially how it may exempt certain states from the application of emerging customary norms. This section also analyzes key rulings and interpretations by the ICJ concerning the doctrine (Hadden, 2021).

The significance of this research lies in its attempt to structure and critically assess the evolving legal validity of the doctrine, particularly as it continues to develop within both international legal discourse and state practice. Although the Persistent Objector Rule is not frequently invoked, its theoretical and practical presence raises important questions about the integrity of customary international law and the extent to which states may assert legal autonomy when confronted with emerging global norms (Weill, 2021).

Given the rule's limited formal recognition and visibility in both practice and legal scholarship, this study concludes by urging international legal bodies particularly the United Nations to formally acknowledge the Persistent Objector Rule as a recognized element of customary international law. Furthermore, it calls for greater academic engagement to address ongoing fragmentation in scholarly interpretations and to provide states with a clearer legal framework for safeguarding their interests during the complex process of customary norm formation (Brölmann, Lefeber, & Zieck, 2023).

Before delving into the legal dimensions of persistent objection, it is necessary to revisit the foundational concept of customary international law itself. As one of the primary sources of international legal rules, customary law emerges from the consistent behavior of states accepted as law. Historically, in all human societies where cooperation and shared interests exist, unwritten norms have developed to regulate behavior. These informal practices, shaped by repetition and community acceptance, eventually gain binding legal character this is the essence of customary international law (Shahabuddin, 2021)..

For much of modern legal history, customary international law played a dominant role due to its

flexibility, broad applicability, and its grounding in real-world state behavior, in contrast to treaties, which are confined to signatories. Even today, custom remains vital in many underdeveloped or uncodified areas of international law, such as the law on state responsibility. Thus, understanding the role and limits of the Persistent Objector Rule requires first appreciating the enduring relevance and dynamic nature of custom in the international legal system (Sornarajah, 2021).

### **1.1. Definition and Elements of Customary International Law**

Art. 38(1)(b) of the Statute of the International Court of Justice (ICJ) explicitly identifies custom as a source of international law. It defines it as "evidence of a general practice accepted as law." Customary international law is commonly understood to consist of two essential elements: the material (or objective) element and the psychological (or subjective) element, also acknowledged as *opinio juris*. (Okeke, 2022)

Al-Fatlawi & Hawamdeh assert that the material element refers to the actual practice of states, repeated, consistent, and widespread behavior carried out over time. This practice must be general and conducted by a large number of states. It does not necessarily require a specific time frame, but must reflect a settled and recognized pattern of conduct among the international community. In its jurisprudence, the ICJ has emphasized the prominence of uniformity and consistency in state practice. Notable rulings, such as the 1950 Asylum Case and the 1969 North Sea Continental Shelf Cases, affirmed that even a relatively short duration of state conduct may suffice, provided it is sufficiently intense and widely observed (Malksoo, 2020).

The psychological element, or *opinio juris*, denotes the belief held by states that their conduct is carried out of a sense of legal obligation, rather than mere habit or courtesy. This element is critical in distinguishing binding legal norms from non-binding practices. The ICJ has repeatedly confirmed that the formation of customary international law requires not only consistent state practice but also this accompanying belief in its legal necessity. *Opinio juris* may be inferred from a variety of sources, including diplomatic correspondence, statements by state officials, and even silence in certain contexts, which may suggest tacit acceptance. As legal scholar Hersch Lauterpacht (2010) argued, consistent and uniform behavior among states can be presumed to reflect *opinio juris* unless proven otherwise (Enyew, 2022).

### **1.2. Formation of Customary Rules and the Role of the UN General Assembly**

The United Nations General Assembly, although lacking legislative authority in a formal legal sense, has played a significant role in the development of customary international law. Through its declaratory and normative resolutions, the General Assembly has contributed to shaping and codifying principles that many states eventually accept and follow as legally binding. Notable examples include Resolution 2131 on non-intervention, Resolution 3314 defining acts of aggression, and the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. While these instruments do not carry binding legal force *per se*, they have been instrumental in crystallizing customary norms by expressing and reinforcing widespread state practice coupled with *opinio juris* (Grzybowski, 2024).

Once both elements state practice and *opinio juris* are present, the customary rule becomes legally binding. States may rely on such norms to assert legal positions or to defend against claims raised by others. A breach of customary international law, in many respects, carries the same weight as a violation of treaty obligations: the former reflects a state's implicit consent, while the latter involves explicit consent. Despite this binding nature, international law recognizes certain exceptions most notably, the doctrine of persistent objection. Under this principle, a state that clearly, consistently, and persistently objects to the formation of a customary rule from its inception may exempt itself from its future application. However, the objection must satisfy specific legal conditions to be considered valid and produce the intended legal effect. Importantly, invoking this rule is not a breach of custom; rather, it is a legitimate legal mechanism through which a state may assert its sovereign will in the face of emerging norms (dos Reis & Grzybowski, 2024). Accordingly, this study focuses on the principle of persistent objection in customary international law its definition, conditions, and legal consequences. A detailed legal and analytical exploration of this doctrine will be presented in the first chapter of the study (Åtland, 2021).

## **2. THE NATURE OF THE PERSISTENT OBJECTOR RULE IN CUSTOMARY RULES**

A state may, during a conflict in which it is involved, express its wish to exclude a certain rule from being applied because it does not benefit its interests in the situation. Initially, this claim might

appear implausible or even inappropriate, as states typically cannot selectively enforce or ignore legal rules based on their interests in a specific case. However, this assertion becomes plausible when a state has consistently opposed a rule, which later became a binding customary norm, during its development, as long as certain specific conditions are satisfied. In such scenarios, the state may attempt to free itself from the future enforcement of this customary rule (Mak, 2024).

The validity of this objection should not be interpreted as a way to weaken the principle of obligation within customary international law or to dismiss what the Vienna Convention on the Law of Treaties has established regarding the function of customary international law in the absence of explicit treaty provisions addressing a specific issue. The persistent objector rule does not apply to the majority of well-established customary international norms, particularly the *jus cogens* norms, which are fundamental principles that carry binding force for all states. Instead, this rule has been introduced to handle certain disputed customary norms, rules that have not yet reached full stabilization, or norms that are relevant to a specific group of states, such as regional customs (Teoh, 2023).

The development of the persistent objector rule is also associated with the diminishing influence of customary international law, which has increasingly been eclipsed by the codification and formalization of international legal frameworks. Al-Saadi observes that, "The rise of international treaties and written legal instruments has progressively supplanted the traditional role of customary law." In this context, this study investigates the concept of the persistent objector rule, detailing the conditions necessary for its application and its legal implications. This exploration will be elaborated upon in the first section of this study (Grzybowski & dos Reis, 2024).

## ***2.1. The Concept of the Persistent Objector Rule in Public International Law and Its Emergence and Significance***

The Persistent Objector Rule within customary international law is a fairly recent idea, and legal scholars have engaged in discussions about whether it should be seen as an established principle or merely a procedural guideline used by states. In academic writings, Trawneh noted that: "different terms have been employed to refer to this idea, including the Principle of the Persistent Objector to Customary Rules, Objection to Customary Rules, and Counter-Practice." Different viewpoints exist regarding the historical emergence of this rule,

regardless of its name. Some academics believe that Ian Brownlie introduced it in his 1966 book, *Principles of Public International Law*. Others argue that the principle only became acknowledged as part of customary international law theory during the 1970s or 1980s. In contrast, some scholars dispute the notion of its contemporary origin, claiming that the idea can be traced back to the 18th century. For instance, the Dutch jurist Bynkershoek's 1721 work, *A Study on the Jurisdiction of Ambassadors in Civil and Criminal Cases*, explored whether states could revoke diplomatic immunities and concluded that such immunities could be canceled if the state made a public declaration in advance (Shrikhal, 2021).

Examining the evolution of this principle shows that in the 1960s and 1970s, numerous nations in Asia, Africa, and South America sought freedom from colonial rule and asserted their right to self-determination. Before this era, as noted by Al-Saadi, "the international community consisted of a relatively small and uniform group of states, with dominant nations exercising control over various realms, including the development and politicization of legal norms to benefit their interests." With the assertion of influence by newly independent states, they played a role in the development of customary legal norms, which resulted in a slow diminishing of the prevailing legal practices. This transformation enabled the introduction of new legal ideas, such as the Persistent Objector Rule, within the advancing structure of customary international law (Shahabuddin, 2021).

Moreover, practical factors significantly influenced the development of this rule. In the 20th century, the process of establishing and defining customary international law became more intricate due to the increasing number of states, their varied legal practices, and often conflicting interests. These complexities raised concerns, especially among smaller states, regarding the majority's power in shaping international legal standards. Nevertheless, states generally resort to the Persistent Objector Rule only when a new customary rule poses a direct and serious threat to their national interests. "States are typically hesitant to assume the role of a persistent objector in numerous situations because of the political and diplomatic repercussions involved" (Hoffa, 2021). Therefore, imposing a customary rule on a state that has consistently opposed it would be futile. This would effectively subject the state to a norm it did not agree to during its formation, thereby infringing upon the principles of state consent and sovereignty, which are core tenets of international law.

Regardless of its historical background, the Persistent Objector Rule is fundamentally rooted in a state's clear and ongoing rejection of the development of a customary rule, thus freeing itself from its obligatory influence. Under customary international law, a rule only becomes obligatory when states have not raised objections during any phase of its formation. The action of persistent objection acts as a countermeasure that inhibits the customary rule from applying to the state that objects. This is especially significant when "the rule in question has not yet satisfied the necessary criteria for the establishment of customary international law, which are state practice, uniformity, and widespread acceptance in international practice". Furthermore, a formal definition of the Persistent Objector Rule can be articulated as follows: A clear objection articulated through the unilateral intention of a subject of international law (such as a state or an international organization), indicating its refusal to accept a developing, non-peremptory customary rule because of its effects on the fundamental rights and interests of the objector (Vidas & Freestone, 2022).

Based on the preceding analysis, a preliminary conclusion can be drawn: the Persistent Objector Rule "permits a state to exempt itself from the obligatory nature of a newly forming customary international rule, as long as it fulfills the necessary criteria and shows ongoing, consistent, and clear objection during the rule's development phase". This principle differs from the general norm that once a customary international rule is established, it becomes obligatory for all states. However, an exception is made for states that have consistently voiced their objections to the practice before it solidified into a binding legal norm (Vidas & Freestone, 2022).

The establishment of customary international law does not necessitate a complete agreement among all states; however, a rule that is embraced by the majority does not automatically obligate those states that have consistently opposed it. The continuous and repeated objections of a state guarantee that it remains excluded from the customary rule, not as a means to evade or disregard international responsibilities, but as a valid expression of sovereignty grounded in well-founded and reasoned objections. This rejection may be either temporary, allowing for possible future acceptance, or permanent, contingent on the legal and political factors influencing the objecting state. It is crucial to note that invoking the Persistent Objector Rule does not equate to withdrawing from customary international law or outright rejecting its authority;

instead, it serves as a sophisticated mechanism within the realm of international law that respects state sovereignty while upholding the legitimacy of customary rules.

### **2.1.1. The Rule's Role in the Evolution of International Law**

The importance of the Persistent Objector Rule stems from its evolving connection with the nature of international law. Customary international law is fundamentally flexible, adaptable, and responsive to the changing interests of the global community. States continuously influence the development of international norms by either introducing new practices or discarding outdated ones in favor of contemporary legal frameworks. Legal scholar Stein emphasizes the significance of this principle in modern international law, noting that: "The Persistent Objector Rule will gain practical relevance in modern international law, as there is a growing shift toward mechanisms that allow states to seek clarification regarding the future applicability of international rules before they are required to adhere to them. This viewpoint underscores the need for a gradual and predictable evolution in the formation of customary international norms, ensuring that states are not suddenly bound by rules to which they have never agreed. Therefore, the rule acts as a protection against the imposition of norms that may clash with the essential interests of specific states, reinforcing the principles of state sovereignty and voluntary compliance within the international legal framework.

### **2.1.2. The Role of the Persistent Objector Rule in Shaping Customary International Law**

Understanding the Persistent Objector Rule is crucial for grasping its vital function in the development of customary international law. This rule allows states to opt out of emerging norms while also influencing the progression or stagnation of customary regulations. As a result, when a state presents logical and well-supported objections to a budding customary rule, it may encourage other states involved in general, repetitive practices to strengthen their commitment to recognizing the rule's formation. By doing so, they may enhance their legitimacy by sharing their viewpoints and justifications, thereby fortifying the process of solidifying the customary norm.

On the other hand, persistent objections can yield the contrary effect: if other states support the objecting state, this united resistance may block the establishment of the custom altogether. This phenomenon arises because elements such as the

frequency, intensity, and duration of objections, the significance of the interests at stake, and the subsequent actions of the involved parties are crucial in undermining the rule's validity, potentially to the point that it never fully develops into a binding custom.

This principle represents a third alternative, a compromise, or a safety mechanism within the international legal system often referred to as a "rational choice." By consistently and opposing a developing customary rule, a state protects its essential interests, which could otherwise be jeopardized if the rule were enforced upon it. Simultaneously, the dissenting state avoids being seen as a violator of established international law, as its rejection is founded on a recognized and valid legal process. Furthermore, this rule reduces the likelihood of contravening international norms that might unjustly benefit certain nations while maintaining the objecting state's standing in the global community. By utilizing this rule, a state can legitimately withdraw from an unwelcome customary norm without infringing upon the core tenets of international law, thereby achieving a balance between adhering to legal obligations and safeguarding national interests.

Although it holds significant practical relevance, the Persistent Objector Rule has faced critiques in modern legal scholarship. A primary concern is that it enables states to withdraw from widely accepted customary regulations, which diminishes the universality of international customs. This ultimately diminishes the principle of consistency in customary international law and complicates the identification of state obligations, making it challenging to establish clear and universally applicable legal standards. Nevertheless, the rule continues to be an essential element of international law, balancing state sovereignty with the evolving nature of customary legal progress.

### **2.1.3. Criticism of the Persistent Objector Rule**

Although the Persistent Objector Rule holds practical importance, it has encountered significant criticism from numerous legal scholars. A primary objection is rooted in the dismissal of the consensualist theory of customary international law. Detractors contend that customary norms gain their obligatory nature not solely from state consent, but from an objective necessity acknowledged by the international community. This viewpoint highlights that international customs arise not through voluntary endorsement but as a result of a collective legal consciousness that recognizes the need for

compliance.

From this perspective, customary law is obligatory for all states, regardless of their participation in its creation or their explicit agreement. It is regarded as a manifestation of legal necessity, justice, and international unity, necessitating widespread compliance. This principle was reinforced by the International Court of Justice (ICJ) in its 1971 Advisory Opinion, which emphasized the objectively binding nature of customary norms, even when permanent members of the Security Council chose not to vote on significant issues. Additionally, the "ICJ's 1950 Asylum Case emphasized that once a customary norm is established, no country can ignore it". This supports the view that allowing states to selectively opt out of customary rules weakens the coherence of international law, as it calls into question the universality and collective authority of recognized customs (Kattan, 2022).

Another significant critique is that sustained objections are extremely uncommon in reality. Considering the nature of international relations, nations rarely utilize this rule, as it demands consistent and clear opposition throughout all stages of a norm's development. Furthermore, international legal precedents offer limited backing for this principle, with most rulings suggesting that customary law is universally applicable unless it is explicitly negated by treaty obligations or other distinct legal frameworks. Additionally, the rule may simply act as a temporary postponement tool rather than a lasting exemption. As time passes, objecting nations frequently feel pressured to align with the emerging norm due to political, economic, or diplomatic influences. As a result, the rule may operate more as a transitional mechanism instead of a way for states to indefinitely avoid customary duties.

Regardless of one's stance on the rule, it is established within international law that it can fulfill both individual and collective purposes. While it provides states the option to opt out of new customary norms, it can also be strategically applied to motivate other states to reject an emerging norm, thus hindering its development entirely. Consequently, a state's ongoing objection may not only advance its national interests but could also represent a broader effort to influence international law. If a state can sway others to join its dissent, it might successfully obstruct the adoption of a new customary rule or contest the claim that such a rule is in the process of forming.

### **2.1.4. Conditions for a Valid Persistent Objection**

A state cannot unreasonably assert that it is

exempt from a customary rule unless it fulfills specific, stringent criteria. If these criteria are not satisfied, the state is obligated to follow the customary standard and cannot legally reject compliance. Not meeting these criteria could lead to the state being deemed responsible for breaching international law (Charlesworth & Chinkin, 2022).

## 2.2. *The Second Requirement: Conditions for Applying the Persistent Objector Rule to Achieve Its Legal Effects*

The International Law Commission (ILC) has been instrumental in outlining different elements related to the conditions under which the persistent objector rule applies to customary international law. Specifically, in its 2016 report submitted to the United Nations Secretary-General after its 68th session, the Commission detailed both the substantive and procedural prerequisites for invoking this rule. (Tomuschat, 2021) The key excerpts from the report are as follows:

- "When a State objects to a rule of customary international law while it is in the process of formation, the objecting State is not bound by the rule in question, provided that it maintains its objection consistently."
- "The objection must be expressly and unequivocally stated, duly communicated to other States, and continuously upheld over time."

The ILC has indicated that while customary international law generally holds binding status, a consistent and clear objection to the establishment of a specific customary norm allows the objecting State to be excluded from that norm's applicability (Vidas & Freestone, 2022). Additionally, the ILC noted that an objecting State can adopt one of two strategies. The first involves attempting to prevent the formation of the customary norm entirely, thus hindering its solidification into obligatory international law. The second entails ensuring that, if the norm does come into existence, it does not gain obligatory power over the objecting State. For a persistent objection to be effective in a legal sense, it must be expressed clearly and definitively during the initial stages of the customary norm's development, free from vagueness or implicit qualifications. Furthermore, the objection must be officially conveyed and appropriately communicated to other States on an international scale.

The ILC also tackled a significant matter regarding objections raised after the fact, meaning objections presented once the customary norm has been completely established. The Commission

clearly stated that there is no principle of "subsequent objection" in customary international law (Okeke, 2022). After a customary rule has been fully developed, a State cannot retroactively raise objections to avoid the binding nature of that rule. Therefore, a post facto objection is legally insignificant and is seen as merely a violation of international law, rather than a legitimate application of the persistent objector doctrine. This distinction highlights the fine line between lawful objection and unlawful non-compliance, which may be challenging to differentiate in practice.

According to the conclusions drawn by the International Law Commission (ILC) mentioned earlier, the criteria for the enforcement of the persistent objector rule concerning customary international norms can be summarized as follows:

The initial requirement is that the State must demonstrate a continuous, clear, and active objection to a customary rule (Frost & Murray, 2024). For a persistent objection to hold legal significance, it needs to be maintained over a period, occurring regularly rather than sporadically and consistently, indicating that it should not contain fundamental contradictions. Furthermore, the objection should be unequivocal, without allowing for any implications or ambiguities. It must be clearly articulated by the "objecting State," whether expressed verbally or in writing, as long as it is evident, obvious, and recognizable by other States. For an objection to be considered legally valid, it must be paired with concrete actions or behaviors that demonstrate the State's refusal to accept the developing customary norm. However, there is no mandated form of expression needed. A spoken declaration, like a formal statement, is adequate to maintain the legal position of the objecting State. This objection can be communicated through official diplomatic letters, documentation from international treaty discussions, records of diplomatic conferences, or national laws enacted during the development of the customary rule. Although a State's legislative actions opposing an emerging customary rule may act as proof of objection, such legislation on its own is not enough unless the State conveys its objection to other States, as outlined in a later stipulation.

In addition, a State that objects must present clear and convincing proof of its ongoing refusal to adhere to the customary norm. This requires dismissing any assumption of implicit acceptance and consistently and explicitly refraining from applying the customary rule whenever possible. The objection should be consistently articulated in international settings, such as through official protests or when the

State is asked to clarify its stance. The International Law Commission (ILC) has affirmed that a verbal, explicit objection be it spoken or written is adequate to preserve the legal position of the objecting State, without necessitating any physical actions. Furthermore, the objection must be maintained both prior to and following the complete crystallization of the customary rule, ensuring that the State's legal position remains unchanged over time.

The persistent objection must be clear and direct; simply remaining silent about a developing practice is interpreted as acceptance rather than objection. This principle is well-established in international law and state behavior. One prominent case is the Anglo-Norwegian Fisheries Case (1951) adjudicated by the International Court of Justice (ICJ). The case focused on the boundaries of the territorial sea and the legitimacy of Norway's baseline drawing method, which diverged from standard international practices. In 1935, Norway enacted a Royal Decree that set its territorial sea and fisheries zone by establishing straight baselines through fjords and coastal inlets, ignoring the commonly accepted 10-nautical-mile limit in international law. The United Kingdom subsequently contested this approach, arguing that it conflicted with customary international law. However, the ICJ sided with Norway, determining that the country's long-standing and consistent application of straight baselines had received general international acquiescence. The UK's inaction for over sixty years amounted to tacit endorsement of Norway's method, and the lack of any formal objection during this lengthy period prevented the UK from later disputing the legality of Norway's baseline system. This decision highlights the important distinction between objection and simple non-compliance. A State that does not timely protest against a developing practice may find itself legally bound by acquiescence, thus precluding it from later claiming the persistent objector stance.

The second criterion, referred to as the temporal requirement, stipulates that a state must consistently object to a customary rule during its development and before it becomes fully established, fulfilling both its material and psychological elements. A state is required to articulate its objection from the initial stages of the customary rule's emergence. Since objecting to a customary rule is a deviation from the general principle regarding the binding nature of custom, and considering that norms of customary international law inherently apply equally to all members of the international community, a state's objection must occur during the rule's formative

period. This condition is essential because the completion of a customary norm's formation transitions it from a mere repetition of state practices into a binding rule that reflects the collective belief of states in its obligatory character. In such circumstances, no state can subsequently object to a well-established customary norm and assert that it had previously opposed it to escape its legal consequences. A state making this claim risks facing international accountability for undermining international legitimacy. Therefore, as the International Law Commission has highlighted, the timing of the objection is of paramount importance. A state must voice its dissent before a practice solidifies into an obligatory norm of international law, and ideally, it should do so at the earliest possible moment.

The third condition indicates that an objection cannot pertain to a peremptory norm (*jus cogens*) within customary international law. Peremptory norms are obligatory for all states, no matter how they come into being, as they aim to safeguard the essential interests of the global community. This feature fundamentally opposes the reasoning behind the persistent objector rule, which is relevant only to supplementary norms or interests specific to certain regions (Enyew, 2022). For instance, if a state were to oppose a developing customary rule that forbids aggression against another state's territory, such an opposition would be unacceptable and legally invalid, since it contradicts a peremptory norm in international law. Article 53 of the Vienna Convention on the Law of Treaties clearly outlines a peremptory norm as a rule that is accepted and acknowledged by the international community as a whole, which can only be modified by a later norm of the same type.

The practice of states has established that the status of a persistent objector does not apply to peremptory norms. A significant instance of this is the ongoing objection by South Africa and Rhodesia (now Zimbabwe) to the international legal standard that prohibits apartheid. In the South West Africa Cases, Ethiopia and Liberia contended before the International Court of Justice that South Africa could not claim the persistent objector rule against a principle recognized by nearly unanimous consensus within the international community, as it fell under the category of *jus cogens* norms in international law. Furthermore, Omran has referred to the judgment in: ICJ Plead., 1966:305.

The fourth condition, referred to as the interest requirement, specifies that the existence and obligatory nature of the customary rule in question

must adversely affect the specific interests of the state that objects (Mak, 2024). Naturally, states that raise this objection must have a significant interest in preventing the customary norm from being applied to them once it is recognized. In the absence of such an interest, an objection would lack significance and purpose. States are generally reluctant to unilaterally object to a developing customary rule unless it has a direct impact on their national interests or imposes constraints or restrictions on them.

The fifth requirement relates to the duty of informing other nations about the objection. A nation's objection to a developing customary international rule cannot be confined to its internal affairs; instead, it must be officially communicated on an international level (Grzybowski & dos Reis, 2024). As noted by the United Nations Commission in its previously cited report, the responsibility to ensure that other nations are adequately informed of the objection lies solely with the objecting nation. This implies that simply making an internal declaration of objection is not enough; the nation must actively work to disseminate and communicate its opposition to the wider international community.

### **3. THE LEGAL EFFECT OF THE PERSISTENT OBJECTION RULE ON INTERNATIONAL CUSTOM AND THE STANCE OF THE INTERNATIONAL COURT OF JUSTICE**

To weaken the psychological aspect (*opinio juris*) of a developing customary norm during its early stages, a state or group of states must issue clear and consistent objections. These objections, whether expressed as protests, official statements, or diplomatic actions, seek to prevent the norm from being applied to the dissenting state(s) or to completely obstruct its establishment. When these objections are consistently reiterated and legally supported (as detailed in the previous conditions of this study), "such acts of dissent may create a countervailing material factor that undermines the binding authority of the proposed customary norm." (Grzybowski & dos Reis, 2024)

The International Court of Justice (ICJ) has examined the persistent objection rule in various contentious cases, evaluating its effect on the validity and enforceability of customary norms. In the subsequent subsections, we will explore two interconnected issues: (1) the degree to which persistent objections weaken the mandatory nature of customary law, and (2) the ICJ's jurisprudential approach to this rule, specifically its criteria for recognizing or rejecting objections in practice (Tomuschat, 2021).

#### ***3.1. The Impact of Unilateral State Acts (Persistent Objection) on the Binding Force of Customary Law p 21***

Unilateral international acts can be described as "legal actions executed by a singular intention within the context of international law." Another way to define unilateral international acts is: "Any voluntary action taken with the purpose of creating or altering the current legal framework at the time it is issued or one that will be applicable in the future."

From both definitions, we can derive the fundamental components of unilateral international acts as follows: First, the will must be accountable: This indicates that the will should have the legal capacity to acquire rights or assume obligations, meaning it must come from a competent authority authorized to express it. Second, the will must be autonomous: This suggests that the act must be unilateral, independent of any other will, in contrast to international treaties, which arise from the consensus of several parties. Third, the will must intend to create a legal effect of an international character: The act should aim either to assert rights or to take on obligations at the international level. Generally, such acts are binding exclusively on the state issuing them and do not apply to others, in accordance with the principle of sovereign equality, as reaffirmed in international documents, including the preamble of the United Nations Charter. As a result, this analysis of the essential components of unilateral acts clearly illustrates that, as a general principle, any unilateral action taken by a state or international organization to produce legal outcomes is limited to that entity and does not extend beyond it (Shaw, 2021).

Among the acknowledged types of unilateral international actions, aside from reservations, is the act of protest or objection (Crawford, 2019). Protest is characterized as: "A unilateral action taken by a specific entity within public international law, whether a state or an international organization, whereby the intent is to reject the validity of a particular legal status (such as an action, fact, behavior, or claim) because it violates the rights or interests of the party making the protest, independent of the manner in which the protest is communicated, as long as it is made by the appropriate authority that is empowered to express the wishes of the protesting party in the context of international relations." (Klabbers, 2021)

Typically, customary rules serve as a source of public international law that applies to everyone, and one cannot claim that these rules are non-binding (Grzybowski & dos Reis, 2024). Nevertheless, a

protest, viewed as a unilateral act in international law, represents an exception to the enforcement of customary rules, as such an objection challenges the legal belief required to establish the binding nature of the rule (Aust, 2021). A state's ongoing rejection of the contested conduct articulated through protest can hinder the customary rule from gaining binding force, either on a relative basis (exempting the protesting state) or, in some instances. This can entirely occur if the protesting state successfully rallies other states to support its objection with enough intensity and frequency, ultimately preventing the rule from forming altogether.

Additionally, as noted earlier, if the requirements for invoking the persistent objector rule are satisfied, a state's unilateral protest or objection to the customary rule can influence the rule's binding effect. This is because an objection made in accordance with legal standards leads to the non-application of the contested norm against the state that objects (Caron, 2014). Therefore, the act of protest serves as a valid defense of an unquestioned right, while not impacting the validity or legitimacy of the practice for other states that have accepted it and opted not to exercise their right to object. The International Law Commission has clarified that: "All states that may become bound due to their inaction must be given adequate time to avoid implied acceptance by resisting the formation of the rule".

It can therefore be concluded from the above that a state's objection to the establishment of a customary rule assuming that the objection meets the necessary legal criteria, according to the first doctrinal perspective serves to exempt that state from the application of said rule, acting in its capacity as the provider of a unilateral declaration. Nonetheless, such an objection does not hinder the formation, evolution, or strengthening of the customary rule itself, nor does it obstruct the rule's development into a legally binding norm under international law. Consequently, the legal challenge has a relative effect, so to speak, whereby the customary rule remains inapplicable only to the protesting state, while it continues to be obligatory for all other states once it solidifies into a universally accepted custom of international law.

In other terms, the legal implications of a protest are limited to validating and safeguarding the particular rights and interests of the state that is protesting, thereby creating a unique legal effect that restricts the binding nature of the customary norm solely concerning that state. Other nations, especially those that are newly formed or have recently joined the international community and were not involved

or active while the customary rule was being established, do not have the same right to object. Even if they were to register a protest against a pre-existing and recognized customary norm, such a protest would lack any legal impact in freeing them from its application they remain obligated to follow the rule.

The alternative doctrinal perspective suggests that if several states consistently and strongly object to a practice that is on the verge of becoming customary law, their coordinated and persistent disapproval can significantly shape the direction of that practice. When these unilateral actions are made collectively by a group of states, they may not only weaken the obligatory nature of the developing customary rule but also hinder the establishment of the custom entirely. This happens by impeding the development of the *opinio juris* element, which is a crucial psychological factor necessary for the formation of a customary rule.

When evaluating this situation, various factors need to be considered: the frequency of protests made, their severity, the actions taken by the parties afterward, the level of sensitivity related to the interests involved, and the timeframe during which the relevant actions or practices occurred. Collectively, these aspects may lead to a legal conclusion that the necessary criteria for the establishment of international custom have not been fulfilled, thus preventing the development of the rule.

Following the analysis of the legal consequences of the persistent objector rule in the context of customary international law, the study will now move on to its second and concluding section, which will investigate the stance taken by international judicial institutions, particularly the International Court of Justice, concerning the implementation of this doctrine.

### *3.2. The Position of the International Court of Justice on the Application of the Persistent Objector Rule in Cases Brought before It p24*

This portion of the analysis concentrates on the practical implementation of the persistent objector rule by the international judiciary, as evidenced by three pivotal rulings issued by the International Court of Justice (ICJ). These rulings have played a crucial role in establishing and affirming the legal legitimacy of the rule within international law, thus bolstering its position as a recognized and enforceable tenet of international law, even in the face of ongoing academic critique or doubt regarding its relevance. By exploring these judicial precedents,

the analysis seeks to illustrate that the persistent objector rule is indeed acknowledged within the international legal framework and is firmly entrenched in the case law of the ICJ.

The first of these judgments is as follows:

1. The Asylum Case (Colombia v. Peru), ICJ Reports 1950, p. 266

The details of the Asylum Case relate to events that took place before the initiation of the dispute, in which the Republic of Colombia, via its embassy in Lima, granted political asylum to Víctor Raúl Haya de la Torre a Peruvian political leader and head of a political party who had been charged by the Peruvian authorities with political crimes following a military insurrection. After asylum was granted, the Colombian ambassador asked the Government of Peru to ensure safe passage for the asylum-seeker to exit the country.

This request was submitted within the framework of the Havana Convention on Asylum, which specifies that diplomatic asylum may be granted to political refugees who are citizens of countries in the region, provided certain conditions are met. However, the Peruvian government declined the request because Haya de la Torre had not engaged in a political crime but had instead committed ordinary criminal offenses, which meant he was ineligible for asylum under international law. As negotiations between the two governments did not lead to a resolution, the issue was referred to the International Court of Justice.

**The main legal issues facing the Court were**

- Does Colombia have the power to independently label the nature of the crime attributed to Haya de la Torre, and is this designation obligating for the country in question namely, Peru?
- Are neighboring states legally required to ensure the secure exit of the asylum-seeker after asylum has been granted?

Colombia grounded its legal reasoning in various international and regional agreements: the Bolivarian Agreement of 1911 regarding extradition, the Havana Convention of 1928 concerning asylum, and the Montevideo Conventions from 1933 and 1939 on political asylum. Additionally, Colombia invoked inter-American international law principles, asserting its right under these agreements to define the nature of the offense for asylum purposes unilaterally. Moreover, it maintained that this legal interpretation should obligate Peru, particularly since the Montevideo Conventions encapsulated regional customary practices among Latin American nations, regardless of Peru's failure to formally ratify

those conventions.

In its decision, the ICJ answered both legal inquiries in a negative manner. The Court determined that Colombia lacked the authority to impose its legal interpretation of the offense on Peru, nor could it force Peru to ensure safe passage for Haya de la Torre. Additionally, the Court supported Peru's counterclaim, concluding that Colombia's unilateral offer of asylum was a breach of the Havana Convention, especially since the requirements for asylum had not been satisfied, and no recognized regional custom could be invoked to override the sovereign discretion of the territorial state.

This ruling thus serves as a significant precedent, highlighting that unilateral state actions regardless of their basis in regional instruments or customs do not supersede the consent-based principles of customary international law. Moreover, it reflects the ICJ's implicit acknowledgment of a state's right, such as Peru's, to contest the formation or enforcement of a regional custom to which it has neither agreed nor consistently followed, resonating with the doctrinal aspects of the persistent objector rule.

**The Court, in its final decision, arrived at the following conclusions concerning the legal claims put forth by the Government of Colombia**

1. Colombia did not succeed in proving the presence of a regional customary norm that would grant the state providing asylum the right to unilaterally decide whether the act committed by the individual qualifies as a political crime or a common offense.
2. Even if we assume, for the sake of argument, that such a regional custom existed, it could not be asserted against Peru. This is due to Peru's consistent demonstration of a stance that is fundamentally opposed to the development and acknowledgment of such a rule. Specifically, Peru has continually objected to the norm throughout its development, particularly by declining to ratify the Montevideo Conventions of 1933 and 1939, both of which established the principle allowing the state granting asylum to determine the nature of the crime in cases of diplomatic asylum.

These conclusions highlight the Court's implicit acknowledgment of the persistent objector doctrine within customary international law. In this instance, Peru's unwavering and clear opposition to the relevant customary rule prevented its application against it, even if the rule applied to other states in the region.

1. Fisheries Case (United Kingdom v. Norway),

ICJ Reports 1951

- This case centered on how Norway established its maritime baselines for measuring its territorial sea. The United Kingdom argued that Norway's approach of using straight baselines to encompass extensive maritime regions was in violation of international law, which the UK claimed restricted the territorial sea to a maximum of 10 nautical miles from the coastline. In response, Norway pointed to its long-standing and consistent opposition to this standard, upholding its distinctive method based on geographical conditions and historical practices. **The ICJ ruled in favor of Norway, determining that**

- No universal customary rule had emerged that restricted territorial seas as claimed by the UK.
- Even if such a rule did exist, it could not be enforced against Norway, which had consistently and explicitly objected to it and whose maritime practices had been accepted by other nations.

#### **The Court stated**

"Even if a general rule had emerged, it appears that such rule could not be enforced against Norway, which had consistently objected to its application to its own coastline."

This ruling distinctly emphasized the persistent objector rule, highlighting that states are permitted, according to international law, to legally reject the formation of new customs through consistent and prompt objections.

#### **3. Fisheries Jurisdiction Case (United Kingdom v. Iceland), ICJ Reports 1974**

In contrast to the earlier two decisions, the ICJ in this matter rejected the persistent objector defense. In 1972, Iceland independently expanded its exclusive fishing zone to 50 nautical miles, surpassing the 12-mile limit that had been established with the UK in their 1961 exchange of notes.

- The UK opposed the unilateral extension, citing both the existing agreement and the absence of widespread acceptance of the 50-mile claim. Britain characterized its objection as a consistent challenge to the developing norm.
- Nevertheless, the ICJ determined in favor of Iceland, stating that:
- A new general customary rule acknowledging broader preferential fishing rights for coastal states particularly those that rely heavily on their fisheries had come into being.
- This rule could not be invalidated by the objection of a single state, especially

considering the progression of international law towards the protection of resources and the sustainable management of fisheries.

This ruling has been broadly perceived as constraining the reach of the persistent objector doctrine. Importantly, Judge Tomuschat, in his remarks on the decision, stated: "If the Court had decided in favor of the United Kingdom based on the persistent objector principle, it would have effectively stalled the advancement of maritime law, thus jeopardizing the adaptability and vitality crucial for the progression of customary international law."

### **3. CONCLUSION**

This research has explored the doctrine of persistent objection in customary international law, which states that a nation expressing a clear, consistent, and sustained dissent through its authorized representatives during the development of a new customary norm will not be obligated to follow that norm once it solidifies into binding customary law, as long as the contested norm does not qualify as a *jus cogens* (peremptory) norm of international law. In this view, the persistent objector rule serves as an exception to the overarching principle of the universality and obligatory nature of customary norms. Additionally, the examination indicated that this doctrine has elicited both academic support and criticism. Advocates contend that it is crucial for preserving state sovereignty and allowing nations to defend their essential national interests, especially when they are not part of the practices that lead to the norm's creation. They also seek to reconcile two fundamental realities: firstly, that customary international law is upheld by a collective of states that frequently adhere to rules without explicit consent, perceiving them as integral to a developing legal consciousness; and secondly, that law must remain grounded in core ethical principles, foremost among them the sovereign equality of states and the necessity to maintain pluralism and autonomy within the international legal framework. Therefore, enabling states to dissociate from emerging rules that conflict with their interests is vital, provided that these rules do not possess a peremptory status.

### **4. KEY FINDINGS**

1. The principle of persistent objection operates as an established tenet acknowledged within customary international law. This principle is supported by both the International Law Commission's 2016 Draft Conclusions and the jurisprudence of the International Court of

- Justice.
2. A state that effectively invokes the persistent objector rule must demonstrate its continuous formal objection at the crucial moment when the customary norm is being established. An objection put forth by an individual state must be distinguished from general inaction or acceptance of norms and can, in certain circumstances, ultimately prevent the formation of these norms.

## 5. RECOMMENDATIONS

1. Official acknowledgment by institutions of the

United Nations can solidify the persistent objector doctrine as a recognized component of customary international law, which would enhance its implementation in state practices.

2. Legal scholars must focus closely on the doctrine to clarify its specific scope, required conditions, and legal applications. Insights gained from thorough and balanced academic research will foster a better understanding of the doctrine's function in law and its practical everyday relevance, particularly as new legislation emerges.

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