THE PERSISTENT OBJECTOR RULE IN THE WORK OF THE INTERNATIONAL LAW COMMISSION ON THE *IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW*

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Abstract

The persistent objector rule is a well-known but controversial mechanism for a state to exempt itself from norms of customary international law. This article examines the rule with a specific focus on the work of the International Law Commission (ILC) on the Identification of Customary International Law*, through a consideration of Conclusion 15 and the commentary to it that have been adopted, as well as the ILC plenary debates on the topic. The state usage and, indeed, very existence of the rule will be considered, given that this has been so controversial in the ILC and wider literature. The article further examines whether the rule rightly formed an aspect of the Commission's work, and looks at the terminology employed in Conclusion 15. Finally, it assesses the requirements for the operation of the persistent objector rule as expressed by the ILC, through comparison to the manner in which the criteria have been employed in state practice.*

Keywords: persistent objector rule; persistent objection; customary international law; International Law Commission; ILC.

1. INTRODUCTION

This article examines the engagement by the International Law Commission (ILC), in the context of its work on the *Identification of Customary International Law*,[1] with the so-called "persistent objector rule". It evaluates the ILC's approach to, and understanding of, persistent objection, both in its debates on the topic and in the draft conclusions and commentaries that it has now adopted.

All international lawyers are familiar with the basic notion of the persistent objector rule: the broad concept is that where a state objects to a norm of customary international law

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[1] See "Analytical Guide to the Work of the International Law Commission: *Identification of Customary International Law*", <http://legal.un.org/ilc/guide/1_13.shtml>.

persistently, and does so while that norm still is emerging, the state is said to gain an exemption from the norm when it crystallises into binding customary international law. The rule is a ubiquitous feature of mainstream international law scholarship[2] and has been endorsed in a number of decisions by international[3] and domestic[4] courts and tribunals. For some commentators, it is viewed as crucial for protecting the voluntarist notion that states are only bound by law to which they have consented to be bound by, on the basis that the rule allows states to *withhold* consent to customary international law.[5]

The persistent objector rule has formed an aspect of the ILC's recent work on the *Identification of Customary International Law*, and is set out in Conclusion 15 [previously 16] of the draft conclusions on the topic that were provisionally adopted by the Commission's drafting committee in 2015,[6] and then adopted by the ILC as a whole in 2016.[7] Conclusion 15 reads:

> ***Persistent objector***
>
> 1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.
> 2. The objection must be clearly expressed, made known to other States, and maintained persistently.

This adopted conclusion may be seen, at least in broad terms, as amounting to an endorsement by the ILC of the orthodox view of the persistent objector rule. However, the debates in the Commission on the *Identification of Customary International Law* reveal that there remain underlying controversies in relation to the rule, which are considered herein. Further, while Conclusion 15 presents a relatively orthodox picture of the rule, the commentary to it goes into more detail than most accounts of the rule. The requirements that the ILC has set

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[2] See, e.g., Fourth Report on Identification of Customary International Law (WOOD, Special Rapporteur), Addendum, UN Doc. A/CN.4/695/Add.1 (2016) pp. 19-20.
[3] See, e.g., *Fisheries* (*United Kingdom v Norway*), merits, 1951 ICJ Rep., pp. 131; *Domingues v United States*, merits, 2002 IACmHR, Report No. 62/02, Case 12.285; *BG Group Plc v Republic of Argentina*, final award, 2007, <http://ita.law.uvic.ca/documents/BG-award_000.pdf>.
[4] See, e.g., *Siderman de Blake v Republic of Argentina*, 1992, United States Court of Appeals for the Ninth Circuit 965 F.2d 699 (9th Cir. 1992), p. 715; *Philippine Embassy* case, 1977, BVerfGE (German Federal Constitutional Court) 46, 342 2 BvM 1/76, para. 6; *S v Petane*, 1988 (3) SA 51 (C), 64A-B.
[5] See, e.g., STEINFELD, "Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons", Brooklyn Law Review, 1996, p. 1655. See also UN Doc. A/CN.4/SR.3252 (2015), p. 8 (WISNUMURTI).
[6] UN Doc. A/CN.4/L.869 (2015), p. 5.
[7] UN Doc. A/71/10 (2016), pp. 112-114.

out for the rule's operation therefore are tested in this article against the way in which the rule has developed in state practice (as well as in case law and scholarship).

The space constraints of an article of this kind mean that in-depth engagement with state practice and case law is impossible, but it should be noted that it draws on the findings of a major six year project on the rule previously conducted by the author.[8]

2. The Usage (and Very Existence) of the Rule

It was noted in the ILC's report on the work done in its sixty-seventh session in 2015 that while "[s]everal members supported the inclusion of the [persistent objector] rule in the set of draft conclusions … some other members considered that it was a controversial theory not supported by sufficient State practice and jurisprudence…"[9] A review of the Commission's plenary debates both in 2015 and 2016 confirms that a substantial minority of members were sceptical about *very existence* of the persistent objector rule, or at least had significant concerns about its inclusion in the draft conclusions given that they felt it was insufficiently supported by state practice.[10]

This minority, but fundamental, critique of the persistent objector rule in the ILC is reflective of the wider academic literature. Despite the ubiquity of the rule in scholarship, as one ILC member rightly stressed in plenary debate,[11] plenty of writers doubt whether it exists *at all*[12] on the basis that it is never (or almost never) used. For example, Anthony D'Amato wrote in 2014 that "[t]he persistent objector rule *has never been* invoked in state practice".[13] In total contrast, another group of scholars have argued that there is in fact a notable amount of state usage of the rule.[14] Maurice Mendelson asserted in 1998, for example, that there was

[8] Published as Green, *The Persistent Objector Rule in International Law*, Oxford, 2016 (paperback edition, 2018).
[9] UN Doc. A/70/10 (2015), p. 46. See also UN Doc. A/CN.4/SR.3340 (2016), p. 8 (Tladi).
[10] See, e.g., UN Doc. A/CN.4/SR.3252, *cit. supra* note 5, p. 4 (Murase); *ibid.*, pp. 8-9 (Caflisch); *ibid.*, p. 16 (Kamto); UN Doc. A/CN.4/SR.3253 (2015), p. 9 (Petrič); *ibid.*, p. 11 (Vázquez-Bermúdez); UN Doc. A/CN.4/SR.3254 (2015), p. 8 (Gómez-Robledo); UN Doc. A/CN.4/SR.3302 (2016), p. 9 (Park).
[11] UN Doc. A/CN.4/SR.3288 (2015), p. 14 (Caflisch).
[12] See, e.g., Dumberry, "Incoherent and Ineffective: The Concept of Persistent Objector Revisited", International and Comparative Law Quarterly, 2010, p. 779 ff.; Dupuy, "A propos de l'opposabilité de la coutume générale: enquête brève sur 'l'objecteur persistant'", in *Le droit international au service de la paix, de la justice et du développement: Mélanges offerts à Michel Virally*, Paris, 1991, p. 257.
[13] D'Amato, "Groundwork for International Law", American Journal of International Law, 2014, p. 668 (emphasis added).
[14] See, e.g., *Committee on Formation of Customary (General) International Law*, Final Report of the Committee (2000), <http://www.ila-hq.org/en/committees/index.cfm/cid/30>, pp. 27-28; Colson, "How Persistent Must the Persistent Objector Be?", Washington Law Review, 1986, p. 969.

"quite a wealth of state practice in support of the persistent objector rule" and that scholars simply have not "looked hard enough" to find it.[15]

The reality falls somewhere between these two extremes of "no usage" and "significant usage". When one reviews state practice it is clear, at least in the view of the present author, that there has been more than enough invocation of the persistent objector rule by states, and recognition of the exempt status that it brings, to conclude that the rule exists, especially when one adds to this the numerous endorsements of the rule in case law and the majority (if far from universal) support for it in scholarly opinion.[16] D'Amato's claim that rule "never been invoked in state practice" is patently, demonstrably wrong. Indeed, not only is the persistent objector rule being used by states, it is being used with increasing regularity in the 21st century.[17] Nonetheless, it also is important not to overstate the amount of state usage of the persistent objector rule. The rule is used, and increasingly so, but it is undeniable – when one does "look hard enough" at practice – that it is still not used all at that much.[18]

While deep-rooted disagreement persists amongst experts (including in the ILC), it is telling that states themselves widely accept the rule's existence,[19] even if they do not use it all that often. Indeed, this is something that is evident purely from the ILC's work on the *Identification of Customary International Law* topic. In the submissions made to the Commission by states on the subject, no state expressed any concern about the notion of including the rule in the draft conclusions – which might have been expected had there been any significant dissent on the matter – and some states explicitly endorsed it.[20] Switzerland, for example, stressed that

> [l]es notions d'objecteur persistant et d'objecteur subséquent ont été précisées à plusieurs reprises et de manière conjointe par les autorités suisses. Les autorités suisses n'ont cependant, à l'heure actuelle, jamais invoqué une objection persistante de la Suisse à la formation de la coutume.[21]

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[15] MENDELSON, "The Formation of Customary International Law", Recueil des cours, 1998, p. 238.
[16] See GREEN, *cit. supra* note 8, particularly pp. 33-56.
[17] See *ibid*, pp. 54-55; BRADLEY, "The Juvenile Death Penalty", Duke Law Journal, 2002-2003, p. 517. See also UN Doc. A/CN.4/SR.3253, *cit. supra* note 10, p. 12 (HUANG).
[18] See GREEN, *cit. supra* note 8, particularly at p. 55, pp. 63-65.
[19] UN Doc. A/71/10, *cit. supra* note 7, p. 113; UN Doc. A/CN.4/SR.3253, *cit. supra* note 10, p. 11 (VÁZQUEZ-BERMÚDEZ).
[20] See REINISCH, on behalf of the Permanent Mission of Austria to the United Nations in New York, 2016, p. 3; "La pratique suisse relative à la détermination du droit international coutumier", information submitted by Switzerland to the ILC, 2016, p. 57.
[21] *Ibid*.

Thus, Switzerland went so far as explicitly accepting persistent objection even while stressing that it had, as yet, never used the rule itself.

States use the persistent objector rule and accept its use. Admittedly, the assertion in the ILC's adopted commentary to Conclusion 15 that "[t]he persistent objector rule is *quite frequently* invoked and recognized",[22] arguably goes slightly too far, in that it may indicate that the rule is used more than is actually the case. Nonetheless, crucially, Conclusion 15 and its commentary effectively, and correctly, reject the repeated claims that the rule is never (or hardly ever) used.

3. THE RULE AND THE IDENTIFICATION OF CUSTOM

Notwithstanding the conclusion in the previous section that the ILC rightly has found that the persistent objector rule exists and is used, one might question whether the rule should have been included as part of the Commission's adopted conclusions, or form an aspect of the programme of work on the *Identification of Customary International Law* topic.

The persistent objector rule is a "secondary rule"[23] of the international legal system,[24] in that it is a "rule about rules". However, it is not a "secondary rule *of recognition*",[25] in that it does not contribute to the *creation* or *determination of content* of substantive primary rules of customary international law. Instead, the persistent objector rule "concerns the scope of application of a customary international law rule or its 'opposability'".[26] On that basis, it was debated in the Commission whether the persistent objector rule fell outside of the scope of the ILC's work, given that it is focused on the *identification* of customary international law.[27] Some ILC's members concluded that the rule is not, strictly speaking, relevant to the identification of custom, because it does not help to identify the content or existence of such rules.[28] Others, in contrast, took a broader view of the notion of "identification", arguing that it encompassed not just the identification of existence or content, but also the identification of the *legal effect*

[22] UN Doc. A/71/10, *cit. supra* note 7, p. 113 (emphasis added).
[23] See HART, *The Concept of Law*, Oxford, 2nd edn., 1994, particularly pp. 79-99.
[24] STEIN, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law", Harvard International Law Journal, 1985, p. 458.
[25] HART, *cit. supra* note 23, particularly pp. 94-99.
[26] YEE, "Report on the ILC Project on 'Identification of Customary International Law'", Chinese Journal of International Law, 2015, p. 381.
[27] See "Identification of Customary International Law", Statement of the Chairman of the Drafting Committee, (2015) p. 18 (FORTEAU).
[28] See, e.g., UN Doc. A/CN.4/SR.3252, *cit. supra* note 5, p. 4 (MURASE); UN Doc. A/CN.4/SR.3340, *cit. supra* note 9, p. 7 (MURASE).

of customary rules,[29] something with which the persistent objector obviously is directly concerned.

The decision that that the persistent objector rule should be included in the Commission's programme of work (and the resulting draft conclusions) was largely reached on a pragmatic basis, notwithstanding whether or not the rule "technically" fell within the scope of the Commission's topic. Omitting the rule from the conclusions was seen as something that would make them less valuable as a practical tool for engaging with customary international law, and this in itself was considered sufficient to justify its inclusion.[30] As the Special Rapporteur, Sir Michael Wood, noted, the question of persistent objection "might well arise before judges who were asked to identify rules of customary international law. It would thus be useful to provide practitioners with guidelines on how the matter was to be evaluated..."[31]

This reasoning is hard to dispute. The absence of the persistent objector rule would have given readers of the draft conclusion an incomplete picture of how customary international law operates, as well as fuelling the incorrect claims that the rule does not exist. However, it may have been helpful for the practical value underpinning the rule's inclusion to have been made explicit in the commentary to Conclusion 15. The commentary instead adopted the rather vague wording proposed by Donald McRea,[32] that the rule is something that "not infrequently arises in connection with the identification of rules of customary international law".[33] That statement is correct, and neatly side-steps the question of whether the rule is about the "identification of custom" or not. Yet it lacks the clarity of an explicit assertion as to why the Commission felt the rule should be included, given that its relationship to the "identification of customary international law" can at least be questioned.

4. Is the Persistent Objector "Rule" a Rule?

Another way in which the continued controversy surrounding the concept of persistent objection manifested in the ILC was in relation to terminology. The persistent objector rule commonly is referred to as just that: a "rule". It therefore appears somewhat strange that the

[29] See, e.g., *ibid*., p. 8 (Nolte); *ibid.* (Wood).
[30] See UN Doc. A/CN.4/SR.3280 (2015) p. 13 (Report of the Drafting Committee); Statement of the Chairman of the Drafting Committee, *cit. supra* note 27, pp. 18-19; UN Doc. A/CN.4/SR.3254, *cit. supra* note 10, p. 9 (Singh); *ibid*., p. 14 (Wood)
[31] *Ibid.*
[32] UN Doc. A/CN.4/SR.3340, *cit. supra* note 9, p. 8 (McRea).
[33] UN Doc. A/71/10, *cit. supra* note 7, p. 112.

adopted text of Conclusion 15 refers not the "persistent objector rule", but simply to "persistent objector".

The term "rule" was avoided because some members of the Commission were uncomfortable with labelling persistent objection in that way.[34] For example, some felt it was rather more nebulous than a "rule", and, as such, should be referred to as a "doctrine" or "concept".[35] Other members went further, indicating their underlying scepticism about the very notion of persistent objection, by instead terming it the persistent objector "theory".[36]

Whether or not the process of persistent objection amounts to a "rule" of course depends as much on how one defines a "rule" in an international legal context – hardly a settled question – as it does on the content or mechanics of persistent objection. This is not the place to delve into philosophical constructions of what a "rule" is, but one might note that persistent objection has some of the features that have been associated with legal rules, at least by some.[37] In particular, it has a prescriptive and algorithmic structure (i.e., it has criteria that underpin its operation[38] and that its application leads to a direct legal effect). As one member of the ILC stated, at least in the formulation in which it appears in Conclusion 15, the mechanism for persistent objection certainly seems to be presented as a "rule",[39] and, as was discussed above in section 1, that formulation is broadly reflective of the way in which persistent objection commonly is framed in wider doctrine.

The terminology used in Conclusion 15 – while interesting – admittedly is perhaps a minor issue. It is telling that, while the term "rule" was omitted from Conclusion 15, the term "persistent objector *rule*" is used repeatedly in the adopted commentary to Conclusion 15. For those ILC members who supported the rule's inclusion in the draft conclusions, there presumably seemed little to be gained by insisting that it be made explicit that it is "a rule" in the conclusion itself, in the face of opposition from other members. The use of the open-ended term "persistent objector" is a neat solution, which allows readers to infuse it with their own preferred understanding. Had an alternative descriptor (such as "concept" or – worse –

[34] See, e.g., UN Doc. A/CN.4/SR.3340, *cit. supra* note 9, p. 7 (PETRIČ); *ibid.* (SABOIA); *ibid.* (JACOBSSON).
[35] See, e.g., *ibid.*, p. 6 (PARK); *ibid.*, p. 7 (ŠTURMA); *ibid.* (MCRAE).
[36] See, e.g., UN Doc. A/CN.4/SR.3252, *cit. supra* note 5, p. 8 (CAFLISCH); UN Doc. A/CN.4/SR.3254, *cit. supra* note 10, p. 8 (GÓMEZ-ROBLEDO). See also UN Doc. A/66/10 (Annex A: Formation and evidence of customary international law) (2011) p. 308.
[37] For discussion, see, e.g., ALEXANDER, "The Objectivity of Morality, Rules, and Law: A Conceptual Map", Alabama Law Review, 2013, p. 501 ff.; PERRY, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View", Fordham Law Review, 2006, p. 1171 ff.
[38] See section 5.
[39] UN Doc. A/CN.4/SR.3340, *cit. supra* note 9, p. 8 (TLADI).

"theory") been adopted instead of "rule", it would have embedded significant uncertainties as to the rule's existence and nature in the draft conclusions.

What is important is that the *content* of the notion of persistent objection was endorsed in the adopted draft conclusions. As Georg Nolte stressed in plenary debate, persistent objector rule "did not stop being a rule simply because the Commission did not describe it as one."[40] A spade is a spade, and – in this writer's view – the persistent objector rule is a rule, whether we call it one or not.

5. THE CRITERIA FOR THE OPERATION OF THE PERSISTENT OBJECTOR RULE

As the ILC correctly noted in its commentary to Conclusion 15, the persistent objector rule is subject to "stringent requirements".[41] The criteria for persistent objection are onerous,[42] as is appropriate for a rule that sanctifies exceptionalism.[43] They also involve a notable degree of flexibility and uncertainty. Of course, the basic aspects of the persistent objector rule – particularly the need to object persistently, and to do so before the norm being objected to has crystallised into binding law – are extremely familiar,[44] but there remains a lack of clarity as to exactly what is required for persistent objection, and how the criteria are to be applied in practice.

Despite such uncertainties, an examination of state practice and jurisprudence provides insights into the manner in which the rule is used and, thus, the necessary criteria for its use.[45] The present author conceptualises the requirements for persistent objection as five criteria. All of these five criteria have been reflected in the work of the ILC on the identification of customary international law to some extent, as well as all being present in wider scholarship. Having said this, these criteria are often framed in different ways: for example, sometimes they are combined or articulated through alterative terms. More notably, they are emphasised to different extents by different commentators, to the point that some of them are at times entirely overlooked.

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[40] UN Doc. A/CN.4/SR.3340, *cit. supra* note 9, pp. 7-8 (NOLTE). See also, *ibid.*, p. 8 (COMISSÁRIO AFONSO); *ibid.* (TLADI).
[41] UN Doc. A/71/10, *cit. supra* note 7, p. 112, p. 114. See also Statement of the Chairman of the Drafting Committee, *cit. supra* note 27, p. 20.
[42] See, e.g., BÖLÜKBAŞI, *Turkey and Greece: The Aegean Disputes – A Unique Case in International Law*, London, 2004, p. 217; GUZMAN and HSIANG, "Some Ways that Theories on Customary International Law Fail: A Reply to László Blutman", European Journal of International Law, 2014, pp. 557-558.
[43] GREEN, *cit. supra* note 8, p. 278.
[44] *Ibid.*, p. 274.
[45] See *ibid.*, pp. 59-188.

5.1 Objection

It is perhaps inane to say that a state must "object" for it to be considered a persistent objector. However, it is important to note that not any objection will suffice. In particular, objection must be openly expressed, so that it is effectively communicated to other states. This is evident from a review of practice[46] and, perhaps rather obviously, stems from requirements of certainty and the need for other states to be able to rely on the dissenter's objections.[47] It therefore is pleasing that these elements of the required "quality" of objection, which are often overlooked in literature, have been made explicit in the ILC's outcomes, not only in the commentary to the draft conclusions,[48] but in text of Conclusion 15 itself, which, it will be recalled, states that "[t]he objection must be clearly expressed [and] made known to other States."[49]

Beyond the need for objections to be open and clear, it is evident that no particular form of objection – in the sense of a particular formal pronouncement or issued document – is required,[50] and the ILC commentary again rightly notes this.[51] It also is clear that states can gain exemption through persistently objecting by way of statements alone: it need not necessarily practice what it is preaching.[52] This too correctly is confirmed by the commentary to Conclusion 15: "a clear verbal objection, either in written or oral form, as opposed to physical action, will suffice to preserve the legal position of the objecting State."[53] However, this passage potentially creates uncertainty as to whether a state can object *purely* through its physical actions/contrary practice. The use of the term "as opposed to physical action" could be read simply as a way of describing, by contrast, what was intended by "verbal objection"; alternatively, it could be read as suggesting that physical actions/contrary practice *cannot* amount to objection.

When one examines the way in which states have responded to the usage of the rule by other states, it is clear that physical acts have not been seen as sufficient if unaccompanied by

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[46] See, e.g., *Chagos Marine Protected Area Arbitration* (*Mauritius v UK*), reply of the Republic of Mauritius, 2013, <http://www.pca-cpa.org/5.%20Replya480.pdf?fil_id=2587>, p. 124.
[47] GULDAHL, "The Role of Persistent Objection in International Humanitarian Law", Nordic Journal of International Law, 2008, p. 54.
[48] UN Doc. A/71/10, *cit. supra* note 7, p. 114.
[49] *Ibid.*, p. 112.
[50] See BÖLÜKBAŞI, *cit. supra* note 42, p. 206 (discussing the wide range of forms that Turkey's objections to an extension of the territorial waters limit took).
[51] UN Doc. A/71/10, *cit. supra* note 7, p. 114.
[52] See, e.g., GREEN, *cit. supra* note 8, p. 80 (discussing the UK's persistent objections to the prohibition on belligerent reprisals against civilians).
[53] UN Doc. A/71/10, *cit. supra* note 7, p. 114.

explicit statements of objection (in whatever form).[54] However, contrary "deeds" can act as objection if *combined* with "words" (whether oral or written).[55] As phrased, the commentary could potentially be seen as suggesting that "acts of objection" may undermine accompanying explicit statements of objection, which is – for this writer – incorrect. It is unlikely that this was what was intended, but it would have been desirable for the Commission to more clearly highlight that, while physical acts of objection alone will not be sufficient (unlike statements of objection alone, which can be), they can contribute to a pattern of persistent objection if combined with statements.

5.2 Persistence

If a state wishes to rely on the persistent objector rule, as the rule's name would suggest, it must have objected *persistently*. State practice demonstrates that single or isolated objections will not suffice.[56] Voluntarist theory cannot explain this requirement of persistence: if the rule was only about consent, then one clear statement of objection would presumably be enough.[57] However, the criterion is justified by more pragmatic, practical concerns: the need for persistence tests the will of the objector to ensure that the rule is not used frivolously and, at least to an extent, promotes clarity and certainty.[58]

In the view of this author, Conclusion 15 and its commentary accurately reflects the persistence requirement. In particular, it acknowledges that the requirement is notably difficult to apply, because – as with so many aspects of the operation of customary international law – precisely *how* persistent the objector must be is a context-specific question.[59] This is made explicit in the ILC commentary: "[a]ssessing whether this requirement has been met needs to be done in a pragmatic manner, bearing in mind the circumstances of each case."[60] This acts as a helpful reminder that dissenting states are best served by objecting as often as possible.

5.3 Consistency

As well as objecting persistently, a dissenting state must object *consistently*: indeed, the "persistent objector rule" should be called the "persistent and consistent objector rule".

[54] See, e.g., *C* et al. *v Director of Immigration and Secretary for Security*, 2011, Hong Kong Special Administrative Region, Court of Appeal, CACV 132-137/2008, para. 72.
[55] See, e.g., *In Re "Agent Orange" Product Liability Litigation*, 2005, statement of interest of the United States, <http://www.state.gov/documents/organization/87322.pdf>, pp. 4-13.
[56] GREEN, *cit. supra* note 8, pp. 91-96.
[57] MENDELSON, *cit. supra* note 15, 239.
[58] GREEN, *cit. supra* note 8, pp. 96-98.
[59] See, generally, COLSON, *cit. supra* note 14, p. 957 ff.
[60] UN Doc. A/71/10, *cit. supra* note 7, p. 114.

Consistency is not the same thing as persistence. While the term "persistence" denotes repetition, as well as a degree of steadfastness,[61] consistency requires a level of *uniformity* of objection, or what might be called "non-derogation" by the state from its dissenting stance. A state could "persistently" object to a newly forming rule (by regularly and repeatedly rejecting it), but in fact do so inconsistently (by accepting or affirming the rule on a minority of occasions, in the midst of its general policy of objecting persistently). It is evident that both persistence and consistency are required in practice.[62] The consistency requirement is commonly noted in the literature on the persistent objector rule,[63] but, unfortunately, the criterion often is unhelpfully amalgamated with the persistence requirement.[64]

It was therefore notable that Michael Wood's third report on the identification of custom topic explicitly asserted that "[a] State must maintain its objection *both* persistently *and* consistently."[65] However, this welcome clarification in one of Special Rapporteur's background reports perhaps makes it all the more disappointing that the text of Conclusion 15, as ultimately adopted by the ILC, refers only to the need for objection to be "maintained persistently",[66] without any reference to consistency.

The Drafting Committee took the view that the term "persistently" in Conclusion 15 "meant that the State must maintain its objection both persistently and consistently."[67] This means that while the Commission reinforced the confused amalgamation of "persistence" and "consistency" in the literature by not including both in Conclusion 15, it at the same time did accept the need for both criteria. The decision not to explicitly affirm the consistency requirement in the draft conclusion therefore is regrettable for two reasons. First, because such merging of the criteria is a particular failing of much of the existing academic commentary (with this programme of work representing an opportunity for the Commission to remedy that fact), but also, secondly, because the ILC, at least as a whole, clearly took the (correct) view

[61] GUZMAN, "Saving Customary International Law", Michigan Journal of International Law, 2005-2006, p. 169.
[62] See, e.g., GREEN, *cit. supra* note 8, pp. 107-115.
[63] See, e.g., CRAWFORD, "Chance, Order, Change: The Course of International Law – General Course on Public International Law", Recueil des cours, 2013, p. 247; FIDLER, "Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law", German Yearbook of International Law, 1996, p. 209; LAU, "Rethinking the Persistent Objector Doctrine in International Human Rights Law", Chicago Journal of International Law, 2005-2006, p. 498.
[64] See, e.g., GULDAHL, *cit. supra* note 47, p. 54; LEPARD, *Customary International Law: A New Theory with Practical Applications*, Cambridge, 2010, p. 239.
[65] Third Report on Identification of Customary International Law (WOOD, Special Rapporteur), UN Doc. A/CN.4/682 (2015), p. 66 (emphasis added).
[66] UN Doc. A/71/10, *cit. supra* note 7, p. 112.
[67] UN Doc. A/CN.4/SR.3280, *cit. supra* note 30, p. 13.

that persistence and consistency both are required for persistent objection (meaning that not only the circumstances but also the will to remedy this issue in the literature was present).[68]

It is, however, pleasing that the consistency requirement was confirmed in the adopted commentary to Conclusion 15,[69] reflecting the position set out in the Special Rapporteur's third report. The reasoning expressed by the drafting committee – that the word "persistence" in the draft conclusion itself in fact refers to the dual requirements of persistence and consistency – is also made clear in the commentary.[70]

In terms of understanding what the consistency criterion requires, the commentary to Conclusion 15 states that

> objection should be reiterated when the circumstances are such that a restatement is called for (that is, in circumstances where silence or inaction may reasonably lead to the conclusion that the State has given up its objection). This could be, for example, at a conference attended by the objecting State at which the rule is reaffirmed. States cannot, however, be expected to react on every occasion, especially where their position is already well known … [S]uch repeated objections must be consistent overall, that is, without significant contradictions.[71]

This accurately represents the manner in which the criterion is applied in practice. The requirement is onerous, with even one explicit statement that is contrary to the objection appearing to be terminal.[72] Similarly, even silence can be seen as inconsistent, when this occurs in circumstances where other states might reasonably expect the dissenter to have objected.[73] The ILC commentary also is correct that 100% consistency is not required in all circumstances,[74] albeit that, applying an ultra-critical eye, one might take issue with the final statement of the quote passage (that objection "must be consistent overall, that is, without

[68] See *ibid*.; UN Doc. A/CN.4/SR.3252, *cit. supra* note 5, p. 4 (MURASE); UN Doc. A/71/10, *cit. supra* note 7, p. 114.
[69] *Ibid*.
[70] *Ibid*.
[71] *Ibid*.
[72] See, e.g., PRICE, "Emerging Customary Norms and Anti-Personnel Landmines", in REUS-SMIT (ed.), *The Politics of International Law*, Cambridge, 2004 p. 124; GREEN, *cit. supra* note 8, pp. 118-120 (both discussing the position of Turkey in relation to antipersonnel landmines).
[73] *Ibid*., pp. 112-130.
[74] See, e.g., *ibid*., pp. 120-122 (discussing US objections to the prohibition on the use of herbicides in armed conflict).

significant contradictions"). That line may be somewhat misleading, because even "less significant" contradictions have been viewed as being unacceptable by states on occasion.[75]

Nonetheless, while it is a shame that the consistency requirement was not made explicit in Conclusion 15, the important distinction between, and requirement for both of, the persistence and consistency requirements is present in the outcomes of the ILC's work, and, further, it may be said that the way in which the requirement is applied in practice is well-reflected in the draft conclusion's commentary.

5.4 Timeliness

Persistent objection must be *timely*, in the sense that it must occur before the customary norm being objected to crystallises: as Conclusion 15 makes clear, objection must begin "while that rule [of customary international law] was in the process of formation".[76] There is no "subsequent objector" rule,[77] despite a small minority of writers who support this.[78] There are good policy reasons for this timeliness criterion, related to the maximisation of stability in the system and limiting exceptionalism,[79] and, again, the criterion can be identified in state practice.[80]

However, applying the timeliness criterion may be extremely difficult, given the uncertainties surrounding the point of crystallisation for any given norm of customary international law, which acts as the "end date" for effective persistent objection.[81] The ILC commentary acknowledges this uncertainty: "the line between objection and violation may not always be an easy one to draw…"[82] It perhaps is important to note that this is a symptom of wider uncertainty in customary international law generally (and, particularly, the point of "crystallisation" for any given rule), rather a particular flaw of the persistent objector rule itself. Nonetheless, the timeliness requirement is, like the other criteria for persistent objection, a notably onerous one. States must pay significant attention as to when they may need to begin

[75] See, e.g., HAMPSON and SALAMA, "Working Paper on the Relationship between Human Rights Law and International Humanitarian Law", Commission on Human Rights, UN Doc. E/CN.4/Sub.2/2005/14 (2005), para. 70.
[76] UN Doc. A/71/10, *cit. supra* note 7, p. 112.
[77] This is made explicit in the ILC's commentary, *ibid*., 113. See also ABASHEIKH, "The Validity of the Persistent Offender Rule in International Law", Coventry Law Journal, 2004, p. 46
[78] See, e.g., BRADLEY and GULATI, "Withdrawing from International Custom", Yale Law Journal, 2010, p. 202 ff.; HELFER, 'Exiting Custom: Analogies to Treaty Withdrawals", Duke Journal of Comparative and International Law 2010, p. 65 ff.
[79] GREEN, *cit. supra* note 8, pp. 145-153.
[80] *Ibid*., 138-143.
[81] See CONFORTI, "Cours général de droit international public", Recueil des cours, 1988, p. 74.
[82] UN Doc. A/71/10, *cit. supra* note 7, p. 113.

objecting: even the most vigilant state may still find that its objections come too late. This, too, is acknowledged in the ILC commentary, which notes that the objector's "position will be more assured if it did so at the earliest possible moment".[83]

5.5 Maintenance of Objection after Crystallisation

Finally, objection must be (persistently and consistently) maintained *after* the custom has crystallised.[84] The timeliness requirement means objection must begin before the new norm of custom has formed, but it is very clear from practice that states also must continue to object post-crystallisation or they will lose the exempt status that they have acquired.[85]

Compared to some aspects of the persistent objector rule's operation, this need for "ongoing" objection is one of the elements that sometimes is overlooked in literature, but it is a crucial aspect of the rule in terms of returning exempt states to the legal orthodoxy where possible. Pleasingly, this requirement is clearly indicated, if implicit, in Conclusion 15: "…the rule is not opposable to the State concerned f*or so long as it maintains its objection* … [and objection must be] *maintained* persistently".[86] Even more pleasingly, the requirement for ongoing objection post-crystallisation then is made entirely explicit in the commentary: "[t]he requirement that the objection be maintained persistently applies both before and after the rule of customary international law has emerged."[87]

6. CONCLUSION

The work of the ILC on the wider *Identification of Customary International Law* topic reveals that there remain controversies about the place of the persistent objector rule in international law, including highlighting the endurance of the minority view that it *has no* such place. This article has argued that the rule does exist – for good or ill – and that the ultimate conclusion of the Commission to that effect, and the determination that it is an important aspect of the functioning of customary international law, is therefore welcome. When considering the way in which Conclusion 15, and particularly the commentary to it, set out the underpinning

[83] *Ibid*.
[84] See, e.g., HENCKAERTS and DOSWALD-BECK (eds.), *Customary International Humanitarian Law, vol. I*, International Committee of the Red Cross Study, Cambridge, 2005, p. xlv.
[85] See, e.g., "Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting", (2010) UNICEF Report, <http://www.unicef.org/policyanalysis/files/UNICEF_-_LRI_Legislative_Reform_to_support_the_Abandonment_of_FGMC_August_2010.pdf>, p. 7, p. 21, p. 46 (Mauritania's abandonment of its position on female genital mutilation).
[86] UN Doc. A/71/10, *cit. supra* note 7, p. 112.
[87] *Ibid*., p. 114. See also UN Doc. A/CN.4/SR.3253, *cit. supra* note 10, p. 11 (VÁZQUEZ-BERMÚDEZ).

criteria for the rule's operation, it becomes apparent that, at least in broad terms, the ILC's work also has accurately reflected the way in which the rule is applied in practice and case law. Indeed, there are aspects of the rule's operation that are less often noted or less well-known in wider doctrine that the Commission has helpfully underlined. There are, unsurprisingly, aspects of the draft conclusions and commentaries in relation to persistent objection that the present author feels could have better reflected practice and/or brought more clarity to our understanding of the rule. However, despite notable divisions within the Commission, it should be applauded for the outcomes that it reached on this controversial secondary rule of the international legal system.