

# Oxford Public International Law

## Foreword by Sir Michael Wood

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From: The Persistent Objector Rule in International Law  
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The persistent objector rule—whereby a state which objects to a rule of customary international law while it is emerging, and which persistently maintains its objection, is not bound by the rule—is an important aspect of the theory and practice of international law. While quite controversial, the rule is not infrequently relied upon by states, and is regarded by them as a safety valve within the customary international law process.

Professor Green's monograph is thorough, thoughtful, timely, and above all moderate. While recognizing the theoretical difficulties with the rule, the author pays particular attention to its application in the practice of states.

The book contains much that will be of interest to practitioners and academics alike. The relatively recent origins of the rule, not least in key decisions of the International Court of Justice, are examined with care, as is its application since 1945. The detailed analysis of the requirements—'core elements', 'criteria'—for the rule's operation (objection, persistence, consistency, and timeliness) are at the heart of the book. Of particular interest is the author's emphasis on consistency as a separate element, something that has often been overlooked and which is usually considered to be implicit in the persistence requirement.

The relationship between the persistent objector rule and peremptory norms of general international law (*jus cogens*) is examined at length. The conclusion that there can be no persistent objector to a peremptory norm may seem obvious, but in fact requires a careful and clear-headed consideration. The author's treatment of the interface between *jus cogens* and persistent objection is a major contribution to both topics.

What, then, of the role and value of the persistent objector rule? For challenging and original thoughts one cannot do better than turn to Chapter 9. Neither 'voluntarism' (often regarded as *the* basis for the rule), nor 'communitarianism' (thought to be opposed to it) offers real answers to the theoretical mysteries behind the rule. In fact, 'states use the rule, and they must do so for a reason'. As Professor Green explains, there are many reasons why the rule has value, both real value and, which may be as important, perceived value: 'the rule has value not just in terms of what it actually does, but also in terms of the perception of autonomy that it engenders'. In a word, the persistent objector rule is beneficial not only

to the objecting state but to states generally and to workings of the international legal system.

It is a happy coincidence that the International Law Commission took up the persistent objector rule at precisely the time when Professor Green's study was nearing completion. It did so at its sixty-seventh session (2015), under the topic *Identification of customary international law*. It is encouraging to see that Commission and author seem to tend towards similar conclusions—though the Commission's work has some way to go before a definitive position is reached.

(p. viii) In July 2015, the Commission's Drafting Committee provisionally adopted a full set of *Draft conclusions on the identification of customary international law*, including one on the persistent objector rule. Draft conclusion 15, together with an accompanying commentary (still to be prepared), is expected to be considered by the Commission at its 2016 session. The matter was not without controversy within the Commission in 2015. Some questioned the inclusion of the draft conclusion, either on the ground that it did not really have a place in a topic that was concerned with the identification of rules of customary international law, or—more radically—because they were not convinced that the persistent objector rule formed part of international law. Still others seem to have felt that the rule was too rarely invoked and too exceptional to justify inclusion in the draft conclusions. Others, however, agreed with my view, as Special Rapporteur, that draft conclusion 15 did have a place in the text, that the rule was well established in international law, that it arose in practice rather more frequently than is commonly supposed (including before a wide range of international and domestic courts and tribunals), and that it was therefore important to spell out the stringent requirements for its application. It was also pointed out that the Commission had acknowledged the existence of the rule as recently as 2011 in its *Guide to practice on reservations to treaties*.

This book will undoubtedly be of great service to members of the International Law Commission as they proceed with the topic *Identification of customary international law*, and to the representatives of states and others as they consider the Commission's product. It will be a primary resource for all those—state officials, judges, practitioners, academics—who may be called upon to consider and apply the persistent objector rule. It will quickly establish itself as the leading work on the subject, and is likely so to remain for many years.

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