

Michigan Journal of International Law

Volume 43 | Issue 2

2022

The Consent-Based Problems Surrounding the Persistent Objector Doctrine

Moisés Montiel Mogollón

Universidad Iberoamericana, Mexico City and Universidad Panamericana, Guadalajara

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Law Commons](#)

Recommended Citation

Moisés M. Mogollón, *The Consent-Based Problems Surrounding the Persistent Objector Doctrine*, 43 MICH. J. INT'L L. 301 (2022).

Available at: <https://repository.law.umich.edu/mjil/vol43/iss2/3>

<https://doi.org/10.36642/mjil.43.2.consent-based>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

THE CONSENT-BASED PROBLEMS SURROUNDING THE PERSISTENT OBJECTOR DOCTRINE

*Moisés Montiel Mogollón**

INTRODUCTION

The persistent objector doctrine holds that a state may exempt itself from being bound by a rule of customary international law by “unambiguously and persistently”¹ protesting the normative character or applicability of the rule when the norm is in its formative stage. Moreover, the doctrine assumes that any state that does not make clear its objection to the rule in a timely fashion will be held to have acquiesced² and will have no subsequent right to opt out of the application of the rule.³ This, in turn, destines states that did not take part in the formation process of rules of customary international law to be bound by them anyway.⁴

Scholars and the international judiciary alike have welcomed the persistent objector doctrine without much opposition,⁵ to the point that there is

* Adjunct Professor of Treaty Law and International Law (Universidad Iberoamericana, Mexico City) and Adjunct Professor of International Humanitarian Law and International Human Rights Law (Universidad Panamericana, Guadalajara). Managing Partner at Lotus Soluciones Legales (Mexico City). LL.M. in International Law, The Fletcher School of Law and Diplomacy. B.LL. Universidad Central de Venezuela. The author would like to thank Michael J. Glennon and Adalberto Urbina for their invaluable input and comments, as well as the MJIL Editorial Team for a laudable initiative in opening up the journal to a more diverse range of authors, they truly have understood the value of diversity in voices and perspectives, unlike the doctrine here discussed. Views and mistakes are the author’s own.

1. HENRY WALDOCK, GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 49 (1962).

2. See Int’l Law Comm’n., Draft Conclusions on Identification of Customary Int’l L. with Commentaries, U.N. DOC. A/73/10, at 152–53 (2018). [Hereinafter ILC Draft Conclusions].

3. See WALDOCK, *supra* note 1.

4. This occurs regardless of whether the states in question did not exist at the time the custom was formed or because they were unaware or uninterested in the formation of the specific customary rule. While neither the International Law Commission (“ILC”) nor the International Court of Justice (“ICJ”) have enunciated this explicitly, it is the forcible consequence of the temporal restriction attached to the doctrine.

5. See Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 INT’L & COMPAR. L.Q. 779, 779–802 (2010); Adam Steinfeld, *Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons*, 62 BROOK L. REV. 1635 (1996); Eric David, *L’Objecteur Persistant, Une Règle Persistante?*, in DROIT INTERNATIONAL HUMANITAIRE COUTUMIER: ENJEUX ET DÉFIS CONTEMPORAINS 89 (Paul Tavernier & Jean-Marie Henckaerts eds., 2008).

widespread agreement that the doctrine is binding customary law.⁶ If the persistent objector doctrine is indeed law, the question arises: Is it compatible with the consent-based system of international law? Since states are the law-makers in the international system and are all equally sovereign, any rule that seeks to impose limitations on their law-making capabilities should be examined in detail and treated with certain skepticism when its origin appears to be judicial and academic, rather than found in the practice of states. This article analyzes the legality of the persistent objector doctrine and its compatibility within the wider system of international law.

This article argues that the persistent objector doctrine is in frank contradiction to fundamental aspects of international law, thus rendering it illegal. It also submits that the doctrine lacks substantial practice and *opinio juris* from the international legal community, which calls into question the existence of the rule outside of the normative preferences of scholarly commentary. In doing so, this article focuses on the jurisprudence of the International Court of Justice (“ICJ”) as it pertains to the acknowledgement and application of rules of customary international law in the settlement of international disputes.⁷ It will take as a starting point the *Fisheries* and *Asylum* cases, where the ICJ first promulgated the doctrine, and will then review the seminal scholarship on the doctrine that has shaped much of modern discussion, including that of Ted Stein, Ian MacGibbon, Patrick Kelly and Anthony D’amato, among others. Ultimately, this article substantiates the claim that the commentary of scholars and writers in international law has provided grounding for the doctrine where it previously had none and has driven the conviction of its existence and legality.

Part I of this article focuses on the essential notions concerning the formation of rules of customary international law as the background against which the rest of the paper will develop its arguments. Part II presents the conceptual and historical origins of the persistent objector doctrine. Parts III-VIII address the various complications and contradictions surrounding the doctrine. Specifically, Part III demonstrates that the consent threshold necessary to hold a customary rule as applicable to a state cannot be satisfied by judicial guesswork or academic preference on their own absent clear and unequivocal acceptance by states. In furtherance of this, Part IV analyzes the ICJ’s attribution of meaning to silence in accordance with the persistent objector rule which bypasses the need for expressive consent. This part holds that assigning meaning to non-expression fails to adequately represent the

6. ILC Draft Conclusions, *supra* note 2, at 153, *see also* JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF INTERNATIONAL LAW 26 (9th ed.2019); LORI DAMROSCH, LOUIS HENKIN, SEAN D. MURPHY & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 100–01 (5th ed., 2009); MANUEL DIEZ DE VELASCO, INSTITUCIONES DE DERECHO INTERNACIONAL PÚBLICO 141 (17th ed. 2009), just to name a few all include the doctrine without hesitation, as well as the many others works cited in this piece.

7. SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 10 (1991).

will of states and exceeds the mandate entrusted to the ICJ since there is no rule of attribution enabling it to draw such conclusion and it is tasked with resolving controversies in accordance with existing international law. From there, Part V surveys the inability of the ICJ to create rules of international law, positing that any actor other than a state lacks law-making capacity and is therefore not entitled to create obligations or design “rules of recognition.”⁸ Apart from the problems stemming from rule-making authority (or lack thereof), Part VI suggests that the fact that identification of rules of custom is retrospective makes it impossible to ascertain when a rule has begun to form and the exact point until which states may protest, thus burdening most states disproportionately and assuming they have perfect knowledge of the customary rule formation landscape at all times. Keeping with the issues relating to capacity of states, Part VII concludes that the persistent objector doctrine violates the principle of self-determination and sovereign equality of states, especially in the cases of newly formed states. Finally, Part VIII holds that the alleged rule lacks widespread state practice and *opinio juris*, therefore refuting its character as a rule of customary international law or even as a rule at all.

The foremost reason why this analysis matters is because certainty in the existence of obligations and the ways in which they bind states is a necessary requirement of a rules-based order, particularly when said order is meant to be voluntary and grounded in state sovereignty. The persistent objector doctrine seems to respect sovereignty in that it allows states to opt out of customary rules under strict conditions. In fact, back in 1985, Ted Stein—notable academic and counsel to the US State Department for the *Tehran Hostages* case before the ICJ—anticipated that subsequent decades would witness states’ increasing use of the persistent objector doctrine in order to exempt themselves from new rules of customary international law.⁹ However, the rule’s shortcomings have effectively prevented it from truly serving that purpose and have reduced the doctrine to little more than a judicial *obiter dicta* used by academics.

A. *On the Formation of Rules of Customary Law*

Understanding the underlying logic behind the persistent objector doctrine and its contradictions requires understanding the process by which customary international law is created. This section argues that for rules of customary international law to be valid they must be created and accepted in a manner that proves states are engaging in certain conduct because they mean to give it legal character. Custom is, after all, forcibly social because it requires a certain number of states acting in a certain way to satisfy the

8. In the Hartian sense, as satisfying all requirements in order for a rule to be considered valid and efficacious. See H. L. A. HART, *THE CONCEPT OF THE LAW* (1961).

9. Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 463 (1985).

objective normative threshold. Joel Trachtman—who has studied the interaction of custom and treaties both in private and public international law—observes that customary international law is in a continuous process of formation until it starts to disintegrate.¹⁰ The reason for this phenomenon is that states continually shape it, and it is their participation that *makes* the law. It is the states' repetition and conviction of lawfulness that makes customary international law binding.¹¹ Oliver Wendell Holmes pointed out “the life of the law has not been logic; it has been experience.”¹² This rings even more true for custom. Even in the most ancient forms of human social organization, custom has played a central role in defining mutually accepted rights and obligations.¹³

Custom, as a more organic manifestation of international legal rules,¹⁴ has the particularity that it requires the participation—or at least the acceptance—of the potentially bound states in order for them to be bound by the rule. This requirement can be ascertained from the text of article 38(1)(b) of the Statute of the ICJ, which grants the status of international law to “international custom, as evidence of a general practice accepted as law.”¹⁵ In this enunciation, the requirement of state acceptance is spelled out, albeit in a somewhat inconclusive manner due to the non-definitional character of the text. It does not seek to define custom, but rather spells out how it forms. László Blutman—member of the Hungarian Doctoral Council and a reference on European accounts of sources' theory—argues that the article “only sets forth two connecting circumstances: general practice and its acceptance as law), which occur along with custom without giving particulars of how custom can be evidence of them.”¹⁶ The concept provided by the American Law Institute in its Third Restatement is perhaps clearer in representing the dynamics of the formation of customary international law; it explains that “customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁷ The Restatement

10. Joel P. Trachtman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 221, 221–33 (2010) (responding to Curtis A. Bradley & G. Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 205 (2010)).

11. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055.

12. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

13. HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 56 (2014).

14. As opposed to treaties and general principles of law as primary sources of international law, which are often less flexible given that the formal procedures for determining their existence require a higher degree of formality. See Int'l Law Comm'n, *Rep. on the Work of Its Sixty-Third Session*, U.N. DOC. A/66/10, at 279–84 (2011).

15. Statute of the International Court of Justice, *supra* note 11, art. 38.

16. László Blutman, *Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail*, 25 EUR. J. INT'L L. 529, 532 (2014).

17. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (Am. L. Inst. 1987).

describes customary international law as the result of the process through which a general and consistent practice converges with the acceptance by a “general” amount of states of the obligatory character of that action or practice.¹⁸

The two key elements of any analysis¹⁹ on the formation of rules of customary international law, which are both pertinent to the consideration of the persistent objector doctrine, are those of generality (or critical mass of states engaged in the practice) and the expression of *opinio juris* by those states as evidence of their acceptance of the rule. With regards to generality, Michael Glennon—Professor of Law at the Fletcher School and former Advisor to the U.S. Senate Foreign Relations Committee—observes that “under traditional doctrine, a practice need not be universally followed to qualify as custom; it need merely be generally and consistently practiced by a representative group of states capable of participating in the practice.”²⁰ This conception of practice lays out the traditional requirements as understood by mainstream doctrine²¹ and points toward a widespread understanding of customary international law, in which universal conduct is not necessary. Instead, a majority of states, or a representative²² number of them, are sufficient. As will be shown in Parts III and V, given the characterization of the international legal system as consent-based,²³ several key problems arise when a rule is deemed to exist without the explicit agreement of the allegedly bound party.

Similar problems arise when determining *opinio juris* as a constitutive part of a rule of custom. One problem is the methodological inconsistencies, or lack of a clear and generally accepted method, for extracting the “conviction of lawfulness” or “sense of obligation” among states.²⁴ The lack of a generally accepted method has led to disagreement among judges, commentators, scholars, and national decision-makers concerning which actions

18. *Id.*

19. ILC Draft Conclusions, *supra* note 2, at 154.

20. MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 54 (2001).

21. Also dubbed the “rulebook conception” of custom by Monica Hakimi. *See* Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487 (2020).

22. This phrase is ambiguous in that it has been interpreted to mean numerically representative (a general number of states, as read in article 38 of the ICJ Statute) or representative on account of including specially affected states. *See infra* note 216 and accompanying text; *see also* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Jan. 20); Statute of the International Court of Justice, *supra* note 11, art. 38.

23. As opposed to domestic systems in which the state has *imperium* or *auctoritas* over its nationals. In domestic systems such relationships are better characterized by the notion of submission by the citizen to the authority of the state. The most concrete instance of the characterization of the international community as a theoretically horizontal social body is enshrined in the principle of sovereign equality of states.

24. For a more detailed analysis of the “*sive necessitates*” requisite see Nicholas Tsagourias, *Necessity and the Use of Force: A Special Regime*, 41 NETH. Y.B. INT’L L. 11 (2011).

satisfactorily express *opinio juris*.²⁵ This problem will be central in the subsequent analysis of the persistent objector doctrine, as issues of capacity, awareness, willingness, consent, and sovereign equality all cause tensions between doctrine and the horizontal and consent-based nature of the international legal order.

The consideration of any modern notion of customary international law will immediately reveal that its requisites of state practice and *opinio juris* are two-fold and forcefully concurrent.²⁶ The idea that particular conduct must be backed by a subjective conviction of the conduct's obligatory character to distinguish it from acts of simple habitude or comity can be traced as far back as 1899 in François GénY's—French jurist and seminal author of the French Scientific School of Law—*Méthode D'interprétation Et Sources En Droit Privé Positif*. GénY posited that the repetition of an act in and of itself would be indistinguishable from “what we call the mores of the people”²⁷ unless the normative conviction motivating the action or omission could be ascertained.²⁸ Lassa Oppenheim—German Jurist and lasting referent of Exclusive Legal Positivism—suggests *opinio juris* requires the action or practice to be undertaken with the conviction that it is “according to international law, obligatory or right.”²⁹ This precision is important because the fact that a state engages in a practice because it regards it as legally required indicates the state's consent to be bound by the emerging rule.³⁰ In fact, there can only be

25. See generally, Ross Schreiber, *Ascertaining Opinio Juris of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on the U.N. Process*, 16 BOS. UNIV. INT'L L.J. 309 (1998); see also ILC Draft Conclusions, *supra* note 2; Moisés Montiel, *Fantastical Opinio Juris and How to Find it*, OPINIO JURIS BLOG (June 23, 2021), <http://opiniojuris.org/2021/06/23/fantastical-opinio-juris-and-how-to-find-it/>.

26. North Sea Continental Shelf, 1969 I.C.J. ¶ 77; ILC Draft Conclusions, *supra* note 2, at 124–25.

27. FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF: CRITICAL ESSAY 110 (1954).

28. Similar considerations are raised by the International Court of Justice in its *Nuclear Weapons* Advisory Opinion, suggesting that the mere fact of engaging in concerted and repeated action does not immediately amount to custom unless evidence can be shown that such actions are carried out as a product of a belief of legal requirement. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 1996 I.C.J. 226 (July 8). To this end, authors such as Michael Glennon posit a third requirement for the formation of customary international law: causal nexus. This requirement is intended to explain that conduct is undertaken *because* it is thought to be obligatory. Thus the *opinio juris* would amount to the consideration by states of the legal characterization of a certain practice and the nexus would provide the link from the objective aspect to the psychological one. See Michael J. Glennon, *The Road Ahead: Gaps, Leaks and Drips*, 89 INT'L LEGAL STUD. 362 (2013).

29. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 26 (8th ed. 1955). Additionally, on the concept of *opinio juris*, see Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

30. See generally *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 184 (June 27) (providing examples of the inductive method of identification of custom used by the Court); see also Stefan Talmon, *Determining Customary*

expressive value to the reiteration of conduct if it is reflective of both the belief of lawfulness and the causal relationship between the practice and the certainty of its entity as a rule.³¹ By this reasoning, every time a state engages in a practice regarded as a rule of custom it theoretically reaffirms its consent to be bound by the rule. These considerations are important because without the concurrence of both practice and *opinio juris* it would be impossible to separate a true rule of customary international law from a mere courtesy or a prescriptive judgment on whether something should be held as lawful or obligatory.

Uncomplicated as this might sound, much of the judicial practice and scholarly commentary shows that there is no “one size fits all” solution or criteria to determine when a state is bound by a rule of customary international law or if the norm even exists at all.³² It is often the case that the law-making process associated with customary international law has a certain propensity to be sequestered to promote normative or prescriptive agendas without regard to the actual procedure that needs to be followed, as it often occurs with foreign policy doctrines that end up purportedly becoming general rules.³³ This custom, inferred from the normative preferences of a few without regard to the general requirement of consent of all parties subject to a purported rule, “lacks the authority of the international community.”³⁴ Arguably, these problems stem not from customary international law as practiced since its recognition as a formal source of international law and its later enshrinement in the statutes of the Permanent Court of International Justice (“PCIJ”) and the ICJ, but from the considerable dissensions³⁵ or

International Law: The ICJ's Methodology Between Induction, Deduction and Assertion. 26 EUR. J INT'L L. 417 (2015).

31. See ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 74–75 (1971); Blutman, *supra* note 16, at 537. On the subject the nature of *opinio juris* as source or “ratification” of rules of custom see BRIAN LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 8–15 (Cambridge University Press. 2010).

32. An excellent practical example of this is February 2021's Security Council Arria Formula meeting on whether article 51 of the UN Charter encompasses self-defense against nonstate actors operating from the territory of a third non-consenting state. See Letter from the Permanent Representative of Mexico to the United Nations to the Secretary-General and the President of the Security Council (Mar. 8, 2021), see also, for example, cases in the jurisprudence of the ICJ, cases like: *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, (Can. v. U.S.), Judgment, 1984 I.C.J. 246 (Oct. 12).

33. For example, the Estrada, Tobar, or Betancourt Doctrines all allegedly being customary rules applicable to recognition of governments. For a more recent instance of this in the form of the discussion surrounding the customary extension of article 51 of the UN Charter by means of the unwilling/unable doctrine within the UN Security Council and the larger UN system, see Naz Modirzadeh & Pablo Arrocha Olabuenaga, *A Conversation between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the Origins, Objectives, and Context of the 24 February 2021 'Arria-formula' Meeting Convened by Mexico*, 8 J. ON USE FORCE & INT'L L. 291, 291–342.

34. Kelly, *supra* note 29, at 456.

35. This Part will not address concerns of political imperialism and judicial hegemony, which are apparent upon analysis of the normative agendas of states and institutions. These

inconsistencies in the reading and interpretation of the positive formulation of the norm contained in article 38(b) of the Statute of the ICJ.³⁶

I. ASPECTS OF THE PERSISTENT OBJECTOR DOCTRINE

The most popular formulation of the persistent objector doctrine, which in turn summarizes most of its features, is offered by Ted Stein, he posits that “a state that has persistently objected to a rule is not bound by it, so long as the objection was made manifest during the process of the rule’s emergence.”³⁷ From this definition five main operational requirements of the persistent objector doctrine may be extracted:

- (1) The would-be rule is in its formative period. Such a rule should be evidenced by the increasing presence of concurrent practice and *opinio juris*. The articulation of the legality of the conduct could be yet to be recognized directly by states or, alternatively, supported by multilateral treaties and declarations in international *fora* such as the United Nations (“UN”) General Assembly,³⁸ which aid or bolster the formative process.³⁹
- (2) The purported norm is not yet recognized as valid law. This requirement is of the utmost importance to a correct understanding of the persistent objector rule since this temporal aspect will signal the period over which a state should and must protest the rule, and additionally the doctrine will only avail a state that

points will be reviewed in Part V (rulemaking by the ICJ) and VII (the impact of the doctrine on equality *vis à vis* newly-formed states) of this work.

36. For a (not so) brief account of the magnitude and depth of issues that the question of identification of customary rules present, see the Fourth and Fifth Report of the ILC’s Special Rapporteur Sir Michael Woods where comments by states are responded to concerning the identification of customary international law. Sir Michael Woods (Special Rapporteur to the Int’l Law Comm’n), *Fourth Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/695 (Mar. 8, 2016); Sir Michael Woods (Special Rapporteur to the Int’l Law Comm’n), *Fifth Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/717 (Mar. 14, 2018); see also Int’l Law Comm’n, *Rep. on the Work of Its Seventieth Session*, U.N. Doc. A/71/10, ¶¶ 50–63 (2018).

37. Stein, *supra* note 9, at 458.

38. D’AMATO, *supra* note 31, at 74–75.

39. Eduardo Jiménez de Arechaga, *Custom, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING* 4–8 (Antonio Cassese & Joseph H.H. Weiler eds., 1988). As will be noted later on, this second approach to customary lawmaking, premised on the possibility of custom without practice raises substantive issues, especially concerning the adequate moment for protest. It would end up negating the appropriate temporal instance for the exercise of the right to protest. Furthermore, the United Nations General Assembly has no law-making capacity and can provide at best an indicium of emerging consensus regarding the character of a rule of custom.

“opposes the rule in the early days of the rule’s existence (or formation).”⁴⁰

- (3) A majority, or at the very least, a substantial amount of states should participate in the formation of the rule. Otherwise, the debate on the first point would not be necessary at all.
- (4) An appropriate mechanism for protesting the emergence or applicability of the rule. A private protest within the government structure at the domestic level fails to satisfy the “persistent and unambiguous” requisite set out by the doctrine.⁴¹ However, this requirement of publicity raises the question of the appropriate venue to voice the objection both in general custom and regional/special custom.
- (5) The existence of bilateral will to consider a state exempt from a particular rule if the state in question objects, or an authoritative judicial body capable of making such a determination.

The doctrine, in theory, should be a good mechanism to ensure the certainty and stability of the international legal order, allowing certainty concerning which states are bound by which rules and which aren’t, as well as providing a clear and accepted opt-out mechanism for states not wishing to be bound by certain rules. However, it is riddled with many complications arising from the rule itself and from the working dynamics of contemporary international law as a system of coordination between sovereign states. The standard to judge whether states are aware of a certain rule of custom is not uniform across different areas of international law. For example, article 9 of the Vienna Convention on Contracts for the International Sale of Goods (“CISG”) establishes that parties are not only bound by the usages they have agreed to, but also bound by those others “of which the parties knew or ought to have known and which in international trade [are] widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.”⁴² Incidentally, this provision hints at the so-called mandatory view of custom, which will be expanded upon below, that serves as the foundation of the persistent objector doctrine insofar as it holds that states are bound by all rules of custom they have not opted out of based on the assumed knowledge of all customary rules.

Notably, provisions similar to the one contained in the CISG, which are intrinsically linked with the persistent objector doctrine, can hardly be found in other treaties or in enunciations of customary law across other fields of international law. If the rule is, as its proponents advocate, a firm part of international law, then it should be relatively easy to find more conventional

40. Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L. 1, 3 (1985).

41. See Stein, *supra* note 9; ILC Draft Conclusions, *supra* note 2.

42. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 3 U.N.T.S. 1489.

codifications of it in treaties that provide mechanisms to deal with mixed treaty-custom legal regimes, such as it happens with the law governing the seas, the law of treaties, or even international humanitarian law.

A. *Origins of the Persistent Objector Doctrine*

The “closest of kin” to the persistent objector doctrine may be found in estoppel by acquiescence.⁴³ In this regard, Ian MacGibbon, an authoritative reference on estoppel, held that “estoppel obliges a state to be consistent in its attitude to a given factual or legal situation”⁴⁴ to the end of providing legal certainty or, as the ICJ has put it, to provide “finality, stability and predictability.”⁴⁵ However, when it comes to estoppel by acquiescence, silence does not directly entail acceptance unless certain requirements are met, such as the knowledge of both parties of the legally relevant situation. Estoppel by acquiescence only operates when it refers to facts that are or ought to be known by the acquiescing state (*notoriety*), where such facts are of direct interest for the acquiescing state (*interest*), when these facts have existed for a significant period (*lapse of time*) without significant change of context and the meaning conveyed (*consistency*), and in cases in which the conduct is attributable to a relevant representative of the state (*provenance*).⁴⁶

However, in the absence of a rule of recognition to that effect not all silence means the same, and sometimes silence may mean nothing at all. Specifically, in the realm of estoppel, “the lack of protest by non-interested states does not imply that they necessarily acquiesce in the legal theory of the claims.”⁴⁷ In terms of awareness or knowledge of the legal situation, the use of the *si loqui debuisset ac potuisset* (ought to or could) standard constitutes yet another problem since a course of conduct can only be acquiesced to if certain criteria are satisfied. In the case of estoppel, it requires: (1) a clear and unambiguous statement that is (2) voluntary, unconditional, and authorized, and which should rest upon (3) good faith trust on the representation to the prejudice of the relying party or the benefit of the state making the representation.⁴⁸ The resemblance to the persistent objector doctrine is uncanny and may well be where the ICJ drew inspiration for the doctrine.⁴⁹

43. The persistent objector rule can be said to be an application in its variant of estoppel by acquiescence in a relation of species to genus. On the normative pedigree of the doctrine of estoppel see HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 83 (1934); Megan Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CAL. L. REV. 1777 (1986).

44. Ian MacGibbon, *Estoppel in International Law*, 7 INT'L & COMPAR. L.Q. 468 (1958).

45. Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 78, ¶ 78 (Feb. 3) (Separate Opinion by Ajibola, J.).

46. See Elias Olufemi, *Persistent Objector*, in THE MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Max Planck Institute ed., 2006).

47. DAMROSCH ET AL., *supra* note 6, at 78.

48. See Wagner, *supra* note 43, at 1780.

49. See Talmon, *supra* note 30; Wagner, *supra* note 43, at 1779.

The persistent objector doctrine originates in the ICJ rulings in the 1950 *Asylum* case and the 1951 *Fisheries* case.⁵⁰ In the *Asylum* case, Colombia argued that it had the right to bind Peru to its determination that the offense committed by a certain individual qualified him for asylum by virtue of the action being a “political offense.”⁵¹ Colombia made this claim based on the alleged existence of regional custom concerning the practice of asylum in Latin America as codified by the 1933 Montevideo Convention and other regional treaties concerned with asylum.⁵² The ICJ held that Colombia had been unable to establish the binding nature, *vis a vis* Peru, of such a right under customary international law.⁵³ Furthermore, the ICJ reasoned that Peru could not be bound even if such a custom existed because it had not made any statements to the effect of endorsing the rule, had refrained from signing the Montevideo Convention, and did not ratify the relevant treaties, which the ICJ viewed as the codification of the right to unilaterally ascertain the political nature of an offense in terms of political asylum in the region. The ICJ held that by virtue of its behavior refusing to sign those treaties, Peru had in fact opted out of the customary norm concerning asylum.⁵⁴ The main point here, however, is that the ICJ acted on the understanding that it had the authority to assign a given meaning to Peru’s silence and inaction in the absence of clear protest, choosing to view Peru as objecting to the rule outlined by Colombia.

The *Fisheries* case is the first time the ICJ applied the persistent objector doctrine in its modern form. Decided in 1951, only one year after the *Asylum Case*, the *Fisheries* case involved the United Kingdom challenging the method utilized by Norway to draw the baseline from which it measured its territorial sea.⁵⁵ The United Kingdom claimed that existing customary international law precluded the Norwegian baseline being drawn across a bay from being longer than ten miles.⁵⁶ The result was the same as in the *Asylum Case*: The ICJ found that the rule alleged by the United Kingdom was not applicable to Norway on account of its behavior toward such a norm.⁵⁷ Moreover, the ICJ argued that, had the rule existed, it would not have been applicable because Norway “had always opposed any attempt to apply it to the Norwegian coast.”⁵⁸

These cases represent the only two instances in which the ICJ has utilized the persistent objector doctrine (even if not by its modern name). The only

50. MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 180–81 (1999).

51. *Asylum (Colom. v. Peru)*, Judgment 1950 I.C.J. 266, 274 (Nov. 20).

52. *Id.* at 277.

53. *Id.* at 278.

54. *Id.*

55. *See Fisheries (U.K. v. Nor.)*, Judgment, 1951 I.C.J. 116 (Dec. 18).

56. *Id.* at 131.

57. *Id.*

58. *Id.*

other example to date in which the ICJ has availed itself of the rule, albeit with less fanfare, is the 1974 *Fisheries Jurisdiction* case (*United Kingdom v. Iceland*).⁵⁹ Additionally, the Inter-American Commission of Human Rights made a brief reference to the doctrine in *Roach & Pinkerton v. U.S.* in 1987, this time calling it by its modern name.⁶⁰ Other than that, judicial or quasi-judicial mentions of the doctrine are scant in the seventy-year period since its first application, especially in a context that would invite so much use from states seeking to exempt themselves from purported rules of custom.⁶¹ However, while the ICJ's use of the doctrine seemed to cease after the *Fisheries Jurisdiction* case, the most renowned scholars continued to theorize about it.

It is worth noting that before the *Asylum* and *Fisheries* cases, the persistent objector doctrine was absent from the most widely used manuals on international law. For example, the doctrine was not included in Lassa Oppenheim's treatise until its eighth edition in 1955,⁶² four years after the *Fisheries* case. It would not be absurd to argue that there is a causal connection between the judgment and the inclusion of the doctrine in the seminal treaty, which would be proof that the doctrine was previously not on the academic radar. The doctrine also subsequently appeared in Humphrey Waldock's *General Course on Public International Law* in 1962.⁶³ But, it was its inclusion in Ian Brownlie's manual that presumably provided the tipping point for the inclusion of the incipient rule in mainstream international legal teaching, as this manual became the most famous modern treatise on international law.⁶⁴ Authors such as Judge Lauterpacht, Prosper Weil, and Michael Akehurst, among others, followed suit.⁶⁵ From there, the persistent objector doctrine was incorporated into the international *corpus juris* by way of commentary rather than by concurrence of practice and *opinio juris*. While the writings of the most renowned publicists and the jurisprudence of tribunals certainly play an auxiliary role in the determination of the extent and content of rules, as per

59. Fisheries Jurisdiction Case (U.K. v. Ice.), Judgment, 1973 I.C.J. 3 (Feb. 2).

60. See Dumberry, *supra* note 5, at 787.

61. A few other instances of application of the doctrine are offered by the ILC in its 2018 Report on identification of customary international law as proof of practice. See ILC Draft Conclusions, *supra* note 2, at 122 n.778 (citing Michael Domingues v. United States, Case No. 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, ¶¶ 48–49 (2002); Sabeh El Leil v. France [GC], Case No. 34869/05 Eur. Ct. H.R., ¶ 54 (2011); Panel Reports, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Docs. WT/DS291/R, WT/DS292/R & WT/DS293/R (adopted Nov. 21, 2006); Siderman de Blake v. Argentina, 965 F.2d 699, 715 (1992)).

62. See OPPENHEIM, *supra* note 29, at 875.

63. WALDOCK, *supra* note 1, at 106.

64. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (1966). Incidentally, Brownlie is credited with having coined the term “persistent objector.”

65. See HERSCH LAUTERPACHT, INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT (1977); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L LAW 1 (1974).

the ICJ Statute,⁶⁶ they are by no means autonomous sources for the creation of obligations.

B. *On the Virtues of the Persistent Objector Doctrine*

The persistent objector doctrine has, according to its defenders, several potential benefits.⁶⁷ Perhaps the most prominent is the relative simplicity of the doctrine: A state opposing the application of a customary rule in its formative stage need only express its opposition at every available instance in order to be exempted from the rule once it crystallizes. In a dynamic context, such as the creation of rules of custom, whatever law-determining procedure exists ought to be straightforward, lest normative certainty be threatened or relevant legal transactions hindered on account of normative obscurity. The persistent objector doctrine offers a clean exit for any state not wishing to be bound by a norm. By this logic, “the principle of the persistent objector resonates well with the ideology of sovereignty that, for good or ill, dominates the legal rhetoric of much of the world.”⁶⁸ The fact that the objection must be expressed unambiguously provides certainty to other states. This may be compared to the binding character of certain acts of the state in that such unilateral acts provide legal certainty to an otherwise political act and make it legally relevant.⁶⁹ To this end, the International Law Commission (“ILC”) has opined that the “behaviors capable of legally binding states may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other states may reasonably rely.”⁷⁰ If, in fact, states may rely on the protest of a persistent objector, then this reliance helps create juridical certainty, which is a desirable situation from the point of view of the legal interpreter or the judiciary in that it adds predictability to legal exchanges.⁷¹ Additionally, the persistent objector doctrine is potentially useful in that it does not seek to undermine the existence of whatever rule of international custom is contested—it simply seeks to establish that a given state is not bound by a rule. Consequently, rather than striking out the rule

66. Statute of the International Court of Justice, *supra* note 11, art. 38(1)(c).

67. Such as allowing states to customize the breadth and depth of their obligations by means of a simple procedure and being deferential to state-sovereignty. *See generally* JAMES GREEN, *THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW* (2016); Jonathan Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 538–42 (1936); JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 26 (9th ed. 2019).

68. Stein, *supra* note 9, at 464.

69. On the question of unilateral acts of the state as sources of international obligations, see *Nuclear Tests (Aus. v. Fr.)*, Judgment 1974 I.C.J. 253 (Dec. 20).

70. Int’l Law Comm’n, *Rep. on the Work of Its Fifty-Eighth Session*, U.N. DOC. A/61/10, at 369–81 (2006) (Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations).

71. Elina Paunio, *Beyond Predictability—Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order*, 10 GER. L.J. 1469 (2009); *see also* ROBERT KOLB, *THE LAW OF TREATIES: AN INTRODUCTION* 5–6 (2016) (on the higher threshold of certainty provided by treaties as a proxy argument for preference in predictable legal intercourse).

altogether, it creates an exception for states that clearly manifested their will to not be bound by the customary obligation.

All of these facets of the persistent objector doctrine are appealing. A mechanism that allows for states to opt out of rules before they are totally formed creates more room for maneuverability for states with special interests⁷² in any given subject matter. In principle, the norm appears to be respectful of state sovereignty⁷³ and of the realities that permeate the system of international law. Nevertheless, a closer analysis of the implications and features of the persistent objector rule will reveal that it is in fact logically unsound and contrary to much of the existing contemporary international law.

C. *The Shortcomings of the Persistent Objector Doctrine*

Useful as it may seem, the persistent objector doctrine is far from ideal or even coherent within the modern system of international law. It fails to properly respect aspects of the inter-state order such as consent, sovereignty, and equality among states. The very aspects that are applauded as convenient in the formulation of the persistent objector doctrine make it incompatible with a consent-based view of international law. The doctrine does not derive from the general practice or conviction of states that a right to opt out of a rule in such a way exists,⁷⁴ but rather from two rulings of the ICJ and from subsequent scholarly commentary. Its origin and pedigree create a grave problem: It imposes limitations on state freedom of action that are not expressly accepted by the states themselves.

International law is a system of coordinated wills among horizontally-equal sovereign states, and it should not limit the states' right to opt out of rules created by way of judicial precedent or doctrinal development. This paraphrases the freedom principle as enshrined by the PCIJ's *SS Lotus* case,⁷⁵ in which it held that a Turkish ship had no right to exert jurisdiction over a French vessel after a collision in the high seas in the absence of a permissive rule, which forced the bench to resort to freedom from foreign jurisdiction as the controlling normative paradigm. This logic of freedom was consistently

72. Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AM. J. INT'L L. 191 (2018).

73. See DAMROSCH ET AL., *supra* note 647, at 101–05 (for a balanced representation of authors endorsing and contesting the doctrine).

74. As should be the case with norms of customary international law under article 38(1)(b) of the ICJ Statute as an authorized enunciation of the process for identifying custom, also reflected in the ILC's conclusions on the identification of custom as referred to *supra* note 1.

75. See *SS Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

upheld by subsequent ICJ rulings such as the *Continental Shelf*⁷⁶ and *Gulf of Maine*⁷⁷ cases, in addition to the *Kosovo*⁷⁸ and *Nuclear Weapons*⁷⁹ opinions.

Accepting the persistent objector doctrine would create an undue restriction on the freedom of states for the simple reason that the rule does not stem from their action or even acceptance. In addition, it allows a dangerously large amount of leeway for international institutions, such as the political organs of multilateral organizations or the international judiciary, to construe the meaning of states' silence without necessary regard to the context in which the silence arose. Scholar Patrick Kelly argues that:

There are significant problems with silence as an indication of the normative conviction of states. Consent or consensus without knowledge is impossible. Many states are unaware of the formation of custom unless their interests are specifically affected. Even if they are aware of state practice inconsistent with their view, they may not perceive any immediate need to protest because they might not be aware that their silence binds them when their interests are not directly challenged.⁸⁰

This creates the further problem that, when presented with an emerging rule of customary international law, different institutions may allocate different meanings to state inaction.⁸¹ This complication arises uniformly at different law-determining instances. Determining the actual point of crystallization of a rule is a task that is normally undertaken retrospectively, when the existence of the rule has not been previously recognized.⁸² On this issue, Trachtman offers the following observation: “[T]he error of the conventional persistent objector rule might be in seeking artificially to distinguish between a period of formation and a period of application.”⁸³ If the persistent objector doctrine was to be accepted and effectively gain traction and support from

76. North Sea Continental Shelf, 1969 I.C.J. 3 (Feb. 20).

77. Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can. v. U.S.), Judgment, 1984 I.C.J. 246 (Oct. 12).

78. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).

79. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

80. Kelly, *supra* note 29, at 474.

81. Take for example the ICJ: Its judges sit for terms of nine years and five new judges are elected every three years. The rotation in the bench could – and normally does – bring about changes in the notions of the judges concerning the possible effects of silence or other institutions of international law. Statute of the International Court of Justice, *supra* note 11, art. 13.

82. See *Asylum (Colom. v. Peru)*, Judgment 1950 I.C.J. 266, 274 (1950); *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3 (Feb. 20) (for example of the retrospective identification process); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 1996 I.C.J. 226 (July 8) (same); see also Talmon, *supra* note 30 (for a more elaborate expression of the deductive reasoning that is employed in this method).

83. Trachtman, *supra* note 10, at 222.

states, this would arbitrarily lead to setting temporal limits for the protestation of a rule. Such arbitrary character stems from the artificial difference pointed out by Trachtman, since the formative and application stages are virtually indistinguishable until a case is brought and requires determination.

Yet another reason why the persistent objector doctrine is far from ideal, or even in line with international law, is that custom as a form of law continues to present significant challenges on account of the lack of a consolidated method of determination.⁸⁴ In this context, some commentators suggest that rules of custom can now be said to flow purely from the normative conviction of states as expressed in international institutions,⁸⁵ without the need to look for substantial practice.⁸⁶ If this description of custom “on demand” is accurate, it would negate altogether the possibility of a period for protests from concerned states that do not wish to be bound by the prospective rule. The mechanism provided by the rule would be nullified and thus betray the freedom principle and sovereignty altogether.

Another concern is that the persistent objector doctrine could open the way for judicial law-making that in turn could translate, if left unchecked, into the imposition of preferences of a few states on the whole of the international community, much in the same way the “standard of civilization” constituted a key requirement to join the international community in the first half of the twentieth century⁸⁷ and went on to constitute a pillar of the mandate system of both the League of Nations and the UN. Judge Bedjaoui—who raised this point numerous times from the bench of the ICJ—posited in this respect that the:

[J]udicial order set up by the former international society gave the impression of neutrality or indifference. But the *laissez-faire* and easy-going attitude with which it thus sanctioned led in reality to legal non-intervention, which favored . . . a ‘right of dominion’ for the benefit of the ‘civilized nations.’ This was a colonial and imperial right.⁸⁸

84. The best proof of this can be found in the ILC’s 2018 report on identification of customary international law and the wide margin of appreciation and subjectivity it offers for identifying both the objective and subjective element of custom. ILC Draft Conclusions, *supra* note 2.

85. See DAMROSCH ET AL., *supra* note 6, at 99.

86. Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 758 (2001).

87. As is still evident in article 38(1)(c) of the ICJ Statute. Statute of the International Court of Justice, *supra* note 11 art. 38(1)(c). For another perspective on the standard of civilization (as a function of structural colonialism) see *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, Second Phase, 1966 I.C.J. 6 (July 18).

88. Mohammed Bedjaoui, *Poverty of the International Order*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 153 (Richard Falk, Friedrich V. Kratochwil & Saul H. Mendlovitz eds., 1985).

He further argues, “as it had been formed historically on the basis of regional acts of force, it could not be an international law established by common accord, but an international law given to the whole world by one or two dominant groups.”⁸⁹ While these excerpts refer largely to international law as a discipline, they maintain their validity when analyzed through the lens of the persistent objector doctrine in that the practice of states actively partaking in the creation of the new rule is valued much more prominently than the silence of those unaware or indifferent to the formation of the new rule. This feature of the doctrine risks perpetuating the still very much alive center-periphery dynamics⁹⁰ that are endemic to international law.

But perhaps the most disturbing factor when it comes to analyzing the doctrine is the fact that it has no general support or practice on the part of states. In fact, in many instances where states could have claimed the doctrine to their advantage, they preferred to contend the existence of the customary rule altogether.⁹¹ More to the point, Stein—ardent defender of the doctrine—observes that:

The support for the principle of the persistent objector in writing on the sources of international law is so broad and the legal consequences of being a persistent objector so decisive that one would expect to find a large number of instances in which states have claimed that status for themselves . . . The paucity of empirical referents for the persistent objector principle is striking.⁹²

Indeed, after some seven decades since the judicial christening of the rule, it may constitute a stretching of the truth to say that it is widespread in its reception and use.⁹³

The preceding paragraphs are, of course, a quick survey of the difficulties associated with the persistent objector doctrine both in theory and in practice. In furtherance of these observations, it becomes evident that the bulk of inconsistencies arisen from the doctrine are byproducts of the real issue the doctrine poses: consent as the source and proof of law-creation in the international system.

89. *Id.* at 154.

90. On the idea of world system theory which provides meaning of these center-periphery relations see IMMANUEL WALLERSTEIN, *THE MODERN WORLD SYSTEM I: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY* (1974).

91. See DAMROSCH ET AL., *supra* note 6, at 102.

92. Stein, *supra* note 9, at 459.

93. See *supra* note 61 and accompanying text (taking note of instances of use identified by the ICL).

II. THE PROBLEM OF CONSENT

Any thorough analysis of the persistent objector doctrine as the sole opting out mechanism for a state that does not wish to be bound by a nascent rule of customary international law⁹⁴ must look at the issue of consent as the cornerstone of the international legal system. One of the fundamental notions guiding international law is that of consent as a defining characteristic of the system. James Brierly—a seminal jurist of the 1950s who served as rapporteur to the ILC—argues that only duly given consent can be binding on a party.⁹⁵ However, in order to ascertain how consent may be given, it is essential to undertake a review of the fundamental characteristics of international law.

A. *Horizontal Equality and its Impact on Consent*

This sub-section will present the three governing principles of international law that must be kept in mind while analyzing the persistent objector doctrine: (1) international law regulates the conduct of states; (2) all states participating within the system have the same standing and capability to create law; and (3) by reason of their equality, states must participate affirmatively in the creation of any restriction upon their freedom of action.

The first characteristic of international law necessary to understanding the persistent objector doctrine, and perhaps the most essential, is that it first and foremost is a law by and for states. Georg Schwarzenberger—Oxford professor and an authority of the post-World War II rules-based order—defined international law as the “body of international rules which apply between sovereign states and such other entities as have been granted international personality.”⁹⁶ Considering states as the central actors under international law thus leads to the second essential trait of the system: States, as members of the international community, possess sovereign equality.⁹⁷ On this topic, Hans Kelsen—author of the *Pure Theory of the Law*, which still orients modern legal positivism—noted:

The term “sovereign equality” used in the Four Power Declaration probably means sovereignty and equality; two generally recognized characteristics of the states as subjects of international law; for to speak of “sovereign equality” is justified only insofar as both

94. While there are other ways to eliminate rules of custom, such as supersession by treaty, desuetude, or the replacement of a custom by another, newer one, the doctrine presents the only possibility of avoiding being bound by the rule since its crystallization.

95. JAMES BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 154 (1963).

96. GEORG SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* § 1 (5th ed. 1967).

97. This is evident both in article 2 of the U.N. Charter as well as in General Assembly Resolution a/res/2625 XXV of 1970 containing the statement of seminal principles of international law. U.N. Charter art. 2; G.A. Res. 2625 (XXV) (Oct. 25, 1970).

qualities are considered to be connected with each other. Frequently, the equality of states is explained as a consequence of or as implied by their sovereignty.⁹⁸

As Kelsen observes, the equality of states can be regarded as a function of their sovereignty. Such a horizontal construction, which is in fact unique to international law, stems from the objective fact that there is no world government or state reigning supreme in the community of nations.⁹⁹ The lack of a central authority to dispense justice and create norms causes the international legal order to be one of forcible coordination among equals, premised on a certain degree of convergence of interests and goals.¹⁰⁰ Thus, and especially so when it comes to rule-making, their participation is required to create whatever institution is seeking to constrain their liberty of action, consistent with the freedom principle.

The fact that no state may impose its will upon others and that participation of each state is required to impose restrictions on conduct, sheds light on the third relevant characteristic of international law. Namely, “it does not as yet include a competence on the part of the international community to impose fresh obligations upon an unwilling state.”¹⁰¹ The PCIJ in the *SS Lotus Case* presented a clear articulation of the rule whereby a state, being a sovereign equal of other states, must accept any obligation looking to restrict its freedom of action; therefore, the binding force of international law arises from the actual or tacit consent of states.¹⁰² Consent, in other words, is a law-creating fact.

Having established these three fundamental principles, it is prudent to recall the considerations laid out in Part I concerning the formation of rules of customary international law. All three of these principles play an essential role in the development of norms of custom. However, special deference ought to be paid to the requirement that consent be expressed by the state purporting to create the regulation. The importance of the expression of consent can be found in the formulation of the freedom principle as referred to in the *Lotus* ruling. A validly recognized means of expression of consent is crucial if there is to be any certainty on the obligations that a state is expected to follow by its peers. Presumption, then, makes for a poor substitute of

98. Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207 (1944).

99. *Id.*

100. SCHWARZENBERGER, *supra* note 96, at 12.

101. OPPENHEIM, *supra* note 29, at 123.

102. *SS Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 10 (Sept. 7). Additionally, the *Lotus* case opens the door for tacit acceptance. While it could be a possibility, the following section will show the intrinsic problems of regarding silence as an acceptance. The point here is to show that the states must accept limitations on their freedoms. Otherwise they would be left with obligations that do not flow from their sovereign will. This would in turn overturn the equality of states in their international relations and substitute legal order for power as a characteristic of the legal system.

acceptance, especially so if the freedom principle is the starting point for law-determination. This is all the more true in the absence of any rule of recognition clearly assigning a given meaning to the silence of the state.¹⁰³

B. *Consent and the Freedom Principle*

In answering the question of the type of consent required to limit states' freedom of action, Sir Gerald Fitzmaurice—member of the ILC, judge of the Permanent Court of Arbitration and the ICJ—has characterized the requirement to have explicit consent in general rules of customary law as artificial. Fitzmaurice argues:

It is probably true to say that consent is latent on the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law.¹⁰⁴

Fitzmaurice's view is supported by the conclusions of the International Law Association ("ILA") at the meeting of the Committee on the Formation of Customary International Law at the London Conference of 2000. The ILA held that "where a rule of general customary international law exists, for any particular state to be bound by that rule it is not necessary to prove that state's consent to it."¹⁰⁵ This position would seem, at best, to be challenged by the fundamental traits of the system of international law as described above. It defies the freedom principle—as stated by the *SS Lotus* case and upheld until now by the ICJ—and the nature of international law as an order of coordination between sovereign equal states lacking a superior authority. Both notions from Fitzmaurice and the ILA lay the groundwork for the recognition of the persistent objector doctrine by holding that if a state does not object to the creation of a rule during the time of its formation, it must *necessarily* agree by virtue of its silence. As shown below, equating silence and consent is not only illegal, but it is also counterproductive given the very specific characteristics of the community of nations and its law-making dynamics.¹⁰⁶

Analyzing the dynamics of customary law making, Ted Stein writes that including the persistent objector doctrine in the rank of the meta-rules or rules of customary international law follows from the premise that in the absence of a centralized hierarchical authority with the power to prescribe rules for the subjects of the order, "the law must result from the concurrent wills of

103. Which would in turn require expressive acceptance on the part of potentially bound states. While the persistent objector doctrine aims to provide a solution, the lack of traction and repetition it has generated since its advent casts reasonable doubt on its very existence, as will be explored below *infra* section VIII.

104. Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 1 (1953).

105. INT'L L. ASS'N, FINAL REPORT OF THE COMMITTEE ON FORMATION OF CUSTOMARY INTERNATIONAL LAW (2000).

106. See *infra* section III(c).

states.”¹⁰⁷ Indeed, given the defining characteristics of international law, it holds true that when it comes to states and law making, *nemo primo inter pares* (there is no first among peers). He later adds that any given rule cannot bind a state that has manifestly and continuously refused to accept it.¹⁰⁸ This latter view is consistent with the *Lotus Case* holding:

International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in convention or by usages generally accepted as expressing principles of law.¹⁰⁹

This necessity for the expression of the free will of the states underpins the voluntary nature of international law. Indeed, note that the PCIJ enunciated the “freedom principle” later in the same ruling by showing that “restrictions on state’s freedom of action cannot be found in international law in the absence of positive law emanating from state consent.”¹¹⁰ As a consequence, states would be precluded from carrying out only such actions that are explicitly forbidden. Additionally, any prohibition must be the product of an expression of will, duly manifested in accordance with the appropriate mechanisms designed to that end.

C. Practice as a Substitute for Explicit Consent

Proponents of the persistent objector doctrine, such as Stein, Charney, and Waldock, would probably argue that this notion of consent is an anachronism, and that if support for consent can only be found in a ruling almost a century old, it may not be up to date with the recent developments and transformations of international law. However, the ICJ has upheld, time and time again, the necessity of consent for the formation of rules of international law. For example, in the *Nicaragua Case* it held that “in international law there are no rules, other than such rules as may be accepted by the state concerned, by treaty or otherwise.”¹¹¹ Similar observations have been made by the ICJ in other landmark rulings and opinions, such as the *Nuclear Weapons Advisory Opinion*, where the ICJ looked to the existence of any rule of custom made evident by the conduct of states that prohibited the use of nuclear weapons (but found none).¹¹² Moreover, the ICJ in the 2010 *Kosovo Opinion* was asked whether the unilateral declaration of independence by Kosovo violated

107. Stein, *supra* note 9, at 459.

108. *Id.*

109. *SS Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 10 (Sept. 7).

110. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

111. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 269 (June 27).

112. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226.

international law in any way, a question the bench answered by investigating whether any rule, grounded on the consent and practice of states, existed that prohibited such an action.¹¹³ The difficulties in ascertaining the subjective element of custom, explored above, incline the legal operator to rely on the generality and density of any given practice to establish that the regulation exists and thus makes consent implicit in practice.¹¹⁴

In this spirit, MacGibbon writes:

The presumption of general consent or acquiescence is more strongly raised by virtue of the fact of general participation in the practice, than would be the case with regard to an exceptional customary right exercised by a single state or by a small group of states.¹¹⁵

By this logic, however, an unequal evidentiary value is placed on the practice of states depending on whether they are proposing a new rule or simply staying silent in the face of the purported norm.¹¹⁶ This raises the question then of whether the action of many is more legally relevant than the silence of a handful of states, or even whether the many may impose obligations upon the silent by the mere virtue of their larger cumulative will. While the general logic of the formation of rules of customary law would seem to imply so, this implication denies the sovereign equality of states. Sovereign equality negates the possibility that some states may have more law-making power than others in the abstract. Sovereignty also supposes that any purported rule basing its normativity and opposability on numbers alone is a fallacy.

Prosper Weil—author of one of the most controversial papers in modern international law, entitled *Towards Relative Normativity in International Law*¹¹⁷—has observed that the number of states required for any judgment of the “critical mass” of states is in fact dwindling dangerously:

For the past several years, the degree of generality required of a practice, to enable it to serve as the basis of a customary rule, has been steadily diminished, while on the contrary, the binding character of such a rule once formed is being conceived of as increasingly general in scope. The result is a danger of imposing more and more

113. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).

114. See P.P. Rijpkema, *Customary International Law in the Nicaragua Case*, 20 NETH. Y.B. INT'L L. 91 (1989).

115. Ian MacGibbon, *Customary International Law and Acquiescence* 33 BRIT. Y.B. INT'L L. 110, 112 (1957).

116. On this differentiated value, see Heller, *supra* note 72.

117. See Weil, *supra* note 65. The controversy surrounding this piece is precisely because Weil warns about the potential risks of a relative international legal order which would end up failing to fulfill its purpose. For a more in-depth analysis see the excellent piece by Karen Knop, *Introduction to the Symposium on Prosper Weil, “Towards Relative Normativity in International Law?”*, 114 AJIL UNBOUND 67, 67–71 (2020).

customary rules on more and more states, even against their clearly expressed will.¹¹⁸

While the greatest concern presented by Weil is that an overburdening number of obligations will be imposed on states, the final sentence of the excerpt is perhaps the most important to the analysis of the persistent objector doctrine. If the number of states required for a practice to be deemed a rule of customary international law is in fact diminishing, then the number of non-participating states who either reject or, more importantly, remain silent regarding the alleged formation of the norm is greater. Such states would be bound by the purported rule unless they registered their objections.

However, it is noteworthy that the ICJ has held—rather contradictorily—that the lack of protest by non-interested states does not imply that they necessarily acquiesce in the legal theory of the claim.¹¹⁹ Additionally, in the case of states with a special interest or stake in the application of a rule, also dubbed “states specially affected by a purported rule of customary international law,” it is held that these “could not be presumed to be bound by such a rule without their consent.”¹²⁰ As will be discussed in the next sub-section, different silences appear to mean different things when states are faced with a prospective rule of customary international law, and there does not seem to be an objective metric to judge those silences or to attribute meaning to them, which then makes the persistent objector doctrine impossible to apply on account of the impossibility of conclusively holding silence to mean acceptance.

D. The Persistent Objector Rule as Expression of the Mandatory View of Customary International Law

The requisite amount and degree of practice for a rule of customary international law to be held to exist and the subsequent possibility of opting out of it are perhaps more revealing of scholarly consensus than actual reality. To this effect, the doctrine on custom distinguishes between the mandatory and the default view of customary international law. Under the mandatory view, seemingly predominant in the scholarly commentary concerned with contemporary customary international law, a state may not unilaterally opt out of a rule at any point it wishes; instead, the state is obliged to do so in compliance with the persistent objector doctrine.¹²¹ This stems from the notion that rules of custom can be brought into existence without the participation of all states and that those that do not express their rejection cannot preclude the formation of the rule.¹²² It also reflects a preference for the rules to be held

118. Weil, *supra* note 65, at 434.

119. See *Fisheries (U.K. v. Nor.)*, Judgment, 1951 I.C.J. 116 (Dec. 18).

120. DAMROSCH ET AL, *supra* note 6, at 79.

121. Curtis Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010).

122. *Id.*

constant in that allowing states to unilaterally opt out of rules would weaken the certainty and predictability of the system. Such a preference for stability is, of course, a value judgment in which commentators and judges alike *decide* that this is better or more desirable.

While it is true that legal certainty is important for the rules to be clear and for states to know how to act, it is also true that the mandatory view is reminiscent of the order of submission proper to domestic law whereby a central authority decides what the law is, and the subjects adjust their actions accordingly. In the domestic context, legal certainty serves as a limit to governmental action and defines the degree and breadth of freedom of the subjects. However, international law is an order of horizontal coordination in which lawmakers are subject to the law without being subordinate to the lawmaker due to the lack of a central authority. Any kind of restriction of states' freedom of action—even the freedom to become exempt from a certain rule by using a defined procedure—should come into being by virtue of the consent of states.

The default view prescribes that states must give their consent or they will not be bound by the purported rule.¹²³ Such a view would seem to provide a better description of the intrinsic realities and features of the international community and is also more compatible with the fundamental characteristics of international law.¹²⁴ It maximizes freedom of action of states and allows them to opt out of obligations from which they do not wish to be bound.

Mitu Gulati and Curtis Bradley—professors at Duke University—point out that the default view was prevalent among eighteenth and nineteenth century writers and became canonical in the twentieth century.¹²⁵ Emmerich De Vattel—Swiss philosopher, jurist, and diplomat—contemplated the possibility of states opting out of rules they later deemed to be prejudicial to in addition to the notion that could only be bound by their acceptance and consent. He wrote:

When a custom or usage has become generally established either between all the civilized countries of the world or only between those of a given continent, Europe for example, or those which have more frequent intercourse with one another; if this custom be indifferent in nature, much more so if it be useful and reasonable, it becomes binding upon all those nations which are regarded as having given their consent to it. They are bound to observe it towards one another, so long as they have not expressly declared their unwillingness to follow it any longer.¹²⁶

123. *Id.* at 216.

124. *See* discussion *supra* Part III(b).

125. Bradley & Gulati, *supra* note 121, at 216.

126. EMMERICH DE VATTEL, *THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, at lxxv, 385–86 (Joseph Chitty ed., 6th Am. ed. 1844) (1797).

Most early international law treatise writers, such as Cornelius Bynkershoek, Henry Wheaton, and Andrés Bello endorsed this view, which places the will and sovereignty of the state as supreme rule maker and subject of the law above all other considerations.¹²⁷ In this view, rules of custom could only be entered into by the explicit consent of the states and could be opted out of at any time by the simple expression of the wish to do so. In supporting this view, J.J. Burlamaqui—Swiss legal theorist—wrote:

There is, besides, another law of nations, which we may call arbitrary and free, as founded only on an express or tacit convention; the effect of which is not by itself universal; being obligatory only in regard to those who have voluntarily submitted thereto, and only as long as they please, because they are always at liberty to change or repeal it.¹²⁸

As a final consideration on the issue of consent, it is worth noting that the mandatory view would seem to have as its ultimate goal the consistency and certainty of legal rules in an ever-changing system. This preference explains the growing amount of literature claiming that customary international law is in decline on account of the codifying function of treaties, which provide more certainty.¹²⁹ This purported decline suggests that treaties are more certain means of law making.¹³⁰ However, treaties allow for denunciation and exit by any party that no longer wishes to be bound at any point in time, and they may only be entered into by the expression of the most rigorous forms of explicit consent, as is evident from the Vienna Convention on the Law of Treaties (“VCLT”).¹³¹

Maybe the entirety of the trend observed by Bradley and Gulati is no more than international law biting its tail in an infinite circle, not unlike the ouroboros. However, until states see it fit to bring about fundamental change to the system, consent will continue to be the essential foundation of international law. This evidences a fundamental flaw in the persistent objector

127. See CORNELIUS VAN BYRKENSHOEK, *DE FORO LEGATORUM LIBER SINGULARIS: A MONOGRAPH ON THE JURISDICTION OVER AMBASSADORS IN BOTH CIVIL AND CRIMINAL CASE* 106–07 (Geoffrey Cumberlege, 1946) (1744); see also HENRY WHEATON, *HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA: FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON* 196, 227 (Gould, Bank & Co. 1845) (1842); ANDRÉS BELLO, *PRINCIPIOS DE DERECHO INTERNACIONAL* 16–17 (El Mercurio 1844).

128. J.J. BURLAMAQUI & H.P. NUGENT, *THE PRINCIPLES OF NATURAL LAW: IN WHICH THE TRUE SYSTEMS OF MORALITY AND CIVIL GOVERNMENT ARE ESTABLISHED* 199 (Lawbook Exchange Ltd. 2004) (1748).

129. See Joel P. Trachtman, *The Obsolescence of Customary International Law, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 172 (Cambridge Univ. Press 2016).

130. For a comparative analysis between treaties and custom from the perspective of this argument, see KOLB, *supra* note 71, at 4.

131. Vienna Convention on the Law of Treaties arts. 11–16, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

doctrine. On the one hand, it presupposes consent where protest is not made manifest, and, on the other hand, it limits the sovereign power to withdraw from rules of customary international law in a system that is voluntary by design.

Thus far, this article has hinted at how the very complications that are evident in the process of identifying customary international law become even more manifest and taxing when it comes to the persistent objector doctrine. In order to highlight in greater detail how these issues shake the foundations of the doctrine, the subsequent sections will dissect the particular aspects of the attribution of meaning to silence as the core component of the doctrine.

III. THE PROBLEM OF SILENCE

Among the many problems presented by the persistent objector doctrine is the arbitrary allocation of meaning to silence. Glennon observes “a handful of states cannot speak for all states, and it is improper to infer agreement from silence.”¹³² If this is true for states, it is even more so for any other international actor acting in delegated capacity, such as the ICJ. This Part focuses on the nature of silence as a legally relevant phenomenon and its possible consequences for the persistent objector doctrine, since it is premised on the equation of silence with acceptance.

This allocation of meaning is contrary to the physical nature of silence and to its inability to communicate anything unequivocally. As the Greek philosopher Parmenides observed, “*ex nihilo nihil fit*”¹³³ or “nothing comes from nothing.” Silence, by its very nature, is the absence of sound. Silence is suboptimal to convey meaning, for it is void of certainty in its expression. To explain this point with an analogy, it would be proper to borrow a page from the book of Judge Cançado Trindade, who sits on the bench of the ICJ and is fond of quoting from Homer, and referencing the *Apology of Socrates*. In the *Apology*, Plato eloquently corners Meletus by stating that he may assume his silence gives consent to the claim put forth in the debate,¹³⁴ much in the same way the ICJ does. Notice that in the context of the dialogues, this is born out of a stylistic convention (evidenced because it is a recurring move and no objection is made to it) which is all but absent in international law.

While this may be acceptable for the sake of a rhetorical exercise between philosophers, it is hardly an ideal or legal premise for law-making in a system such as international law, absent a rule allowing such an attribution of meaning. By its very nature, silence is inconclusive and ambiguous. Therefore, any attempted determination of its consequences involves a subjective judgment

132. GLENNON, *supra* note 20, at 79.

133. TITUS LUCRETIUS, *DE RERUM NATURA* (Internet Classics Archive 2011). This quote was first attributed by Aristotle to Parmenides. See Aristotle, *Fragments of Parmenides* 1-19, (trans. John Burnet), https://lexundria.com/parm_frag/1-19/b (last visited Feb. 7, 2021).

134. PLATO, *DIALOGUES OF PLATO* 24 (Simon & Schuster 2013).

of intention. This judgment can be—and often is—ill-construed and has great potential to misrepresent the state’s actual intention, or lack thereof.

A. *The Expression of Opinio Juris as a Requirement
for the Recognition of Custom*

Unlike Plato, the ICJ and states should not take it upon themselves to unilaterally determine the meaning of a given inaction in the context of the emergence of a rule of custom. This assertion comes from the requirements built into the concept of customary law. The *opinio juris* requisite is crucial to the existence and acceptance of any given rule of customary law in that it expresses the willingness of a given state to act in conformity to the purported rule and its conviction that it is owed to others.¹³⁵ If this were the common standard of reasoning, for example, every time a state invades the sovereign territory of another and the entirety of the international community fails to condemn it with one voice, those states which do not condemn the action would be in fact supporting the aggression and thus eroding the prohibition against the use of force.¹³⁶ This is at the heart of the expressive value of repetition for the creation of custom *if and only if* it can be reasonably ascertained that such repetition entails recognition of the rule. Otherwise, it would be no more than simple usage or comity lacking in normative character.¹³⁷ In the *Nuclear Weapons* Advisory Opinion, the ICJ argues that the impossibility of establishing clear and distinct *opinio juris* makes it difficult to ascertain that a rule of customary international law exists.¹³⁸

Silence—by its nature—is inadequate to convey the type of conviction required by the subjective element of custom, and practice alone can be carried out for many reasons completely unrelated to normative intent on the part of states; it is inconclusive, if not totally isolated from, normative conviction. However, as far as the persistent objector doctrine is concerned, it all comes down to how the ICJ views silence.

B. *The Conclusive and Evidentiary Views of Silence*

The ICJ’s own jurisprudence has not stopped it from attempting to construe meaning and intent from silence. An example of the views informing

135. Fitzmaurice, *supra* note 104104, at 68.

136. This is of course not the case, since the prohibition against the use of force is a peremptory norm of general international law according to most accounts and it could not, therefore, fall into desuetude. See generally James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT’L L. 215, 215–20 (2011) (providing background information on the peremptory norm of general international law prohibiting the use of force).

137. See MacGibbon, *supra* note 115, at 117 (“a practice may have been adopted and perpetuated for the reason that it was convenient and appeared to be in the interests of the states participating in it.”).

138. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶67 (July 6).

the ICJ's reasoning in drawing conjectures and imposing obligations is illustrated in the majority and dissenting opinions of the *Fisheries* case. Alexander Ovchar characterizes the two stances argued in this case as conclusive and evidentiary views of silence. The conclusive view "contends that the mere fact of silence gives rise to an estoppel."¹³⁹ Specifically, the ICJ held that by failing to object for sixty years to the delimitation undertaken by Norway, the United Kingdom had in fact acquiesced to the delimitation and was estopped from challenging it.¹⁴⁰ This view diminishes the requirement for *opinio juris* in that it requires only a proponent state acting in a certain way and encountering the silence of others for rules of custom to exist. Such a stance undermines the two-fold nature of the custom identification methodology.

The evidentiary view, on the other hand, suggests that "silence must be viewed in context of the circumstances in which it was maintained; the presumption of consent derived from silence may be rebutted by a clear indication of contrary intention."¹⁴¹ This view can be seen in Judges Reid and McNair's dissents. The latter expanded in his interpretation by claiming that:

In this circumstance, I do not consider that the United Kingdom was aware, or ought but for default on her part to have become aware, of the existence of a Norwegian system of long straight base-lines connecting outermost points.¹⁴²

While Judge McNair bases his analysis chiefly on the reasonable standard of knowledge that a state may be said to possess regarding a certain situation, the larger point is the fact that all the circumstances surrounding a given act of the state should be considered when the act is in itself ambivalent or inconclusive. This would seem like a sensible idea *prima facie* because it would reinforce the requirement for expression of consent to meet the *opinio juris* requirement. However, this creates a further problem: Which circumstances are to be taken into account, and which are to be discarded? This, in turn, creates a larger problem of discrimination between equally tenuous factors and opens the door for misinterpretation and abuse. Between the two theories of the effects of silence, Judge McNair's dissent is perhaps the most respectful of states' sovereignty. There is, nevertheless, a third option: taking silence at face value. This would entail that silence cannot under any circumstances be construed as possessing meaning on account of being ill-suited, inconclusive, and ambiguous.

139. Alexander Ovchar, *Estoppel in the Jurisprudence of the ICJ: A Principle Promoting Stability Threatens to Undermine it*, 21 BOND L. REV. 124 (2009).

140. *Fisheries (U.K. v. Nor.)*, Judgment, 1951 I.C.J. 116, 138–39 (Dec. 18).

141. Ovchar, *supra* note 139, at 10.

142. *Fisheries*, 1951 I.C.J. at 180 (Sir Arnold McNair, dissenting).

C. *The Perils of looking to Estoppel by Acquiescence for Guidance*

As was pointed out above, the persistent objector doctrine seems to draw a great deal from the doctrine of estoppel in international law. Accordingly, this section discusses the parallels between the ICJ's reasoning in both estoppel and the persistent objector doctrine, and their application. This similarity of ends would presumably allow for a certain degree of analogy, with the difference being that estoppel—unlike the persistent objector doctrine—is in fact rooted in the municipal legal traditions of at least the common law system and its civil counterparts.¹⁴³

While being mindful that estoppel applies to factual situations and not to legal precepts in general,¹⁴⁴ and that the persistent objector doctrine is used to determine the exemption from nascent rules of custom *vis à vis* particular states, the goal of both is ultimately the same: to assert the existence of an obligation as a result of the action (or rather, the inaction) of the state.

It is noteworthy that the ICJ has been inconsistent in clarifying its reasoning when it comes to concluding that estoppel can operate through silence.¹⁴⁵ Instead of looking to state practice and *opinio juris* for a systematic doctrine on the effects of silence that it could build upon, the ICJ has opted for descriptive indicia in the guise of a checklist, as it did in the *North Sea Continental Shelf* case.¹⁴⁶ According to the ICJ, estoppel consists of three fundamental elements: (1) a state makes a certain representation to another; (2) the representation must be unconditional and made with proper authority; and (3) the state invoking estoppel must rely on the representation.¹⁴⁷

Taking estoppel by acquiescence (in the absence of any more proximate variety) as the closest relative and direct ancestor of the persistent objector doctrine, it is fairly easy to establish that the required representation, or implied acceptance, originates from silence and inaction. The limit of inferences that may be drawn from silence is virtually endless in the absence of a rule that prescribes a set significance. If allowed to, a state may take a silence to mean almost absolutely anything depending on context, including acceptance of the action of the proponent, as is the case with estoppel. In this regard, Judge Fitzmaurice pointed out in his separate opinion in the *Temple* case that “a representation and thus possibly estoppel, can arise from a declaration or

143. MacGibbon, *supra* note 444, at 473.

144. See Wagner, *supra* note 43, at 1803–04.

145. See *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, ¶¶30–33 (Feb. 20); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1984 I.C.J. 14, ¶392; (June 27); *Temple of Preah Vihear* (Cambodia v. Thai.), Separate Opinion, 1962 I.C.J. 62, ¶¶ 40–45 (June 15) (Separate Opinion by Alfaro, J.); *Nuclear Tests* (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457, ¶¶ 267–68 (Dec. 20). These cases even date back to the Permanent Court of International Justice (“PCIJ”). See *The Legal Status of Eastern Greenland Case* (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser A/B) No. 53, ¶ 71 (Apr. 5).

146. *North Sea Continental Shelf*, 1969 I.C.J., ¶ 30.

147. *Id.*

from silence.”¹⁴⁸ However, neither he nor any other member of the *Temple* bench saw fit to indicate how or why a given silence should mean acceptance. Fitzmaurice’s position is strongly evocative of the conclusive view of silence discussed above. Moreover, the ICJ in the *Nicaragua* case, observed that: “[E]stoppel may be inferred from the conduct, declarations and the like made by a state which . . . clearly and consistently evinced acceptance of a particular state of affairs.”¹⁴⁹ This statement begs the question of what standard is acceptable or appropriate to even *evince* that a state has accepted something, especially when the conduct under scrutiny is quite literally nothing but silence? Is it consistency with previous declarations, as the *Eastern Greenland* case suggests?¹⁵⁰ Or the reliance of the other party on the silence à la *Nuclear Tests* case?¹⁵¹

Both options are unpersuasive absent a controlling standard of evidence to that end. As a matter of evidence, it would be impossible to ascertain which, if any, is the controlling standard to attribute intent to silence. Even if the findings of the *Eastern Greenland* and *Temple* cases have created judicial constructs to that end, international tribunals are tasked with deciding cases in accordance with existing international law, as articles 36(2) and especially 38 state. Even if the argument is put forth that such a possibility is made available by way of general principles under article 38(1)(c) of the Statute of the ICJ, the ICJ would have to demonstrate that a principle allocating definitive meaning to inaction is recognized by all major legal systems of the world.¹⁵² Such analyses are all but absent in the major rulings of the ICJ dealing with estoppel by acquiescence.

At best, any attempts at discovering the controlling act for attribution of meaning to silence would encounter problems of infinite regress or faulty reversal causation (did the silence cause acceptance or is it the other way around?).¹⁵³ In the case of the persistent objector doctrine, the starting premise is that the state that opposes the rule has never made any previous statement and such silence causes it to be bound by the crystallized rule. Is that then the intention as represented by the ICJ in the *Nuclear Tests* case? By this measure, “the intention of being bound is to be ascertained by an

148. See Ovchar, *supra* note 139, at 4; see also *Temple of Preah Vihear (Cambodia v. Thai.)*, Separate Opinion, 1962 I.C.J. 6, at 62 (June 15) (separate opinion by Fitzmaurice, J.).

149. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Preliminary Objections, I.C.J. Reps. 392, ¶ 51 (1984).

150. *Legal Status of Eastern Greenland Case (Den. v. Nor.)*, Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 53 (Apr. 5).

151. *Nuclear Tests (N.Z. v. Fr.)*, Judgment, 1974 I.C.J. 457, ¶ 47 (Dec. 20).

152. For the determination of general principles of law, see ILC, *Rep. on the Work of the Seventy-First Session*, U.N. Doc. A/74/10, at 24–26 (2019) (discussing the prohibition on the use of force as a *jus cogens* norm).

153. These quandaries are not unlike those of the egg and chicken dilemma. In legal terms this means there would need to be a rule of recognition validly created by states or recognized as authoritative by the Court (derived from its import in domestic legal systems) attributing meaning to silence under specific circumstances.

interpretation of the act.”¹⁵⁴ There is no further mention of whose interpretation (whether of the states or the ICJ) is said to be authoritative in the matter,¹⁵⁵ or by which parameters an interpretation should be conducted.¹⁵⁶ Ironically, the ICJ ends up construing France’s intent not from the interpreted subjectivity of the state, but from its actual declaration inasmuch as it is indicative of the “mental state” of the actors, which is the basis of the legal claim of the applicants.¹⁵⁷ In other words, the Court avoided haphazard attributions of legal significance to mere intention, rather, it relied on objective and active behaviors indicative of consent to create obligations. A reasoning more compatible with parallel regimens such as the VCLT when it comes to rule-making. This shows that when presented with dubious intentions, even the ICJ has chosen to look for explicit acts of the state whose interpretation can actually be derived from the context of the act itself and its surrounding circumstances.

Another instance of extra-legal consideration of the conclusive effects of silence in the creation of obligations is the one utilized by Judge Alfaro in his dissent in the *Temple* case.¹⁵⁸ He argues that silence constitutes “a presumption *juris et de jure* in virtue of which a state is held to have abandoned its right to oppose an adverse claim by another state.”¹⁵⁹ Even if it were the case that the uncontested use of the persistent objector doctrine could have confirmed its normative character, claiming that it constitutes a *jure et de jure* presumption might be misrepresenting the magnitude, origin, and importance of the rule. Attributing such character to the doctrine would necessitate a valid rule,¹⁶⁰ which is controversial in the case at hand given the doctrine’s judicial origins. The Latin phrase *et de jure* translates literally to “and *from* the law.”

The ICJ, or any other international court for that matter, is precluded from granting *jure et de jure* character to any norm since it is not a formal source

154. *Nuclear Tests*, 1974 I.C.J. 457.

155. The logical conclusion would have to be that only the state’s determination (as a law-creating fact) is authoritative, as courts ought to ascertain the existence of international law from the legal order, as designed by states, following the logic of article 38 of the ICJ Statute, which tasks the court with deciding *in accordance* with international law. Such a phrasing makes evident that the court ought to interpret within the context of the actions capable of indicating acceptance on the part of states as indicated by them in validly created rules of recognition. Statute of the International Court of Justice, *supra* note 11, art. 38; *see also Nuclear Tests*, 1974 I.C.J. 457.

156. The Court did offer—in passing—a standard of evaluation to ascertain the normative character of unilateral acts of the state in the *Nuclear Tests* case. However, in the cited case the Court used it for actions and not omissions. *See id.* ¶¶ 43, 44, 46; *see also* Int’l Law Comm’n, *Second Rep. on Unilateral Acts of States*, U.N. Doc. No. A/CN.4/500 & Add.1, ¶ 13 (1999).

157. *Id.* ¶¶ 11, 44.

158. *Temple of Preah Vihear (Cambodia v. Thai.)*, Separate Opinion, 1962 I.C.J. 62, ¶¶ 39, 40 (June 15) (Separate Opinion by Alfaro, J.).

159. *Id.*

160. For more on the role of factual presumptions in international customary law, see Raphael Walden, *The Subjective Element in the Formation of Customary International Law*, 12 ISR. L. REV. 344, 353 (1977).

of obligations. It follows that in a system characterized by legislative coordination between equals,¹⁶¹ as opposed to submission to a central authority wielding *imperium*, it is impossible to have (1) any kind of *jure et de jure* presumptions absent a controlling international agreement (written or otherwise), or (2) a central authority (which would defeat the whole purpose of international law as an order of coordination among equals). Therefore, Judge Alfaro's claim concerning the *jure et de jure* character of the assumption of the effects of silence for estoppel and for the persistent objector doctrine seems to run into trouble when scrutinized by the formal sources system, making it, at best, unpersuasive and, at worst, incompatible with international law.

Estoppel by acquiescence, then, would seem to have several issues of normativity attached to it unless it could be ascertained that it is overwhelmingly accepted by all legal systems of the world as a general principle, which it may or may not be (and such an analysis eludes the aim of this paper). However, it does exhibit issues that are present in its younger objecting sibling. It also showcases the difficulties present when the ICJ indicates that this or that is a norm of international law in the absence of clear state agency, which leads to the problem of normative authority that riddles the persistent objector doctrine and its origin.

IV. THE PROBLEM OF AUTHORITY

One of the main problems surrounding the persistent objector doctrine in its equation of silence to acquiescence is that silence by itself says little in the absence of an authoritative indication of any of a myriad of possible meanings that may be allotted to it. As noted in Part I, the mere repetition of conduct on the belief that it is of normative character, has an expressive value in and of itself when determining the existence of a rule of customary international law. In cases where a state *does* something, it is less problematic to value whether its action (in the context) can be construed to mean acceptance. But what happens when inaction or silence is the only manifestation of the will, or lack thereof, of a state? The persistent objector doctrine would suggest that absent loud, clear, timely, and repeated protest, the state forgoes the right to exempt itself from the rule.

Now then, on whose authority did the ICJ see fit to determine that the effect of any given state silence should be acceptance rather than refusal? It is essential to recall that the ICJ works under the delegated authority of the parties of the UN Charter and that its powers are explicitly defined in its Statute.¹⁶² Nowhere in the Statute does it say that the Court may create "rules of

161. SCHWARZENBERGER, *supra* note 96, at 3.

162. For the extent of the competence of the Court to engage in law-determination, see Statute of the International Court of Justice, *supra* note 11, art. 38; *see also* Ian Johnstone, *Law-Making by International Organizations: Perspectives from IR/IL Theory*, in

recognition” or decide to accord one or other meaning to an act of a state. As the *Lockerbie* case suggests, the ICJ is not above and beyond expanding its scope of jurisdiction on account of carefully crafted semantic sleights of hand.¹⁶³ Nevertheless, the fact that it did not refuse the case on the grounds of lack of jurisdiction from the outset remains the subject of much discussion, even if it refused to exert judicial review over a UN Security Council (“UNSC”) resolution, not because it thought it was barred from doing so, but more because it chose not to.¹⁶⁴ While the ICJ has envisaged its mandate and powers as more of a moving target, adaptable to the necessities of the cases brought to it, a sober inspection will indicate that it is not the case that such adaptability should go beyond what the drafters of the Statute originally meant.

A. *The Limits of the Mandate and Authority of the ICJ*

When scrutinizing the behavior of the ICJ in relation to the persistent objector doctrine, it becomes clear that it is acting *ultra vires* as it goes beyond the will of the states in their exclusive law-making capabilities. This is because the mandate entrusted to the ICJ is to settle disputes among parties by applying existing international law,¹⁶⁵ if it finds that there is no applicable law it ought to indicate so, like it did on the *Northern Sea Continental Platform* case.¹⁶⁶ Otherwise, the forcible conclusion is that the bench is incurring in legislative activity, as is the case with the persistent objector doctrine.

However, the alternative to this closed reading of the ICJ’s mandate is to be found in the doctrine of implied powers. Another creation of judicial conception, this doctrine entails that “under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication, as being essential to the performance of its duties.”¹⁶⁷ While referring generally to “the Organization,” the doctrine of implied powers applies to each one of the main bodies of the UN, including the ICJ.¹⁶⁸ The question of whether the ICJ

INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey Dunoff & Mark Pollack eds., 2013).

163. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objections, 1998 I.C.J. 9, ¶¶ 17–39 (Feb. 27).

164. For a detailed analysis on the limits of the ICJ’s mandate concerning judicial review of UNSC decisions in the Lockerbie case, see Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Dissenting Opinion, 1998 I.C.J. 64, 73–81 (Dissenting Opinion by Schwebel, J.) (Feb. 27).

165. Statute of the International Court of Justice, *supra* note 11, art. 38, *see also* ILC, *supra* note 152.

166. *See* Statute of the International Court of Justice, *supra* note 11, paras. 21–36.

167. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11).

168. For an account of the operation of the doctrine of implied powers even in organs beyond the United Nations, see Moises Montiel, *Los Limites a los Poderes Implícitos de las*

requires law-making power to fulfill its mandate can only be answered in the negative as per articles 38 and 59 of its Statute.¹⁶⁹

For the same reason domestic political systems have separation of powers and checks and balances among the different branches of a government, the ICJ cannot simultaneously be the legislator and the adjudicator.¹⁷⁰ The ICJ must uphold the will of the states, the only legitimate lawmakers, and adhere to whatever rules they have explicitly created. This is the legal consequence of the restriction imposed upon it by article 38 of the Statute.¹⁷¹

On the other hand, the argument for the lack of contestation as a basis for acquiescence to the legislative attempts of the ICJ should mean that its patrons agree to give the ICJ new powers that were not previously allocated to it. Or should it? An interesting fact to consider while pondering this question would be the relatively low number of cases that the ICJ handles in a year (and throughout its history), which in turn could signal a lack of interest on the part of the states to appear before the ICJ to handle their disputes.¹⁷² An arbiter that alters the rules of the game as it goes on provides little guarantee of certainty and predictability in a world of sovereign equals, which could contribute -among other factors- to disincentivize states to appear before the Court.

To this day, the question of self-attribution of powers and the reaction of states has been, and remains, a hotly contested one.¹⁷³ Note that at the San Francisco Conference, at which the UN was created, the IV Committee—tasked with designing the judicial organ—observed the following on the subject of expansive interpretation of competences:

It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative

Organizaciones Internacionales (según se vea), PARÉNTESIS LEGAL, June 12, 2021, <https://www.parentesislegal.com/post/los-1%C3%ADmites-a-los-poderes-impl%C3%ADcitos-de-las-organizaciones-internacionales-según-se-vea>.

169. Statute of the International Court of Justice, *supra* note 11, arts. 38, 59.

170. See SIMON CHESTERMAN, IAN JOHNSTONE & DAVID M. MALONE, *LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY* 7–8 (1st ed. 2008).

171. See Statute of the International Court of Justice, *supra* note 11, art. 38.

172. The total number of cases that the Court has handled, as of November 2021, is 165. *List of All Cases*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/en/list-of-all-cases> (last visited Nov. 7, 2021). For more information on the reluctance of states to appear before the ICJ, see Simon Gómez-Guaimara & Moisés Montiel, *A Commentary on the Arbitral Award of 3 October 1899 (Guyana v. Venezuela) Jurisdiction Ruling: The Road to Hell is Paved with Good Intentions*, OPINIO JURIS (Feb. 19, 2021), <http://opiniojuris.org/2021/02/19/a-commentary-on-the-arbitral-award-of-3-october-1899-guyana-v-venezuela-jurisdiction-ruling-the-road-to-hell-is-paved-with-good-intentions/>.

173. See CHESTERMAN ET AL., *supra* note 170, at 100.

interpretation as precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter.¹⁷⁴

Being one of the main bodies of the UN, the ICJ would not escape the observation presented by the preparatory commission of the UN Charter. The ICJ is entitled, as per article 36 dealing with its material competence, to render its judgment on any question of international law pursuant to its jurisdiction. This formulation of article 36(2) should be read as providing the ICJ jurisdiction concerning the application of *existing* law. It would be hazardous to state sovereignty if the article were construed as enabling the ICJ to create law, which would imply a legislative function, alongside its judicial task,¹⁷⁵ or, even worse, impose obligations on states to which they have not agreed. This argument is supported by the nature of the relationship of the states and the ICJ. If the latter is to be permitted to pass judgment on any question, it must have the *explicit* consent of the state in question to do so. As an illustration of this situation, the ruling on jurisdiction of the *Arbitral Award of 3 October 1899*¹⁷⁶ is perhaps most illuminating: Venezuela had consistently rejected the jurisdiction of the ICJ for any and all matters, had protested Guyana's application to the ICJ, and did not appear in the preliminary hearing; yet, the ICJ still deemed itself competent to hear the case on the basis of an capacious interpretation of the 1966 Geneva Agreement.¹⁷⁷ Where, then, could the ICJ find the authority to impose an obligation on a state that has not explicitly consented to it?

B. *The Issue of Judge-made International Law*

The ICJ, backed by scholarly commentary, has played an essential role in the creation of the persistent objector doctrine. In embracing a normative preference for predictability, stability, and finality (akin to that of the proponents of the mandatory view) over an acknowledgment of the actual characteristics and features of the international system of states, the epistemic

174. See STATE DEP'T, THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 880 (U.S. Gov't Printing Off., 1946).

175. Legality of the Use or Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 18 (July 8).

176. Arbitral Award of 3 October 1899 (Guy. v. Venez.), Judgment, 2020 I.C.J. 1 (Dec. 18).

177. An interpretation that privileged a one-sided construction of the object and purpose of the treaty put forth by the applicant and uncontested by the defendant, instead of a textual reading of the agreement, its subsequent practice, and relevant declarations by all parties. For a more detailed analysis of the unwarranted extension of the Court's competence on this case, the Dissenting Opinions of Judges' Abraham and Bennouna are most illuminating, and are also applicable to the broader contention being made in this section. See Arbitral Award of 3 October 1899 (Guy. v. Venez.), Dissenting Opinion, 2020 I.C.J. 1 (Dissenting Opinion by Abraham, J.) (Dec. 18); Arbitral Award of 3 October 1899 (Guy. v. Venez.), Dissenting Opinion, 2020 I.C.J. 1 (Dissenting Opinion by Bennouna, J.) (Dec. 18), see also Gómez-Guaimara & Montiel, *supra* note 172.

community of international law seems to have overrepresented the magnitude of the powers and authority of the ICJ. It is in fact odd that any account of the persistent objector doctrine would look at rulings from the ICJ as the origin of a norm of customary international law since international rules flow from the will and practice of states.¹⁷⁸ They alone are the lawmakers in the international system.¹⁷⁹

As discussed above, it is mostly influential scholars that have kept the doctrine alive. These scholars, in celebrating the provision of a new mechanism to grant certainty to the international rule of law and a right to opt-out of rules in formation, seem oblivious to the fact that they were endorsing a rule that creates tensions with the Statute of the ICJ¹⁸⁰ and signals their acceptance of the ICJ's engagement in law-making.¹⁸¹ While it is true that the ICJ serves the function of harmonizing interpretations of international law, there is a very distinct line between harmonization and legislation.¹⁸² Thus, law-making is and should remain the exclusive realm of states if the law is to be truly international.

The above problem is arguably a consequence of a misconception of the role of the international judiciary in the larger scheme of international law. In fairness, a possible explanation of this phenomenon is that it is a recurring problem in international law (especially the judicial aspects of it) in that lawyers and judges tend to import their visions of domestic law (in which they were trained and their skills developed) to international law.

In addition to applying international law in its decisions, the ICJ is established under and governed by international law.¹⁸³ By this logic, and bearing in mind that the only subject of international law capable of enacting or derogating norms are states, the ICJ is constrained by the existing rules of the system and is indeed tasked with applying whatever law already exists. In fact, its Statute clearly states that its "function is to decide *in accordance with international law* such disputes as are submitted to it."¹⁸⁴ This is, of course, the result of a very strict reading of the mandate of the ICJ, but it is far from the only one. Tom Ginsburg, constitutional and international law scholar,

178. See OPPENHEIM, *supra* note 29, at 874–75.

179. This is further evident when analyzing the enunciation of sources that the Court may use as per article 38 of its Statute, all three of them flow from state (and state alone) action. See Statute of the International Court of Justice, *supra* note 11, art. 38.

180. *Id.* art. 59.

181. Regarding the international rule of law, see Stein, *supra* note 9; WALDOCK, *supra* note 1. For more information on the right to opt-out of rules in formation, see WALDOCK, *supra* note 1.

182. For more on the origin of customary international law through ICJ rulings, see Richard Falk, *The Role of the International Court of Justice*, 37 J. INT'L AFFS. 253, 264 (1984).

183. Statute of the International Court of Justice, *supra* note 11, art. 38(1); see also Sean Murphy, *International Judicial Bodies for Resolving Disputes*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare Romano et al. eds., 2014).

184. Statute of the International Court of Justice, *supra* note 11, art. 38.

illustrates the opposing view of this debate, arguing that the ICJ does in fact have the authority to pull new law out of thin air. He writes that:

Judges are supposed to resolve disputes in accordance with pre-existing legal rules, but quite often pre-existing legal rules do not provide a definitive answer. When confronted with a situation where there is no clear pre-existing rule, the judge must make a new rule.¹⁸⁵

What is most striking about Ginsburg's position is the claim that the ICJ "must" make a new rule in the absence of an applicable one. This would lead to the sense that the ICJ not only can, but ought to fill the *lacunae* of the law. To illustrate this argument, it would be useful to pay attention to the doctrine of *non liquet*. The Latin adage means that the law is "unclear," and it points toward the inexistence of applicable law in certain cases.¹⁸⁶ Hans Kelsen reasoned that in the absence of a controlling norm, any subject of the law is free to behave at will, thus turning freedom into the controlling law.¹⁸⁷ This argument is of course contested by other prominent thinkers such as Lassa Oppenheim, who claims that if the law is not immediately apparent it can always be derived from the general principles and legal rules of the system.¹⁸⁸

The peril in a view such as the one offered by Oppenheim is that by granting leeway to the ICJ to creatively interpret or create law, the Pandora's box of judicial overreach is opened and will become impossible to close. One consequence of such a design could be that the ICJ holds itself above the states that created it and effectively imposes whatever obligations it deems fit on them. This would mean the demise of the international law *of states* and negate the decentralized and horizontal nature of the system.¹⁸⁹

However, if the system must be followed as it is, there is no room for progressively expansive attribution of authority by the ICJ itself. A few instances of when expansive attribution of authority has occurred are the *Arbitral Award* case referenced above (to the chagrin of the non-appearing Venezuela),¹⁹⁰ the *Nicaragua* case merits hearing and procedure to which the United States refused to appear for the merits phase,¹⁹¹ and the *Wall* opinion

185. Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 U. VA. J. INT'L L. 631, 634 (2005).

186. See Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L., 757, 797 n.199 (2001).

187. HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* (Lawbook Exchange 1952).

188. OPPENHEIM, *supra* note 29, at 13.

189. Whether that is a good or bad thing is another discussion altogether and beyond the scope of this paper.

190. *Arbitral Award of 3 October 1899 (Guy. v. Venez.)*, Judgment, 2020 I.C.J. 1 (Dec. 18).

191. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 1996 I.C.J. 226 (July 8).

in which Israel treated the ICJ's dictum as little more than an afterthought.¹⁹² These "shows of force" by the ICJ disincentive states from having recourse to judicial settlement and potentially erode the efficacy and overall authority of the bench.

The ICJ was created and is governed by international law. It cannot change the system that brought it into being absent express license by states, and it must remain in the realm of dispute settlement and not encroach into legislation, for legislation is not, nor was it ever, the ICJ's place. In this context, note that as a general principle of law,¹⁹³ an agent may not exceed the limits of the mandate entrusted to it by the principal, lest it risks losing the legal coverage of the principal.¹⁹⁴ Such a preclusion is in stark contrast to most domestic legal systems, in which mechanisms like judicial review or constitutional and conventional review blur the lines between legislation and adjudication because their constitutional systems expressly allow for such a possibility.¹⁹⁵ Such a permission is nowhere to be found in the law governing the ICJ, barring the possibility of even indirect legislation via precedent setting.

C. *The Prohibition of Generating Stare Decisis*

The preceding sections have posited that the ICJ cannot make new law as a consequence of the characteristics of the system of international law. However, there is further evidence that it was the intent of the creators of the ICJ that it should be precluded from doing so. This evidence can be found in the Statute of the ICJ, which states unambiguously that a decision of the ICJ "has no binding force except between the parties and in respect of that particular case."¹⁹⁶ This prohibition of generating *stare decisis* means that the ICJ may not create precedent and that each ruling will only have the force of *res judicata* between the parties of each dispute.¹⁹⁷ If the ICJ can only bind the parties that appear before it, how could it purport to create law with general effects? Note that along the same lines, the text of the Statute in article 38(1)(d) clearly spells out that prior rulings may serve only as a subsidiary means to determine the content of an obligation. To this effect, former ICJ Judge Shahabudeen notes that:

192. See Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

193. ILC, *Rep. of the International Law Commission on the Work of its Fifty-Third Session*, U.N. Doc. A/56/10 (2001); Wladyslaw Czaplinski, *UN Codification of Law of State Responsibility*, 41 ARCHIV DES VÖLKERRECHTS 62 (2003).

194. Evidence of this can be found in articles 5 and 7 of the Draft Articles of State Responsibility. ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10, arts. 5, 7 (2001).

195. See, e.g., Ginsburg, *supra* note 185.

196. Statute of the International Court of Justice, *supra* note 11, art 59.

197. *Id.* art. 38(1)(d).

The international system treats judicial decisions as a supplemental source of international law, albeit one that is subject to limitations. Article 38(1) of the Statute of the International Court of Justice provides that judicial decisions and the writings of publicists are a supplemental source of rules to be applied by the Court. This definition of the sources of international law has been adopted widely as canonical; and, although it technically applies only to the I.C.J., judges and scholars have not been reluctant to suggest that it has a general character.¹⁹⁸

As observed by Judge Shahabudeen, the fact that the drafters of the Statute included such a provision and provided for the separation between primary sources and auxiliary mechanisms further attests to the fact that the sources from which the ICJ can derive law are treaties, custom, and general principles of law (without prejudice to others not included in the article, like unilateral acts or declarations or binding decisions of the UNSC).¹⁹⁹ The secondary mechanisms would then only be used in supporting conclusions made under the primary sources, if there are any to be had.²⁰⁰ Thus, the ICJ may not look to its own rulings—or the work of scholars for that matter—to ascertain whether a rule of law exists if the rule cannot be found within the primary sources. It can, however, refer to these sources only when determining the content, reach, and operation of a rule found within the actual sources. This is because—as it has been pointed out *ad nauseam* here—only states can legislate in international law. The same holds true for the writings of the foremost publicists, which share their place of honor with international jurisprudence as auxiliary mechanisms. However, these two should not and cannot cover gaps in legislation.²⁰¹

It is noteworthy that the preclusion from generating precedent has not stopped the ICJ from citing itself countless times in subsequent *dicta* and construing its prior views as precedent-like.²⁰² This overstepping of boundaries has not received active protest from states, presumably because rulings can

198. MOHAMMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 232 (2007).

199. On the sources not included on article 38 of the ICJ Statute, see Fabian Castañeda, *A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin*, 13 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 355 (2013); *Nuclear Tests (N.Z. v. Fr.)*, Judgment, 1974 I.C.J. 457 (Dec. 20); U.N. Charter, ch. V (describing the binding nature of security council resolutions).

200. See HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 25 (1958); see also ARNOLD DUNCAN MCNAIR, THE DEVELOPMENT OF INTERNATIONAL JUSTICE 17 (1954).

201. Statute of the International Court of Justice, *supra* note 11, art 38(1)(d).

202. See OPPENHEIM'S INTERNATIONAL LAW 42 (Robert Jennings & Arthur Watts, eds., 1992); see also CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 104 (1965) (stating that "[I]t is also no doubt true that, as the body of judicial decisions increases, the authority of the commentator is diminished").

only affect the parties to the dispute. Therefore, other states may not be keen to protest something they do not perceive as “their business.”

As constitutional scholar Martin Shapiro points out, the argument can be made that the more any given court hands out consecutive rulings, the greater the likelihood it will be considered as a precedential system.²⁰³ The ILA is of the same view, arguing that “the real significance of the decisions of international courts and tribunals (apart from their role in settling a particular dispute) lays in their precedential value as determinations of the law.”²⁰⁴ Those who defend the precedential value of the ICJ’s rulings, in outright disregard for the constraints built into its founding Statute’s article 59, do not stop at saying that the Court can create precedent. Proponents go as far as to present precedent-setting as a good thing and explain the all too natural reasons for such an occurrence.²⁰⁵

The counter argument raised here is that the significance of the international judiciary’s decisions rests not on their precedential value (which article 59 of the Statute suggests it does not have), but on the judiciary’s role as a venue for peaceful settlement of disputes as per article 39 of the UN Charter.²⁰⁶

Furthermore, the fact that ICJ judges are appointed for relatively long terms would seem to encourage this culture of continuity as well as reliance on past decisions.²⁰⁷ Nevertheless, the fact that reliance occurs at the ICJ does not mean that it *can* or *should* happen. As has been shown, precedent-setting is beyond the authority of the ICJ, and it is precluded from changing this by way of practice, being governed as it is by the law it is called to uphold. Since the ICJ cannot create laws, it must be satisfied with finding and applying already existing law.

It is essential to stress that no class of legal specialists, even ICJ judges, can replace the will of sovereign and equal states in the creation of rules. This is even truer in the case of rules of customary international law, which, as pointed out by Judge Shahabudeen, are in fact a decentralized form of law-making that derive their authority from the reiteration of state practice over

203. See Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL’Y 155 (1994).

204. INT’L L. ASS’N, FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 18–19 (2000).

205. Lowe Vaughan, *The Politics of Lawmaking: Are the Method and Character of Norm Creation Changing?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 215 (Michael Byers ed., 2000); Martin Shapiro, *Toward a Theory of “Stare Decisis”*, 1 J. LEGAL STUD. 125 (1972); Alec Stone, *Judicial Authority and Market Integration in Europe*, in INSTITUTIONS & PUBLIC LAW: COMPARATIVE APPROACHES (Tom Ginsburg & Robert Kagan eds., 2005).

206. See United Nations, *Statute of the International Court of Justice*, New York, 18 April 1946, art. 59.

207. See Erik Voeten, *The Politics of International Judicial Appointments*, 9 U. CHI. J. INT’L L. 387 (2009).

time, accompanied by a conviction of normativity.²⁰⁸ The ICJ cannot manufacture state practice or *opinio juris* and cannot impose previously inexistent obligations on the shoulders of states. Patrick Kelly appropriately posits that “[t]he I.C.J. lacks the independent authority to create generally applicable customary rules; it possesses only the authority to apply customary law, not to create it.”²⁰⁹

The reason why all these considerations are important is because the persistent objector doctrine, as intended by the ICJ, is a limitation on the ability of states to opt out of rules of customary international law that has no footing on either general practice or in the legal conscience of states.²¹⁰ The very fact that it has its origins in the limited jurisprudence of the ICJ and has not been applied by any ICJ judge since 1974 should be sufficient proof of its lack of traction even in the repertoire of the international judiciary.²¹¹ The concurring fact that no state had applied the doctrine before 1951 at the ICJ hints that states did not regard it as good law either (and continue not to, given the paucity of examples outside of the ICJ context). It would currently seem that the only actors endorsing the doctrine are the scholarly proponents of the mandatory view of customary international law.²¹² This occurrence, added to the creative, but inappropriate, empowerment of the ICJ to set “binding” precedent and engage in judicial law-making apparently drew a number of influential scholars to believe that the ICJ somehow has the authority to create a “rule of recognition” that limits the freedom of states to opt out of rules of custom before their crystallization.

All the reasons noted above concerning the lack of support for the persistent objector doctrine in international law also serve to negate a hypothetical scenario that could be argued by any defenders of the purported rule. The argument would be that by not having objected to the *dicta* of the ICJ in the *Fisheries* and *Asylum* cases, the international community has in fact acquiesced to the rule and accepted it as valid. By this line of reasoning, states would have had to be persistent objectors to the alleged persistent objector doctrine.²¹³ Moreover, if the decisions of the ICJ are only binding on the parties as per the Statute of the Court,²¹⁴ then only five states are effectively bound by the rule since they are the only recipients of rulings containing a rule to that effect: the United Kingdom, Norway, Iceland, Colombia, and

208. See SHAHABUDEEN, *supra* note 198.

209. Kelly, *supra* note 29, at 477.

210. DAMROSCH ET AL., *supra* note 6, at 100–04.

211. See *Fisheries (U.K. v. Nor.)*, Judgment, 1951 I.C.J. 116, 138–39 (Dec. 18). For other judicial and quasi-judicial instances, see *supra* note 61.

212. Bradley & Gulati, *supra* note 121.

213. This is purely hypothetical since the point doesn’t seem to have been raised—to the best of the author’s knowledge—by detractors of the rule, but it does go to show that the rule lacks logic and the logistics of its operation are, at best, complicated. See *Asylum (Colom. v. Peru)*, Judgment 1950 I.C.J. 266 (1950); *Fisheries*, 1951 I.C.J. 116.

214. Statute of the International Court of Justice, *supra* note 11, art. 59.

Peru. Enlarging the personal scope of the rule's application risks the first steps that may ultimately lead to judicial tyranny or to a plutocracy of the doctrine in an otherwise mostly horizontal legal landscape composed of only states. In conclusion, the ICJ is a judicial institution that lacks the authority to legislate and therefore acts *ultra vires* if it attempts to make law. This applies in even more force if the purported exercise is in any way inconsistent with the freedom of states and their central and unique role as creators of international law.

As demonstrated above, the persistent objector doctrine lacks an acceptable origin as far as law-making goes. But even if indulged on that count, it displays several other problems in its intended operation. One of those is precisely *when* the required objections should occur, bearing in mind the particularities of the formation of custom.

V. THE TEMPORAL DETERMINATION PROBLEM

As a result of the predominance of the mandatory view in both literature and in judicial normative preferences, Professor Joel Trachtman would be correct in assuming that a state may only opt out of a customary rule when it is in the process of emerging.²¹⁵ The conclusion of this process of emergence is dubbed by the doctrine as the ripening or crystallization of a rule.²¹⁶ In this particular context, the crystallization phenomenon corresponds to the metaphor utilized by the ICJ and scholars alike to signal the moment in which an emerging rule of customary international law establishes itself as a final product, resembling the slow growth of crystalline minerals.²¹⁷ This process was classically held to take a substantial—yet mostly undetermined—amount of time and repetition before the practice had in fact become obligatory.²¹⁸

The standard demanded by the ILC is equally indeterminate in stating that practice should be sustained “over a considerable period of time.”²¹⁹ Bing Cheng—authority on the law of outer space—made the claim that there can be instant custom that would need neither material practice nor the passage of any period of time to be regarded as crystallized.²²⁰ These notions are at odds with the *dicta* of the ICJ in the *North Sea Continental Shelf* case, where

215. For more on the mandatory view, see Bradley & Gulati, *supra* note 121, at 204; see also Joel P. Trachtman, *Persistent Objector, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMPAR. & INT'L L. 221, 227 (2010).

216. ILC Draft Conclusions, *supra* note 2, at 143; see also Michael Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. INT'L & COMP. L. 305, 306, 319–20 (2014).

217. *Id.* at 306.

218. *Id.*

219. Manley O. Hudson, Working Paper on Article 24 of the Statute of the International Law Commission, U.N. Doc. A/CN.4/16, at 26 (1950).

220. Bing Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 IND. J. INT'L L. 23 (1965).

the ICJ argued that a rule of custom can crystallize much more rapidly in the following way:

Although the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of customary international law . . . an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.²²¹

The timeframe for custom to form is an essential component of the persistent objector doctrine because it signals the temporal scope of protest that states ought to affect. It also constitutes one of the main difficulties for its effective use. A careful reading of the positions held by traditional and modern doctrine, and the caveats of the Court in the *North Sea Continental Shelf* ruling and the *Nuclear Weapons* opinion, illustrate that the problems in identifying the exact moment at which a rule is crystallized are manifold.²²² These difficulties carry over to the analysis of the rule on account of the difficulties to pinpoint when a state should start protesting a rule in formation, and how long they must protest before they are recognized to have opted-out of that rule.

Since custom is a more dynamic and organic process than treaty making, this article posits that it is essentially impossible to chronologically deconstruct the specific start and end of the formation process.²²³ Hence, most arguments in the relevant case law regarding custom dispute the very existence of the alleged norm and the placement of the burden of proof on the claimant state, as seen in the *Asylum* or *Temple* cases.²²⁴ The practical solution, as far as litigation is concerned, is that rules of custom are retroactively determined when there is dispute about the existence of the rule: In other words, the ICJ examines the relevant time period in which the rule is claimed to have developed and determines whether the requisites for the existence of a rule have been satisfied and the moment in which the rule crystallized.

221. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, ¶¶ 71-74 (Feb. 20); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 6).

222. This proposition is supported by the disclaimer from the ILC in its 2018 report, specifically the one contained in comment 5 of conclusion 1 that excludes the temporal dimension of the formation of rules of custom in a document supposed to be an authorized guide to the identification of customary law. See ILC Draft Conclusions, *supra* note 2, at 123.

223. See KOLB, *supra* note 71, at 7.

224. *Asylum* (Colom. v. Peru), Judgment 1950 I.C.J. 266 (1950); *Temple of Preah Vihear* (Cambodia v. Thai.), 1962 I.C.J. 62 (June 15).

A. *The Retroactive Determination of Rules of Custom*

It is easy to examine *ex post facto* the occurrence of certain legally relevant actions and then expound on their consequences when a perfectly drawn and omniscient timeline is readily available. This is seldom the case as events are unfolding; knowledge is imperfect and situational awareness will be more a function of the capabilities of each state or even the product of sheer luck. By way of illustration, imagine that a state believes to the best of its knowledge that it is proceeding in good faith and not violating any rules by acting in a certain fashion. Anyone who happens to witness this behavior would pronounce such a state to be acting lawfully under the aegis of the freedom principle given that there is—at the moment—no rule to the contrary.²²⁵ Unbeknownst to that state, however, a practice to the contrary effect is rapidly gaining traction, iteration, and support from a significant number of states. The contrary practice of this second group could be said to be hardening into law because of the acceptance (or lack of opposition) of another substantial group of states.²²⁶ Several years later, their respective courses of action lead them to a collision of interests. Being peace-loving and law-abiding countries, they decide to take the dispute to the ICJ.

The ICJ would, as it often does, ask the party claiming the existence of the rule of custom whether it “is established in such a manner that it has become binding on the other party.”²²⁷ The state would then proceed to demonstrate the existence of custom based on reiterated and dense practice, as well as its support by several other states also engaging in the practice. In all likelihood, the states claiming the existence of the rule will claim that it was followed because it was largely held to be obligatory in nature. In deciding, the ICJ would most likely apply similar criteria to those at play in the *Fisheries* case and decide that the first state ought to have known the rule existed and that its silence in protesting the rule while it was in formation effectively translated to acquiescence.²²⁸ The vanquished state will naturally question the existence of the alluded-to rule of customary international law on the grounds that it had no knowledge of its emergence. It will also probably challenge that the formative period of the rule is a fact it should or could have known at the time the facts under scrutiny occurred.

The aforementioned example may be overly simplistic in representing the dimensions of state knowledge and the inferences to be drawn from legally relevant interactions. However, the opposite would also be unreasonable. That is, it is wrong to assume that all states have perfect information on

225. Additionally, it would be naive to assume that a state would devote entire legions of government-employed lawyers to track any possible norm of customary international law that may be making its way into the international legal order.

226. For a more detailed account of the process of crystallization see ILC Draft Conclusions, *supra* note 2, at 145.

227. *Asylum Case (Colom. v Peru) Judgment*, 1950 I.C.J. 276, ¶ 14 (1950).

228. *Fisheries (U.K. v. Nor.) Judgment*, 1951 I.C.J. 116, 141–43 (Dec. 18).

all the practices carried out by all other states, all of the time. The only way in which that would be possible would be to either have a monstrous legal department at each Ministry of Foreign Affairs or to impose a straining amount of monitoring tasks on diplomatic missions.²²⁹ As reality shows, neither of those two is possible for all states because of—presumably—budgetary reasons. Also, the codification division of the Office of Legal Affairs of the UN does most of the heavy lifting concerning these processes,²³⁰ and its findings are in no way binding on states.

As a second hypothetical, imagine the previously depicted situation, but now from the perspective of a state that was neither a party to a judicial dispute pertaining the crystallization of a customary rule, nor did it possess a gargantuan codification department at its Foreign Ministry—assume the same incompleteness of information and add a verifiable lack of interest because the practice in question did not affect it at that time. After the ICJ extends its ruling on a case concerned with the crystallized rule, this state discovers that due to a new development it is now very much affected by the rule but has no opportunity to object since its situation only changed after the ICJ’s declaration. It is now evident that a specially-affected state whose practice would have been required for the norm to ripen at all sees its situation dramatically altered. Because it did not foresee that in some future it may become a state with a sizeable interest in the matter, it is now barred from protesting because it failed to do so before the norm in question has been said to have solidified.

²³¹

As shown by the hypotheticals, the dominant perspective on the formation of customary international law was, and remains, retrospective. The backward-looking character of this determination is built into the logic of article 38(1)(b) of the ICJ Statute. It states that custom is the evidence of practice generally accepted by states.²³² To check for consistency and the satisfaction of the two-element test, it will be imperative to search the period preceding the intended determination. Fundamentally, “the question of what

229. It is noteworthy that many countries have “concurrent” embassies to several geographically close countries. If monitoring the political, social and economic developments in one country alone is already a substantial task, having to monitor any practices susceptible of becoming custom in one or more countries would transform such a task to one herculean in nature, without even mentioning the personnel and training it would require.

230. The Codification Division of the UN Office of Legal Affairs is tasked with executing this mandate and aid the Secretariat and member states in respect of these issues. *See* Charter of the United Nations and Statute of the International Court of Justice art. 13(1), June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevens 1153; *see also* UNITED NATIONS, CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW, <https://legal.un.org/cod/> (last visited Nov. 22, 2021).

231. If specially affected states do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required. On this subject see INT’L L. ASS’N, *supra* note 105, at 26.

232. Statute of the International Court of Justice, *supra* note 11, art. 38(1)(b).

states ought to do was answered primarily by asking what they have done.”²³³ However, in determining the temporal range during which their actions will be analyzed, the lack of certainty as to when the rule comes into force is a particularly worrisome trait for states that would see themselves exempted from being bound.

The very thing that makes customary international law a useful, flexible, and dynamic method of law-making is the Achilles’ heel of the persistent objector doctrine. The “organic” character of the custom-formation process does not have any fixed parameters other than the loose components outlined by the black letter law and commentary.²³⁴ It is far more informal than treaties, which are subject to regulations and formalities that secure their validity.²³⁵ The one clear advantage of treaties in relation to custom is the certainty of their entry into force.

Most discussions about treaties deal with their material or personal scope of application and only exceptionally about their entry into force for any party in particular. Customary international law, on the other hand, decidedly lacks such certainty when it comes to the temporal determination of its entry into force.²³⁶ This lack of certainty further complicates the distinction between the formation period and its definitive crystallization. Who is then to say when a purported rule starts to emerge and when it ceases to be in its figurative cocoon and becomes a full-fledged norm of international law? Relying on international institutions such as the ICJ or even other states will unavoidably present all the problems mentioned in the preceding pages and perhaps more.

It is not absurd to think of the issue of temporal determination as a cautionary warning of the difficulties that surround custom in general and the persistent objector doctrine in particular. Another salient issue is that of instant custom and how it further complicates the operation of the doctrine of the persistent objector.

B. *The Incompatibility of the Persistent Objector Doctrine with Instant Custom*

Another situation that deserves attention on account of its negative implications for the persistent objector doctrine is the possibility of creating instant custom and the intersection of the effect of resolutions of international bodies on international custom, as well as the role of multilateral organizations as information-sharing *fora* that could contribute to provide certainty to the formation period.

If there can be such a thing as instant custom (that is, the prohibition of military activities in outer space),²³⁷ the logic would follow that only one

233. Stein, *supra* note 9, at 463.

234. See *supra* note 14 and accompanying text.

235. See KOLB, *supra* note 71.

236. See Charney, *supra* note 40.

237. See Cheng, *supra* note 220.

opportunity would exist to object to such a rule.²³⁸ The appropriate venue for the expression of an objection would be the adoption ceremony of the resolution or declaration purporting to create the rule (in the international organization context, which is the setting in which instant custom operates). This situation begs the question of whether the requirement of sufficient and consistent protest would be satisfied by casting an abstaining or negative vote in the presence of an overwhelming affirmative majority. Such a notion is supported by the argument proposed by Weil, namely that “dissenting states can hardly fail to recognize the decisive importance of the adoption of a multilateral convention or of a “declaratory” resolution.”²³⁹ However, as is often the case, the aforementioned situation is not so clear-cut.

For example, in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, passed in the 1408th meeting of the General Assembly of December 1965,²⁴⁰ Judge Rosalyn Higgins opined that this resolution was an example of law-making by the General Assembly.²⁴¹ The ICJ’s ruling in the *Nicaragua* case supports such a vision and may in fact have treated the adoption of the aforementioned resolution as an example of *opinio juris*.²⁴² However, the actual extent to which the General Assembly or any other organ of the United Nations has binding legislative powers is a matter of debate.²⁴³

The point to stress in this example is whether the adoption of such a resolution can be construed to express the intent of all 110 states present at the voting, especially since there was one abstention.²⁴⁴ Considering that the General Assembly adopts its resolutions on behalf of and under the authority of the entire Organization membership, is the abstention of this one state

238. See G.A. Res. 1721A (XVI) (Dec. 20, 1961); G.A. Res. 1962 (XVIII) (Dec. 13, 1963).

239. See Stein, *supra* note 9, at 467 (referencing HUGH THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 115–77 (Martinus Nijhoff Publishers, 1972).

240. G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Dec. 21, 1965).

241. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 35–37 (Oxford Univ. Press 1963).

242. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.)*, Judgment, 1984 I.C.J. 14, ¶¶ 36, 69, 91, 93 (June 27) (illustrating examples of treating the resolution as an example of *opinio juris*).

243. As of 2001, in response to the attacks against the United States by transnational terrorist organizations such as Al-Qaeda, the Security Council has adopted several resolutions which would seem to be legislative in nature. These create general obligations on states in the guise of an international agreement and bypass the requisite of explicit or implied consent. Surprisingly the international community of states has met such instances of legislation with relatively silent acceptance. See, e.g., S.C. Res. 1373 (Sept. 29, 2001).

244. Edward McWhinney, *Introductory Note to the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. General Assembly Resolution 2131(XX)*, U.N. AUDIOVISUAL INT’L L. LIBR. (2013), http://legal.un.org/avl/ha/ga/ga_2131-xx/ga_2131-xx.html.

trumped and converted *ex officio* into acceptance? What if instead of abstaining, the state had voted against? Could this negative vote be construed as a persistent objection (even though it was only expressed once) to the crystallization of a norm of instant customary law against intervention in domestic affairs?

While this question is ultimately more concerned with the law-making powers of the General Assembly and the debate surrounding the institution of soft law as a source of international law, the fact remains that it is debatable whether the states that voted it into existence had intended it to create law.²⁴⁵ Note, for instance, the statement to that effect of the representative of the United States on the nature of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty:

We view this declaration as a statement of attitude and policy, as a political declaration with a vital political message, not as a declaration or elaboration of the law governing non-intervention... the Special Committee of the Assembly on the Principles of international law concerning Friendly Relations and Cooperation among states has been given the precise job of enunciating that law. Thus, we leave the precise definition of the law to the lawyers, and our vote on this resolution is without prejudice to the definition of the law we shall make in the Special Committee.²⁴⁶

The situation presented by this statement is, to say the least, controversial. The United States voted to adopt the declaration but made clear its view that their declaration was not constitutive of law of any kind and emphasized the important and prominent role allocated to the law-proposing bodies of the UN in such a task.²⁴⁷ If the argument of Judge Higgins is correct, then the United States accepted the rule because it voted in favor, but at the same time it also indicated its view that the rule was not constitutive of obligations.²⁴⁸ This illustrates the problems created by the persistent objector doctrine in the context of multilateral attempts at law-making by international organizations exercising their alleged capability to produce instant custom. Most states regard the General Assembly as a political organ that produces political statements, mostly because of the language contained in the UN Charter itself in

245. CHESTERMAN ET AL., *supra* note 170, at 152–53, *see also* HIGGINS *supra* note 241; ILC Draft Conclusions, *supra* note 2, at 141, 143.

246. U.N. GAOR, 20th Sess., First Committee, U.N. Doc. A/C.1/PV.1423, at 12 (1966).

247. Stephen Schwebel, *Review of The Development of International Law Through the Political Organs of the United Nations* by Rosalyn Higgins, 75 YALE L.J. 677, 680 (1966).

248. HIGGINS, *supra* note 241; G.A. Res. 1721A (XVI) (Dec. 20, 1961); G.A. Res. 1962 (XVIII) (Dec. 13, 1963).

chapter IV.²⁴⁹ By voting affirmatively, states signal their approval of a political message contained within the text of any given instrument and not necessarily their endorsement of a purported rule of international law.²⁵⁰ This would then be construed by adherents of the mandatory view of customary international law as actively accepting the crystallization of the norm in a single instance.²⁵¹ As can be observed from the declarations of the representative of the United States, this is not always a state's intent. It could additionally be assumed that, to the United States, the rule is still in formation—if existing at all—and that there would still be time to object the rule in accordance with the allotted timeframe.

C. The Role of International Fora in Determining the Formative Period

It is relevant to examine the claim that, under the premise of multilateralism, constant interaction and informational transactions occur among states. Two theories that explain this process by which states gather around international *fora* and share and shape norms are (1) that of the transnational legal process by Harold Koh, Yale professor and former adviser to the US Department of State, and (2) the notion of interpretative communities as explained by Ian Johnstone, professor of law at the Fletcher School and former senior UN officer.²⁵² In the case of the transnational legal theory, Koh explains that the transactions of different international and national actors shape the law and, in turn, the conduct of these actors is shaped by it.²⁵³ On the other hand, the interpretive communities approach posits that states, meeting in the context of international organizations as *fora* and utilizing legal reasoning as a highly technical type of argumentation, offer different inputs that shape lawmaking and the subsequent interpretation of the law with the “better argument” that is “victorious” as a matter of its being more in tune with the legal zeitgeist prevailing in the floor at such a time.²⁵⁴ It should be noted that both of these theories have more to do with the actual process of norm interpretation and dissemination in international organizations; however, the starting point for both is essential in analyzing the implications of the forcibly socialized process of law making in international institutions. States do not act in isolation from one another. Their concerted efforts through international institutions not only bring them together, but the joint efforts also decrease

249. For more on the General Assembly as a political organ, see Rosalyn Higgins, *The United Nations and Lawmaking: The Political Organs*, 64 AM. J. INT'L L. 37 (1970); U.N. Charter, ch. IV.

250. See ILC Draft Conclusions, *supra* note 2, at 141.

251. See Bradley & Gulati, *supra* note 121.

252. For more on the transnational legal process, see Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184–86 (1996). For more on the notion of interpretive communities, see Ian Johnstone, *The Power of Interpretive Communities*, in *POWER IN GLOBAL GOVERNANCE* (Michael Barnett & Raymond Duvall eds., 2004).

253. See Koh, *supra* note 252, at 184.

254. Johnstone, *supra* note 252.

transactional costs associated with asymmetrical information while enhancing the prospects for cooperation,²⁵⁵ given that all participants know more about each other and have socially constructed meanings for the processes and outcomes therein negotiated. The difficulties associated with the temporal determination of the appropriate period to object discussed in this Part are untouched by these premises of social construction of norms of customary international law.

In coming together to discuss a prospective rule of customary international law or calling for the adoption of a new norm, all states present should know that such a rule is in the formation period. This notion would mean that the satisfaction of the standard of knowledge for any state would be a given since states—and other actors, according to Koh²⁵⁶—participate in these international organizations and are thus informed during the course of the debates of whatever practice is generating traction and legal support, or they are at the very least informed of the degree of *opinio juris* a prospective practice engenders. By this logic, and as a result of the role of international organizations as *fora* for information sharing among member-states, it would be easy to assume that: “[K]ey moments in the maturation of a legal rule are much more readily identified and much more concentrated in time.”²⁵⁷ The problem of inconclusiveness over the voting of a declaration or resolution remains.

As seen in this sub-section, the temporal dimension of custom determination is not exactly compatible with the persistent objector doctrine on account of the indeterminacies of the formation period, which create major challenges from the perspective of instant custom. Another problem which concerns the time for protest but is ultimately about sovereignty, is that of the practicability of the doctrine in the case of newly independent states, which will be explored in the following section.

VI. THE PROBLEM OF SELF-DETERMINATION AND NEWLY INDEPENDENT STATES

Aside from the core theoretical issues discussed above, the application of the persistent objector doctrine presents issues relating to the Global South and especially newly-formed states. To illustrate the potential implications of the doctrine, consider the threat to the sovereignty and autonomy of states that came into being after a particular rule of customary international law was deemed to be in existence. If the persistent objector doctrine were duly applied, the result would be that those states that were not around at the time of the formation of a given rule, and were unable to protest it, would be

255. For a richer understanding of the prospective gains to be had from cooperation, see the International Relations literature on the neo-neo dialogue. *See, e.g.*, Robert Axelrod & Robert O. Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, 38 *WORLD POL.* 226 (1985).

256. Koh, *supra* note 252, at 183.

257. Stein, *supra* note 9, at 465.

considered bound by the rule in question²⁵⁸ Unlike other problems with the persistent objector doctrine, this case presents a sample of the potential implications that the persistent objector doctrine would have if it were applied consistently and coherently.

Kevin Jon Heller—professor at the University of Copenhagen and the Australian National University—notes that the doctrine is a response on the part of the Global North to the increasing power of the exponentially growing numbers of Global South states in the multilateral context.²⁵⁹ Along the same lines, Galindo and Yip—both academics and diplomats in Brazil—write that:

[I]t can be argued that this doctrine arose precisely to deal with the independence of Third World states and its effects in the international legal order, when ‘Western States feared losing control over the development of customary law.’ In this sense, the doctrine would be a sort of ‘counter-reformation’ by the West against the attempt of Third World countries to use their majority in multilateral organizations to reshape inter-national law, or, in other words, an exhaust valve so that traditional states would not be bound by the norms put forward by the Third World.²⁶⁰

Furthermore, Kelly supports this notion in observing that the persistent objector doctrine can be seen as a response by the old powers of the post-colonial world to the shifting distribution of “legislative” power in the UN General Assembly by virtue of the admission of newly independent states in the 1960s and 1970s.²⁶¹ Western states—according to Kelly—would have introduced the doctrine in order to counter the efforts by newly admitted members to overpower the former in the making of rules of customary international law solely by virtue of their numbers, which were, of course, greater.²⁶²

The problem is thus concerned with the effects of the persistent objector doctrine and customary obligations on newly independent states and generally on the global south.²⁶³ Notably, the only existing international legislation covering a similar issue is the Vienna Convention on Succession of States in Respect to Treaties of 1978 (“Convention”).²⁶⁴ The Convention, as its title

258. While Crawford writes about a ‘subsequent objector rule,’ his analysis seems to be more aligned with the causes and effects of desuetude or customary replacement than with a true right to individually opt-out of rules after crystallization. See CRAWFORD, *supra* note 6, at 21.

259. See Heller, *supra* note 72, at 241.

260. George Rodrigo Bandeira Galindo & Cesar Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 CHINESE J. INT’L L. 251, 267 (2017).

261. Kelly, *supra* note 29, at 514. On the point of preservation of the normative *status quo* to favor the as-is order, see Modirzadeh & Arrocha Olabuenaga, *supra* note 33.

262. *Id.*

263. For more on this specific issue from post-colonial perspectives, see DAMROSCH ET AL., *supra* note 6, at 100–04; see also Heller, *supra* note 72, at 241.

264. Vienna Convention on the Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3, 17 I.L.M. 1488 (1978).

suggests, regulates only treaty obligations and their survival after the fact of succession has consummated and a new state has been recognized by the international community. The Convention is not concerned with obligations flowing from customary international law, but rather with treaty obligations in the event of succession, as shown by its first article.²⁶⁵ However, the regime delineated for newly independent states indicates that the drafters of the treaty intended that a state which has just seceded from another should be able to maintain its autonomy and not be bound by preexisting obligations that would suffocate *ab initio* its right of self-determination. In the 1960s, an anonymous article in the Yale Law Journal supported this view and added that:

When a state is extinguished, it is thought unfair to hold the state which succeeds to control over the territory to bargains made by its predecessor. The successor -a "different state" from the one extinguished- may have different interests and affinities in its international affairs, and should be able to pursue those interests free from obligations taken on by others.²⁶⁶

In the context of newly independent states, and in the doctrine in general, the principle of self-determination amounts to the legal right of the people to decide their own destiny internationally. This conception implies a prohibition of interference *vis-à-vis* other states.²⁶⁷ Its logic suggests that the international community may not overburden a newly minted state with a load of obligations it does not have a chance to consent to. In fact, in its very preamble, the Convention notes: "[T]he principles of free consent, good faith and *pacta sunt servanda* are universally recognized."²⁶⁸ The fact that consent is required for imposing new burdens on a state is in and of itself a reaffirmation of the principle of self-determination that evolved significantly in the twentieth century.²⁶⁹ In the mid 1900s international support grew for the right of all people to self-determination.²⁷⁰ This led to successful secessionist

265. *Id.* art. 1.

266. Note, *Revolutions, Treaties, and State Succession*, 76 YALE L.J. 1669, 1671 (1967).

267. U.N. Charter, art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); *see also* G.A. Res. 2625 (XXV), ¶122 (Oct. 24, 1970).

268. U.N. Charter, prml.

269. Consent was ultimately recognized as a human right of "nations" in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, both of 1966. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

270. Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMPAR. L.Q., 241, 241 (1994).

movements during and after World War I and World War II and laid the groundwork for decolonization in the 1960s.²⁷¹

In sum, the persistent objector doctrine seems to be in the middle of a tension between a preference on the part of Global North states, avid to maintain their prominence in the normative landscape—as depicted by revisionist accounts—and the need for an opt-out mechanism for newly emerging states, which the rule could theoretically favor as well, if the obligation in question is burdensome or draconian.²⁷² However, in analyzing this issue while thinking of the temporal determination problem pointed out in the preceding Part, the balance seems to favor the “normative establishment” of the Global North countries.

While not strictly a normative reason to fight the doctrine, the interest of actual and tangible sovereign equality would certainly suggest that the visions espoused by Kelly, Heller, and Galindo and Yip are closer to reality and should be taken into account in assessing how legal (and ethical) the doctrine is. Moreover, on strictly normative grounds the principle of sovereign equality is the cornerstone of international law, and, as such, is considered the rule of *jus cogens*.²⁷³ On that basis, the practical effects of the persistent objector doctrine undermine the supreme rule of horizontality in legal relations. As such, the consequence contemplated in article 53 of the VCLT could, theoretically, be brought into play,²⁷⁴ even if the voiding effect of the contravention of a *jus cogens* rule when it conflicts with custom is still somewhat debated.²⁷⁵

The following sub-section will discuss an even more specific point in relation to the analysis of the operation of the persistent objector doctrine in

271. Legal Information Institute, *Self Determination (International Law)*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/self_determination_\(international_law\)](https://www.law.cornell.edu/wex/self_determination_(international_law)) (last visited Nov. 21, 2021).

272. While it would be desirable for newly-emerging states to have a right to tailor their normative landscape as a function of their sovereignty equality, the “sacred trust of civilization” as put forth in the ICJ’s *South West Africa* cases and *Namibia* Opinion, seem to be a forcibly all-inclusive deal. See *South West Africa Cases*, (Ethiopia v. South Africa & Liberia v. South Africa), Second phase, ICJ, 1966, at para. 34, and *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, 1971, ICJ, paras. 42-86, (1971).

273. Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT’L L., 946, 953 (1967).

274. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

275. For the position favorable to such an operation see ILC Draft Conclusions *supra* note 2, at 329–32 (considering in particular Conclusion 14(1), (2), and especially (3)), which specifically single out the inapplicability of the persistent objector rule to opting out of rules of *jus cogens*.

regards to newly-formed states: namely those dubbed by the 1986 Vienna Convention as recently independent states and the conventional recognition of the “clean slate principle.”

A. *The Clean Slate Principle and its Relation to Customary International Law*

After decolonization movements, the clean slate principle was devised for the new sovereign states to be truly sovereign with respect to any obligations contracted under the rule of the predecessor state. The principle is included in article 16 of the 1986 Convention on Succession in Respect of Treaties, which reads:

A newly independent state is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the treaty was in force in respect of the territory to which the succession of states relates.²⁷⁶

By this logic, any new state that is not a seceding state as per the definition laid out in article 34 of the 1986 Vienna Convention enjoys a clean slate in that none of the treaty obligations of the predecessor state may be imposed on the former.²⁷⁷ This logic is fully compatible with the respect of the sovereign equality of all states and with the principle of self-determination. The principle of *res inter alios acta altera partem non nocet* should be brought to bear in order to paint a more comprehensive picture of the regime designed by the international community of states to regulate the juridical situation of recently independent states. This maxim of law translates to “things done among parties ought not to hurt others.”²⁷⁸ It has been recognized as a general principle of international law—of the sort provided for in article 38(1)(c) of the ICJ Statute—as early as 1919 in the *Austro-German Customs Union* opinion, and later in the *Chorzow Factory* case and article 34 of the VCLT.²⁷⁹ In this context, any comprehensive understanding of the system of treaty obligation will yield the conclusion that it would be intrusive upon the new state’s sovereignty and a violation of its people’s right of self-determination to burden it with conventional obligations that were celebrated among other parties now different from the new state itself.

This premise begs the question: Why should obligations derived from customary international law be any different? If the underlying logic of the regime regulating newly independent states is that they should be free to

276. Vienna Convention on the Succession of States in Respect of Treaties art. 16, Aug. 23, 1978, 1946 U.N.T.S. 3, 17 I.L.M. 1488 (1978).

277. *Id.* art. 34.

278. Translated by the author.

279. See *Customs Regime Between Germany and Austria*, Advisory Opinion, 1931 P.C.I.J. 53 (Sept. 5); *The Factory At Chorzow (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13); Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

consent to whatever treaty obligations these new states deem fit, in due regard to their autonomy, self-determination, and sovereign equality, why should these states be bound by rules of customary law simply because they did not exist to protest the regulation in the first place? As an example of this situation, emerging states in Latin America throughout the nineteenth century were considered bound by existing customary law despite continuous objections by a sizable number of them.²⁸⁰ So much so, in fact, that Latin American politicians and theorists, such as Andrés Bello, contributed major reformulations to international law as it existed at the time.²⁸¹

The same could be said for African and Asian states that came into being as a result of the decolonization wave during the 1960s and 1970s.²⁸² Are these states, as Judge Bedjaoui suggested, less sovereign than the powers of old?²⁸³ Patrick Kelly opined in this regard that:

There is an unspoken assumption that the practices, theories and perspectives of the United States and the United Kingdom, each of which have been paramount powers in distinctive periods of international law, have preeminent weight. The practices of non-western cultures are just not taken seriously.²⁸⁴

If this were true, then the necessary conclusion would be of a certain Orwellian character. It could be claimed that all states are sovereign and equal, but some are more sovereign and equal than others.²⁸⁵ Said conclusion, while feasible in the realm of politics, is hardly tolerable in the legal sphere. The principle of sovereign equality of states would seem to preclude some states having more rights than others, and it would certainly prohibit more powerful or older states from bypassing the consent of more recent states by holding them to rules that they did not even know to protest against in the first place. It may, however, be conceded that a new state would be justified in regarding itself as not bound by those rules that it disagreed with.²⁸⁶ Nevertheless, feeling justified and being legally entitled are two completely different things. If the persistent objector doctrine is in fact regarded as good law, then its application is nothing short of a mockery to the principle of self-determination, the

280. CHARLES LIPSON, *STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES* 53–57 (Univ. Cal. Press. 1985).

281. Bello's proposition on the extent of the territorial waters of states had a substantial impact on International Law at the time. See Jeannette Barrenne, *The Contribution of Andrés Bello to the Law of the Sea in the Chilean Civil Code*, in *LAW OF THE SEA, FROM GROTIUS TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* 7–17 (Brill Nijhoff, ed. 2015).

282. Brian Ikejiaku, *International Law Is Western Made Global Law: The Perception of Third-World Category*, 6 *AFR. J.L. STUD.* 337, 345 (2014).

283. See Bedjaoui, *supra* note 88, at 162.

284. Kelly, *supra* note 29, at 473.

285. If the reader will be so kind as to allow a paraphrase of George Orwell's *Animal Farm*. GEORGE ORWELL, *ANIMAL FARM* (75th Annual ed. 1996).

286. Michel Virally, *The Sources of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* (Max Sorensen ed. 1968).

freedom principle, and, most importantly, the sovereign equality of states, regardless of their date of origin. Fortunately, as has been already observed, the persistent objector doctrine has failed to generate sufficient practice or conviction of lawfulness for such claims to be made in a serious manner.²⁸⁷

VII. THE INEXISTENCE OF THE PERSISTENT OBJECTOR DOCTRINE

Until this point, the many conceptual deficiencies and incongruences the persistent objector doctrine displays have shown that it is contrary to international law and that it exhibits a distinct lack of verifiable practice and *opinio juris*.²⁸⁸ Scholarly and judicial doctrine consistently categorizes the rule as one of customary international law. To have such a character, it must possess both objective and subjective elements. The failure to show substantial repetition demonstrates the absence of practice.²⁸⁹ The fact that states do not refer to it while reasoning their opposition or challenge to rules demonstrates that it does not possess sufficient legal standing in the legal consciousness of states and that it therefore lacks *opinio juris*. The necessary consequence of the absence of these concurrent elements is that the persistent objector doctrine is no doctrine at all.

Analyzing the many conceptual problems surrounding the persistent objector doctrine, perhaps the most striking fact is that states have not engaged in the use of it.²⁹⁰ In the Advisory Opinion of the ICJ on the *Legality of the Use or Threat of Use of Nuclear Weapons*, the United States and the United Kingdom did not argue that they were persistent objectors.²⁹¹ Rather, they argued generally that customary international law did not prohibit the use of nuclear weapons.²⁹²

Another example of this is Venezuela's position on the definition of an "island" provided for in the United Nations Conventions on the Law of the Sea ("UNCLOS"). UNCLOS largely codifies preexisting customary law regarding the regime of the seas, and it also adds some new rules under the guise of progressive development.²⁹³ Venezuela has consistently and vocally

287. Although Green does record the case of South Africa claiming the status of persistent objector in the *South West Africa* case before the ICJ. See JAMES A. GREEN, *THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW* 189–282 (2016).

288. See DAMROSCH ET. AL., *supra* note 647, at 59–105 (addressing state practice, *opinio juris*, and the persistent objector doctrine).

289. *Id.*

290. See Virally, *supra* note 286, at 134.

291. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 261–62 (July 6).

292. *Id.*

293. Jan Schneider, *Codification and Progressive Development of International Environmental Law at the Third United Nations Conference on the Law of the Sea: The Environmental Aspects of the Treaty Review*, 20 COLUM. J. TRANSNAT'L L. 243, 247–48 (1981); see also Robin R. Churchill, *Law of the Sea*, in *ENCYCLOPEDIA BRITANNICA* (Sept. 23, 2013), <https://www.britannica.com/topic/Law-of-the-Sea>.

opposed the rules concerning the definition of islands and certain other aspects relating to the law of the seas even before the adoption of the first UNCLOS.²⁹⁴ It considers itself exempt from the regime in those aspects but has never publicly characterized itself as a persistent objector, but rather as a non-party to the treaty.²⁹⁵ As shown by the Venezuelan example, states will challenge the existence of the norm or avoid a treaty regime rather than contend that they are not bound by a rule of custom. A similar thing happened with the United States in the *Nicaragua* case. The United States argued that the norm prohibiting the use of force was not a rule of customary international law but rather an obligation derived from a multilateral agreement, from which the Vandenberg Agreement exempted it.²⁹⁶ Other instances can be cited in which states preferred to challenge the existence of the norm rather than applying the persistent objector doctrine, such as the Turkish contention in the *Lotus* case that they could, in fact, exercise jurisdiction and that there therefore was no prohibition against such a conduct.²⁹⁷ The lack of practice on the part of states is indicative of the regard the doctrine has in contemporary international law and evokes Koskenniemi's reflection:

A law which would lack distance from state behavior, will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to state behavior, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way.²⁹⁸

A way to enunciate this situation would be to say that any law that distances itself from state behavior, or legal reality for that matter, is no law at all. If it ever was, perhaps the Damocles Sword of desuetude has already fallen upon it. Perhaps the reason why the persistent objector doctrine lacks favor among the members of the international community is, as observed by Kelly, because:

The imposition of an obligation to respond would place the majority of nations at a severe disadvantage. Few nations have the legal and financial resources to monitor the many incidents of state practice,

294. See Angelina Jaffé, *The Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: The Venezuelan Perspective*, 25 OCEAN Y.B. ONLINE 475 (2011).

295. See Tullio Treves, *UNCLOS and Non-Party States Before the International Court of Justice*, in OCEAN LAW AND POLICY: TWENTY YEARS OF DEVELOPMENT UNDER THE UNCLOS REGIME 367–78 (Carlos Espósito et al. eds., 2017).

296. See R. P. ANAND, THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 220 (Asia Publ'g House 1961); H. W. Briggs, *Reservations to Acceptance of Compulsory Jurisdiction of the International Court of Justice*, COLLECTED COURSES OF THE HAGUE: ACAD. INT'L L., https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789028613027_03 (last visited Nov. 21, 2021).

297. *SS Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

298. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 17 (Cambridge Univ Press. 2006).

analyze the legal implications, and respond in an informed and timely fashion. As a factual matter, even the wealthiest of nations does not devote the resources necessary to regularly respond.²⁹⁹

Kelly observes a reality that is all too clear. Governments will not and cannot allocate the immense quantity of resources demanded by the pursuit of tracking every norm of customary international law in formation at a given time.

All the arguments expounded in this article point to a logical and necessary conclusion: Legal thought must catch up to reality. The persistent objector doctrine lacks practice and *opinio juris* and cannot be regarded as a valid rule of customary international law or even as a “rule of recognition.” Perhaps its demise will prompt a sincere reflection on the actual—and not the desired—characteristics of contemporary international law that will serve to better address the shortcomings of the current system and to tailor it to the many challenges faced by states in their legally relevant transactions.

VIII. CONCLUSION

The persistent objector doctrine, when closely scrutinized, reveals significant inconsistencies. These discrepancies ultimately make it incompatible with international law to the point that the doctrine’s application would be outright illegal. The fact that the rule has its origins (and only official appearances) in two rulings of the ICJ shows that it failed to generate traction even among its designers. The subsequent development of the doctrine in scholarly commentary is more representative of the normative preferences of the international publicists for predictability and certainty of legal relations than of any actual substance or entity.

Furthermore, the persistent objector doctrine, in asserting that silence equates acquiescence, bypasses the need for explicit consent of states as required by the rigors of the formulation of article 38(1)(b) of the ICJ Statute³⁰⁰ and further elaborated by the ILC’s 2018 report on identification of custom.³⁰¹ The voids or gaps in the expression of states’ consent cannot be repaired by preferences of the scholarly community or the international judiciary, as the alleged rule would have it. In connection to this, the arbitrary attribution of expressive meaning to silence by the ICJ not only exceeds its mandate and powers, but also opens the door to judicial law-making. Arguably, if states had intended the ICJ to be able to create law, they would not have constrained it to applying already existing law.

This article also demonstrates the intrinsic difficulties in ascertaining the exact moment in which a rule of customary international law crystallizes. Such lack of certainty and determination would negate the possibility of

299. Kelly, *supra* note 29, at 474.

300. Statute of the International Court of Justice, *supra* note 11, art. 38(1)(b).

301. ILC Draft Conclusions, *supra* note 2.

having concise and well-defined temporal limits for the protest required by the doctrine to take place at all, thus creating the desired exemption. Additionally, it has been shown that the purported rule is a violation of the principle of self-determination of those nations that come into being after the formation of any rule of custom has taken place. This inequality by reason of a state's date of origin is inconsistent with sovereign equality and self-determination as essential principles of international law.

At the outset of this article, the question was posed whether the persistent objector doctrine is truly compatible with the consent-based system of international law. The answer is a clear and resounding no. It is, in fact, contrary to the most basic principles of international law.

Finally, the fact that states have chosen not to invoke the rule when they have had the opportunity to do so effectively subtracts from the required generality of the practice to ripen into law, a lack that cannot be filled by the preferences of scholarly commentary. To constitute a rule of customary law, the persistent objector doctrine would require the concurrence of general practice and *opinio juris*. As a result, it seems Ted Stein's prognostication that subsequent decades would witness states' increasingly recurrent use of persistent objector doctrine failed to actualize.

