

# WITHDRAWING FROM CUSTOM AND THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW

C.L. LIM\* & OLUFEMI ELIAS\*\*

## INTRODUCTION

In their excellent article, *Withdrawing from International Custom*, Professors Curtis Bradley and Mitu Gulati call into question the prevailing conception of customary international law, according to which states “never have the legal right to withdraw unilaterally from customary law” (the “Mandatory View”).<sup>1</sup> Bradley and Gulati question the intellectual history and functional desirability of the Mandatory View, and they identify “significant uncertainties about how the Mandatory View would work in practice.”<sup>2</sup> Their observations appear to us to be convincing. If the basis of the Mandatory View is not convincing, then its main tenets, such as the absence of a right of withdrawal, must also fall. Without focusing directly on the question of whether there exists a right of unilateral withdrawal from customary international law, we have also previously rejected the prevailing conception of customary international law on other grounds.<sup>3</sup> In this paper, we will amplify a number of issues we had raised in our critique of the prevailing view. We will sketch a consensual explanation of customary international law that is based on how states argue about international custom. We will argue that taking empiricism seriously means eschewing literal readings of state practice. It means doing more than focusing on what states say about what they do, and instead examining what they actually do. We will argue that such a consensual explanation provides a better context in which to examine the question of withdrawal from custom.

---

\* Professor of Law & Associate Dean for Academic Affairs, the University of Hong Kong; Visiting Professor of Law, King’s College London.

\*\* Visiting Professor in International Law, School of Law, Queen Mary, University of London; Executive Secretary, World Bank Administrative Tribunal, Washington D.C.

1. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010).

2. *See generally id.*

3. O.A. ELIAS & C.L. LIM, THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW (1998).

## I. RULES ABOUT CUSTOM AS RULES OF CUSTOM

A discussion of the conditions under which withdrawal from customary law is permissible is necessarily a discussion of the nature of the rules that govern the operation of customary law (such as the rules on how customary law rights and obligations are created and changed). The question that arises here has been posed as follows: “Do propositions about the sources of law require empirical support? Or, on the contrary, is deduction from a set of postulates that define the international legal order a sufficient basis for their validity?”<sup>4</sup> In other words, how does one establish whether withdrawal from custom is or is not permissible? Is there a difference between the way in which the law on permissibility of withdrawal, or on the effect of persistent objection, is to be established, on the one hand, and the way in which ordinary substantive rules of custom are proved, on the other?<sup>5</sup>

The predominant view today provides the following affirmative answer: “A persistent objector rule makes the applicable customary international law rule depend on timely, actual and persistent dissent to a general rule on the part of the objecting state, but applying a general rule of custom (i.e. an ordinary substantive rule) to a state does not require the consent of that state to that general rule.” This view would run into problems since the latter application of a customary international law rule depends neither on non-dissent nor consent on the part of that state where such non-dissent or consent would at least be empirically verifiable. What is left instead is a form of deduction. Deduction from a set of postulates that cannot be traced to a positivist source of law can be authoritative as accurate prescription only up to a point. If international practice—in statements made by states explaining their actions, or in judicial decisions—supports something different from conclusions based on the reasoning of scholars, the validity and the usefulness of those conclusions would be called into serious question. The fact is that states and tribunals, applying international law, refer to empirically verifiable criteria—i.e. practice and *opinio juris*—to establish the existence of rules of customary law.<sup>6</sup> If there is law on how customary law changes, as indeed there must be, the best way (or at least a very important way) to know its content is to

---

4. 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, 461 n.13 (1985).

5. For excellent recent discussion of issues surrounding this problem, see Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523 (2004).

6. See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 3 Bevans 1179.

refer to the practice of those who make and identify the law.<sup>7</sup> In this sense, empiricism has instructive value even if there is some other, better way of ascertaining the truth of propositions of law regarding the operation of custom.

However, such international practice, which empiricism upholds as a criterion for legal validity, can be read in two different ways. First, it can be read literally, i.e., it can be read with a view to finding a literal answer *in what states say about what they do*, to questions such as: Is there a persistent objector rule? What are the conditions for qualification as a persistent objector? How widespread must practice be for it to lead to a new custom? When, if ever, can a state withdraw from customary law? Second, it can be read in context, with a view to finding out *what states actually do*. We will begin with the first.

## II. CONCEPTIONS OF THE ROLE OF CONSENT IN CUSTOMARY LAW: THE INCOHERENCE OF THE PERSISTENT OBJECTOR THEORY

The discussion of a right to withdraw from customary international law is a discussion of the right to withdraw consent to a particular rule of customary law; withdrawal is surely an act of will. The discussion is therefore about the role of consent in customary international law viewed from a particular aspect. A number of conceptions of the role of consent in customary international law have been expressed.<sup>8</sup> These conceptions range from those at one end of the spectrum according to which, for various reasons, the consent or practice of states plays a minimal role,<sup>9</sup> to those at

---

7. See, e.g., A.V. Lowe, *Do General Rules of International Law Exist?*, 9 REV. INT'L STUD. 207, 209 (1983) ("The secondary rule of law-creation will itself be a rule of customary international law derived from state practice . . . ."); K. Venkata Raman, *Toward a General Theory of International Customary Law*, in TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL 365, 367 (W. Michael Reisman & Burns H. Weston eds., 1976) ("[T]he so-called pre-existing rule of law, entailing legal obligation by customary practice, is itself a product of customary practice."); JAN H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 32 (1968) ("[I]n any legal order, the question regarding the birth of customary law must be answered in accordance with the positive . . . law obtaining in it in respect of the formation of law."); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS & VALUES 32 (1995) ("The norm governing the making of customary law—the requirement of consistent general practice plus *opinio juris*—is based on the constitutional conceptions of the State system, but developed by custom."). For a contrary view, see Kammerhofer, *supra* note 5, at 545 (arguing that the method of looking to State practice plus *opinio juris* to answer this question is flawed because it "presupposes a method of proof which itself is the object of the investigation").

8. ELIAS & LIM, *supra* note 3, at 29-33.

9. See, e.g., International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 174, at 175-78 (July 11) (dissenting opinion of Judge Alvarez); Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 BRIT. Y.B. INT'L L. 148 (1937); Georges Scelle, *Règles générales du*

the other end according to which no *general* rule of customary international law will arise if some states, or maybe a state, objects to that rule.<sup>10</sup> These conceptions do not enjoy support in practice or in academic opinion.<sup>11</sup>

Two other conceptions enjoy greater support. The first holds that rules of customary international law are created by a system of majority rule (whatever the required majority may be), and that the fact that an individual state has not accepted or has never objected to this rule does not prevent the applicability of the rule to that state.<sup>12</sup> A variant of this conception makes an exception and holds that while customary international law applies to all states, it will not be applicable to persistent objectors, i.e., states that have unequivocally and consistently manifested their dissent from the rule during its formation. Subsequent objectors, however, are bound. Both variants of this conception cover what Bradley and Gulati describe as the Mandatory View—"mandatory" because there is no right to withdraw unilaterally from custom once it is established.<sup>13</sup> A second conception holds that rules of customary international law are "not applicable to a particular state unless that state has in some way consented to that rule" (the "consensual theory").<sup>14</sup> According to this view, a general customary rule is only an aggregate of individual acts of consent.<sup>15</sup> While the assumption in the Mandatory View is that a rule of custom applies to all states, the starting point in the consensual theory is the consent of the individual state against whom the rule of custom in question is sought to be applied.

Empirical observation has led to the conclusion that the practice of states regarding the role of consent in the customary international law process has not been uniform because states have expressed different views

---

*droit de la paix*, 46 RECUEIL DES COURS 434 (1933-IV) (Neth.); Louis Le Fur, *Règles générales du droit de la paix*, 54 RECUEIL DES COURS 198 (1935) (Neth.).

10. See, e.g., S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 103 (Sep. 7) (dissenting opinion of Judge Altamira's); Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 at 89-90 (July 25) (separate opinion of Judge de Castro) ("For an international custom to come into existence, the fact that a rule may be adopted by several States in their municipal legislation, in treaties and conventions, or may be applied in arbitral decisions is not sufficient, if other States adopt a different rule.").

11. ELIAS & LIM, *supra* note 3, at 37-38.

12. See, e.g., Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 513, 531-32 (Ronald St. J. Macdonald & David M. Johnston eds., 1983); Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 1-2 (1985); Luigi Condorelli, *Custom, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 179, 202-07 (Mohammed Bedjaoui ed., 1991).

13. The difference between the two variants in this conception is that, according to the first variant, the persistent objector theory does not have a basis in practice or in principle.

14. ELIAS & LIM, *supra* note 3, at 31.

15. See *id.* at 130-34.

on the matter.<sup>16</sup> Furthermore, the manner in which states argue about customary international law is complex, and the context in which such claims are made is perhaps more illuminating than the claims themselves. We shall return to this issue in the next section. In the meantime, two pertinent propositions can be put forward. The first is that, as has been recognized by a significant body of opinion, “in the absence of clearly established general rules, the legal issue has continued to present itself in terms of the opposability of the claim to [an]other state rather than of the absolute legality or illegality of the claim *erga omnes*; in other words, in terms of the acceptance or acquiescence of other states.”<sup>17</sup> The second is that commentators have invariably noted the paucity of examples of practice or judicial decisions supporting the persistent objector rule, and with it the Mandatory View.<sup>18</sup> Consent is central to the creation of customary law obligations, but that consent is not the version proffered by the Mandatory View and the persistent objector theory.

The difference between the consensual theory and the Mandatory View with regard to the role of state consent is that the Mandatory View conditions

---

16. *Id.* at 112-113. See also, e.g., Jelbo M. Lobo de Souza, *The Role of State Consent in the Customary Process*, 44 INT’L & COMP. L.Q. 521, 539 (1995) (“[T]here is not a common view among the States about the idea of consent and its role in the customary process . . . it is not at all clear how precisely each State perceives it . . . . The first conclusion one could formulate is that there is no rule which prescribes that the consent of all States is a necessary condition to the formation of a general customary rule. The second conclusion is that there is no universally recognized rule which would replace the ‘all consent’ rule.”). See also Hidemi Suganami, *A.V. Lowe on General Rules of International Law*, 10 REV. INT’L STUD. 175, 175 (1984) (“It seems somewhat doubtful that an investigation into state practice can reveal conclusively whether, according to the secondary rule, a generally accepted rule of customary law is binding on a state unless it persistently objects, or whether a state, unless it is a persistent objector, is presumed to have consented to it, and is therefore bound by it.”).

17. *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3, ¶ 35 (July 25) (separate opinion of Judge Sir Humphrey Waldock). See also ELIAS & LIM, *supra* note 3, ch. VI; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 12 (6th ed. 2003) (explaining that in the absence of a general practice, customary law becomes “a network of special relations based on opposability, acquiescence, and historic title”); ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 346-347 (1986); Lowe, *supra* note 7, at 209-11; Donald W. Greig, *Reflections on the Role of Consent*, 7 AUSTL. Y.B. INT’L L. 125, 173 (1988-89) (“If, as seems to be generally accepted, a new or different rule can become established amongst a regional or other grouping of States in derogation from the general rule, there would seem to be no reason in theory why the same should not be true in reverse. It is perfectly possible for a group of States to adhere to a former rule in the face of evidence of State conduct moving towards acceptance of a new rule. Indeed, the new rule may well become established amongst the States adhering to it. Admittedly this creates difficulties in determining the rule to be applied in relations between States promoting different rules to a particular situation. However, this is not an uncommon problem.”); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 30 (1974-75).

18. Charney, *supra* note 12, and Stein, *supra* note 4, at 459, both underline the paucity of examples of the application of the persistent objector rule. See also O. Elias, *Persistent Objector*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 18 (2009).

the operation of consent on a number of formalities, namely, actual dissent, timeliness and persistence. But problems arise largely because the Mandatory View demands and assumes a high degree of legal certainty in the operation of customary law. However, such certainty is notoriously lacking, both in relation to the formation of customary law and in relation to the content of the persistent objector rule itself. First, the difficulties in knowing when a rule of customary law comes into existence are well-known and have been discussed extensively.<sup>19</sup> There is no certainty regarding the requirements of generality, consistency and uniformity of the practice required of the rule. The difficulties with the subjective element, *opinio juris*, are even more notorious. In addition, customary law is an ever-evolving process of claim and response.<sup>20</sup> Even in areas where there might be said to be settled general rules, these rules are constantly being added to and subtracted from.<sup>21</sup> These considerations deprive the so-called persistent objector rule of its intended utility, as the exercise of the right to dissent depends on the existence of a general rule from which to dissent. Is dissent supposed to be expressed from the earliest articulations of a nascent rule, at the time of creation, or soon thereafter? Then how persistent, and consistent, must the persistent objector be?<sup>22</sup> These ill-defined formal requirements do not feature in a true consensual explanation, which looks to whether there has been some kind of consent.

Further problems exist. The persistent objector rule is meant to be the safeguard for the essentially democratic and consensual nature of customary law.<sup>23</sup> The rule gives states the chance to exempt themselves from a rule of customary law before that rule is established and, presumably in the interests of legal certainty, states cannot exempt themselves thereafter.<sup>24</sup> But equating

---

19. See, e.g., Henkin, *supra* note 7, at 29-31.

20. See Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 356-57 (1955).

21. See generally, Maurice H. Mendelson, *State Acts and Omissions as Explicit or Implicit Claims*, in LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT 373 (Mélanges Michel Virally ed., 1991).

22. See generally David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957 (1986).

23. COMMITTEE ON THE FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW, INTERNATIONAL LAW ASSOCIATION, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 28 (2000) [hereinafter ILA REPORT] (“As a matter of policy, the persistent objector rule could be regarded as a useful compromise. It respects States’ sovereignty and protects them from having new law imposed on them against their will by a majority; but at the same time, if the support for the new rule is sufficiently widespread, the convoy of the law’s progressive development can move forward without having to wait for the slowest vessel.”).

24. States which simultaneously advocate the persistent objector rule and the Mandatory View enjoy the benefit of a useful and flexible tool. While the persistent objector rule allows a state to withdraw from a general rule and adopt an isolationist legal policy when it is unable to influence the formation of a general rule, the Mandatory View (which the persistent objector rule assumes) also

the role of consent with—or more accurately, replacing it by—the ill-defined conditions of the persistent objector rule renders it incoherent, and there is much that is counter-intuitive in the Mandatory View.<sup>25</sup>

Those who subscribe to the Mandatory View hold that a state's consent is not required for it to be bound by a rule of customary law, but they nevertheless uphold the persistent objector theory.<sup>26</sup> This involves maintaining a distinction between a silent state and a dissenting state; the former is bound by a general rule, but the latter is not. If a state is bound by a rule of custom in spite of its dissent, there must be a system of majority rule in customary international law; but the entire rationale for the persistent objector rule is that there is no system of majority rule. This is because state will is an important criterion, if not the main criterion, in the process of custom-formation. But if state will is the criterion, it should be the criterion for all states, whether they are silent or dissenting states. So why do silent states find themselves in a different situation from dissenting states under the Mandatory View/persistent objector theory? The explanation provided appears to be that states are given the chance, and the legal burden, to exempt themselves during the permissible period, and that that is the extent of the role allowed for their individual consent. The difficulty with this explanation is that it is counter-intuitive to see how customary international law, an informal process, is reduced by the persistent objector theory to a system requiring early notification of views as if it were a process containing readily identifiable and applicable criteria.<sup>27</sup> Furthermore, the persistent objector rule means that states have agreed between themselves to set up a system that denies them the option of remaining neutral. The persistent objector rule apparently

---

enables that state to project its own preferred rule as the general rule whenever it is likely to succeed in doing so.

25. See, for example, Stein, *supra* note 4, at 477-78, which points out a further problem with the persistent objector theory. It is sometimes said to be premised on a theory of vested or acquired rights or interests. Because it requires there to be a general rule, however, it goes against the principle of intertemporal law, which requires, at least in some of its versions that the validity, not just of the acquisition of a right, but also of its continued existence, be conditioned by the evolution of law. If the general rule (a condition precedent for the operation of the persistent objector theory), which is binding on all states, means that the universal law on a given issue is changed, the continued existence of the persistent dissenter's acquired rights will become dependent on the new law, and it will be trying to seek exemption from the application of the general rule. This problem would be much reduced for the consensual theory, since it does not depend on the existence of a general rule, but on individual positions adopted by states.

26. See, e.g., Akehurst, *supra* note 17; ILA REPORT, *supra* note 23, at 30.

27. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 444-45 (1989) ("Even if the State is hard pressed so as not to be able to deny the *inter alios* existence of the norm, it will still have the possibility of qualifying itself as a persistent objector as it may argue that it learned about the norm (or that the norm was intended to apply in respect of it, too) only now and thus voice its 'objection' at the moment of application.").

encourages states to dissent as early as possible even if in doubt, and presumably even in circumstances in which the realities of international relations may render such objections unusual or unpopular.<sup>28</sup> This, again, neither accords with intuition nor appears to reflect how states behave.

Surely if states claim the right to dissent, it is because they do not wish to be bound by rules they find unacceptable, and they therefore do not wish to subscribe to majority rule. This surely cannot be taken to mean that states wish to be bound if they are silent or uninterested or do not wish to commit themselves one way or another for practical-political reasons, or if they commence their dissent too late. As Charney, an avowed non-consensualist, has put it, “[g]overnment officials are jealous of their state’s sovereignty and autonomy and are loath to adopt rules that bind dissenters. For they know that at some point their state may be on the dissenting side of the issue.”<sup>29</sup> To say that the very existence of a right to dissent confirms the existence of a rule that states are bound unless they are persistent objectors is to take state practice too literally. Such an assumption gives too much import to what states say about what they do and the moments when they do not say anything, as opposed to what states actually do and understand themselves to be doing. The fact that states claim a right to dissent does not necessarily imply that they normally mean to be bound without their consent, and a general consensual explanation of the role of dissent makes much more sense than the explanation provided by the persistent objector theory. As one commentator, has put it, the right to dissent cannot be regarded as “merely an annex in the general theory of custom,”<sup>30</sup> which is precisely the role the persistent objector theory ascribes to it.

### III. THE WAY STATES ARTICULATE CLAIMS ABOUT CUSTOMARY INTERNATIONAL LAW

It has been argued that a consensual explanation is not convincing because it does not reflect the reality of the way in which states make claims about customary international law.<sup>31</sup> States, and tribunals, do not normally

---

28. See ELIAS & LIM, *supra* note 3, at 96-97.

29. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 550 (1993).

30. KOSKENNIEMI, *supra* note 27, at 443.

31. ILA REPORT, *supra* note 23, at 24 (“[n]o international court or tribunal has ever refused to hold that a State was bound by a rule of alleged general customary international merely because it had not itself actively participated in the practice in question or deliberately acquiesced in it. In other words, it is not necessary to prove the individual consent of a State for it to be bound by a rule of general law. There have been several cases in which the International Court, for instance, has taken it for granted that the State concerned would be bound by the rule if it could be shown that the other criteria for the formation of general customary law were satisfied. This is also generally the position taken by States, and there have been no substantial challenges to this proposition.”).

concern themselves with demonstrating individual consent, and focus instead on the establishment of generally applicable rules to support their position. In many cases, they leave it at that, and do not refer to the consent of the state against which the rule is to be applied. As has been argued, the whole reason why so much time is spent trying to establish the generality of a practice would seem to be the fact that if it is established, the rule having that attribute will be binding on all. The normal way in which arguments are formulated before the International Court, for example, is by one party arguing that a practice is sufficiently general, and therefore that custom exists, which consequently binds the other state who has in fact consented to it. The other party will normally argue that the rule is not sufficiently general, and as a result does not exist, thus is not binding on it, and that in any case it has not consented to the rule and has even dissented therefrom. This has happened, for example, in every case before the International Court in which the requirements of customary law were scrutinized.<sup>32</sup> But this is not a feature only of the pleadings before international tribunals; diplomatic correspondence normally refers to “generally accepted rules,” or even “established international law,” and domestic legislation purports to be based on rights conferred by international law.<sup>33</sup> What are the implications of this form of argumentation for the consensual theory? Let us consider the issue from the point of view of the state that denies the application of a rule to itself. Such a state can do one of two things. First, it may concede that there is a rule, but maintain that that rule is not binding on it. Second, rather than denying its scope or applicability, the state may deny the existence of the rule itself. Now, as far as that state is concerned, it is not (or at least it seeks to show that it is not) under an obligation, whether on the basis of the absence of a rule or on the basis of the non-applicability of the rule to itself. It would seem to be a legitimate inference to conclude that the state denying the existence/applicability of a custom has not consented to that custom; the fact that that consent is *sufficient* (even if not *necessary*) to bind a state is not contested. It would appear to be a question of argumentative strategy. Showing that a rule does not exist, as a means of avoiding obligations imposed by that rule, is more convincing and less difficult to concede than showing that the rule exists but that for some reason—such as lack of consent—that rule is not applicable. It is safer to present one’s view as the orthodox view, and not to portray oneself as the dissident.<sup>34</sup> To recall a well-

---

32. See generally ELIAS & LIM, *supra* note 3, ch. III.

33. *Id.* at 110-11.

34. See KOSKENNIEMI, *supra* note 27, at 444 (“The objection may concern the norm’s *erga omnes* validity, not merely its application . . . . These States deny that *any* such custom has emerged. It is

known example from the 1980s, the United States did not deny a customary law obligation to refrain from unilateral exploitation of the ocean floor on the basis of its persistent objection; the United States argued that there was no such customary law.<sup>35</sup> Our forensic sensibilities suggest that a more searching view and acute understanding of state practice on the recognition of customary rules is required. Our experience about the actual conduct of international diplomacy should also feature in our understanding of state practice because of what such experience will tell us about the unspoken habits which states observe when contesting a customary rule. Such habits are in turn an element of state practice.

For the reasons above, it would seem strange to suggest that arguing on the basis of a right to dissent is necessarily a concession to majority rule.<sup>36</sup> A state is merely seeking to avoid an obligation; the lack of precision as to what amounts to a general custom, or a perceived high standard of proof for the establishment of a restrictive rule, would seem to be attractive avenues to achieving this end.<sup>37</sup> The persistent objector rule is less attractive.

In sum, it is doubtful whether a state that denies the existence of a general rule is really manifesting *opinio juris* to the effect that all rules supported by general practice are binding on all states, including itself. Arguing that a rule does not exist in no way necessarily implies that if that rule did exist, it would be binding. The whole point of arguing in that way is to show the state involved does not: (a) recognize the obligations flowing from that rule; or (b) has not accepted the rule. The argument between states about customary law is not disinterested dialogue. Claims made in concrete cases about customary law must be viewed in the context in which they were made, being mindful always of the purpose and meaning behind the ways in which states contest customary rules.

---

because the objection can *always* be formulated in such a manner that we remain incapable of delimiting the category of persistent objectors.”).

35. See statement of Ambassador Elliott Richardson, in THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, Vol. IX, (1982) 103-04 (“But the United States could not accept the suggestion that, without its consent, other States would be able, by resolutions or statements, to deny or alter its rights under international law.” He also stated, concerning resolution 27/49, that it was apparent from the text, and from statements made at the time of its adoption, that “the intention had not been to impose it as an interim deep-sea bed mining régime, rather it had been intended as a general basis for further negotiation of an internationally agreed régime.”).

36. Lobo de Souza, *supra* note 16, at 533.

37. Serge Sur, Discussion, *IN CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING* 127 (Antonio Cassese & Joseph H. Weiler eds., 1988) (“There are cases where a custom is itself the object of dispute, where its applicability is directly at issue, where the parties do not agree as to the opposability of the rule. When the Court is faced with such a hypothesis, it indisputably gives the palm . . . to the consensualist solution. But when it has to do with customs which are not in dispute, customs which are simply an element in its reasoning, it utilises them in a much more flexible manner.”).

Regarding withdrawal, a state that does not wish to have a given rule of custom applied to it will not typically say “[t]his is the law that everyone accepts, but we will now withdraw from it” (“where everyone would recognize that what we are doing is that we are withdrawing from it”). A state is more likely to argue that there is no general custom requiring conduct to which it does not wish to subscribe, and would most likely argue in favour of a rule that supports its preferred course of action.<sup>38</sup>

#### IV. CONSENSUALISM THEN AND NOW

The complex way in which states argue about the basis of customary international law does not appear to be properly explained by those who claim empirical support for the Mandatory View.

We must depart from the usual doctrinal explanations and canonical understandings. Part of what we have said about the complex ways in which states argue about the basis of customary international law is attributable to the inherent vagueness of legal rules.<sup>39</sup> It is precisely because legal certainty is notoriously lacking when dealing with contestation over customary rules that the Mandatory View is attractive. The Mandatory View’s doctrines and canons provide hope and a verisimilitude of certainty while at all times appearing, facially at least, to comport with what states say about what they do. Yet the Mandatory View’s explanations cloud our understanding of the true facts of how states actually go about recognizing customary rules. We also question the suppression of the infinite variety of contexts in which customary law disputes occur.<sup>40</sup> What makes the basis of customary international law extremely complex for scholars is that the conditions under which withdrawal can take place are often caught up in legal interpretative dispute. In such a context, states will not argue for the existence of inconvenient rules, or for the truth of inconvenient legal interpretations. A further complication is that states do not always say what they mean, or mean what they say. In so doing, they do not mean to deny the existence of a legal rule when they mean instead to deny the application of that rule to themselves, but they may say that they do in order to make their case more compelling. Understanding such facts about state behavior means accepting that states do not necessarily take the Mandatory View seriously to be the theoretical basis of customary international law, as

---

38. See Maurice H. Mendelson, *Practice, Propaganda and Principle in International Law*, in 42 CURRENT LEGAL PROBLEMS 1989 1, 9 (Roger Rideout & Jeffery Jowell ed., 1990) (“[I]f you can present your demand as an existing right, it is the other government who would ostensibly be disturbing the status quo by denying it, and not by you making the demand.”).

39. ELIAS & LIM, *supra* note 3, at 69, 259-60, 289-92.

40. *Id.* at 261.

opposed to being sometimes a convenient fiction about how customary international law is formed.

While we recognize some of the merits in having a widespread acceptance of the Mandatory View—i.e., that it facilitates law creation and the ability to make general statements of what “the law” is—we also consider the need for simplicity. In our opinion, there is much to commend the view that international law scholarship should focus on the central methodological importance of establishing the opposability of a customary rule to a particular state without always having to address complex questions about general customary international law. This requires a re-orientation of how we think about the importance of international law. If one is concerned with the human rights situation in Country *X*, is it really more important to demonstrate that a large number of countries support a particular human rights rule than to demonstrate that the rule in question applies to Country *X*? It may be important to the cause of advocating human rights protection to say that a large number of countries accept the rule in question (“We all accept the rule, yet Country *X* denies its existence”), and the Mandatory View may have rhetorical value in this respect, but it is not strictly important as a matter of legal doctrine to prove either that a large number of countries accept the rule or that such a broadly accepted rule therefore applies to “silent” states.

Because we were content to show that the Mandatory View is conceptually flawed in this way, and theoretically superfluous, we neither tried to define the scope for subsequent state “exit” (i.e. subsequent objection) as closely as Professor Andrew Guzman has tried to do,<sup>41</sup> nor did we address the policy desirability of the Mandatory View on rule of law or other grounds as Professors Bradley and Gulati have done. Similarly, we did not invest in the protection of expectations as a justification for the Mandatory View as we were not sure who would decide what these expectations are, and whether we mean to derive an *a priori* “expectation” from the collective silence of a large number of states.<sup>42</sup>

Instead, we directed our analysis at the purpose or point which states have ascribed to custom and the invocation of customary rules.<sup>43</sup> This question is fundamental and explains the current polarization of scholarly opinion between those who advocate a skeptical theory of customary

---

41. Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 170-71 (2005).

42. ELIAS & LIM, *supra* note 3, at 83-84.

43. *Id.* at 267; *see also*, RONALD DWORKIN, *LAW’S EMPIRE* (1986).

international law,<sup>44</sup> and those who support the systemic rule of law and policy concerns underlying the Mandatory View. At one end, state practice is seen *only* as bare self-interested behavior,<sup>45</sup> while at the other end, the Mandatory View's systemic concerns leads its proponents towards a majoritarian,<sup>46</sup> or even a deductive theory of customary international law<sup>47</sup> (some versions of which do not even accept the importance of state practice and thus do not allow for understanding such practice). One promising approach seeks to avoid these extremes by drawing our attention back to the central importance of accounting for actual state behavior, while maintaining fidelity to customary international law scholarship's traditional concern—i.e., the need to understand how states might actually act in a cooperative manner under color of law.<sup>48</sup> This approach is derived from the behavioral preoccupations of economic analysis.

Our view proceeds from a separate stream of legal thought altogether; one which takes questions about meaning and legal uncertainty seriously. While states may disregard, acknowledge as obligatory and/or follow general customary rules, they also contest the scope and meaning of customary rules. Unlike the Mandatory View, however, we see customary international law certainty as something which is inherently problematic. When contesting the scope and purpose of a rule, states may not always express the theories they hold about how a rule of custom comes into place. In any case, they may have different theories about how custom is formed.<sup>49</sup> A final complication is that a state which finds it disagreeable to dissent constantly has reasons based in argumentative strategy to present its attempt to modify a supposed general rule to suit its circumstances as a denial of a general customary rule instead. In either case, such a state does not concede the existence of a general rule, i.e., by *seeming* to claim a right to dissent therefrom. Thus, what is claimed is the need for consent.

Demonstrating that the Mandatory View is conceptually flawed, or that its picture of how states behave is incomplete and misleading, is not the only task at hand for contemporary customary international law

---

44. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

45. *Id.*

46. *See, e.g.*, Cheng, *supra* note 12, at 531-532; Charney, *supra* note 12, at 1-2; Condorelli, *supra* note 12, at 202-207.

47. *See, e.g.*, International Status of South-West Africa, 150 I.C.J. 174,175-178; Kopelmanas, *supra* note 9; Scelle, *supra* note 9; Le Fur, *supra* note 9.

48. *See* JOEL P. TRATCHMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008), 113 (“CIL rules may be coterminous with self-interest.”).

49. ELIAS & LIM, *supra* note 3, at 95, 112-113. *See de Souza, supra* note 16, at 539; Suganami, *supra* note 16, at 175.

scholarship. Recent efforts have contributed significantly to furthering our understanding of what it means, in policy terms, to reject the Mandatory View. Professors Bradley's and Gulati's important article on withdrawal from custom stands out as a fine example of that contribution.