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**Stability And Change In International Customary Law**

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## STABILITY AND CHANGE IN INTERNATIONAL CUSTOMARY LAW

ABSTRACT: While customary law is capable of creating universally binding rules, the rules that govern its formation allow states to gain an exemption from emerging norms of customary law by remaining persistent objectors. This form of objection requires the objecting state to take express action to oppose an emerging practice by making its objections widely known before the practice solidifies into a binding rule of custom. Likewise, after the custom is formed states have an opportunity to express an objection or depart from it. In this latter case, the departing state does not obtain an exemption from the binding custom unless other states acquiesce to its departure. We model the effects of persistent objector and subsequent objector doctrines in the formation and change of customary law when heterogeneous states are involved.

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Custom constitutes a primary source of international law, and has given origin to many rules that govern relationships between sovereign states. The binding force of international customary law rests on the implied consent of states. States express their consent to be bound by a given customary rule through their own actions or practices. The process of custom formation has struggled with the vexing question of how to promote stability and reliance on customary law, while preserving the voluntary support of customary law in the fluid environment of international relations. The balance between stability and change in international customary law becomes particularly complex in the face of diverse states' preferences and changed circumstances over time.

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

In this paper we model the process of customary law formation and consider two legal doctrines that allow states to avoid the binding force of international customary law: the persistent objector and subsequent objector doctrines. The first doctrine gives objecting states an opportunity to avoid, partially or entirely, the binding force of an international norm by objecting to it. Under the subsequent objector doctrine, states can gain an exemption to depart from an existing rule of customary law only by securing the acquiescence of other states. This paper considers the effects of these two doctrines when heterogeneous states are involved. The economic model reveals that the persistent and subsequent objector doctrines minimize the impact of strategic objections and departures from customary law, while maintaining the flexibility necessary for adapting custom to changed circumstances over time. By doing so, these international law doctrines effectively balance opposing needs for stability and change in the evolution of custom, while preserving the voluntary basis of international customary law.

Section 1 provides a stylized explanation of the rules that govern the formation of international customary law and the role of the persistent objector doctrine in the formation of custom. Section 2 models custom formation when states have an opportunity to opt out of emerging customs by invoking the persistent objector doctrine. Section 3 considers the role of the subsequent objector doctrine in custom formation. Section 4 extends the model to examine the workings of the subsequent objector doctrine. Section 5 compares the effects of the two doctrines on custom formation.

## **1. International Customary Law and Persistent Objector Doctrines**

Relatively few principles govern the formation of customary law. The theory of customary law defines custom as a practice that emerges outside of legal constraints and which individuals, organizations, and states follow in the course of their interactions, out of a sense of legal obligation.

## 1.1 Principles on the Formation of General International Customary Law

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

With respect to the first formative element, the emergence of an international customary law requires the presence of a stable and fairly uniform international practice with which many states have consistently complied. A time limit for compliance is not defined; however, a long duration helps to establish that compliance with the practice was consistent, and also helps to clarify the context and meaning of the practice.<sup>1</sup> Further, the practice should emerge from the spontaneous and uncoerced behavior of states. Restatements of international law refer to the consistency and generality of the customary practice. The consistency requirement is not met if it is impossible to identify a general practice because of fluctuations in behavior.<sup>2</sup> More recent cases in international law restate the uniformity requirement in terms of increasing and widespread acceptance, allowing special consideration for emerging norms (or local clusters of multilateral practice) that are expected to become widespread over time.

The second formative element is generally identified by the phrase *opinio juris ac necessitatis*, which describes the requirement that the customary action be perceived by states as fulfilling an essential norm of social conduct.<sup>3</sup> According to the *opinio juris* requirement, states must act with the belief that the applied practice is undertaken to fulfill an underlying legal

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<sup>1</sup> Viller, 1985, p. 24. Stability of the practice over time is interpreted with some flexibility according to the circumstances. There is no universal minimum duration for the emergence of customary rules. Customary rules have evolved from both immemorial practice and single acts. Still, French scholars have traditionally advocated the passage of forty years for the emergence of an international custom, while German doctrine has generally required thirty years. (Tunkin, 1961; and Mateesco, 1947). Naturally, the longer the time required to form a valid practice, the less likely it is for custom to be an effective substitute for treaty law (or formal legislation, in the domestic setting), and to adapt to changing circumstances over time.

<sup>2</sup> Regarding the interpretation of the condition of consistency or universality, international legal theory is ambivalent. Charney (1986) suggests that the system of international relations is analogous to a world of individuals in the state of nature, and dismisses the idea that unanimous consent by all participants is required before binding customary law is formed.

<sup>3</sup> This element is also often described as necessary and obligatory convention (Kelsen, 1939 and 1945; D’Amato, 1971; Walden, 1977).

obligation, and that the practice is not followed by the state out of convenience or diplomatic courtesy during a certain period of time. This requirement is aimed at insuring that customary law results from a general consensus of states, rather than from an occasional and unqualified convergence of state practice.<sup>4</sup>

## 1.2 *Persistent Objector Doctrines and Special International Customary Law*

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

Some states have successfully argued that if they persistently object to an emerging rule of customary law, if and when a rule is formed it cannot be applied against them. These claims led to the gradual recognition of a principle known as the *persistent objector doctrine*, allowing states to opt out of a new and otherwise universal rule of international customary law by remaining persistent objectors (Brownlie, 1990, p. 10; Kontou, 1994, p. 4; Stein, 1985, p. 457; and Wolfke, 1993, p. 66).<sup>5</sup> Objection to an emerging custom may be full or partial. Full objection signifies that the state does not accept and does not wish to become bound by any part of the emerging custom. A partial objection implies acceptance of some part of the custom. Partial objection is generally found when states object by articulating or implementing a different rule

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<sup>4</sup> Asylum and diplomatic immunity rules are among the oldest examples of customs that emerged in line with these requirements. Already in ancient Greece the practices of granting asylum for political reasons and giving immunity to diplomatic missionaries were accompanied by the belief that those practices fulfilled a fundamental necessity of international relations, given the fact that their violation would have seriously undermined the stability of peaceful relations of states. See Kelley (1992)

<sup>5</sup> For further discussion of the persistent objector doctrines in international customary law see also Akehurst (1974-75) and Charney (1985). For a dissenting view on the legality and desirability of the persistent objector's exemption from customary law, see D'Amato (forthcoming).

which they consider preferable to the emerging custom. Full persistent objection leads to a complete exemption from the emerging custom, while partial objection leads to a partial exemption from the rule. Once the custom solidifies, the portion of the custom that was not objected to binds the partial persistent objector.

Feasibility of the persistent objector doctrine was explicitly supported by two well-known cases decided by the International Court of Justice. In *Columbia v. Peru*, the Columbian embassy granted political asylum to a Peruvian national who was a leader of a military rebellion in Peru. The Peruvian government argued that the grant of asylum violated both a 1911 extradition treaty and a rule of customary law. The court ruled in favor of Peru, stating that Colombia failed to establish existence of a custom which permits the state granting diplomatic asylum to unilaterally define an offense as political. The court stated that since Peru did not ratify the treaty in question and specifically repudiated the asylum provisions, it would only be bound by international customary law. The customary rule governing asylum was however found not enforceable against Peru, because Peru persistently objected to such custom during its formative stage.<sup>6</sup> Similarly, in *United Kingdom v. Norway*, the court ruled that because the government of Norway had consistently opposed the territorial fishing zone regime, Norway was a persistent objector and therefore not bound by such customs.<sup>7</sup>

To successfully invoke the persistent objector doctrine two elements must be met. First, the objecting state must oppose an emerging customary practice by making its objections widely known before the practice solidifies into a binding rule of custom. Thus, the state must clearly object to the law from the moment of its conception or from the moment the state learns about any relevant practice or declaration that may lead to the establishment of a custom. The objection can be expressed in the form of statements, votes, or protests or can be implied by “abstaining from practice or adhering to a different practice” (Viller, 1985, p.15).<sup>8</sup> Second, the objection to a practice must be consistent. Thus, the state must clearly object to the law from the beginning and continue to do so throughout its formation and beyond (Loschin, 1996, p. 150). A state may not

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<sup>6</sup> *Asylum case (Columbia v. Peru)*, 1950 I.C.J. 266, 272-78.

<sup>7</sup> *Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. 116, 124-31.

<sup>8</sup> According to Stein (1985, p. 458), in order for the doctrine to apply, it is sufficient that a state makes its objection “manifest during the process of the rule’s emergence.” See also the *Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. 116 (Judgment of December 18); *Asylum Case (Columbia v. Peru)*, 1950 I.C.J. 266 (Judgment of June 13).

adhere to a practice on some occasions and object to the practice on other occasions. A consistency requirement allows other states to rely on the position of the objecting state and prevents the objecting state from benefiting from ambiguities in its own course of action.

Two additional principles govern applicability of the persistent objector doctrine. The first excludes application of the persistent objector doctrine to international norms that are peremptory. A state may not invoke the persistent objector doctrine if the customary law has achieved the status of *jus cogens* or imperative law.<sup>9</sup> The second principle provides new states an opportunity to opt out of an existing rule of international customary law. New states, and states that achieved independence after formation of a custom, can obtain exemption from a previously arisen custom if they object within a reasonable period of time.<sup>10</sup>

### 1.3 Uniformity and Diversity in Customary Law

Traditionally, influence of the persistent objector doctrine on formation of international customary law was quite limited (Stein, 1985). In the past the doctrine was rarely applied; states that did not want to follow a rule simply attempted to refute its existence. Recent decades have seen a growing amount of official documentation concerning the existence and content of customary law (judgments of international courts, writing of publicists, or declaratory treaties). With increased awareness by the international community and non-governmental organizations of existing international customs, states cannot easily confute an existing customary rule and invoke the persistent objector doctrines to avoid the binding force of existing custom.

The greater accessibility and verifiability of general customary law has thus given momentum to the persistent objector doctrine in the practice of international law (Loschin, 1996, pp. 151-153). The persistent objector doctrine offers a dissenting state a way to avoid being bound by specific emerging customs, while reaffirming the legitimacy of the underlying customary law process at the same time.

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<sup>9</sup> *Jus cogens* encompasses peremptory rules that serve the most fundamental interests of the international community and that should be obeyed by all states without exception (Loschin, 1996, pp. 158-163). *Jus cogens* principles cannot be overridden by the persistent objector doctrine because *jus cogens* stands for fundamental and essential norms of justice which no state can be allowed to disobey (McClane, 1989, p. 25).

<sup>10</sup> The reason that newly independent states are given time to gain the status of a persistent objector is the necessity to support a newly independent state's sovereignty and equality (Viller, 1985, pp. 16-17).

## 2. The Formation of Custom with Persistent Objectors

In the recent law and economics literature, attention has been devoted to the emergence, sustainability, and change of international customary law (Goldsmith and Posner, 1999 and 2000; Fon and Parisi, 2002). This Section wishes to contribute to that literature analyzing the impact of the persistent objector doctrine on the process of custom formation when heterogeneous states are involved. As discussed above, customary rules emerge from past practice. Prior to the solidification of a practice into a binding custom, states engage in actions on a purely voluntary basis, taking into account the costs and benefits of the action and their interest in establishing a customary rule that would bind for the future.<sup>11</sup> After the initial period, from period 1 to infinity states alternate roles on a probabilistic basis and engage in repeated interaction. Each state  $i$  confronts probability  $\alpha_i$  that once the custom is established, it may receive a benefit from other states' compliance with the custom, and probability  $\beta_i$  that state  $i$  may be called upon to fulfill obligations created by the custom.<sup>12</sup>

Consider the emergence of a multilateral custom among  $M$  heterogeneous states. A level of participation effort  $e$  characterizes the content of the customary rule.<sup>13</sup> Effort to comply with the custom imposes costs on the performing state and benefits on the receiving state. A state  $i$  that participates in the custom with level of effort  $e_i$  faces compliance costs  $ae_i^2$  and generates benefits  $be_i$  to other states. Once the custom is established, the state can rely on reciprocal

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<sup>11</sup> Before practices mature into a custom, states face a voluntary participation problem similar to that studied by Fon and Parisi (2002). They investigated bilateral custom under reciprocity and discussed the ability of custom formation to generate Kaldor-Hicks efficient customs. This paper extends those findings to persistent objector and subsequent objector doctrines.

<sup>12</sup> The interpretation of probabilities  $\alpha_i$  and  $\beta_i$  can be illustrated by the following example. Imagine that a customary rule imposes an affirmative duty on coastal states to rescue foreign vessels within a range of 200 miles from the state's coastline. Then  $\alpha_i$  represents the probability that state  $i$ 's vessels may need rescue and benefit from the customary rescue rule. This probability depends on the number of vessels that fly state  $i$ 's flag when navigating the high seas.  $\beta_i$  represents the probability that state  $i$  may be called upon to rescue other states' vessels. This probability depends on the extent of state  $i$ 's coastline and navigation routes in its proximity.

<sup>13</sup> In our rescue example, the effort level  $e$  represents the standard of care or investment of resources that states undertake when rescuing other states' vessels under the customary practice.

conduct from other states. Assuming that the state has a discount rate  $r$  ( $r > 0$ ), the ideal level of custom participation for state  $i$  is identified by solving the following problem:<sup>14</sup>

$$\max_{e_i} P_i = \frac{1}{r}(\alpha_i b e_i - \beta_i a e_i^2) \quad ((a))$$

The ideal level of custom participation chosen by state  $i$  is thus:

$$e_i = \frac{\alpha_i b}{2\beta_i a}, \quad ((b))$$

and the payoff achievable under the custom for state  $i$  is:

$$P_i(e_i) = \frac{\alpha_i^2 b^2}{4\beta_i a r} \quad ((c))$$

Note that if states are homogeneous, so that each state faces the same probabilities, costs, benefits, and participation constraints, then the interests of all states converge. Each state desires the same custom level  $e_i = \frac{\alpha b}{2\beta a}$ , and no state has an incentive to become a persistent objector.

The presence of heterogeneous states implies that participating states may have different views on the desirability and content of the custom. The persistent objector doctrine provides a mechanism through which the different actions and objections of the states are brought together to generate a rule of custom.<sup>15</sup>

When a typical heterogeneous state  $i$  chooses not to participate in the emerging custom, the alternative for the state is to continue its undertakings in the absence of a recognized rule. In many instances the no-custom regime implies adopting a “self-help” approach. In the absence of custom, the state faces the cost of its own effort each time it seeks to obtain a benefit for itself, and the probabilities of supplying and receiving help thus equal  $\alpha_i$ .<sup>16</sup>

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<sup>14</sup> A discount rate reflects the state’s time preference on the uncertainty concerning the effective emergence of a custom. See Fon and Parisi (2002) for more discussion.

<sup>15</sup> Persistent objector states may opt out in full or in part from excessive customary obligations. There is no symmetric opportunity for persistent objector states to force a level of customary obligation higher than the emerging custom. Obviously, differences among states based on asymmetric preferences can be settled by means of bilateral or multilateral treaties specifying specific treaty obligations for the states. Such tailoring of international obligations to the needs of states is not possible under general customary law, given the initial need for uniform customary practices.

<sup>16</sup> For example, with respect to our hypothetical rescue rule, rejection of the custom implies that the state prefers a self-help approach in which each state faces the burden of rescuing its own ships, even when far from the state’s

Generally speaking, we assume that the costs faced by the state in a no-custom regime are  $\bar{a}_i e_i^2$ , which differ from costs faced by the state under the custom.<sup>17</sup> We assume that the benefit received is the same and equals  $b e_i$ . Given these assumptions, the custom-participation problem faced by state  $i$  depends on solving the following problem.

$$\max_{e_i} \bar{P}_i = \frac{1}{r} \alpha_i (b e_i - \bar{a}_i e_i^2) \quad ((d))$$

The optimal choice of effort for the no-custom regime is  $\bar{e}_i = b/2\bar{a}_i$ . The optimal payoff obtainable by the state in the absence of the custom is given by the following:

$$\bar{P}_i(\bar{e}_i) = \frac{\alpha_i b^2}{4 \bar{a}_i r} \quad ((e))$$

State  $i$ 's best obtainable payoff in the no-custom regime,  $\bar{P}_i(\bar{e}_i)$ , determines state  $i$ 's participation in the custom. State  $i$  chooses to participate in the custom when the best obtainable payoff under the custom is higher than  $\bar{P}_i(\bar{e}_i)$ .

States may gain an exemption from customary law by persistently objecting to an emerging customary practice. Objection can be full or partial. Objection is full when a state is altogether unwilling to join the custom, whatever its content. Objection is partial when a state is willing to join the custom, but prefers a level of effort lower than that required by the emerging custom.<sup>18</sup> Consider the behavior of two groups of states. The first group of states desires a lower level of obligation than that required by the custom. Conversely, the other group of states prefers a higher level of obligation than the emerging custom would deliver.

First, take the case in which the ideal level of custom participation  $e_i$  for state  $i$  is less than the emerging custom obligation level  $e^C$ . Should state  $i$  decide to join the custom, it would never choose full participation, given the opportunity to obtain partial exemption via the persistent objector doctrine. This is true because the payoff obtainable at the privately optimal  $e_i$

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own coastline, without the assistance of other states in closer proximity to the accident. Under the self-help regime, states must assist their own vessels each time they are in trouble.

<sup>17</sup> This can be easily understood in the rescue example. The cost of rescuing a ship far from the state's coastline is different from the cost to the state of rescuing a foreign vessel in the proximity of its coast.

<sup>18</sup> As a second-best solution, in the face of a persistent objection, other states take advantage of the reciprocal effects of a unilateral objection, allowing them to adopt the same customary level against the objecting state. In this context, the persistent objector doctrine constitutes an example of weak reciprocity studied in Fon and Parisi (2003).

is higher than that obtained by full adherence to the custom  $e^C$ . Thus, state  $i$  either joins the custom partially by becoming a partial persistent objector, or opts out of the custom altogether by raising full objection. In either case, state  $i$  takes advantage of the opportunity to be a persistent objector. The choice between full and partial objection is driven by the relative magnitudes of  $P_i(e_i)$  and  $\bar{P}_i(\bar{e}_i)$ . If  $\bar{P}_i(\bar{e}_i)$  is greater than  $P_i(e_i)$ , the payoff under the no-custom regime is higher than the payoff from joining the custom. State  $i$  therefore fully objects to the custom. Substituting the values found in ((c) and ((e) for  $\bar{P}_i(\bar{e}_i)$  and  $P_i(e_i)$  and simplifying, we see that state  $i$  fully objects if  $\frac{1}{\bar{a}_i} > \frac{\alpha_i}{\beta_i a}$ . Thus, when the cost of not joining the custom  $\bar{a}_i$  is relatively small and/or the probability ratio  $\alpha_i/\beta_i$  is small, the persistent objector state  $i$  fully opposes the emerging custom.<sup>19</sup> On the other hand, when the cost of not joining the custom is rather large and/or the probability ratio  $\alpha_i/\beta_i$  is large, the persistent objector state  $i$  partially opposes the emerging custom.

Next, consider the case in which the ideal level of custom participation  $e_i$  for state  $i$  is greater than the emerging custom obligation level  $e^C$ . Although state  $i$  prefers the emergence of a custom with a higher level of obligation, persistent objector states cannot force a level of customary obligation higher than the emerging custom. Thus, the state's benefit from joining the custom is given by the payoff at the custom obligation level  $e^C$ :  $P_i(e^C)$ . The participation constraint now requires a comparison between the payoff obtained under the no-custom regime  $\bar{P}_i(\bar{e}_i)$  and  $P_i(e^C)$ . If  $P_i(e^C)$  is greater than  $\bar{P}_i(\bar{e}_i)$ , there is full participation in the custom and state  $i$  does not become a persistent objector. If  $\bar{P}_i(\bar{e}_i)$  is greater than  $P_i(e^C)$ , state  $i$  is better off opting out of the custom altogether by becoming a full persistent objector.

The above analysis brings to light some interesting results. First, different categories of states may choose to opt out of an emerging custom. Full objection is a rational strategy not only for states that consider the emerging custom excessively burdensome, but also for states that like

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<sup>19</sup> If the probability ratio of receiving benefit and performing under custom  $\alpha_i/\beta_i$  is small, state  $i$  is less likely to receive a benefit than to face the burden of future implementation of the custom. State  $i$  can be considered a low benefit or high cost state. Thus, in this case it is more likely for state  $i$  to fully oppose the custom.

the custom but want more of it. Some states agree with the spirit of the custom but are not satisfied with the emerging rule because they would like a custom with a greater level of obligation. Some of these states may be better off opting for a no-custom regime and addressing the issue on their own. The payoff in a no-custom regime represents the opportunity cost of custom participation identified in ((e)). This opportunity cost will likely be larger for stronger states that face lower cost,  $\bar{a}_i$ , and which may have greater opportunities to stand alone and generate benefits for themselves in the absence of international cooperation. For those states customary cooperation is less indispensable than for other states that have less opportunity to address the underlying need by acting on their own. Given the lower payoff obtainable in a no-custom regime, weaker states facing higher costs may be more willing to go along with an emerging custom that does not correspond to their ideal level.

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

Finally, the level of objection would differ if states had to formulate objections at the time they were called upon to comply with the custom. In this model we do not include the initial cost of custom compliance because the persistent objector doctrine requires the objection to be “consistent” (i.e., states’ objections should be formulated *ex ante*, rather than when states are called upon to perform a custom obligation). The legal requirement of “consistency” is thus instrumental to avoid manipulation of the content of the custom by a state’s myopic strategic objection. If allowed to formulate objections when compliance is due, states might be tempted to corrode the mutual long-term benefits of the custom to avoid immediate compliance costs. This would compromise the ability of the custom process to generate desirable levels of legal obligations.

### 3. Subsequent Objector Doctrines in International Customary Law

According to traditional international law, states can object to a norm of international customary law only during its emergence. The persistent objector doctrine requires a timely reaction of states to emerging customs. If a state waits to object until after the practice becomes a binding rule of international customary law, the state cannot claim exemption from it. Subsequent departures of a state from an established custom would constitute an international wrong, unless other states acquiesce to the state's late departure. A state cannot *unilaterally* depart from a customary rule once it has become bound by it.<sup>20</sup>

This traditional approach provides an opt-out opportunity during the formative phase of a custom but provides no flexibility for subsequent adaptation of custom to the changing needs of the international community over time. In the context of multilateral customs, international law practice has gradually developed doctrines to avoid excessive rigidity of international customary law. One such doctrine, resulting from the application of the long-standing principle of *rebus sic stantibus* to customary law, allows states to depart from international law in the face of fundamental changes in the state of affairs that led to the original legal obligation (Kontou, 1994).<sup>21</sup> Given their limited verifiability, changes to individual states' costs and benefits are not covered by the *rebus sic stantibus* principle. Likewise, states are not allowed to invoke changes in internal laws or policies as a justification for a unilateral departure from international customary law.<sup>22</sup> Departures from customary law that are not supported by the *rebus sic stantibus* principle may nevertheless find limited accommodation in the *subsequent objector doctrine* (Brownlie, 1990).

The subsequent objector doctrine addresses situations where a state (the "subsequent objector" state) objects or departs from a customary rule after its formation, as opposed to

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<sup>20</sup> See Wolfke (1993, p. 66) "A state may certainly not unilaterally at will refuse the legal consequences of its previous consent to accept a practice as law . . . ."

<sup>21</sup> The *rebus sic stantibus* principle is often referred to as the law of changed circumstances. It allows a state to terminate an existing obligation on the grounds of fundamental and unforeseen changes in circumstances, as long as the changes were not caused by the state invoking the excuse (Brownlie, 1990).

<sup>22</sup> A fundamental change in circumstances may be the basis of an exemption from international law only if it increases "the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken". *Fisheries Jurisdiction Case* (1973).

objecting to the rule during its emergence, as in the persistent objector case.<sup>23</sup> The effects of a state's departure from a previously recognized custom are determined by the speed and spread of the process of defection. Many different outcomes are possible under this doctrine. One limiting case occurs if a substantial number of states depart from an old custom. If the momentum of widespread defection is accompanied by general acquiescence by the remaining states, a new rule may result. Thus if events unfold rapidly, one state's departure from an existing custom may trigger the emergence and widespread adoption of a new custom. The other limiting takes place when the subsequent objector's departure from customary law is met with general opposition by other states. In this case the subsequent objector's action, far from generating a new custom, is construed as a breach of international customary law. The subsequent objector doctrine in fact does not allow unilateral departures from existing custom.

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

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<sup>23</sup> Villiger (1985, p. 17) discusses the difficulties in recognizing subsequent objectors' unilateral departures and the need to obtain acquiescence from other states: "Their position is untenable, in part, because other states have come to rely on the subsequent objector originally conforming to the rule. Also, general customary law is binding on all states and cannot, in the words of the Court, be subject of "any right of unilateral exclusion exercisable at will by any one of [the international community members] in its own favor." (Quoting *North Sea Cases* ICJ Reports 1969). See also Stein (1985, p. 458).

The above process implies that when one state departs from a preexisting custom and another state acquiesces to such departure the subsequent objector doctrine allows the rule to be modified between these parties.<sup>24</sup> The change in customary law affects only the relations between these states. Other states must choose between becoming parties to a new or amended custom that may affect their rights under the preexisting customary rule, or continue to adhere to the old regime and demand compliance with the preexisting custom by the departing state. Even in the face of a third state's opposition, the change in the customary law between the departing state and the acquiescing state will take place.<sup>25</sup> In practice, this process often fragments a previously uniform rule of custom into a network of bilateral relations, where the content of each bilateral relation is determined by the extent of one state's departure and the other state's acquiescence.<sup>26</sup>

#### **4. Custom with Subsequent Objectors: Theoretical Considerations**

In the subsequent objector doctrine, the objection to a custom takes the form of a departure from an established and already binding rule of custom. To highlight and separate the subsequent objector's problem from the persistent objector's problem, we start with a group of

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<sup>24</sup> This process bears some similarity with the rules governing the amendment of international treaty law. Under § 334 (3) of the *Restatement of the Law, Third Foreign Relations Law of the United States*: "§ 334. Amendment or Modification of International Agreement. (1) An international agreement may be amended by agreement between the parties. [...] (3) Two or more of the parties to a multilateral agreement may agree to modify the agreement as between themselves alone if such modification [...] would not be incompatible with the rights of the other parties to the agreement or with its object and purpose." Under this provision, an amendment is permissible and takes effect for the states that agree to it even if other states do not agree to the amendment. See also 1969 *Vienna Convention on the Law of Treaties*, Article 41(2).

<sup>25</sup> The change in customary law takes effect for the departing states and the states that provide implicit consent via acquiescence unless the rule of customary law is one of *jus cogens* or the change to the two states' practice adversely affects the interests of third party states.

<sup>26</sup> Note however that while a subset of states can modify the effects of a customary rule by subsequent practice or modify a treaty obligation by subsequent treaty amendment, international law is still ambivalent on the issue of modification of treaties via subsequent practice. The International Law Commission proposed an article providing that a treaty could be modified by subsequent practice indicating agreement to such modification. As explained in the Reporter's Notes to the *Restatement of the Law, Third Foreign Relations Law of the United States*, that proposal was deleted after the delegation of the United States, among others, objected that an agreement might be deemed amended as a result of unauthorized actions by state officials. Kearney and Dalton (1970, p. 525). The question of modification by subsequent practice tends to merge into that of interpretation by subsequent practice under § 325, Comment c. See also *Decision of Arbitration Tribunal concerning International Air Transport Services Agreement between France and the United States*, 16 R.Int'l Arb. Awards 5 (1964).

homogeneous states acting under an established custom. This stylized simplification ensures that when the custom emerges, no state has an incentive to become a persistent objector. In particular, each state faces the same probability of receiving benefit  $\alpha$ , the probability of being burdened by the custom obligation  $\beta$ , the same discount rate  $r$ , and the same benefit and cost from participation in the custom,  $be$  and  $ae^2$ . Thus, each homogeneous state  $i$  is confronted with the forward-looking problem before the practice consolidates to a custom:

$$\max_e P_i = \frac{1}{r} (\alpha be - \beta ae^2), \quad ((f))$$

and each state chooses the following effort level:

$$e^* = \frac{\alpha b}{2a\beta}. \quad ((g))$$

Given homogeneity of the states, the effort level  $e^*$  characterizes the content of the states' respective obligations under customary law.

Given an existing rule of customary law, there are many reasons why a state may become a subsequent objector.<sup>27</sup> Some reasons are merely strategic: a state may object to an existing rule of customary law to avoid the cost of fulfilling its obligations under that rule. Other subsequent objections are driven by changes in the costs and benefits of the custom. For example, if the cost  $a$  of complying with the custom has increased or if the probability  $\alpha$  of receiving a benefit from other states' compliance has decreased, a state may develop different views on the desirable content of the custom.<sup>28</sup>

To understand how other states react to a subsequent objector's departure from existing custom, it is useful to separate states into three groups. The first group consists of first-party states that have reasons to become subsequent objector states. The second group of states comprises second-party states that would benefit from the subsequent objector's fulfillment of the customary obligation. Finally, third-party states neither expend effort to fulfill the customary obligation nor receive any direct benefit from the subsequent objector's compliance in the current period.

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<sup>27</sup> Unlike persistent objectors who raise objections prior to facing a compliance problem when the custom is not yet binding, subsequent objectors manifest their objections by departing from an already binding rule of customary law.

<sup>28</sup> This can be seen from (1)a)i)(1)(g).

Just as a state may become a subsequent objector for various reasons, different factors influence the reactions of second-, third-, and other first-party states to a proposed departure of a subsequent objector.<sup>29</sup> We first consider the case of no exogenous changes in the circumstances of all states. Then we assume uniform changes in the circumstances of all states. Finally, we study the subsequent objector doctrine given asymmetric changes in the circumstances of all states.

#### 4.1 *Strategic departures, subsequent objector doctrine, and opposition from other states*

Consider the case in which probabilities, benefits and costs associated with the expected long-term participation in the custom do not change for any state. A first-party state may still become a subsequent objector for strategic and myopic reasons. In one period, the first-party state confronts its turn to fulfill the obligations under customary law. The need to incur an immediate cost for compliance with the custom may induce the first-party state to invoke a standard different from the existing customary law and to become a subsequent objector. Due to the immediate performance costs the first-party state faces a somewhat different yet myopic problem from before:

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

The privately optimal effort of the first-party state now differs from the existing customary obligation:

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

Since  $\frac{\alpha}{(r + \beta)} < \frac{\alpha}{\beta}$ , from ((i) and ((g) we see that  $e_1 < e^*$ . The first-party state wishes to

depart from the existing rule of custom and is willing to lower the future customary obligations for all participants in light of its current situation. Although  $e_1$  is first-best for the subsequent

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<sup>29</sup> Other first-party states that become subsequent objectors also react to the original subsequent objector state. The content of the custom between two first-party states who both want to depart from the existing custom, perhaps to different levels, is governed by the subsequent objector doctrine in ways similar to those explicitly considered in this section.

objector state, any value less than the original customary rule  $e^*$  is better than  $e^*$ , as long as it is greater than  $e_1$ . Thus, in proposing a departure from the existing custom, the subsequent objector effectively puts a lower bound on the acceptable level of custom at  $e_1$ .

If the subsequent objector state could have its own way, custom would evolve to a lower level, with a partial erosion of the preexisting customary rule. But the subsequent objector's proposed departure is not necessarily acceptable to other states.<sup>30</sup> When another state does not oppose (acquiescence) the subsequent objector's departure from an existing custom, the content of the custom changes from the original value  $e^*$  to  $e_1$  for both the subsequent objector and the acquiescing states. When another state opposes (no acquiescence) the subsequent objector's departure from an existing custom, the content of the custom between the subsequent objector and the non-acquiescing state remains at the original value  $e^*$ . In the intermediate case in which departure is partially opposed (partial acquiescence), the content of the custom between the two states changes from the original customary value  $e^*$  to the lower value acquiesced by the other state.

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

$$e_3 = e^* . \quad \text{((j)}$$

This means that in the absence of changes to the exogenous variables, a third-party state opposes the subsequent objector state's departure.

Similar to a third-party state, a second-party state acquiesces to another state's departure from an existing custom only if the resulting change in custom yields a total payoff at least as large as the payoff obtainable under the current custom. Although there are no changes to the

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<sup>30</sup> Unlike persistent objectors who can gain an exemption from an emerging custom by unilaterally objecting, subsequent objectors can only gain an exemption from a rule of customary law if their departure from an existing custom is not opposed by other states.

circumstances of the second-party state, this state derives an immediate benefit from the subsequent objector's fulfillment of the customary obligation in the current period. Thus, the problem confronting the second-party state is no longer given by ((f)). Instead, it is the following:

$$\max_e P_2 = be + \frac{1}{r}(\alpha be - \beta ae^2). \quad ((k))$$

This means that the desired custom for the third-party state is characterized by effort level:

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

Given the expectation of an immediate benefit from the other state's compliance with the custom, the second-party state desires a level of effort  $e_2$  that is larger than the one required by existing customary law  $e^* = \frac{\alpha b}{2a\beta}$ . The second-party state opposes the subsequent objector state's departure to a level lower than  $e^*$ .

Affected by strategic and myopic considerations, a second-party state opposes more strongly an objector's departure than does a neutral third-party bystander, as can be seen from the fact that  $e_2 > e^* = e_3$ . These results suggest that in the absence of any change in circumstances for all states, the subsequent objector doctrine effectively constrains departures from existing customary law driven solely by the attempt to avoid immediate costs of compliance. Any such strategic attempts to depart are always met with opposition by second- and third-party states.

#### 4.2 *Strategic non-acquiescence and the inertia of customary law*

After the formation of a custom, there may be changes to exogenous factors affecting the behavior of states. We next concentrate on a uniform change to all states that gives the first-party state an additional reason to depart from the custom. Without loss of generality, assume that the cost of performing increases from  $a$  to  $a'$  for all states. Updating the problem confronting the first-party state and adjusting the effort level from ((i)), the first-party state now

chooses to depart from the existing customary level  $e^*$  to effort level  $e'_1$  where  $e'_1$  satisfies the following:<sup>31</sup>

$$e'_1 = \frac{\alpha b}{2a'(r + \beta)} < e_1 < e^* . \quad ((m))$$

In addition to the immediate compliance cost issue, the first-party state now incurs a higher cost to fulfill its obligations under the custom. This provides an additional reason for the first-party state to become a subsequent objector.<sup>32</sup> Indeed, comparing effort level  $e'_1$  for this case and effort level  $e_1$  in ((i)) when there are no exogenous changes in performance cost, the first-party state now has an incentive to depart from the custom by adopting a lower level than it would adopt in the absence of an increase in performance cost.

Given the rise in performance cost, the third-party state is also inclined to adopt a lower level of custom than before. Updating the optimal level of effort in ((g)), the third-party state now desires  $e'_3$  where

$$e'_1 < e'_3 = \frac{\alpha b}{2a' \beta} < e^* . \quad ((n))$$

Thus, induced by higher cost the third-party state consents to a change in custom by partially acquiescing to  $e'_3$ . The customary obligations of two states towards one another can only be modified by the extent to which both implicitly agree to the change. Partial acquiescence by the third-party state to the subsequent objector therefore leads to a partial change in customary law. The content of the custom between the two states changes from the original customary value  $e^*$  to  $e'_3$ .

For the second-party state, the problem is similar to that considered previously, with an immediate benefit term. This time however the second-party state faces the same exogenous cost change faced by the other states. Adjusting ((l)) to the higher cost parameter  $a'$ , the optimal level of effort for the second-party state becomes:

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<sup>31</sup> In the presence of uniform exogenous changes to the states, optimal effort levels are denoted with a prime.

<sup>32</sup> Naturally, a uniform change for all states can have a mitigating effect on the subsequent objector's departure. For example, if the cost of performing has decreased, the first-party state is induced to undertake a higher level of effort. This counteracts the need for the first-party state to minimize the effort level to reduce the immediate burden of compliance. Likewise, the decrease in cost also has different impacts on second- and third-party states. We concentrate on the case where it is more likely for the existing custom to erode.

$$e'_2 = \frac{(r + \alpha)b}{2a'\beta} \quad ((o))$$

Comparing the level of effort in ((o)) with the existing customary level  $e^* = \frac{\alpha b}{2a\beta}$ , it is not clear whether  $e'_2$  or  $e^*$  is larger; the immediate benefit has a positive impact on the level of effort while the increase in future performance cost has a negative impact. When  $e'_2$  is greater than or equal to  $e^*$ , the second-party state opposes the subsequent objector's departure. This prevents any change in the custom governing the relationship between the first- and second-party state. When  $e'_2$  is less than  $e^*$ , given that  $e'_2$  in ((o)) is greater than  $e'_1$  in ((m)), the second-party state only partially opposes the subsequent objector's departure. Hence, the content of the custom between the two states changes from the original customary value  $e^*$  to  $e'_2$ .

To conclude, when all states face a uniform increase in performance cost, there is a partial convergence of interests between the subsequent objector and the third-party state. The subsequent objector's departure from the current custom is motivated by the attempt to reduce the burden of immediate compliance and to minimize the impact of higher compliance costs in the future. The third-party state shares the motive to reduce the impact of higher compliance costs in the future. Thus the subsequent objector has incentives to depart more extensively from the existing custom than the third-party state would likely allow.

For the second-party state, the net effect of an exogenous change in costs depends on whether the presence of an immediate benefit for the second-party state is offset by the increase in future performance cost. If the impact of immediate benefit dominates, the second-party state is either content with the current customary rule or wants a level of custom higher than the current level. The second-party state opposes any departure by the subsequent objector from the current custom, and the relationship between the two states remains governed by the existing customary rule. If the impact induced by the increase in future performance cost dominates, the second-party state's private optimum falls below the existing customary law. Still, the second-party state's private optimum is greater than the level preferred by the subsequent objector. In this case a partial convergence between the interests of the subsequent objector state and the second-party state takes place. The second-party state foregoes part of the immediate benefit

from the custom by providing partial acquiescence. The custom governing the relationship between the two states changes from the existing customary law to the level desired by second-party state.

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

#### 4.3 *The adaptation of custom to changed circumstances*

We end our analysis of the subsequent objector doctrine by considering the case of asymmetric exogenous changes for the states involved. Start by assuming that the subsequent objector chooses a level of departure effort  $e''$  less than existing customary law  $e^*$ , either for strategic reasons or for reasons induced by environmental changes.<sup>33</sup>

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

$$\max_e P_3 = \frac{1}{r'} (\alpha' b' e - \beta' a' e^2). \quad ((p))$$

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

$$e_3'' = \frac{\alpha' b'}{2a' \beta'}. \quad ((q))$$

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<sup>33</sup> In the presence of asymmetric exogenous changes to the parameters, the states' optimal effort levels are denoted with a double prime.

Recall that a state acquiesces to another state's departure from an existing custom if the resulting change to the custom yields a total payoff that is higher than the payoff obtainable under the current rule. In this Section, since the problem is more general, we introduce the concept of acquiescence constraint to help identify the changing relationship between a state's departure and another state's acquiescence. Given that  $e^*$  is the existing customary level of effort, the third-party state acquiesces to a different and lower level of effort  $e$  (perhaps different from  $e_3''$ ) only if it satisfies the acquiescence constraint:<sup>34</sup>

$$\frac{1}{r'}(\alpha'b'e - \beta'a'e^2) \geq \frac{1}{r'}(\alpha'b'e^* - \beta'a'e^{*2}) \quad ((r))$$

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

Next consider the case in which the exogenous changes in the third-party state induce an effort level  $e_3''$  less than the existing customary law  $e^*$ . Like the subsequent objector, the third-party state also desires a lower level of effort for the custom. Clearly  $e_3''$  is the most desirable among all customary rules that are acceptable to the third-party state. Departures from the customary obligation that fall between  $e_3''$  and  $e^*$  satisfy the acquiescence constraint ((r)) and all changes of the customary rule between  $e_3''$  and  $e^*$  improve the payoff to the third-party state over the status quo. In particular, the closer the custom level to the private optimum  $e_3''$  the better off the third-party state will be. On the other hand, although there are levels of effort

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<sup>34</sup> The corresponding acquiescence constraint for the second-party state is:

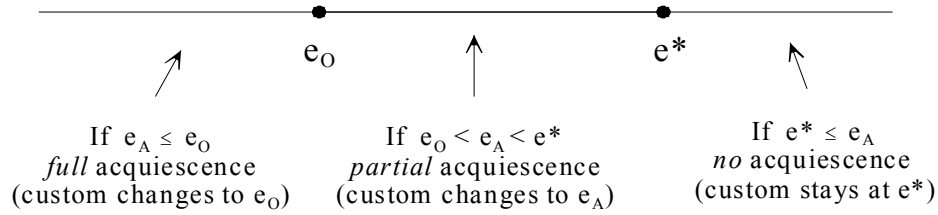
$$b'e + \frac{1}{r'}(\alpha'b'e - \beta'a'e^2) \geq b'e^* + \frac{1}{r'}(\alpha'b'e^* - \beta'a'e^{*2}).$$

below  $e_3''$  that satisfy the acquiescence constraint, these levels of effort are inferior to  $e_3''$  for the third-party state. Hence, there is no reason for the third-party state to acquiesce to any change in current custom that brings the level of customary obligation below its privately optimal value  $e_3''$ . Thus, similar to the subsequent objector, the third-party state has a lower bound on the acceptable level of custom:  $e_3''$ .

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

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

Figure 1 maps the different scenarios. In the figure, the value chosen by the subsequent objector  $e_o$  and the current customary rule  $e^*$  are held constant.



**Figure 1:** *The Subsequent Objector Doctrine*

Figure 1 identifies three regions. In the first region,  $e_A \leq e_0$  indicates that state  $A$  wants a level of custom less than or equal to the level proposed by the subsequent objector. In this case, application of the subsequent objector doctrine implies that the relationship between state  $A$  and the subsequent objector state is governed by a bilateral customary rule  $e_0$ .

The second region,  $e_0 < e_A < e^*$ , is characterized by partial convergence between the interests of state  $A$  and the subsequent objector state. While both states are dissatisfied with current custom, state  $A$  wants a level of custom above the level proposed by the subsequent objector. In this case, application of the subsequent objector doctrine leads to a more limited change, from  $e^*$  to  $e_A$ , in the custom governing the relationship between the two states.

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

## 5. Change and Stability in Customary Law

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

The significance of the persistent and subsequent objector doctrines can be fully appreciated in the case of heterogeneous states. Widely accepted customary principles may acquire different forms when implemented in the practice of heterogeneous states. The content of some customary rules may prove very undesirable for high cost states. In this paper we have explored the important intuition of Goldsmith and Posner (1999) according to which universal norms of international customary law are the result of pairwise state interactions. This paper contributes to this line of research to studying the specific role of persistent and subsequent objector doctrines in the process of custom formation and change. These doctrines avoid the dangers associated with imposing a new rule or transforming an existing rule on a sovereign nation that has ostensibly opposed the new rule or transformation. Any attempt to force changes in the customary law against non-consenting states would open the doors to a potential “tyranny of the majority,” in that any large number of states could impose a costly customary obligation on a minority of non-consenting states.<sup>35</sup> This would undermine the legitimacy of custom as a source of public international law in a world of sovereign nations.

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

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<sup>35</sup> As suggested by Goldsmith and Posner (1999), a more complex formulation of the customary relationship should account for the possibility that the customary practice results from coercion or is affected by the states’ relative power, shedding light on how a custom could be transformed by a change in the states’ interest and relative power.

Both doctrines assure that any new rule of customary law or any change to existing customary law only affects states for which the new rule or the change in existing rule constitutes a Pareto improvement. A state facing a net prejudice from a newly emerging custom can opt out from that rule by persistently objecting. Likewise, any state facing a prejudice from a departure from an existing custom can oppose the departure and enforce the current rule. There are, however, limits to custom formation when heterogeneous states are involved. Through application of the persistent objector doctrine, high cost states effectively constrain the emergence of new custom in their relationships with other states. The resulting level of custom formation may be suboptimal compared to the alternative scenario in which high cost and low cost states effectively bargain with one another for the choice of a value-maximizing customary effort. The subsequent objector doctrine creates the opposite problem. By allowing acquiescence of other states to serve as constraints, this doctrine may yield excessive customary obligations to outlive the circumstances that justified their emergence. In the presence of heterogeneous states, these persistent and subsequent objector doctrines allocate control over the resulting level of customary law on different states. By doing so, these doctrines promote stability in customary relations but may fail to induce first best social optima obtainable via compromise solutions. These results are consistent with the traditional wisdom according to which custom is an effective source of international law when homogeneous states are involved, but that alternative sources such as treaty law may be better instruments for the pursuit of first best outcomes when heterogeneous parties are involved.

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

Opposite results hold when the objecting state fails to manifest its dissent in a timely fashion. In this case, high cost states can legitimately depart from custom only if the departure is accepted by low cost states through express endorsement or tacit acquiescence. Low cost states thus control change in the custom by having an opportunity to oppose other states' departure from a binding rule of customary law. In this context, the subsequent objector doctrine constitutes an example of strong reciprocity, since customary obligations are kept high by states that prefer higher levels and oppose the departure of the subsequent objector state.

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

## **6. Conclusions**

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

The persistent and subsequent objector doctrines acquire particular importance when heterogeneous states are involved, since they provide criteria for determining the content of the

binding custom when states advocate different customary rules in the course of their interactions. The economic analysis has shown that these processes of custom formation effectively discourage strategic objections and opportunistic departures from customary law, while leaving room for objections and departures that reflect differences in state preferences or changes in costs and benefits of custom compliance. These mechanisms, which are themselves the product of spontaneous evolution, provide flexibility for the gradual adaptation of custom to changing circumstances over time.

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

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