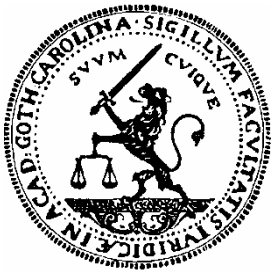

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Persistent objector – The demise of a hero?

Master thesis
20 points

Supervisor

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International law

Spring 08

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Summary

The principle of the persistent objector strikes at the heart of international law creating uncertainty over issues as how customary international law is created, whom it binds and how states actively can evade being bound by certain customary international laws. The mere existence of this principle gives rise to a great number of diverging interpretations.

The study presented herein analyses the principle of the persistent objector from both a normative and a positive viewpoint. In doing so, it is essential to first clarify the concepts of state consent, state sovereignty and customary international law since these are prerequisites for any discussion of the principle. If states actively have to consent to being bound by emerging customary international law, then the importance of state sovereignty is maintained and therefore it will be easier for a state to gain position as a persistent objector by lack of consent. If however, the importance of state sovereignty is not maintained and state consent is not paramount for the creation of customary international law then a majority of states can claim the persistent objector is in violation of international law.

Initially the reader is provided with the broad corpus of scholar works on the subject of the persistent objector, alongside relevant case law and treaties. Hereby the existence and contemporary importance of the principle is provided for.

It is then shown how a theory of state sovereignty must contain flexibility and adoptability to remain usable. Customary international law must also contain an element of majority decision making, although universally binding, to find a place in this globalizing world.

The boundaries of the principle are set by analysing it in comparison to four areas where norm conflict is likely to occur. Consequently, it is shown how subsequent objectors and new states cannot become persistent objectors after the emerging rule has become a law, since this would bring to much

instability to the international system as such. Thereafter this thesis handles the issue of whether it is possible to be a persistent objector to laws within the human rights regime. Since such a development would be detrimental to both the regime and the principle, the answer is no. Lastly, the principle of the persistent objector is analysed in the light of rules of jus cogens. It becomes evident that no state can be a persistent objector to a rule of jus cogens since these rules, by nature are peremptory.

In conclusion, this thesis finds a place for the principle of the persistent objector in a time and place where answers are greatly needed though hard to come by.

Preface

I would like to thank my faculty for insight and knowledge and my family and friends for support and encouragement. You are all sine qua non.

Abbreviations

Arts	Articles
CIL	Customary International Law
CAT	Convention Against Torture
EU	European Union
Hon	Honorary
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Social, Cultural and Economical Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILR	International Law Review
NGO	Non-Governmental Organisation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNTS	United Nations Treaty Series
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

1 Introduction

1.1 Introductory notes

Alongside treaties and general principles of international law, customary law is the basis on which we build all international law[1]. Customary international law is binding upon states and acts contradictory to such a norm constitutes an internationally wrongful act. As far, there is consensus amongst the writers. However, there is a rather substantial lack of agreement regarding questions such as how customary international law is created, whom it binds and how states actively can evade being bound by certain customary international laws.

For over half a century, the principle of the persistent objector has been a topic of discussion in the literature of international law. 1985 Ted Stein, Professor of International Law at the University of Uppsala, described the principle as follows: ”[...] a state that has persistently objected to a rule of customary international law during the course of the rule's emergence is not bound by the rule[...]”[2]. Quite rapidly answers are called for to the questions of who can be a persistent objector, by what procedure can one become a persistent objector and what effects of international law can come out of someone holding such a status. These aspects and many more are dealt with in the doctrine.

A quite tangible majority of the writers agree that there is such a principle[3], but there is disagreement upon exactly how this principle is constructed and what consequences it could be allowed to give. A question substantially dealt with is the one of how much emphasis should be put on the consent of single states when customary international law is being formed. If the principle was to be applied as described by Stein, it would work as a

[1] Statute of the International Court of Justice, adopted June 26 1945, 59 Stat. 1031, TS No. 993, UNTS xvi art 38.1

[2] Ted Stein, “The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law”, 26 *Harvard International Law Journal* 457 (1985), p 457

[3] Charney, J.I. “The Persistent Objector Rule and the Development of Customary International Law”, *British Yearbook of International Law* 56: 1, (1985) p 2.

legitimate way for states to avoid being bound by customary international law for which they have not given their consent. However, this consequence angers as well as pleases.

This discussion has brought forward many prominent writers from several different areas of international law solely because the principle touches upon some of the most fundamental questions in international law: The formation, and for that matter the un-formation, of customary international law.

I here intend to, in a summarizing fashion, reproduce the highlights of the debate regarding the principle of the persistent objector from the different angles portrayed in the doctrine.

1.2 Purpose and delimitation

The purpose of this thesis is to investigate whether there exists a principle of the persistent objector at force in customary international law today. It will also be examined how far reaching such a principle can be allowed to be. In doing so, I will have to elaborate on such questions as:

- How exactly is customary international law made?
- Is the principle of the persistent objector in force in contemporary international law?
- In which situations, if any, should there be a limitation to the principle of the persistent objector?

In this thesis I will limit my work to two main areas. First, the legal justification of the principle and secondly, the definition or limiting of the principle. In defining the principle I have selected four areas to help frame the principle. These areas are subsequent objectors, new states, human rights and rules of jus cogens.

1.3 Outline

Firstly, I will explain and give a short introduction to the principle of the persistent objector and general setting in which customary international law

is created. In doing so, I will also illuminate the topic of state sovereignty, since it is a vital issue for the outcome of this thesis. To illustrate the problems, these issues will be examined from the view of the voluntarist as well from the view of the world communitarian. This contrast will be main theme throughout the thesis.

Thereafter follows a review of the judicial cases from the highest international instances and the publications of the most highly qualified publicists relevant to the principle in focus. Here, the four main problems facing the principle of the persistent objector, subsequent objectors, new states, human rights and rules of jus cogens, are presented.

Lastly, I will analyze the arguments put forward in the cases and the doctrine to assess the legal positions regarding the principle. Doing so, it is of significance to first analyze state sovereignty and customary international law. I will try to pinpoint the legal status of the principle in regard to areas where questions and conflicts are most likely to arise. I will also make a prediction on where the principle will be in the future.

1.4 Method and material

The thesis has its starting point in Ted Steins publication “The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law” which became the launch of the modern discussion of the principle.

Since this thesis touch upon state sovereignty as well as CIL and the principle of the persistent objector, the amount of doctrine available is substantial. The first step was to read and evaluate the doctrine. The large number of books and articles written on the subject of the persistent objector provides argumentation for many different lines of thought. Therefore, the task was to find some kind of authoritative source while examining the doctrine. One could discover early on, two diverging main lines of argumentation, voluntarists and world communitarians. It became necessary then, only to use the academic work of the most renowned scholars or the

ones with the most specialized knowledge. However, both main lines were equally supported.
The authoritative source needed, was found in the opinions of the ICJ, the ICTY and the IACtHR. The conference report from the ILA proved very useful in examining the creation of CIL. The source of treaties proved less important in this thesis since it mostly dealt with customary law. However, the UDHR, the UN Charter and the VCLT turned out to be of use.

In the analysis, personal opinions and argumentations are interlaced with the findings of the examination earlier preformed. To support the analysis, it proved helpful to examine the opinions of several other governmental and nongovernmental organizations.

To increase the credibility and range of the thesis it has been a secondary objective to use sources from other academic areas than strictly legal, if possible and appropriate. It has also been a secondary objective not to let the thesis only reflect European or Western values. This has been done by using the judicial decisions of not only European courts and by using works of scholars from different parts of the world and from different areas of the academic world.

2 Doctrine on Customary International Law

2.1 Doctrine on the formation of CIL

Within international law it is accepted that the statute of the ICJ art. 38.1 accurately describe the sources of international law. The sources are international treaties, customary international law and general principles of international law. For customary international law to be made, two criteria's are to be satisfied. A general practice of states is to be shown and this should be accepted as law by the practitioners (opinion juris). These two criteria's are also called the objective criteria (general practice) and the subjective criteria (opinion juris). However, it is not totally determined in what magnitude these have to exist. Customary international law is in many ways a source with an informal construction procedure and therefore it is practically impossible to determine exactly how much general practice and how much opinion juris is required for law to be made. Through the years, some guidelines have crystallized though. In the praxis of the ICJ is shown that a practice has to be general, constant and uniform[4]. ILA demands the practice to be extensive and representative[5].

Opinio juris demands that the actions of states not only express goodwill or cultural/religious customs but rather a genuine conviction that the actions pursued are in line with international law. It therefore becomes a question of evaluating how states are thinking and reasoning. To evaluate this subjective "intent" of states one often looks upon the different actions that a state can

[4] *North Seas Continental Shelf Case* (Denmark vs. Germany),20 Feb 1969, ICJ § 77 and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 21 Jun 1970, Advisory Opinion of 21 June 1971, ICJ § 22, also International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Principle 9 and *Continental shelf case* (Libya vs. Malta) , 3 Jun 1985, ICJ § 44

[5] Ibid not 4, International Law Association, Final Report, Principle 12

undertake. Be this the exercise of prerogatives of the states but also public statements or correspondences etc.

The first problem relevant to this thesis is the demand for generality of the practise. How many states have to act in a how uniform way for a practice to be a potential customary law? Can a majority of states make decisions that become binding upon a few uninterested or protesting states? In the end, it will become a question of how to equilibrate the state sovereignty and need for flexibility and functionality of the international community.

Is it necessary for all states to actively take part in the process of decision-making or do we require some kind of a qualified passivity? The doctrine is not quite unified here.

2.1.1 Voluntarist views on CIL

One group that has crystallized is the so-called voluntarists. Their main argument is that since there is no supranational legislative body of the world, there can be no higher entity than the state. Therefore, the states have an absolute power to decide when a law is to be made or not. The name voluntarists originate from the belief that consent is an absolute precondition for customary international law to be made. The absolute power comes out of the fact that state sovereignty cannot be indisposed by any higher authority. For a state to be bound by a rule of customary international law, as a prerequisite, you would have to show that the state has consented, or volunteered, to be bound by that rule at an earlier period of time.

Still within this camp (voluntarists), there are only a few scholars who argue that every state has to have been active in the decision-making process. The others rather speak of constructing consent out of different kinds of passivity. Since the lack of consent leads to boundlessness and passivity leads to boundness, the voluntarists demand that lack of consent is to be manifested openly by protest (persistent objector). Most voluntarists consider a state to become unbound by a rule, for which the protest has been

expressed, even though the rule becomes binding upon the rest of the world community. The lack of consent from one state does not stop the state practice from becoming a customary international law and the state practice does not have to be universal for a rule of customary international law to be created.

Some voluntarists take the argumentation a step further and claim that the principle of the persistent objector should apply to new states and states that have gotten an interest in the rule only after the state practice became a law. These states complain after the state practice has become a customary international law and should therefore, by the normal definition, not be able to become a persistent objector. However, these latter complaints will be dealt with in a separate part below.

2.1.2 World communitarian views on CIL

2.1.2.1 Main world communitarian views

A group that, compared to the voluntarists, hold an opposite viewpoint are the so-called world communitarians. They have also been frequently quoted in the literature and they hold the viewpoint that consent is a satisfactory but not necessary requisite for a rule of customary international law to be created. For them the consent of each state is irrelevant for the actual making of the law. Rather, the majority-decision of the world community, or the international body, is the highest legislative order. An uninterested or passive state, that is not active in the decision-making process, will still be bound by the new law. Not because of some kind of qualified passivity but rather because that state has to get in line with the will of the world community. An argument often seen is that in real life there is never any control of whether every state consented to the rule, as this would make the system ineffective and very hard to handle. If a state practice is representative enough, and is supported by especially effected states, then that is enough for the rule to become binding upon all states.

The representativeness also suggests that the state practice of different states could have different weight when construing a new rule of customary international law. If one powerful state opposes the new state practice it can later on become a persistent objector, but if a group of states does the same then the representativeness would not be fulfilled and therefore the rule could not become law. Therefore, a group of powerful states can hinder the birth of new customary international law in a manner not available to groups of small states of the same number.

ICJ in the Nicaragua-case supports the teachings of this group, where is stated that:
"[...] The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule..... The Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. [...]" [6]

As well the North Sea Continental Shelf Case seems to support this viewpoint:
"[...] Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked. [...]" [7]

[6]Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), 27 June 1986, ICJ, point 186
[7] North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands: Federal Republic of Germany/Denmark), 20 Feb 1969, ICJ, point 74

2.1.2.2 Radical world communitarian views

Unlike the voluntarists, the world communitarians, as a group, do not agree on if a state can enjoy status as a persistent objector. For example, the current ICJ-president Rosalyn Higgins is convinced that a state should never be able to enjoy boundlessness from customary international law. She argues that the principle of the persistent objector is useful for states when negotiating as to whether new customary international law has been made or not. A state can protest and object persistently until the rule becomes a law in an attempt to change the views of other states. However, when the law is in place it binds even the most resilient of states because of the will of the world community. If the objecting state persists in its dissident way it would violate international law and could be held responsible therefore.

One must add though that this is not the majority opinion within the world communitarians. The majority of these writers argue that states get bound by international law unless clear and persistent objections have been rendered.

Even though the assumptions put forward by the voluntarists are attractive in theory, it cannot find much support in the actual interactions between states. For the consent to be a necessary, not only sufficient criteria for customary international law, state sovereignty would have to be stronger than any majority decision of the world community. The voluntarists presuppose a kind of Westphalian state sovereignty where states are highly independent of each other. However, the interdependency of the international body today is quite high. States cannot stay unaffected by each other. State sovereignty is today not as unimpeachable as it once was. The world community seems more interested in peace, stability and security than in every states unequivocal right to be sovereign and not to be bothered. To further analyze how much regard should be given to state sovereignty, the concept must be examined more closely.

2.2 Doctrine on State sovereignty

When examining the importance of state sovereignty in the making of customary international law, an adequate starting point would be the UN charter, which states that all states possess a sovereign equality[8]. State sovereignty by one definition, is entailing the competences, independencies and equalities of states, another is "[...] that absolute and perpetual power vested in a commonwealth [...]"[9]. Nevertheless, what does that mean exactly? To figure out what sovereignty entails, it is essential to examine its origin and development.

Westphalia

The concept of state sovereignty as we know it today has roots that go back to the year 1648. This was the end of the thirty years' war also known as the peace of Westphalia. This was the first large-scale modern peace between the state-like entities of Europe. The peace-making entities wished to create a long lasting peace and this was to be achieved by dividing Europe into inviolable autonomous territories.

The kind of sovereignty that was created at the peace of Westphalia (further on "The model of Westphalia") had two founding pillars; Territory on the one hand and autonomy on the other.[10]

The first pillar meant that political power was to be exerted over a specified demarked territory. The opposite of this would be power exerted based on religion, tribal membership or likewise mobile criteria. That is not to say that territorial borders were as fixed as they are today. Overlapping spheres of power frequently existed on the European continent[11].

[8] Charter of the United Nations, 1 UNTS XVI, entered into force 24 October 1945 art 2.1
[9] Knutsen, Torbjørn: A History of International Relations Theory; 2nd Edition; New York: Manchester University Press, 1997, p. 73.
[10] Stephen Krasner, "Compromising Westphalia", *International Security* 20:3 (1995/6), p 1
[11] Lecture by Rouzbeh Parsi (28/2 07) "History of Europe", Lund: CTR Human rights 101, Lund University

The second pillar stated that no one from outside of the territory had the right to influence or coerce the ruler of that territory. This was an attempt to decrease the power of the church over the worldly lords but also to make the states inviolable towards each other. The treaty signatories, however, never intended for this to apply outside of Europe and hence colonialization was not a violation of any state sovereignty. Neither did it mean that the rights would originate from the people in a right to self-determination. The right to exert autonomous power belonged solemnly to the hegemony of the territory.

A common objection of international law towards "the model of Westphalia" is that powers of governance are now seen as constituted by the people and not by the hegemony. A state is a united people and not a sovereign and untouchable ruler. Therefore, evolution of governance has brought a rule of man into a rule of law.

Philosophers

For half a millennium state sovereignty has been discussed amongst the scholars. Jean Bodin described state sovereignty in the 16th century as a power vested in a commonwealth, everlasting beyond every one human being and limited only by God and the ruler himself. Bodin considers that since no worldly power is bigger than the state, there can be no interstate relationship other than lawlessness and anarchy[12].

For Thomas Hobbes, in the 17th century, the concept of sovereignty is closely connected to the power of the ruler. Sovereignty is the rulers' absolute and unrestricted force[13]. "[...] The rulers are the state; their interest the state's interest; their will the state's will [...]".[14] The ruler could attain sovereignty by gaining knowledge, education, manners and allies.

Gottfried Leibniz, in the 18th century, regards the ruler to be the absolute power within a territory, who has the almighty authority, but also the entire duties. For him the show of sovereignty is the actual and present power of

[12] Ibid not 9 Knutsen, 1997, p. 76.
[13] Ibid not 9 Knutsen, 1997, p. 105.
[14] Ibid not 9 Knutsen, 1997, p. 105.

the ruler to constrain subjects on his own territories[15]. Leibniz designed a concept of sovereignty that demanded the presence of three indispensable conditions. These are a minimum size of territory, the so called majesty (the ability to demand obedience from the subjects), and military control over the realm.

For both Hobbes and Leibniz God was seen as irrelevant for justification of the power of the ruler.

Common for these three thinkers is, if anything, that they consider state sovereignty to be the absolute essence of interstate relationships and that they present a very real political view of state sovereignty coloured by their respective timeframes.

Contemporary

Several other models of sovereignty have been discussed in the literature. What they all have in common is that they see "the model of Westphalia" as too stiff and inflexible and that it does not reflect the world in which we live. As mentioned earlier, no state can exist in a vacuum with no contact with or influence by other states. This develops a need for a more flexible model of state sovereignty that to a larger degree makes allowances for the border-crossing way of conducting life that exists today. A model of state sovereignty should also take into consideration the large-scale intergovernmental bodies of cooperation that holds a lot of de facto power in the world community today.

As demonstrated, none of these great thinkers can provide a definition of state sovereignty that can be used today. Therefore, it is of importance to study more contemporary philosophy regarding state sovereignty. In doing so, few people are more renowned or accepted than former Secretary General of the UN Mr Kofi Annan. Annan argues that the world, since the end of the cold war, is turning more and more global. He reasons that, as this happens, state sovereignty will have less and less importance. It does not only decrease, but also is being redefined into a being in service of the people of the world and of the international community and not of the state

[15] Ibid not 9 Knutsen, 1997, p. 91.

governments. He points to the increasing opportunities for the UN to conduct peace missions, the increase in effectiveness of international cooperation and success of human rights[16]. Annan argues that states ought to have a responsibility to protect the people within its borders and in failing to do so, state sovereignty can be breached by the world community[17].

As shown above, state sovereignty has developed from a rigid theory dependent on the good will of a God or a sovereign. One has sought to explain state sovereignty through natural law and sheer power without success. Today, a more positive view of state sovereignty is used, resulting in a more flexible and functionally based theory being applied.

2.3 ILA on customary international law

ILA (International Law Association) is a worldwide NGO whose main objective is to study, clarify and develop international law[18]. ILA has a consultative role towards a plurality of UN organs. In the year 2000, the ILA held a conference in London with the purpose to clarify how customary international law is created. The result was a statement in which the ILA describes some of the most important criteria for the creation of the relevant customary law. Below the ILA's conclusions being relevant for this thesis are listed.

In point 1 (ii) ILA declared: "[...] If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of "general customary international law". Subject to Section 15, such a rule is binding on all States. [...]"
As can be seen here, the ILA has deviated from the notion of every state having to consent to the making of a new rule of customary international law. Neither do they consider that every state has to be active in the process.

[16] International: Two concepts of sovereignty
Kofi Annan. The Economist. London: Sep 18, 1999. Vol. 352, Issue. 8137; pg. 49, 2 pgs
[17] Ibid not 16, Annan, p 49 and also http://www.iciss.ca/report2-en.asp Date: 2008-08-18 Time: 10.00
[18] http://www.ila-hq.org/en/about_us/index.cfm Date: 2008-08-18 Time: 10.00.

If the criteria of extensiveness and of representativeness are fulfilled, and if no persistent protests have been delivered, the new customary international law becomes binding upon all states equally.

Point 2 (ii): "[...] The principles concerning the formation of rules of general customary international law, although similar in many respects to those concerning the formation of particular customary law, are not necessarily identical. [...]"
Here it is noticed that the local customary law not necessary can be treated in the same way as global customary law. This may not seem significant now but will be of importance in the analysis of the Asylum-case below in section 5.4.

Onwards to point 13: "[...] For State practice to create a rule of customary law, it must be virtually uniform, both internally and collectively. "Collective" uniformity means that different States must not have engaged in substantially different conduct, some doing one thing and some another. [...]"
This point is significant since it tell us that states practice does not have to be universal and identical to be able to create a new law. There is some leeway in the process and this indicates that a single reluctant state cannot stop the process of a new law.

In point 14: "[...] For a rule of general customary international law to come into existence, it is necessary for the State practice to be both extensive and representative. It does not, however, need to be universal.
(ii) Subject to the rules about persistent objection in Section 15 below, for a specific State to be bound by a rule of general customary international law it is not necessary to prove that it participated actively in the practice or deliberately acquiesced in it. [...]"
Again, the ILA declares that the development from state practice to customary international law is not so much a unanimous agreement but rather a majority decision of the community of states. If the world

community has reached a consensus, then the single consent of a state could become irrelevant. Without proper objections, the binding effect of customary international law will be universal.

Point 15: “[...] If whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it. [...]”
The ILA declares that the principle of the persistent objector actually exists and sets out some ground rules for it. According to the ILA it must be a state that persistently and openly objects to the state practice of others. Furthermore, this must be done while the rule has not yet transformed into law. If states can fulfill these obligations, they receive boundlessness from the law that emerges. This description of the principle corresponds well with the definition set out by Ted Stein and will therefore serve as a working-definition for this thesis.

Part 3 into p 4: “[...] Customary law is not tacit treaty law. However, this does not mean that consent is wholly irrelevant. [...]”
Here the ILA states that there still is some value to be attributed to consent of the state. On the one hand for customary international law to become binding, an extensive number of states has to consent to the emerging rule. In this process consent is not necessary to prove the binding effect but it is surely sufficient. On the other hand a single objector, by not consenting, will have a hard time hindering the process as such. However, ILA writes that a state can either receive status as a persistent objector or, if the state is significant enough in the relevant field, stop the emergence of the rule altogether. So therefore the consent of states still plays an active role in the formation of international customary law. This also gives show to the representativeness criterion. ILA accepts that there is a difference in power and significance between states and that is something that the principles have to take into consideration.

Point 18. “[...] Whilst the will or consent of a particular State that a practice satisfying the criteria set out in Part II shall be a rule of law is sufficient to bind that State to a corresponding rule of customary international law, it is not generally necessary to prove that such consent has been given by a State for it to be bound by the rule in question, subject to Section 15. Neither is it necessary to prove the consent of the generality of States. [...]”

Once again ILA states that for a rule of customary international law to become binding one does not have to investigate the consent of every state. It would suffice to show a not contradicted way of action that point to a consensus among states. A silent state will neither be seen as an objector nor will cause any problems for the process as such. A majority decision would not contradict the state sovereignty in the creation of customary international law. Therefore consent is not the foundation or the necessary criteria for customary international law.

2.4 Summary

To summarize this chapter it is shown that the issue of the creation of customary international law is closely linked to the issue of state sovereignty. The more emphasis is put on state sovereignty the more important the consent of the state will become and vice versa.

It was also demonstrated that the ILA has taken the position that consent is a sufficient but not necessary base for the creation of customary international law. Rather the ILA accepts the notion of a majority decision procedure in which consensus among states is a far more functional base.

A model of state sovereignty that all states and academics can support has not yet been presented to the world. What can be interesting and relevant for this thesis is that there seems to be a general consensus amongst writers in a revulsion against the model of Westphalia, which demands consent from the state as a prerequisite for all actions affecting the state. Writers rather seem to prefer a more dynamic state sovereignty that regards international cooperation and interdependence as something necessary and indispensable.

State practice and opinio juris must be the basis of all discussions of the making of customary international law according to ICJ-statute art 38.1. In this debate, opinio juris ought not to be as big an obstacle and poses more an issue of securing evidence than a normative problem.

Universality cannot reasonably be a necessary criterion for state practice. Partly because it is not possible to investigate whether the practice of each reaches a sufficient level, and partly in reality such an investigation has never been done or even attempted (the theories of instant customary law cannot be used here since it contains no real state practice, only opinio juris). Lastly, the experts in the field have almost all left the thought of consent as an absolute criterion for the creation of customary international law.

3 Case law

In the *Anglo-Norwegian Fisheries Case* the ICJ made the now famous statement: ”[...] the 10-mile rule would appear to be in-applicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast [...]” [19].

Norway and the UK were disputing over whether the UK had rights to exercise fishing outside the coast of Norway. The UK argued that straight baselines were not allowed to be drawn over bay-areas and that the indention of the bays was not allowed to be more than 10 nautical miles wide. Norway argued that this prohibition was not an accepted customary international law.

In this case, Norway has in a persistent and open way indicated to the UK that Norway does not accept that the UK uses the 10 nautical mile rule. Norway has for a long time, through actions and statements, objected to and resisted the rule, and can therefore not be bound by it.

In the *Asylum Case* the ICJ stated that: “[...] even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it [...]” [20]. In this case, Colombia wanted the ICJ to issue a right of free passage for a Mr Victor Raul Haya de la Torre from the Colombian embassy in Lima to the Colombian border. As a basis for this request, Colombia had unilaterally given Haya de la Torre the status of political prisoner. Colombia wanted this status to be valid in any South American country due to a custom amongst these states to this effect.

The ICJ stated that it could not be shown that an international customary law to that effect actually existed. Furthermore, and relevant to this thesis,

[19] Anglo-Norwegian Fisheries Case (United Kingdom vs. Norway), 18 Dec 1951, ICJ, point 131
[20] Asylum Case (Colombia vs. Peru), 20 Nov. 1950, ICJ, point 277–78

the ICJ stated that even if there was such a law, Peru would not be bound to it by way of persistent objection.

In the *North Sea Continental Shelf Cases,* the ICJ held that: "[...] indeed, custom, which Article 38, paragraph 1 (b), of the Statute of the Court takes as evidence of a general practice accepted as law ... requires the consent, express or tacit, of the generality of States[...]"[21].

All these three cases are often quoted in the discussion about the principle of the persistent objector. However, both sides are quoting them with equal intensity. As support of the principle it is held that the ICJ has dealt with and spoken of the principle in positive wording. Weight is given to the fact that in none of the cases the state could be bound by the customary international law in question. Nevertheless, this way of argumentation requires a bit of caution as will be shown later[22].

As arguments against the principle, it is held that the principle was never mentioned, other than in obiter dicta, and not once was it of paramount importance for the outcome of the case. The verdicts of the cases, ICJ upheld with other rules of international law. It is held that the ICJ had a good opportunity to verify the existence and strength of the principle, but chose not to do so[23]. Furthermore, Anthony D'Amato, Leighton Professor of Law at Northwestern University School of Law, considers the fact that in the Asylum Case, the court did not speak of general international law but merely of local international law. He claims that the verdict says nothing of the principle of the persistent objector since this is a principle of general international law[24].

[21] North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 20 Feb 1969, ICJ, p 104
[22] Andrew T Guzman, *Saving customary international law*, (Berkeley electronic press, 2005), p 47 and Michael Akehurst, "Custom as a source of international law", *British Yearbook of International Law* 47 (1974), p 25
[23] Charney J.I., "Universal International Law", *American Journal of International Law* 87:529 (1985), p 539-540
[24] Anthony D'Amato, *The concept of custom in international law*, Cornell University Press, New York, 1971, pp 252-254

Stein notes that the Anglo Norwegian Fisheries case and the Asylum case are the only two cases where boundlessness has successfully been argued. This shows if nothing else that there is a rather sparing usage of the principle.

A proper run-through of these cases is to be found below in the section marked 5.4.

4 Doctrine of the persistent objector

The primary objects within international law that can achieve a status as a persistent objector are states[25].

The desired result of being a persistent objector is creating an exemption from a rule of customary international law that the state does not wish to be bound by[26].

This all goes back to the thought of will, or consent, of states as being of the outmost importance in determining what the state can be bound by. Therefore, it could be a good start to examine what role the consent has in the process of making customary international law.

The two elements that make up customary international law are state practice and opinion juris. This far the scholars agree. A question that becomes relevant here is whether all states should have shown a uniform practice and opinion juris or if it suffices with a qualified majority of unified states. Here scholars do start to disagree and subsequently are divided into two major lines of thought.

4.1 The importance of consent from two angles

Voluntarist views on persistent objector

The type scholar of the first line of thought is the renowned Professor Antonio Cassese, first president of the ICTY. He suggests that consent is absolutely necessary for a state to be bound by customary international law. Since a persistent objector clearly shows a lack of consent to be bound by

[25] Andrew T. Guzman, *How International Law Works*, Oxford University Press, 2008, p 197

[26] Jack L Goldsmith and Eric A Posner, "A theory of customary international law", p 7, available at: *http://www.law.uchicago.edu/Lawecon/WkngPprs_51-75/63.Goldsmith-Posner.pdf* Date: 2008-08-18 Time: 10.00

the rule in question, no binding effect can ever have been made[27]. Amongst the people agreeing with Cassese can be mentioned Dr. Erik Franckx, Professor of International Law at the Vrije Universities Brussels, who considers the expression of consent to be necessary as all of international law is from the beginning based on consent[28]. Dr. David Colson, University of Berkeley, derives the necessity of consent from the sovereign equality of all states[29]. Arguing in a similar way is Professor James L. Brierly[30], who regards the lack of a supranational legislative organ to leave consent as the only viable, and therefore possible, mechanism of binding a state to law.
For these scholars, the opportunity of a state to act as a persistent objector and receive boundlessness is a natural consequence of the necessity of consent.

World communitarian views on persistent objector
As type scholar of the second line of thought, the current president of the ICJ Hon. Rosalyn Higgins can be regarded. She argues that states who disagrees with a new state practice can use their protests as a tool of negotiation up until the time that the new rule becomes customary international law. When the state practice has become law, the opposing state is as bound by the rule as any other state would be. Acting in defiance with the new law would constitute an internationally wrongful act for which international responsibility can be demanded[31]. This opinion is also supported by Professor Anthony D'Amato who argues that the principle of the persistent objector has nothing to do with general customary law since

[27] Antonio Cassese, *Change and Stability in International Law-Making*, (1988, published by Walter de Gruyter), p 128
[28] Erik Franckx, "Pacta Tertiis and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", FAO Legal Paper On-Line, No. 8 ,June 2000, available on: http://www.fao.org/Legal/prs-ol/lpo8.pdf, p 5 Date: 2008-08-18 Time: 10.00
[29] David Colson, "How persistent must the persistent objector be?", *Washington Law Review*, Vol 61 (1986) 957, p 961
[30] James L. Brierly, "The Law of Nations: An Introduction to the International Law of Peace ", *New York: Oxford University*, (1963), pp 59-60
[31] Rosalyn Higgins, *Problems and Process: International law and how we use it*, (1995, Oxford university press), p 34

consent cannot reasonably be a prerequisite for the validity of a new customary international law[32].

Professor Jonathan I. Charney, the former Editor-in-Chief of the American Journal of International Law, is also found in this line of thought as he argues that the social context in which customary international law is made, makes it possible for states to be bound by customary international law to which they have not consented[33].

Dr Hans Kelsen, Professor of law at University of California, Berkeley, argues for his part that a state is as free and sovereign towards international law than a citizen is sovereign towards his national legislation. According to Kelsen consent is a false basis of the binding effect of customary international law, since that effect comes out of a general moral duty to act as your ancestors have before you[34]. For these scholars, the notion of a state being unbound by international law because of a lack of consent certainly becomes less attractive.

4.2 The boundaries of the persistent objector

These disagreements aside, there is a large agreement over the fact that this principle really exists[35].

Demands

Then, what demands are forced on a state that wishes to hold a status as a persistent objector? According to Stein, the demands are three. These are that the state has *protested*, done so *persistently* and done so *before the rule became a customary international law*[36].

There are no actual demands on the form of the protest as such. A statement is as strong as an action. ICJ has repeatedly stated that a polite objection is

[32] Ibid not 24, D'Amato, p 261
[33] Ibid: not 3, Charney, p 16
[34] Hans Kelsen, *Principles of international law*, (1952, Rinehart & Company, Inc., New York), p 307
[35] Ibid: not 3, Charney, p 2
[36] Ibid: not 2, Stein, p 457

to be considered as strong as an aggressive objection[37]. The important thing is that the objection is clear and unequivocal[38].

Regarding the persistence, the form is dependent on the situation at hand. It depends how many states, and which, are positive to the new rule, how strongly they have spoken for the new rule and what kind of customary law is at hand (local or general). As a general rule could be said that the more unified and secure the opposing side is, the more clear and persistent must the objector be. The more political pressure and isolation the objector is subdued to the more distinctly it must show its will to the world[39].

The aspect of time is one of the issues that have been duly discussed in the doctrine. An especially difficult question for the potential persistent objector is to know exactly when a rule of customary international law becomes binding[40]. Applying the theory put forward by Higgins, this becomes especially important. The objecting state will, in this moment, go from using a method of negotiation to acting in defiance with international law. Using the theory put forward by Cassese, the status of the objecting state will go from negotiating to being an actual persistent objector. This may not change the legal obligations of the state but certainly the political status of the objector.

Some writers dismiss this problem saying that the increasing number of cases within international law will make sure to clarify the moment when a customary rule becomes a law[41].

Other writers leave this aspect of the principle unclarified claiming no clarity can be reached.

Latter complaints

[37] *Temple of Preah Vihear Case* (Cambodia v. Thailand), 26 May 1961 ICJ point 32 and Nuclear Tests Case, (Australia vs. France), 20 Dec 1974, ICJ, point 267-68

[38] Ibid: not 29, Colson, p 963, Colson also make it clear that the third law of Newton is not to be considered as applicable to these protest. Colson writes: “not every legal action needs an equal and opposite reaction to maintain one's place in the legal cosmos”.

[39] Ibid: not 29, Colson, p 967-969

[40] Ibid: not 23, Charney, p 538

[41] Lau Holning, “Rethinking the Persistent Objector Doctrine in International Human Rights Law”, *Chicago Journal of International Law Summer 2005 issue* 495, p 505

4.2.1.1 Subsequent objectors and new states

The aspect of time regarding this principle gives reason to consider the question of how to deal with states that protest after a customary rule has become binding as a law. The way this principle has been used before, and according to the majority of writers, this precludes the opportunity of the state to become a persistent objector to that matter[42].

These states are divided into two groups. The first one is subsequent objectors. These are states that existed before the relevant law became binding and who had an opportunity to object, but for some reason chose not to. The second group are new states. These are states whose very existence was initiated after the law became binding and therefore had no chance to object during the development of the law.

First, considering subsequent objectors, a large majority of the scholars say the protest has to have been exercised before the law became binding. The "father" of the principle, Ted Stein, stated as mentioned above the three criteria's of protest, persistence and during the development of the rule.

The ILA has stated the protest has to be made "[...] whilst a practice is developing into a rule of general law [...]"[43].

Even Antonio Cassese, who wishes to see the principle as widely applied as possible, regards only those who have protested from "the outset" to be worthy of the status as a persistent objector[44].

Timothy Hillier, Senior Lecturer in law, De Montfort University, Leicester, focuses on the fact that if subsequent objectors would have an opportunity to escape being bound to a law already in place, the binding force of customary international law would disappear completely. Hiller regards such a development in international law as highly detrimental to the international system[45].

However, in the article "Saving customary international law" Andrew T. Guzman, Professor of Law at Berkeley Law School, has questioned if this, by any necessity, is the best way to approach the problem.

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[42] Thomas Buergenthal, *Public International Law in a Nutshell*, West Group, 1990, p 22
[43] Ibid. not 4 International Law Association, Final Report, Principle 15
[44] Ibid not 27,Cassese, p 167
[45] Timothy Hillier, *Sourcebook on international law*, Cavendish Publishing Ltd., 1998, p 74

4.2.1.2 Developing countries

Guzman handles the problem of developing countries that at the time of development of the law has no interest in objecting to the rule in question. He takes the example of a developing coastal state that in the beginning only practices a small scale fishing industry close to land and therefore has no reason to consider an emerging rule changing the territorial sea. In a later stage of the development of the country, the law could have great impact on the states fishing industry, but the state will have no opportunity to become a subsequent or persistent objector to this law.

Since, according to Guzman, the principles of subsequent objectors and persistent objectors bears similar problems, there is no meaning of keeping the two apart. However, Guzman recognizes the problem of opportunistic states who wish to capitalize on the exception to legitimize breaches of international law. He therefore, suggests a limitation of the principle to only apply to states who objected as soon as they had a real interest in the rule in question. Others cannot receive boundlessness.

The theories of Guzman must however be seen as de lege ferenda[46].

4.3 Advantages of the persistent objector

The two big advantages of the principle of the persistent objector are that it creates predictability and at the same time preserves the importance of consent in international law.

The consent is safeguarded by the fact that state sovereignty is given weight in the development of customary international law[47]. Since the states are the primary actors of international law and since the positive will of states creates international law, logically, the negative will of states must also have an impact on the creation of international law. According to the ILA on the formation of customary international law, the principle of the persistent objector is a good way for a dissenting state to remain unbound by a

[46] Ibid: not 22, Guzman, p 51-53
[47] Ibid: not 40, Holning, p 499

majority decision whilst the international legislative process remains flexible and is not unduly delayed by a few obstinate reactionaries[48].

The predictability connects to the issue of when in time a law becomes binding, as dealt with earlier. Receiving a status as a persistent objector means that the state does no longer run the risk of involuntarily breaking international law as a result of uncertainty of whether the rule has become a law. This will create a sort of safety valve for states who are not ready to be bound to a developing customary international law[49].

4.4 Difficulties for the persistent objector

Over now to the criticisms brought up in the doctrine towards the principle of the persistent objector. The most common objection against the principle is that states cannot choose whether or not to be bound by a customary international law since consent is irrelevant for the validity of such a law. Charney argues that when one seek to establish a customary international law, only the practice of the largest and most prominent states are regarded as relevant. A few obstinate states cannot stand in the way of the world community doing what is best for the world[50].

There have also been protests regarding the practical feasibility of the principle. Franckx argues that a persistent objector can impossibly stand up against the political pressure put upon an objector by the world community demanding indulgence. The principle will not get any real effect, since a state will not be able to maintain a status as a persistent objector[51].

Professor Prosper Weil, Professor emeritus of the University of Paris II: Panthéon-Assas law school, and a member of the Institut de France, expresses the same opinion by arguing that all states possess sovereign equality but in essence, some states are more equal than others[52].

[48] Ibid. not 4 International Law Association, Final Report, Principle 15
[49] Ibid: not 22, Akehurst, p 26
[50] Ibid: not 23, Charney, p 537 and p 551
[51] Ibid: not 23, Charney, p 537 and p 551
[52] Prosper Weil, "Towards relative normativity in international law", 77 *American Journal of International Law* 413, p 441

Stein argues that even if states in theory are, by sovereignty, free to object, in reality states can feel quite restricted considering the diplomatic implications that objections could bring[53].

Besides these objections two other main areas of critique have often been discussed in the doctrine. These two areas are peremptory norms in international law (jus cogens) as well as human rights. These deserve special mentioning due to the special impact they have on international law.

Persistent objector vs. Jus cogens

In this part, the debate focuses on the status of the rules of jus cogens as peremptory norms.

4.4.1.1 Doctrine on Jus cogens

Malcolm N. Shaw, Professor of International Law at the University of Leicester, as well as Michael Akehurst, Professor of Law at the University of Cambridge, argues that an overwhelming majority of states, crossing political and ideological block-lines, can together give jus cogens character to a customary international law[54].

The USA has in its Restatement (Third) of Foreign Relations Law taken the standpoint that a large majority of states can create the acceptance and acknowledgement needed to give a law the status of jus cogens. Therefore, this status of jus cogens will apply even to a small number of reluctant states[55].

France has met this claim by saying that it does not consider itself bound to the jus cogens character of any rule since France did not consent to the development of the jus cogens concept[56].

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[53] Ibid: not 2, Stein, p 481

[54] Shaw Malcolm N., *International Law*, Fifth Edition, Cambridge University Press 2003 p 118 see also Shaws note 212

[55] (Restatement (Third) of Foreign Relations Law, §102, and reporter's note 6 (1986), citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, UN Doc. A/Conf. 39/11 at 471-72).

[56] Prosper Weil , 1983, p 428 American Journal of International Law July, 1983 *413 TOWARDS RELATIVE NORMATIVITY IN INTERNATIONAL LAW and LA DOCUMENTATION FRANCAISE, NOTES ET ETUDES DOCUMENTAIRES, No. 3622, at 10 (1969)

Lee Peoples, Associate Professor of Law Library Science at Oklahoma City University School of Law, argues that jus cogens rejects consent as basis for its existence, and therefore jus cogens trumps persistent objectors when dealing with customary international law[57]. If jus cogens were dependent upon the consent of states, it would not have been peremptory.

On the other hand, Antonio Cassese argues that the principle of the persistent objector is valid in every situation, which is even against a rule of jus cogens. For a jus cogens rule to have a peremptory effect, the world community as a whole must accept it. To Cassese, this means that if one state disagrees, then the world community is not whole and therefore no peremptory effect. Here, state sovereignty and consent are the two most valuable principles in international law. No consent automatically means no binding effect. He writes:

”No country which persistently, consistently, objects to a rule of customary international law from its conception, can be regarded as bound to that rule. I would like to add that even jus cogens cannot bind a “persistent objector”; in other words, voluntarism applies even to jus cogens.”[58]

What Cassese argues here is highly controversial and seems to be contradicted by cases from ICTY, IACtHR and ICJ.

4.4.1.2 Praxis on Jus cogens

First, in order to establish that jus cogens is accepted by courts as peremptory norms under international law:

In the Congo vs. Rwanda case before the ICJ, the court made a direct statement regarding jus cogens. The prohibition on genocide was considered to have reached a status of both erga omnes and jus cogens. In the courts own words:

[57] Lee Peoples, “Research guide to custom, general principles and the teachings of highly qualified publicists”, 2005, p 2 available at: *http://www.okcu.edu/law/lawlib/pdfs/guide_custom.pdf* Date: 2008-08-18 Time: 10.00

[58] Ibid: not 27, Cassese, p 112

”The same applies to the relationship between peremptory norms of general international law *(jus cogens)* and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute.”[59]

In the Nicaragua case before the ICJ, the court stated that the prohibitions on international violence in the UN charter[60] were rules of jus cogens status. The court reached this conclusion after quoting a comment to the draft of the VCLT (Vienna Convention on the Law of Treaties) made by the ILC. ICJ stated that the prohibition on international violence is:”a conspicuous example of a rule of international law having the character of *jus cogens”* [61].

Then, on to establish the relationship between jus cogens and the principle of the persistent objector.

In the case of Furundzija before the ICTY, the tribunal states that there is a peremptory prohibition on torture and that this prohibition internationally precludes any legislative, administrative and judicial attempt to legitimize torture[62].

In the Domingues vs. United States before the IACtHR, the court argued that since the prohibition on executing minors had reached the status of peremptory norm (jus cogens), there was no possibility for the USA to become a persistent objector to that law[63].

[59] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Rwanda) 3 Feb 2006 ICJ, p 90
[60] Charter of the United Nations, 1 UNTS XVI, entered into force 24 October 1945, article 2.4
[61] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 27 June 1986, ICJ § 190 p 100
[62] *Furundžija, Case* No. IT-95-17/1-T, Judgement (TC), 10 December 1998, ICTY
[63] Inter-American Commission on Human Rights: Report No 62/02, Merits Case 12.285, at 85

In the Legal Consequences for States of the Continued Presence of South Africa in Namibia before the ICJ, South Africa could have gotten a persistent objectors status against the prohibition on apartheid. The court chose not to adhere to such an argument by stating that apartheid is an obvious violation of fundamental human rights[64].

4.4.1.3 Documents on Jus cogens

Two influential documents are also in part dealing with the issue of the persistent objectors vs. jus cogens. These are the VCLT and the ILC draft articles on internationally wrongful acts.

VCLT

The concept of jus cogens was developed around the 1960s and finds support in the rulings of several international judicial instances as shown above. In 1969, the Vienna Convention on the Law of Treaties was established after some 20 years of preparation.

Article 53 VCLT gives us three preconditions for a jus cogens rule. It should be a peremptory norm under international law. The world community as a whole should have accepted that no deviations are to be made from this rule. Lastly, a jus cogens rule can only be changed by the emergence of a new jus cogens rule. Article 53 in conjunction with article 63 VCLT states that any obligation constituting a breach of a jus cogens rule is to be considered null and void.

Even though the VCLT has only been ratified by 105 of the 194 of the states of the world, it is still important since it is considered a codification of customary international law in its area. Therefore, one could make the argument that this is an accurate description of jus cogens as a concept.

In the doctrine, there has been a great deal of debate over jus cogens and its contents. However, today it can be regarded as safe to assume that jus cogens exist as portrayed in article 53 VCLT.

[64] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion of 21 June 1971, *ILR*, Vol. 49 p 128-132

ILC draft articles on internationally wrongful acts

The special status of jus cogens rules is further portrayed by ILC draft articles on internationally wrongful acts[65]. These articles are considered a codification of the customary international law in this area. In article 26, it is stated that no force majeure, self-defence, distress or necessity can be used as an explanation when a state has breached a jus cogens rule. Therefore, actions that normally preclude the wrongfulness of acts cannot change the universally binding force of a jus cogens rule. Non-compliance with such a rule will always entail international responsibility. Article 41 declares that if a state commits a flagrant breach of a jus cogens rule, then all other states are under obligation not to aid such a breach and not to proclaim such action legal.

4.4.1.4 Conclusion – Jus cogens

The point of view most widely held, by scholars and legislatures, seems to be that jus cogens cannot be trumped by a principle of the persistent objector.

Persistent objector vs. Human rights

Therefore, it seems that a state cannot become a persistent objector to a rule of jus cogens. Nevertheless, how will the regime of human rights stand its ground against such an argumentation? Some human rights, as for example the prohibition of torture, have reached a status of jus cogens but most other human rights have not.

The IACtHR in the Domingues vs. the USA (2002) case explicitly attacked this question. The USA admitted that there was a prohibition on executing minors but held itself as a persistent objector to that law. The USA stated that there is a possibility to become a persistent objector towards human rights and therefore they could not be affected by the prohibition. The

[65]"Draft articles on Responsibility of States for internationally wrongful acts", adopted by the International Law Commission at its fifty-third session, (2001) arts 26 and 41 available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf Date: 2008-08-18 Time: 10.00

IACtHR accepted the argumentation of the USA in so far as it agreed on the fact that a state can become a persistent objector towards a human right. However, the court considered this particular prohibition to have reached a status of jus cogens and therefore the USA was not allowed to execute Domingues[66].

Even though the USA could not become a persistent objector this time, the court was nevertheless clear in its evaluation of the norm-hierarchy of international law giving rules of jus cogens a higher protection than the human rights regime.

4.4.1.5 The original consent theory

In the summer of 2005, Dr (emeritus) Holning Lau, Hofstra University School of Law, wrote an addition to the debate where he argued that the principle of the persistent objector should be seen as inapplicable to the whole of the human rights regime. Lau argues that not only jus cogens rules but also every human right is universal, and therefore should no exceptions to these rules be accepted. He basis this on the fact that the human rights regime created by the UN is clearly meant to be universal (UDHR, ICCPR, ICESCR).

Lau introduces a theory that he calls “the original consent theory”. The essence of this theory is that since all states cooperate within the UN forum, and since UN conducts its work as if the human rights regime was universal, therefore states have given a tacit consent to the idea of the whole human rights regime to be seen as universal. If a state has taken part in human rights work within the UN forum, then this state can no longer achieve status as a persistent objector since it has already given its consent to the human rights regime to be considered as peremptory norms under international law[67].

Lau is aware of the fact that his theory is somewhat controversial, but maintains that it is compatible with valid international law for two reasons. Firstly, he considers the importance of consent not to be as great as it has

[66] Inter-American Commission on Human Rights: Report No 62/02, Merits Case 12.285, at 85
[67] Ibid: not 40, Holning, s 503-505

been. Secondly, he reckons that the increasing number of cases on this area of international law will sustain the predictability of international law. The cases will clarify any uncertainties and thereby remove the need for a status of persistent objector in the area of human rights. Lau predicts that this change will not cause any trouble for states in general[68].

[68] Ibid: not 40, Holning, s 505-510

5 Analysis

5.1 The existence of a persistent objector

Regarding the question of how customary international law is made, an accurate starting-point would be the concept itself. International law is a law between nations. The peoples make up Nations and there is no supranational legislative body. The question of interest then becomes, whether a state is truly sovereign or if the world community can take majority decisions.

For states that are member of the UN, the UN charter article 2.1 is applicable[69]. Here it is stated that the sovereign equality of all states is paramount to the UN as an organization. A second evidence of this principle is found in the Friendly relations declaration[70] stating that each state is sovereign and its political freedom shall be in violable.

This gives evidence that the international community regards every state to be truly sovereign and independent. However, as to what it means to be sovereign, no one seems to have a universally accepted definition of the term[71].

With logics, and bearing in mind that there is no supranational legislative body, one can come to the conclusion that all states are free to choose which international commitments they are to be bound to. Otherwise, sovereignty would be rather hollow. The theory is that if the positive will of the state leads to an international commitment then the negative will of states leads to the lack of commitment. This is an attempt to derive the principle of the persistent objector from state sovereignty itself.

What is stated in the part above is merely a normative point of view. In the international community of today, it is fair to question in how far it is possible to implement the theories of sovereignty practically. One could pose the question if the international community is not rather built on real

[69] Charter of the United Nations, 1 UNTS XVI, entered into force 24 October 1945 art 2.1
[70] United Nations General Assembly resolution 2625 (XXV), 24, Oct 1970
[71] Ibid: not 23, Charney, s 543; Ibid: not 29, Colson, s 961

politics and factors of power then on law between equal states. It is without question easier for a strong state, not economically dependent on others, to remain in a status as a persistent objector.

If a state is facing severe economical sanctions or default treaties of commerce in the case of becoming a persistent objector, the possibilities for that state to object are quite limited. The example of this would be the actions of the USA regarding so called art 98 treaties. Several smaller African states had to face the threat of trade sanctions if unwilling to sign such deals for the benefit of the USA[72].

In the light of this, it is to be questioned whether a rigid, inflexible form of sovereignty like the model of Westphalia could be a political reality. The international community is governed more by functionality and strategic alliances then by the normative viewpoint of treaties and precedents earlier presented. In order to make sure that state sovereignty does not lose its credibility, it is essential that the forming of the principle regards both the purely normative and the purely positive.

The fact that there, purely theoretically, is a room for the principle of the persistent objector is not hard to demonstrate. It is rather the consequences of such a principle that should be examined.

5.2 The boundaries of State sovereignty

5.2.1 Territory, autonomy and God

How does one define state sovereignty? It is a term that has no one true definition. It varies between different cultures, times and fields of scholars. Therefore, it will not be attempted to create a universal definition of the term but rather try to define the underlying values and considerations one

[72] http://www2.amnesty.se/icc.nsf/ffc3926fc473d909c12570b90033f05f/04a54b98c24a6a92c12572280057e31b/$FILE/ICC-presentationsmaterial.doc p 16 Date: 2008-08-18 Time: 10.00or http://www.civitatis.org/pdf/icc.pdf p 20 Date: 2008-08-18 Time: 10.00

ought to have in mind when creating one's own definition of state sovereignty. In order to facilitate the analysis of this term it will be confined to present time sovereignty in the field of law. The basic negative demarcations of state sovereignty are these:

The first point is to excluding God from the equation. One cannot, as Bodin could, base current law theory on neither religious teachings nor natural law. Neither, can the origin of state sovereignty be traced to theories of rule of man, or the power, or wealth for that matter, of a hegemony. These kinds of governments do exist, but legitimate power is a result of the will of a people rather than the success of an army.

Thirdly, state sovereignty is not an unlimited power. It cannot be seen as in the days of Hobbes and Leibniz, limited only by the strength of a ruler or sovereign.

Territory and autonomy must be vital parts of any state sovereignty, but they cannot be interpreted as narrowly as in the model of Westphalia.

Territory has taken a positive development since the time of the model of Westphalia. It is now possible to determine borders with high accuracy and even though some borders are still disputed, the issue of territory is a less problematic factor.

Autonomy, on the other hand, seems to have rather taken a negative development. However, there are still prerogatives and privileges that accrue to the state alone. For example in matters as collecting taxes, legislative power (national as well as international), international migration and the monopoly on violence, the states is still the primary actor. In these so-called core-issues, the state has still the almost absolute autonomy. In other areas as trade, culture and education, we see that the state has little or no exclusive privileges compared to Westphalian days.

As detected above, the model of Westphalia cannot be applied today. If one were to consider the practise of all states relevant, one would have to face

the problem of not all states having agreed to the rule in question and the fact that there will not be a unanimous will of all states.
However, one cannot totally disregard that model without presenting a valid substitution. Without state sovereignty no international law would exist and the rule of man would apply. Therefore, there is a need for a flexible and functional model of state sovereignty.

In reality, international law works more the way Kofi Annan describes it. The international normative system, creates a framework of interaction that does not regard the recent developments in the international system. One can very much see that the international normative system was created for the world as it was at the end of the Second World War. Of course, the design of that system was the only opportunity available at the time, but the most significant changes in international interactions since then have come about these last 20 years. The international normative system does not adequately deal with globalization and the need for humanitarian intervention. It does not consider that the importance of state sovereignty is decreasing and therefore, one must consider the possibility of looking more at reality than the texts to be able to exert the true essence of state sovereignty.

5.2.2 Normative or positive view

What can be learned regarding state sovereignty by looking at the structures and interactions of the international community? As shown above, a strictly normative view of international law is not enough. According to the convention of Montevideo (1933) on the rights and duties of states art 1, the term state is defined by demands of a) a permanent population, b) a defined territory, c) a government and d) the capacity to interact with other states.
Art 3 of the same convention states that a state exists regardless of the acceptance of other states. However, the actual conduct demonstrates that a state cannot reach complete sovereignty without the approval of the international community

The international community has the right, through the UN charter, to exert military power as well as economical sanctions towards a state if they consider it to be necessary. Military violence between states is forbidden but violent negotiations, where states use their difference in powers but not their weapons are perfectly legal. Due to states pursuing their own interests, international law is a highly political phenomenon. The mere fact that the security council has undemocratic characteristics, through its excluding composition and through the veto power, shows how far the international community has deserted the thought of the equality of all states[73].

Another difference between the normative and the positive view is visible here. In theory, the sovereignty of states is independent of the opinion of other states. The convention of Montevideo art 3 and the right of self-determination of people clearly shows that. A state does not need the acceptance of other states for its existence to be valid.
This wording correlates with the jus cogens protected right of people to self-determination. It states that people have the right to freely determine what state to belong to, no matter what status the people currently have. This also entails a right to, if willing, be governed by a democracy[74]. These rules argue that the opinions of other states should not be given any greater value. It gives the power and right to the people to determine when, where and how a state is to be formed. Therefore, it should be the people deciding which laws the state is bound to when receiving statehood. Art 1 of the Montevideo convention declares that a state needs a people, territory, a government and the ability to act. For statehood, one does not need to be bound by international law.

[73] Stefan Talmon, "The Security Council As World Legislature", *American Journal of International Law* 99:175 (2005), p 179

[74] United Nations General Assembly resolution 2625 (XXV), 24, Oct 1970 art 21.3, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art 1 and International Covenant on Economical Social and Cultural Rights G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 art 1

Nevertheless, in reality, we notice that the only way for political units to reach statehood, and thereby sovereignty, is to be accepted by the world community[75].

Today most scholars regard the model of Westphalia to be outdated and believe that it cannot be applied to modern states. If no entity outside of the state had the right to influence the state, then the UN, the WTO and the EU would be grave infringements upon state sovereignty. Hence, the term in itself would be rather hard to work with. No state could then claim to be truly sovereign.

The world community needs a rule that regards the equal rights of states but not necessarily equal opportunities within the community. One can compare it to the national legal systems where it is accepted that people have equal rights even though they do not have equal opportunity.

All of the international community is built on the notion of sovereign states having the ultimate legislative power. In the charter of the UN, this is shown in arts 2.1 and 2.7. It is expressed here that all states are sovereignly equal and that all states have the right of privacy in internal matters. Any principle of state sovereignty must show the importance of equality and privacy for states[76].

5.3 The need of flexiblility in the theory

This leads to the conclusion that a positive way of looking at state sovereignty is more logical than a purely normative one.

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[75] An example of this is how Kosovo could reach sovereignty by declaring independence whilst South Ossetia and Abkhazia could not. http://www.globalpolicy.org/security/issues/kosovo1/2006/1002sovereignty.htm Date: 2008-08-18 Time: 10.00 and http://www.svd.se/nyheter/utrikes/artikel_1538769.svd Date: 2008-08-18 Time: 10.00and http://www.hbl.fi/text/utrikes/2008/3/5/w10878.php?rss Date: 2008-08-18 Time: 10.00

[76] See e.g. Asylum Case, ICJ Reports (1950), at 276-7 (stating that a part that relies on custom "[...] must prove that this custom is established in such a manner that it has become binding on the other party […] that the rule invoked […] is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.' [...]").

Still, the state is the largest concentration of power there is. Disregarding that dooms the theory to failure. However, other entities within the international system have the capability to establish international judicial acts. These entities and their political authority have to be considered as well.

States today, have a large interest in using resources located in other countries. That may be oil, tourists, knowledge or entertainment. Money is being transferred all across the globe in the form of foreign aid, remittances, placement of currency or trade in goods or services. In today's globalised world, the streams of currency create international dependency. These dependencies may be one-sided or reciprocal but they do infringe on the opportunities of states to act. However, in most cases this is not perceived as a problem and definitely not as violation of international law. It does create job opportunities, new markets and promotes prosperity (just look at Norway and its oil).

The steady increase of international movements will most likely proceed. In order to account for processes within the international community, international law theory needs to embrace this interdependency instead of ignoring it. The aim of international law ought to be an increase in peace and stability, international cooperation and trade. My theory is that an increase in interdependency among states decreases the risk of exploitation and unpeace.

5.3.1 Philosophical considerations

Inevitably one must also consider the moral debate of international law (or perhaps of law altogether). One must consider the values upon which international law is built and the aims and goal which it is to achieve. A principle of state sovereignty should, if possible, consider these values and goals and render them support.

There have been many thoughts on how the state should be composed, from Notzik's minimalist state to the highly involved state theories of Marx. Most scholars however consider the state necessary for the wellbeing of people. As Hobbes put it "[...] life will be solitary, poor, nasty, brutish and short [...]" without the state.

What the values and goals of each state in each international question may be cannot accurately be determined. These goals might possibly be a depressing realisation however, since states often tend to act in self-interest. The values and goals of the world community on the other hand can be seen in several international documents. It has been put into many different wordings, but an attempt to summarize these value and goals would be this: What is good for people is good for the world. Therefore, what is good for people should be the aim of international law as well as international relations theory. Therefore, this should be considered when formulating rules of international law. Democratic states are very good for tending to the needs of individuals but they might need some assistance while tending to international questions.

The core-issue for the world community seems to be the perseverance of peace and security. Development work, trade, diplomacy and sabre-rattling achieve this. All these ways of interaction have international aspects that would be highly damaged by a too far-reaching state sovereignty. Such a principle would make living harder for a large number of individuals currently benefitting from international aid and missions.

State sovereignty - conclusion

According to the findings made above one can identify three sources of authority. These are, authority being provided by divine respectively natural law, claiming authority with the help of great military power and legitimization by the people through a democratic act. Only the latter one is accepted as legitimate in present time.

Since the end of the cold war and the increase of globalization, indefeasibility and priority of state sovereignty have lessened. The model of

Westphalia or ancient philosophers can no longer account for today's definition of sovereignty.

In these days, state sovereignty is connected to responsibility. A state is granted sovereignty as long as it does not abuse this privilege. If abused, the international community has the right to temporarily violate that sovereignty and remove a faulty regime. When considering this and also the fact that a state in practice has to be approved of by other states to achieve ability to interact internationally, makes one wonder, if state sovereignty is not something that has to be given (and therefore can be reclaimed) from the international community. This might rather describe the obtainment of sovereignty, how it happens in reality, than the process of sovereignty coming into existence merely from the will of the becoming state as it is illustrated in the doctrine.

The theory put forward by Kofi Annan seems to hold up. As state sovereignty is changing to fit a globalized world and as autonomy rather is a tool of the people and the international community, one can conclude that a discussion of state sovereignty as such cannot harm the principle of the persistent objector.

5.4 Customary international law

A problem to be respected is the discrepancy between state sovereignty as it is presented in international texts and the state sovereignty as it is used in day-to-day international actions. Even though it is not mentioned in the international treaties, one simply must regard the difference of strength between states. As already observed, the model of Westphalia accounts neither for modern legal systems nor for this difference of strength between states. In contrast to the decision-making process as portrayed in the model of Westphalia, today this is practised in a rather consensus oriented manner. Such an order is also more compatible with what is known of the sources of law as presented in the statute of the ICJ art 38. If the demands upon state practice and opinion juris are to show the opinion of the majority, then it is easier to regard customary international law as a figment of the will of the world community and not necessarily the will of all states. This point of

view will also dispose of the portrayed discrepancy since the majority of states have created a rule to the effect that the majority of states can create law.

The normative viewpoint that all power derives from the state and that the consent of all states must be examined before being bound by customary international law, can be regarded as both out of date and contradicted.
A decision-making process based on consensus is the more sensible way to go. It is concluded that customary international law consists of how the majority of states act and what these consider to be law. Therefore, it seems more reasonable to base a theory of sovereignty upon what actually goes on in the world.
When customary international law is made, there cannot be a demand for the world community to act absolutely unanimously. This would make the system brutishly slow and hard to work with. It would also completely detract the need of a principle of the persistent objector, since an objecting state simply could block the development of a new customary international law.

5.5 Case law

In the *Anglo Norwegian Fisheries Case*, it is clear that the court is talking about persistent objectors. Great importance is given to the fact that boundlessness was given to Norway since it had objected to the 10-mile rule and the UK had accepted Norway's conduct. It is true however, that the principle was mentioned in obiter dictum and as such cannot amount to as great importance as it would have in ratio decidendi. One should also consider the fact that the principle of the persistent objector was applied by the court to the relevant circumstances of the case and treated as if it was part of current and valid international legislation. This leads to the belief that the case should be seen as a support of the principle of the persistent objector rather than an opposing argument.

In the *Asylum Case,* it is relevant that the court posed the demand that a state has to consent to be bound to a customary international law. Since Peru refused the relevant rule, they could not be bound by it. Hence, Peru had achieved a status as a persistent objector.
However, D'Amato seems correct when arguing that the case concerns a local custom rather than a global one. Whether local and global customs can be used in the same fashion is not yet satisfactory concluded. One should be careful in stating this case in support of the persistent objector in global cases but the claim of D'Amato that the case is not at all about persistent objectors seems to be unfounded.

In the *North Sea Continental Shelf Cases,* the court seems to pose a demand for consent amongst states for a rule to turn into customary international law. However, the consent is the one of the majority of states and not of every single state. This rather suggests that the importance of the consent of every state is less, and the majority decision of the world community is benefiting from that ruling. One has to be prudent before stating this case as solid evidence for the principle since it could be used to argue both for and against. Even though this case does not address directly of the principle of the persistent objector as such, it does provide evidence for the appropriateness of the principle. The court disregards any discussion of all states having to be qualified passive states for the obtaining of state practice. Still this jurisdiction signals that state consent is important enough to create a need for the principle of the persistent objector.

5.6 Analysing the boundaries of the persistent objector

Now that it is established that there exists a principle of the persistent objector, it is to be examined how narrow or far-reaching it might be allowed to be.

A problem one is immediately faced with is what to do with states who have not objected to the customary rule within the stipulated timeframe. This is a problem best dealt with in two subcategories namely subsequent objectors and new states. Subsequent objectors are these states that existed at the time when the rule became law, but for some reason did not object then and who at a later time seek to be unbound by the customary international law. New states are the states that initiated its existence after the rule became law, and that wish to obtain boundlessness by objecting from the outset of statehood.

Persistent objector vs. Subsequent objectors

The opinion of the majority, regarding the extension of the principle in time, is that if a state objects after the rule has become customary international law it will still be bound by it. As it seems, this is a practical solution to a complicated problem, but by no absolute truth does it have to be like that. It is important to create a balance between the role of consent and the predictability and practicality of international law. The more crucial the role of consent is, the more states are free to go their own way and that lessens the predictability of the system. To let so-called subsequent objectors without any restriction deny the binding of a rule of customary international law would be to go too far. Customary international law would then in reality not have any biding effect at all and the predictability of the system would have to be provided by treaties. This is not a desired outcome.

The suggestion Guzman made in regard to granting subsequent objectors to be unbound by customary international law as long as they have no real interest in the rule is interesting but carries some flaws. To begin, it creates the problem of knowing exactly when a law achieves the status of being relevant to the country in question. The procedure of courts would be longer and harder since the issue of relevancy/interest has to be clarified before the merits can be evaluated. The real problem though is that interest is a highly subjective term. For seconds, this sends a message to the states of the world saying that customary international law is not of universal interest. Thirdly, using this suggestion, customary international law would lose its binding

effect and be reduced to a custom between the interested. Uninterested states would then not be forced to choose whether to accept or object to the new customary international law.

5.6.1.1 Binding effect of CIL

A principle of the persistent objector that does not give any such leeway to subsequent objectors would demand states to interact and take part in the international forums and debates, but it is a choice that secures predictability of state behaviour within the international system.

It would most probably avoid a lot of conflicts to let these uninterested states stay unaffected by the decision of the majority until a real interest arises. The deficit of that way of action on the other hand is that no state could count on international law having a universal effect on other states. This universal effect is considered one of the foundations and prerequisites of the international law as such. Even though uninterested states have to make the effort of keeping up with current international events that are not particularly relevant to their affairs, the world community is in need of the universal effect for customary international law. This need must surely prevail since it was to come to the conclusion that a customary law is made by majority decision rather than a veto right of every state.

Without a binding universal effect, customary international law is rather useless. This is supported by the ICJ in the North Seas Continental Shelf Cases where the court issued the following statement: "[...] whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own.[...]"[77]

Possibly this can be seen as a denial of the doctrine of the persistent objector, but one has to bear in mind that this court addresses the issue of law already in force and not the development of such rules into law.

[77] Ibid not 7, North Seas Continental Shelf Case, s38

If a universally binding effect is what one wants, then the line has to be drawn somewhere. Even though the rights of uninterested states are somewhat overlooked, the alternative brings several great difficulties such as uncertain levels of proof, loopholes and unbound states. The binding effect of customary international law entails, as opposed to the ditto of treaty law that a state through some consent gives up the right to derogate or object to the relevant rule. In a world where all states behaved in an exemplary manner, more leeway could have been for the better. However, it would seem that states of today in some cases care more about its own interests than of conforming to legal norms. In this world and with these states, tighter and more rules are desirable.

After this elaboration one comes to the conclusion that the interest of states, as the term is used here, is not the accurate requisite to determine whether a state should be bound or not. An interested state may be bound by a customary international law it has not consented to. Such a state has no possibility of obtaining boundlessness from such a law at a later time. The theory of Guzman substitutes customary international law with a kind of good practise or honour codex which certainly would be detrimental to the international system as such.

5.6.2 Persistent objector vs. New states

The next issue to be analyzed is the rather complicated one of the new states. The first remark that has to be made is that this question is closely connected to the issue of whether states automatically are bound by the international law in force at the time of the creation of the new state. If a new state is bound by contemporary international law, it is a setback for state sovereignty since the state becomes affected by a set of rules it has not consented to. However, if the state remains unbound by contemporary international law, then it would be a setback for the universality of customary international law, since it would be ever changing and bound by consent.

5.6.2.1 Successor states

A new state is either a continuation of an old state (as in the case of the Soviet Union becoming Russia) or a new entity within international law (as in the case of East Timor gaining independence from Indonesia). When dealing with successor states, the state in question is bound by the international duties and commitments of the old state. If a successor state starts to object to an international law already in force, it will be treated as a subsequent objector since its capacity to interact with other states has not changed. As previously shown, a subsequent objector cannot, and therefore neither a successor state, obtain status as a persistent objector.

This is usually not a problem, since successor states, to show that they really are a continuation of the old state, often undertakes to honour the commitments, made under international law, by the old state.

5.6.2.2 Newly established states

On to the case when a new and unbound unit of international law is created.

Since the applicability of international law is in question, one would normally consult the VCLT. However, this concerns the question whether customary international law is in force or not and therefore one cannot apply the VCLT, since it concerns law of treaties.
There is also reason to believe that the VCLT does not codify the customary law of the area[78].

If one accepts the definition given by Ted Stein, then new states will not fulfil the criteria of objecting during the development of the law and neither the criteria of persistency since it requires a certain, if yet undetermined passage of time. Therefore, one has to examine the problem to see how he

[78] Mrak Mojmir (ed), *Succession of states*, Martinus Nijhoff Publishers, 1999 s 132

reached that conclusion and if there is any reason to avoid Steins definition of the principle.
First, it has to be dealt with the question of whether new states are bound by the international law in force at the time of its foundation or if the law has to be approved and consented to for a binding effect can apply.

Perhaps, the requisite in the Montevideo-convention regarding the ability to interact with other states has created, even if unwillingly, a demand for states to be approved of by other states. If so, it might be possible that other states would not approve of a state that is unwilling to play by the rules.

State Sovereignty of newly established states

As previously shown, customary international law is created by a majority decision of the states rather than by the consent of all states. We can also ascertain that state sovereignty as in the model of Westphalia can no longer be applied. A modern form of state sovereignty is more concerned with the functionality and flexibility of the international system than of the absolute right of every state to be autonomous.
With this in mind, it is easier to argue that the sovereignty of new states does not give them the right to choose freely amongst the rules of customary international law. If the binding effect of customary international law is not dependent on the expressed consent of each state, then the universal effect of customary international law should apply without the need of consent being given or even asked for. This brings along the need to regard consent as sufficient but not necessary for customary international law.

However, the question of whether the new state can become a persistent objector to one or more of these laws remains to be examined.

International ability to act, responsibility and boundness

The two main problems are, a) when does a state become bound by customary international law and b) who can deliver the objections necessary? We know for a fact that some political movements, like the revolutionary movement in Iran of 1979, can obtain international

responsibility before they are accepted as states. To be on the safe side one could assume that a new state becomes bound by customary international law the moment the political movement is accepted as a state. The other question can be answered thusly: only states can make the objections needed to become persistent objectors.

However, one cannot satisfactorily answer that simply. There seems to be a connection between international ability to interact, international responsibility and boundness to international law. If a breakaway movement can obtain limited ability to interact internationally before official statehood is achieved (de facto government with a de facto ability to act), then this correlates to the international actions for which such a movement can obtain international responsibility for, when statehood is achieved and as such then that movement is bound by international law. This responsibility under international law cannot reasonably emerge from treaty law, since it is not relevant before statehood is achieved. Therefore, the ability and responsibility arises from customary law. When the growing state gets a larger ability to interact it simultaneously is put under responsibility and duties to follow international law. Full statehood means full ability to act, but also full international responsibility to care for the people and full duties to obey international law.

If one accepts this line of thought, then one would have to conclude that a new state could not deliver the said objections before it is bound by the very law it is objecting to. This will closely resemble the case of instant customary law coming into force for the state.

Using Ted Stein's definition, the new state would not have the option of becoming a persistent objector since it cannot object in time.

5.6.2.2.1 Latter complaints – newly established states

When coming to that conclusion, the question of whether there is a possibility for new states to become persistent objectors even after statehood is achieved has to be asked. The difference between this case and a normal

subsequent objector is that the new state did not miss an opportunity to object, since it never had one. How grave is the circumstance that the new state did not have any chance to affect the development of the customary international law? Does this justify a special treatment of these states? This is also a question of how the universally binding effect of international law works. Does that effect bind states in past, presence and future? Alternatively, is it a possibility that the effect is impacted by neologism, remodelling and reinterpretation and therefore can become more or less binding over time?

A way of seeing the matter is that there is no point in creating a kind of tacit treaty law where states can come and go as they please. What makes customary international law so useful is that it is not based on consent alone. Therefore, a lack of consent of a new state cannot as such justify a different treatment. The lack of consent is just not relevant for the new state becoming bound to customary international law.

One could also discuss whether there is some kind of moral reason for letting states remain unbound by contemporary international law. When examining these reasons one notices that they all rely on one argument: That state sovereignty trumps customary international law. As previously shown, state sovereignty today has a minor importance compared to majority decisions of the world community. International law of today cannot be a gathering of independent units in unwanted coexistence, but rather a global community in constant development and cooperation. However, one must admit that this is a weighing of different valid considerations under international law against each other. The line has to be drawn somewhere and it is simply a matter of one interest outweighing the other.

The judicial situation of a new state will then be the same as one existing state that objects after the law has come into force (subsequent objector). As previously demonstrated, such a state cannot be allowed to stay unbound by customary international law since that would jeopardize the fundamental idea of international law.

5.6.3 Persistent objector vs. Jus cogens

5.6.3.1 The existence of Jus cogens

The principle of the persistent objector originates from the thought that states are sovereign and therefore can remain unbound by a rule it has not consented to. Jus cogens present a problem then, since the traditional way to argue is that jus cogens does not depend on any state consent. Critics to the principle of the persistent objector have often stated jus cogens as a proof of the absurdity of the principle. Therefore some closer examination of this problem is needed .

In the case of jus cogens it has been decided that the contractual freedom of states shall be limited and that some rules of customary international law have to have higher priority than the law of treaties. Jus cogens therefore is a form of minimal-standard in international law from which deviation would both be unright and immoral. Jus cogens claims to be the divider of absolute right and absolute wrong within international law. This is indeed a big task, but it has not been inaccurately preformed over the years.

Well, now it is concluded that there is such a thing as jus cogens, the problem of its origin still remains. The problem arises since there is no supranational legislative body within the world community. Jus cogens is binding for all states without the option to go astray according to VCLT. In the next sections, it is going to be elaborated on the question, if this is reconcilable with the thought of the origin of international law being in state consent.

5.6.3.2 VCLT

What is stated in the VCTL, regarding rules becoming jus cogens, is that the rule has to be one generally accepted by the world community. The state sovereignty has some effect here, since only states can create the rules of customary international law that later could be turned into jus cogens rules.

In addition, only states can give the rule in question the character of jus cogens. Still, one should bear in mind that it is not an absolute majority sought, rather a qualified majority comprised of an overwhelming majority of the states in the global community.
The world community also have to agree on the fact that no derogation from this rule can be permitted and that such a rule can only be changed by the emergence of another jus cogens rule. States decide when a rule is to be considered a jus cogens rule. Normal state practice and opinio juris is to be applied to the situation.

However, this is inconsistent with assumptions made by voluntarists. When a jus cogens rule is in force, consent becomes irrelevant. A state cannot go around the fact that a certain rule is of jus cogens character unless a new jus cogens rule emerges. Some voluntarists try to solve this by arguing that the loss of the importance of state consent is a consent-based decision made by states.
Even though this might be right, it is easier to argue that the loss of the importance of state consent is due to the fact that neither jus cogens nor customary international law is wholly consent based. Therefore, what evolves from it is the usual binding effect of international law. If there was an opportunity for states to escape this, it had no consequence at all.

Another problem, not crucial but an interesting line of thought, is whether arts 53 and 64 of the VCLT is jus cogens rules, normal rules of customary international law or perhaps rules of treaty law. If arts 53 and 64 are not jus cogens this means that one could become persistent objector to these rules. This problem can, if not be solved, at least be avoided by arguing that VCLT in this respect is a codification of the customary law of the area and that no state has tried to become a persistent objector to these rules. That means that de facto no state is allowed to make contracts or treaties in violation with a jus cogens rule. Worth mentioning is also the fact that the specific rule of jus cogens character (prohibition on torture, prohibition on genocide etc.) does not obtain its peremptory capacity from VCLT, but

rather from the consent of the world community. Therefore, these rules will still be peremptory even if parts of the VCLT are not.

5.6.3.3 Lack of enforcement – a theoretical gap?

When dealing with rules of jus cogens character, there is a unanimous praxis to find support in. ICTY as well as IACtHR and ICJ have stated that jus cogens is not affected by a principle of the persistent objector[79]. One accepts the definition of jus cogens as peremptory norm and that a treaty violating a jus cogens rule is null and void. To then argue that a state by objecting can remain unbound by the peremptory effect of that law seems contradictory. Jus cogens would then have to be redefined since one could no longer speak of any universally binding force for these rules. The theory put forward by Cassese, that persistent trumps any kind of rule even jus cogens, can be dealt with by arguing that state consent has even less of a foundation in the jus cogens rules than in normal customary international law.

A normative view of the matter would no doubt lead to the conclusion that jus cogens out-weighs persistent objector. However, a positive view of the matter is worth mentioning. The fact that several states violate jus cogens, more or less openly, is a well-known one. One of the clearest examples is the prohibition on torture. The USA has for a long duration and rather openly used torture as a method of obtaining information when interrogating prisoners[80]. The prohibition on torture is one of the least disputed rules of jus cogens. Still torture is used as a viable tool. Responsibility and punishment for states that use torture has not been implemented yet. One could pose the question if the USA have a de facto status as a persistent objector towards the prohibition on torture. The USA has shown both state

[79] Inter-American Commission on Human Rights: Report No 62/02, Merits Case 12.285, at 85 and *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Rwanda) 3 Feb 2006 ICJ, p 90 and *Furundžija, Case* No. IT-95-17/1-T, Judgement (TC), 10 December 1998, ICTY, § 144

[80] Mark Danner, *Torture and Truth: America, Abu Ghraib and the War On Terror*, New York Review Books, 2004, p 83-84, also according to Amnesty International as seen on: http://web.amnesty.org/library/index/engamr511452004 Date: 2008-08-18 Time: 10.00 and according to The Guardian as seen on: http://www.guardian.co.uk/world/2005/dec/10/usa.comment Date: 2008-08-18 Time: 10.00

practice and opinio juris to the effect that they have the right to use torture. However considering the fact that the USA has signed CAT the answer is probably no. It is startling none the less, to see how the USA repeatedly violates jus cogens rules without having to fear penalty. The reason for this can in part be explained by the lack of enforcement measures, and by the fact that a strong state has an easier time violating peremptory norms of international law than a weaker one.

5.6.3.4 General customary international law

This whole discussion can be traced back to how customary international law is made. If one considers that consent, state practice and opinio juris have to be given from every state, then one would have to argue, even if it is hard, that jus cogens cannot bind a state that has not consented to its peremptory character. On the other hand, if one argues that state practice and opinio juris have to be obtained from a qualified majority of states, then it is more natural to argue that the majority decision, even regarding the peremptory character of the rule, can bind a few obstinate states.

The argument made by France, that the jus cogens character as such could not apply to France, is probably easiest to meet with the argument that jus cogens is not a specific norm to which one can be a persistent objector. Rather it is a rule-character that is a part of the norm-administering procedure. Therefore, the character of jus cogens is equally binding on all states even though some specific rules with that character might not be.

5.6.3.5 Conclusion Jus cogens

As well as for customary international law, for jus cogens consent is sufficient but not necessary. State practice and opinio juris originating from a majority of states is sufficient for jus cogens to be established. No customary law, global or local, can rightfully violate a jus cogens rule.

From a positive point of view it would be a catastrophe for the human rights regime, if their front-liners, the jus cogens rules, were not binding, universal and peremptory.

Thereto, ILC draft articles on State Responsibility part two chapter 3 states that it is to be unlawful for states to consider flagrant violations of a jus cogens rule as legitimate and that it shall be unlawful to aid or support such a crime.

Considering all this and the fact that a broad majority of the cases, scholars and legislatures consider jus cogens to exist as presented above, it is safe to conclude that a rule of jus cogens cannot be set aside by prior objections by a state, no matter how persistent.

5.6.4 Persistent objector vs. Human rights

5.6.4.1 Theory of Lau

Dr Lau goes quite far in his article, stating that the whole human right regimes should be exempt from the principle of the persistent objector. His "original consent theory" means that every human rights law has to be treated as peremptory under international law. . This would mean that the rules currently seen as peremptory would get less protection, since the prohibition on international violence[81] and the prohibition on torture would get the same protection as the prohibition on sexual discrimination at a workplace. This would lead to a lowering of jus cogens rules due to the fact that their status is not as exclusive as it is today. This would probably not lead to an increased value for human rights, for no state in this world is ready to accept every human right as peremptory. Making too great demands on states might have a reversing affect, since states could start to turn away from the regime as a whole.

Laus theory could also create a certain amount of uncertainty within the system as human rights are not fully delimited. It would also mean a strain

[81] Ibid: not 42, UN Charter, art 2.4, and the, for this area relevant and arguably identical, customary international law.

on the judicial instances combating the worst forms of human rights abuse, which are violations of jus cogens rules.

Laus original consent theory is only in part corresponding to international law theory. The role of consent has been lessened over time regarding the making of customary international law. However, he argues that the two main pillars of his theory are that it would not be detrimental to the predictability of international law and that human rights would be given a greater protection.

The first pillar can be understood as an affirmation that the international system will not suffer harm if the theory was to be implemented. However, this does not provide any substantial argumentation on why Lau's theory would be legitimized under international law. Therefore, this pillar is of secondary importance.

His argument of the strengthening of human rights is an honourable one. One might think most people would like to strengthen human rights, they just have different ideas on how to do so. However, one must consider the fact that human rights as a regime does not have such a strong backing. In Europe the work with human rights has come a lot further than in other parts of the world. The ideas and values contained in the human rights regime are built on European values and much of the financing of human rights come from state and non-state actors of the European Union. This is of course something European human rights workers can be proud of, but there is also a great danger in making the human rights regime seem like a western and Christian idea. Voices have been raised calling human rights a western, imperialistic and covert re-colonialization[82]. This is highly detrimental to the regime as such, since human rights depend on the cooperation of all states. Therefore, the development should rather go slow, with all states in the boat, than having states leaving the ship all together.

[82] Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), especially chapter 10, "Armed Intervention for Humanity," and chapter 11, "Failed States: International Trusteeship." See also Mohammed Ayoob, "Humanitarian Intervention and International Society," *Global Governance* 7, no. 3 (July—September 2001), pp. 225-230.

The problem somewhat lies in how we define the terms human rights and jus cogens. Considering that neither human rights nor jus cogens have a clear or even satisfactory definition, one will still see that the threshold of definition is higher regarding jus cogens. As mentioned earlier, art 53 VCLT demands that the world community shall have accepted and recognized the rule as peremptory and that no derogation can be tolerated. The customary international law on this subject is identical.

Up until today, Lau seems to be a part of a very small minority of the scholars stating that the human rights regime is universal. As a matter of fact, no state has argued or acted like the whole human rights regime was peremptory.

Even if the theory of Lau, from a humanitarian viewpoint is highly respectable, it contains flaws from the viewpoint of international law. For the theory to work practically, it is needed that state consent is regarded as in all irrelevant, for the benefit of a supranational legislative body. Such a result, morally respectable as it may be, the international legal system is not ready to accept quite yet.

5.6.4.2 Case law

In the cases, and for that matter in the doctrine, regarding jus cogens one finds support for the opinion that the human rights regime should not enjoy such universality. The ICJ, the IACtHR and ICTY have all stated that there is a clear difference between universally binding rules (jus cogens) and human rights. Therefore, e contrario one could use all the cases stated above in section 4.4.1.2. as proof that the human rights regimes has no universally binding force.

The fact that the ICJ has acknowledged the extremely high protective value of jus cogens rules gives witness to the fact that there are other rules with less protective value that do not deserve the same high protection. Some, but not all, human rights rules have reached a status of jus cogens, but there is no support due to the circumstance that the regime as a whole has reached peremptory status.

In the Domingues case before the IACtHR the court specifies that there is a possibility to become a persistent objector towards human rights.

Human rights are still a rather controversial regime if one is to consider the abilities and wills of states to implement these norms. If the demands on states become too high, the risk is that states start to turn away from the regime as a whole. This would be highly regrettable since the states are still the major actors and enforcers regarding implementation of human rights.

5.6.5 Conclusion - persistent objector defined

Regarding the delimitation of the principle of the persistent objector one comes to the conclusion: A state can obtain a status as a persistent objector towards a customary international law including human rights, but not towards a peremptory norm (jus cogens). To become a persistent objector, a state has to deliver its objections before the rule becomes a customary international law. Neither subsequent objectors nor new states can by protesting affect the universally binding force of customary international law.

5.7 The issue of enforcement

Criticism regarding the practicability or the implementation of the principle is just and fair. For small and weak states, it can be hard to stand up against the diplomatic and economic pressure that stronger states often use to create a uniform praxis or simply to get their will through. The ICJ made a comment on this in the Use of Nuclear Weapons Opinion Case where the court considered, that if vital state-interests are at stake, then that state will have no problem being the dissident, even though the pressure is high[83].

[83] *Legality of Threat or Use of Nuclear Weapons Opinion,* 8 Jul 1996, ICJ, ICJ Reports 1996, p. 226

However it seems as if no state has ever used the principle of the persistent objector as a long-time solution. Most states seem to have the wish to maximize their conformity with international law, and within that it does not fit to persistently object to customary international law. Regardless whether this originates from a genuine belief in the moral correctness of the norms or if it arises from political or economic pressures, the outcome is the same: no matter how big the state is, it sooner or later adjusts to the will of the world community and cannot or will not keep its status as a persistent objector.

6 Conclusion

The conclusion after an examination and analyze of the legal position of this principle is that there is a right for states to become a persistent objector to a rule and therefore remain unbound by its legal effect for as long as the objections are kept up. This is possible since customary international law is created by a majority decision of the world community.

To become a persistent objector the state has to object openly, persistently and do so before the rule comes into force as a law. This means that no such possibility exists for subsequent objectors or for new states, as the preservation of the binding effect of customary law is a higher objective.

A status as a persistent objector can be obtained against any kind of rule except peremptory norms (jus cogens). Therefore, such a status can be obtained against normal human rights.

7 Finish

In order to be able to unite, every state's protection for its sovereignty with the aims and goals of the world community, to create peace and security, there is a need for a principle of the persistent objector. The principle cannot be used too widely, since international law would lose its predictability. The principle cannot be used to narrowly either, for state sovereignty will be damaged and one risks to have states turning away from the international system as such.

The principle as presented in this thesis takes this into consideration. However, since the role of state sovereignty is declining and the world community is becoming ever more functionally based and flexible, one must conclude that the principle is existent today but will possibly not be employed in the future. The creation of the principle resulted from the decline of state sovereignty. Since a trend of increased globalization, interdependency and integration becomes visible, this will inevitably lead to a decline in legitimacy for the persistent objector as well. If the trend continues, the future decisions of the world community will be binding upon all states without exceptions. The principle of the persistent objector is a great compromise between state sovereignty and supranational majority governance. During the globalization process, there will be a need for the principle. When that transition is over, the diplomacy or flexibility offered by the principle of the persistent objector will no longer be needed. Therefore, it can be detected that the case of the persistent objector is indeed the one of a demising hero.

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