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Rethinking the Persistent Objector Doctrine in International Human Rights Law
Holning Lau*

I. INTRODUCTION: CRITICAL ASSESSMENT OF THE PERSISTENT OBJECTOR DOCTRINE IS DUE

The doctrine of the persistent objector ("the doctrine") limits the enforceability of international laws. According to the doctrine, if a state persistently objects to the development of a customary international law, it cannot be held to that law when the custom ripens. Presently, persistent objection is a valid defense unless the customary international law attains the rare status of a peremptory norm or, as it is referred to in Latin, a *jus cogens*. Under existing international law, only a handful of human rights norms qualify as *jus cogens*, leaving the large majority of human rights laws susceptible to the persistent objector doctrine. This Comment argues that application of the persistent objector doctrine to customary human rights law is undertheorized and, consequently, misguided. This Comment proposes a reformulated doctrine that would be less accessible as a defense against human rights violations.

At present, the persistent objector doctrine is widely accepted by international law treatises, but this acceptance has been somewhat blind. Scholars rarely scrutinize the doctrine’s theoretical foundation. For example, in his oft-cited international law treatise, Ian Brownlie simply sidestepped this line

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1 For a discussion on the scope of *jus cogens* norms, see Part I.A.
2 See, for example, Ian Brownlie, Principles of Public International Law 10 (Oxford 5th ed 1998).
3 See Jonathan I. Charney, The Persistent Objector Rule and the Development of Customary International Law, excerpted in Anthony D’Amato, ed, International Law Anthology 110–11 (Anderson 1994) (“Many commentators report the existence of the persistent objector rule but with little explanation and few supporting authorities.”). Three of the few scholars who have analyzed the persistent objector doctrine’s theoretical foundation are Jonathan I. Charney, Anthony D’Amato, and Ted L. Stein. However, none of them specifically examined the doctrine’s compatibility with human rights law, which is the central purpose of this Comment. See id at 110–15 (summarizing studies by Charney, D’Amato, and Stein).
of analysis, suggesting that such an inquiry is unnecessary. He stated: "Whatever the theoretical underpinnings of the [persistent objector] principle [may be], it is well recognized by international tribunals, and in the practice of states." Infrequent invocation of the persistent objector doctrine may explain the dearth of theoretical discourse on the doctrine.  

A critical assessment of the persistent objector doctrine is due in light of recent events. In 2002, the Inter-American Commission on Human Rights recognized the persistent objector defense in Domingues v United States. In Domingues, the United States asserted a persistent objector defense against allegations that its use of the juvenile death penalty violated customary international law. The Commission held that the United States could not assert the defense in the specific case of Domingues because the juvenile death penalty’s proscription had attained the status of jus cogens; however, the Commission did give the defense a big nod by expressly recognizing its legitimacy as a matter of law. In other words, the Commission confirmed that states can raise a persistent objector defense against violations of human rights law, so long as the law has not yet become jus cogens.

Domingues v United States ushered in a new era. Although Domingues was the first case in which the persistent objector defense was raised in response to a human rights violation, it is unlikely to be the last. By expressly recognizing the persistent objector doctrine, the Inter-American Commission on Human Rights has opened the door for other states to raise the defense in the future in different human rights contexts. Furthermore, the fact that the United States has exercised the persistent objector defense will likely embolden other states to assert the defense because the United States serves as a world leader whose

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4 Id.
5 In The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law, Ted L. Stein discusses the fact that states have rarely invoked the doctrine. See 26 Harv Int'l L J 457, 459–63 (1985). He predicts, however, that invocation may become more frequent in the near future due to changing interstate dynamics. See id at 463.
9 Id at ¶ 48 ("[A] norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law.").
examples other states often emulate.\textsuperscript{10} Indeed, Domingues brings urgency to the study of the persistent objector doctrine.

This Comment, which proceeds in five parts, critically assesses the persistent objector doctrine and concludes that the doctrine’s application to human rights should be restricted. Part II provides background on the persistent objector doctrine—its mechanics, its functional purposes, and its history. Part III provides background on human rights law. It discusses the inherent tension between human rights law’s assumption of universality and the doctrine of persistent objector. Part IV analyzes the applicability of the persistent objector doctrine to international human rights law. It looks specifically at the doctrine’s two primary functions: preserving the role of consent and promoting foreseeability. In its analysis, Part IV argues that neither of these two functions would be unduly jeopardized by restricting the doctrine’s applicability in the human rights context. Thus, to preserve the universality of human rights law, application of the doctrine should be restricted. Accordingly, Part V proposes an alternative construction of the persistent objector doctrine, in which states may only invoke the doctrine as a defense against human rights violations when the ripeness of relevant customary international law is at issue.

II. PERSISTENT OBJECTOR DOCTRINE: ITS UNDERPINNINGS

A. MECHANICS

Customary international law consists of two components: \textit{opinio juris} and usage.\textsuperscript{11} \textit{Opinio juris} refers to the psychological component of customary international law. In order for an international norm to be deemed customary law, the norm must be strong enough such that states believe that the norm is strong enough to be compelling law; this belief manifests in \textit{opinio juris}.\textsuperscript{12} Usage refers to the behavioral component of customary international law. It requires that a critical mass of states acknowledge the psychological component and actually implement the norm, in order for the norm to become law.

As one might gather, international norms develop over time; they do not simultaneously emerge and become law. During a norm’s gradual emergence,

\textsuperscript{10} See Stein, 26 Harv Int’l L.J. at 463–64 (cited in note 5) (suggesting that if “highly visible and legally conscious states” raise the persistent objector defense, “[t]heir resort to the principle of the persistent objector will tend to popularize and legitimize invocation of the principle.”)


\textsuperscript{12} \textit{Black’s Law Dictionary} (West 8th ed 2004) defines \textit{opinio juris} as the “principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.”
some states may object to the norm attaining legal status. According to the persistent objector doctrine, these objectors shall be exempt from the norm after it becomes law, so long as the state can rebut the assumption that it acquiesced to the norm and prove that, instead, it exercised clear and consistent objections throughout the norm’s emergence.\textsuperscript{13} However, due to limited case law, the definitions of “objection” and “consistent” are unsettled questions; states’ evidentiary burden to prove those elements is also unclear.\textsuperscript{14}

The only exceptions to the persistent objector doctrine are cases involving \textit{jus cogens}.\textsuperscript{15} \textit{Jus cogens} are a vague subset of norms deemed by the international community to be so important that absolutely no derogation from them will be tolerated.\textsuperscript{16} Courts and scholars usually determine whether a norm is \textit{jus cogens} based on qualitative, descriptive analyses. Currently, only a small number of human rights norms are considered \textit{jus cogens}; they include proscriptions of only the most egregious acts such as genocide, slavery, and torture.\textsuperscript{17} Thus, many human rights advocates may find that, due to \textit{jus cogens}' under-inclusiveness, the \textit{jus cogens} exception is narrow and the application of the persistent objector defense to human rights offenses is overly broad.

\section*{B. Functionality}

In order to determine whether the persistent objector doctrine should apply to human rights law, one should consider what functional purposes the doctrine serves and whether those functions are compatible with human rights law. A close look at the doctrine suggests that it serves two functional

\begin{footnotesize}
\begin{enumerate}
\item Id at 154 (“The form of the objection, how consistent it must be, and to what types of customary law it applies, all remain open questions.”).
\item Inter-American Commission on Human Rights: Report No 62/02, Merits Case 12.285, at ¶ 49 (cited in note 6). \textit{Black’s Law Dictionary} (cited in note 12) defines \textit{jus cogens} as “A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.” However, it is unclear how and when a norm becomes \textit{jus cogens}. See generally James S. Gifford, Note, \textit{Jus Cogens and Fourteenth Amendment Privileges or Immunities: A Framework of Substantive, Fundamental Human Rights in a Constitutional Safe-Harbor}, 16 Ariz J Intl & Comp L 481 (1999).
\item See Loschin, 2 UC Davis J Intl L & Poly 162–63 (cited in note 13) (noting that, “[a]t this time, there are few human rights norms that clearly fit within [the \textit{jus cogens} category]”; Restatement (Third) of Foreign Relations Law § 702 cmt n (1987) (enumerating a notably short list of human rights norms that are peremptory: prohibition on genocide, slavery or slave trade, murder or causing disappearance, torture, prolonged arbitrary detention, systematic racial discrimination, and consistent pattern of gross human rights violations).
\end{enumerate}
\end{footnotesize}
goals in international law: (1) preserving the role of consent and (2) providing foreseeability.

Among the limited literature on the persistent objector doctrine, most commentators note that the doctrine serves the primary function of safeguarding the role of consent in international law.¹⁸ According to its traditional conceptualization, international law derives from agreement among sovereign states. Thus, traditional theorists assert that states are only bound by international laws to which they have agreed to be bound. These theorists point out that there is no international legislature to impose laws, and accordingly, international law must be borne out of consent among equally sovereign states. According to these theorists, the persistent objector doctrine is a natural component of the consent-based international system.

A secondary and less discussed function of the doctrine is to provide foreseeability in international law.¹⁹ The process by which customary international law emerges is an amorphous one. As mentioned above, opinio juris and usage combine to create customary international law, but the question of when these two elements merge and ripen is often unclear. There is no centralized international agency that issues a declaration every time a customary international law ripens. Thus, it is difficult to pinpoint the date on which any customary law ripens.²⁰ As a result, without the persistent objector doctrine, states that oppose the formation of an international norm might find themselves liable for violating an international law without much forewarning. If the process by which customary law ripens is so amorphous, how do states know when to stop objecting and when to start complying with an international norm? In light of this question, the persistent objector doctrine serves an important function—it prevents the subjection of states to unforeseen liabilities.

C. HISTORY

The history of the doctrine is rather thin. Prior to Domingues, the doctrine had only been recognized by an international tribunal on two other occasions.²¹

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¹⁸ See, for example, Jonathan I. Charney, *Universal International Law*, 87 Am J Intl L 529, 541 (1993) ("All arguments supporting the persistent objector rule are based on the view that international law is the product of the consent of states.")

¹⁹ Consider Charney, *The Persistent Objector Rule* at 113 (cited in note 3) (noting that states are most likely to invoke the doctrine when the ripeness of a customary international law is unclear).

²⁰ See Charney, 87 Am J Intl L 536–39 (cited in note 18) (discussing why "it is difficult to fix the precise date at which any customary law norm is established.").

²¹ Ted L. Stein’s article from 1985 notes that the *Asylum Case* and the *Fisheries Case* were the only source of international case law to recognize the persistent objector doctrine. See Stein, 26 Harv Intl L J at 459 (cited in note 5). Two consolidated cases, *Federal Republic of Germany v Denmark* and *Federal Republic of Germany v the Netherlands* (North Sea Continental Shelf Cases), 1969 ICJ 3 (Feb 20,
Those two cases are *Colombia v Peru* (the *Asylum Case*)\(^{22}\) and *United Kingdom v Norway* (the *Fisheries Case*)\(^{23}\)—both of which were adjudicated by the International Court of Justice ("ICJ"). It is notable that in both cases, the ICJ's recognition of the persistent objector doctrine was purely dictum and the ICJ had resolved the disputes on other grounds.\(^{24}\) Even more notably, neither the *Asylum Case* nor the *Fisheries Case* addressed human rights law. The *Asylum Case* addressed whether Peru's repudiation of a treaty's asylum provision amounted to persistent objection.\(^{25}\) The *Fisheries Case* addressed whether Norway's repeated opposition to the demarcation of a fishing zone amounted to persistent objection.\(^{26}\) As discussed below in Part III, invoking the persistent objector doctrine in the human rights context creates a unique tension worth discussing. Neither the *Asylum Case* nor the *Fisheries Case* discussed this unique tension and, therefore, their persuasiveness as precedents is limited.

### III. INTERNATIONAL HUMAN RIGHTS LAW: ITS ASSUMPTIONS

The international human rights regime is grounded in an assumption that human rights are universal,\(^{27}\) that is to say, a single human rights standard should apply across the globe, transcending cultural, social, and political lines.\(^{28}\) After all, the bedrock of the UN human rights regime lies in an instrument called the *Universal Declaration of Human Rights* ("UDHR").\(^{29}\) States reaffirmed the universalism embodied in the UDHR in the 1993 Vienna Declaration on Human Rights (1966), indirectly hinted at the persistent objector doctrine by noting the importance of recognizing state objections. See, for example, id at 26–27. See also Brownlie, *Principles of Public International Law* at 10, nn 50–51 (cited in note 2) (citing the *Asylum Case*, the *Fisheries Case*, and the *North Sea Continental Shelf Cases* as support for the persistent objector doctrine).

22 *Colombia v Peru (Asylum Case)*, 1950 ICJ 266 (Nov 20, 1950).

23 *United Kingdom v Norway (Fisheries Case)*, 1949 ICJ 116 (Dec 18, 1951).

24 Stein, 26 Harv Int'l L J at 460 n 7 (cited in note 5).

25 *Asylum Case*, 1950 ICJ at 275–78.

26 *Fisheries Case*, 1949 ICJ at 131.


29 Many jurists now regard the UDHR as customary international law. See Steiner and Alston, *International Human Rights in Context* at 41 (cited in note 27) (explaining the status of the UDHR).
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Rights. By definition, universalism means that exceptions will not be made for individual states. Indeed, the late Professor Jonathan I. Charney noted that, in the wake of World War II, members of the United Nations sought to create a human rights regime that “incorporated the principle that universal rules may be established from which no derogation is permitted.” In recent decades, there has been debate over whether there should be cultural exceptions to the assumption of universalism; however, despite this debate, the cultural relativist position remains a minority position and the human rights regime remains resoundingly universal in practice.

The human rights regime's universalist assumption is at odds with the effects of the persistent objector doctrine. By allowing individual states to exempt themselves from international human rights law, the human rights regime's universalist nature is necessarily compromised. To clarify the scope of this Comment, it is worth noting that the assumption of universality is particular to human rights law and not to other areas of international law. Thus, the persistent objector doctrine may very well be compatible with some areas of international law, but not the human rights context.

IV. Analysis: Misapplication of The Persistent Objector Doctrine

Given the tension between the persistent objector doctrine and the theoretical foundation of human rights law, one is left to ask whether the doctrine should apply at all in human rights cases. This Part argues that, based on the doctrine's functional purposes, the doctrine should not be broadly applied in the human rights context.

A. The Non-Absolute and Diminishing Role of Consent

The doctrine's first functional purpose is to preserve consent. Indeed, the international legal system was developed around principles of consent. However, those principles have never been absolute. Furthermore, the legal system is evolving in such a way that the role of consent in public international law is diminishing.

31 Charney, 87 Am J Ind L at 543 (cited in note 18).
In 2004, Paul W. Kahn aptly described the diminishing role of consent in public international law.

In the classical era of international law, the state’s commitment to a conception of domestic sovereignty as unbounded authority led to an international legal order organized around the principles of nonintervention and consent. Today, pressure is in the opposite direction: Recognition of state interdependence is pushing toward a reconceptualization of the meaning of domestic sovereignty.  

In the past half-century, there has been a growing number of instances in which notions of consent were overridden—instances when international law was imposed on states despite their lack of consent. An early example of the diminishing role of consent comes from the decolonization period. The international community held newly independent states to already-established international law despite those states’ frequent objections. Although the emerging states did not consent to many existing laws, they still became bound by them.  

More recent illustrations of the diminishing role of consent involve jurisdiction. For example, foreign states have not necessarily consented to American jurisdiction; nonetheless, the United States’ Alien Tort Claims Act allows non-Americans to sue foreign leaders in American courts for violations of customary international law. Moreover, the concept of universal jurisdiction, albeit controversial, has garnered support from a significant number of courts

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34 Stein, 26 Harv Ind L J at 467 (cited in note 5).


36 To a degree, the Alien Tort Claims Act preserves principles of consent because it only provides a cause of action for violations of international norms that are clearly defined and accepted by enough states to be considered “specific, universal, and obligatory.” However, the Alien Tort Claims Act undermines principles of consent because even if states consent to an international norm, they have not necessarily consented to allowing the United States federal courts to adjudicate claims involving that norm. See Sosa v Alvarez-Machain, 124 S Ct 2739 (2004) (upholding the Alien Tort Claims Act as a tool for non-Americans to sue foreign leaders for violations of “specific, universal, and obligatory” international human rights norms); Patrick Curran, Comment, Universalism, Relativism, and Private Enforcement of Customary International Law, 5 Chi J Intl L 311 (2004) (providing background on the Alien Tort Claims Act).

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and academics. Essentially, the concept of universal jurisdiction states that certain violations of human rights law are so egregious that they can be tried anywhere in the world under international law, regardless of whether the parties to the case have consented to the forum. The trend towards universal jurisdiction suggests a diminishing role for consent and, inversely, an increasing emphasis on universality in international law.

B. THE PRINCIPLE OF ORIGINAL CONSENT

Because the role of consent in international law is evolving and unclear, international lawyers should not blindly accept the argument that principles of consent necessitate the persistent objector doctrine. This Comment recognizes that consent does play an important role in international law, but the question is: to what degree?

This Comment argues for a new interpretation of consent in human rights law, which it shall call the principle of original consent. The principle is as follows: As discussed in Part II, it is well understood that states built the UN human rights regime on assumptions of universalism. The UDHR and the Vienna Declaration embody states’ informal consent to the inextricable universality of human rights law. Participation in the UN human rights regime—which grew out of the UDHR—should itself be considered an informal expression of consent to the regime’s underlying assumption of universalism. Thus, if a state participates in the UN human rights regime but later requests to excuse itself from a specific human rights law because of its objections during the specific law’s emergence, that request should be refused. Principles of consent are not violated because that state already consented to the universality of human rights. Requesting an exception would be in violation of its original consent to universalism. It is true that the state’s original consent to universalism was informal. Notably, the UDHR and the Vienna Declaration are not binding treaties. Nonetheless, considering the tension between human rights law and the persistent objector doctrine, legal theorists should treat these declarations as

38 See Richard H. Steinberg, Universal Jurisdiction: Issues Raised by Competing Theories, 8 UCLA J Int'l L & Foreign Aff 41, 43 (2003) (noting that “most commentators and many courts” claim that there is a legal basis for universal jurisdiction).


40 The original building block of the UN human rights regime is the Universal Declaration of Human Rights, which many scholars now believe to be customary international law. See note 29. Members of the UN human rights regime reiterated their commitment to universalism in the 1993 Vienna Declaration on Human Rights (cited in note 30).
persuasive evidence of consent when they rethink the applicability of the persistent objector doctrine to human rights law.

By applying the persistent objector doctrine to human rights law, theorists are essentially creating a second layer of consent that impedes the enforcement of human rights law. Moreover, this second layer is doctrinally unsound: requiring a second layer of consent to specific human rights laws controverts states’ broad—yet significant—original consent to the human rights regime. Simply put, by the time a specific human rights norm attains the status of customary law, all states within the human rights regime have already consented informally to that law’s universality \textit{ex ante} because they understood that universalism undergirds the human rights regime.

Clearly, the principle of original consent is a loose interpretation of consent. However, accepting that original consent is a theoretical principle rather than a formal legal agreement, jurists should still consider the persuasive weight of original consent. Why should legal theorists replace the current bi-layered interpretation of consent with an original consent interpretation, insofar as human rights are concerned? First, as noted above, the role of consent is not absolute; thus, there is no doctrinal requirement for a strict interpretation of consent. Second, the trend in international law militates towards reducing the role of consent in international law. This trend suggests that the persistent objector doctrine’s strict interpretation of consent is somewhat anachronistic. Third, over the years, a number of legal philosophers have waged normative arguments against the role of consent in international law. Thus, rethinking the role of consent may be due. In light of these current dynamics, the original consent theory is persuasive.

One could argue that a new understanding of consent is unnecessary because the persistent objector doctrine, as it stands today, already recognizes that principles of consent are not absolute. At present, the persistent objector doctrine provides for the \textit{jus cogens} exception. Unfortunately, the \textit{jus cogens} exception has its weaknesses. Most notably, \textit{jus cogens} norms are under-inclusive. Very few human rights norms attain \textit{jus cogens} status. In effect, the \textit{jus cogens} exception creates a two-tiered system with bottom-tier human rights and an upper tier, the \textit{jus cogens}, which are absolutely non-derogable human rights. This system is under-inclusive to only except \textit{jus cogens} from the persistent objector

\footnote{See Brian D. Lepard, \textit{Is the United States Obligated to Drive on the Right? A Multidisciplinary Inquiry into the Normative Authority of Contemporary International Law Using the Arm’s Length Standard as a Case Study}, 10 Duke J Comp \\& Int’l L 43, 109 (1999) ("[T]heorists question whether consent alone constitutes a necessary or sufficient normative justification for government or the authority of international law.").}

\footnote{See note 17.}
defense because all, not just some, human rights are grounded in an assumption of universalism. For example, commentators have noted that certain children’s rights and certain indigenous peoples’ rights have ripened into customary international human rights law. Like all human rights, these rights are considered universal, even though they are not *jus cogens.*

Another weakness of the *jus cogens* exception is the fact that *jus cogens* are amorphous entities that are subject to discretionary interpretation. Some commentators have criticized the Inter-American Commission on Human Rights for discretionarily labeling the ban on juvenile executions as *jus cogens.* Arguably, the Commission overextended its discretion and overstretched legal reasoning by equating the ban on juvenile death penalty with other *jus cogens* such as genocide. The Commission could have avoided its questionable legal reasoning by employing instead an original consent argument. Rather than straining the scope of the term *jus cogens,* the Inter-American Commission on Human Rights could have more simply acknowledged that the United States had previously consented to the universality of human rights. Thus, the Commission could have reasoned that the persistent objector defense should not apply because it would controvert that original consent. In other words, the United States’ consent to the universality of human rights laws should override its lack of consent to a specific law during the law’s formation.

**C. FORESEEABILITY: BECOMING A NON-ISSUE**

As noted above, preservation of foreseeability is another functional purpose of the persistent objector doctrine. This function, however, is increasingly becoming unnecessary due to the rise of international litigation.

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45 See generally James S. Gifford, 16 Ariz J Ind & Comp L at 481 (cited in note 15).

46 See, for example, Bradley, 52 Duke L J at 537–38 (cited in note 7).

It is true that customary international laws still ripen at varying paces and it is difficult to identify exactly when a customary international law has ripened. However, the rise of international litigation mitigates this problem. When customary law is unclear, international case law serves as a subsidiary source of law. Thus, after an international tribunal has held that a certain norm has attained the status of customary international law, states should be on notice that the customary international law has ripened. In other words, international case law adds an element of foreseeability to international law.

Commentators have taken note of this rise in international litigation, especially in the realm of human rights litigation. With the rise of international litigation, a growing body of international case law has developed. Accordingly, foreseeability becomes increasingly a non-issue. In the past, the persistent objector doctrine provided a safety net for states. A state that objected to the formation of an international law may not have known when it should stop objecting and when to begin accepting the fact that a customary law had ripened. Thus, the doctrine prevented unforeseen liability. However, the rise of international case law reduces this foreseeability concern. As a result, the role of the persistent objector doctrine should be modified to suit the times.

V. RECONCEPTUALIZATION: LIMITING THE DOCTRINE’S APPLICATION

Considering the inherent tension between the persistent objector doctrine and the universality of human rights law, jurists should not blindly apply the doctrine to the human rights context. In light of the diminishing role of consent in international law, the argument that the doctrine must be applied to preserve consent in international law is questionable. The consent argument becomes even less compelling when we consider states’ original consent to human rights laws’ universality. Thus, the only true function that the doctrine still serves is the preservation of foreseeability in the limited number of cases where the ripeness of a customary human rights law is at issue. Accordingly, invocation of the persistent objector defense should be limited to such cases where ripeness is at issue.


According to commentators, proscription of female genital mutilation ("FGM"), non-systematic types of racial discrimination, and employment discrimination on the basis of gender are all examples of international norms that are emerging but have not fully ripened.\(^{50}\) It is unclear if and when exactly these norms will ripen into customary international laws. Thus, states objecting to the norms will have no notice when they should stop objecting and start complying with the new customary international laws. In these areas of law, ripeness is at issue.

The remainder of this Part discusses this Comment's reformulation of the persistent objector doctrine: limiting the doctrine to cases where a customary international law's ripeness is at issue. First, this Part uses a case study on FGM to examine how the reconceptualized doctrine would play out in individual cases of human rights litigation. Afterwards, it considers how the reconceptualized doctrine would impact international law more broadly. For example, this Part will consider how this Comment's proposed version of the doctrine would affect treaty law and the concept of jus cogens.

A. APPLYING THE RECONCEPTUALIZED DOCTRINE

Examining a hypothetical case involving Mauritania and FGM sheds light on how the reconceptualized doctrine would affect human rights litigation. Currently, the African Union is establishing an African Court on Human Rights.\(^{51}\) In the future, a state like Mauritania—in which approximately 95 percent of particular ethnic groups' girls undergo FGM—may be brought to the court on the issue of FGM.\(^{52}\) Mauritania can try to argue that the ban on FGM is not yet customary international law and alternatively, even if the norm has ripened, it has been a persistent objector. If the court finds that the norm against FGM has ripened, it should recognize Mauritania's persistent objector...


defense because, prior to the case, Mauritania persistently objected\textsuperscript{53} to
banning FGM \textit{and} there had been no definitive holding that FGM is
proscribed by customary international law. In other words, Mauritania
persistently objected \textit{and} it had no notice that it should have ceased objecting
to the developing norm and begin complying.

Our hypothetical case would serve as notice to all other states under the
jurisdiction of the African Court of Human Rights. Thus, under the
reconceptualized construction of the persistent objector doctrine, the defense
would not be valid against an FGM claim for any other African state because
foreseeability would no longer be an issue. Furthermore, if another petitioner
were to bring a second case against Mauritania in the future, Mauritania would
not be allowed to reinvoke the persistent objector defense, as long as enough
time had passed for Mauritania to begin reforms, because it was put on notice by
its first FGM case.

One might query whether there exists any practical difference between (1)
holding Mauritania in violation of FGM norms and (2) holding Mauritania
temporarily excused because it had no forewarning of the ripened norm, but
requiring Mauritania to reform and comply anyway. There is indeed a significant
difference. The human rights system is largely grounded in theories of
socialization. Labeling a human rights violator as such is in and of itself a
punishment because it diminishes the state's reputation, and thus, its soft
power.\textsuperscript{54} By recognizing that Mauritania has a valid defense, while still
compelling it to comply in the future, a court inflicts less severe damages upon
Mauritania's human rights record.

\textsuperscript{53}The evidentiary burden for establishing a persistent objection defense is unclear. See note 14.
However, one can reason that Mauritania can satisfy the definition of a persistent objector. In
international negotiations, Mauritania has objected to regulation of Islamic practices (such as
FGM) by lodging treaty reservations when it signed the Convention on the Rights of the Child
and the Convention on the Elimination of All Forms of Discrimination Against Women. See
United Nations Population Fund, \textit{Mauritania}, available online at
<http://www.unfpa.org/adolescents/opportunities/mauritania/maur-npr.html> (visited Mar
24, 2005) (summarizing Mauritania's ratification of relevant treaties). Mauritania has also refused
Ratification of the Charter}, available online at <http://www.africa-union.org/child/home.htm>
(visited Mar 24, 2004). Furthermore, Mauritania has no laws proscribing FGM. Amnesty
International, \textit{Female Genital Mutilation in Africa: Information by Country} (cited in note 52). Thus,
Mauritania has no domestic laws that would jeopardize the consistency of its objector claim.

\textsuperscript{54}See Kathryn Sikkink, \textit{A Typology of Relations Between Social Movements and International Institutions}, 97
socialization through adverse international publicity about a state's violations of human rights;
noncompliance thus leads to embarrassment or damage to reputation. Moreover, once a state's
human rights misconduct has been exposed, more damaging bilateral or multilateral enforcement
may follow.").
B. SITUATING THE DOCTRINE IN EXISTING LAW

While the case study on Mauritania illustrates how the reconceptualized doctrine would play out in specific cases, it leaves open questions on how the reconceptualized doctrine would affect international law more broadly. This subsection considers some of these remaining questions.

First, one might query how this Comment's proposed version of the doctrine would affect treaty law, specifically treaty reservations. To address that inquiry, one must understand treaty law and its relation to customary international law. Presently, customary international law trumps treaty law. When principles in a treaty attain the status of customary international law, those principles become universal, extending to states who were not signatories of the treaty. By reconceptualizing the persistent objector doctrine, this Comment simply extends that logic to treaty reservations by equating treaty reservations with decisions not to sign specific provisions of a treaty. Presently, states can use treaty reservations as evidence of their objection to make a persistent objector claim and to excuse themselves from a customary international law even after it ripens. Under the reconceptualization, a state can use treaty reservations to make a persistent objector claim, but only until the relevant customary international law clearly ripens. In other words, signatories to a treaty can still use a reservation to excuse themselves from a particular treaty term, but only until the reservation is trumped by customary international law.

Second, one might also ask whether the reconceptualized version of the persistent objector doctrine essentially collapses customary international human rights law and jus cogens. It does not. Jus cogens norms may never be derogated. However, states may derogate customary international law under a limited number of circumstances—for example, under national security emergencies.

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55 See Anthony D'Amato, The Concept of Human Rights in International Law, 82 Colum L Rev 1110, 1127 (1982) ("T]reaties containing generalizable principles of international law generate rules of customary international law that bind even non-signatories.").

56 It is unclear how reducing the power of treaty reservations would affect states' decisions to commit to any given treaty in the first place. This Comment hypothesizes that states would still experience considerable pressure—from other states, from non-governmental organizations, and individuals—to commit and comply with human rights treaties. For a discussion of the various pressures and incentives that influence states' commitment to international law, see Oona Hathaway, Between Power and Principle: An Integrated Theory of International Law, 72 U Chi L Rev ___ (forthcoming).

57 It is generally understood that the customary international law embodied in the International Covenant on Civil and Political Rights may be derogated under circumstances such as a national security emergency. See generally Anna-Lena Svensson-McCarthy, The International Law of Human Rights and States of Exception (M Nijhoff 1998); The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, reprinted in 7 Hum Rts Q 3, 12 (1985).
This Comment’s reconceptualized version of the doctrine simply eliminates persistent objection as a circumstance that would justify derogating a customary human rights norm. Other justifications for derogation remain intact. A state simply would no longer be able to pick and choose which human rights laws it will comply with unless derogation is justified by extenuating circumstances such as a national security crisis.

Finally, one might wonder whether reformulation of the persistent objector doctrine is really necessary to limit its reach. Perhaps jurists can simply limit the doctrine’s applicability to human rights law by setting a heavy evidentiary burden for states wishing to invoke the doctrine. Indeed, at least one commentator has suggested this solution. Unfortunately, raising the evidentiary burden simply suggests that states need only to object louder and more frequently in order to exempt themselves from human rights laws that are supposedly universal in nature. In practice, such requirements might create disincentives for invoking the persistent objector doctrine, thereby mitigating the erosion of human rights law’s universality. Nonetheless, such a solution is unsatisfying because the conceptual tension between the persistent objector doctrine and universality still remains. To truly resolve the tension between the persistent objector doctrine and the underlying assumptions of human rights law, a wholesale reconceptualization of the persistent objector doctrine is necessary.

VI. CONCLUSION

In light of the inherent tension between the human rights regime and the persistent objector doctrine, evolving notions of consent in international law, and reduced foreseeability concerns in international law, application of the doctrine to human rights cases should be limited. As far as the human rights context is concerned, the doctrine should be limited to cases in which foreseeability is truly at issue. That is to say, the doctrine should only be honored if there is not definitive and applicable case law regarding the human rights norm at issue.