

A POST-FORMATION RIGHT OF WITHDRAWAL FROM CUSTOMARY INTERNATIONAL LAW?: SOME CAUTIONARY NOTES

SAMUEL ESTREICHER *

I

Duke law professors Curtis Bradley and Mitu Gulati (“B&G”) have written a very interesting, original paper questioning the conventional view of the binding effect of customary international law (“CIL”). That view holds that once a customary rule becomes law, by dint of the widespread practice of states in the belief that they are legally required to adhere to that practice (termed *opinio juris*), the rule is binding on all states, with the possible exception of those who persistently objected to the rule during its formative stages.¹ B&G maintain that this “Mandatory View” of CIL is an ill-conceived twentieth-century alteration of a previously established “Default View” of CIL that would allow states to withdraw from customary rules even if their objections are voiced *after* the rule has acquired the status of customary law. As they see it, the Default View does a better job of accommodating legal change than does the conventional position.

The effect of adopting the B&G formulation would be to require international tribunals and international lawyers to recognize a subsequent-objector right or privilege² in CIL. Putting aside the merits of their formulation for one moment, one needs to ask how such a fairly dramatic revision of international law will in fact occur. It is not likely to come about through the conventional route of changing a customary rule—a state

* Dwight D. Opperman Professor of Law & Co-Director, Opperman Institute of Judicial Administration. Text of paper for Scholarship Roundtable, “Opting Out of Customary International Law,” Duke University School of Law, January 30, 2010. In addition to the Roundtable participants, my valued colleague Ryan Goodman has been very generous with his comments; all errors remain my responsibility. Copyright © 2010 by Samuel Estreicher. All rights are reserved.

1. Curtis J. Bradley and Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202 (2010) [hereinafter B&G].

2. I call this a “subsequent-objector right or privilege” because, while post-formation objection by states occurs under current law—indeed, it is a principal means of changing customary law—such objections, in the conventional account, are normatively disfavored and treated as “violations,” even if they are sometimes necessary to legal change. B&G’s innovation is to embrace the normative acceptability of such objections.

“violating,” or attempting to displace, a customary rule with a new rule that ultimately commands a new consensus and confirmatory practice.³ This is because, as will be seen below, states are not likely to justify their breach of a customary rule by express subsequent objection, persistent or otherwise. A new Convention on CIL, on the order of the Vienna Convention on the Law of Treaties, is also a long shot. And even if it were established, the convenors would not likely be moved by functional arguments in favor of a right of subsequent objection, given the rhetorical and other benefits of the Mandatory View.

CIL is a profoundly stable institution, not because it has been able to address successfully the serious analytical challenges academics and others have leveled⁴ but because of the advantages it provides its principal players: states (including their armed forces, other personnel and lawyers), international tribunals, and publicists/academics. Most often, interstate disputes are resolved by what might be called the self-interested application of prudence or comity; there is normally little point in acting unreasonably with respect to other states if you will need those states to recognize your similar claims on other occasions. After a settled practice has emerged, publicists or the International Law Commission then may attempt a formal recitation of the practice.

It is this strong dimension of reciprocity that explains the development of, say, diplomatic immunity law and customary rules on the recognition of foreign judgments in domestic tribunals. For other matters, either the prospect of reciprocity may be less important or changes in relative power or stage of development among states may provoke change in customary practices. For such disputes, CIL provides a currency, linguistic and otherwise, for negotiating differences that avoids the language of self-interest, does not require use or overt threat of force or other countermeasures and need not practically bind anyone, unless states have agreed *ex ante* or *ex post* to refer the dispute to the International Court of Justice (“ICJ”) or other arbitral mechanism for resolution under CIL.⁵ For weak states—i.e., those that lack the means to use self-help measures to enforce their expectations of appropriate behavior by other states, such as

3. See generally Anthony D’Amato, *The President and International Law: A Missing Dimension*, 81 AM. J. INT’L L. 375, 377 (1987) (“Existing customary law, then, contains the seeds of its own violation; otherwise it could never change itself.”).

4. See, e.g., Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY. L. REV. 859 (2006); Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT’L L. 5 (2003).

5. It is often ignored that the ICJ functions principally as an arbitral forum, except when it issues advisory opinions to aid the work of United Nations bodies.

seizing of fishing boats nearing waters to which they lay claim—CIL provides a means of saving face and registering objections short of force. For strong states—i.e., those that can use self-help with relative impunity—CIL provides a means of signaling the intensity of their claim initially without actually declaring resort to self-help or other force.

The law-speak afforded by CIL also permits a measure of flexibility with respect to treaty-making. This is, of course, the explanation for the so-called Martens clause⁶ that gives treaty-makers the best of all worlds—a specific code to guide behavior, with the assurance that whatever is left out of the treaty will still be governed by international law via CIL. A state that does not wish to agree to every aspect of a multilateral treaty, in a context where reputational loss is likely if it bows out entirely, may agree to aspects of the treaty coupled with reassurance to its sister states that it remains bound by customary law on the subject.⁷ Some non-assenting states may in fact be counting on the likelihood that the principles set forth in the treaty, to which they have agreed, will help shape lacunae in customary law.

International tribunals also benefit from the flexible, if not amorphous, nature of CIL jurisprudence. To the extent the jurisdiction of these tribunals depends on the *ex ante* or *ex parte* agreement of the states to submit their disputes, these tribunals act essentially as arbitration mechanisms. They are not likely to resort to hard-and-fast legal rules both because they implicitly do not wish to alienate states from submitting future disputes to them but, more importantly, because the parties are not usually seeking an up-or-down declaration of rights respecting their positions, but rather a more mediated, or nuanced, resolution based on flexible principles that resemble equity—giving something, if only rhetorically, to both sides.

And of course when we get to publicists and academics, the virtues of CIL are obvious. Like constitutional law and conflicts of law, CIL is an area of law where academics unofficially rule; they are the principal organs

6. See, e.g., Laws and Customs of War on Land (Hague IV), Oct. 18, 1907; Geneva Convention Relative to the Treatment of Prisoners of War, art. 142, Aug. 12, 1949, 6 U.N.T.S. 3616; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art.158, Aug. 12, 1949, 6 U.N.T.S. 3516.

7. A good example is Israel's position that although it will not sign the 1977 Additional Protocols to the Geneva Conventions, it adopts many of their substantive provisions as declaratory of customary international law binding in its courts. See Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241 (2008); see generally Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

for discerning and elaborating customary law. The decentralized, nuanced, flexible, and multi-pronged nature of customary rules virtually invites publicist/academic exposition, restatement, and intramural debate.⁸ Given that these factors suggest that the relevant actors in the international law-making system are likely to be deeply entrenched in their endorsement of the binding nature of CIL, the practical burden is a heavy one for those seeking to alter conventional understandings.

Even the beginning of a thoughtful consideration of the Default View will not occur, I suggest, until further work is done on whether the treatise writers and other publicists, the Permanent Court on Arbitration, the Statute of the International Court of Justice (ICJ)⁹ and the decisions of the ICJ and other tribunals expounding the Mandatory View of CIL have misinterpreted their sources or have otherwise gotten the law wrong. Here, we need evidence of actual practice of state objection to, or withdrawal from, settled rules during the period of the Default View—evidence lacking in the treatises and other secondary literature cited by B&G in (Parts II and III of) their article—as well as a more detailed account of the changeover to the Mandatory View, including whether the players recognized they were doing something new, and explained why they were doing it. Without such preliminary work, it is too easy for defenders of the conventional view, set in their ways for the reasons given, to dismiss proponents of revision as building a mountain out of a molehill of poorly crafted language from early treatises arguably taken out of context.

II

Even if one is a critic of the expansive conceptions of CIL (as I am), such as those propounding a form of “instant customary law” (which

8. Identifying state practice has always been a difficult endeavor; which may help explain why some current academic writing seeks to equate state practice with certain forms of *opinio juris*—forming what might be called “instant custom”. See, e.g., Anthony T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 114 (2005).

9. Statute of the International Court of Justice, art. 38 (reciting the sources the court may rely upon in deciding international law disputes, rather than expounding an authoritative listing of the sources of international law); cf. IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (5th ed., 1998) (These provisions [referring also to Article 59] are expressed in terms of the function of the Court, but they express the previous practice of arbitral tribunals, and Article 38 is generally regarded as a complete statement of the sources of international law. Yet the article itself does not refer to ‘sources’ and, if looked at closely, cannot be regarded as a straightforward enumeration of the sources.”); but see Restatement (Third) of Foreign Relations Law of the United States § 102 (1987), Reporters’ Notes (“[Sources listed in Article 38 are] ‘sources’ of international law, in the sense that they are the ways in which rules become, or become accepted as, international law.”).

essentially dispenses with the actual-practice requirement)¹⁰ or advocating “customary” limitations on the ability of states to place reservations on their assent to treaties,¹¹ it is not clear whether recognition of a right of subsequent objection will have any practical effect, and if does whether the effect will be to narrow rather than broaden the reach of CIL. I offer a number of reasons for this cautionary note.

First, a rule facilitating exit may well increase production and enlarge the reach of CIL.¹² This is because exit helps mollify, in theory, objections to the non-consensual basis of CIL. It could help spur even further the ambitions of proponents of instant, elastic, “modern custom.” Thus, it is not surprising that Professor Anthony Guzman, an instant-CIL proponent, is open to recognition of a right of subsequent objection.¹³

Second, a right of subsequent objection is not likely to be invoked to any significant degree by states. Despite the perhaps qualified acceptance of the right of persistent objectors to exclude themselves from customary law still in the making—a right that enjoys some recognition in ICJ rulings,¹⁴ treatise writers, and the Restatement (Third) of the Foreign Relations Law of the United States (Restatement)¹⁵—states generally do not claim persistent-objector status when they object to supposed

10. See *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 43 (Feb. 20) (judgment) (“[A]lthough the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”).

11. See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT’L L. 521 (2002).

12. The prospect of increased production of CIL would not necessarily win over adherents of the Mandatory View. Much would depend on whether such adherents care more about preserving the law-speak or the traditional requirements of existing arrangements than they welcome the additional creation of instant custom facilitated by post-formation exit rights.

13. See Guzman, *supra* note 8, at, 169 (requiring a state to object “from the moment at which it has an interest in the issue”). There is, of course, more than one reason why some have urged movement away from the actual-practice requirement of CIL. Identifying state practice has always been a difficult endeavor—which perhaps explains why some academic writers have sought to equate state practice with certain forms of *opinio juris*.

14. Arguably the ICJ’s reference to the persistent-objector principle in the Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18), and the Asylum Case (Colombia v. Peru), 1950 I.C.J. 266 (Nov. 20), can be dismissed as dictum not necessary to the ruling because “the Court in each case had determined that the substantive rule to which objection was made was not binding on states generally.” Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L. J. 457, 460 (1985).

15. See Restatement § 102, comment e.

customary rules.¹⁶ They, rather, employ the “more attractive” argument that the preconditions for customary law in the particular case have not been established.¹⁷ Both rhetorically in international tribunals and practically when seeking to justify use of sanctions, states are on firmer ground when objecting to the existence of a customary rule rather than urging a persistent-objector exclusion from an established rule. If the state is also seeking to induce change in the underlying rule, here, too, the law-speak that CIL permits enables objecting states to launch a new practice and, if challenged, justify their conduct by claiming that there is no prior binding practice, that the ostensibly new practice is merely a continuation of custom, or that the ostensibly new practice is a new, superseding custom. They are not likely, even for the sake of argument, to concede they are violating CIL.

A right of subsequent objection, by contrast, could not be exercised *sub silentio* but would have to be expressly asserted, as B&G acknowledge: “Withdrawals would have to be planned and announced ahead of time, thereby reducing the scope for opportunistic exits. Moreover, a reasonable notice period might be imposed in situations in which reliance interests are at stake.”¹⁸

Even though lawyers can always argue in the alternative, the objector in the B&G scheme would have to make clear that it was acting in contravention of the customary rule. Indeed, it is the very purpose of the B&G proposal to give normative recognition to such objections. Yet, to the extent states have been reluctant to claim persistent-objector status during the formative period of a customary rule, is it likely they will grab

16. See, e.g., Stein, *supra* note 14, at 459 (“The paucity of empirical referents for the persistent objector principle is striking.”), 460-61 (despite objections to any inroads on the rule of absolute sovereign immunity, court decisions do not indicate that the Soviet Union “claimed the benefits of persistent objector status in any of the numerous cases in which Soviet agencies or instrumentalities have been sued in various national courts”), 462 (several examples from the law of the sea); Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, BRIT. Y.B. INT’L L. 1, 11 (1985) (“One can look in vain through writers’ discussions of the persistent objector rule for references to State practice that clearly support the rule.”).

17. See Maurice H. Mendelson, *The Formation of Customary International Law*, 272 HAGUE ACADEMY OF INTERNATIONAL LAW, COLLECTED COURSES 155, 234 (1998) (“[F]rom a rhetorical standpoint, so to speak, reliance on the persistent objector rule is not likely to be the preferred mode of argumentation. It is much more attractive for a State to be able say: ‘No general rule has emerged (inter alia) because my opposition (and that of like-minded States) has prevented its doing so,’ than to say ‘I concede that a general rule has emerged, but I am not bound by it because of my persistent objection.’ Legally, the latter argument could shift the ‘burden of proof’ from the State asserting that a general rule exists to the one seeking the application of the alleged rule; and, diplomatically, the persistent objector argument admits that the State making it is the ‘odd man out.’”).

18. B&G, *supra* note 1, at 258-59; accord Guzman, *supra* note 8.

the mantle of subsequent-objector status when the rule has already acquired its footing as customary law?

“Nations would still be responsible for their past actions,”¹⁹ B&G advise. In the fishing-rights example offered above, would the state objecting to, say, a previously customary 10-mile verge be able to engage in post-withdrawal fishing in the same waters without being branded a violator? Conversely, would the coastal state seeking to enlarge a previously customary 5-mile limit be able to punish post-withdrawal fishing in the newly enlarged zone without violation? The often hazy line between separating past, completed actions from continuing actions is likely further to dampen state interest in express objection or withdrawal.

Third, without destabilizing areas of CIL that do work effectively to maintain interstate cooperation, a right of subsequent objection would not be applicable, as a practical matter, in contexts where, like the fishing-rights example above, the normative force of the customary rule—whether announced as law or a principle of comity—is due to state expectations of customary behavior. Strong states, willing to incur the costs of angering their neighbors, can try to change expectations through unilateral action, but it is difficult affirmatively to treat such behavior as appropriate without undermining the normative force of the prior rule or, perhaps, the entire system. B&G wisely require reasonable notice of unilateral change, but that mitigating measure ultimately does not solve the problem.

Given this dynamic, any right of subsequent objection will be exercised, if at all, only with respect to rules where states do not have direct material interests and where their unilateral act will not disrupt settled expectations of other states. Customary international human rights law (CIHRL) would seem an area where the state is essentially an altruistic actor endorsing a moral position concerning the behavior of other states. It is precisely in this area, however, where CIL claims outstripping state practice tend to proliferate, that B&G seem to draw back: “There may be situations . . . in which we can be confident, *ex ante*, that the interests of governments and populations will diverge, and where the moral considerations are so strong that they override the usual deference to national governments.”²⁰ Without gainsaying the underlying concern or evaluating here whether this characterization of CIHRL captures the moral entrepreneurship of non-governmental organizations and other policy elites in this process, B&G’s apparent concession removes much of any remaining practical role for express objection or withdrawal.

19. B&G, *supra* note 1, at 258

20. *Id.* at 267.

III

I welcome B&G's contribution to the CIL literature and the goal of furthering a functional understanding of customary rules. I suspect, in the end, that the system is better off with vigilant insistence on the conventional requirements for CIL formation—widespread practice and *opinio juris*—and the conventional consequences for the formation of customary rules that you are bound until by your practice and the practice of other states the customary rule gives way to a new custom.