Articles | Faculty Scholarship

2009

Stability and Change in International Customary Law

Vincy Fon

Francesco Parisi
University of Minnesota Law School, parisi@umn.edu

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles

Part of the Law Commons

Stability and Change In International Customary Law⋆

Vincy Fon,⋆⋆ Francesco Parisi⋆⋆⋆

Customary law creates universally binding rules. According to the persistent objector doctrine, states have an opportunity to gain an exemption from emerging norms of customary law by opposing an emerging practice before it solidifies into a binding rule of custom. The subsequent objector doctrine instead gives states an opportunity to depart from an already binding custom when other states acquiesce to their departure. This paper examines the effects of the persistent objector and subsequent objector doctrines in the formation and evolution of customary law when heterogeneous states are involved.

I. INTRODUCTION

Custom constitutes a primary source of international law and has given origin to many rules that govern relationships between sovereign states. The binding force of international customary law rests on the implied consent of states. States express their consent to be

bound by a given customary rule though their own actions or practices. The process of custom formation has struggled with the vexing question of how to promote stability and reliance on customary law, while preserving the voluntary support of customary law in the fluid environment of international relations. The balance between stability and change in international customary law becomes particularly complex in the face of diverse states' preferences and changed circumstances over time.

In this paper, we study the process by which customary rules can change over time.[1] While customary law is capable of creating universally binding rules, the rules that govern its formation allow parties to gain an exemption from emerging norms of customary law by remaining persistent objectors. This form of objection requires the objecting parties to take express action to oppose an emerging practice by making its objections widely known before the practice solidifies for others into a binding rule of custom. After the custom is formed the opportunity to express an objection or depart from the custom produces different effects. An exemption from the binding custom is obtained by subsequent objector states only to the extent to which the prospective beneficiaries of the rule acquiesce to the departure. We model the effects of persistent objector and subsequent objector doctrines in the formation and change of customary law when heterogeneous parties are involved. By noting the ability of low cost states to block changes in custom already in place, our analysis partially supports those who worry about the inertia of custom in a world of technological change,[2] advocating a qualified application of the persistent and subsequent objector doctrines.

Recent scholarship has reached widely different conclusions as to whether custom is capable of generating welfare enhancing rules. Some claim that custom should be held presumptively efficient, and that courts should recognize and adjudicate such practices.[3] Others recognize the potential limits of customary law identifying the con-

---

[1] The rules that govern the formation and application of international customary law have themselves been the product of customary evolution. The process of custom formation is capable of creating universally binding rules. At the same time, this process contemplates ways for unwilling states to gain exemption from emerging or existing rules of customary law.

[2] J.O. McGinnis and I. Somin, *Should International Law Be Part of Our Law?* 54 Stan L Rev 1175–1247 (2007)

[3] R.D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 International Rev of Law & Econ 215-27 (1994); R.D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 Pa L Rev 1645–96 (1996).

ditions under which customs may be welfare enhancing.[4] Yet others reach less optimistic conclusions with respect to the ability of customary law to generate efficient binding rules.[5] Our analysis contributes to the existing literature studying the specific rules that govern the formation of custom and providing a qualified endorsement of some of the recent critiques of customary legal processes in the context of international law. Section II provides a stylized explanation of the rules that govern the formation of international customary law and the role of the persistent objector doctrine in the formation of custom. Section III models custom formation when states have an opportunity to opt out of emerging customs by invoking the persistent objector doctrine. Section IV considers the role of the subsequent objector doctrine in custom formation. Section V extends the model to examine the workings of the subsequent objector doctrine. Section VI compares the effects of the two doctrines on custom formation.

Our analysis reveals that the persistent and subsequent objector doctrines minimize the impact of opportunistic or myopic objections and departures from customary law, while maintaining the flexibility necessary for adapting custom to changed circumstances over time. By doing so, these international law doctrines effectively balance opposing needs for stability and change in the evolution of custom, while preserving the voluntary basis of international customary law.

II. INTERNATIONAL CUSTOMARY LAW AND PERSISTENT OBJECTOR DOCTRINES

Relatively few principles govern the formation of customary law. The theory of customary law defines custom as a practice that emerges

---

[4] F. Parisi, *Toward a Theory of Spontaneous Law*, 6 Constitutional Pol Econ 211-31 (1995); F. Parisi, *Customary Law*, The New Palgrave Dictionary of Econ and the Law 572-78 (Macmillan 1998).

[5] J.L. Goldsmith and E.A. Posner, *A Theory of Customary International Law*, 66 U Chi L Rev 1113 (1999). A related strand in the law and economics literature focuses on the relationship between law and social norms—a relationship that is germane but different to the one under consideration, inasmuch as customary rules are recognized as proper sources of law, while social norms and other customary practices are not. Most importantly on this topic, see L. Bernstein, *Social Norms and Default Rules Analysis*, 3 So Cal Interdisciplinary L J 59–90 (1993); L. Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U Pa L Rev 1765–1821 (1996) and E.A. Posner, *Law, Economics, and Inefficient Norms*, 144 U Pa L Rev 1697-1744 (1996); E.A. Posner, *Law and Social Norms* (Harv Univ Press 2000). For a comprehensive collection of reference articles, see E.A. Posner, *Social Norms, Nonlegal Sanctions, and the Law* (Edward Elgar 2007).

outside of legal constraints and which individuals, organizations, and states follow in the course of their interactions, out of a sense of legal obligation.

A. Principles on the Formation of General International Customary Law

When resolution of a dispute requires application of international customary law, an international tribunal verifies the presence of two formative elements of a custom. These elements are generally referred to as the "quantitative" element of practice, and the "qualitative" element of *opinion juris.* When both elements are present, the international practice gains the status of international customary law and states are considered bound by the resulting custom.

With respect to the first formative element, the emergence of an international customary law requires the presence of a stable and fairly uniform international practice with which many states have consistently complied. A time limit for compliance is not defined; however, a long duration helps to establish that compliance with the practice was consistent, and also helps to clarify the context and meaning of the practice.[6] Further, the practice should emerge from the spontaneous and uncoerced behavior of states. Restatements of international law refer to the consistency and generality of the customary practice. The consistency requirement is not met if it is impossible to identify a general practice because of fluctuations in behavior.[7] More recent cases in international law restate the uniformity requirement in terms of increasing and widespread acceptance, allowing special consideration for emerging norms (or local clusters

[6] M.E. Viller, *Customary International Law and Treaties* 24 (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1985). Stability of the practice over time is interpreted with some flexibility according to the circumstances. There is no universal minimum duration for the emergence of customary rules. Customary rules have evolved from both immemorial practice and single acts. Still, French scholars have traditionally advocated the passage of forty years for the emergence of an international custom, while German doctrine has generally required thirty years. G.I. Tunkin, *Remarks on the Juridical Nature of Customary Norms in International Law*, 49 Cal L Rev 419 (1961); N.M. Mateesco, *La Coutume dans les Cycles Juridiques Internationaux* (Paris 1947). Naturally, the longer the time required to form a valid practice, the less likely it is for custom to be an effective substitute for treaty law (or formal legislation, in the domestic setting), and to adapt to changing circumstances over time.

[7] Regarding the interpretation of the condition of consistency or universality, international legal theory is ambivalent. Charney suggests that the system of international relations is analogous to a world of individuals in the state of nature, and dismisses the idea that unanimous consent by all participants is required before binding customary law is formed. J.I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Brit Yearbook of Intl L 1 (1985).

of multilateral practice) that are expected to become widespread over time.

The second formative element is generally identified by the phrase *opinio juris sive necessitatis*, which describes the requirement that the customary action be perceived by states as fulfilling an essential norm of social conduct.[8] According to the *opinion juris* requirement, states must act with the belief that the applied practice is undertaken to fulfill an underlying legal obligation, and that the practice is not followed by the state out of convenience or diplomatic courtesy during a certain period of time. This requirement is aimed at insuring that customary law results from a general consensus of states, rather than from an occasional and unqualified convergence of state practice.[9]

B. Persistent Objector Doctrines and Special International Customary Law

In a multilateral setting, the formative elements of a custom may be present only for a subset of states, or only for a limited portion of the international practice. International law has developed legal doctrines that govern the workings of customary law when states have different levels of participation in a customary practice or when states have outright opposed an emerging custom. While customary law is capable of creating universally binding rules, for a fuller understanding of the process of international customary law formation, it is important to consider the possibility that some states may attempt to gain exemption from emerging rules of general customary law by fully opposing a nascent custom or may trigger a special bilateral custom by partially opposing the nascent custom and complying with a lower behavioral standard.

Some states have successfully argued that if they persistently object to an emerging rule of customary law, if and when a rule is

[8] This element is also often described as necessary and obligatory convention. H. Kelsen, *Théorie du Droit International Coutumier*, 1 Revue Internationale de la Théorie du Droit 263 (1939); H. Kelsen, *General Theory of Law and the State* (Harv Univ Press 1945); A. D'Amato, *The Concept of Custom in International Law* (Cornell Univ Press 1971); R.M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12 Israel L Rev 344 (1977).

[9] Asylum and diplomatic immunity rules are among the oldest examples of customs that emerged in line with these requirements. Already in ancient Greece the practices of granting asylum for political reasons and giving immunity to diplomatic missionaries were accompanied by the belief that those practices fulfilled a fundamental necessity of international relations, given the fact that their violation would have seriously undermined the stability of peaceful relations of states. See J.M. Kelly, *A Short History of Western Legal Theory* (Clarendon Press 1992).

formed it cannot be applied against them. These claims led to the gradual recognition of a principle known as the *persistent objector doctrine*, allowing states to opt out of a new and otherwise universal rule of international customary law by remaining persistent objectors.[10] Objection to an emerging custom may be full or partial. Full objection signifies that the state does not accept and does not wish to become bound by any part of the emerging custom. A partial objection implies acceptance of some part of the custom. Partial objection is generally found when states object by articulating or implementing a different rule which they consider preferable to the emerging custom. Full persistent objection leads to a complete exemption from the emerging custom, while partial objection leads to a partial exemption from the rule. Once the custom solidifies, the portion of the custom that was not objected to binds the partial persistent objector.

Feasibility of the persistent objector doctrine was explicitly supported by two well-known cases decided by the International Court of Justice. In *Columbia v. Peru*, the Peruvian government had unsuccessfully sought extradition of the leader of a military rebellion in Peru from Columbia. The Columbian embassy re-sisted the Peruvian request, granting political asylum to the Peruvian rebel. Peru brought this case before the International Court of Justice, arguing that Columbia's grant of asylum violated both a 1911 extradition treaty and a rule of customary law by unilaterally defining the alleged crime as political. The court ruled in favor of Peru, stating that Columbia failed to establish existence of a custom which permits the state granting diplomatic asylum to unilaterally define an offense as political. The court stated that since Peru did not ratify the treaty in question and specifically repudiated the asylum provisions, it would only be bound by international customary law. The customary rule governing asylum was however found not enforceable against Peru, because Peru persistently objected to such custom during its forma-

---

[10] I. Brownlie, *Principles of Public International Law* 10 (Clarendon 4th ed 1990); N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* 4 (Clarendon Press 1994); T.L. Stein, *The approach of the Different Drummer: The principle of the persistent Objector in International Law*, 26 Harv Intl LJ 457 (1985); K. Wolfke, *Custom in Present International Law* 66 (2d ed Netherlands: Kluwer Academic Publishers 1993).

For further discussion of the persistent objector doctrines in international customary law see also M. Akehurst, *Custom as a Source of International Law*, 47 Brit Yearbook of Int L 1 (1974-75); Charney, 56 Brit Yearbook of Intl L 1 (cited in note 7). For a dissenting view on the legality and desirability of the persistent objector's exemption from customary law, see A. D'Amato, *A Groundwork for International Law*, Unpublished manuscript (on file with author) (forthcoming).

tive stage.[11] Similarly, in *United Kingdom v. Norway*, the court ruled that because the government of Norway had consistently opposed the territorial fishing zone regime, Norway was a persistent objector and therefore not bound by such customs.[12]

To successfully invoke the persistent objector doctrine two elements must be met. First, the objecting state must oppose an emerging customary practice by making its objections widely known before the practice solidifies into a binding rule of custom. Thus, the state must clearly object to the law from the moment of its conception or from the moment the state learns about any relevant practice or declaration that may lead to the establishment of a custom. The objection can be expressed in the form of statements, votes, or protests or can be implied by "abstaining from practice or adhering to a different practice."[13] Second, the objection to a practice must be consistent. Thus, the state must clearly object to the law from the beginning and continue to do so throughout its formation and beyond.[14] A state may not adhere to a practice on some occasions and object to the practice on other occasions. A consistency requirement allows other states to rely on the position of the objecting state and prevents the objecting state from benefiting from ambiguities in its own course of action.

Two additional principles govern applicability of the persistent objector doctrine. The first excludes application of the persistent objector doctrine to international norms that are peremptory. A state may not invoke the persistent objector doctrine if the customary law has achieved the status of *jus cogens* or imperative law.[15] The second principle provides new states an opportunity to opt out of an existing rule of international customary law. New states, and states that achieved independence after formation of a custom, can obtain

---

[11] Asylum case (*Columbia v Peru*), 1950 ICJ 266, 272-78.

[12] Fisheries Case (*United Kingdom v Norway*), 1951 ICJ 116, 124-31.

[13] Viller, *Customary International Law and Treaties* at 15 (cited in note 6). According to Stein, 26 Harv Intl LJ at 458 (cited in note 10), in order for the doctrine to apply, it is sufficient that a state makes its objection "manifest during the process of the rule's emergence." See also the Fisheries Case (*United Kingdom v Norway*), 1951 ICJ 116 (Judgment of Dec 18); Asylum Case (*Columbia v Peru*), 1950 ICJ 266 (Judgment of June 13).

[14] L. Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 UC Davis J Intl L & Policy 150 (1996).

[15] *Jus cogens* encompasses peremptory rules that serve the most fundamental interests of the international community and that should be obeyed by all states without exception. Loschin, 2 UC Davis J Intl L & Policy 158-63 (cited in note 14). *Jus cogens* principles cannot be overridden by the persistent objector doctrine because *jus cogens* stands for fundamental and essential norms of justice which no state can be allowed to disobey. B. McClane, *How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?*, 13 ILSA J Intl & Comp L 24 (1989).

exemption from a previously arisen custom if they object within a reasonable period of time.[16]

C. Uniformity and Diversity in Customary Law

Traditionally, influence of the persistent objector doctrine on formation of international customary law was quite limited.[17] In the past the doctrine was rarely applied; states that did not want to follow a rule simply attempted to refute its existence. Recent decades have seen a growing amount of official documentation concerning the existence and content of customary law (judgments of international courts, writing of publicists, or declaratory treaties). With increased awareness by the international community and non-governmental organizations of existing international customs, states cannot easily refute an existing customary rule and invoke the persistent objector doctrines to avoid the binding force of existing custom.

The greater accessibility and verifiability of general customary law has thus given momentum to the persistent objector doctrine in the practice of international law.[18] The persistent objector doctrine offers a dissenting state a way to avoid being bound by specific emerging customs, while reaffirming the legitimacy of the underlying customary law process at the same time.

III. THE FORMATION OF CUSTOM WITH PERSISTENT OBJECTORS

In the recent law and economics literature, attention has been devoted to the emergence, sustainability, and change of international customary law.[19] This section wishes to contribute to that literature analyzing the impact of the persistent objector doctrine on the process of custom formation when heterogeneous states are involved. As discussed above, customary rules emerge from past practice. Prior to the solidification of a practice into a binding custom, states engage in actions on a purely voluntary basis, taking into account costs and

---

[16] The reason that newly independent states are given time to gain the status of a persistent objector is the necessity to support a newly independent state's sovereignty and equality. Viller, *Customary International Law and Treaties* at 16-17 (cited in note 6).

[17] Stein, 26 Harv Intl LJ at 458 (cited in note 10).

[18] Loschin, 2 UC Davis J Intl L & Policy 151-53 (cited in note 14).

[19] Goldsmith and Posner, 66 U Chi L Rev 1113 (cited in note 5); Goldsmith & Posner, 40 Va J Intl L 639; E. Kontorovich, *Inefficient Customs in International Law*, 48 Wm & Mary L Rev 859 (2006); V. Fon and F. Parisi, *International Customary Law and Articulation Theories: An Economic Analysis*, 2 Intl L & Mgmt Rev 201-32 (2006).

benefits of the actions and their interest in establishing a customary rule that will bind for the future.[20]

Consider first the emergence of a multilateral custom among homogeneous states, with a level of participation effort characterizing the content of the customary rule. After the initial period, states engage in repeated interaction from period 1 to infinity. Once the custom is established, a state can rely on reciprocal conduct from other states. In each period, state i confronts a probability (α_i) that it will receive benefits from other states' compliance with the custom and a probability (β_i) that it may be called upon to fulfill obligations created by the custom.[21] Effort (e_i) to comply with the custom imposes costs (ae_i^2) on the performing state and generates benefits (be_i) on the receiving state.[22] Assume that the state discounts future periods at a rate r $(r > 0)$. The ideal level of custom participation for state i is identified by solving the following problem, where the first term is the expected benefit from the customary rule in each period, the second term is the expected cost to comply with the customary rule in each period, and division by the discount rate r represents summing net benefits over an infinite number of periods: [23]

$$\max_{e_i} P_i^{+C} = \frac{1}{r}(\alpha_i be_i - \beta_i ae_i^2) \tag{1}$$

The ideal level of custom participation chosen by state i is thus:[24]

---

[20] Before practices mature into a custom, states face a voluntary participation problem similar to that studied by Fon and Parisi. V. Fon and F. Parisi, *Reciprocity-Induced Cooperation*, 159 J of Inst & Theoretical Econ 76-92 (2003).

They investigated bilateral custom under reciprocity and discussed the ability of custom formation to generate Kaldor-Hicks efficient customs. This paper extends those findings to persistent objector and subsequent objector doctrines.

[21] The interpretation of effort level and probabilities α_i and β_i can be illustrated by the following example. Imagine that a customary rule imposes an affirmative duty on coastal states to rescue foreign vessels within a range of 200 miles from the state's coastline. The effort level represents the standard of care or investment of resources that states undertake when rescuing other states' vessels under the customary practice. Then α_i represents the probability that state i's vessels may need rescue and benefit from the customary rescue rule. This probability depends on the number of vessels that fly state i's flag when navigating the high seas. β_i represents the probability that state i may be called upon to rescue other states' vessels. This probability depends on the extent of state i's coastline and navigation routes in its proximity.

[22] Instead of maintaining the usual assumption that costs are increasing and benefits are decreasing in effort level, we take the simple case that costs are increasing while benefits remain constant.

[23] A discount rate reflects the state's time preference on the uncertainty concerning the effective emergence of a custom. The objective function involved is then the sum of the state's payoffs from period 1 to infinity.

[24] The superscript $+C$ denotes *joining* the Customary rule, either partially or fully.

$$e_i^{+C} = \frac{\alpha_i b}{2\beta_i a} \tag{2}$$

Thus, a state's ideal level of custom participation effort is higher when the probability (α_i) that it will benefit from the customary rule is higher and/or the benefits it brings (benefit parameter b) when other states comply with the customary rule is higher. On the other hand, the state's ideal level of custom participation effort is lower when the probability (β_i) that it may be called upon to fulfill obligations and/or the cost it incurs (cost parameter a) to comply with the customary rule is higher. Substituting the optimal level of participation effort (2) in the objective function (1) provides the payoff achievable under the custom for state i:

$$P_i^{+C}(e_i^{+C}) = \frac{\alpha_i^2 b^2}{4\beta_i ar} \tag{3}$$

When states are identical; each state faces the same probabilities, costs, and benefits. Assuming that participation constraints are satisfied so that joining the custom provides a larger payoff than not joining the custom, the interests of all states converge. Each state desires the same custom level $e^\star = (\alpha b)/(2\beta a)$, which characterizes the content of the customary rule, and no state has an incentive to become a persistent objector.

When heterogeneous states are present, some states have different views on the desirability and content of the custom. The persistent objector doctrine provides a mechanism through which the different actions and objections of the states are brought together to generate a rule of custom.[25]

When a typical heterogeneous state i chooses not to participate in the emerging custom, the non-participating state supplies no effort to and receives no compliance from the custom. In many instances the nonparticipating-in-the-custom regime implies adopting a "self-help" approach, where the state faces the cost of its own effort each time it seeks to obtain a benefit for itself. The probability that the state needs to engage in self-help equals α_i.[26] Generally speaking, we

[25] Persistent objector states may opt out in full or in part from excessive customary obligations. There is no symmetric opportunity for persistent objector states to force a level of customary obligation higher than the emerging custom. Obviously, differences among states based on asymmetric preferences can be settled by means of bilateral or multilateral treaties specifying treaty obligations for the states. Such tailoring of international obligations to the needs of states is not possible under general customary law, given the initial need for uniform customary practices.

[26] For example, with respect to our hypothetical rescue rule, rejection of the custom implies that the state prefers a self-help approach in which each state faces the bur-

assume that costs faced by the state in a no-custom regime $(\bar{a}_i e_i^2)$ differ from costs faced by the state under the custom $(\bar{a} \neq a)$.[27] The benefit received is the same and also equals be_i. Given these assumptions, the custom-participation problem faced by state i depends on the solution to the following problem:[28]

$$\max_{e_i} P_i^{-C} = \frac{1}{r}\alpha_i(be_i - \bar{a}_i e_i^2) \tag{4}$$

Compared to problem (1), the probability that it needs to expend effort to provide benefits is the same as the probability that it will gain benefits (β_i must equal α_i), since the state has to provide the benefits to itself. The cost to provide benefits in isolation differs from being part of the custom contingent. The summation of net benefits over time is similar, as indicated by the division of net expected benefit by the discount rate r.

The optimal choice of effort for the no-custom regime is $e_i^{-C} = b/(2\bar{a}_i)$; it is directly related to benefit but inversely related to cost. Unlike the ideal level of custom participation effort e_i^{+C} in (2), the optimal level of no-custom effort e_i^{-C} does not depend on the relative probabilities of being a recipient to being a performing state of custom obligations, as the two probabilities are the same. Substituting e_i^{-C} into (4) gives the optimal payoff obtainable by the state in the absence of the custom:

$$P_i^{-C}(e_i^{-C}) = \frac{\alpha_i b^2}{4\bar{a}_i r} \tag{5}$$

State i's best obtainable payoff in the no-custom regime, $P_i^{-C}(e_i^{-C})$, helps determine state i's degree of participation in the custom. State i chooses to participate in the custom when the best obtainable payoff under the custom exceeds the payoff under no-custom regime $P_i^{-C}(e_i^{-C})$.

States may gain an exemption from customary law by persistently objecting to an emerging customary practice. Objection can be full or partial. Objection is full when a state refuses to join the custom, whatever its content. Objection is partial when a state is willing to

---

den of rescuing its own ships, even when far from the state's own coastline, without the assistance of other states in closer proximity to the accident. Under the self-help regime, states must assist their own vessels every time they are in trouble.

[27] In the rescue example, the cost of rescuing a ship far from the state's coastline is different from the cost to the state of rescuing a foreign vessel in the proximity of its coast.

[28] The superscript $-C$ denotes the self-help case, where the state does *not join* the Customary rule.

join the custom, but prefers a level of effort lower than that required by the emerging custom.[29] Consider the behavior of two types of states. The first type prefers a lower level of obligation than that required by the custom, and the second desires a higher level of obligation than the emerging custom would deliver.

First take the case in which the ideal level of custom participation e_i^{+C} for state i is less than the emerging custom obligation level $e^{\star}$. Since e_i^{+C} maximizes P_i^{+C}, the state's payoff at e_i^{+C} is higher than its payoff at $e^{\star}$, i.e., $P_i^{+C}(e_i^{+C}) > P_i^{+C}(e^{\star})$. Should state i decide to join the custom, it would never choose full participation via the persistent objector doctrine, given the opportunity to obtain partial exemption at its ideal level of custom participation e_i^{+C} provides a higher payoff. The choice between full and partial objection is driven by the relative magnitudes of the payoff obtainable under no custom and the payoff achievable under custom with partial objection. If the payoff under the no-custom regime $P_i^{-C}(e_i^{-C})$ is higher than the payoff from joining the custom with partial objection $P_i^{+C}(e_i^{+C})$, state i fully objects to the custom. This occurs whenever $\beta_i a > \alpha_i \bar{a}_i$. Thus, when the expected compliance cost $\beta_i a$ to join the custom is larger than the expected cost $\alpha_i \bar{a}_i$ of self-help for not joining the custom, the persistent objector state i fully opposes the emerging custom.[30] The condition $\beta_i a > \alpha_i \bar{a}_i$ is equivalent to $a > (\alpha_i / \beta_i) \bar{a}_i$. Holding the cost parameters a and $\bar{a}_i$ constant, the smaller the ratio α_i / β_i, the more likely the persistent objector state fully opposes the emerging custom. This is intuitive because a small probability ratio α_i / β_i of receiving benefit and performing under custom means that state i is less likely to receive a benefit than to face the burden of future implementation of the custom. When α_i / β_i is small, the incentive to join the custom is weak.

On the other hand, if the payoff from joining the custom with partial objection $P_i^{+C}(e_i^{+C})$ is greater than payoff under no custom regime $P_i^{-C}(e_i^{-C})$, state i partially objects to the custom. Condition $P_i^{+C}(e_i^{+C}) > P_i^{-C}(e_i^{-C})$ is equivalent to $\alpha_i \bar{a}_i > \beta_i a$. When the expected cost of not joining the custom is larger than the expected cost of compliance, the persistent objector state i joins the custom, although it partially opposes the emerging custom as the emerging custom obligation level is too high.

---

[29] As a second-best solution, in the face of a persistent objection, other states take advantage of the reciprocal effects of a unilateral objection, allowing them to adopt the same customary level against the objecting state. In this context, the persistent objector doctrine constitutes an example of weak reciprocity studied in Fon and Parisi. Fon and Parisi, 159 J of Inst & Theoretical Econ (cited in note 20).

[30] Strictly speaking, we should compare the expected marginal costs $2\beta_i a e_i$ and $2\alpha_i \bar{a} e_i$.

Next consider the case in which the ideal level of custom participation e_i^{+C} for state i is greater than the emerging custom obligation level $e^\star$. While this seems to suggest that the state should fully participate in the custom and will not become a persistent objector, it is not always the case. Although state i prefers the emergence of a custom with a higher level of obligation, persistent objector states cannot force a level of customary obligation higher than the emerging custom. Thus, the state's benefit from joining the custom cannot be realized at its ideal custom level e_i^{+C}. Instead, the state settles for a lower payoff at the custom obligation level $e^\star$: $P_i^{+C}(e^\star)$. The behavior of the state then requires a comparison between the payoff under the custom obligation level $P_i^{+C}(e^\star)$ and the payoff obtained under the no-custom regime $P_i^{-C}(e_i^{-C})$. If $P_i^{+C}(e^\star)$ is greater than $P_i^{-C}(e_i^{-C})$, there is full participation in the custom and state i does not become a persistent objector. If $P_i^{-C}(e_i^{-C})$ is greater than $P_i^{+C}(e^\star)$, state i is better off opting out of the custom altogether by becoming a full persistent objector.

The above analysis brings to light some interesting results. First, different categories of states may choose to opt out of an emerging custom. Full objection is a rational strategy not only for states that consider the emerging custom excessively burdensome, but also for states that like the custom but want more of it. Some states agree with the spirit of the custom but are not satisfied with the emerging rule because in order to achieve the highest payoff they need a custom with a greater level of obligation. Some of these states are better off opting for a no-custom regime and addressing the issue on their own. The payoff in a no-custom regime represents the opportunity cost of custom participation identified in (5). This opportunity cost will likely be larger for stronger states that face lower cost $\overline{a}_i$. At the other extreme, given the lower payoff obtainable in a no-custom regime, weaker states facing higher costs may be more willing to go along with an emerging custom that does not correspond to their ideal level.

Second, all other things equal, the likelihood of participation in a less than ideal custom depends on the relative magnitudes of the probabilities of being on the receiving side versus the giving side of the customary relationship in future time periods. States that are more likely to benefit from the custom than to be burdened by it are more likely to participate in the custom, even though the custom does not correspond to their optimum.

Finally, the level of objection would differ if states could formulate objections when they are called upon to comply with the custom. This model does not include the initial cost of custom compliance because the persistent objector doctrine requires objections to be "consistent." That is, states' objections should be formulated ex

ante, rather than when they are called upon to perform a custom obligation. The legal requirement of "consistency" is thus instrumental to avoid manipulation of the content of the custom by a state's myopic objection. If allowed to formulate objections to avoid immediate compliance costs, states might be tempted to corrode the mutual long-term benefits of the custom. This would compromise the ability of the custom process to generate desirable levels of legal obligations.

IV. SUBSEQUENT OBJECTOR DOCTRINES IN INTERNATIONAL CUSTOMARY LAW

According to traditional international law, states can object to a norm of international customary law only during its emergence. The persistent objector doctrine requires a timely reaction of states to emerging customs. If a state waits to object until after the practice becomes a binding rule of international customary law, the state cannot claim exemption from it. Subsequent departures of a state from an established custom would constitute an international wrong, unless other states acquiesce to the state's late departure. A state cannot *unilaterally* depart from a customary rule once it has become bound by it.[31]

This traditional approach provides an opt-out opportunity during the formative phase of a custom but provides no flexibility for subsequent adaptation of custom to the changing needs of the international community over time. In the context of multilateral customs, international law practice has gradually developed doctrines to avoid excessive rigidity of international customary law. One such doctrine, resulting from the application of the long-standing principle of *rebus sic stantibus* to customary law, allows states to depart from international law in the face of fundamental changes in the state of affairs that led to the original legal obligation.[32] Changes to individual states' costs and benefits do not generally justify the application of the *rebus sic stantibus* principle, unless such changes become a source of unbearable or unfair burden for the departing state.[33] Likewise, states

[31] See Wolfke, *Custom in Present International Law* 66 (cited in note 10), "A state may certainly not unilaterally at will refuse the legal consequences of its previous consent to accept a practice as law . . . ."

[32] Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (cited in note 10). The *rebus sic stantibus* principle is often referred to as the law of changed circumstances. It allows a state to terminate an existing obligation on the grounds of fundamental and unforeseen changes in circumstances, as long as the changes were not caused by the state invoking the excuse (Brownlie 1990).

[33] The *rebus sic stantibus* principle allows a state to terminate an obligation deriving from international law, on grounds of equity and justice, when there is an unfore-

are not allowed to invoke changes in internal laws or policies as a justification for a unilateral departure from international customary law.[34] Departures from customary law that are not supported by the *rebus sic stantibus* principle may nevertheless find limited accommodation in the *subsequent objector doctrine* (Brownlie, 1990).

The subsequent objector doctrine addresses situations where a state (the "subsequent objector" state) objects or departs from a customary rule after its formation, as opposed to objecting to the rule during its emergence, as in the persistent objector case.[35] The effects of a state's departure from a previously recognized custom are determined by the speed and spread of the process of defection. Many different outcomes are possible under this doctrine. One limiting case occurs if a substantial number of states depart from an old custom. If the momentum of widespread defection is accompanied by general acquiescence by the remaining states, a new rule may result. Thus if events unfold rapidly, one state's departure from an existing custom may trigger the emergence and widespread adoption of a new custom. The other limiting takes place when the subsequent objector's departure from customary law is met with general opposition by other states. In this case the subsequent objector's action, far from generating a new custom, is construed as a breach of international customary law. The subsequent objector doctrine in fact does not allow unilateral departures from existing custom.

The subsequent objector doctrine provides rules to govern the array of possibilities contained between these limiting cases. Specifically, when defection is not widespread and it is not possible to identify a new emerging general custom, the effects of the subsequent

----

seen change of circumstances that radically affects the basis of the obligation. The change in circumstances should be a fundamental and vital one, such as to make the fulfillment of the international obligation excessively and unfairly burdensome, not just inconvenient, for the departing state. See 1 *Yearbook of the International Law Commission* 150, ff (1963) (A/CN.4/SR.696, providing a summary record of the Commission's 696th meeting).

[34] A fundamental change in circumstances may be the basis of an exemption from international law only if it increases "the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken." *Fisheries Jurisdiction Case* (1973).

[35] Viller, *Customary International Law and Treaties* at 17 (cited in note 6), discusses the difficulties in recognizing subsequent objectors' unilateral departures and the need to obtain acquiescence from other states: 'Their position is untenable, in part, because other states have come to rely on the subsequent objector originally conforming to the rule. Also, general customary law is binding on all states and cannot, in the words of the Court, be subject of "any right of unilateral exclusion exercisable at will by any one of [the international community members] in its own favor." (quoting *North Sea Cases*, ICJ Reports 1969). See also Stein, 26 Harv Intl LJ at 458 (cited in note 10).

objector's actions depend on specific relationships with the opposing states. The subsequent objector doctrine specifies that in the face of a unilateral departure from an existing custom, a subsequent objector can only gain an exemption from a rule of customary law if, and to the extent that, its departure is not opposed by other states. Since the reactions of the other states may differ from one another, application of the subsequent objector doctrine leads to the creation of "a network of special relations based on opposability, acquiescence, and historic title" (Brownlie, 1990, p. 5). For example, the relationship between a subsequent objector and a fully acquiescing state is governed by a bilateral obligation consistent with the norm advocated by the objector state. The relationship between a subsequent objector and an opposing state remains governed by the preexisting custom. Finally, when the departure is only partially opposed, the content of the rule governing the bilateral relation between the departing state and the partially objecting state changes according to the extent of the latter state's acquiescence.

The above process implies that when one state departs from a preexisting custom and another state acquiesces to such departure the subsequent objector doctrine allows the rule to be modified between these parties.[36] The change in customary law only affects relations between these states. Other states must choose between becoming parties to a new or amended custom that may affect their rights under the preexisting customary rule, or continue to adhere to the old regime and demand compliance with the preexisting custom by the departing state. Even in the face of a third state's opposition, the change in the customary law between the departing state and the acquiescing state will take place.[37] In practice, this process often fragments a previously uniform rule of custom into a network of bilateral

---

[36] This process bears some similarity with the rules governing the amendment of international treaty law. Under § 334 (3) of the *Restatement of the Law, Third Foreign Relations Law of the United States*: "§ 334. Amendment or Modification of International Agreement. (1) An international agreement may be amended by agreement between the parties. [. . .] (3) Two or more of the parties to a multilateral agreement may agree to modify the agreement as between themselves alone if such modification [. . .] would not be incompatible with the rights of the other parties to the agreement or with its object and purpose." Under this provision, an amendment is permissible and takes effect for the states that agree to it even if other states do not agree to the amendment. Restatement (Third) Foreign Relations Law § 334. See also 1969 Vienna Convention on the Law of Treaties, Art 41(2).

[37] The change in customary law takes effect for the departing states and the states that provide implicit consent via acquiescence unless the rule of customary law is one of *jus cogens* or the change to the two states' practice adversely affects the interests of third party states.

relations, where the content of each bilateral relation is determined by the extent of one state's departure and the other state's acquiescence. [38]

V. CUSTOM WITH SUBSEQUENT OBJECTORS: THEORETICAL CONSIDERATIONS

Unlike persistent objectors who raise objections prior to facing a compliance problem when the custom is not yet binding, subsequent objectors manifest their objections by "departing" from an already binding rule of customary law.[39] To highlight and separate the subsequent objector's problem from the persistent objector's problem, we start with a group of homogeneous states acting under an established custom. This stylized simplification ensures that when the custom emerges, no state has an incentive to become a persistent objector. In particular, each state faces the same probability of receiving benefit α, the probability of being burdened by the custom obligation β, the same discount rate r, and the same benefit and cost from participation in the custom, be and ae^2. Thus, each homogeneous state i is confronted with the forward-looking problem before the practice consolidates to a custom:

$$\max_e P_i = \frac{1}{r}\left(\alpha be - \beta ae^2\right), \tag{6}$$

and each state chooses the following effort level:

$$e^\star = \frac{\alpha b}{2a\beta} . \tag{7}$$

---

[38] Note however that while a subset of states can modify the effects of a customary rule by subsequent practice or modify a treaty obligation by subsequent treaty amendment, international law is still ambivalent on the issue of modification of treaties via subsequent practice. The International Law Commission proposed an article providing that a treaty could be modified by subsequent practice indicating agreement to such modification. As explained in the Reporter's Notes to the *Restatement of the Law, Third Foreign Relations Law of the United States*, that proposal was deleted after the delegation of the United States, among others, objected that an agreement might be deemed amended as a result of unauthorized actions by state officials. D. Kearney and R.E. Dalton, *The Treaty on Treaties*, 64 Amer J Intl L 495, 525 (1970). The question of modification by subsequent practice tends to merge into that of interpretation by subsequent practice under § 325, comment c. See also Decision of Arbitration Tribunal concerning International Air Transport Services Agreement between France and the United States, 16 R Int'l Arb Awards 5 (1964).

[39] In the subsequent objector doctrine, the objection to a custom takes the form of a *departure* from an established and already binding rule of custom.

Given homogeneity of the states, the effort level $e^\star$ characterizes the content of the states' obligations under customary law in our current persistent objector model.

Given an existing rule of customary law, a state may become a subsequent objector for a variety of reasons. For the purpose of our analysis, it is possible to group these reasons in two general categories. First, an individual state's choice to depart from an already binding rule of custom may be driven by circumstantial factors that affect the immediate costs and benefits of the compliance with the custom (we shall refer to these factors as "circumstantial interest"). Changes in the circumstantial interest are often myopic and driven by excessive political discount rates: a state may object to an existing rule of customary law to avoid the short-term cost of fulfilling its obligations under that rule, heavily discounting the long-term benefits of preserving the rule. Second, the state's departure may be driven by a change in the long-term interest that the state actually has in preserving the binding force of the customary rule (we shall refer to these factors as "normative interest"). These changes in the normative interest may be driven by permanent changes in the costs and benefits of the custom, specific to an individual state. For example, if the cost of complying with the custom a increases or if the probability of receiving a benefit from other states' compliance α decreases, a state may develop different views on the desirable content of the custom.[40]

To understand how other states react to a subsequent objector's departure from existing custom, assume that something happens in the first period, causing some states to incur obligations and other states to be recipients of obligations this period. It is useful to separate states into three groups. The first-party states incur obligations, giving them reasons to become subsequent objector states (negative circumstantial interest). The second-party states, the recipients of obligations, would benefit from the first-party states' fulfillment of customary obligations (positive circumstantial interest). Lastly, third-party states face no circumstantial interest, inasmuch as they neither expend effort to fulfill the customary obligation nor receive any direct benefit from the first-party states' compliance in the current period.

Just as a state may become a subsequent objector for various reasons, different factors influence the reactions of second-, third-, and other first-party states to a proposed departure of a subsequent ob-

---

[40] This can be seen from expression (7).

jector.[41] The problem with a subsequent objector will be analyzed first by considering the case of no exogenous change in the circumstances of all states. Then the case with uniform changes in the circumstances of all states is considered. Finally, the subsequent objector doctrine given asymmetric changes in the circumstances of all states is studied.

A. Opportunistic departures and opposition from other states

Consider the case in which probabilities, benefits and costs associated with the expected long-term participation in the custom do not change for any state. When faced with a call to fulfill its obligations, a first-party state may still be biased by its negative circumstantial interests and opportunistically become a subsequent objector to avoid its obligations. In one period, a state faced with its obligations under customary law, may attempt to reduce its immediate costs by departing from the custom or advocating a standard different from the existing customary law. Due to its negative circumstantial interest, the first-party state faces a somewhat different problem from before:

$$\max_e P_1 = -ae^2 + \frac{1}{r}(\alpha be - \beta ae^2). \tag{8}$$

This objective function is similar to yet different from that in (6). Compared to the case before the consolidation of the customary rule, now there is an additional term (the first term) which represents the immediate need to incur costs to comply with the custom (negative circumstantial interest). The second term in (8) resembles the objective function (6) because of the summation of future expected net benefit over *infinite* periods, discounting to the present period. The privately optimal effort of the first-party state now differs from the existing customary obligation $e^\star$, and is given by the following:

$$e_1 = \frac{\alpha b}{2a(r+\beta)}. \tag{9}$$

Comparing (9) and (7), since $\alpha/(r+b) < a/\beta$, we see that $e_1 < e^\star$. The first-party state wishes to depart from the existing rule of custom

---

[41] Other first-party states that become subsequent objectors also react to the original subsequent objector state. The content of the custom between two first-party states who both want to depart from the existing custom, perhaps to different levels, is governed by the subsequent objector doctrine in ways similar to those explicitly considered in this section.

and wants to lower the future customary obligations for all participants in light of its current situation. While e_1 is first-best for the subsequent objector state, any value less than the original content of the customary rule $e^\star$ is better than $e^\star$, as long as it is greater than e_1. This is true because the payoff for the first party state P_1 is decreasing from its first-best level e_1 to the content of the customary rule $e^\star$. Thus, in proposing a departure from the existing custom, the subsequent objector effectively puts a lower bound on the acceptable level of custom at e_1.

If the subsequent objector state could have its own way, custom would evolve to a lower level, with a partial erosion of the preexisting customary rule. But the subsequent objector's proposed departure is not necessarily acceptable to other states.[42] When another state does not oppose the subsequent objector's departure from the existing custom (acquiescence), the content of the custom changes to e_1, the level proposed by the subsequent objector, for both subsequent objector and acquiescing states. When another state opposes the subsequent objector's departure from the existing custom (no acquiescence), the content of the custom between the subsequent objector and the non-acquiescing state remains at the original value $e^\star$. In the intermediate case in which departure is partially opposed (partial acquiescence), the content of the custom between the two states changes from the original customary value to the lower value acquiesced by the other state.

A typical third-party state acquiesces to the first-party state's departure from an existing custom only if the resulting change to the custom yields a total payoff that exceeds the payoff obtainable under the current rule. Since no exogenous change occurred and there is no obligation to comply in the current period, there are no immediate benefits to be gained and the third-party state's problem does not change. That is, the problem confronting the third-party state is again given in (6) and the existing customary level of effort given in (7) remains optimal to the third-party state. The third-party state continues to find the existing custom obligation privately optimal:

$$e_3 = e^\star. \tag{10}$$

Acquiescence does not make sense since a lower customary obligation leads to a lower payoff. This means that in the absence of

[42] Unlike persistent objectors who can gain an exemption from an emerging custom by unilaterally objecting, subsequent objectors can only gain an exemption from a rule of customary law if their departure from an existing custom is not opposed by other states.

changes to the exogenous variables, a third-party state opposes the subsequent objector state's departure.

A second-party state also acquiesces to another state's departure from an existing custom only if the resulting change in custom yields a total payoff at least as large as the payoff obtainable under the current custom. Although there are no exogenous changes to the circumstances of the second-party state, this state derives an immediate benefit from the subsequent objector's fulfillment of the customary obligation in the current period (positive circumstantial interest). Thus, an extra immediate benefit term is added to the total payoff (6) and the problem confronting the second-party state becomes:

$$\max_e P_2 = be + \frac{1}{r}(\alpha be - \beta ae^2),\tag{11}$$

and the desired custom for the second-party state is characterized by effort level:

$$e_2 = \frac{(r+\alpha)b}{2a\beta}.\tag{12}$$

Enticed by an immediate benefit from the other state's compliance with the custom, the second-party state desires a level of effort e_2 above that required by existing customary rule $e^* = (\alpha b)/(2a\beta)$. The second-party state therefore opposes the subsequent objector state's departure to a level lower than e^*.

Affected by its positive circumstantial interest (it is now the second-party state's turn to receive the benefit), a second-party state opposes more strongly an objector's departure than does a neutral third-party bystander, as can be seen from the fact that $e_2 > e^* = e_3$. These results suggest that in the absence of change in circumstances for all states, the subsequent objector doctrine effectively constrains departures from existing customary law driven solely by the attempt to avoid immediate costs of compliance. Any such attempt to depart from a binding rule of custom would always be met with opposition by second- and third-party states.

B. Non-acquiescence to subsequent objectors and the inertia of customary law

After the formation of a custom, there may be unanticipated changes to exogenous factors affecting the behavior of states. We next consider a uniform change to all states that gives the first-party state an additional reason to depart from the custom. Without loss of generality, assume that the cost of performing increases from a to a' for all states. Updating the problem confronting the first-party state and

adjusting the effort level from (9), the first-party state now chooses to depart even more from the existing customary level $e^\star$ than in the previous case, to effort level e_1' where e_1' satisfies the following: [43]

$$e_1' = \frac{\alpha b}{2a'(r+\beta)} < e_1 < e^\star . \qquad (13)$$

In addition to the immediate compliance cost issue (negative circumstantial interest), the first-party state now faces a change in its normative interest triggered by the unanticipated change in circumstances. This provides an additional reason for the first-party state to become a subsequent objector.[44] Indeed, comparing effort level e_1' for this case and effort level e_1 in (9) when there are no exogenous changes in performance cost, the first-party state now has an additional incentive to depart from the custom by adopting a level lower than it would adopt in the absence of an increase in performance cost.

Given the rise in performance cost, the third-party state is also inclined to adopt a lower level of custom than before. Updating its prior normative interest, a third-party state's optimal level of effort in (7) now becomes e_3' where

$$e_1' < e_3' = \frac{\alpha b}{2a'\beta} < e^\star . \qquad (14)$$

Induced by future higher compliance cost, the third-party state also desires a level of effort (e_3') lower than the existing customary level $(e^\star)$, but not as low a level as that desired by the first-party state. The first-party state is in fact additionally biased by its negative circumstantial interest, since it must pay an immediate performance cost. Thus, the third-party state consents to a change in custom by partially acquiescing to e_3'. The customary obligations of two states towards one another can only be modified by the extent to which both implicitly agree to the change. Partial acquiescence by the third-party state to the subsequent objector therefore leads to a partial change in customary law. The content of the custom between the two states changes from the original customary value $e^\star$ to the level chosen by the acquiescing third-party state e_3'.

[43] In the presence of uniform exogenous changes to the states, optimal effort levels are denoted with a prime.

[44] Naturally, a uniform change for all states can have a mitigating effect on the subsequent objector's departure. For example, if the cost of performing has decreased, the first-party state is induced to undertake a higher level of effort. This counteracts the need for the first-party state to minimize the effort level to reduce the immediate burden of compliance. Likewise, the decrease in cost also has different impacts on second- and third-party states. We examine the case where it is more likely for the existing custom to erode.

For the second-party state, the problem is similar to that considered previously. The state faces a positive circumstantial interest, with an immediate benefit term. This time, however, the second-party state encounters the same exogenous cost increase faced by the other states. The second-party state will thus have to choose balancing its positive circumstantial interest with its updated normative interest. Adjusting (12) to the higher cost parameter a', the optimal level of effort for the second-party state becomes:

$$e_2' = \frac{(r+\alpha)b}{2a'\beta} \tag{15}$$

Comparing the level of effort in (15) with the existing customary level $e^\star = (\alpha b)/(2a\beta)$, it is not clear whether e_2' or $e^\star$ is larger. The immediate benefit (the first term in the numerator of e_2') has a positive impact on the level of effort while the increase in future performance cost (the higher a' in the denominator of e_2') has a negative impact. When the positive impact of immediate benefit dominates, e_2' is greater than or equal to $e^\star$, and the second-party state opposes the subsequent objector's departure. This prevents any change in the custom governing the relationship between the first- and second-party states. When the negative impact of future performance cost dominates, e_2' is less than $e^\star$. Given that e_2' in (15) is greater than e_1' in (13), the second-party state only partially opposes the subsequent objector's departure. In this case, the content of the custom between the two states changes from the original customary value $e^\star$ to the level chosen by the acquiescing second-party state e_2'.

To conclude, when all states face a uniform increase in performance cost, there is a partial convergence of interests between the subsequent objector and the third-party state. The third-party state and the subsequent objector state shares the motive to reduce the impact of higher future compliance costs (their normative interests have changed in similar direction). However, the subsequent objector's departure from the current custom is additionally motivated by the negative circumstantial interest and by its wish to reduce the burden of immediate compliance. Thus the subsequent objector has incentives to depart more extensively from the existing custom than the third-party state would allow.

For the second-party state, the net effect of an exogenous change in costs depends on the extent to which an immediate benefit (positive circumstantial interest) is offset by an increase in future performance cost (changed normative interest). If the impact of immediate benefit dominates, the second-party state wants a level of custom higher than the current level, and it opposes any departure by the subsequent objector from the current custom. The relationship between

the two states remains governed by the existing customary rule. If the impact induced by the increase in future performance cost dominates, the second-party state's private optimum falls below the existing customary law. Still, the second-party state's private optimum is greater than the level preferred by the subsequent objector. In this case a partial convergence between the interests of the subsequent objector state and the second-party state takes place. The second-party state foregoes part of the immediate benefit from the custom by providing partial acquiescence. The custom governing the relationship between the two states changes from the existing customary law to the level desired by the second-party state.

The analysis reveals a potential factor of inertia in the process of custom formation. When exogenous changes affect the states' ideal levels of customary law, the adaptation of customary law to such changes in circumstances may be hindered by opposition from second-party states. Second-party states may oppose the subsequent objector's departure not so much because they value the current custom, but because they are biased by their positive circumstantial interest and attracted by the immediate benefit from custom compliance. This further justifies the workings of the subsequent objector doctrine, allowing the bilateral obligations of first- and third-party states to adapt to changed circumstances in spite of second-party states' opposition.

C. The adaptation of custom to changed circumstances

We end our analysis of the subsequent objector doctrine by considering the case of asymmetric exogenous changes for the states involved. Start by assuming that the subsequent objector chooses a level of departure effort e_1'' which is lower than existing customary law $e^\star$ for reasons that are specific to the departing state. This may be either because of changes in its circumstantial interest (as discussed in Section 4.1) or changes in its normative interest (as discussed in Section 4.2).[45]

In the face of the subsequent objector's departure from current custom, the problems confronting second-party state and third-party states are similar, except for the extra immediate benefit factor enjoyed by the second-party state. Without loss of generality, we only consider the specific problem confronting a third-party state in detail. With primes indicating new parameter values, the problem confronting the third-party state is:

---

[45] In the presence of asymmetric exogenous changes to the parameters, the states' optimal effort levels are denoted with a double prime.

$$\max_{e} P_3 = \frac{1}{r'}(\alpha' b' e - \beta' a' e^2). \tag{16}$$

The optimal level of effort for the third-party state is given by:

$$e_3'' = \frac{\alpha' b'}{2a' \beta'}. \tag{17}$$

Recall that a state acquiesces to another state's departure from an existing custom if the resulting change to the custom yields a total payoff above the payoff obtainable under the current rule. In the current more general problem, we introduce the concept of an acquiescence constraint to help identify the changing relationship between a state's departure and another state's acquiescence. Given that $e^\star$ is the existing customary level of effort, the third-party state acquiesces to a different and lower level of effort e (perhaps different from e_3'') only if the new lower level generates a higher payoff by satisfying the acquiescence constraint:[46]

$$\frac{1}{r'}(\alpha' b' e - \beta' a' e^2) \geq \frac{1}{r'}(\alpha' b' e^\star - \beta' a' e^{\star 2}) \tag{18}$$

Note that e_3'' maximizes the left hand side of inequality (18). Thus, if the exogenous changes in the third-party state induce a new optimal level e_3'' greater than the existing customary law $e^\star$, the third-party state would like to raise the content of the custom obligation to this privately optimal value e_3''. But this is not an option for the third-party state. When faced with the departure of a state from current customary law, the third-party state can either acquiesce or oppose such departure, but cannot induce a change of the custom towards an even higher level. The acquiescence constraint thus implies that the lowest acceptable value for the third-party state is the current customary value $e^\star$. In this case, the third-party state does not acquiesce.

On the other hand, if the exogenous changes in the third-party state induce an effort level e_3'' less than the existing customary law $e^\star$, the third-party state, along with the subsequent objector, also desires a lower level of effort for the custom. Clearly e_3'' is the most desirable customary rule acceptable to the third-party state, but any customary obligation between e_3'' and $e^\star$ satisfies the acquiescence constraint (18) and improves the payoff to the third-party state over the status quo $e^\star$. In particular, the closer the custom level to the

---

[46] The corresponding acquiescence constraint for the second-party state is:

$$b'e + \frac{1}{r'}(\alpha' b' e - \beta' a' e^2) \geq b' e^\star + \frac{1}{r'}(\alpha' b' e^\star - \beta' a' e^{\star 2}).$$

private optimum e_3'', the better off the third-party state will be. While there are levels of effort below e_3'' that satisfy the acquiescence constraint, these levels are inferior to e_3'' for the third-party state, as the payoff for the third-party state falls when effort is below the optimal level e_3''. Hence, the third-party state has no reason to acquiesce to a change that brings the level of customary obligation below its privately optimal value e_3''. That is, the third-party state has a lower bound on the acceptable level of custom: e_3''.

Given that the third-party state is willing to accommodate any proposed change in custom as low as e_3'', when the subsequent objector's desired level e_1'' is larger than e_3'', the third-party state provides full acquiescence. In this case, e_1'' becomes the content of the bilateral custom that governs the relationship between the first-party state and the third-party state. When the subsequent objector's desired level e_1'' is less than the desired level e_3'' for the third-party state, the third-party state is only willing to provide partial acquiescence. In this case, e_3'' characterizes the bilateral custom between the third-party state and the subsequent objector.

To summarize our results, we adopt a slightly more general notation. Let e_O represent the effort level adopted by the subsequent objector state, where by definition it is less than the existing customary level $e^\star$. We refer to any state confronted with the subsequent objector state's departure and facing the acquiescence problem as state A. Further, assume that e_A is the privately optimal level of effort for state A. We generalize the results found in the previous analysis to show that the combined effects of the subsequent objector's departure from current customary law and the other state's acquiescence may lead to various possible changes in the custom between the two states. Such change is given by $\max\{e_O, e_A\}$ when $e_A < e^\star$. According to the subsequent objector doctrine, if $\max\{e_O, e_A\} = e_O$, there is full acquiescence and the bilateral custom evolves to the subsequent objector's preferred level e_O. If $\max\{e_O, e_A\} = e_A$, there is partial acquiescence, and the bilateral custom governing the relationship between the two states instead evolves to the choice of the partially acquiescing state e_A. No change in customary law takes place when $e_A \geq e^\star$.

Figure 1 maps the different scenarios; the value chosen by the subsequent objector e_O and the current customary rule $e^\star$ are held constant. Figure 1 identifies three regions. In the first region, $e_A \leq e_O$ indicates that state A wants a level of custom less than or equal to the level proposed by the subsequent objector. In this case, application of the subsequent objector doctrine implies that the relationship between state A and the subsequent objector state is governed by a bilateral customary rule e_O.
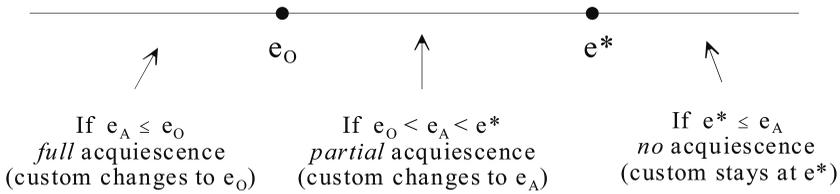
Figure 1.   *The Subsequent Objector Doctrine*

The second region, $e_O < e_A < e^\star$, is characterized by partial convergence between the interests of state *A* and the subsequent objector state. While both states are dissatisfied with the current custom, state *A* wants a level of custom above the level proposed by the subsequent objector. In this case, application of the subsequent objector doctrine leads to a more limited change, from $e^\star$ to e_A, in the custom governing the relationship between the two states.

In the third region, $e^\star \leq e_A$, state *A* is either content with the current customary rule, $e^\star = e_A$, or wants a level of custom greater than the current level, $e^\star < e_A$. In this case, state *A* opposes any attempted departure of the subsequent objector from the current custom. This lack of acquiescence implies that the relationship between the two states remains governed by the existing customary rule $e^\star$ and that any departure from the rule is treated as a breach of international customary law.

VI. CHANGE AND STABILITY IN CUSTOMARY LAW

The economic models of custom formation presented in this paper illustrate how existing legal principles are instrumental to securing consensus in the formation and transformation of custom. Customary rules cannot be enforced against states that have opposed a given custom from its inception. Similarly unilateral departures from existing customary law can exempt from legal obligations only with the acquiescence of other states.

The significance of the persistent and subsequent objector doctrines can be fully appreciated in the case of heterogeneous states. Widely accepted customary principles may acquire different forms when implemented in the practice of heterogeneous states. The content of some customary rules may prove very undesirable for high cost states. In this paper we have explored the important intuition of Goldsmith and Posner according to which universal norms of international customary law are the result of pairwise state interac-

tions.[47] This paper contributes to this line of research to studying the specific role of persistent and subsequent objector doctrines in the process of custom formation and change These doctrines avoid the dangers associated with imposing a new rule or transforming an existing rule on a sovereign nation that has ostensibly opposed the new rule or transformation. Any attempt to force changes in the customary law against non-consenting states would open the doors to a potential "tyranny of the majority," in that any large number of states could impose a costly customary obligation on a minority of non-consenting states.[48] This would undermine the legitimacy of custom as a source of public international law in a world of sovereign nations.

As a result of these voluntary mechanisms of custom formation, customs emerge only if the resulting rule is at least weakly preferred to the status quo. Dissenting states can opt out of emerging regimes of customary law. Likewise, changes in existing customary law can only take place with respect to states that suffer no prejudice from the change. Opposing states can continue to invoke the older rule against departing states.

Both doctrines assure that any new rule of customary law or any change to existing customary law only affects states for which the new rule or the change in existing rule constitutes a Pareto improvement. A state facing a net prejudice from a newly emerging custom can opt out from that rule by persistently objecting. Likewise, any state facing a prejudice from a departure from an existing custom can oppose the departure and enforce the current rule. There are, however, limits to custom formation when heterogeneous states are involved. Absent the possibility to provide side payments to high cost states to subsidize their participation to an emerging custom, the persistent objector doctrine allows high cost states to constrain

[47] Goldsmith and Posner, 66 U Chi L Rev 1113 (cited in note 5). As Norman and Trachtman have pointed out, many customary international law problems may be n-party problems in which the actual payoffs may change with the number of participants. G. Norman and J.P. Trachtman, *Measuring the Shadow of the Future: An Introduction to the Game Theory of Customary International Law*, Univ of St. Gallen L & Econ Working Paper No. 2007-20 (2007).

  In this context, we are grateful to an anonymous referee for pointing out that this variability of payoffs may affect the willingness of third party states to acquiesce in subsequent objection, and may also affect the willingness of states to accept rules where persistent objectors are not obligated to comply.

[48] As suggested by Goldsmith and Posner, a more complex formulation of the customary relationship should account for the possibility that the customary practice results from coercion or is affected by the states' relative power, shedding light on how a custom could be transformed by a change in the states' interest and relative power. Goldsmith and Posner, 66 U Chi L Rev 1113 (cited in note 5).

the emergence of new custom in their relationships with other states.[49] The resulting level of custom formation may be suboptimal compared to the alternative scenario in which high cost and low cost states effectively bargain with one another for the choice of a value-maximizing customary effort. The subsequent objector doctrine creates the opposite problem. By allowing acquiescence of other states to serve as constraints, this doctrine may yield excessive customary obligations to outlive the circumstances that justified their emergence. In the presence of heterogeneous states, these persistent and subsequent objector doctrines allocate control over the resulting level of customary law on different states. By doing so, these doctrines promote stability in customary relations but may fail to induce first best social optima obtainable via compromise solutions. These results are consistent with the traditional wisdom according to which custom is an effective source of international law when homogeneous states are involved, but that alternative sources such as treaty law may be better instruments for the pursuit of first best outcomes when heterogeneous parties are involved.

A comparison between the results achieved under persistent objector and subsequent objector regimes reveals that when acting in a timely fashion, high cost states have an advantage over low cost states. Persistent objectors can gain a partial or full exemption from an emerging custom. High cost states can effectively control the level of custom formation, at least with respect to their networks of bilateral relations with other states. In the face of a persistent objection, low cost states can only invoke the general principle of reciprocity in international law, allowing them to adopt the same customary level against the objecting state when roles are reversed. In this context, the persistent objector doctrine constitutes an example of weak reciprocity, given that the reciprocal level of customary obligations corresponds to the lower level unilaterally desired by the persistent objector.

Opposite results hold when the objecting state fails to manifest its dissent in a timely fashion. In this case, high cost states can legitimately depart from custom only if the departure is accepted by low cost states through express endorsement or tacit acquiescence. Low

---

[49] The possibility of side payments or cross-rule linkages may promote Kaldor-Hicks efficient rules, allowing the achievement of outcomes that are superior to those produced by a regime where each particular rule is considered in isolation and without side payments. These methods could theoretically allow movement from what we call a constraint of weak reciprocity to a more flexible rule of generalized reciprocity. It should be noted, however, that unlike treaty formation, where obligations can more easily be linked together and combined with possible side payments, the process of customary law formation does not easily allow for such optimal bundling.

cost states thus control change in the custom by having an opportunity to oppose other states' departure from a binding rule of customary law. In this context, the subsequent objector doctrine constitutes an example of strong reciprocity, since customary obligations are kept high by states that prefer higher levels and oppose the departure of the subsequent objector state.

It is generally believed that the more restrictive conditions of the subsequent objector doctrine promote stability and reliance in customary law. The economic model reveals that the subsequent objector doctrine also avoids opportunistic departures from existing custom motivated by myopic attempts to avoid the immediate costs of compliance with existing customary law. Absent such restrictions the sustainability of customary law would be severely undermined. The general functionality of this doctrine, however, reveals its shortcomings when states that derive an immediate benefit from the custom are myopic and oppose the other state's departure from existing custom in order to protect their positive circumstantial interest. This may result in the survival of customs that no longer correspond to the values of the international community at large.

VII. CONCLUSIONS

Given the absence of a world legislature and the cost involved with forming and ratifying multilateral treaties, customary law has played a fundamental role in governing relationships between sovereign states in both historical and modern settings. While customary law is capable of creating universally binding rules, the persistent and subsequent objector doctrines provide ways for states to gain exemptions from emerging or existing rules of customary law. According to the persistent objector doctrine, a state can gain an exemption from emerging norms of customary law by opposing an emerging customary practice. The subsequent objector doctrine additionally allows a state to gain an exemption from a binding custom when its departure from the custom is met with acquiescence by other states.

The persistent and subsequent objector doctrines acquire particular importance when heterogeneous states are involved, since they provide criteria for determining the content of the binding custom when states advocate different customary rules in the course of their interactions. The economic analysis has shown that these processes of custom formation effectively discourage myopic departures and opportunistic objections from customary law, while leaving room for departures and objections that reflect actual differences in state preferences or changes in costs and benefits of custom compliance. These mechanisms, which are themselves the product of spontane-

ous evolution, provide flexibility for the gradual adaptation of custom to changing circumstances over time.

Future research should evaluate these fundamental principles of international law in conjunction with other practical considerations, such as the existence of reputational cost that states may face when objecting to customary law and the reputational cost that second- and third-party states may face when opposing another state's departure from an exiting custom. The practice of customary law is heavily affected by considerations of diplomatic and political expediency and such costs may create frictions and biases in the process of custom formation that are worthy of consideration. Further, if reputational costs differ from state to state, this may create a systematic advantage for states that place less weight on reputation. The process of custom formation is further affected by free-riding and opportunistic behavior by second- and third-party states, none of which fully internalizes the benefit of monitoring other states' compliance with custom. Thus when states face a private cost in opposing departures from customary law and generate a public benefit for the international community a public good problem may arise. As a result states may fail to oppose other states' departures more often than is desirable for the world community as a whole. Future research should verify the relevance of this analysis for understanding other social and legal settings where social norms or customary rules are created through the spontaneous interaction of parties in society.