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# Constraining Objection: The Limits of State Consent in Customary International Law

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# Abstract

This study examines the persistent objector doctrine in customary international law from the perspective of the limits of state consent and systemic stability. It begins from the tension between the ability of customary international law to generate binding rules without express consent and the principle of sovereign equality. Within this framework, the study reads the persistent objector doctrine not as a sovereign right, but as a structural mechanism that narrows the scope of consent and seeks to preserve normative stability. Accordingly, the doctrine cannot be reduced solely to the question of whether an objection is raised in a timely manner; it also produces systemic consequences by providing grounds for competing claims regarding the bindingness, scope, or regional applicability of settled norms. To this end, the study examines the Cod Wars, the South China Sea, and the Aegean dispute, showing that delayed objections erode normative expectations, while early and sustained objection may in some cases entrench the dispute. It concludes that a narrow and restrictive interpretation of the persistent objector doctrine is not incompatible with the principle of sovereign equality; on the contrary, it is necessary for preserving predictability in a decentralised legal order. On this basis, the study treats the doctrine's near-complete failure to succeed on its own not as a weakness but as the question to be explained, shifting the inquiry from "does the doctrine work?" to "under what conditions should an objection be regarded as legally persuasive?"


# INTRODUCTION

Although customary international law ranks among the constitutive sources of the international legal order, how it is formed and why it binds remain matters of persistent controversy. At the root of the debate lies a structural tension. Custom generates obligations through general practice and opinio juris rather than through formal procedures of consent, and it may therefore bind even states that have never expressly agreed to be bound. In an order in which the practice of powerful states shapes norm formation to a disproportionate degree, this feature has long been criticised as lacking democratic legitimacy. It is here that the persistent objector doctrine comes to the fore as the principal formal mechanism available to a state seeking to escape the binding force of an emerging rule. Whether the doctrine amounts to a settled rule of positive law is, however, contested. The state practice supporting it is thin, and instances in which a state has unambiguously freed itself from an otherwise binding customary rule on the strength of its objection alone are almost nowhere to be found. This study does not assume that the doctrine is firmly established. It treats it instead as a contested yet analytically meaningful mechanism, one whose proper scope, rather than its existence, is in question (Dumberry, 2010, pp. 779–781). Indeed, the International Law Commission's (ILC) explicit treatment of the rule in Conclusion 15 of its 2018 conclusions has shifted the centre of gravity of the debate from the doctrine's existence to its scope and conditions of operation (Green, 2018, pp. 175–176; ILC, 2018, Conclusion 15).

Within the Westphalian tradition, this tension carries normative weight. Consent is regarded as a principal source of legal legitimacy, and the imposition of a rule upon a non-consenting state sits uneasily with sovereign equality. The persistent objector doctrine has traditionally been seen as a

safeguard against this difficulty, since it allows states to remain exempt from customary rules through timely and consistent objection. Yet the very requirement that objection begin at the earliest stage of norm formation produces structural inequalities of its own. States that gained independence in the post-colonial era, in particular, found themselves subject to the entire body of pre-existing custom without ever having had a meaningful opportunity to object. This has lent force to calls for a more pluralist and consent-sensitive reading of customary international law.

At the same time, the strict temporal conditions attached to the doctrine perform an important systemic function. Once a rule has reached a certain degree of crystallization, the stability of the legal order depends on the shared expectations that states have built around it. To open the door to late or open-ended objection beyond that point is not merely to tolerate deviation; it weakens common expectations, encourages selective compliance and, by undermining the generality of rules, creates systemic uncertainty. Seen in this light, the temporal limitation operates as a structural threshold: by foreclosing belated objection, it protects the expectations states have built around emerging norms.

Existing approaches to the doctrine are concerned for the most part with when objection must be raised, treating timing as the decisive criterion while leaving the scope, duration and quality of objection largely untheorised. This study takes that temporal focus as its point of departure but moves beyond it, conceptualising the doctrine as a structured mechanism of constrained objection. Two further dimensions are added to this framework: a reopening limit, which prevents settled norms from being indefinitely called back into question, and a justification threshold, which measures the persuasive force of an objection by looking beyond its bare existence to its legal adequacy.

Attending to the timing of objection alone, however, captures only part of the problem. Even at its strictest, the persistent objector doctrine can itself generate instability. Permitting states to position themselves outside emerging normative frameworks opens the way to rival legal interpretations, fragmented expectations and protracted disputes over the bindingness of rules. Where the content, scope or applicability of a norm remains contested, the availability of a legally recognised route for exemption may deepen uncertainty rather than resolve it. How the institutionalisation of objection shapes the stability of the legal order therefore matters as much as the question of when objection is permitted.

The study proceeds on three interconnected analytical levels. The first examines the persistent objector doctrine in doctrinal terms, as it appears in state practice and judicial decisions, especially in the jurisprudence of the International Court of Justice. The second adopts a systemic-functional perspective and asks how the doctrine operates as a structural mechanism within a decentralised legal order. The third advances a normative reconstruction of the conditions under which claims of persistent objection may be regarded as legally persuasive, and develops a constrained objection model resting on three interrelated criteria. This reconstruction draws on judicial decisions as well as on the ILC's approach to the identification of customary international law. The Commission's treatment of state practice, opinio juris, silence and the legal significance of objection supplies an important interpretive foundation for the

framework developed here. These three levels are not self-contained parts; they converge in a single mechanism-based account that traces how the doctrine stabilises or unsettles the system along the dimensions of timing, entrenchment and recognition.

The central claim of the study is that the temporal limitation of objection is necessary to prevent the erosion of customary law, but that the persistent objector doctrine can secure stability only conditionally. The doctrine stabilises the system in one respect and unsettles it in another: it grants flexibility in the early stages of norm formation, while carrying the risk of entrenching fragmentation where rival interpretations persist over time. It is therefore misleading to treat the doctrine either as a right arising from sovereignty or as a merely technical exception. It is a conditional mechanism whose effect varies according to the timing of the objection, the degree of crystallization of the norm and the form that state objection takes. This reconstruction comes into sharpest relief in the constrained objection model developed below, and in particular in the justification threshold. The threshold is not proposed as a replacement for existing doctrine; it is an interpretive framework that brings together, in more systematic form, elements already implicit in the case law (Nicaragua, Fisheries, Gulf of Maine) and in the practice of the ILC. The aim is to sharpen the application of existing doctrine by clarifying the conditions under which an objection may be regarded as legally persuasive.

Proceeding from this framework, the study reconceptualises the persistent objector doctrine as a structured form of constrained objection. Rather than treating deviation as an open-ended expression of state will, it examines the doctrine through three interrelated criteria that clarify when, how and on what grounds an objection may be regarded as legally meaningful.

## Consent, Stability and the Limits of Continuing Will

Consent remains one of the principal sources of legitimacy in international law. In a decentralised order, sovereign equality resists the unilateral imposition of obligations, and the law of treaties reflects the same understanding through the pacta tertiis principle. Customary law, however, complicates any straightforward consent-based account, since general practice and opinio juris can give rise to obligations without individual and formal approval (Buchanan, 2003, p. 6; Crawford, 2019, p. 2; d'Aspremont, 2009, p. 254; Jennings & Watts, 1992, p. 15; Vienna Convention on the Law of Treaties, 1969, art. 34).

This premise generates a structural dilemma. Were legal obligation to remain tied to the continuing, individualised will of every state, customary rules could neither stabilise expectations nor coordinate conduct over time. Yet if the entrenchment of norms is severed from consent altogether, the criticism that customary law merely reproduces the preferences of the states that most shape practice gains force. Consent therefore retains its significance in norm formation. Once a rule has become a common point of reference, however, its legal effect cannot remain indefinitely revocable (Benvenisti, 2014, pp. 22–23; Klabbers, 2009, pp. 105–108, 114; Krisch, 2010, p. 27).

The problem is aggravated by inequalities in the conditions of participation in norm formation. States do not take part in the formation of custom with equal information, bargaining power or institutional capacity. A restrictive approach to persistent objection may accordingly preserve predictability while depriving newly independent or comparatively weak states of any meaningful opportunity to object to norms formed before they could effectively participate (Goldsmith & Posner, 2005, pp. 111–112; Guzman, 2008, pp. 91–100; Koskenniemi, 1990, pp. 7, 20–27).

The limited analogy with domestic legal orders is not meant to import hierarchy into international law; it points to a narrower claim. General rules acquire part of their authority because they can order expectations without requiring the continuous reaffirmation of every addressee. The task in customary law is to preserve this coordinating function without extinguishing the legal significance of objection (Hart, 1961, pp. 79–99; Raz, 1999, p. 53).

The persistent objector doctrine is one way of managing this tension. It permits limited divergence during norm formation, while its temporal conditions prevent states whose preferences change later from reopening settled rules. The doctrine is therefore neither an unconditional guarantee of sovereignty nor a complete answer to the problem of inequality. It is a narrow mechanism that distributes, within a decentralised order, the systemic costs of preserving general norms.

# The Persistent Objector as a Systemic Exception: Not a Right

One of the enduring sources of criticism of the doctrine lies in the way it has been conceptualised in the literature. To set the discussion on firmer ground, it is first necessary to clarify how the doctrine operates and what its functional logic is. In its traditional form, the persistent objector doctrine holds that a state that objects to an emerging rule clearly and consistently, from the earliest stage of its formation, will not be bound by that rule. Where objection is absent, ambiguous or inconsistent, silence in the face of emerging practice is read as acquiescence (qui tacet consentit), and the rule may become binding (Elias, 2006; Pazarcı, 2018, p. 113).

Dumberry's (2010, pp. 779–781, 792–802) critique is significant because it casts serious doubt on whether persistent objection can be accepted as an effective and coherent doctrine of exemption. This study does not attempt to refute that diagnosis by presuming the existence of a settled doctrine. It asks instead how claims to differentiated bindingness should be assessed in situations where states invoke persistent objection, or functionally resemble it, in disputes over crystallization, applicability or the opposability of a norm to the state concerned.

Doubt about the doctrine's existence is not confined to Dumberry. As early as 1985, Stein reported that, beyond the Asylum and Fisheries judgments, he had been unable to identify a single instance in which a state had claimed exemption from a rule on the basis of the persistent objector principle, or had been granted such exemption. That observation has echoed through critiques that treat the doctrine as largely

inoperative (Dumberry, 2010, pp. 779–781; Stein, 1985, p. 459). Outright rejection of the doctrine is, however, equally difficult to sustain. In Conclusion 15 of its 2018 conclusions, the ILC expressly formulated and systematised the persistent objector approach, requiring that the objection be raised while the rule is in the process of formation, be clearly expressed, be made known to other states and be maintained persistently. The commentary further states that the rule has frequently been invoked and recognised in judicial practice (ILC, 2018, Conclusion 15). Green accepts that this formulation risks overstating the rule's actual use, yet stresses that Conclusion 15 and its commentary rightly reject the claim that the rule has never been employed (Green, 2016; Green, 2018, pp. 175–176). The development of the doctrine, together with the drafting history and elements of Conclusion 15, has also been examined in detail in Turkish scholarship (Albayrak, 2018; Bilge, 2022, pp. 867–876).

The most radical recent critique rejects the doctrine altogether. Mogollón (2022, pp. 301–302, 356–358) contends that the persistent objector rule is not merely flawed but contrary to international law and therefore unlawful: it erodes state consent by equating silence with consent, presumes a law-making authority that the Court does not possess, and undermines sovereign equality, especially for newly independent states. On this account, the rule, lacking sufficient practice and opinio juris, never existed at all. This study responds to that diagnosis through a narrow, immunity-based reading rather than by denying its force. Mogollón's critique is strongest against a rights-based interpretation that gives states a broad unilateral exit from emerging norms. The reading defended here, by contrast, accepts that silence alone cannot be equated with consent and takes the equality objections seriously, but reduces the doctrine to a limited immunity within a shared normative framework. In doing so, it moves the dispute from the plane of existence to the plane of scope. Moreover, the fact that Mogollón's own footnotes catalogue instances of invocation, including Roach and Pinkerton, Domingues and the further episodes collected in the ILC's 2018 report, shows that persistent objection is not a purely theoretical construct, even though its legal effect and systemic status remain contested (ILC, 2018, p. 122, n. 778; Mogollón, 2022, p. 312, nn. 60–61). Recent studies such as Yeini's likewise pursue the debate largely along this axis of scope and operation (Yeini, 2021). Even Norway's position in the Fisheries judgment, the example conventionally treated as paradigmatic, rests on an obiter dictum delivered after the Court had held that the rule had not formed in the first place. The fact that the doctrine rarely succeeds on its own does not invalidate it; it constitutes the very question of this study, which accordingly moves from asking whether the doctrine works to asking under what conditions an objection should be regarded as legally persuasive.

At this point, a distinction is needed that will guide the remainder of the analysis. Two situations, frequently conflated, are analytically distinct. The first is persistent objection properly so called: the rule has genuinely acquired customary status, but the objecting state escapes its binding force because it has opposed the rule clearly and consistently from the outset. The second is the denial of crystallization: the state contends that no binding rule ever came into existence and that, since there is nothing binding it, there is logically nothing to object to. The two postures look identical from the outside, in that the state does not regard the norm as binding, yet they rest on different legal premises. Turkish scholarship registers the same divide, emphasising that persistent objection can arise only after a rule has formed;

where the concept is properly in play, the existence of the rule is not in doubt and the rule is merely inopposable to the objecting state (Bilge, 2022, p. 878). As the disputes examined below show, much of the conduct described as persistent objection in fact belongs to the second category, and the argument turns on the existence of the rule rather than on exemption. This study examines such conduct because it performs the same systemic function, sustaining a differentiated position on bindingness within a shared normative space, while preserving the distinction so that the two logics are not tacitly merged.

In the literature, the persistent objector doctrine is most often discussed, explicitly or implicitly, in the language of rights, as though it conferred on states an entitlement to resist the binding force of customary rules. Byers approaches objection directly through the concept of a right and notes that the reluctance of states to recognise the rights of persistent objectors may amplify the effect of reciprocity. Chimni, though he avoids the term, portrays the doctrine as a device enabling states to escape the binding consequences of customary law, and argues that the persistent objector rule was invented to open an exit from certain rules for powerful states. Taken together, these assessments show that the doctrine has been understood, even where it is not expressly named, as a right-like power producing exclusionary effects (Byers, 1999, p. 103; Chimni, 2018, p. 23).

Writers such as Akehurst (1975), Charney (1985), Weil (1983) and Lepard (2010) accept, by contrast, that the doctrine confers no affirmative and equally available power on states, and that it operates only as a technical mechanism producing non-bindingness in very narrow and exceptional circumstances. Even so, the rights-based idiom in which the doctrine is often expressed obscures the narrow and conditional character of its operation.

A more accurate framework can be derived from Hohfeld's (1913) distinction between rights, powers and immunities. Viewed in these terms, the persistent objector doctrine is not a right that generates correlative obligations for others, but a limited legal capacity to resist the application of a particular legal change. The doctrine gives the state no power to determine the content of norms and provides no general exit from the legal order. It functions, under specified conditions, as a narrowly defined immunity against the binding effect of a specific rule. So understood, it is not a political escape device but a technical instrument regulating the temporal limits of obligation in a decentralised system.

The approach of the International Court of Justice in the North Sea Continental Shelf cases must be read with care. The significance of the judgment lies not in any direct application of persistent objection or acquiescence, but in its insistence that crystallization cannot be inferred from treaty text, limited participation or ambiguous conduct. In declining to treat the equidistance principle as customary, the Court required that the practice supporting the asserted rule be extensive and representative, including the practice of specially affected states, and that it be accompanied by opinio juris. Its assessment of Germany's conduct, moreover, concerned consent, acceptance and estoppel rather than late objection. North Sea thus supplies a strict evidentiary standard for the formation of custom, not a rule about the consequences of late objection. Its value for this study is indirect: by setting a high threshold for

crystallization, the judgment clarifies when a rule has reached the stage of entrenchment at which the temporal limit on objection begins to operate (North Sea Continental Shelf, 1969, paras. 27–30, 71–74).

This temporal logic becomes particularly important when the time condition at the heart of the doctrine is examined. Often criticised as exclusionary towards states that join the system after rules have crystallized, the requirement that objection begin early in fact performs a specific systemic function. Permitting objection after crystallization would allow states to withdraw selectively from settled frameworks, undermining predictability and encouraging strategic non-compliance. The temporal limitation is therefore a structural safeguard against this form of erosion.

This mechanism, however, creates a second layer of tension. While temporal limits restrain destabilising late objections, the very existence of the doctrine opens a legally recognised route to differentiation, and it does so unequally. States able to mount early and consistent objection can avoid obligations, whereas new states, bound under the tabula rasa principle by previously formed custom though not by their predecessors' treaties, fall within the scope of norms they had no effective opportunity to oppose. At the same time, space is opened for rival interpretations as to whether a rule has genuinely crystallized and whom it binds. The doctrine is thus more than a filter protecting stability; it also operates as a threshold that distributes access to legal exemption unequally and may prolong legal uncertainty rather than resolve it.

The literature reflects this dual character. Writers such as Weil and Charney regard strict limits on objection as indispensable to preventing the relativisation of norms and the fragmentation of the order; for them, the doctrine is a controlled exception that preserves the generality of custom. Critical and TWAIL-inspired approaches show, in turn, that the same structure can entrench historically dominant norms and constrain meaningful objection by weaker states (Anghie, 2005; Charney, 1985, p. 3; Chimni, 2010, 2018; Koskenniemi & Kari, 2020; Okafor, 2008; Weil, 1983, pp. 437–442).

This tension cannot be reduced to a simple choice between stability and equality. It shows that the doctrine both limits and reproduces instability. Temporal limits forestall the late erosion of norms and protect predictability, while the institutionalisation of objection as a mechanism of exclusion opens space for differentiated legal positions and prolonged disputes over the status of norms. The doctrine therefore offers no definitive resolution of the tension between consent and stability. It structures the way that tension operates within the legal order, and its systemic effects become visible only in concrete instances of objection.

## Normative Contestation, Persistent Objection and Systemic Instability

The analysis that follows adopts a systemic-functional perspective. Rather than weighing the merits of individual objections, it traces how the doctrine produces stabilising or destabilising effects under different combinations of timing, entrenchment and recognition. The three disputes examined here are

not a representative sample of all objections to custom. They are illustrative cases that make visible the different mechanisms through which the doctrine generates instability or fails to resolve it.

The previous section set out the doctrine's conceptual and functional limits. Its systemic consequences emerge in concrete manifestations of state practice. Existing discussion has focused largely on how custom forms and when departure from emerging norms is permissible. Yet the doctrine also determines who may remain outside the rules, on what conditions and with what systemic consequences. This dimension is particularly important in a decentralised order whose norms depend on stabilising expectations among diverse actors.

The problem is sharper still for states that enter the international order under conditions of limited institutional capacity, fragile political authority or incomplete constitutional consolidation. In such settings, attitudes towards international norms are often shaped by urgent security pressures and material constraints rather than by settled bureaucratic processes. Conduct that formally appears as consent may, in practice, reflect short-term accommodation rather than durable acceptance. Where reliance on the doctrine requires early, clear and consistent opposition, these asymmetries acquire legal significance and distribute access to legal exemption unequally (Benvenisti, 2014, pp. 19–20; Carothers, 2002, pp. 9–11; Chimni, 2018, p. 23; Giorgetti, 2010, pp. 471–474).

The stakes are higher again in politically sensitive fields such as maritime delimitation, sovereignty claims, the use of force and territorial regimes. In these areas, customary law does more than regulate conduct. It coordinates expectations and reduces the risk of escalation. Where the content or applicability of norms remains contested, legally recognised routes of exit can harden the positions of the parties and turn legal uncertainty into instability.

The Cod Wars between Iceland and the United Kingdom illustrate the instability generated by uncertainty over the temporal limits of emerging norms. From the 1950s onwards, Iceland progressively extended its fishery zones, while the United Kingdom rejected the binding force of these unilateral claims and relied on the earlier understanding of the freedom of the high seas. At the core of the dispute lay not fisheries policy as such, but the absence of any clear threshold indicating when a new rule had crystallized and when objection lost its legal effect. This uncertainty over when custom had formed, whom it bound and whether objection remained timely spilled beyond legal argument into direct confrontation and recurrent crisis.

The dispute was settled in practice by agreement between the two states in 1976. The 200-nautical-mile exclusive economic zone received general regulation only later, within the framework of the United Nations Convention on the Law of the Sea, article 57 of which fixes the outer limit of the EEZ at 200 nautical miles (United Nations Convention on the Law of the Sea, 1982, art. 57). These two developments should not be treated as parts of a single causal chain. The bilateral agreement ended the crisis, while the later entrenchment of the EEZ regime supplied, after the fact, the general threshold whose absence had made the dispute so intractable.

The dispute also produced the judicial assessment that most directly bears on the issue. In Fisheries Jurisdiction (United Kingdom v. Iceland), the Court separated the elements it accepted as customary, namely the concept of a fishery zone and the preferential rights of a coastal state specially dependent on its fisheries, from Iceland's broader claim to a 50-nautical-mile exclusive fisheries jurisdiction. It held that the broader claim was not opposable to the United Kingdom. The reasoning thus turned on which elements had acquired customary status and against whom they could be invoked, rather than on a valid objection to a settled rule. At the judicial level, this confirms that the live issue in the Cod Wars was an uncertain threshold of crystallization (Fisheries Jurisdiction, 1974, paras. 52–67; Ingimundarson, 2003, pp. 88–94; Steinsson, 2016, pp. 256–261; Steinsson, 2018, pp. 339–355).

The Cod Wars thereby expose a structural problem at the heart of customary law: the absence of a clear threshold separating permissible normative contestation from objection that has lost its legal effect. It is here that the function of the reopening limit emerges. The limit marks the point at which the legal consequences of norm formation can no longer be undone retroactively by subsequent objection. As shown above, North Sea supplies no direct authority for such a limit. It provides, rather, a strict evidentiary threshold of crystallization. Its effect here is confined to clarifying when a rule is entrenched enough for the question of late objection to arise at all. What the Cod Wars reveal, then, is less a maritime dispute as such than the systemic cost of the absence of a reopening limit: serious disruption followed by the later emergence of a general threshold capable of restoring stability.

The South China Sea presents a different problem. Overlapping claims to maritime jurisdiction and rival narratives of historic rights have produced lasting uncertainty over how asserted regional claims relate to the framework of the United Nations Convention on the Law of the Sea. It would be inaccurate to characterise the problem as a late objection to a settled rule. The core question is whether the historic-rights claims advanced by China possess sufficiently definite normative content and whether they can be reconciled with the treaty-based allocation of rights and entitlements under UNCLOS (Chubb, 2021, pp. 79–84; Hermez, 2020, pp. 559–560; Liu, 2019, pp. 262–266; Wang, 2017, p. 203).

Viewed through the model developed in this study, the dispute brings the justification threshold to the fore. A regional or historic claim of right cannot rest on general assertion or long-standing practice alone. It must articulate the normative content asserted, its legal basis, its territorial or maritime scope and its relationship to the UNCLOS framework. The arbitral award therefore matters less as a grant of personal exemption from an already crystallized norm than for what it says about the legal intelligibility and scope of the differentiated position asserted (South China Sea Arbitration, 2016, paras. 261–278).

Claims of differentiated participation are also found in the practice of major powers. When the United States proclaimed its exclusive economic zone in 1983, it separated the elements of the UNCLOS regime it was prepared to accept from those it declined to regard as binding, most notably the deep seabed mining regime. Although not expressed in the language of persistent objection, the episode shows that a state may distinguish, within a broader legal regime, between the elements it accepts and those it contests (Peirce, 1983, pp. 581–586, 596–601).

The Nicaragua case, which addressed the customary status of the prohibition on the use of force, adds a further layer to the analysis by focusing on the qualitative adequacy of objection as much as on its existence. Although the Court did not apply the persistent objector doctrine, its reasoning on the identification of custom bears directly on the quality of objection. Conduct inconsistent with a rule does not, in the Court's view, extinguish the rule by itself. Where states characterise deviations as breaches, or defend them by invoking exceptions and justifications rather than by asserting a rival rule, their conduct confirms rather than weakens the rule and carries weight for opinio juris.

It follows that a state wishing to remain outside a norm cannot achieve that result merely by acting inconsistently with it. It must present its conduct as the exercise of a distinct legal entitlement, rather than as a justified departure from a rule whose authority it essentially accepts. Objections lacking behavioural consistency, or voiced only in political statements, are therefore less persuasive as claims to persistent objector status. The judgment establishes that objection cannot be reduced to a formal declaration. It must be supported by a consistent pattern of conduct evincing genuine legal conviction beyond strategic interest. This conclusion is consistent with the qualitative justification threshold developed in this study, which assesses the persuasive force of an objection by reference to behavioural consistency and a legally grounded alternative framework (Military and Paramilitary Activities in and against Nicaragua, 1986, paras. 186, 207–209, 232–236).

The relationship between persistent objection and acquiescence is nonetheless more intricate than this binary suggests. The maxim qui tacet consentit assumes that silence is unequivocal, whereas a state's conduct may send mixed signals. A state may consistently reject a norm in its official statements while partially aligning its behaviour with that norm in certain fields. This creates ambiguity in protracted disputes. If objection is maintained verbally while conduct selectively converges with the contested norm, does the objection retain its legal effect, or does partial compliance amount to acquiescence that weakens its persuasive force?

International jurisprudence supplies no mechanical formula. It points instead to a context-sensitive assessment. In Fisheries, the Court treated the United Kingdom's prolonged failure to object to the Norwegian straight-baseline system as acquiescence. In Gulf of Maine, the Chamber stated that conduct can amount to acquiescence only where it is sufficiently clear, sustained and consistent. More recently, the South China Sea arbitration, though not a judgment of the International Court of Justice, underlined the importance of distinguishing asserted historic rights from entitlements arising under UNCLOS. The tribunal accepted that, to the extent the two were incompatible, historic rights had to be regarded as superseded by the UNCLOS regime rather than as a parallel rule (Delimitation of the Maritime Boundary in the Gulf of Maine Area, 1984, paras. 145–146; Fisheries, 1951, pp. 138–139; South China Sea Arbitration, 2016, paras. 261–278).

A similar caution appears in the ILC's 2018 conclusions. The Commission stresses that state practice and opinio juris must be assessed together, and that silence carries no legal meaning of its own in the abstract. Its significance depends on whether a reaction was called for and whether the circumstances

reasonably permitted inaction to be read as acceptance. This supports the thesis that claims of persistent objection must be assessed by reference to how the objection was expressed, how it was maintained and how it is situated in the wider legal context, not by timing alone (ILC, 2018, pp. 125, 152, Conclusion 15). The literature likewise accepts that the requirement of persistence does not demand a declaration repeated without exception in every forum. Where a state's position is clearly known, the requirement must be assessed pragmatically in light of the concrete context (Colson, 1986, pp. 965–967).

Whether, and to what extent, partial compliance affects the persuasive force of a claim of persistent objection cannot be resolved in the abstract. Its consequences become visible only in concrete disputes in which the consistency of state conduct over time is itself contested.

The Aegean dispute is the clearest example of a second and more difficult dimension, one that strict temporal limits alone cannot address. The analysis that follows assesses the merits of neither the Greek nor the Turkish legal position. The Aegean is examined not as a case to be adjudicated, but as an illustration of the structural dynamics by which a sustained challenge to crystallization or regional applicability, where the threshold of legal recognition is low, produces a durably fragmented normative terrain rather than a passing disagreement.

At the centre of the dispute lies the breadth of the territorial sea to be applied to islands in a semi-enclosed sea. Greece maintains that the twelve-mile rule expressed in article 3 of UNCLOS has acquired customary status and is binding, a view Greek scholarship generally supports by stressing both that status and the significant maritime effect of islands in delimitation. Türkiye contends that it is not a party to UNCLOS and that it has consistently rejected the characterisation of the rule as customary in the Aegean. Analytically, this position is closer to an objection directed at the crystallization or regional applicability of the rule than to a classic claim of persistent objection against a settled rule. Its significance for this study lies not in whether it satisfies the formal conditions of the doctrine, but in its functional resemblance to persistent objection, in that it denies the binding force of a rule others regard as settled.

Nor is the position a merely political refusal. In his third report on the identification of customary international law, ILC Special Rapporteur Wood (2015, para. 212) records Türkiye's statements at the Third United Nations Conference on the Law of the Sea as a documented instance of persistent objection to the twelve-mile rule. Türkiye has also carried the position into its domestic law: the Territorial Waters Act No. 2674 of 1982 retains a breadth of six nautical miles and makes any extension conditional on the principle of equity and on account being taken of all the relevant characteristics of the sea concerned (Territorial Waters Act, 1982, art. 1). That Türkiye expressly supported Conclusion 15 during the ILC's work further indicates that its stance rests not on a rejection of the doctrine's general framework, but on a position maintained within its terms (Bilge, 2022, p. 874).

The legal positions of the parties are accompanied by reciprocal allegations concerning military and research activities. Greece asserts that Türkiye conducts amphibious exercises and seismic surveys in

areas Greece regards as subject to its sovereign rights, while Türkiye formally alleges that Greece has militarised the Eastern Aegean islands contrary to the relevant treaties. These allegations are treated here not as established facts, but as rival official narratives that entrench the absence of common normative ground (Başeren, 2021, p. 19; Greece, 1995a; Greece, 2021; Greek Ministry of Foreign Affairs, 2021; Kozyris, 1997, pp. 21–65; Republic of Türkiye Ministry of Foreign Affairs, 2022a, 2022b; Schaller, 2022, pp. 555–556; Siousiouras & Chrysochou, 2014, pp. 12–13, 38–40; Türkiye, 1995, pp. 2–3; Türkiye, 2021; Van Dyke, 2005, p. 83).

This divergence is not a transitional stage on the way to convergence. It is a structurally entrenched dispute over the existence and applicability of the norm. Greece treats the rule as general and binding, while Türkiye maintains that, in light of its continuous objection and regional particularities, the rule does not bind it. The result is not legal pluralism but the absence of common normative ground. The parties do not merely disagree about the rule; lacking any shared point of reference to structure their relations, they operate with fundamentally incompatible understandings of what the law is. This reflects the structural effect of a system that permits differentiated positions on bindingness within the same normative space, allowing mutually incompatible claims to coexist over long periods. Unlike the Cod Wars, the Aegean shows a situation in which uncertainty was never resolved and objection ceased to be temporary, becoming instead a permanent feature of the dispute.

This permanence has direct consequences for systemic stability. In the absence of a common legal point of reference, conduct is coordinated through strategic signalling and displays of force rather than through shared expectations. Upon ratifying UNCLOS in 1995, Greece placed on record a declaration reserving, under article 3 of the Convention, the right to extend its territorial sea to twelve nautical miles at any time (Greece, 1995b). In the same year, the Grand National Assembly of Türkiye unanimously adopted a resolution authorising the Government to take all measures it deemed necessary, including military measures, should Greece extend its territorial sea in the Aegean beyond six nautical miles. Greece has consistently treated the resolution as a casus belli, while Türkiye describes it as a political warning rather than a declaration of war. This reciprocal characterisation shows that the dispute has moved beyond doctrinal disagreement into a structurally unstable environment of confrontation (Grand National Assembly of Türkiye, 1995, pp. 135–137; Greek Ministry of Foreign Affairs, 2021; Republic of Türkiye Ministry of Foreign Affairs, 2018).

The Aegean thus marks a limit that temporal restrictions alone cannot cure: even where a state's objection is clear and continuous, differentiated positions on bindingness can prevent common norms from taking hold. The problem, accordingly, is not exhausted by the question of when objection was raised. It concerns the conditions under which objection is to be regarded as legally persuasive.

In practice, states usually avoid invoking the terminology of persistent objection explicitly, yet they rely on the doctrine's functional logic. They do so by denying the binding force of norms that others regard as settled, often on the ground that a norm never crystallized or never became binding. The claim here is not that the formal boundaries of the doctrine have expanded in practice; strictly applied, they have not.

The point is that the debate surrounding the doctrine helps to explain the systemic effects of a wider family of objections directed at crystallization, bindingness and regional applicability. These objections share the doctrine's functional logic and together keep open a zone of flexibility within the system.

This assessment must not lose sight of the unequal history of customary law. Modern international law developed within Eurocentric and colonial structures, and the law of the sea in particular has often tracked the development of the capacity to use and exploit maritime spaces. These asymmetries turn the possibility of objection into a genuine question of legitimacy. They do not show, however, that any norm should remain indefinitely open to unilateral revision (Chimni, 2018, pp. 6–9; Gross, 1948, pp. 20–21; Hershey, 1912, pp. 56–59; Kaya, 2023, p. 27; Koskenniemi, 2001, pp. 132–136; Nussbaum, 1947).

The need for common normative ground is compatible with a critical view of how rules emerge. Customary rules can be contested, changed or replaced. Such change, however, comes about through a renewed process of norm formation resting on sufficiently broad state practice and opinio juris, not through a single state's later declaration that it will no longer be bound (Byers, 1999, p. 34; Hakimi, 2020, pp. 1506–1517; Lukashuk, 1989, pp. 513–514; Weil, 1983, p. 442).

## Persistent Objection in the Face of Jus Cogens: The Domingues Example

One of the most concrete appearances of the doctrine arose outside the jurisprudence of the International Court of Justice, before a regional human rights body. In Domingues v. United States, the United States expressly relied on persistent objector status, arguing that it had maintained continuous and consistent opposition to the customary rule prohibiting the execution of offenders who were under eighteen at the time of the offence. The Inter-American Commission on Human Rights rejected the defence on the ground that the contested prohibition had passed beyond ordinary custom and hardened into a peremptory (jus cogens) norm (Domingues v. United States, 2002, paras. 48–49, 106). The earlier Commission decision in Roach and Pinkerton v. United States, together with the subsequent domestic development in Roper v. Simmons, completes this line of authority (Roach and Pinkerton v. United States, 1987; Roper v. Simmons, 2005).

The case is instructive for this study in two respects. First, it weakens the familiar claim that persistent objection has never actually been invoked, since the doctrine was raised as a defence in a contested proceeding and ruled upon. Second, the basis for rejection converges with this study's treatment of jus cogens as an outer limit: persistent objection is inoperative against peremptory norms. Some writers indeed read the decision as implicit confirmation that a persistent objector defence could, in principle, succeed where the norm concerned has not attained jus cogens status (Green, 2016). Domingues is, however, not a binding judgment but a non-binding Commission report of recommendatory character. Its value lies less in proving the doctrine's place in positive law than in clarifying its operative logic and outer limit.

The case also prefigures the qualitative dimension of the justification threshold developed below. The Commission accepted that, even leaving the formal conditions of the objection open, a persistent objector defence could produce no legal effect against a norm of jus cogens character. The failure stemmed not from timing or inconsistency, but from the status of the norm against which the objection was directed. Turkish scholarship draws the doctrine's limit at the same point, noting that views defending the possibility of persistent objection against peremptory norms remain exceptional today (Bilge, 2022, pp. 889–892; Öktem, 2013, pp. 459–460).

Jus cogens serves here not as an independent basis of the argument, but as a point of comparison marking its limits. The peremptory character of these norms signals the domains in which the legal order permits no unilateral exit. The warning in critical scholarship that claims of universality may reflect historically specific value systems is well taken. The significance of the comparison lies not in suggesting that persistent objection and peremptory norms operate alike, but in making visible the outer limit of consent (Anghie, 2005, pp. 1–4, 13–17; Chimni, 2018, p. 23; Mutua, 2001, pp. 201–205; Orakhelashvili, 2006, pp. 7–10; Tomuschat, 1999, pp. 161–162).

The comparison must therefore remain limited. Persistent objection narrows obligation by allowing a qualified and temporally bounded exemption, whereas jus cogens broadens obligation by admitting no derogation. What the two share is not their function but their relation to state will: each restricts the capacity of a state unilaterally to determine what it is bound by. The Hohfeldian (1913) vocabulary is employed as an analytical analogy, not as a claim that the formation of customary law reproduces the bilateral legal relations for which Hohfeld's scheme was originally designed.

## The Constrained Objection Model: Scope, Criteria and Function

The preceding analysis has relied on three concepts: the temporal limitation, the reopening limit and the justification threshold. This section brings them together as a single interpretive model and clarifies their operation through the disputes examined above. The model is not advanced as a statement of settled positive law; it is an interpretive reconstruction. The temporal element largely restates an existing condition. The reopening limit makes explicit a logic implicit in the case law. The justification threshold is a proposal, in part de lege ferenda, for assessing when an objection should be regarded as legally persuasive. Read together, these three elements separate questions that are often conflated: whether a rule has formed, whether a state can claim personal exemption from it, and whether a broader challenge to the rule's scope or regional applicability is legally persuasive.

The first element, the temporal limitation, has the firmest footing in existing doctrine. For a state to claim individual exemption from an emerging rule, it must raise its objection while the rule is still in the process of formation and maintain that objection consistently thereafter. Opposition voiced for the first time after the rule has settled confers no exemption. This element governs only the personal legal position of the objecting state and says nothing, by itself, about the status of the rule for other states (ILC, 2018, Conclusion 15).

The temporal limitation is therefore useful only once it is clear that a rule has genuinely entered the process of crystallization. The Cod Wars illustrate the difficulty that arises before that point. The basic issue was not whether the United Kingdom could claim personal exemption from a settled 50-nautical-mile rule, but whether the content and scope of the new fisheries regime had crystallized at all. The temporal limitation was therefore secondary. Before state practice and opinio juris had produced a sufficiently definite legal footing, the continuing dispute was evidence of an incomplete process of norm formation, not of a late objection that had lost its legal effect. In Fisheries Jurisdiction, the Court separated the elements it accepted as customary, namely the concept of a fishery zone and the preferential rights of a coastal state specially dependent on its fisheries, from Iceland's broader claim to a 50-nautical-mile exclusive fisheries jurisdiction. It held that the broader claim was not opposable to the United Kingdom. The reasoning thus turned on which elements had acquired customary status and against whom they could be invoked, rather than on a valid objection to a settled rule (Fisheries Jurisdiction, 1974, paras. 52–67; Ingimundarson, 2003; Steinsson, 2016).

The Cod Wars also clarify the second element of the model: the reopening limit. This limit concerns a different question and must be kept apart from the temporal limitation with which it is often confused. Whereas the temporal limitation concerns a single state's claim of personal exemption, the reopening limit concerns the general status of a settled norm within the legal order. On this view, opposition raised by a single state, later and in isolation, cannot by itself reopen the settled status of a rule. Unsettling an established norm requires not individual objection, but contrary practice that is widespread, consistent and supported by opinio juris, and capable of generating a new or modified rule.

Understood in this way, the reopening limit does not mean that settled norms can never change. Customary rules can erode, evolve and be replaced. What the limit denies is only that such change can be achieved through late and individual objection rather than through a renewed process of general practice and opinio juris. The limit thus preserves stability without freezing the law's capacity for development. Turkish scholarship likewise observes that a state objecting after the fact assumes a risky position: if its objection attracts the support of other states, the rule may change; if it does not, responsibility for breach may follow (Öktem, 2013, p. 458). The limit's foundation is indirect. It derives from the same logic that gives meaning to acquiescence and crystallization in the case law, and from the ILC's insistence that the legal significance of conduct and silence is determined by context rather than arising in the abstract (ILC, 2018, Conclusions 2, 6–8; Military and Paramilitary Activities in and against Nicaragua, 1986, paras. 186, 207–209; North Sea Continental Shelf, 1969, paras. 70–74).

The Cod Wars show why this limit matters. The absence of a clear threshold separating permissible normative contestation from objection that has lost its legal effect contributed to the instability of the dispute. North Sea supplies no direct authority for a reopening limit, but it does provide a strict evidentiary threshold of crystallization. Its relevance here is confined to clarifying when a rule is sufficiently entrenched for the question of late objection to arise at all. The Cod Wars therefore reveal less a maritime dispute as such than the systemic cost of uncertainty over crystallization: without a clear threshold, states may continue to contest not merely the application of a rule but its very existence.

The third element, the justification threshold, assesses the persuasive force of an objection by its quality rather than by its timing or bare existence. It is the most openly reconstructive element of the model and is presented as an interpretive standard, not as a settled rule. It comprises three connected assessments. The first two are basic conditions of a legally intelligible objection, while the third is a factor that ordinarily strengthens the claim.

First, an objection must rest on accepted methods of legal reasoning and of identifying customary law. It must engage with the practice and opinio juris of other states, rather than rely on a bare assertion of will. This element draws on the ILC's approach to the identification of custom and on the Nicaragua Court's treatment of how departures from rules are to be characterised. Second, the objection must identify with precision the normative content in dispute: which rule is objected to, to what extent, and with what regional or material qualifications. An indeterminate refusal cannot be properly assessed and tends to collapse into an undifferentiated claim of non-bindingness. Third, an objection will ordinarily be more persuasive where the objecting state articulates an alternative normative framework that it accepts as binding (ILC, 2018, Conclusions 2–3, 8, 15; Military and Paramilitary Activities in and against Nicaragua, 1986, paras. 186, 207–209, 232–236).

This third assessment is the most contested, and it has deliberately been framed not as a strict condition of opposability but as a factor enhancing the persuasive force of an objection. The ILC requires that objection be clearly expressed, communicated to other states and consistently maintained. It does not require the objecting state to propose an alternative legal regime, and neither does the model. The narrower claim is evidentiary. A state that does not merely reject a rule but also indicates what regulation should apply in its place makes its position intelligible as a legal stance rather than as opportunistic non-compliance. It thereby becomes harder to dismiss the objection as merely strategic deviation. Where the state offers no such alternative, its objection is not thereby rendered void but it is simply weakened. Under the logic of Nicaragua, it also becomes easier to characterise the conduct as a justified or exceptional departure that confirms the contested norm rather than displacing it.

The South China Sea illustrates this difficulty. The question is not whether late objection can displace an otherwise settled customary rule, but whether a regional or historic claim whose normative content remains contested, and whose relationship to the UNCLOS framework has not been clearly established, can be maintained. The justification threshold therefore asks whether the claim defines a precise rule, delimits its geographic and material scope, and explains its relationship to the treaty-based legal framework governing the same maritime space. This inquiry does not reduce the matter to a unilateral veto, nor does it prejudge the merits of any claim of historic rights. What is examined is whether the differentiated position asserted is expressed as a general denial of bindingness or as a legally intelligible alternative (ILC, 2018, Conclusions 2, 8, 15; South China Sea Arbitration, 2016, paras. 261–278).

The Aegean dispute brings the same threshold into sharper relief. The controversy concerns both whether the twelve-mile rule possesses general customary status and whether it is regionally applicable in a semi-enclosed sea. The matter is therefore not exhausted by a completed claim of persistent

objection. Under the model, a legally persuasive challenge must set out the precise scope of the rule contested and the legal basis of the regional qualification. Türkiye's official documents emphasise the distinctive geography of the Aegean and oppose unilateral extension, but they do not, of themselves, articulate an alternative regional rule defined in all its elements. This does not mean that the objection has gone legally unrecorded: Türkiye's opposition is cited as an instance of persistent objection in the report of the ILC Special Rapporteur and has been given concrete form in domestic law through Act No. 2674 (Territorial Waters Act, 1982; Wood, 2015, para. 212). What the justification threshold requires, beyond this recorded and consistent refusal, is the articulation of the constitutive elements of the proposed regional regulation, that is, its scope, its criteria and its legal basis. The finding does not resolve the merits of the dispute in favour of Greece; it explains only why, for the purposes of this study, a position framed predominantly as refusal remains weaker than one resting on a clearly articulated alternative legal framework (Greece, 1995a; Republic of Türkiye Ministry of Foreign Affairs, 2022a, 2022b; Türkiye, 1995).

The model's position in relation to Conclusion 15 should therefore be stated plainly. Conclusion 15 governs the individual position of the persistent objector, requiring that the objection be raised while the norm is forming, be clearly expressed, be made known to other states and be persistently maintained. These conditions have temporal, clarity-and-communication and persistence dimensions. They affect the opposability of the rule to the objecting state but do not alter the status of the general rule. Within this framework, the temporal limitation rests directly on Conclusion 15's conditions of personal exemption. The reopening limit is not a condition of Conclusion 15 but an interpretive proposal to the effect that a single, late objection cannot alter the status of a settled general norm. The justification threshold is directed at the gap the Commission left open: Conclusion 15 sets out the conditions of persistent objector status or of an individual claim of exemption, but it supplies no qualitative measure of when a claim concerning crystallization, scope or regional applicability is to be regarded as legally persuasive. The model therefore neither contradicts Conclusion 15 nor seeks to replace it. By separating the individual validity of an objection from its persuasive force, it systematises the qualitative field of assessment that the Commission left open.

A final clarification concerns the model's scope. The temporal limitation applies, strictly speaking, only to persistent objections raised against a rule that has genuinely crystallized. The reopening limit and the justification threshold, by contrast, extend to the wider family of objections examined in this study: denials of crystallization and of regional applicability, which share the functional logic of persistent objection even where they do not satisfy its formal conditions. The model should accordingly be read not as a test peculiar to a single doctrinal category, but as a framework for assessing when, within this family of objections, a differentiated position on bindingness ceases to be an avoidable source of instability and deserves to be regarded as legally persuasive.

This synthesis clarifies the model's function. The model does not eliminate normative contestation, nor does it predetermine the merits of contested claims. It separates three questions that are frequently run together: has a rule formed; can a state claim personal exemption from it; and is a broader challenge to

the rule's scope or applicability legally persuasive? Keeping these questions apart allows customary international law to remain open to development without reducing its binding character to unilateral preference.

## CONCLUSION

The tension between state consent and the binding force of customary law is not a defect that can be cured by choosing between sovereignty and universality. It is a constitutive condition of a decentralised legal order. Persistent objection, in turn, should be understood not as a subjective right of unilateral exit from binding law, but as a narrow mechanism for managing that condition.

This study makes three principal contributions. The first is to separate persistent objection properly so called from the denial of crystallization and of regional applicability. The second is to reconceptualise persistent objection as a conditional mechanism of stability whose legal weight depends on timing, entrenchment and the quality of the claim. The third is to develop the constrained objection model, which identifies when differentiated positions on bindingness cease to be an avoidable source of instability and may instead be regarded as legally persuasive.

The case studies show why timing alone is not enough. The Cod Wars turned on an uncertain threshold of crystallization. The South China Sea exposes the difficulty of maintaining regional or historic claims whose normative content and relationship to the UNCLOS framework remain contested. The Aegean demonstrates the need for precise claims about both the rule objected to and the regional framework proposed in its place. The comparison with jus cogens serves a more limited function: it marks the outer limit of consent and confirms that state will is neither wholly determinative nor legally insignificant.

The constrained objection model accordingly combines the temporal limitation, the reopening limit and the justification threshold. The third element is not an independent condition of legal opposability, but an instrument for identifying what makes a claim credible as a legal position.

In the end, customary law could not remain stable if every state could reopen a rule by unilateral objection. Yet objection also loses its legal significance when it is reduced to silence, bare refusal or non-compliance. Narrowly construed, and viewed within the model developed here, the persistent objector doctrine opens a limited space between these two extremes: a space in which objection carries legal meaning only when it is timely, legally intelligible and assessable within a shared framework of state practice and opinio juris.

## Declarations

# Competing Interests

The author declares that there are no competing interests.

### Ethics Approval

This article is a doctrinal legal study and does not involve human participants, human data, animals, clinical material, interviews, surveys, or experimental procedures. Therefore, ethics approval was not required.

### Consent to Participate

Not applicable.

### Consent for Publication

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Y.C.K. solely conducted the research and wrote the manuscript

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Data sharing is not applicable to this article as no datasets were generated or analysed during the current study.

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