THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

1985

FIFTY-SIXTH YEAR OF ISSUE

OXFORD
AT THE CLARENDON PRESS
1986

Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Kuala Lumpur Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland
and associated companies in
Beirut Berlin Ibadan Nicosia

OXFORD *is a trade mark of Oxford University Press*

ISBN 0-19-825547-0

ISSN 0068-2691

The British Year Book of International Law is an annual publication, starting with Volume 52 (1981). Subscriptions £65 (U.S. $120 for subscribers in the U.S.A., £55 for those in the U.K.), postage included. Subscriptions should be sent to Journals Subscriptions Department, Oxford University Press, Walton Street, Oxford OX2 6DP, U.K., or placed through a subscription agent or bookseller

Printed in Great Britain
at the University Printing House, Oxford
by David Stanford
Printer to the University

Editorial Communications should be addressed as follows:

Articles and Notes:
PROFESSOR IAN BROWNLIE
All Souls College, Oxford, OX1 4AL.

Books for Review:
PROFESSOR D. W. BOWETT
Queens' College, Cambridge, CB3 9ET.

CONTENTS

THE PERSISTENT OBJECTOR RULE AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW
By JONATHAN I. CHARNEY 1

IS THERE AN INTERNATIONAL LAW OF REMEDIES?
By CHRISTINE GRAY 25

THE SHATT-AL-ARAB RIVER BOUNDARY: A LEGAL RE-APPRAISAL
By KAIYAN HOMI KAIKOBAD 49

THE SEAWARD LIMIT TO CONTINENTAL SHELF JURISDICTION IN CUSTOMARY INTERNATIONAL LAW
By D. N. HUTCHINSON 111

THE LEGAL VALIDITY OF MILITARY INTERVENTION BY INVITATION OF THE GOVERNMENT
By LOUISE DOSWALD-BECK 189

NON-GOVERNMENTAL INTERFERENCES WITH HUMAN RIGHTS
By M. FORDE 253

REVIEWS OF BOOKS:

Agrawala, S. K., Rao, T. S., and Saxena, J. N. (Editors): *New Horizons of International Law and Developing Countries* 281
Bebr, Gerhard: *Development of Judicial Control of the European Communities* 282
Bernhardt, Rudolf (Editor): *Encyclopaedia of Public International Law.* Volume 7 284
Dipla, Hartini: *Le Régime juridique des îles dans le droit international de la mer* 285
Donner, Ruth: *The Regulation of Nationality in International Law* 287
Fawcett, James E. S.: *Outer Space: New Challenges to Law and Policy* 288
Ferrer Vieyra, Enrique: *Las Islas Malvinas y el Derecho Internacional* 290
Harris, Stuart (Editor): *Australia's Antarctic Policy Options* 291
Laursen, Finn (Editor): *Toward a New International Marine Order* 292
Lillich, Richard B. (Editor): *The Iran–United States Claims Tribunal 1981–1983* 293
Lowe, A. V.: *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* 294
Makarczyk, Jerzy (Editor): *Essays in International Law in Honour of Judge Manfred Lachs* 295
Mazzeschi, Riccardo Pisillo: *Risoluzione e Sospensione dei Trattati per Inadempimento* 297
Mériboute, Z.: *La Codification de la succession d'états aux traités* 298
Meron, Theodor (Editor): *Human Rights in International Law: Legal and Policy Issues* 298
North, P. M. (Editor): *Contract Conflicts* 300
Oellers-Frahm, K. and Wuhler, N.: *Dispute Settlement in Public International Law* 301

Olmstead, Cecil J. (Editor): *Extra-Territorial Application of Laws and Responses Thereto* 302

Platzöder, R. (Editor): *Third United Nations Conference on the Law of the Sea: Documents* 303

Przetacznik, Franciszek: *Protection of Officials of Foreign States according to International Law* 304

Sinclair, Sir Ian: *The Vienna Convention on the Law of Treaties* (2nd edition) 305

Thirlway, H. W. A.: *Non-Appearance before the International Court of Justice* 307

Elkind, Jerome B.: *Non-Appearance before the International Court of Justice: Functional and Comparative Analysis* 307

von Dyke, Jon M. (Editor): *Consensus and Confrontation: The United States and the Law of the Sea Convention* 308

von Münch, Ingo and Buske, Andreas (Editors): *International Law: The Essential Treaties and Other Relevant Documents* 309

DECISIONS OF BRITISH COURTS DURING 1985 INVOLVING QUESTIONS OF PUBLIC INTERNATIONAL LAW

By James Crawford 311

DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1985

By J. G. Merrills 335

UNITED KINGDOM MATERIALS ON INTERNATIONAL LAW 1985

Edited by Geoffrey Marston 363

TABLE OF CASES 543

INDEX 547

THE PERSISTENT OBJECTOR RULE AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW*

By JONATHAN I. CHARNEY[1]

I. The Persistent Objector Rule in Public International Law

THE role of the dissenting State in the development of customary international law is difficult to identify. The positivists clearly held that no rule of international law could be binding on a State without its consent.[2] Most modern theories of international law do not require that express consent be found before a rule of customary international law can be held to be binding on a State. Many authorities argue that a State can be bound by a rule of customary international law even though the State neither expressly nor tacitly consented to the rule.[3] The Socialist States appear

[1] Professor of Law, Vanderbilt University. Appreciation is given to Jeffrey A. Green, JD, Vanderbilt University School of Law 1984, who served as the research assistant for this article. Professor Anthony D'Amato's comments on the treatment, in an early draft, of his writings are also appreciated.

[2] Vattel, *Le Droit des gens* (trans. Chitty, 1857), Preliminaries section 26, at p. 62. See also *The SS 'Lotus'* (*France* v. *Turkey*), *PCIJ*, Series A, No. 10, pp. 4, 18 (1927); Hudson, *World Court Reports* (1935), vol. 2, pp. 20, 35. The Court speaks of international law being created by States' 'own free will'. In *The Scotia*, 81 US (14 Wall.) 170 (1872), the Supreme Court stated, '. . . it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation': ibid. at p. 188. In *The Antelope*, 23 US 66 (1825), the Court at p. 122 requires that there be the consent of the State before a rule of international law can be applied to it. Chief Justice Cockburn wrote in *The Queen* v. *Keyn*, 2 Ex. Div. 63 (1876), 'To be binding, the law must have received the assent of the nations who are bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage . . .': ibid. at p. 202. Hackworth wrote: 'customary . . . international law is based on the common consent of nations extending over a period of time of sufficient duration to cause it to become crystallized into a rule of conduct': *Digest of International Law*, vol. 1 (1940), p. 1. See also *Tinoco* case, *Great Britain* v. *Costa Rica* (1923), *Reports of International Arbitral Awards*, vol. 1, pp. 375, 381. See the discussion of this point in MacGibbon, 'Customary International Law and Acquiescence', this *Year Book*, 33 (1957), p. 115. Jaffe has argued that consent is required for the system only and is not necessary in the case of specific rules: *Judicial Aspects of Foreign Relations* (1933), p. 90.

[3] Most Western writers reject the view that express consent is required for the creation of a new international law because the view does not present an accurate description of the development of international law. See, e.g., Akehurst, 'Custom as a Source of International Law', this *Year Book*, 47 (1974–5), pp. 1, 23; Brierly, *The Law of Nations* (6th edn., 1963), pp. 51–3; and Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', *Recueil des cours*, 92 (1957–II), pp. 1, 36–47. In practice, States are bound by rules to which they have not given their express consent. D'Amato has written, 'The World Court has had numerous occasions to apply customary international law, and yet nowhere has it held as a matter of general customary law that the defendant state must have consented to the rule in question in order to be bound by it': *The Concept of Custom in International Law* (1971), p. 190. See also ibid. at pp. 194, 198 and 246, and D'Amato, 'On

to require the presence of consent but permit a finding of consent based on the most indirect evidence.[4] No authority would permit a State unilaterally to opt out of an existing rule of customary international law,[5] and few would permit new States to choose to exempt themselves from such rules.[6]

Even though most authorities recognize that a State is not required to have expressly consented to be bound by a rule of customary international law, virtually all authorities maintain that a State which objects to an *evolving* rule of general customary international law can be exempted from its obligations. Thus the recent tentative draft of the *Restatement of the*

Consensus', *Canadian Yearbook of International Law*, 8 (1970), pp. 104, 108. H. Lauterpacht identified three types of international law: universal, general and particular:

'There is no clear definition of universal international law. On the face of it it seems to mean an international law binding on all or practically all states. . . . Properly understood, it is international law which is binding on all states regardless of their consent; most of them may have consented to it, and this is probably the way in which the bulk of conventional international law has come into existence. However, such consent is not essential. When in *West Rand Central Gold Mining Co.* v. *The King* [[1905] 2 KB 391], Lord Alverston declared as binding upon English courts rules of international law to which the United Kingdom has given its assent or which are so generally accepted that it is inconceivable that a civilized State should refuse its consent to them, he was referring to universal international law'

(*International Law* (ed. E. Lauterpacht), vol. 1 (1970), p. 267). See also Waldock, 'General Course on Public International Law', *Recueil des cours*, 106 (1962–II), pp. 1, 50; Lauterpacht, op. cit. above at p. 64; dissent of Judge Lachs in the *North Sea Continental Shelf* cases (*Federal Republic of Germany/Denmark*; *Federal Republic of Germany/Netherlands*), *ICJ Reports*, 1969, pp. 3, 229; De Visscher, 'Reflections on the Present Prospects of International Adjudication', *American Journal of International Law*, 50 (1956), pp. 467, 472–3; Kelsen, *Principles of International Law* (1952), pp. 307, 311–17; O'Connell, 'Sedentary Fisheries and the Australian Continental Shelf', *American Journal of International Law*, 49 (1955), pp. 185, 194. While Henkin appears to require consent to a new rule he implies that consent includes acquiescence: *How Nations Behave* (2nd edn., 1979), pp. 33–4.

[4] Tunkin writes: 'A rule of conduct, being the result of universal practice, becomes a customary norm of international law only if it has been accepted or recognized by the states as juridically binding as a norm of law': 'Remarks on the Juridical Nature of Customary Norms of International Law', *California Law Review*, 49 (1961), pp. 419, 422, 423; and see Tunkin, 'Co-Existence and International Law', *Recueil des cours*, 95 (1958–III), pp. 1, 12–14. But even Tunkin does not require express consent; he allows it to be implied: '[i]t may be assumed that recognition of one or another rule as a norm of international law by a large number of states can serve as a basis for the assumption that this norm has won general recognition. However, this is an assumption only, and not a final conclusion', *California Law Review*, 49 (1961), at p. 429. See Akehurst, *A Modern Introduction to International Law* (5th edn., 1984), pp. 31–2; Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law', *Recueil des cours*, 172 (1981–III), pp. 219, 246.

[5] *Restatement of the Foreign Relations Law of the United States (Revised)* (hereinafter *Restatement*), section 102, Comm. (d) (Tentative Draft No. 6, 12 April 1985); dissenting opinion by Judge Azevedo, *Asylum* case (*Colombia/Peru*), *ICJ Reports*, 1950, pp. 266, 336; Akehurst, op. cit. (previous note), at p. 18; Akehurst, loc. cit. above (p. 1 n. 3), at p. 25; Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law', this *Year Book*, 30 (1953), pp. 1, 24–6; MacGibbon, loc. cit. above (p. 1 n. 2), at p. 138.

[6] *Restatement*, section 102, Comm. (d); Akehurst, op. cit. above (n. 4), at pp. 19–22; Akehurst, loc. cit. above (p. 1 n. 3), at pp. 27–8; D'Amato, *The Concept of Custom in International Law* (1971), at pp. 191, 192. Tunkin argues that newly emerging States may withhold their consent if they do so at the time they enter the international system: *California Law Review*, 49 (1961), at p. 428, and *Recueil des cours*, 95 (1958–III), at pp. 60–1. It is argued that empirical data demonstrate that new States are not bound by existing international law: Alexandrowicz, 'Empirical and Doctrinal Positivism in International Law', this *Year Book*, 47 (1974–5), pp. 286, 289; Anand, *New States and International Law* (1972).

Foreign Relations Law of the United States (Revised) states in Comment (d) to section 102:

Dissenting views and new states . . . [I]n principle a dissenting state which indicates its dissent from a practice while the law is still in the process of development is not bound by that rule of law even after it matures. . . . A state that enters the international system after a practice has ripened into a rule of international law is bound by it.[7]

The tentative draft of the *Restatement* could be interpreted to permit the dissenting State to invoke an exemption merely by indicating its disagreement with a practice in a timely manner. Other authorities draw the rule more narrowly, requiring the State to have actively and persistently maintained an objection to the evolving rule of law.[8] Thus Akehurst wrote that a State which 'opposes the rule in the early days of the rule's existence (or formation) and maintains its opposition consistently thereafter' may prevent a rule of customary international law from becoming binding on it.[9]

[7] *Restatement*, section 102, Comm. (d). See also ibid. at section 131, Comm. (b). This rule is founded upon the position of the *Restatement* that acceptance by individual States of new general international law is not required. Rather, a new rule must only be 'accepted as such by the international community of states . . .': ibid. (Tentative Draft Number 6), section 102 (1). The use of the term 'international community of States' places the focus on the community in general as opposed to individual States. This view is reinforced in the Introductory Note to this draft where it is said 'general law depends on general acceptance': ibid., at p. 19. While the next sentence begins with the statement, '[l]aw cannot be made by the majority for all', it continues with a reference to the persistent objector rule which makes it clear that some type of majority will make law for the community but that individual States may be exempted under certain conditions. Similarly, the statement on the previous page that actions of the UN 'influence the development of international law but only when accepted by states' refers to 'states' in a collective sense: ibid. at p. 18.

The Chief Reporter of this *Restatement*, Professor Henkin, appears to have taken a somewhat different position in his own work: see above, p. 1 n. 3.

[8] Because there exists a difference of opinion as to whether the objection must be persistent, some authorities refer to the rule as the 'persistent objector rule', and others refer to it as the 'objector rule' or 'dissenting State rule'. This article will refer to the rule as the 'persistent objector rule' but the thesis does not necessarily turn on the question of whether or not the objection must be persistent.

[9] Akehurst, loc. cit. above (p. 1 n. 3), at p. 24. See MacGibbon, 'Some Observations on the Part of Protest in International Law', this *Year Book*, 30 (1953), pp. 292, 318–19; Akehurst, loc. cit. above (p. 1 n. 3), at pp. 25, 32; Fitzmaurice, loc. cit. above (p. 2 n. 5), at p. 26; Lauterpacht, op. cit. above (p. 1 n. 3), at pp. 65–6, 443; Thirlway, *International Customary Law and Codification* (1972), p. 110; Verzijl, *International Law in Historical Perspective* (1968), vol. 1, pp. 37–8; Waldock, loc. cit. above (p. 1 n. 3), at p. 50; *Fisheries* case (*United Kingdom* v. *Norway*), *ICJ Reports*, 1951, p. 116 at pp. 131, 138–9; separate opinion of Judge De Castro, *Fisheries Jurisdiction* case (*United Kingdom/Iceland*), ibid., 1974, pp. 3, 91–2. Kelsen appears to have argued that international law is binding even on the dissenting State: op. cit. above (p. 1 n. 3), at pp. 316–17.

MacGibbon argues, 'In the event of repetition of the acts protested against or the continuation of the situation created by them, it is clear that scant regard will be paid to the isolated protest of a State which takes no further action to combat continued infringements of its rights. Failure to supplement the initial expression of disapproval will not unreasonably give rise to the presumption either that its opposition could not be supported by any show of legal right, or that . . . it was for some reason indifferent to the outcome': loc. cit. above, at p. 310. See also ibid., at pp. 311, 314.

Some argue that an objection may never be effective against a rule of international law that is *jus cogens*: Thirlway, op. cit. above, at p. 110; *Anglo-Norwegian Fisheries* case, Reply of the UK (28 November 1950), *ICJ Pleadings, Oral Arguments, Documents*, 1951, vol. 2, pp. 291, 428–9. If, however, a rule of *jus cogens* comes into force through the same process that creates customary international law a dissenting State may be able to invoke the persistent objector rule. It would only be

The International Court decision that writers primarily rely upon to support this rule is the *Anglo-Norwegian Fisheries* case. In that judgment the International Court of Justice made an alternative finding that a coast-line delimitation rule put forward by the United Kingdom 'would appear to be inapplicable as against Norway, in as much as she has always opposed any attempt to apply it to the Norwegian coast'.[10]

It is interesting that this rule has been given attention in the new *Restatement* when it was absent from the earlier *Restatement*.[11] This development may reflect the United States' and other Western developed countries' belief that their influence over the evolution of international law is eroding. Accordingly, they must seek a haven from objectionable changes by invoking this rule.[12] Increased attention to the persistent

after the rule of *jus cogens* comes into force that a dissenting State could not then dissent and seek an exemption from the rule of law. See below, p. 19 n. 81. See also Alexidze, loc. cit. above (p. 2 n. 4), at pp. 253–4. See, generally, Robledo, 'Le *jus cogens* international sa genèse, sa nature, ses fonctions', *Recueil des cours*, 172 (1981-III), p. 7; Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission', *American Journal of International Law*, 61 (1967), p. 946; and *Restatement*, section 102, Comm. (k).

[10] *Fisheries* case, *ICJ Reports*, 1951, p. 116 at p. 131. Norway raised the rule first in its Counter Memorial (31 July 1950), *Fisheries* case (*United Kingdom* v. *Norway*), *ICJ Pleadings, Oral Arguments, Documents*, 1951, vol. 1 at pp. 381–4. The response of the UK to Norway's argument and supporting citations was to argue that the decline of extreme positivism put the argument in question, particularly in matters involving fundamental principles: Reply of the UK, ibid., vol. 2 at pp. 428–9. Norway's response is found at Duplique soumise par le Gouvernement du Royaume de Norvège, ibid., vol. 3, p. 1, at pp. 291–6. See Fitzmaurice, loc. cit. above (p. 2 n. 5), at pp. 25, 26; Fitzmaurice, loc. cit. above (p. 1 n. 3), at pp. 99–101. The treatment of the rule by the International Court of Justice may not be consistent. In the *Fisheries* case the persistent nature of the Norwegian behaviour was clear: *ICJ Reports*, 1951, p. 116 at p. 131. In the other important case in this area, the *Asylum* case (*Colombia* v. *Peru*), *ICJ Reports*, 1950, p. 266, the operative Peruvian objection was based merely on its refusal to become a party to a single convention. It was maintained in a dissenting opinion that Peru's behaviour had not been consistent. See dissenting opinion by Judge M. Caicedo Costilla, ibid., at pp. 359, 367–8. See also dissenting opinion by Judge Lachs in the *North Sea Continental Shelf* cases, *ICJ Reports*, 1969, p. 3 at pp. 232, 238.

[11] The last *Restatement* only addressed the question of the role of the dissenting State in the context of the dynamics of the development of a new rule of law:

'e. *Objection to practice as means of preventing its acceptance as rule of law.* The growth of practice into a rule of international law depends on the degree of its acceptance by the international community. If a state initiates a practice for which there is no precedent in international law, the fact that other states do not object to it is significant evidence that they do not regard it as illegal. If this practice becomes more general without objections from other states, the practice may give rise to a rule of international law. Because failure to object to practice may amount to recognition of it, the objection by a state to a practice of another is an important means of preventing or controlling in some degree the development of rules of international law':

Restatement of the Law, Second, Foreign Relations Law of the United States (1965), section 1, Comm. (e).

[12] Key examples in which the Western developed States' power may be slipping are found in the law of the sea where the developed maritime States resisted both the expansion of the territorial sea to 12 miles and the development of the 200-mile exclusive economic zone. In the end they have been forced to adjust to the new rule of law that was imposed upon them by the international community. They may now face similar losses in the case of the law for the deep sea-bed. See Charney, 'The Law of the Deep Seabed Post UNCLOS III', *Oregon Law Review*, 63 (1984), pp. 19, 46–52.

The question of the law for the deep sea-bed is addressed in the *Restatement* (Tentative Draft No. 6), at section 523. Comment (e) states that while the deep sea-bed regime in the Convention on the Law of the Sea might emerge as general international law, the US would not be bound by the new rule of law since it had rejected the regime: ibid., at p. 120. See also section 131, Comm. (b).

objector rule may also reflect the emphasis on State sovereignty that the newly emerging States have encouraged.[13] This rule, however, is particularly difficult to reconcile with the view that consent is not required before a rule of customary law can bind the State.

It is the purpose of this article to examine the persistent objector rule in order to ascertain its real contribution to the development of customary international law. The importance of the rule may increase in the future, and its inclusion in the *Restatement* may presage a return to a more consent-oriented analysis of international law.

II. Support for the Persistent Objector Rule

(a) *In General*

While the overwhelming majority of international law writers accept the persistent objector rule, support for the rule in State practice and judicial decisions is limited. The writers appear to have no difficulty reconciling their acceptance of the persistent objector rule with their rejection of the requirement that a State must consent to a rule of international law.

Brierly both accepted the persistent objector rule and rejected consent as a necessary element of customary law formation:

> The truth is that states do not regard their international legal relations as resulting from consent, except when the consent is express, and that the theory of implied consent is a fiction invented by the theorist; only certain plausibility is given to a consensual explanation of the nature of their obligations by the fact, important indeed to any consideration of the methods by which the system develops, that, in the absence of any international machinery for legislation by majority vote, a *new* rule of law cannot be imposed upon states merely by the will of other states.[14]

Brierly proceeded from this passage to criticize further the consensual theory of international law without any explanation of why his arguments mandating a rejection of that theory might not also require rejection of the persistent objector rule. He did not provide any examples of State practice that would support his assertion that new customs cannot be imposed on States 'merely by the will of other states'.

A more recent writer, Brownlie, sought to identify the basis of the persistent objector rule but did not provide a satisfying explanation:

> *The persistent objector.* The way in which, as a matter of practice, custom resolves itself into a question of special relations is illustrated further by the rule that a state may contract out of a custom in the process of formation. Evidence of objection must be clear and there is probably a presumption of acceptance which

[13] Akehurst, op. cit. above (p. 2 n. 4), at pp. 19–22.
[14] Brierly, op. cit. above (p. 1 n. 3), at p. 52.

is to be rebutted. The toleration of the persistent objector is explained by the fact that ultimately custom depends on the consent of states.[15]

Brownlie justified the rule by reference to a dependence of custom on consent. But he cannot mean that custom depends upon the express consent of States since, at the same time, he declares that both passive and subsequent objectors are bound by customary law.[16] Thus, custom must depend on the implied consent of States, but Brownlie does not disclose to us the rules that determine when consent is to be implied and when it is not. Brownlie is of the view that consent is to be implied in the absence of initial active dissent. Without more, however, the passage quoted above does not explain, but merely restates, the persistent objector rule.[17] Many others report the existence of the persistent objector rule but with little explanation and few supporting authorities.[18]

(b) *D'Amato's Special Custom Analysis*

Only D'Amato appears to reject the rule. His argument has two parts. First, he argues that the persistent objector rule is incompatible with the theory that public international law is not founded upon the specific consent of States to rules of law.[19] Secondly, he argues that the authorities cited in support of the persistent objector rule either do not support the rule in fact or are limited to situations in which a special, rather than general, rule of customary international law is relevant.[20] He maintains that the persistent objector rule is appropriate in the case of a special custom since such a custom represents a derogation from generally applicable legal obligations by a limited group of States.[20] To require consent in that limited circumstance would be compatible with the general jurisprudence of public international law.

[15] Brownlie, *Principles of Public International Law* (3rd edn., 1979), pp. 10–11, (2nd edn., 1973), p. 10, (1st edn., 1966), p. 8.

[16] Ibid. (3rd edn.).

[17] As is true in the case of most writers on this subject, limited references are given to support the rule. In only the third edition of his book does Brownlie provide support for the rule, and then only for the first sentence of the above-quoted passage. Reference is to 'the views of Judge Gros in his Separate Opinion in the *Nuclear Tests Case*, (Australia v. France), ICJ Reports (1974), p. 253 at pp. 286–9': op. cit. above (n. 15), 3rd edn., p. 10.

[18] Waldock reports the existence of the rule and relies on passages in the judgments of the International Court of Justice in the *Fisheries* case and the *Asylum* case: loc. cit. above (p. 1 n. 3), at pp. 49–50. He does not endeavour to reconcile this rule with the view that rules of international law are not based on State consent. Fitzmaurice similarly relies on the judgment in the *Fisheries* case for the rule notwithstanding his elaborate rejection of the consent theory: loc. cit. above (p. 2 n. 5), at pp. 24–6; and loc. cit. above (p. 1 n. 3), at pp. 36–47, 99–101. The Soviet jurist Alexidze also reports the existence of the rule: loc. cit. above (p. 2 n. 4), at p. 246. Prosper Weil seems to place this rule near the centre of the classical theories of custom: Weil, 'Towards Relative Normativity in International Law?', *American Journal of International Law*, 77 (1983), pp. 413, 433–4, 437–8. Other writers who report the existence of the rule are identified at p. 3 n. 9, above.

[19] D'Amato, *The Concept of Custom in International Law* (1971), at p. 261. See also ibid. at pp. 187–95.

[20] Ibid. at pp. 233–4, 248–9, 252–4, 261.

D'Amato and Akehurst have engaged in a strenuous debate over whether the case authorities that appear to support the persistent objector rule involve only special customs.[21] They have focused particularly on the passage in the *Fisheries* case quoted above. D'Amato argues that the Court was referring to a theoretical special custom of Norway and the UK forbidding the use of straight baselines.[22] Akehurst argues that the passage addresses the general proposition that Norway's persistent objection to the 10-mile bay rule had immunized it from the obligations under the rule.[23]

D'Amato's analysis is based on the distinction between general and special customs. The classic example of a special custom is found in the *Asylum* case which also serves as an authority for the persistent objector rule.[24] In that case, Colombia alleged that Peru was bound by a Latin-American custom permitting the asylum in question. Colombia had the burden of arguing that the relevant group of States had created a special custom:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised 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.[25]

Colombia relied on evidence of practice by Latin-American States and certain international agreements in an attempt to establish this regional custom.[26] Nevertheless, the Court concluded that no uniformity of practice had been shown sufficient to find a custom among Latin-American States and continued:

> The Court cannot therefore find that the Colombian Government has proved the existence of such a [regional or local] custom. But 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. . . .[27]

D'Amato uses this case as the prime example of his position that the persistent objector, although bound by general customary law, is not bound

[21] Ibid.; Akehurst, loc. cit. above (p. 1 n. 3), at pp. 24–5.

[22] D'Amato, *The Concept of Custom in International Law* (1971), at pp. 252–4, 261; id., *Canadian Yearbook of International Law*, 8 (1970), at pp. 110–11 n. 27; id., 'The Concept of Special Custom in International Law', *American Journal of International Law*, 63 (1969), pp. 211, 221; id., 'The Concept of Human Rights in International Law', *Columbia Law Review*, 82 (1982), pp. 1110, 1144. The distinction between special and universal rules of international law is also drawn by Fitzmaurice, loc. cit. above (p. 2 n. 5), at pp. 68–9. See also MacGibbon, loc. cit. above (p. 1 n. 2), at pp. 122, 123.

[23] Akehurst, loc. cit. above (p. 1 n. 3), at p. 25. See also Thirlway, op. cit. above (p. 3 n. 9), at p. 110.

[24] *Asylum* case, *ICJ Reports*, 1950, p. 266.

[25] Ibid., at p. 276. See also *Restatement*, at section 102, Comm. (e).

[26] *Asylum* case, *ICJ Reports*, 1950, at pp. 275–7.

[27] Ibid., at pp. 277–8 (emphasis added).

by special, here regional, custom.[28] Unfortunately, his attempt to impose this limitation on the *Anglo-Norwegian Fisheries* case causes him to define the role of a special custom so broadly that the distinction he seeks to draw lacks significance.

In order to make the distinction between special and general custom, D'Amato has had to find the matter under discussion in the *Anglo-Norwegian Fisheries* case to be a special custom. As the reader will recall, Norway argued that it was not bound to use the conservative baseline rules advocated by the UK. It argued that the 10-mile bay closing line rule advocated by the UK did not have the force of law and that it had a right to use its system of straight baselines. The Court held for Norway.

> [The United Kingdom] has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law.
>
> In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.
>
> In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.[29]

D'Amato argues thus:

> . . . the Court considered the ten-mile rule both in general and in special custom. It upheld Norway on the general ground because of the division of state practice throughout the world. And it upheld Norway on the special ground because, as between Norway and Great Britain, Norway had not consented to the practice (indeed she had opposed it). Here the Court was in effect saying that Norway's delimitation of bays was not unreasonable in light of general customary practice, and therefore Great Britain could not *limit* Norway's rights within the ambit of reasonableness unless Norway consented to the establishment of such a special custom.[30]

Thus, according to D'Amato, there were two grounds for the judgment, general and special custom. The first ground states that under general international law Norway was free to draw a system of straight baselines within a range of reasonableness. The second ground is dependent on the first. It provides that initially Norway had the right to draw its straight baselines unless it consented to relinquish that right in a special custom with the UK.[31] But what was this rule that the UK had put forward? It was

[28] D'Amato, *The Concept of Custom in International Law* (1971), at pp. 252–4.

[29] *Fisheries* case, *ICJ Reports*, 1951, at p. 131.

[30] D'Amato, *The Concept of Custom in International Law* (1971), at p. 261.

[31] D'Amato took a similar approach in his more recent analysis of the judgment in the *North Sea Continental Shelf* cases, arguing that the Federal Republic of Germany had rights in its continental shelf to its geological limits and only if it had by special custom consented to the equidistance rule could those rights be dislodged: *Columbia Law Review*, 82 (1982), at pp. 1142–3. To the contrary, the

a general rule of customary international law that limited straight baselines to 10 mile closing lines of bays for all States. The UK did not seek to apply a special custom to Norway but rather a general rule. Thus under D'Amato's analysis any new general rule put forward by a State can be effectively denied applicability to an objecting State without further inquiry.[32] He calls this process the denial of a special custom, but it is hard to distinguish it from the process of developing rules of general customary international law.[33] The result in either event is that a State can resist a new rule by objecting to it at an early date.

(c) *Judicial Opinions*

Even the judicial opinions upon which writers normally rely do not represent the strongest authorities in support of the concept of the persistent objector. In the two International Court of Justice judgments discussed above, the *Anglo-Norwegian Fisheries* case and the *Asylum* case,[34] the passages that arguably support the rule are merely secondary bases for the Court's decisions. In both, the Court had previously found that the substantive rule of law did not exist in the first place. The Court then went on to allow that even if the rule were international law, the objecting States in these cases would not legally be obligated to abide by the rule.[35]

Writers also rely on separate or dissenting opinions to support the existence of the rule. Thus Akehurst relies on Judge Azevedo's dissent in the

Court never placed the geological limit in such a pre-eminent position. At most, one could argue that the Court was engaged in an effort to discover the true boundary law that already existed. See Charney, 'Ocean Boundaries Between Nations: A Theory for Progress', *American Journal of International Law*, 78 (1984), pp. 582, 585–6, 587–93.

[32] The Court's judgment implies that Norway's system of straight baselines is opposable to all States, with the possible theoretical exception of a State that had expressly protested Norway's claim. It is doubtful that a special custom could be binding on States not party to the special custom: Akehurst, loc. cit. above (p. 1 n. 3), at pp. 29, 31; D'Amato, *The Concept of Custom in International Law* (1971), at p. 46; *contra*, Thirlway, op. cit. above (p. 3 n. 9), at pp. 136–9.

[33] D'Amato, in his book *The Concept of Custom in International Law* (1971), directly addressed the question of the definition of special custom: at pp. 241–4, 246–63. While he catalogued a few cases according to whether they concerned a general custom or a special custom (at p. 252), in the end he admitted that he could not define special custom: '. . . the examples are too few to spell out all the elements of special custom in international law. Nor can we be sure that there exist generalizable elements of special custom, for out of the practice of states may emerge many varied rules relating to different types and situations of special custom': ibid., at p. 263.

In his recent article on the subject, D'Amato appeared to tie the concept of a special custom and the requirement of consent closely to States' rights in territory: *Columbia Law Review*, 82 (1982), at p. 1144. His analysis in this article started from the proposition that a State cannot lose rights in territory without its consent. Such consent may be acquired 'through the process of special custom . . .': at pp. 1143–4. While this may be an uncontroversial proposition it does not help to define the role of special custom. The critical question to be answered in the two relevant cases discussed in this article, the *Fisheries* case and the *North Sea Continental Shelf* cases, is not whether a State may be involuntarily forced to relinquish territory, but rather whether the State had rights in the territory in the first place: ibid., at pp. 1140–4.

[34] *Fisheries* case, *ICJ Reports*, 1951, at p. 131; *Asylum* case, ibid., 1950, at pp. 277–8.

[35] *Fisheries* case, ibid., 1951, at p. 131; *Asylum* case, ibid., 1950, at pp. 277–8; D'Amato, *The Concept of Custom in International Law* (1971), at pp. 117–18.

Asylum case[36] and on the separate opinion of Judge van Wyk in the *South West Africa* cases.[37] Support may also be found in Judge Ammoun's separate opinion in the *North Sea Continental Shelf* cases, as well as Judge Gros's separate opinion in the *Nuclear Tests* case.[38] Yet none of these opinions constitutes a holding of the Court itself.

The more recent *Fisheries Jurisdiction* case presented an interesting situation in which the persistent objector rule might have been directly invoked. As the Court reports, Iceland and the UK had engaged in a long-term dispute over Iceland's attempts to enforce a claim of exclusive fishery jurisdiction beyond 3 nautical miles from its coastline.[39] The UK had consistently taken the position in its relations with Iceland and all other coastal States that the limit of the exclusive fisheries jurisdiction of coastal States was 3 nautical miles and that the waters beyond that limit were subject to the high seas freedom to fish held by all States. Only in 1961 did the UK enter into an agreement with Iceland whereby the UK agreed to object no longer to Iceland's 12-mile fishery zone. The exchange of notes left open questions concerning a further extension of Iceland's fisheries jurisdiction. The agreement also contained a consent by both parties to the jurisdiction of the International Court of Justice in relation to such a further extension.[40] The instant litigation was precipitated by Iceland's assertion and attempted implementation of a 50-nautical mile exclusive fishery zone. The UK objected to the further extension and, after negotiations failed, it invoked the consent to jurisdiction of the Court to commence the suit.[41]

Despite the fact that Iceland refused to participate in the litigation, the Court issued a judgment on the merits of the UK's claim. The Court never directly ruled on the question of the legality under international law of the 50-mile fishery zone. It did, however, hold that the Icelandic claim 'is not opposable to the United Kingdom'.[42] One cannot be certain whether this holding is based on the persistent objector rule as a matter of customary international law or on the obligations that emanated from the exchange of notes.[43] Judge Waldock's separate opinion, however, came closer to invoking the rule. He pointed out the UK's prompt and consistent rejections of the claim and found that the claim 'is not opposable to the United Kingdom

[36] Akehurst, loc. cit. above (p. 1 n. 3), at p. 25 n. 5; *Asylum* case, dissenting opinion of Judge Azevedo, *ICJ Reports*, 1950, p. 332 at pp. 336–7.

[37] Akehurst, loc. cit. above (p. 1 n. 3), at p. 25 n. 5; *South West Africa* cases (*Ethiopia* v. *South Africa*) (*Liberia* v. *South Africa*), *Second Phase*, separate opinion of Judge van Wyk, *ICJ Reports*, 1966, pp. 3, 65, at pp. 169–70. In the *South West Africa* cases two of the judges would have applied the anti-*apartheid* rule to South Africa despite its persistent objection to the rule: separate opinion of Judge Tanaka, ibid., at pp. 250, 293–4; separate opinion of Judge Padilla Nervo, ibid., at pp. 443, 470. See D'Amato, *Canadian Yearbook of International Law*, 8 (1970), at pp. 117–20.

[38] *North Sea Continental Shelf* cases, *ICJ Reports*, 1969, p. 3, separate opinion of Judge Ammoun at p. 131; separate opinion of Judge Gros, *Nuclear Tests* case, ibid., 1974, p. 253 at pp. 286–9.

[39] *Fisheries Jurisdiction* case, ibid., at pp. 10–22.

[40] Ibid., at p. 13.

[41] Ibid., at pp. 15–16.

[42] Ibid., at p. 29. See also p. 30.

[43] Ibid., at pp. 29–30.

under *general international law*'.[44] Judge De Castro took the opposite view, and argued that a 12-mile limit to the fisheries zone could not apply to Iceland because it had persistently objected to any such limit.[45]

Despite the UK's continued support of the traditional high seas regime, the Court did hold that the UK and Iceland had an obligation to negotiate their respective fishery interests in the context of a newly developed rule of international law giving the coastal state 'preferential rights' in the living resources adjacent to their coastlines.[46] While the judgment states that the UK had accepted that rule, the basis for this statement appears to stretch the Court's own report of the UK's position.[47] In sum, while the Court did not reject the persistent objector rule, neither did it take advantage of the opportunity to bolster the rule. Its ambiguous treatment of the subject may have even facilitated Iceland's future behaviour. The ruling did not effectively restrain Iceland's continued enforcement of its claim against the UK, and today Iceland's 200-mile exclusive economic zone is securely in place.[48] It would thus appear that the record of this conflict does not resolve questions relating to the vitality of the persistent objector rule.

(d) *State Practice*

One can look in vain through writers' discussions of the persistent objector rule for references to State practice that clearly support the rule. In addition, recent events cast doubts about the viability of the rule. A number of examples arise in the context of the law of the sea. For some time, the UK, the US and Japan led the fight against the expansion of coastal State jurisdiction. As indicated already, the UK had little success in its dispute with Iceland.

Owing to Japan's island status and its substantial reliance on fish products, it has had a major interest in maximizing the freedoms of the seas in order to minimize restrictions on its distant water fisheries and commerce to and from its territory. It has strenuously resisted the movement towards the expansion of coastal State jurisdiction in the oceans. When, in the mid 1960s, Australia, Mexico, New Zealand, the Republic of Korea and the US claimed their 12-mile exclusive fishery zones, Japan made its position clear that the area beyond the 3-mile territorial sea was high seas open to fishing by all nations. It then proceeded with diplomatic efforts to resolve the dispute. While at one point Japan threatened to take New Zealand to the International Court of Justice on the issue, in the end it entered into agreements with each of these countries, which temporarily resolved

[44] Ibid., separate opinion of Judge Waldock, at pp. 106, 120 (emphasis added). See dissenting opinion of Judge Gros, ibid., at pp. 126, 148–9. See also judgment of 25 July 1974, ibid., at pp. 23–6, 29–31, and joint separate opinion, ibid., at pp. 45, 46.

[45] Ibid., separate opinion of Judge De Castro at pp. 91–2.

[46] Ibid., at pp. 32, 34.

[47] Ibid., at pp. 14, 29.

[48] Anand, 'A New Legal Order for Fisheries', *Ocean Development and International Law*, 11 (1982), pp. 265, 280.

the dispute.[49] In all but the agreement with the Republic of Korea pragmatic solutions were reached whereby Japanese fishermen obtained limited access to specified areas for a determinate period of time without a Japanese acknowledgement of the legality of the coastal State's fishery zone. The agreement with the Republic of Korea contained an express mutual recognition of the right of each State to establish a 12-mile fishery zone.[50] The agreements were intentionally ambiguous on the question of whether international law permitted the coastal State unilaterally to establish a 12-mile exclusive fishery zone. Thus one can interpret the events as demonstrating that Japan had to obtain permission from these coastal States to fish in their fishery zones. Viewed from this perspective, the events implicitly establish the *de facto* effect of these unilateral claims. On the other hand, the record could also be interpreted to establish that Japan's high seas rights in the areas had been vindicated because the coastal States were compelled to permit Japanese fishing in portions of these zones and to obtain the Japanese agreement to relinquish rights to pursue fishing in other parts of these zones.[51] In the end, however, the strong forces favouring the 12-mile fishery zone and then the 200-mile zone overwhelmed the Japanese tenacious efforts to resist these changes. It has accepted the new law of the sea with its 12-mile territorial sea and 200-mile exclusive economic zone.[52] Its status as a persistent objector was of little value in the face of these changes in international law.

[49] The 1967 Agreement between the United States of America and Japan concerning Certain Fisheries off the Coast of the United States of America, signed 9 May 1967, *United Nations Treaty Series*, vol. 685, p. 254, reprinted at Oda, *The International Law of the Ocean Development: Basic Documents*, vol. 2 (1975), p. 136; the 1968 Agreement on Fishing by Japanese Vessels in Waters Contiguous to the Mexican Territorial Sea, signed 7 March 1968, entered into force 10 June 1968, *United Nations Treaty Series*, vol. 683, p. 257, reprinted at Oda, op. cit., at p. 152; the 1967 Agreement on Fisheries between Japan and New Zealand, signed 12 July 1967, entered into force 26 July 1968, *United Nations Treaty Series*, vol. 683, p. 45, reprinted at Oda, op. cit., at p. 160; the 1968 Agreement on Fisheries between Australia and Japan, signed 27 November 1968, entered into force 24 August 1969, *United Nations Treaty Series*, vol. 708, p. 201, reprinted at Oda, op. cit., at p. 162; Agreement on Fisheries between Japan and the Republic of Korea, signed 22 June 1965, entered into force 18 December 1965, *United Nations Treaty Series*, vol. 583, p. 51, reprinted at *International Legal Materials*, 4 (1965), p. 1128.

[50] The diplomatic records of the Japanese efforts on this matter have been collected in Oda and Owada, *The Practice of Japan in International Law 1961–1970* (1982), pp. 149–70. See also Oda, 'International Law of the Resources of the Sea', *Recueil des cours*, 127 (1969-II), pp. 355, 392–6. Even in 1969 Professor Oda seemed to recognize the futility of the Japanese efforts in this regard: ibid.

[51] This ambiguity is made clear in the Japanese diplomatic record. See Oda and Owada, op. cit. (previous note); and Oda, loc. cit. (previous note).

[52] For a recent and comprehensive review of Japan's oceans interests and activities, see Friedheim *et al.*, *Japan and the New Ocean Regime* (1984). While, externally, Japan actively opposed the expansions of coastal State jurisdiction, a study of the internal politics in Japan reveals that there was much conflict: Fukui, 'How Japan Handled UNCLOS Issues: Does Japan Have an Ocean Policy?', ibid., at pp. 21, 36–40, 44–51; Akaha, 'A Cybernetic Analysis of Japan's Fishery Policy Process', ibid., at pp. 173, 198–210. The Japanese change of position in favour of these expansions was critically influenced by its increased international isolation as demonstrated by State practice and the negotiations at the Law of the Sea Conference: Fukui, loc. cit. above, at pp. 39 and 47; Yanai and Asomura, 'Japan and the Emerging Order of the Sea—Two Maritime Laws of Japan', *Japanese Annual of International Law*, 21 (1977), pp. 48, 71, 72.

See, generally, Jones, 'Freedom of Fishing in Decline: The Fishery Conservation and Management