Chapter Eight

Persistent Objector Teflon?
Customary International Human Rights Law and the United States in International Adjudicative Proceedings

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I.) Introduction

The persistent objector rule provides that "[i]f whilst a practice is developing into a rule of general law [that is, customary international law], a State persistently and openly dissents from the rule, it will not be bound by it."[1] However, a number of writers have argued that persistent objection does not (or should not) allow a State to exempt itself from certain "fundamental" norms of international law.[2] Given the moral nature and asserted universality underpinning human rights norms, they – more than any other breed of international legal rule – have been said to fall into this category.[3]

Can States exempt themselves from customary international law human rights standards through persistent objection? Certainly, a significant majority of scholars agree that the "escape hatch"[4] provided by the persistent objector rule cannot be opened in relation

[1] "Statement of Principles Applicable to the Formation of General Customary International Law," Final Report of the Committee on Formation of Customary (General) International Law, International Law Association, London Conference, 2000, http://www.ila-hq.org/en/committees/index.cfm/cid/30, section 15.

[2] See, for example, Patrick Dumberry, "The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?," *Leiden Journal of International Law* 23, 2 (2010): 379, 379 and 397-98; Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010), 230-237; and Oscar Schachter, "International Law in Theory and Practice," in 178 *Collected Courses of The Hague Academy of International Law* (Leiden: Martinus Nijhoff Publishers, 1982), 9, 37-38. See also *Fisheries Case* (United Kingdom v. Norway), reply submitted by the Government of the United Kingdom of Great Britain and Northern Ireland, 1950 I.C.J. Plead. II, 428-429 (28 Nov.).

[3] See Louis Henkin, "Human Rights and State 'Sovereignty'," *Georgia Journal of International Law* 25, 2 (1996): 31, 38; Holning Lau, "Rethinking the Persistent Objector Doctrine in International Human Rights Law," *Chicago Journal of International Law* 6, 1 (2005): 496; Lepard, *supra* note 2, at 333-336; Lynn Loschin, "The Persistent Objector Rule and Customary Human Rights Law: A Proposed Analytical Framework," *University of California Davis Journal of International Law and Policy* 2, 2 (1996): 147; Jordan J. Paust, "The Complex Nature, Sources and Evidences of Customary Human Rights," *Georgia Journal of International and Comparative Law* 25, 1 (1995): 147, 152; Niels Petersen, "The Role of Consent and Uncertainty in the Formation of Customary International Law," *Reprints of the Max Planck Institute for Research on Collective Goods*, 2010, http://www.coll.mpg.de/pdf_dat/2011_04online.pdf: 13-14; and Charles Quince, *The Persistent Objector and Customary International Law* (Denver: Outskirts Press, 2010), 62-63 and 76.

[4] Ted L. Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law," *Harvard International Law Journal* 26, 2 (1985): 457, 472.

to *jus cogens* norms, and a good proportion of the widely recognised peremptory norms of the system have their basis in the field of international human rights law. However, not all human rights norms are peremptory: indeed, ultimately, very few of them are. The insulation from exemption that the *jus cogens* project provides only gets us so far.

Those looking to ensure the application of customary human rights standards even to dissenting States have thus faced a dilemma: whether to 1) make a dubious case for the peremptory nature of the human rights norm in question, so as to try to imbue it with the resultant protection from persistent objection that *jus cogens* status provides; or 2) accept that most human rights norms are *not* rules of *jus cogens*, but then assert that even non-peremptory human rights norms are immune from persistent objection. Either approach is highly problematic, and the third option – to allow for persistent objection to all but the handful of human rights norms that have indeed reached the level of *jus cogens* – runs counter to intuitive notions of justice, universality and morality at the very heart of the human rights concept.

This dilemma is herein considered with a particular focus on the practice of the United States in the context of international adjudication. The United States is the only State to have explicitly claimed to be a persistent objector with regard to human rights norms in international adjudicative proceedings. It did so twice before the Inter-American Commission on Human Rights (IACHR), in *Roach and Pinkerton v. United States* (1987)[5] and *Domingues v. United States* (2002).[6] In both of these proceedings before the IACHR, the United States asserted that it was exempt from any possible customary international law prohibition of the juvenile death penalty. More recently, the United States claimed persistent objector status before a North American Free Trade Agreement (NAFTA) arbitration

[5] *Roach and Pinkerton v. United States of America*, 1987 Inter-Am. CHR, Resolution No. 3/87, Case 9647 (22 Sept.).
[6] *Domingues v. United States of America*, 2002 Inter-Am. CHR, Report No. 62/02, Case 12.285 (22 Oct.).

tribunal, in *Grand River Enterprises v. United States* (2011).[7] The United States' submission in *Grand River* was that it was exempt from a number of customary indigenous human rights – and particularly the right of "indigenous consultation" – by virtue of its repeated expressions of dissent. The claims made by the United States in these three adjudicative proceedings, and the respective responses of the IACHR and the NAFTA Tribunal, will be used to highlight the interplay between customary international human rights law and the persistent objector rule.

First, this chapter briefly sets out, in section II, the common understanding of the persistent objector rule. Section III then – also briefly – considers the notion of State exemption from international human rights law in general terms. The oft-made assertion that persistent objection is unavailing against *jus cogens* norms is considered in section IV. Analysis then turns, in section V, to the problem of non-peremptory human rights norms and, in particular, to dubious claims that have been made with regard to the *jus cogens* status of human rights provisions that are almost certainly not of that hallowed ilk. Section VI considers an alternative approach, being the argument that *all* human rights norms bind even persistent objectors, irrespective of peremptory status. Against this background of preceding analysis, section VI concludes by noting that perhaps the problem of persistent objection to human rights norms is not as pervasive as one might think.

Ultimately, this chapter seeks to shed some light on the relationship between international human rights law and the persistent objector rule. It aims to do so, one hopes fittingly, by adopting the approach so often taken by Professor Sandy Ghandhi in his analysis of the mechanics of international human rights law: at once both inherently humanist and with an eye on the maximisation of protection, while at the same time practical, pragmatic and – where necessary – sceptical.

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[7] *Grand River Enterprises Six Nations Ltd* et al. *v. Government of the United States of America*, final award, 2011, UNCITL/NAFTA, http://www.naftalaw.org/Disputes/USA/GrandRiver/GRE-USA-Award-Merits.pdf (12 Jan.).

II.) The Basics of the Persistent Objector Rule

In predominant positivist understandings of the "horizontal" international legal system, States are not bound by law to which they have not consented to be bound.[8] Consent in the context of the formation of custom is usually premised on silence as constituting tacit consent,[9] and it is here that the persistent objector rule is commonly seen as fulfilling a crucial role. At least theoretically, the rule preserves State autonomy – not to mention the positivist notion of a consent-based legal system – by providing States with a means of *withholding* consent.[10]

Perhaps because of its importance to the voluntarist conception of the international legal system, the persistent objector rule is ubiquitous within mainstream international law scholarship. It makes at least a cameo appearance in virtually every modern textbook on international law,[11] and has been famously endorsed, albeit briefly and as *obiter dicta*, in two merits decisions of the International Court of Justice (ICJ).[12] The rule is usually viewed as having two elements, both of which need to be satisfied for it to operate: 1) somewhat obviously, given the rule's name, objection must be *persistent*;[13] and 2) objection must occur *during the formation* of the norm.[14]

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[8] See Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), 169; and James A. Green, "India's Status as a Nuclear Weapons Power under Customary International Law," *National Law School of India Review* (2012) 24, 1 (2012): 125, 139.

[9] See Olufemi Elias, "Persistent Objector," in *Max Planck Encyclopaedia of Public International Law*, VIII, edited by Rüdiger Wolfrum (Oxford: Oxford University Press, 2012), 280, 285, ¶ 3.

[10] See Adam Steinfeld, "Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons," *Brooklyn Law Review* 62, 4 (1996): 1635, 1655.

[11] There are far too many such works to be cited here, but examples of key textbooks referencing the rule include James Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford: Oxford University Press, 2012), 28; Martin Dixon, *Textbook on International Law* (7th ed., Oxford: Oxford University Press, 2013), 34-35; Robert Jennings and Arthur Watts, *Oppenheim's International Law, Volume I (Peace)* (9th ed., New York: Longman, 1996), 29; and Malcom N. Shaw, *International Law* (6th ed., Cambridge: Cambridge University Press, 2008), 89-91.

[12] See *Asylum Case* (*Columbia*/*Peru*), 1950 I.C.J. 266, 277-278 (20 Nov.); and *Fisheries Case* (*United Kingdom v. Norway*), 1951 I.C.J. 116, 131 (18 Dec.).

[13] Dino Kritsiotis, "On the Possibilities of and For Persistent Objection," *Duke Journal of Comparative and International Law* 21, 1 (2010): 121, 130.

[14] Olufemi Elias, "Some Remarks on the Persistent Objector Rule in Customary International Law," *Denning Law Journal* 6 (1991): 37, 38.

It is worth noting that, despite its ubiquity in the literature, the persistent objector rule certainly has its critics. Some point to the relatively low amount of State usage of the rule,[15] or the fact that objectors commonly find it politically difficult to maintain objection even when the technical legal elements for the rule's operation are met.[16] Others argue that because, for example, new States are not given the opportunity to object prior to the formation of customary law already in existence at their inception, the role that the majority ascribe for the rule (as the champion of State consent) is theoretically unsound.[17]

However, while these minority critiques must be acknowledged, they go beyond the scope of this chapter. The present author takes the view that the persistent objector rule does exist and is used by States, albeit perhaps not as regularly as one might expect. Irrespective of the rule's conceptual problems, States can exempt themselves from emerging norms of customary international law by way of a process of persistent objection.

III.) State Exemption from Provisions of International Human Rights Law

As Ghandhi has highlighted, a significant amount of controversy has been generated in the literature (and amongst States) regarding reservations to human rights treaties.[18] Of course, treaty reservations – as inherent acts of exceptionalism – always have the potential to be

[15] See, for example, Jonathan I. Charney, "The Persistent Objector Rule and the Development of Customary International Law," *British Yearbook of International Law* 56 (1985): 1, particularly 11-16; Jeffrey L. Dunoff *et al.*, *International Law: Norms, Actors, Process: A Problem-Orientated Approach* (2nd ed., New York: Aspen, 2006), 78; and Stein, *supra* note 4, in general, but particularly at 459-463.

[16] See, for example, Jonathan I. Charney, "Universal International Law," *American Journal of International Law* 87, 4 (1993): 529, 539; and Anthony D'Amato, "International Soft Law, Hard Law, and Coherence," *Northwestern University School of Law Public Law and Legal Theory Series*, No. 08-01 (2008): 17-19.

[17] See, for example, and Patrick Dumberry, "Incoherent and Ineffective: The Concept of Persistent Objector Revisited," *International and Comparative Law Quarterly* 59, 3 (2010): 779, 797-798; and J. Patrick Kelly, "The Twilight of Customary International Law," *Virginia Journal of International Law* 40, 2 (2000): 449, 513 and 523-526.

[18] See Sandy Ghandhi, "The Human Rights Committee and Interim Measures of Relief," *Canterbury Law Review* 13 (2007): 203, 233; and P.R. Ghandhi, "The Human Rights Committee and Reservations to the Optional Protocol," *Canterbury Law Review* 8 (2001): 13. Ghandhi specifically makes this point in relation to the controversy surrounding the Human Rights Committee's famous "General Comment on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant," U.N. Doc. CCPR/C/21/Rev.1/Add.6 (2 Nov. 1994). See, more generally, Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent," *American Journal of International Law* 96, 3 (2002): 531; and Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No 24 (52)," *International & Comparative Law Quarterly* 46, 2 (1997): 390.

controversial *per se*. Tensions over reservations are likely to be particularly acute in the context of human rights treaties, however, because their inherent aim is not just to reconcile different national polices, but also different social, religious and moral systems.[19] Furthermore, it goes without saying that international human rights law aims to speak directly to a shared (or, at least, avowedly shared) morality: and questions of morality always raise the collective blood pressure of any society.

Human rights are "part of the concept of the international public order,"[20] and the moral and societal "weight" of such norms means that, for many, any kind of deviation by an individual State should be precluded.[21] Indeed, it is commonly argued (if far from entirely agreed) that human rights are *intrinsically universal* in nature.[22] Given their subject matter, many claim that they must, or at least should, apply to all States – and thus, of course, to all *people* – without exception.

In contrast to the voluminous literature on reservations to human rights treaties, there has been relatively little written on the possibility of persistent objection to customary international human rights law. Yet the irresistible force of moral universalism and immovable object of consent-based sovereignty collide just as obviously in this context too.[23] Persistent objection is, in many respects, the customary international law equivalent of reservations to treaties.[24] The mechanism of persistent objection allows a State to gain exemption from the otherwise universal binding force of the customary legal norm in question. Therefore, as with reservations and human rights in treaty law, the relationship

[19] Anthony Aust, *Modern Treaty Law and Practice* (3rd ed., Cambridge: Cambridge University Press, 2013): 134.
[20] Ian Brownlie, "The Decisions of Political Organs of the United Nations and the Rule of Law," in *Essays in Honour of Wang Tieya*, edited by Ronald St. John MacDonald (Dordrecht: Martinus Nijhoff Publishers, 1994), 91, 102.
[21] Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism," *European Journal of International Law* 12, 2 (2001): 269, 301-305.
[22] Jack Donnelly, "Human Rights as Natural Rights," *Human Rights Quarterly* 4, 3 (1982): 391, particularly 397-398.
[23] Loschin, *supra* note 3, 161.
[24] Bing Bing Jia, "The Relations between Treaties and Custom," *Chinese Journal of International Law* 9, 1 (2010): 81, 101-102.

between the persistent objector rule and human rights standards under customary international law is an inherently uneasy one.

The first port of call in trying to navigate this uneasy relationship is to consider the regularly repeated assertion that persistent objection cannot exempt a State from a peremptory norm of international law.

IV.) Persistent Objection and Peremptory Human Rights Norms

Jus cogens norms are "fundamental legal norms from which no derogation is permitted."[25] It is therefore of no surprise that a significant proportion of the norms that are (or are at least claimed to be) of this "super-norm" character come from the field of international human rights law. The International Law Commission (ILC) stated in the context of its work on the law of State responsibility in 2001, that "[t]hose peremptory norms that are *clearly accepted and recognized* include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."[26] While this is almost certainly a non-exhaustive list, it provides us with a general picture of those norms for which the designation "*jus cogens*" is relatively uncontroversial. Notably, six of the seven norms listed by the ILC stem from international human rights law. It has already been mentioned that human rights have a community-centric, imperative and value-

[25] Hilary Charlesworth and Christine Chinkin, "The Gender of *Jus Cogens*," *Human Rights Quarterly* 15, 1 (1993): 15, 15. Although there is significant support for the concept of *jus cogens* in doctrine, it is worth noting that there remains a good deal of general academic debate as to the scope, nature and, indeed, the very existence of *jus cogens* norms. See, for example, Robert P. Barnidge, Jr., "Questioning the Legitimacy of *Jus Cogens* in the Global Legal Order," *Israel Yearbook of Human Rights* 38, (2008): 199, 203–210; Gordon A. Christenson, "*Jus Cogens*: Guarding Interests Fundamental to International Society," *Virginia Journal of International Law* 28, 3 (1988): 585; Michael J. Glennon, "Peremptory Nonsense," in *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, edited by in Stephan Breitenmoser *et al.* (Zürich: Nomos, 2007), 1265; and Prosper Weil, "Towards Relative Normativity in International Law?," *American Journal of International Law* 77, 3 (1983): 413. Suffice it to say here that the present author accepts the existence of *jus cogens* norms.

[26] Report of the International Law Commission, 53rd Sess., 23 April-1 June and 2 July-10 August 2001, U.N. Doc. A/56/10 (2001): 85, emphasis added.

based nature, and the same can obviously also be said of peremptory norms: the two thus have an inherent interrelationship.[27]

This chapter is not the place to consider in detail the way in which peremptory norms of international law come into being,[28] but it is worth recalling the most widely quoted definition of *jus cogens* from Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT). Article 53 states that peremptory norms must be "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."[29]

It is fairly clear that such acceptance and recognition on the part of the "international community of States as a whole" does not necessitate *universal* acceptance by States as to the peremptory character of any given norm. As the chairman of the Drafting Committee of the VCLT made clear in 1968, it is enough for "a large majority" of States to take such a position.[30] This notion of a "large majority" bestowing *jus cogens* status is, of course, rather at odds with a positivist conception of international law as being built on State consent.[31]

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[27] Antonio Cassese, *Five Masters of International Law* (Hart: Oxford, 2011), 25 (interview with René-Jean Dupuy: "human rights [can be seen as] *the basis for jus cogens*: if all men are equal, then by extension all peoples are equal"), emphasis added.

[28] For a more detailed analysis of the manner in which *jus cogens* norms are created, see Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 36-130.

[29] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, art. 53. Complementing art. 53 is art. 64 of the VCLT, which states: "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Admittedly, using Article 53 as the definition of *jus cogens* is not entirely satisfactory, see Erika de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law," *European Journal of International Law* 15, 1 (2004): 97, 98-99.

[30] Official Records of the United Nations Conference on the Law of Treaties, 1st Sess., 26 March-24 May 1968 (Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole), A/CONF.39/C.1/SR.34 (1968): 472.

[31] See Gennady M. Danilenko, "International *Jus Cogens*: Issues of Law-Making," *European Journal of International Law* 2, 1 (1991): 42, in general, but particularly at 48-57; and Lauri Hannikainen, *Peremptory Norms (*Jus Cogens*) in International Law: Historical Development, Criteria, Present Status* (Helsinki: Lakimiesliiton Kusannus, 1988), 49.

Nonetheless, it is, for most, justified by the need to avoid a single State vetoing a peremptory norm accepted as such by all others.[32]

Acquisition of *jus cogens* status is the Holy Grail for any provision of human rights law: derogation becomes untenable, as does – aside from where a contrary norm of the same character later emerges – *change*. The particular consequence of peremptory status that is of relevance here, however, is that a significant majority of scholars argue that a State cannot exempt itself from a peremptory norm by way of persistent objection, even when the usual criteria for the rule's operation – persistence and timeliness – are otherwise met.[33] The ILC has articulated this majority view with particularly vehement language: "it is *inconceivable* that a persistent objector could thwart such a norm."[34]

The "classic" example from State practice illustrating that objection is unavailing in relation to a peremptory human rights norm is the widespread view that repeated dissent by South Africa and Rhodesia to the emerging customary international law norm prohibiting the policy of apartheid did not allow for those States to later continue to practice racial discrimination.[35] *Jus cogens* simply overrode the persistent objections of these States. Yet

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[32] Rafael Nieto-Navia, "International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law," in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, edited by Lal Chand Vohrah *et al.* (The Hague: Kluwer Law International, 2003), 595, 612. Cf., J. Brock McClane, "How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?," *International Law Students Association Journal of International Law* 13 (1989): 1, 25 (arguing that *universal* acceptance is required for the emergence of a new *jus cogens* norm).

[33] This claim is ubiquitous, but to give just a few examples of those taking this view: Michael Byers, "Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules," *Nordic Journal of International Law* 66, 2 (1997): 211, 217 and 223; Christopher A. Ford, "Adjudicating *Jus Cogens*," *Wisconsin International Law Journal* 13, 1 (1994-1995): 145, 146-147; Peter Hulsroj, "*Jus Cogens* and Disarmament," *Indian Journal of International Law* 46, 1 (2006): 1, 8; Karen Parker and Lyn Beth Neylon, "*Jus Cogens*: Compelling the Law of Human Rights," *Hastings Journal of International and Comparative Law* 12, 2 (1989): 411, 418; and Christian Tomuschat, "Obligations Arising for States Without or Against Their Will," in 241 *Collected Courses of The Hague Academy of International Law* (Leiden: Martinus Nijhoff Publishers, 1993), 195, 307. See also *North Sea Continental Shelf* (Federal Republic of Germany/Denmark) (Federal Republic of Germany/the Netherlands), 1969 I.C.J. 3, 229 (20 Feb.) (Lachs, J., dissenting).

[34] Report of the International Law Commission, 59th Sess., 7 May-5 June and 9 July-10 August 2007, U.N. Doc. A/62/10 (2007): 101, emphasis added.

[35] See, for example, Omar Abasheikh, "The Validity of the Persistent Offender Rule in International Law," *Coventry Law Journal* 9 (2004): 40, 44; Luigi Condorelli, "Custom," in *International Law: Achievements and Prospects*, edited by Mohammed Bedjaoui (Dordrecht: Martinus Nijhoff, 1991), 179, 205; John Dugard, *International Law: A South African Perspective* (3rd ed., Cape Town: Juta & Co., 2008), 32; Maurice H. Mendelson, "The Formation of Customary International Law," in 272 *Collected Courses of The Hague*

while apartheid may be by far the most commonly cited example of this phenomenon, perhaps of more note is the fact that ultimately *no State* has been able to maintain persistent objection to a peremptory norm.

In term of legal theory, the rationale underpinning this position is based on a conceptualisation of the purpose of peremptory norms, as being aimed at protecting the most crucial values of common interest and moral imperative.[36] It is understandably seen as undesirable, once "the international community as a whole" (meaning, as we have noted, *virtually* all States) has "accepted and recognised" any given international law norm as being of such importance that it cannot be derogated from, to allow a single State to gain exemption from that norm. Indeed, the very concept of a norm that cannot be derogated from is intuitively at odds with the persistent objector rule, the *raison d'etre* of which is derogation.[37]

Overall, then, it is relatively uncontroversial[38] to state that human rights norms that have been accepted and recognised as being peremptory – the prohibitions on torture, apartheid, genocide, slavery, *et al.* – are legally immunised from the possibility of State exemption through persistent objection.

V.) Lengthen the List of Peremptory Human Rights Norms?

The problem is that this list of peremptory human rights norms – or at least the list of relatively uncontentious peremptory human rights norms – is rather short. The legal criteria for establishing any given norm as being peremptory are onerous: while universal acceptance is unnecessary, the test is nonetheless whether the *vast majority* of States of the world have

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Academy of International Law (Leiden: Martinus Nijhoff Publishers, 1998), 155, 235-236; and Stein, *supra* note 4, 463 and 473-474.

[36] See, for example, Quince, *supra* note 3, 39; Steinfeld, *supra* note 10, 1678; and John Tasioulas, "Customary International Law and the Quest for Global Justice," in *The Nature of Customary Law*, edited by Amanda Perreau-Saussine and James Bernard Murphy (Cambridge: Cambridge University Press, 2007), 307, 313.

[37] See Ford, *supra* note 33, 146; and Kritsiotis, *supra* note 13, 133-134.

[38] A small number of writers have criticised the majority view on the basis that denying exemption from *jus cogens* norms would amount to an erosion of the sovereign right of States to consent (or not) to rules of international law. See, for example, Cassese, *supra* note 8, 178; and Nieto-Navia, *supra* note 32, 612.

accepted and recognised the norm as being peremptory.[39] Peremptory status for any given norm is difficult to be sure of.[40] As such, what we can be fairly sure of is that, as Lau concludes, "only a handful of human rights norms qualify as *jus cogens*, leaving the large majority of human rights laws susceptible to the persistent objector doctrine."[41]

One approach taken by those looking to ensure that human rights standards apply universally, even to persistent objectors, has therefore been to unilaterally lengthen the list of peremptory human rights norms. Rules that are almost certainly non-peremptory (based on any reasonable application of the VCLT Article 53 criteria) are thus at times argued to have acquired a peremptory character, specifically so that State persistent objection to them can be considered to be validly overridden. It is entirely understandable that writers "have strained to conclude that that a norm is *jus cogens*"[42] in instances where the norm in question is of particular moral importance – a designation that self-evidently includes provisions of international human rights law – without the rigorous application of the positivist criteria for the creation of peremptory rules.[43]

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[39] Christos L. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties* (Amsterdam: North Holland Publishing Company, 1976), 15.

[40] James A. Green, "Questioning the Peremptory Status of the Prohibition of the Use of Force," *Michigan Journal of International Law* 32, 2 (2011): 215; and Christiana Ochoa, "Disintegrating Customary International Law: Reactions to *Withdrawing from International Custom*," *Duke Journal of Comparative and International Law* 21, 1 (2010): 157, 166 n.40.

[41] Lau, *supra* note 3, 495, and at 498. See also Susan C. Breau, "The Constitutionalization of the International Legal Order," *Leiden Journal of International Law* 21, 2 (2008): 545, 547-548; Camilla G. Guldahl, "The Role of Persistent Objection in International Humanitarian Law," *Nordic Journal of International Law* 77, 1 (2008): 51, 62; Loschin, *supra* note 3, 163-164; and Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles," *Australian Yearbook of International Law* 12 (1988-1989): 82, 103. Cf., *South West Africa Cases* (Ethiopia v. South Africa) (Liberia v. South Africa), Second Phase, 1966 I.C.J. 6, 298 (18 Jul.) (Tanaka, J., dissenting).

[42] Lepard, *supra* note 2, 241.

[43] For example, Steinfeld seemingly determines, with relatively little evidence, that the entire corpus of International Humanitarian Law and – even less convincingly – international environmental law, are peremptory in nature, so as to protect these rules against possible persistent objection by nuclear weapon States. Steinfeld, *supra* note 10, at 1640 and 1680-1685. See Guldahl, *supra* note 41, at 84 (rightly pointing out that Steinfeld's arguments in this regard are simply "untenable"). Another example is Tabassi's argument that the alleged customary comprehensive nuclear test-ban is a *jus cogens* norm, on which basis she then claims that possible persistent objector States (specifically India, Pakistan and the Democratic People's Republic of Korea) would nonetheless be required to refrain from nuclear testing, see Lisa Tabassi, "The Nuclear Test Ban: *Lex Lata* or *de Lege Ferenda*?," *Journal of Conflict and Security Law* 14, 2 (2009): 309, 347-350. However, this claim is obviously incorrect: see James A. Green, "India and a Customary Comprehensive Nuclear Test-Ban: Persistent Objection, Peremptory Norms and the 123 Agreement," *Indian Journal of International Law* 51, 2 (2011): 3, 29

However, whatever the merit or moral "value" of any given legal rule, this does not in itself turn it into a peremptory norm; nor do pronouncements to this effect made by scholars, however numerous.[44] To allow for the uncritical and subjective selection of peremptory norms does more harm than good to the commendable goals of the *jus cogens* project. Without genuine acceptance and recognition by States, any avowed peremptory norm will not be treated as one by States, leaving a gap between what is peremptory on the page and what is peremptory in practice. We need to keep that gap a narrow one to avoid damaging the entire credibility of *jus cogens*.

This problematic "kitchen sink" approach to the identification of peremptory norms is highlighted by the practice of the United States in the context of international adjudication. As has already been noted, the United States is the only State to formally argue that it is an exempt persistent objector to human rights norms in adjudicative proceedings. The United States first made this claim in 1987 before the IACHR, in *Roach and Pinkerton*.[45] Here, the Commission was examining whether the imposition of the death penalty on the petitioners by United States' courts for crimes committed before their eighteenth birthdays (the petitioners indeed having been executed before the end of the proceedings), violated various provisions of the American Declaration of the Rights and Duties of Man 1948[46] "as informed by customary international law which prohibits the imposition of the death penalty for crimes committed by juveniles under eighteen."[47] The United States argued that, if a customary prohibition on the execution of persons who were less than eighteen years old at the time of

(the "equivocal State practice and *opinio juris* in relation to customary status *simpliciter* [of the test ban] is impossible to equate to the near-universal acceptance and recognition of 'supernorm' status required for elevation to the hallowed group of peremptory international legal rules").
[44] Barnidge, *supra* note 25, 205.
[45] *Roach and Pinkerton*, *supra* note 5.
[46] Specifically, the petitioners alleged violations of Article I (right to life), Article VII (special protection of children) and Article XXVI (cruel, infamous or unusual punishment), *ibid*., ¶ 34.
[47] *Ibid*.

the commission of the offense existed, it was nonetheless exempt from it as a persistent objector.[48]

First, the IACHR determined that if there was a customary international law prohibition on the juvenile death penalty, the United States would indeed not be bound by any such norm on the basis of its persistent objection.[49] Secondly, however, the Commission held that there was not only an established customary norm prohibiting the execution of juvenile offenders, but that this norm was peremptory in nature.[50] One would assume that this then meant that the Commission saw American objections as being unavailing (given that, as is the common consensus, the IACHR viewed the persistent objector rule as being inapplicable in relation to of *jus cogens*). Yet, in something of a *volte-face*, the IACHR went on to determine that – while a peremptory prohibition on juvenile executions existed – it was not clear that the age limit for identifying a "juvenile" for this purpose was necessarily set at *eighteen*.[51] The Commission felt that a new norm specifically prohibiting the executions of individuals aged *less than eighteen years* when their offense was committed was "emerging" at the time, but that this had not yet emerged.[52] This meant that the policy of the United States in executing sixteen year old offenders did not violate the (peremptory) customary legal prohibition after all.[53] The IACHR's report in *Roach and Pinkerton* therefore acts as authority for the view that persistent objection is unavailing in relation to human rights norms that have acquired peremptory status, but only ultimately in the abstract.[54]

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[48] *Roach and Pinkerton*, Memorandum of the United States to the Inter-American Commission on Human Rights in Case 9647, Inter-Am. CHR 147, OEA/ser.L/V./II.71, doc. 9 rev. 1, 15 (17 July 1981).
[49] *Roach and Pinkerton*, *supra* note 5, ¶ 54.
[50] *Ibid*., ¶ 56.
[51] *Ibid*., ¶ 60.
[52] *Ibid*.
[53] *Ibid*. Although the Commission nonetheless saw the United States as being in violation of Articles I and II of the American Declaration of the Rights and Duties of Man, at ¶¶ 61-65.
[54] Dumberry, *supra* note 17, 788.

This view was however further reinforced in the IACHR's 2002 decision in *Domingues*.[55] Following the Commission's report in *Roach and Pinkerton*, there were increasing claims made that – from the early 1990s onwards – a norm prohibiting the execution of persons under the age of eighteen had crystallised into customary international law,[56] and there exists a good deal of evidence indicating that this was the case.[57] The increased general acceptance of the customary prohibition meant that the IACHR felt it was on firmer ground in 2002, when next it was faced with the juvenile death penalty issue.

Domingues concerned a death sentence imposed by the state of Nevada on an individual who was sixteen at the time that he committed two homicides.[58] The United States once more argued that it was exempt from the prohibition on juvenile executions in relation to Mr Domingues – or, at least, was exempt from a rule that took eighteen rather than sixteen as the threshold for minority executions – on the basis that it was a persistent objector.[59]

Unlike in *Roach and Pinkerton*, by 2002 the IACHR felt comfortable in asserting that there was indeed a customary prohibition on the execution of juveniles (with the threshold for this specifically being eighteen years).[60] It then rejected the United States' claim of exemption from that customary norm on the basis, *inter alia*, that the prohibition on the execution of juveniles had the status of a norm of *jus cogens*:

> [T]he Commission considers that the United States is bound by a norm of *jus cogens* not to impose capital punishment on individuals who committed their

[55] *Domingues*, *supra* note 6.
[56] See, for example, Amnesty International, "United States of America: Open Letter to the President on the Death Penalty," 1994, http://www.amnesty.org/en/library/asset/AMR51/001/1994/en/dc29ca38-0b55-4014-8302-dfc1146a5ffb/amr510011994en.pdf, particularly the State practice referenced at 8.
[57] The State practice supporting the establishment, in the early 1990s, of a customary norm prohibiting juvenile executions is set out in detail in Edward F. Sherman, Jr., "The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation," *Texas International Law Journal* 29, 1 (1994): 69, 88-90.
[58] *Domingues*, *supra* note 6, ¶¶ 1-2.
[59] See *Domingues v. United States*, Response of the Government of the United States to May 1, 2000 Petition, Case No. 12.185 (Michael Domingues), http://www.state.gov/documents/organization/16525.pdf, at 10-11; and *Domingues*, *supra* note 6, at ¶ 14.
[60] *Domingues*, *supra* note 6, ¶ 83.

> crimes when they had not yet reached 18 years of age. As a *jus cogens* norm, this proscription binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a State, persistent or otherwise.[61]

In other words, in 2002, the IACHR was notably less equivocal than it had been in 1987: juvenile executions were prohibited by a *jus cogens* norm, and the United States was therefore in violation of that prohibition irrespective of its persistent objection. The United States Supreme Court subsequently ruled, in *Roper v. Simmons*[62] in 2005, that the juvenile death penalty was cruel and unusual punishment and was therefore unlawful under the American Constitution. This decision has been seen by some as likely being a direct result of the Commission's findings in its *Domingues* report,[63] and thus conclusive evidence that persistent objection does not pay in relation to *jus cogens* rules.

The approach of the IACHR in both *Roach and Pinkerton* and *Domingues* certainly conforms to the general view of the immunisation from persistent objection provided to human rights norms by the acquisition of *jus cogens* status. More generally, the Commission can be applauded for its stance of direct opposition to the world's most powerful State on a crucial issue of human rights exceptionalism. Venturing momentarily into the light of biased moral certainty, before quickly retreating back into his hole of (admittedly fictional) legal impartiality, the present author would venture that the execution of juvenile offenders is fundamentally and inexcusably *wrong*. On a human, instinctive level it is hard to criticise the Commission for flatly rejecting the assertion of an institutional right to kill children (or, slightly less repugnantly, adults who were children at the time when they committed the crime for which they are executed). Nonetheless, the decisions of the IACHR on the United

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[61] *Ibid*., ¶ 85.
[62] *Roper v. Simmons*, 2005, 543 U.S. 551.
[63] See, for example, Sandra L. Babcock, "Human Rights Advocacy in United States Capital Cases," in *Bringing Human Rights Home, Volume 3*, edited by Cynthia Soohoo *et al.* (Westport: Praeger, 2008), 91, 105.

States' claim of persistent objector status in relation to the juvenile death penalty must be assessed rather more critically than such a gut response allows.

It is worth noting, first, that the United States maintained its policy of juvenile executions for a full *three years* after the unequivocal *Domingues* decision. Perhaps this can be contextualised by the fact that this was generally viewed as a breach of international law, rather than being accepted as an example of an exempt persistent objector legitimately ploughing its own furrow.[64] Nonetheless, to the extent that *Domingues* and *Roach and Pinkerton* act as authority for the assertion that States cannot remain exempt from peremptory norms through persistent objection as a matter of law, the actual practice of the United States shows that it is possible to maintain such a position as a matter of *fact*, even if not indefinitely.

Perhaps more importantly, there has been significant debate as to the veracity of the IACHR's conclusion that the prohibition of juvenile execution is – or was at the relevant time – a super-norm.[65] It is almost impossible to dispute that the prohibition is now, and indeed has for some time been, a rule of customary international law. Whether it is a *jus cogens* rule is far less clear: "[w]hile most scholars would tend to agree that the juvenile death penalty is…established [in custom], few would agree that it is peremptory."[66] The test is whether the international community of States as a whole has "accepted and recognised" not merely that there is a customary prohibition on the juvenile death penalty, but that this prohibition is peremptory. It seems highly unlikely that this degree of consensus has occurred in practice.

It was laudable of the IACHR to seek to block the United States' attempt to avoid compliance with a crucial norm of international human rights law through its persistent

[64] See, for example, the United Nations Sub-Commission on the Promotion and Protection of Human Rights resolution 2000/17, 26th mtg., 17 August 2000.
[65] See, for example, Curtis A. Bradley, "The Juvenile Death Penalty," *Duke Law Journal* 52, 3 (2002): 485, 537-539; Ochoa, *supra* note 40, 166 n.40; Quince, *supra* note 3, 75; and David Weissbrodt, "Execution of Juvenile Offenders by the United States Violates International Human Rights Law," *American University Journal of International Law and Policy* 3, 2 (1988): 339, 369-371.
[66] Loschin, *supra* note 3, 169.

objection. In so doing, however, the Commission chose to elevate an almost certainly *non*-peremptory human rights norm to avowed peremptory status. This had the immediate legal effect of scuppering the United States' use of the persistent objector rule ("immediate" in the sense that this took a further three years), but it also has the disturbing secondary effect of undermining the very notion of *jus cogens*, by moving it into the realm of pure subjective naturalism.

The IACHR's approach is particularly unfortunate because a simpler, albeit rather more prosaic, solution was available. While there was certainly a pattern of objection on the part of the United States that would *prima facie* support its persistent objector claim,[67] in fact the United States' objections to the customary prohibition of the juvenile death penalty were insufficiently *consistent* for it to be considered an exempt persistent objector in the first place.[68] This was noted by the IACHR itself in *Domingues*:

> [T]he United States…rather than persistently objecting to the standard, has in several significant respects recognized the propriety of this norm by, for example, prescribing the age of 18 as the federal standard for the application of capital punishment and by ratifying the Fourth Geneva Convention without reservation to this standard.[69]

Ultimately, though, the IACHR saw this as something of an aside, given that its finding of *jus cogens* had already, for the Commission at least, "washed away" the American exemption.

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[67] Bradley provides *prima facie* evidence of the United States' persistent objection to an emerging customary international law norm on juvenile executions, with its objections starting well before any possible norm could have crystallised. See Bradley, *supra* note 65, particularly at 492-500.

[68] The inconsistent practice of the United States in this regard was set out in significant detail in *Commonwealth of Pennsylvania v. Hector Huertas*, Motion to Preclude the Commonwealth from Seeking the Death Penalty Against a Juvenile and Consolidated Memorandum of Law, 2002 CP 0009-0941, CTD, 25-26. See also Dinah Shelton, "Application of Death Penalty on Juveniles in the US," *Human Rights Law Journal* 8 (1987): 355, 359; and Weissbrodt, *supra* note 65, 368, particularly n.158. Indeed, even some who have advocated the view that the United States should be exempt from the customary international law prohibition on juvenile executions have accepted that its practice was not always entirely consistent in this regard, see Bradley, *supra* note 65, 493.

[69] *Domingues*, *supra* note 6, ¶ 85.

The credibility of the *Domingues* decision would have been significantly increased had the IACHR simply based its ultimate finding on the fact that United States had not been a sufficiently consistent objector. The bright lights of *jus cogens* were too big a draw, however. The finding of peremptory status on the part of the IACHR may actually have done more harm than good to the ability of human rights law to defend itself against persistent objection, playing into the hands of those who attack *jus cogens* as an "eye of the beholder" norm popularity contest.

VI.) A Teflon Coating for All Human Rights?

An alternative approach to dubious unilateral findings of peremptory status, similarly premised upon a moral absolutist and universalist view of human rights, is the claim that *all* human rights norms – be they peremptory or non-peremptory – are inherently immune from persistent objection.[70] Those taking this view accept that not all human rights provisions are peremptory, but argue that it is (or in some, rather more *lex ferenda* versions of this approach, should be) impossible to persistently object to them, nonetheless. The most notable exponent of this position is Holning Lau, who argued in 2005 that:

> The human rights regime's universality assumption is at odds with the effects of the persistent objector doctrine. By allowing individual States to exempt themselves from international human rights law, the human rights regime's universalist nature is necessarily compromised.[71]

A decade earlier, that famous champion of universal human rights, Louis Henkin, took the same view – albeit rather more bluntly: "the 'persistent objector' principle does not apply."[72]

The main challenge that has been raised to this idea of human rights being intrinsically exempt from persistent objection is the notion of State *consent* to international law-making. The persistent objector rule is supposed to preserve the voluntarist

[70] See scholars listed in *supra* note 3.
[71] Lau, *supra* note 3, generally, but quoted at 501.
[72] Henkin, *supra* note 3, 38.

underpinnings of international law, and "[t]o abandon customary international law's strong positivist intellectual roots in favour of a new naturalism (whether expressed in the idiom of the 'rationality' or 'humanity' of favoured norms), would…be folly."[73]

Lau and Quince defend the theory that human rights are immune from persistent objection against this "negation of consent" argument by asserting that there is an element of "original consent" underpinning the international human rights law regime. In other words, they argue that by participating in the regime (for example, by signing and voting to adopt the Universal Declaration of Human Rights, or by ratifying the International Covenant on Civil and Political Rights), a State consents to the universal and intransgressible nature of *all* human rights law: thus meaning that consent in relation to any particular human rights norm has already been established.[74]

Customary international law theory is plagued with fictitious or overstated notions of consent,[75] but – even in that milieu – the idea of ultimate original consent to all human rights now and forever (including consent to human rights not yet formed or even *conceived of*) seems really rather a stretch. If this had any basis in truth, not only would reservations to human rights treaties be entirely and uncontroversially impermissible in all circumstances, but States would be formally required to become party to any new human rights convention as soon as it became open for signature: they would already have given their consent to be bound by the treaty. Quite simply, the original consent theory is nonsense.

Having said this, we know that universal consent is not required for the formation of *jus cogens* norms, but that they nonetheless cannot be persistently objected to. The commonly advanced rationale for prohibiting persistent objection to *jus cogens* is based on the moral universalism of peremptory norms and, given that the same trait is – many argue –

[73] David Bederman, "Acquiescence, Objection and the Death of Customary International Law," *Duke Journal of Comparative and International Law* 21, 1 (2010): 31, 44.
[74] Lau, *supra* note 3, 503-505; and Quince, *supra* note 3, 74 and 76.
[75] See Jörg Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems," *European Journal of International Law* 15, 3 (2004): 523, 533.

inherent in all international human rights too, "ordinary" human rights should also be exempt from exemption. In other words, if the "consent issue" can be overcome regarding *jus cogens* norms because of the power of moral imperative, why cannot the same be true for human rights *in toto*? The fiction of the original consent theory is actually unnecessary, because true consent is itself a fiction in the context of customary international law. Why should there be a distinction here between *jus cogens* and other "moral" norms: why would we, it might be asked, "limit unilateral exit for matters of slavery and piracy (which are generally agreed to be *jus cogens* norms) but not for child labor…?"[76]

Normatively, a difference may perhaps be found in the onerous positivist test for *jus cogens* norms to form. Such rules may not require universal acceptance, but they do require *near*-universal acceptance. That is why there are so few of them. Adhering to the positivist requirements of VCLT Article 53 helps keep the concept of *jus cogens* in touch with reality, and thus actually *protects* and *validates* its value-based agenda. *Jus cogens* norms are, or at least should be, natural law rules under careful positivist guard. Customary international human rights standards, in contrast, do not require the same high level of State acceptance and recognition, but just the usual basic preponderance of practice and *opinio juris* as for any custom. *Jus cogens* and other human rights norms can be distinguished precisely because peremptory norms are inherently different: they are, after all, peremptory.

Ultimately, though, the answer to the distinction between peremptory norms (which cannot be persistently objected to) and other human rights norms (which can) lies not in legal theory but in legal practice. No State has successfully maintained persistent objection in

[76] Ochoa, *supra* note 40, 166 (a point made specifically in the context of discussing the proposal for allowing "subsequent objection" in Curtis A. Bradley and Mitu Gulati, "Withdrawing from International Custom," (2010) 120 *Yale Law Journal* 120, 2 (2010): 202). See also Henkin, *supra* note 3, at 38.

relation to a peremptory norm, whereas many *have* – and continue to – in relation to non-peremptory human rights norms.[77]

This is perhaps best illustrated by another claim of exempt persistent objector status made by the United States in the context of international adjudicative proceedings, specifically in the *Grand River* arbitration, considered by a tribunal under NAFTA Chapter 11.[78] The relevant claim was first put forward by the United States in 2008, but was maintained throughout proceedings until the Tribunal's final award in 2011 and, indeed, *beyond*.

The *Grand River* dispute related to the attempt by various federal states within the United States to reach a settlement with tobacco manufacturers for health-care costs stemming from smoking. The arbitration was instigated by a Canadian-registered tobacco company, Grand River (and some of its shareholders), which claimed that, for various reasons, this constituted discriminatory practice that breached a number of NAFTA provisions.[79] The salient aspect of the dispute for our purposes related to the claimants' contention that the practice of the United States was in breach of certain customary rights of indigenous investors, given the fact that many of the shareholders and employees of the Grand River company were Native American. This contention included what the claimants saw as an "obligation to pro-actively consult with [indigenous persons] prior to taking legislative action that will have a substantial impact upon them."[80] It was argued that that

[77] There are a number of successful persistent objector States to human rights norms, but see, for example, the position of Mauritania with regard to the practice of female genital mutilation: it is clear that Mauritania has met the criteria for persistent objection in relation to the norm and is thus exempt (Lau, *supra* note 3, 507-508). Another example is China's reservation to Article 22(1) the Convention on the Rights of the Child (which has allowed Hong Kong scope to derogate from the rights of asylum seekers or refugee minors contained therein), as part of a pattern of persistent objection to the customary international law norm of *non-refoulement* (*C* et al. *v. Director of Immigration and Secretary for Security*, 2008, Hong Kong Special Administrative Region, CoA, CACV 132-137/2008: 187 and 197–198).
[78] *Grand River*, final award, *supra* note 7.
[79] See *Grand River Enterprises Six Nations Ltd* et al. *v. Government of the United States of America*, notice of arbitration, 2004, UNCITL/NAFTA, http://naftaclaims.com/Disputes/USA/GrandRiver/GrandRiverNoticeOfArbitration.pdf, in particular, ¶¶ 61-80.
[80] *Grand River*, claimants' memorial, merits phase, 2008, UNCITL/NAFTA,

this customary human rights law obligation – which has its roots in Articles 19 and 38 of the United Nations Declaration on the Rights of Indigenous Peoples 2007[81] – had thus been breached by the United States.[82] It is worth noting that this obligation is indisputably a *non*-peremptory human rights norm of customary international law.

The United States provided a dual response: its primary argument was that there was insufficient State practice and *opinio juris* to find that there was a customary international law obligation to consult indigenous peoples in relation to investment.[83] As a secondary argument, however, the United States invoked the persistent objector exception:

> [T]he United States clearly and consistently has articulated its view that...[the requirement of] consultation prior to the adoption of legislation does not reflect customary international law...[therefore] the United States cannot be bound by any consultation requirements.[84]

Certainly, the United States had maintained – and continues to maintain – a notable degree of dissent with regard to a number of "indigenous rights" that may be seen as binding under customary international law, of which the obligation in question here regarding indigenous consultation is just one.[85] Under the usual criteria for persistent objection – persistence and timeliness – it would seem that the United States can be correctly identified as an exempt "persistent objector".

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http://www.naftalaw.org/Disputes/USA/GrandRiver/GRE-USA-Merits-Memorial-R.pdf, particularly ¶¶ 184-192 and 213-217, quoted at ¶ 192.

[81] United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (13 Sept. 2007).

[82] *Grand River*, claimants' memorial, *supra* note 80, ¶¶ 213-217. The claimants were admittedly not entirely unequivocal in regards to this claim, see *ibid.*, ¶¶ 180 and 188.

[83] *Grand River*, counter memorial of the respondent, merits phase, 2008, UNCITL/NAFTA, http://www.naftalaw.org/Disputes/USA/GrandRiver/GRE-USA-Merits-Counter-Memorial-R.pdf: 127-129.

[84] *Ibid*., 128-129, references omitted.

[85] See generally, Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in the United States of America, U.N. Doc. A/HRC/21/47/Add.1 (30 Aug. 2012). The United States is not a Party to the International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), Geneva, 27 Jun. 1969, and was one of only four States to vote against the General Assembly's adoption of the Declaration on the Rights of Indigenous Peoples, *supra* note 81 (143 States voting in favour).

The 2011 final award in the *Grand River* arbitration thus amounted to the first opportunity, in an adjudicative context, to test the assertion that human rights norms are inherently insulated from persistent objection, even when they are non-peremptory. The Tribunal first strongly implied that there was indeed a human right to indigenous consultation under customary international law.[86] However, the Tribunal then failed to pronounce on the claim of the United States that it was a persistent objector. Indeed, it did not even *take note* of this claim.

To an extent, "blame" for this should not be directed at the *Grand River* NAFTA Tribunal because it concluded that, to the extent that there was a customary rule of indigenous consultation, this did not to apply to individual investors and so its scope did not extend to the claimants.[87] In other words, the United States' possible persistent objection was not material to the Tribunal's decision, meaning that any finding on this issue would have been pure *dictum*. However, if human rights are as intrinsically and fundamentally immune from persistent objection as some would have us believe, one might expect that the Tribunal would have at least *acknowledged* this claim by the United States, especially having seemingly indicated that the customary human right in question had indeed crystallised into law.

It is telling that the Tribunal stayed silent on this point, and is perhaps even more telling that the United States felt entirely comfortable asserting persistent objector status to a non-peremptory human rights norm throughout the proceedings. It is also of note there has been almost no academic commentary on the merits of the United States' persistent objector claim in the *Grand River* dispute,[88] and there has been no assertion made in the literature that

[86] See *Grand River*, final award, *supra* note 7, particularly at ¶ 213.
[87] *Ibid*.
[88] Although see Luke Eric Peterson, "Persistent Objector Argument also at Issue in NAFTA Case," 14 July 2009, http://kluwerarbitrationblog.com/blog/2009/07/14/persistent-objector-argument-also-at-issue-in-nafta-case.

the United States was (or even *should have been*) barred from maintaining its exempt status on the basis of a blanket immunity for all customary international human rights law.

The IACHR's dubious finding of peremptory status for the prohibition of the juvenile death penalty in both *Roach and Pinkerton* and *Domingues* also perhaps adds to the story here. That the Commission was willing to stretch credulity in this regard further indicates that that there is no additional exemption from the effects of the persistent objector rule for human rights norms *per se*. If, as some argue, all human rights norms possess some inherent form of persistent objector Teflon, then the IACHR would not have needed to concern itself with whether the prohibition of the juvenile death penalty was peremptory: the prohibition is indisputably a human rights norm, and so would have been universally binding even on dissenters. That the IACHR did not even consider this possibility is telling in itself.

Ultimately, there is no basis in practice for the claim that persistent objection is unavailing in relation to "ordinary" human rights law norms. Indeed, *Grand River* shows us that persistent objection to human rights norms is not only possible, but *unremarkable* in the cut and thrust reality of international legal interaction.

VII.) Conclusion

Where does this leave us? We know that persistent objection is unavailing in relation to *jus cogens* human rights norms, as the impossibility of exemption from the prohibition of apartheid demonstrates. However, the fact that the list of peremptory human rights is rather short means that this solution will rarely be available. This has led those looking to maximise the protections of human rights law and ensure its universal applicability down two different, but equally dangerous, paths: credibility-defying assertions of peremptory status for certain human rights norms, or unfounded claims as to the inapplicability of persistent objection to human rights law as a whole. Either approach involves an act of placing good intention-shaped paving stones on a road, and it is clear where that road leads. Our third option, of

course, is to stoically accept that States can, and sometimes will, exempt themselves from customary international human rights norms.

This range of unpleasant choices mirrors the concern expressed by David Kennedy over what he has termed the "two related dangers of human rights work" – idolatry and pragmatism.[89] The idealism of idolatry manifests itself, for us, in difficult to maintain assertions of peremptory status or – worse still – insistence that any and all human rights are immune from persistent objection when this is clearly not the case in practice. Such blind faith damages rather than protects human rights law:

> [T]o hold the State to [a human rights] norm that is not peremptory, and to which the State has openly, consistently objected…could ultimately do more harm than good…[because] refusing to allow a State to opt out of a norm while the norm is still emerging could ultimately delay the implementation of certain human rights, rather than promote their cause.[90]

Conversely, pragmatism here inevitably leads to a general acceptance of the opposability of persistent objection to human rights, meaning possible undesirable gaps in the applicability of basic standards of protection.

In the interests of trying to avoid ending this chapter on too much of a low note, then, it is worth remembering that this issue – the conflict between human rights and the persistent objector rule – is easily overstated. *Jus cogens* human rights norms are protected, as we know, but so too are any treaty-based human rights to which the State has consented (including customary norms reflected in conventional instruments to which it is party).

[89] David Kennedy, "The Human Rights Regime: Still Part of the Problem?," in *Examining Critical Perspectives on Human Rights*, edited by Rob Dickinson *et al.* (Cambridge: Cambridge University Press, 2012), 19, generally, but quoted at 22.
[90] Loschin, *supra* note 3, 166-168.

Rather obviously, "a State cannot claim persistent objector status to many basic or fundamental rights, as these are either peremptory or covered by treaty."[91]

It is also worth noting that the criteria for persistent objection are quite severe. Given that the rule necessarily represents an exception – and exceptions should be interpreted narrowly – this is no surprise.[92] A significant degree of persistence, unequivocalness and consistency of objection is required for a State to gain exemption by virtue of the rule. Plus, of course, objection must occur before the rule being objected to has crystallised as customary international law; meaning that unless objection has previously (persistently) occurred, all established human rights are already safe.

Moreover, while it is difficult to argue that there exists a *legal* rule that formally insulates human rights norms from persistent objection, the political pressure associated with human rights standards means that is practically untenable for most States to maintain exemption from them. There exists a special "rhetorical power" not just to the concept of *jus cogens*, but to human rights norms *per se*. The "influence of considerations of morality and desirability" makes persistent objection to human rights norms harder in fact, even if perhaps not in law.[93]

An excellent example of the difficulties for even developed States in maintaining objection to human rights norms is the position of Australia with regard to a number of customary international law rights of indigenous peoples.[94] Australia was, until 2009, undoubtedly a persistent objector to certain legal norms relating to indigenous rights,[95] which

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[91] *Ibid*., 167.
[92] Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Cheltenham: Edward Elgar, 2012), 94-95.
[93] Guldahl, *supra* note 41, 84.
[94] There has been increasing agreement, particularly since the 1990s, that a number of "new" indigenous rights have attained the status of customary international law. See S. James Anaya, *Indigenous Peoples in International Law* (2nd ed., Oxford University Press: Oxford, 1996), 61-72.
[95] See "Indigenous Rights Outlined by UN," BBC News, 13 Sept. 2007, http://news.bbc.co.uk/1/hi/in_depth/6993776.stm. Moreover, like the United States, Australia is not a Party to the ILO Convention No. 169, *supra* note 85, and was one of the four states to vote against the Declaration on the Rights of Indigenous Peoples, *supra* note 81.

were almost certainly *not* norms of *jus cogens*. Nonetheless, given the fundamental nature of the human rights norms in question, increasing political pressure ultimately led to a reversal of the Australian position.[96] In other words, Australia found its persistent objector status overruled *de facto*, even though this was not the case *de jure* (because there was no conflict with a peremptory norm). Few states can sustain a game of tug-of-war against the pull of widely accepted human rights standards.

It is admittedly worth remembering – as is the case with so much in the international legal system – the important influence of power in this context. It is no coincidence that the only State to have asserted persistent objector status in international adjudicative proceedings is the world's sole superpower. Inevitably, powerful States will be able to maintain a stance of dissent more easily than others,[97] even in the face of human rights norms (and possibly, for a time at least as shown by the juvenile death penalty example, in respect of *jus cogens* norms). This is a matter of fact, if not of law.[98] Yet the more positive side of this coin is that most States will *not* have the political clout to object to human rights norms. Even the United States will be unable to sustain objection against *jus cogens* norms (at least for long), and it is clear that "ordinary" human rights too have significant political pull (because of their significant *moral* pull), meaning that all States will struggle to stand apart indefinitely.

Therefore, Lau's conclusion, noted previously, that "the large majority of human rights laws [are] susceptible to the persistent objector doctrine"[99] is actually something of an overstatement. For those few States that are swimming against the current of human rights standards by way of persistent objection, there is nothing to stop political pressure from being applied on them (even after the norm in question has formed), to try to influence a

[96] In 2009, Australia explicitly endorsed the 2007 Declaration on the Rights of Indigenous Peoples, and apparently reversed its position on the customary status of a number of provisions contained within it. See "Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights," United Nations News Centre, 3 Apr. 2009, http://www.un.org/apps/news/story.asp?NewsID=30382.
[97] Tasioulas, *supra* note 36, 313; and Guldahl, *supra* note 41, 84.
[98] Bradley, *supra* note 65, 517.
[99] Lau, *supra* note 3, at 495.

renunciation of their isolationist position.[100] Indeed, political pressure *should* be placed on such States to conform, *especially* on powerful States. The law as it stands still currently allows for persistent objection to non-peremptory customary international human rights standards. But that doesn't mean that we have to like it.

[100] Loschin, *supra* note 3, 168.