

The Persistent Objector Rule in International Law

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Introduction

This book examines the persistent objector rule in international law. A core aspect of mainstream international law doctrine, the rule ostensibly holds that if a state persistently and consistently objects to a newly emerging norm of customary international law during the period of the ‘formation’ of that norm (i.e. prior to its crystallization as a binding rule of customary international law), then the objecting state is exempt from the customary norm in question once it has crystallized and for so long as the objection is maintained. The ‘majority (but far from unanimous) view’¹ of the persistent objector rule thus presents it as a mechanism for states to pre-emptively exempt themselves from newly emerging norms of customary international law.

The classic articulation of the sources of international law is to be found in Article 38(1) of the Statute of the International Court of Justice (ICJ),² which lists ‘international custom, as evidence of a general practice accepted as law’ as one of those sources.³ Customary international law is, of course, one of the formal ‘primary’ sources of international law.⁴ Along with treaties, custom acts as one of the two most important sources for norm creation within the international legal system. Custom—which is generally viewed as being manifested through state practice and *opinio juris*⁵—is a source of binding law. Moreover, unlike obligations derived from treaties (which apply only to states for which the treaty in question

¹ T. Treves, ‘Customary International Law’ in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, vol. II (Oxford, Oxford University Press, 2012), 937, 945, para. 39.

² Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055, 33 UNTS 93.

³ *Ibid.*, Article 38(1)(b).

⁴ See H. Charlesworth, ‘Law-Making and Sources’ in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge, Cambridge University Press, 2012), 187, particularly at 189–95; and A.T. Guzman, ‘Saving Customary International Law’ (2005–6) 27 *Michigan Journal of International Law* 115, 116.

⁵ See *North Sea Continental Shelf* cases (*Federal Republic of Germany v Netherlands*, *Federal Republic of Germany v Denmark*), merits, 1969 ICJ Rep. 3, para. 77; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, merits, 1985 ICJ Rep. 13, para. 27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, merits, 1986 ICJ Rep. 14, para. 207. The meanings of both ‘state practice’ and ‘*opinio juris*’ remain highly contentious among scholars. See, for example, J. Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems’ (2004) 15 *European Journal of International Law* 523, 525–36. However, these concepts are at least broadly accepted, and their content has been developed in the ICJ’s jurisprudence to the extent that in 2012, the Court noted that it needed to apply ‘the criteria which it [the Court] has repeatedly laid down for identifying a rule of customary international law’: *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, merits, 2012 ICJ Rep. 99, para. 55, emphasis added.

is in force), norms of customary international law bind all states *prima facie*.⁶ The persistent objector rule is therefore generally seen as forming an optional ‘escape hatch’⁷ to this universal binding force of custom. At least in theory, the rule allows states to elude the otherwise inescapable reach of customary international law. It is important to stress that this means that persistent objection is necessarily a relatively solitary exercise: if there were a notable number of states objecting to the evolution of a new customary international law norm, then this would likely mean that the emerging norm will fail to crystallize at all, as there would be insufficient state practice and *opinio juris* for its creation.⁸ Persistent objector states are thus legally justified pariahs.⁹ The very nature of persistent objection means that ‘objectors’ are swimming against the tide of the vast majority of the international community of states and are essentially doing so alone (or, at least, in very small numbers). In this sense—while it is actually both conceptually and substantively something quite different—the persistent objector rule can broadly be conceived of as the customary international law equivalent to reservations to treaties, in that both constitute procedural legal mechanisms for state exceptionalism when it comes to the binding force of norms of international law.

⁶ See, for example, *North Sea Continental Shelf* cases, *Annex*, n. 5, para. 63 (‘customary law rules ... by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour’); and *Committee on Formation of Customary (General) International Law*, Final Report of the Committee, ‘Statement of Principles Applicable to the Formation of General Customary International Law’, International Law Association, London Conference (2000), <http://www.ila-hq.org/en/committee/index.cfm/cid/30>, section 1. The exception to the universal binding force of customary international law (other than persistent objection) is what is variously called ‘particular’, ‘special’, ‘regional’ or ‘local’ customary international law, which by its nature binds some states but not all. On particular customary international law, see, generally, M. Akehurst, ‘Custom as a Source of International Law’ (1974–5) 47 *British Yearbook of International Law* 1, 28–31; A. D’Amato, ‘The Concept of Special Custom in International Law’ (1969) 63 *American Journal of International Law* 211; Third Report on Identification of Customary International Law (M. W. C. J., Special Rapporteur), International Law Commission, Sixty-seventh session, 27 March 2015, UN Doc. A/CN.4/682, paras 80–4; and *Right of Passage over Indian Territory (Portugal v. India)*, merits, 1960 ICJ Rep. 4, particularly at 39.

⁷ D.A. Colson, ‘How Persistent Must the Persistent Objector Be?’ (1986) 61 *Washington Law Review* 957, 957; and T.L. Stein, ‘The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law’ (1985) 26 *Harvard International Law Journal* 457, 472.

⁸ See C.G. Guldahl, ‘The Role of Persistent Objection in International Humanitarian Law’ (2008) 77 *Nordic Journal of International Law* 51, 54; A. Kaczorowska, *Public International Law* (Abingdon, Routledge, 4th edn, 2010), 41; H. Thirlway, *International Customary Law and Codification* (Leiden, A.W. Sijthoff, 1972), 116; and M.E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (The Hague, Kluwer, 2nd edn, 1997), 36.

⁹ See *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, 1996 ICJ Rep. 226, dissenting opinion of Vice-President Schwebel, 312.

¹⁰ See E. David, ‘L’objecteur persistant, une règle persistante?’ in P. Tavernier and J-M. Henckaerts (eds), *Droit international humanitaire coutumier: enjeux et défis contemporains* (Brussels, Bruylant, 2008), 89, 90; M.A. Hansen, ‘Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict’ (2007) 194 *Military Law Review* 1, 17; B.B. Jia, ‘The Relations between Treaties and Custom’ (2010) 9 *Chinese Journal of International Law* 81, 89, 97 and 101–2; H. Lau, ‘Rethinking the Persistent Objector Doctrine in International Human Rights Law’ (2005–6) 6 *Chicago Journal of International Law* 496, 509; and F.F. Martin, *The Constitution as Treaty: The International Legal Constructionist Approach to the U.S. Constitution* (Cambridge, Cambridge University Press, 2007), 74–5.

All of this means that the persistent objector rule is a purported ‘secondary rule’¹¹ of the international legal system.¹² It is not a substantive rule, but a rule about substantive rules. Having said this, it is worth being clear that the persistent objector rule is not, strictly speaking, a ‘secondary rule of recognition’,¹³ in that it does not contribute to the *creation or determination of content* of substantive primary rules as such (as do, say, the dual requirements of state practice and *opinio juris*). Instead, the persistent objector rule ‘concerns the scope of application of a customary international law rule or its “opposability”’.¹⁴ The rule does not create law, but contributes to establishing its correct application. It is in this sense that the persistent objector rule is a secondary rule of the system.

It is worth noting that this means that the subject matter to which the persistent objector rule could relate is *prima facie* unlimited within international law. The rule could potentially be a means of exemption from an emerging norm of custom relating to any of international law’s plethora of substantive areas of influence, from investment law or the laws of war to civil aviation and telecommunications. In a discipline in which there is ever increasing concern over ‘fragmentation’,¹⁵ both practically and academically, the persistent objector rule is a norm that transcends substance and looks instead to process. As such, it is crucial for every international legal actor that we understand the rule and how it works.

I. The Persistent Objector Rule in Doctrine: Ubiquity and Critique

The persistent objector rule is ubiquitous within mainstream international law scholarship. It makes at least a cameo appearance in most modern textbooks on

¹¹ To use Hart’s famous *c.m.*. See H.L.A. Hart, *The Concept of Law* (Oxford, Oxford University Press, 2nd edn, 1994), particularly at 79–99. In the international law context, see S. Besson, ‘Theorizing the Sources of International Law’ in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010), 164, 178–9; and J.I. Charney, ‘Universal International Law’ (1993) 87 *American Journal of International Law* 529, 533–4.

¹² Stein, n. 7, 458.

¹³ Hart, n. 11, particularly at 94–9. For discussion specifically in the international law context, see Besson, n. 11, 180–4.

¹⁴ S. Yee, ‘Report on the ILC Project on “Identification of Customary International Law”’ (Report by the Special Rapporteur of the Asian-African Legal Consultative Organisation (AALCO) Informal Expert Group on Customary International Law) (2015) 14 *Chinese Journal of International Law* 375, 381, para. 25. See also ‘Identification of Customary International Law’, Statement of the Chairman of the Drafting Committee, Mr Mathias Forteau, 29 July 2015, International Law Commission, Sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2015, 18 (discussing the views of members of the ILC Drafting Committee to this effect); and D. Kritsiotis, ‘On the Possibilities of and For Persistent Objection’ (2010) 21 *Duke Journal of Comparative and International Law* 121, 122 (noting that the persistent objector rule relates to ‘the basis of obligation in public international law’, emphasis in original).

¹⁵ See, for example, *Study Group of the International Law Commission*, Report finalised by M. Koskeniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006), UN Doc. A/CN.4/L.682. See, generally, J. Pauwelyn, ‘Fragmentation of International Law’ in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, vol. IV (Oxford, Oxford University Press, 2012), 211.

international law.¹⁶ Similarly, the rule is an inevitable feature of more specialized works focusing on customary international law.¹⁷ It is usually seen as having been endorsed by two merits decisions of the ICJ,¹⁸ and also has appeared in various individual opinions of ICJ judges.¹⁹ The persistent objector rule additionally has been invoked or referenced in the jurisprudence of a number of other courts and tribunals (both international²⁰ and domestic²¹). Similarly, it has been endorsed by the International Law Association (ILA)²² and within the International Law Commission (ILC), most notably in its recent draft conclusions on the ‘identification of customary international law’²³ (as well as by the ILC’s special rapporteur on that subject, Sir Michael Wood, in his third report).²⁴ The persistent objector rule is therefore undeniably part of the *language* of modern international law. It is uncontroversial to say that, for most international lawyers at least, the persistent

¹⁶ See, for example, A. Abass, *Complete International Law: Text, Cases, and Materials* (Oxford, Oxford University Press, 2nd edn, 2014), 46–9; J. Crawford, *Brownlie’s Principles of Public International Law* (Oxford, Oxford University Press, 8th edn, 2012), 28; M. Dixon, *Textbook on International Law* (Oxford, Oxford University Press, 7th edn, 2013), 34–5; Dugard, *International Law: A South African Perspective* (Cape Town, Juta, 3rd edn, 2008), 32; D. Harris, *Cases and Materials on International Law* (London, Sweet and Maxwell, 7th edn, 2010), 31–3; T. Hillier, *Sourcebook on Public International Law* (London, Cavendish Publishing, 1998), 74; R. Jennings and A. Watts, *Oppenheim’s International Law, vol. I: Peace* (New York, Longman, 9th edn, 1996), 29; Kaczorowska, n. 8, 41–2; J. Klabbers, *International Law* (Cambridge, Cambridge University Press, 2013), 30–1; A.V. Lowe, *International Law* (Oxford, Oxford University Press, 2007), 55–8; P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (New York, Routledge, 7th edn, 1997), 48; and M.N. Shaw, *International Law* (Cambridge, Cambridge University Press, 7th edn, 2014), 63–5.

¹⁷ See, for example, M. Akehurst, ‘Custom as a Source of International Law’ (1974–5) 47 *British Yearbook of International Law* 1, 23–7; R.B. Parker, ‘Customary International Law in the 21st Century: Old Challenges and New Debates’ 21 *European Journal of International Law* 173, 176; M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge, Cambridge University Press, 1999), particularly at 102–5 and 180–3; B.D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge, Cambridge University Press, 2010), 36–7, 229–42, 250–2, 333–6 and 364–5; M.H. Mendelson, ‘The Formation of Customary International Law’ (1998) 272 *Recueil des cours* 155, 227–44; G.J. Postema, ‘Custom in International Law: A Normative Practice Account’ in A. Perreau-Saussine and J.B. Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge, Cambridge University Press, 2007), 279, 282–3; Villiger, n. 8, 33–6; and K. Wolfke, *Custom in Present International Law* (Dordrecht, Martinus Nijhoff, 1993), 66–7.

¹⁸ See *Asylum (Columbia v Peru)*, merits, 1950 ICJ Rep. 266, 277–8; and *Fisheries (United Kingdom v Norway)*, merits, 1951 ICJ Rep. 116, 131. For discussion, see Chapter 2, sections I.i and I.ii.

¹⁹ See Chapter 2, section I.iii, n. 67–n. 80 and accompanying text.

²⁰ See *ibid.*, section I.iii, n. 84–n. 104 and accompanying text.

²¹ See *ibid.*, section I.iii, n. 105–n. 109 and accompanying text.

²² ILA Final Report, n. 6.

²³ ‘Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee’, International Law Commission, Sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2015, UN Doc. A/CN.4/L.869. See also Guide to Practice on Reservations to Treaties with commentaries, 2011, International Law Commission, UN Doc. A/66/10/Add.1, commentary (7) to guideline 3.1.5.3, 371. This was confirmed by Formation and Evidence of Customary International Law: Elements of the Previous Work of the International Law Commission that Could be Particularly Relevant to the Topic, 2013, Memorandum by the Secretariat, UN A/CN.4/659, 28, footnote 97 (a document setting out and reviewing the previous views of the ILC in relation to customary international law).

²⁴ Third Report on Identification of Customary International Law, ILC, n. 6, paras. 85–95.

objector rule is ‘firmly established in the orthodox doctrine of the sources of international law’.²⁵

Yet, while it is true that, for the most part, the persistent objector rule ‘has been treated by jurists and scholars as practically axiomatic’,²⁶ there has also been a significant minority critique of the rule in the literature. Plenty of writers doubt whether the persistent objector rule exists *at all* and see it as a mere academic fiction,²⁷ while others—although accepting the rule’s existence *per se*—argue that it both is theoretically incoherent and has extremely limited utility within the modern international legal system.²⁸ This book engages with these critiques, and others, throughout.

D’Aspremont therefore puts it rather mildly when he says that the persistent objector rule is a ‘much discussed theory’.²⁹ However, it is equally the case that neither supporters nor critics of the rule have examined it in significant detail. To an extent, for all of the targeted discussion of the rule that has occurred in the literature in the past thirty years,³⁰ the leading works examining persistent

²⁵ Stein, n. 7, 463.

²⁶ M.P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge, Cambridge University Press, reissue, 2013), 41. See also Mendelson, n. 17, 227.

²⁷ See, for example, L. Condorelli, ‘Custom’, in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Paris, UNESCO, 1991), 179, particularly at 205; P. Dumberry, ‘Incoherent and Ineffective: The Concept of Persistent Objector Revisited’ (2010) 59 *International and Comparative Law Quarterly* 779, particularly at 780 and 794; P.-M. Duquoy, ‘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, Pédone, 1991), 257; R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press, 1994), 34; J.P. Kelly, ‘The Twilight of Customary International Law’ (1999–2000) 40 *Virginia Journal of International Law* 449, 508–16; I.M. dos Santos de Souza, ‘The Role of Consent in the Customary Process’ (1995) 44 *International and Comparative Law Quarterly* 521, 533 (arguing that the existence of the rule is ‘disputable’); J.P. Paust, ‘The Complex Nature, Sources and Evidences of Customary Human Rights’ (1995–6) 25 *Georgia Journal of International and Comparative Law* 147, 152; and C. Tomuschat, ‘Obligations Arising for States Without or Against Their Will’ (1993) 241 *Recueil des cours* 195, 284–90 and 308. See also Report of the International Law Commission, Sixty-seventh session, 4 May–5 June and 6 July–7 August 2015, UN Doc. A/70/10, advance unedited version, 24 August 2015, 40, para. 93 (noting that, during the consideration of the ‘Identification of customary international law’ topic at the ILC’s Sixty-seventh session, at least some members of the ILC ‘considered that [the persistent objector rule] was a controversial theory not supported by sufficient State practice and jurisprudence’).

²⁸ See, for example, O. Barsalou, ‘La doctrine de l’objecteur persistant en droit international public’ (2006) 19 *Revue québécoise de droit international* 1; J.I. Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) 56 *British Yearbook of International Law* 1; B. Conforti, ‘Cours général de droit international public’ (1988-V) 212 *Recueil des cours* 13, 74–7; J.H.H. Weiler, ‘Editorial’ (2013) 24 *European Journal of International Law* 1, 3; and P.-H. Verdier and E. Voeten, ‘Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory’ (2014) 108 *American Journal of International Law* 389, particularly at 429.

²⁹ J. d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford, Oxford University Press, 2011, paperback edn, 2013), 166.

³⁰ The list of works that have sought to engage *specifically* with the persistent objector rule over the past thirty years is a long one, but some key examples include: Barsalou, n. 28; Colson, n. 7; David, n. 10; P. 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?’ (2010) 23 *Leiden Journal of International Law* 379; Dumberry, n. 27; Dupuy, n. 27; O. Elias, ‘Some Remarks on the Persistent Objector Rule in Customary International Law’ (1991) 6 *Denning Law Journal* 37; O. Elias, ‘Persistent Objector’ in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, vol. VIII

objection remain two relatively short articles, both published in 1985, by Ted Stein³¹ and Jonathan Charney.³² Prior to the publication of the book you are currently reading, there existed only one monograph in print³³ that was (at least apparently) focused on the rule: Charles Quince's *The Persistent Objector and Customary International Law* from 2010.³⁴ However, despite its title, Quince's book actually only devotes thirty-three of its 131 pages to the rule itself, with the rest of the book considering customary international law more generally. With all due respect to Quince's book (which, to avoid any doubt, is excellent on its own terms), its engagement with persistent objection is comparatively limited. The present work thus aims to be the most comprehensive examination of the rule to date.³⁵

II. The Commonly Accepted Elements of the Persistent Objector Rule

While there is little clarity as to the exact nature of the persistent objector rule in the literature, the rule does have a few commonly accepted core elements that are apparent in virtually all of the numerous references to it in scholarship. As Guldahl has noted, the 'theoretical underpinnings of [the persistent objector rule] doctrine have been the subject of much debate, but the basic characteristics of the rule are generally accepted'.³⁶ There is at least a degree of common understanding as to what the rule *is*.

(Oxford, Oxford University Press, 2012), 230; J.A. Green, 'India and a Customary Comprehensive Nuclear Test-Ban: Persistent Objection, Peremptory Norms and the 123 Agreement' (2011) 51 *Indian Journal of International Law* 3; J.A. Green, 'Persistent Objector Teflon? Customary International Human Rights Law and the United States in International Adjudicative Proceedings' in J.A. Green and C.P.M. Waters (eds), *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Leiden, Brill Nijhoff, 2015), 167; Guldahl, n. 8; Kritski, ds. 4. 14; Lau, n. 10; L. Loschin, 'The Persistent Objector Rule and Customary Human Rights Law: A Proposed Analytical Framework' (1996) 2 *University of California Davis Journal of International Law & Policy* 147; J.B. McClane, 'How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?' (1989) 13 *International Law Students Association Journal of International Law* 1; and A. Steinfeld, 'Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons' (1996) 62 *Brooklyn Law Review* 1635.

³¹ Stein, n. 7.

³² Charney, n. 28.

³³ It is important to also note G. Pentassuglia, *La rilevanza dell'obiezione persistente nel diritto internazionale* (Bari, Laterza, 1996). This book appears to be out of print: as such, it has not been possible for this author to review it. According to Oellers-Frahm's review of Pentassuglia's book, it is an extensive investigation of the persistent objector rule (meaning that it is the only monograph truly dedicated to the rule that existed prior to the present one). However, Oellers-Frahm also notes that Pentassuglia ultimately concludes that the persistent objector rule *does not exist*. See K. Oellers-Frahm, 'Buchrezension: Pentassuglia, Gaetano, *La rilevanza dell'obiezione persistente nel diritto internazionale*' (1997) 57 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1180.

³⁴ C. Quince, *The Persistent Objector and Customary International Law* (Denver, Outskirts Press, 2010).

³⁵ Although, having said this, one must also note the earlier publication of Pentassuglia, n. 33. See text in n. 33.

³⁶ Guldahl, n. 8, 53. See also Yee, n. 14, 391, para. 57 ('The general contour of the persistent objector rule is well known').

For example, it is worth considering the understanding of the persistent objector rule provisionally adopted in July 2015 by the Draft Committee of the ILC—tasked by the UN General Assembly to contribute to the progressive development and codification of international law—as part of the Commission’s ongoing work on the identification of customary international law:

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.³⁷

Similarly, the ILA—an organization currently composed of around 3,500 international law experts throughout the world—adopted a definition of the persistent objector rule in 2000, based on its committee report on the *Formation of Customary (General) International Law*.³⁸ The ILA’s definition, as drafted by its committee, set out the rule thus: ‘[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.’³⁹

These definitions—from the ILC and ILA respectively—are representative of the usual articulation of the rule in the wider literature. The persistent objector rule is therefore almost always viewed as being composed of a number of core aspects. Some of these elements are more explicitly advanced than others, but they are present, at least to some extent, in the vast majority of existing representations of the rule.

The first of these core elements, which is not always made explicit, perhaps because it is seen as being self-evident, is a requirement of *objection*.⁴⁰ Silence is not seen as enough. Secondly, objection must be *persistent*.⁴¹ Single or isolated objections will not suffice. Thirdly, objections must be *consistent*.⁴² This consistency criterion is often only implicitly referenced in the literature or is conflated with the persistence requirement, but in fact most accounts of the rule seemingly accept that however *persistent* objection may be, it also needs a degree of internal coherence: persistent but inconsistent objection is likely to be insufficient. Fourthly, the objection must be *timely*,⁴³ in that it must occur prior to the norm being objected to ‘crystallizing’ as a binding norm of customary international law. ‘Subsequent objection’ after the customary norm in question has formed will not avail the objector.

These criteria for the rule’s operation are all relatively easily stated, but there remains very little understanding of what they entail in practice and how they are to be applied: ‘[t]he modalities of the establishment of persistent objection have not been the subject of systematic examination.’⁴⁴ Improving our understanding

³⁷ ILC, Text of the Draft Conclusions, n. 23, 5, Draft Conclusion 15: Persistent Objector.

³⁸ ILA Final Report, n. 6.

³⁹ *Ibid.*, section 15.

⁴⁰ See Chapter 3.

⁴¹ See Chapter 4.

⁴² See Chapter 5.

⁴³ See Chapter 6.

⁴⁴ Elias, ‘Persistent Objector’, n. 30, 284, para. 15. See also O. Elias and C.L. Lim, *The Paradox of Consensualism in International Law* (The Hague, Kluwer Law International, 1998), 72–3; D.W. Greig,

of the requirements for, and mechanics of, persistent objection is crucial, because ‘the right to dissent under the persistent objector rule is seriously weakened if no-one knows *how* to dissent’.⁴⁵ As such, much of this book is devoted to examining the criteria for the rule’s operation.

III. Voluntarism: The Commonly Advanced Rationale for the Rule

Flowing from a conception of international relations as a system of sovereign equality and supremacy, from the early nineteenth century onwards, international law was seen in predominant positivist understandings as being premised on state *consent*.⁴⁶ This undoubtedly flawed,⁴⁷ but still often advanced,⁴⁸ ‘voluntarist’ account of the root of international legal obligation holds that the horizontal structure of the international legal system means that states are only bound by law that they have consented to be bound by.⁴⁹ In relation to treaty law, just as with contracts in domestic legal systems, the identification of consent is at least comparatively straightforward: the question is whether the state has expressed its consent to be bound by the treaty or not.⁵⁰ However, for customary international law—the other main formal source of legal obligation in the system—finding state ‘consent’ is, to put it mildly, rather more difficult.⁵¹

‘Reflections on the Role of Consent’ (1988–9) 12 *Australian Yearbook of International Law* 125, 145–6; Lau, n. 10, 498; and Steinfeld, n. 30, 165). *Contra* T. Christiano, ‘The Legitimacy of International Institutions’ in A. Marmor (ed.), *The Routledge Companion to the Philosophy of Law* (Abingdon, Routledge, 2012), 380, 387 (‘states understand the persistent objector rule’).

⁴⁵ Elias and Lim, n. 44, 73. See also UN Doc. A/70/10, n. 27, 36, para. 73 and 42, para. 106 (views of the Special Rapporteur for the ILC’s ongoing work on the ‘Identification of customary international law’, Sir Michael Wood, during the consideration of the topic at the ILC’s Sixty-seventh session: ‘[t]he Special Rapporteur ... pointed out that the persistent objector rule could be and not infrequently is raised before judges asked to identify customary international law and that it was therefore important to provide practitioners with guidelines on the matter, and especially to clarify the requirements for a State to become a persistent objector’; emphasis added, quoted at para. 106).

⁴⁶ The most famous expression of the ‘voluntarist’ consent-theory remains the statement of the Permanent Court of International Justice (PCIJ) to the effect that ‘[t]he rules of law binding upon states ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.’ *Lotus (France v Turkey)* 1927 PCIJ Series A, No. 9, 18.

⁴⁷ See Chapter 9, section I.iii.

⁴⁸ See, for example, J-A. Carrillo-Salcedo, ‘Droit international et souveraineté des États—Cours général de droit international public’ (1996) 257 *Recueil des cours* 35, 92 (‘[p]our ce qui de la coutume internationale, le rôle du consentement de l’États est indéniable’); and L. Henkin, ‘International Law: Politics, Values and Functions’ (1989-IV) 216 *Recueil des cours* 11, 46 (‘[s]tate consent is the foundation of international law’).

⁴⁹ This is often still seen as a fundamental aspect of the system, and is well expressed by A. Cassese, *International Law in a Divided World* (Oxford, Clarendon Press, 1986), 169.

⁵⁰ See A. Aust, *Modern Treaty Law and Practice* (Cambridge, Cambridge University Press, 3rd edn, 2013), 87–113.

⁵¹ See H.C.M. Charlesworth, ‘Customary International Law and the *Nicaragua* Case’ (1984–5) 11 *Australian Yearbook of International Law* 1, 3 (comparing the relative ease of identifying state

In the context of custom, the orthodox voluntarist ‘consent-theory’ of international law formation is usually premised on silence as constituting tacit state consent.⁵² It is here where the persistent objector rule is most often seen as fulfilling a crucial role. At least theoretically, the rule preserves state autonomy—not to mention the voluntarist conception of a consent-based system in the context of custom—by providing states with a means to exercise ‘consent’ in the law-making process (albeit purely through the option of *withholding* consent). The traditional understanding is therefore that ‘[t]he Persistent Objector Rule is a logical product of the consent theory’.⁵³ Indeed, the rule’s importance to the voluntarist conception of the international legal system in part helps to explain its ubiquity within mainstream international law scholarship.⁵⁴

The underpinning voluntarist rationale for the persistent objector rule will be critiqued throughout this book, and particularly in Chapter 9.⁵⁵ However, it is important to note from the outset that this author rejects the claim that only the will of individual states has any constituting effect when it comes to international law-making. The notion that international law can only be created by state consent is, at least in its pure form, patently incorrect. The plurality of modern international legal norm creation⁵⁶ means that classic ‘voluntarist positivism’ ultimately fails to comply with positivism’s own basic tenet of identifying law ‘as it is’.⁵⁷ Of course, this rejection of voluntarism means that the rationale for the persistent objector rule must itself be rejected, at least as it is most commonly presented. This issue will therefore be returned to in due course.⁵⁸

IV. A Socio-Legal Positivist Approach

This book takes a broadly positivist approach to international law. ‘Legal positivism’, of course, means many things to many people.⁵⁹ The various positivist

consent in treaty law with the problems inherent in so doing for custom). For further discussion, see Chapter 9, section I.iii, n. 64–n. 82 and accompanying text.

⁵² See, for example, J.L. Dunoff, S.R. Ratner and D. Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* (New York, Aspen, 2nd edn, 2006), 78–9; and Treves, n. 1, 945, para. 35.

⁵³ Steinfeld, n. 30, 1655.

⁵⁴ Green, ‘Persistent Objector Teflon?’, n. 30, 170.

⁵⁵ See, in particular, Chapter 9, sections I and IV.

⁵⁶ See Chapter 9, sections I.iii, II and III.

⁵⁷ See J. Kammerhofer and J. d’Aspremont, ‘Introduction’ in J. Kammerhofer and J. d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge, Cambridge University Press, 2014), 1, 5.

⁵⁸ See, in particular, Chapter 9.

⁵⁹ See, for example, H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 601–2, footnote 25 (famously setting out five different meanings of legal positivism, as well as explicitly noting that there may be more). With regard to international law specifically, see U. Fastenrath, ‘Relative Normativity in International Law’ (1993) 4 *European Journal of International Law* 305, particularly at 306–24.

understandings of international law are unsettled,⁶⁰ and this is not the place to attempt to untangle them (or even to explore the version(s) of positivism applied in this book in any great detail). Equally, given that this project examines whether or not the persistent objector rule exists and—following the conclusion that it does—the rule’s content and the criteria governing its application, it is necessary to at least briefly (and admittedly very simplistically) set out the basic assumptions made in undertaking that inquiry. In so doing, it is again worth emphasizing that this book is ‘positivist’, but at the same time—in places, at least—represents a critique of purely voluntarist positivism.

This author rejects the ‘classic’ voluntarist international legal positivism that was particularly prominent in the nineteenth and early twentieth centuries, which took as its core premise the notion that only the expressed will of states had any constituting effect when it came to international law creation.⁶¹ However, ‘one need not necessarily associate positivism with state voluntarism’.⁶² This book uses the label ‘positivism’ more broadly, to indicate that rules of international law must be identified (at least predominantly) by way of an *inductive* methodology, focused on the accepted law-making processes of the system (and, thus, in practice, on the actions of states and other actors within the international community).⁶³ This is as opposed to a purely *deductive* methodology, based on conceptual desirability or the aspirational pull of policy or value-based goals.

It has already been noted that the persistent objector rule is a secondary rule of the international legal system. The secondary rules of international law are ‘notoriously vague’,⁶⁴ and it is clear that they cannot themselves be traced back to the modern ‘sources’ of the international legal system, as commonly set out in Article 38(1) of the Statute of the ICJ.⁶⁵ For example, the notion of *pacta sunt servanda*—which was established long before its appearance in Article 26

⁶⁰ For an excellent recent examination, see, generally, J. Kammerhofer and J. d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge, Cambridge University Press, 2014).

⁶¹ See, generally, R. Collins, ‘Classical Legal Positivism in International Law Revisited’ in J. Kammerhofer and J. d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge, Cambridge University Press, 2014), 23.

⁶² B. Simma and A.L. Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999) 93 *American Journal of International Law* 302, 304.

⁶³ See ILA Final Report, n. 6, 4; S. Breau, ‘State Practice, Customary Humanitarian Law and Civilian Casualties of Armed Conflict’ (2014) 1 *State Practice and International Law Journal* 45, 49 and 52–3; Condorelli, n. 27, 180; Guldahl, n. 8, 61; R. Kolb, ‘Selected Problems in the Theory of Customary International Law’ (2003) 50 *Netherlands International Law Review* 119, 130–3; Mendelson, n. 17, 239; Quince, n. 34, 35–6; A. Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *American Journal of International Law* 757, particularly at 757–8 and 762; and Tomuschat, n. 27, 303.

⁶⁴ J. Pauwelyn, ‘Is It International Law or Not, and Does It Even Matter?’ in J. Pauwelyn, R.A. Wessel, and J. Wouters (eds), *Informal International Lawmaking* (Oxford, Oxford University Press, 2012), 125, 131.

⁶⁵ *Contra* M. Virally, ‘The Sources of International Law’ in M. Sørensen (ed.), *Manual of Public International Law* (London, Macmillan, 1968), 116, 122 (arguing that all secondary rules of international law can be derived from Article 38(1) of the ICJ’s Statute).

of the 1969 Vienna Convention on the Law of Treaties⁶⁶—was almost certainly not ‘created’ through, say, a process of consistent and general state practice combined with *opinio juris*.⁶⁷ It is also not the case that the secondary rules of international law owe their existence to some kind of immemorial historical legitimacy.⁶⁸ A number of the secondary rules of the modern international legal system can be traced back to a relatively recent genesis point. Take, for example, the notion of *opinio juris*: although it is possible to identify something that looks somewhat akin to *opinio juris* in classical writings from the seventeenth century onwards,⁶⁹ and even—in a more general sense—in Roman law,⁷⁰ it is fairly clear that the concept as understood today (even as *broadly* understood) only emerged in the late nineteenth century.⁷¹ It cannot be said that the secondary rules of international law are what they are ‘because always has it ever been’.

How, then, does one identify the existence and content of secondary rules of international law, especially given its largely non-hierarchical nature? To hugely over-simplify, like both Hart and Kelsen, the present author takes the view that secondary rules of international law are rooted in social practice. However, going beyond their formalized approaches, this book adopts a comparatively de-formalized⁷² account of law-ascertainment at the ‘secondary rule’ level, based on *social acceptance*.⁷³ It thus draws on various understandings of international

⁶⁶ Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 UNTS 331.

⁶⁷ See Kolb, n. 63, 127; H. Lauterpacht, *The Function of Law in the International Community* (Oxford, Oxford University Press, 1933), 428–31 (discussing *pacta sunt servanda* from a voluntarist perspective, but accepting that the principle ‘cannot have a positivist nature in this sense’); Lobo de Souza, n. 27, 535; A.V. Lowe, ‘Do General Rules of International Law Exist?’ (1983) 9 *Review of International Studies* 207, 211; and Stein, n. 7, 480 (arguing that *pacta sunt servanda* is ‘inherent’ in the international legal system). See also Virally, n. 65, 127 (noting the different understandings of the source of *pacta sunt servanda*: i.e., natural law, general principles and custom). *Contra* Jia, n. 10, 87.

⁶⁸ Kelsen, for example, formulated his ‘*grundnorm*’ for the international legal system thus: ‘[s]tates ought to behave as they have customarily behaved’. See H. Kelsen, *Principles of International Law* (R.W. Tucker (ed. and revns.), New York, Holt, Rinehart and Winston, 2nd edn, 1966), 564; and H. Kelsen, *General Theory of Law and State* (A. Wedberg (trans.), New York, Russell and Russell, 1945), 369. See also R. Ago, ‘Positive Law and International Law’ (1957) 51 *American Journal of International Law* 691, 706 (arguing that secondary rules of international law ‘are only explicable historically’). This seems unlikely, given that a number of accepted secondary norms do not have any notable historical pedigree. See C.A. Bradley and M. Gulati, ‘Customary International Law and Withdrawal Rights in an Age of Treaties’ (2010) 21 *Duke Journal of International and Comparative Law* 1, 14.

⁶⁹ See O. Elias, ‘The Nature of the Subjective Element in Customary International Law’ (1995) 44 *International and Comparative Law Quarterly* 501, 505.

⁷⁰ Virally, n. 65, 133.

⁷¹ See *ibid.*; Elias, ‘Some Remarks on the Persistent Objector Rule’, n. 30, 504–6; and B. Stern, ‘Custom at the Heart of International Law’ (2001) 11 *Duke Journal of Comparative and International Law* 89 (M. Byers and A. Denise (trans.), originally published as ‘La coutume au cœur du droit international: Quelques réflexions’ in *Le droit international: unité et diversité: Mélanges offerts à Paul Reuter* (Paris, Pedone, 1981), 479), 95–7.

⁷² See, generally, Pauwelyn, Wessel, and Wouters (eds), n. 64.

⁷³ See Postema, n. 17, 292 (‘[c]ustomary norms are established and mature in a community not by repetition [at least, not necessarily by repetition], but by *integration*’; emphasis added).

law-ascertainment that are premised on sociological analysis,⁷⁴ and, particularly, on the understanding advanced by a number of Italian international lawyers writing in the twentieth century.⁷⁵ The ‘Italian doctrine’ sought to distinguish ‘custom as a *basis* of international law’ (*consuetudine-fondamento*) from ‘custom as a *source* of international law’ (*consuetudine-fonte*), arguing that the former was characterized by non-formalized socio-historical evolution, whereas the latter is a process based on the usual (and more formal) state practice/*opinio juris* approach.⁷⁶

To avoid disappearing down the rabbit-hole of detailed analysis of such sociological perspectives, suffice it to say here that the underpinning theoretical claim made in this book is that secondary rules of international law develop in social practice in a non-formalized manner, and must be ascertained based on whether they have been *accepted as secondary rules* by the key actors in the international community.⁷⁷ Put simply, the secondary rules of international law (including those that govern the creation or alteration of customary international law) *must themselves be seen as being ‘customary’*,⁷⁸ albeit that this term as used here should be taken to broadly mean ‘customary social acceptance and usage’ rather than an application of the state practice/*opinio juris* test with which international lawyers are so familiar.

It is necessary to slightly qualify this approach, as adopted in this book. Firstly, in response to a possible charge that many sociological approaches to law-ascertainment veer uncomfortably close to ‘legal realist’ claims that international law is only valid to the extent that states comply with it,⁷⁹ it must be stressed that the ‘social acceptance’ understanding adopted in this book is advanced only in relation to the *secondary rules* of international law. It is argued that once the system’s secondary rules are accepted and used as social facts, these rules then, themselves, in a much more formalized ‘Hartian’ manner, govern the determination of the primary rules.⁸⁰

⁷⁴ For some prominent sociological accounts of international law (from which this book variously borrows certain aspects and abandons others) see, for example, J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, Cambridge University Press, 2010); and B. Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 *European Journal of International Law* 23.

⁷⁵ For a recent summary of this scholarship, see E. Cannizzaro, ‘Il mutamento dei paradigmi della scienza giuridica internazionalista e la dottrina Italiana’ (2014) 1/14 *Annuario di diritto comparato e di studi legislativi* 77. For an analysis of this approach in the influential writings of Dionisio Anzilotti, see G. Gaja, ‘Positivism and Dualism in Dionisio Anzilotti’ (1992) 2 *European Journal of International Law* 123. For the classic English-language example of the ‘Italian doctrine’, see Ago, n. 68.

⁷⁶ See Kolb, n. 63, 123–4 (neatly setting out this core aspect of the ‘Italian doctrine’).

⁷⁷ Another way of viewing the approach taken in this book is perhaps to orient it in Hart’s understanding of ‘pre-legal’ societies: see Hart, n. 11, particularly at 91–2.

⁷⁸ Elias and Lim, n. 44, 78 (stating that ‘the rules on the application of customary law, including the persistent objector rule, are themselves rules of customary law’; however, Elias and Lim adopt this view based on a more overtly voluntarist understanding than the present author); V. Fon and F. Parisi, ‘Stability and Change in International Customary Law’ (2004) 21 *American Law and Economics Association Annual Meetings* 1, 1; Guldahl, n. 8, 55; G. Norman and J.P. Trachtman, ‘The Customary International Law Game’ (2005) 99 *American Journal of International Law* 541, 544; and Tomuschat, n. 27, 279 (‘The basic layer is constituted by general practice’, see also at 290–1).

⁷⁹ For this critique see d’Aspremont, n. 29, 122–7, particularly at 126.

⁸⁰ See Cannizzaro, n. 75, particularly 82–4; and Kolb, n. 63, 124. Again, as an example, take the norm of *pacta sunt servanda*, which—having been established as a secondary rule through social acceptance—now acts as a ‘qualifier’ for primary rules. See n. 66–n. 67 and accompanying text.

The approach taken herein does not open the door to legal realism at the substantive, primary-rule level.

Secondly, it is not the case that the only relevant ‘acceptance’ of secondary rules is *state acceptance*.⁸¹ The adoption of a ‘social acceptance’ understanding is not a return to the pure voluntarist theory already rejected. Other important actors, particularly courts and tribunals, clearly contribute to the creation and development of secondary rules of international law.⁸² Having said this, for good or ill, states remain the most important actors in the international legal system, and thus their acceptance and usage (or lack of acceptance and usage) of purported secondary norms undoubtedly carries the most weight.⁸³

Thirdly, it is not the case that this book adopts any natural law underpinnings in its investigation of the persistent objector rule.⁸⁴ The present author self-consciously ‘shears’ the influence of natural law from (certain) sociological accounts of international law,⁸⁵ to root the inquiry in empiricism.⁸⁶ This approach is adopted in part for pragmatic reasons, because it is argued that without some degree of ‘tethering’ of legal norms to social acceptance and usage, the actors in the international legal system (most pertinently, states) will simply not view purported norms as being prescriptive.⁸⁷

It is ultimately through the observation of social acceptability and usage, as part of the inherently messy to-and-fro of international relations, that we must consider the emergence and nature of the persistent objector rule.⁸⁸ In practice, this means that this book looks to assess the existence and content of the rule in the writings of scholars, the judgment of courts/tribunals, and the actions of states. As such, while we must not allow ourselves to be ‘caught in the positivistic cage of Article 38(1) of [the ICJ’s] Statute’,⁸⁹ when it comes to searching for the existence or content of secondary rules of international law, the process of inquiry

⁸¹ See, for example, Brunnée and Toope, n. 74, 8 and 77–86.

⁸² d’Aspremont, n. 29, 303–13 (although it should be noted that d’Aspremont’s social theory of law-ascertainment is firmly rooted in formalism).

⁸³ See section V.

⁸⁴ Certain deformalized sociological approaches have been criticized on this basis by more ‘formal’ positivist scholars. See, for example, P. Capps, ‘International Legal Positivism and Modern Natural Law’ in J. Kammerhofer and J. d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge, Cambridge University Press, 2014), 213, 225–7.

⁸⁵ Thus, this book adopts the position of the ‘Italian doctrine’ in this regard: see Gaja, n. 75, 123–6 (specifically examining Anzilotti’s rejection of natural law). In contrast, see, for example, Brunnée and Toope, n. 74 (from whom this author borrows aspects of their ‘interactional’, ‘effects-based’ theory, while rejecting their use of the work of Fuller to ‘populate’ that understanding).

⁸⁶ See Gaja, n. 75, 129 (identifying the core empirical basis of the ‘Italian doctrine’, upon which this book draws). *Contra* Kolb, n. 63, 124 (asserting that the ‘Italian doctrine’ is not based on empirical method).

⁸⁷ See Simma and Paulus, n. 62, 303.

⁸⁸ It is worth noting that a sociological approach to law does not merely result in ‘mundane’ descriptivism; it can also ‘open up a more fruitful way of thinking about problems in jurisprudence and ethics’, because it roots such inquiries in reality, rather than in grand theory. See B.Z. Tamanaha, ‘A Socio-Legal Methodology for the Internal/External Distinction: Jurisprudential Implications’ (2006) 75 *Fordham Law Review* 1255, quoted at 1258.

⁸⁹ Tomuschat, n. 27, 304. See also Besson, n. 11, 164–5.

is, in effect, perhaps not as much of a departure from Article 38(1) as one might expect given the foregoing discussion in this section. The focus, ultimately, still must be on the actions of the relevant legal actors in the system, including courts, writers, and—most crucially—states.

V. A Focus on State Practice

The most convenient and authoritative place where the social acceptability/usage of a norm of international law can be identified is, of course, in treaty law. However, the persistent objector rule is neither a product of, nor codified in, any international treaty.⁹⁰ Neither is the rule set out in any other ‘authoritative’ hard or soft law instrument, such as, for example, a resolution of a UN organ. This fact itself is neutral in terms of what it tells us of the existence or content of the rule, but it means that it is necessary to search for the legal source of the persistent objector rule elsewhere. Based on the discussion in the previous section, the primary (albeit certainly not sole) reference point for the persistent objector rule must be the practice of *states*.⁹¹ International law remains deeply rooted in the actions of states, and it is there—in the real-world cut-and-thrust of international relations—that the contours of the persistent objector rule can be identified. One must be careful not to throw the baby of the primacy of states in international law out with the bathwater of absolute state voluntarism. Significant weight is also placed in this book on jurisprudential engagement with the rule, and on the extensive (if often rather cursory) treatment of the rule in the literature: both, especially the former (because of the law-applying authority vested in courts and tribunals),⁹² are crucial touchstones. However, this book seeks to root much of its analysis in the practice of states, to the extent possible: ‘the elements of persistent objection must be set out and developed through state practice.’⁹³

This focus on actual state usage of the persistent objector rule, which forms the core methodology of this book, is relatively unusual in the context of the academic

⁹⁰ *Contra* E.L. Chalecki, ‘Science before the Law: American Exceptionalism in the Kyoto Protocol and the Development of a Global Norm of Environmental Compliance’ (2007) *Selected Works*, http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=elizabeth_chalecki, 19, footnote 45. Chalecki argues that the persistent objector rule can be identified in ‘a number ... of international conventions’ (emphasis added) and, as an example, cites the Convention on Consular Agents: Duties, Rights, Prerogatives, and Immunities (Inter-American) (Havana Convention), 25 February 1928, 155 LNTS 291. However, she does not point to a particular provision in the Havana Convention to support her assertion in this regard, and a review of the treaty confirms that nothing even vaguely approaching the persistent objector rule can be identified anywhere in it.

⁹¹ Greig, n. 44, 166.

⁹² Having said this, in the international legal system, states rarely submit their disputes to review by adjudicative mechanisms. The jurisprudence in the international legal system is, therefore, necessarily comparatively limited. This means that an analysis of the persistent objector rule in state practice is particularly crucial. See Colson, n. 7, 958.

⁹³ Guldahl, n. 8, 55. See also ILA Final Report, n. 6, 4; Kelly, n. 27, 512 (‘[i]f the persistent objector rule [is to be considered] part of [customary international law] theory, it must be demonstrated that the principle has generally been accepted by states’, although Kelly ultimately takes the

engagement with the rule. To the extent that writers have examined persistent objection, this has generally been from quite an abstract perspective. A key reason for this is the common perception that states rarely, if ever, persistently object to the formation of new customary international law, and the few states that do cannot maintain any such exemption.⁹⁴ This claim will be returned to throughout the book, particularly in Part I (with regard to the view that there is no, or extremely limited, state usage of the rule)⁹⁵ and Chapter 8 (with regard to the view that states are never, or almost never, able to maintain their exempt status having gained it by virtue of the rule).⁹⁶ For present purposes, though, it is enough to note that this book takes the position that states certainly do use the rule, and can gain exemption from norms of customary international law through that use. Equally, it is also undoubtedly the case that usage of the rule is rare; *gaining* exemption by way of persistent objection is particularly difficult for states (because the criteria for the rule's operation are so onerous), as is *maintaining* exempt status after the crystallization of the norm being objected (because extra-legal factors, such as political pressure, often make continued persistent objection untenable).

In response to the critique that there is little or no state usage of the rule, Maurice Mendelson asserted in his 1998 Hague Academy course that there is, in fact, 'quite a wealth of state practice in support of the persistent objector rule' and that scholars have simply not 'looked hard enough' to find this.⁹⁷ While the claim that there is 'quite a wealth of state practice' is a significant over-exaggeration, there are certainly a number of instances of persistent objection in state practice. The rule has been used rather more often than its critics indicate. A key goal of this book is therefore to take up Mendelson's challenge and 'look hard enough' for (and at) that practice,⁹⁸ as well as coupling this, as already noted, with reference to judicial decisions and the writings of scholars.

VI. The Structure of This Book

This book is split into three parts. Following this Introduction, Part I (Chapters 1 and 2) begins this book's analysis of the persistent objector rule by examining the rule's origin and legal validity. In particular, Part I tackles a fundamental

view that the rule has not been sufficiently accepted by states in this way); and H. Thirlway, *The Sources of International Law* (Oxford, Oxford University Press, 2014), 87.

⁹⁴ See scholars cited in Chapter 2, n. 117, n. 118 and n. 119.

⁹⁵ See, particularly, Chapter 1, section III; and Chapter 2, section II.

⁹⁶ See, particularly, Chapter 8, section II. ⁹⁷ Mendelson, n. 17, 238.

⁹⁸ It is worth noting that analysis of the persistent objector rule *sensu stricto* always occurs in retrospect: the rule only comes into play after the customary norm being objected to has crystallized into a binding obligation, as the exemption that the rule provides is only relevant after this point. Equally, objection must occur prior to the point of crystallization. See Chapter 6, section IV on the 'timeline' of the persistent objector rule; and Chapter 6, in general, regarding the requirement for objection before the norm being objected to has crystallized. Therefore, it is necessary to consider instances where states express objection even if not yet clear that the emerging norm to which the state is objecting has formed. See Colson, n. 7, 958.

question, which is whether the persistent objector rule *exists at all* as a norm of public international law. Chapter 1 examines the ‘history’ of the persistent objector rule: its emergence in academic doctrine and its basis in pre-1945 state practice and case law. Chapter 2 then assesses the modern legal status of the rule by considering relevant case law and state practice since the Second World War.

Having concluded in Part I that there is a persistent objector rule in international law, Part II (Chapters 3–6) examines the criteria for the rule’s operation. Chapter 3 assesses what is required for ‘objection’. It is axiomatic to say that states must ‘object’ to qualify as ‘persistent objectors’, but what does ‘objection’ *mean* in this context? The chapter particularly focuses on the question of whether a state must object to the *applicability* of the norm in question to that state, or whether it is sufficient for the state to object to the binding force of the norm *per se*. Chapter 3 also considers the ‘form’ that objection must take, and assesses the extent to which objection must be communicated.

Chapter 4 then turns to the ‘persistence’ criterion. It first references state practice to argue that the persistence requirement is, indeed, a feature of the rule. It then turns to the theoretical rationale for that requirement, ultimately arguing that there are practical and policy reasons underpinning the persistence criterion (rather than it necessarily being based on sound theoretical foundations). Chapter 4 also assesses the troublesome question of how ‘persistent’ persistent objection must be, taking a context-specific approach (which explicitly links the required degree of persistence to other factors).

The ‘consistency’ criterion is considered in Chapter 5. The need for consistent objection is actually identified regularly in the literature on the persistent objector rule, but this is often implicit or amalgamated/confused with the persistence standard. Chapter 5 argues that objection must be *both* persistent *and* consistent. Indeed, it is worth noting that the ‘persistent objector rule’ should perhaps more accurately be termed the ‘persistent and consistent objector rule’. As that is something of a mouthful, and so as to stick with the familiar nomenclature (for the purposes of ‘brand’ recognition on the topic, if for no other reason), this book has chosen to retain the name ‘persistent objector rule’. In any event, Chapter 5 explores the meaning of ‘consistency’ in the context of persistent objection, including whether ‘absolute consistency’ is required, as some claim (and, indeed, what ‘absolute consistency’ itself might mean). It also explores whether objections have to be substantively consistent.

Chapter 6 considers the criterion of ‘timeliness’: the requirement that a state must object to the emerging norm of customary international law prior to its crystallization. The chapter examines state practice to assess whether timely objection is required as is commonly supposed, and considers how late in the formation of the customary norm the objection can occur. Chapter 6 further discusses the problematic nature of any attempt to determine when, in fact, a new custom has emerged. It also considers in detail the possible phenomenon of ‘subsequent objectors’ (including new states), and questions whether a state must maintain objection even *after* crystallization.

Part III of the book (Chapters 7–9) analyses the limitations and role of the persistent objector rule. Chapter 7 engages with the often asserted claim that persistent objection is unavailing in the context of *jus cogens* (or ‘peremptory’) norms of international law. It uses state practice to test the majority view that it is impossible, as a matter of law, to be exempt as a persistent objector from a *jus cogens* norm. In so doing, the chapter considers the conceptual incompatibility of the universality and normative superiority of *jus cogens* norms with the inherent exceptionalism of persistent objection. It is ultimately argued that the majority view—that persistent objection does not allow a state to remain exempt from a customary international law norm that acquires peremptory status—is correct. However, this conclusion is far from being as self-evident as many indicate.

Chapter 8 examines issues—other than peremptory status—that may affect whether a state *maintains* its persistent objector stance. First, it considers the debate as to whether ‘fundamental’ (but nonetheless non-peremptory) norms of customary international law—such as human rights norms or rules of international humanitarian law or international environmental law—are beyond the reach of the persistent objector rule by virtue of their particularly ‘important’ nature. It is concluded that this is not the case *de jure*, but that maintaining exemption to norms of this sort will be particularly difficult for dissenting states *de facto*. The chapter then further argues that a range of extra-legal factors make maintaining persistent objection *per se* extremely difficult, irrespective of the nature of the norm being objected to. It is thus argued that the utility of the persistent objector rule is perhaps more limited than one might expect.

Finally, Chapter 9 engages with the ‘value’ or ‘role’ of the persistent objector rule. In the first instance, this involves analysis of—and rejection of—the ‘voluntarist’ conception of international law-making that the rule purportedly serves. However, the chapter also argues that, while one must dismiss the claim that all international law is made by the consent of states, this does not mean that state will is irrelevant in the context of customary international law: far from it. Drawing on a (carefully qualified) rational choice theory approach, Chapter 9 then argues that the persistent objector rule serves, and can serve, various important functions within the international legal system.