

BOOK REVIEW

THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW

James A. Green
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1. INTRODUCTION

James A. Green is Professor of Public International Law at the University of Reading. He has contributed to the international law scholarship as the author of many books, chapters in edited volumes, and journal articles. His seminal works include *The International Court of Justice and Self-Defence in International Law* (Hart Publishing), *Cyber Warfare: A Multidisciplinary Analysis* (Routledge), and ‘Questioning the Peremptory Status of the Prohibition of the Use of Force’ in *Michigan Journal of International Law*. The reviewers believe that the book under review is richly deserving of being counted as a seminal work on the topic. This is especially true when the literature covering the persistent objector rule in international law is not usually this exhaustive and insightful at the same time.

The theme, though specialised, has urgent contemporary value. The International Law Commission’s Draft Conclusions on the identification of customary international law engages with the persistent objector rule in one part.¹ As such, the book under review could assist international actors and lawyers in understanding the rule in depth: in the contexts in which it arose and in which it continues to be engaged.

The author has engaged in the inductive method of research (p 10) and has sought pragmatic and policy-based justifications in analysing the nuances of the rule. The absence of pure focus on doctrine is welcome and could serve as a comprehensible and practical guide to all who seek to learn and work with this rule.

The book under review is divided into three parts in addition to the introduction. The introduction articulates that the monograph ‘aims to be the most comprehensive examination of the rule to date’ (p 6). The passage of four years shows that the aim has been met. The author’s reasoned critique of the voluntarist conception of international law is well substantiated and, to these reviewers, entirely justified.

¹ International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries (2018), Report of the ILC, 70th session, (2018) II *Yearbook of the International Law Commission*, UN Doc A/73/10, Part Six.

Part I examines the history of the persistent objector rule in international law, and locates the source of the law, over two main periods: before and after 1945. The author's mention of the *volte-face* on his view that this rule was a product of academic fiction (p ix) makes examination of this part far more interesting and engaging to undertake. Part II is the heart of the book. The author delves into the constitutive elements of the rule, and this part deserves rich praise for the incisive analysis and temperate conclusions drawn from an extensive survey of scholarship, cases, and state practice. Notably, the author's contribution towards identifying and analysing 'consistency' as a criterion – distinct from, though similar to, the persistence criterion – offers considerable insight and clarity with regard to the operation of the rule. Part III offers insights on the (lack of) operation of the rule in the face of *jus cogens* norms, examines its scope in the interplay with non-preemptory but fundamental norms, and finally offers an alternative theory while making a case for the utility of the persistent objector rule.

2. MORE THAN MERELY ACADEMIC FICTION

In Part I the author substantively engages with the lingering issue that the persistent objector rule is merely an academic construct, which is not backed by state practice. The author, having held the view that the rule was an academic construct, engages in deep study, which is demonstrated in this part. The first chapter, divided into four sections, addresses the history and emergence of the rule. It concludes that the rule, as it is conceived today, is not found before 1945.

Notwithstanding the conclusion that the rule was not conceptualised in its modern avatar before 1945, the author mentions that the test of its current validity is whether the rule gained social acceptance after 1945, and resolves this issue in the affirmative in the second chapter. In the three sections of this chapter the author examines cases and state practice. He states that the rule exists today as a result of its social acceptance after 1945 (p 55).

3. THE CORE ELEMENTS OF THE PERSISTENT OBJECTOR RULE

This part is the essence of the book, and much of the book is involved in deciphering the rule to be used in service of its application (p 8). There are four chapters in this part, each devoted to a criterion of the rule. The first chapter explores the criterion that usually goes unarticulated: the objection criterion. The second chapter is an in-depth study of the persistence criterion and its nuances. The third chapter engages with the consistency criterion, one that received scant scholarly attention as it became conflated with the persistence criterion. The final chapter explores the timeliness criterion and contextualises it in emerging and emergent issues of international law.

The author first discusses the objection criterion and remarks on the intuitive necessity of an objection, concluding that the entitlement to object is available only to states. After surveying state practice, the author comments that the objection is most effective when aimed at the very existence of the norm. This would avoid the political price to the objecting state of objecting to its applicability (p 65). Communication of the objection must be externally voiced, or at least more than simply between states (p 75). The author queries whether words or acts are

sufficient in themselves. He concludes that words alone are sufficient (p 80), but that states should take action to preserve the right to a better claim of the status of exempt persistent objector (p 81).

With regard to the criterion of persistence, the author studies the repetition of objections and concludes that a small number of repetitions is insufficient (p 92). He delves into the justification for persistence as a criterion and locates it in practical and policy reasons (pp 96–98). The degree of persistence required is explored, and the author surveys literature to conclude that, in addition to the context, the nature of the norm is a factor. He remarks, in a practical manner, that the power of the objecting state influences the acceptability of the objection to the norm (pp 103, 105).

The author proceeds to demarcate the boundary between persistence and consistency, attempting to resolve questions on the application of the rule. The author maintains that the objection must have a level of uniformity (p 109) in order to qualify as consistent. The reason for this criterion is similar to the justifications for the persistence criterion. Critically, the author asserts that the rule precludes the objecting state from benefiting from ambiguity in its objections (p 116). He further argues that the standard of consistency is ‘absolute’ rather than ‘general’ (p 121). Accordingly, the author explores whether silence on the part of the state is fatal to its case. He concludes that maintaining silence on an occasion that is appropriate for an objection would count as an inconsistency (p 124). As to the issue of whether states are required to object to similarly placed norms, the author points to the lack of state practice to conclude that such an onerous requirement is not justified (pp 131, 132).

A significant analysis is devoted to the study of the timeliness criterion. The author concludes that the voluntarist conception of customary international law is a flawed justification for the criterion (p 144). Following a detailed examination of the practical justifications for this criterion and those proposed for the subsequent objector rule, the author shows that the subsequent objector rule is detrimental to the development and operation of customary international law (pp 146, 149), and agrees with prioritising pragmatism over doctrine (p 153). The author contributes, with striking clarity, to the discussion of the timeline of the development of a norm, and points out issues arising from the stark uncertainty in identifying the points of conception and crystallisation of a norm (pp 156, 157). He then affirms that arguments around the lack of awareness of the norm are ineffective, and such norms bind states (p 167). He engages with the issue of a state which is subsequently interested in the norm, and concludes that any objections of such a state need to be in the abstract before the interest arises, so as to avoid opportunism and frivolity (pp 168, 170). The author studies objections in the context of accelerated customs. He determines that the burden of complying with the persistence criterion is greater because of the shorter timeline in which to object (p 172). He then addresses the issue of norms being binding on new states. He acknowledges the injustice from a post-colonial perspective (p 174), according to which new states are not entitled to object to existing norms in order to be exempt (p 176). Exploring the point of time at which the state may object, the author concludes that there is no onerous *requirement* to object from the inception of the norm (p 181), but that it is prudent to make an early objection (p 182). The author examines an extension of the timeliness criterion (p 184), and

concludes that objections by the state need to continue even after the norm has crystallised in order to preserve exempt status.

4. THE LIMITATIONS AND ROLE OF THE PERSISTENT OBJECTOR

Part III, titled 'The Limitations and Role of the Persistent Objector', provides circumstances in which the persistent objector rule is inapplicable. By relying on the scholarly work and report of the International Law Commission, the author maintains that the 'escape hatch' provided by the persistent objector rule cannot be opened in relation to *jus cogens* norms (p 189). Further, the author asserts that while no norm is born with the status of *jus cogens*, the persistent objector rule will be overridden if a norm graduates to *jus cogens* status from customary international law. In other words, the persistent objector rule defers to *jus cogens* norms (p 195). The author then provides the rationale for excluding the persistent objector rule with regard to *jus cogens* norms, being norms intended to guard the most crucial values of common interest and moral importance (p 195). Having set out the theoretical dimensions of the interplay of *jus cogens* and the persistent objector rule, the author considers that state practice involving *jus cogens* norms that overlap with the persistent objector rule is limited (p 202) because the creation of *jus cogens* is an onerous process. Subsequently, the author fluently underscores the role of consent vis-à-vis the persistent objector rule; he considers that consent in the formation of customary international law is not absolute. Thus, the theoretical conundrum of voluntarism in the context of custom explains the emergence of the persistent objector rule (p 244).

Further, the persistent objector theory acts as a bridge to buttress voluntarism. Nevertheless, the author also embraces the view that the persistent objector rule cannot be based solely on the rule of consent because voluntarism in itself is plagued with contradiction (p 250). Therefore, while the positivist camp perceives the persistent objector rule as being sufficient to protect state sovereignty, the communitarians contend that it goes too far to protect state sovereignty. As there is an inherent theoretical vacuum between the positivist school and the communitarian position, the author sets out a novel theory – the rational choice theory (p 257) – by looking at the functional benefit both to the objector and to the international legal system.

5. CONCLUSION

The book under review is a fine piece of scholarship, and one is hard put to offer more insights than those already contained in it. The attempt of the author to survey and engage extensively with literature, including non-English scholarship, is commendable for the diversity of viewpoints offered and considered in the book. With regard to the point mentioned by Mandelson that there exists 'quite a wealth of state practice' on the issue (pp 15, 50), the author has done considerable justice by highlighting the intricacies of instances that have gone unnoticed. Substantive engagement with cases and repeated emphasis of various parts of the case are well made. The honesty of the author in acknowledging the past shortcomings of a particular issue is notable (p 180).

The reviewers welcome the instances where the author has located the role of power in determining the acceptability and operation of the rule. However, while outside the strict scope of the book under review, sustained engagement with literature from developing countries on the issue would be particularly appreciated for a further layer of informed and historical depth. It could serve as a dialogic bridge between the rule as it operates today and the (potential) oppression that it perpetuates, with particular emphasis on the most marginalised states on the international plane.

Suffice to say, the treatment that the book under review will receive will be analogous to that of Scotch whisky: its value will only increase with age.

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