CUSTOMARY INTERNATIONAL LAW

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1. Introduction

Given the absence of a world legislature and the cost of forming and ratifying multilateral treaties, customary law has played a fundamental role in governing relationships among sovereign states in both historical and modern settings. Despite some assertions of its diminishing importance (see e.g. van Hoof, 1983), today customary international law is playing an increasingly prominent role in the international legal system (see e.g. Jiménez de Aréchaga, 1978; Lepard, 2010). For example, the customary law of human rights has burgeoned, many crimes under international law are defined primarily by customary law and customary international law plays an increasing role in protection of the environment (see Lepard, 2010). In this chapter, we focus on contributions that consider the process of formation and evolution of customary international law. This process differs from the process of formation and evolution of other sources of law. Rather than through political deliberation or adjudication, the rules of customary international law emerge gradually through states' independent and spontaneous adherence to certain behavioral standards.

This chapter is structured as follows. In section 2, we give a brief overview of the relatively few principles that govern the formation of customary international law. We discuss the two formative elements for an enforceable custom to emerge. We also discuss the persistent objector and subsequent objector doctrines, which allow states to avoid the binding force of customary international law. Section 3 contrasts traditional theories of customary international law with basic insights from the law and economics approach. Most notably, law and economics scholars have criticized traditional theories with respect to the reason why states adhere to international custom. Section 4 provides a basic model of customary international law formation, and discusses the impact of the number of states and of uncertainty and time lags in the process

of emergence and recognition of custom. Section 5 considers a variation in the process of custom formation in which custom emerges when states undertake action consistent with the expression of a belief contained in their prior or concurrent articulations. Section 6 looks at the effects of the persistent-objector and subsequent-objector doctrines on the formation and evolution of customary international law. Section 7 concludes.

2. Basic principles

2.1. Two formative elements

When the resolution of a dispute requires the application of customary international law, an international tribunal verifies the presence of two formative elements of a custom: (1) a quantitative element consisting of a general or emerging practice; and (2) a qualitative element reflected in the belief that the norm generates a desired social outcome. Only when both elements are present does the international practice gain the status of a customary international law that is binding on participating states. The quantitative element concerns both the length of time and the universality of the emerging practice. The longer the formative stage of custom, the less likely it is for the custom to effectively provide a valuable substitute for formal law or treaty agreements or to adapt to changing circumstances over time. There is no universal minimum duration for the emergence of customary rules. These rules have evolved from both immemorial practice and single acts. However, French jurisprudence has traditionally required the passage of forty years for the emergence of an international custom; German doctrine has generally required thirty years (Tunkin, 1961; Mateesco, 1947). With respect to the condition of universality, international legal theory is ambivalent as to whether unanimous consent by all participants is required before binding customary law is formed. Charney (1986), for example, dismisses the requirement of unanimous consent, suggesting that the system of international relations is analogous to a world of individuals in the state of nature. Well-accepted restatements of international law refer to consistency and generality rather than universality (D'Amato 1971; Brownlie 1990). The consistency requirement is not met when it is impossible to identify a general practice because of fluctuations in behavior. More recent cases in international law restate the universality

requirement in terms of increasing and widespread acceptance, allowing special consideration for emerging general norms that are expected to become widespread over time. The second, qualitative element of a customary rule is generally identified by the phrase *opinio iuris ac necessitatis*, which describes a widespread belief in the desirability of the norm and the general conviction that the practice represents an essential norm of social conduct. Those who follow the custom should do so believing that it represents a necessary and obligatory convention (Kelsen 1939 and 1945; D'Amato 1971; Walden 1977).

There is a great amount of disagreement among scholars over the rules of customary international law (Lepard, 2010). D'Amato (1971) has lamented the lack of a consistent theory of custom. According to Kelly (2000), customary law no longer has any authority or legitimacy and should be eliminated as a source of international law, due to the pervasive subjectivity involved in determining customary international law. Bederman (2010) wonders why, after nearly half a millennia of debate, we are no closer to conclusive answers as to what makes a binding custom among nations. Lepard (2010) advocates a new definition: "A customary international law norm arises when states generally believe that it is desirable now or in the future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct." This belief constitutes opinio iuris, and is sufficient to create a customary law norm. It is not necessary to satisfy a separate "consistent state practice" requirement in every case. State practice is just one source of evidence that states believe that a particular authoritative principle or rule is desirable now or in the near future. Note however that according to many practicing international lawyers the tendency has been, in order to prove whether something is a rule of customary international law, to simply show that a certain practice is really followed by states and to forget about the motives for the norm's observance (Bederman, 2010). Some scholars have suggested that one needs to make a distinction between the traditional formulation of custom and modern custom (for a discussion, see Bederman, 2010). Traditional custom is "identified through an inductive process in which general custom is derived from specific instances of state practice…. *Opinio iuris* is a secondary consideration invoked to distinguish between legal and nonlegal obligations". On the other hand, modern custom, which has arisen particularly with the human rights revolution after the Second World War, is "derived by a deductive process that begins with general statements of rules rather than particular instances of practice. This approach emphasizes *opinio iuris* rather than state practice because it relies primarily on statements rather than actions.

2.2. The persistent objector doctrine

Some states have argued that if they persistently object to an emerging rule of customary law, if and when a rule is formed it cannot be applied to them. These claims led to the gradual recognition of a principle known as the persistent-objector doctrine, allowing states to opt out of a new and otherwise universal rule of customary international law by remaining opposed to the practice (Brownlie, 1990; Kontou, 1994; Stein, 1985; and Wolfke, 1993). Objection to an emerging custom may be full or partial. Full objection signifies that the state neither accepts nor wishes to become bound by any part of the emerging custom. A partial objection implies acceptance of some part of the custom. Partial objection is generally found when states object by articulating or implementing a different rule, which they consider preferable to the emerging custom. Full persistent objection leads to a complete exemption from the emerging custom, while partial objection leads to a partial exemption. Once the custom solidifies, the portion of the custom that was not opposed binds the partial persistent objector. Some well-known cases decided by the International Court of Justice have confirmed the persistent objector doctrine. For example, in *United Kingdom v. Norway*, the court ruled that because the government of Norway had consistently opposed the territorial fishing zone regime, Norway was a persistent objector and therefore not bound by such customs.[1]

To successfully invoke the doctrine, states must satisfy two elements. First, the objecting state must make its objections widely known before the practice solidifies into a binding rule of custom. The state must clearly object to the law from the moment of its conception or from the moment the state learns about any relevant practice or declaration that may lead to the establishment of a custom. The objection may be expressed in the form of statements, votes, or protests, or may be implied by "abstaining from practice or adhering to a different practice" (Viller, 1985). Second, a state's objection to a practice must be consistent. The state must clearly object to the law from the beginning, and continue to do so throughout its formation and after its acceptance as international custom (Loschin, 1996). A state may not adhere to a practice on some

[1] *Fisheries case (United Kingdom v. Norway)*, 1951 I.C.J. 116, 124-31. Another case is the *asylum case (Colombia v. Peru)*, 1950 I.C.J. 266, 272-78.

occasions and object to the practice on other occasions. A consistency requirement allows other states to rely on the position of the objecting state, and prevents the objecting state from benefiting from ambiguities in its own course of action. Furthermore, a state may not invoke the persistent objector doctrine if the customary law has achieved the status of *jus cogens* or imperative law, since these rules serve the most fundamental interests of the international community and should be obeyed by all states without exception (Loschin, 1996).

The influence of the persistent objector doctrine was traditionally quite limited (Stein, 1985). However, the greater accessibility and verifiability of general customary law has given the doctrine momentum (Loschin, 1996). Although the doctrine's popularity has increased, acceptance of the doctrine is not unanimous in the international community. Some authors argue that it is of negligible importance, while others claim it does not exist. D'Amato (1971), for example, argues that the cases of the International Court of Justice speak to special or regional custom rather than to general custom. Generally, the wide-ranging literature spawned by the doctrine leaves the impression that commentators have not sufficiently explained the rationale for this exception (see Lepard, 2010). Building further on his new definition of customary international law (see 2.1), Lepard (2010) suggests that persistent objection "should not be allowed to customary norms that states generally believe further such important values that they should bind all states, even states that have persistently objected to them".

2.3. The subsequent objector doctrine

According to traditional international law, states can object to a norm of customary international law only during its emergence. A state cannot unilaterally depart from a customary rule once it has become bound by it (Wolfke, 1993). This traditional approach may lead to excessive rigidity of customary international law when the needs of the international community change over time. International law practice has gradually developed some doctrines to avoid unnecessary inflexibility. One such doctrine is based on the principle of *rebus sic stantibus*, often referred to as the law of changed circumstances. It allows states to depart from international law in the face of fundamental changes in the state of affairs that led to the original legal obligation (Kontou, 1994; Shaw, 2008). Several types of changes cannot be covered by this principle. For example,

changes to individual states' costs and benefits are not covered, due to their limited verifiability. Likewise, states cannot invoke changes in internal laws or policies as a justification for a unilateral departure from customary international law. However, departures from customary law that are not supported by the rebus sic stantibus principle could in theory be accommodated by a *subsequent objector doctrine* (Brownlie, 1990 and Brownlie, 2008). The subsequent objector doctrine, which is not generally recognized (see, for example, Bradley and Gulati, 2009), specifies that in the face of a unilateral departure from an existing custom, a subsequent objector can gain an exemption from a rule of customary law only if, and to the extent that, its departure from the custom is not opposed by other states. Since the reactions of the other states may differ from one another, this doctrine may fragment a previously uniform rule of custom into a network of bilateral relations. The relationship between a subsequent objector and a fully acquiescing state is governed by a bilateral obligation consistent with the norm advocated by the objector state. The relationship between a subsequent objector and an opposing state remains governed by the preexisting custom. When the departure is only partially-opposed, the content of the rule governing the bilateral relation between the departing state and the (partially) objecting state changes according to the extent of the latter state's acquiescence.

3. Law and economics versus traditional theories

The traditional formulation of *opinio iuris ac necessitatis* is problematic because of its circularity. It is quite difficult to conceptualize that law can be borne from a practice which is already believed to be required by law. Some scholars have questioned the notion of *opinion iuris* and the resulting circular explanation of the binding nature of customary law, providing a more complex formulation of the factors that lead states to adhere to international custom. According to Goldsmith and Posner (1999 and 2005), customary law is a relevant source of international law to the extent that it creates state reliance. The reasons for state compliance with custom, however, should be found elsewhere. Goldsmith and Posner explain compliance with custom by considering a number of factors that are consistent with their view of states' interest-oriented behavior. The first is coincidence of interest, whereby all states behave identically because it is in their unilateral interest regardless of the choices made by other states. They offer ambassadorial

immunity as a possible illustration. States may protect the ambassadors of other states given that they perform a valuable function in facilitating communication with other governments. A second explanation is coercion. They provide as an example the custom of "free ships, free goods," whereby all property on neutral ships is immune from seizure. Weak states may respect the principle for fear of retaliation by powerful states. Another reason for states' compliance with custom is that a common practice may represent the solution to an iterated Prisoner's Dilemma. They again offer ambassadorial immunity as a possible example. An exchange of ambassadors can be viewed as an exchange of hostages. A final reason for convergence is that a custom may provide a focal point for a coordination problem. They provide the three-mile limit for territorial waters as an example. For security and other reasons, nations have an interest in claiming dominium over coastal waters, but the exact limit is to a certain degree a matter of indifference. The three mile limit functions as a focal point that is acceptable to all states.

In summary, Goldsmith and Posner argue that convergence in customary practices occurs for reasons of pure self-interest and that continued adherence to such practices happens not because of any sense of legal obligation but because the self-interested reasons remain in place. To support their claim that customary law per se has no influence on state behavior, they argue that rules of customary law are often violated when states have an interest in deviating, and that rogue states, which may have shorter time horizons and higher discount rates, are more likely to deviate than other states. Sykes (2007), however, notes that detractors of the traditional view cannot prove the nonexistence of *opinio juris* merely by pointing to self-interested deviations from custom. It could just be that the force of *opinio juris* is limited. In such a case, when a state's narrow self-interest is sufficiently strong, these counter-incentives could override the force of *opinio juris* and the same observations that Goldsmith and Posner catalog would be observed.

4. Customary international law formation

Parisi and Fon (2009, pp. 137-156) present a model of the process of custom formation. In its simplest version (for extensions, see further), two states are faced with a voluntary participation problem in the absence of an existing custom. For example, one state is facing an emergency, and the other state faces the decision of whether to voluntarily rescue the other and how much effort to spend in doing so. Voluntary participation in a new practice (e.g. rescue) imposes costs on one

state while conferring benefits on another. The states are engaged in repeat interaction. After the initial time period, the states alternate roles (until infinity). Their future roles (e.g. as rescuers or rescued) are only known on a probabilistic basis. In each period, there is a probability that a given state will be the beneficiary of other states' activities and a probability that the state will continue to be on the giving side. The practice is assumed to be socially desirable (e.g. the total benefits of rescue outweigh the total costs). The socially desirable practices are followed, subject to reciprocity. Whatever the level of effort chosen by the state, it can expect that the effort will be reciprocated when it needs to be rescued. Compliance is sustained by reputational constraints. Thus two main factors influence a state's choice to engage in a given action: the immediate costs and benefits of the action (circumstantial interest) and the interest that it may have in establishing a customary rule, which would bind it for the future (normative interest). The process of formation of customary law described above poses a cooperation problem. At each moment in time, the circumstantial interest of one state (e.g. the costs of the rescuer) is in conflict with the commonly-shared normative interests of all the states (e.g., that a customary practice of rescue is socially desirable). Parisi and Fon show that the acting state's participation constraint is less likely to be satisfied and that the state's effort level in the formative stage of the customary rule will be lower when a) the cost of the activity is higher, b) the benefit from cooperation is smaller, c) the probability of being on the benefiting side in future time periods is lower and d) a state's discount rate is higher. These results are fairly intuitive because participation in an emerging custom (or increased effort) imposes a present cost for the expectation of a future benefit, whose (present) value is reduced by higher discount rates, by a lower probability of being on the benefiting side, and by a smaller benefit from cooperation. Parisi and Fon also compare the privately-optimal conduct with the socially-optimal level of effort, finding that the optima will coincide only in limited instances. Intuitively, this can be explained in terms of externalities. The privately optimal conduct could be lower than the socially optimal level of effort because the first-mover (here, the rescuer) internalizes only part of the social benefit of his action (e.g. the creation of a desirable rescue custom). The opposite can also be true, since the first-mover does not bear the full cost of his action (the other state may be called upon to rescue the first-mover at a later stage).

As a first extension, Parisi and Fon examine the case of multilateral custom. Unlike in the previously-described case of bilateral custom, states are not always involved in one role or the

other (e.g. as victims or rescuers) in the case of multilateral custom. Formally, it is assumed that participants to a customary practice are randomly drawn from a larger population. At any time, a positive number of non-participants observe others' activities without participating. When the probability of a state's involvement decreases, it becomes less likely for the state to take part in the customary practice and the effort expended by the state decreases. These results are related to the fact that the choice of initial participation imposes a present and sure cost on the states, while the probability of future involvement with the emerging custom and the resulting net benefits may decrease with the number of participants. These results are consistent with the empirical findings of sociologists and anthropologists that close-knit environments and small communities of players provide the most fertile environments for the emergence of efficient custom (Ulmann-Margalit 1977; Parisi 1998; Ellickson 2001). This result also supports Goldsmith and Posner's (1999 and 2000) skepticism about reciprocity explanations of international cooperation involving more than two states.

Another extension concerns uncertainty in the formation of custom. In real-life settings, initial participants to a customary practice have no guarantee that their initial effort will be met with reciprocity. For example, a potential rescuer has no perfect assurance that his effort will be met with like behavior when fortunes (and roles) are reversed. As intuition suggests, states that have higher expectations that their behavior will successfully consolidate into a binding custom are more likely to participate in the practice, and their initial actions will performed with more effort.

A final extension considers the effect of time lags on the process of emergence and recognition of custom. Time lags and delays affect the time in which the initial participants are able to capture the benefit of the custom when roles are reversed. The delays can be determined by the type of practice, such as events of rare occurrence (e.g. a rescue in outer space or on the high seas), or action in the legal system (e.g. some legal systems require a long-standing practice of 20 or 30 years before the usage is recognized and enforced as a binding customary rule). The authors find that when states have a positive time preference, delays have negative participation and effort effects on the initial participants. These results suggest that customary settings that entail infrequent states' actions should require a lower number of observations, and thus a shorter waiting period, before the practice is allowed to solidify into a binding rule. Otherwise, states would heavily discount the benefits of future applications of the custom.

5. Articulation theories

As discussed above, states' actions can form international customs. Statements and expressions of belief, however, can also play a role in the custom-formation. Theories under which statements and expressions of belief play a role in custom formation are called articulation theories. D'Amato (1971) considers articulation a formative element of customary international law. In D'Amato, this element operates in conjunction with state practice and abstention. According to articulation theories, states' statements and expressions of belief should be attentively considered in the process of ascertaining the qualitative element of *opinio iuris*. States can signal which rules they intend to follow by articulating norms that they would agree to be bound by. Articulation lends tangibility and objectivity to the otherwise subjective and intangible element of *opinio iuris*, allowing belief to be expressed before or in conjunction with customary action. These theories suggest that greater weight should be given to beliefs that have been expressed prior to the emergence of a conflict in order to avoid the effect of biased articulations.

Fon and Parisi (2006) examine whether an alternative, hypothetical process in which articulation determines the content of emerging customs can mitigate the shortcomings of the traditional approach. Their model of custom formation considers a setting similar to the model described in the previous section. The major difference is that states are allowed to choose a rule by means of articulation in the initial period. The endorsement of a hypothetical rule by means of articulation requires no practice or effort expenditure. For example, states are allowed to express their beliefs on the norm of rescue before their respective roles are unveiled and before any state needs rescue. The future horizon for the states is unchanged (role reversal etc.). The most interesting differences can be summarized as follows. First, the participation constraint is more easily satisfied in the articulation case than in the traditional customary law case. Allowing potential participants to announce ex ante their participation in the emerging custom and to articulate the level of effort that they consider appropriate and desirable for such activity facilitates the formation of customary law. Second, under articulation theory, the states' discount rate has no effect on the optimal level of effort. Articulation processes, unlike traditional processes of custom formation, eliminate incentives to understate the states' true normative

interests by letting states commit to a customary rule before their specific circumstantial interests are unveiled. Third, the optimal effort that states would rationally choose under articulation is greater than the effort that those same states would choose under traditional customary law processes. Note, however, that homogeneous states or unbiased role-reversibility are important prerequisites of processes of custom formation even under articulation theories. In our rescue example, the two states will face incentives to articulate efficient rescue rules only when the probability of being rescued equals the probability of becoming a rescuer in the future. This is so because the states will assign equal weights to the expected costs and benefits of future rescue missions. This is not the case when states face asymmetric probabilities of being rescuers or victims. With asymmetry, the private and social incentives diverge and the resulting articulations will be affected by the diverging interests of the states. In general, the lack of alignment between private and social incentives is due to the fact that a privately optimal effort level is obtained by balancing the expected private marginal cost and benefits. Such privately-optimal balancing takes into account the individual probabilities of receiving a benefit or being burdened by a cost. For a social optimum, no such discounting should be made. The social marginal cost and marginal benefit for the states should be balanced, but the distribution of probabilities between states would not enter the calculation for a social optimum because the ex post distribution of costs and burdens between the states becomes irrelevant when all values are aggregated in the social function. Thus, the private optimum and the social optimum will coincide only when the probabilities are uniform for all players.

The same extensions are considered as in the traditional customary law case. With respect to multilateral custom, an increase in the number of potential participants under articulation also renders participation less likely, but has no impact on the optimal level of effort expended by a state. This is a substantial improvement over traditional customary law processes that, as seen above, are affected by pervasive strategic problems in multilateral settings. The effect of uncertainty in the formation of custom is the same as in the traditional customary law case: an increase in the probability that others will reciprocate has a positive impact on the willingness of a state to advocate customary norms by means of articulation and increases the state's willingness to expend effort. Finally, the presence of time lags negatively affects the participation choice under articulation theories as well as traditional processes of custom formation. The longer the delay before any enforcement of the articulated rule takes place, the less likely that the state will

actively engage in the articulation process. However, this delay has no effect on the qualitative standards advocated by the states and the resulting rules of custom. These results can be explained by considering that delays in the implementation of the rule decrease the present-discounted value of the future payoff, thereby weakening the incentives to participate in the articulation venture. On the other hand, delays in future events do not alter the balance between expected benefit and expected cost in the future. Consequently, if the participation constraint is fulfilled, the state has no reason to alter its choice of optimal effort no matter how long the delay is. Also in this case, articulation processes of custom-formation improve upon the traditional processes with respect to the states' incentives and the resulting qualitative content of the emerging custom.

6. The effects of the persistent objector and subsequent objector doctrines

6.1. The persistent-objector doctrine

Fon and Parisi (2009) analyze the impact of the persistent objector doctrine on the process of custom formation when heterogeneous states are involved. In the initial time period, a number of heterogeneous states need to decide whether to participate in a customary rule and to choose levels of effort. There is no initial cost of custom compliance because the persistent objector doctrine requires the objection to be "consistent" (i.e. states' objections should be formulated ex ante). Once the custom is established, in later periods each state confronts a certain probability that it may receive a benefit from other states' compliance with the custom, and a certain probability that the state may be called upon to fulfill obligations created by the custom. Due to the fact that states are heterogeneous—and may face different probabilities, costs, benefits, and participation constraints—the interests of the states may diverge. This implies that states may have different views on the desirability and content of the custom. The persistent-objector doctrine provides a mechanism through which the different actions and objections of the states are brought together to generate a rule of custom. Persistent objectors may opt out in part or in full from customary obligations. Objection is partial when a state is willing to join the custom, but prefers a level of effort lower than that required by the emerging custom. When a state

chooses not to participate in the emerging custom, that state faces the cost of its own effort each time it seeks to obtain a benefit for itself ("self-help"). For example, imagine an emerging customary rule which imposes a duty on coastal states to rescue foreign vessels within a certain range from the state's coastline. Rejection of the custom implies that the state faces the burden to rescue its own ships, even when they are far from the state's own coastline. In the face of a persistent objection, other states take advantage of reciprocal effects of a unilateral objection, allowing them to adopt the same customary level against the objecting state. Logically, a state will choose to participate in the custom when the best obtainable payoff under the custom is higher than the pay-off under self-help. The most important findings can be summarized as follows. First, different categories of states may choose to opt out of an emerging custom. Full objection is a rational strategy not only for states that consider the emerging custom excessively burdensome, but also for states that like the custom but want more of it. Some states agree with the spirit of the custom but are not satisfied with the emerging rule because they would like a custom with a greater level of obligation. Some of these states may be better-off opting for a no-custom regime and addressing the issue on their own. The payoff in a no-custom regime represents the opportunity cost of custom-participation. This opportunity cost will likely be larger for stronger states that face lower cost of self-help, and which may have greater opportunities to stand alone and generate benefits for themselves in the absence of international cooperation. For those states, customary cooperation is less indispensable than for other states that have less opportunity to address the underlying need by acting on their own. Given the lower payoff obtainable in a no-custom regime, weaker states facing higher costs may be more willing to go along with an emerging custom that does not correspond to their ideal levels. Second, the likelihood of participation in a less than ideal custom depends on the ratio of the probabilities of being on the receiving side versus the giving side of the customary relationship in future time periods. States that are more likely to benefit from the custom than to be burdened by it are more likely to participate in the custom, even though the custom does not correspond to their ideal optimum.

6.2. The subsequent objector doctrine

Unlike persistent objectors, who raise objections prior to facing a compliance problem with an emerging custom, subsequent objectors manifest their objections by departing from an already-binding rule of customary law. Given an existing rule of customary law, a state may become a subsequent objector for many reasons (see Fon and Parisi, 2009). Some reasons are merely strategic: a state may object to an existing rule of customary law to avoid the cost of fulfilling its obligations under that rule. Other subsequent objections are driven by changes in the costs and benefits of the custom. To understand how other states react to a subsequent objector's departure from existing custom, it is useful to separate states into three groups. The first group consists of first-party states that have reasons to become subsequent objector states. The second group of states comprises second-party states that would benefit from the subsequent objector's fulfillment of the customary obligation. Finally, third-party states neither expend effort to fulfill the customary obligation nor receive any direct benefit from the subsequent objector's compliance in the current period. Fon and Parisi consider three types of cases. In the first case, the probabilities, benefits and costs associated with the expected long-term participation in the custom do not change for any state. A first-party state may still become a subsequent objector for strategic and myopic reasons. In one period, the first-party state confronts its turn to fulfill the obligations under customary law. The need to incur an immediate cost for compliance with the custom may induce the first-party state to invoke a partial erosion of the preexisting customary rule. Second-party and third-party states, however, will always oppose such strategic attempts to depart. The third-party state continues to find the existing custom obligation privately optimal. Nothing changes for a third-party state. A second-party state, on the other hand, prefers an even larger level of effort than existing customary law requires. Although circumstances of the second-party state do not change, this state derives an immediate benefit from the subsequent objector's fulfillment of the customary obligation in the current period.

In the second case, exogenous factors that affect the behavior of states may change, but changes are uniform for all states. Suppose the cost of performing increases for all states. In such cases, there is a *partial* convergence of interests between the subsequent objector and the third-party state. The subsequent objector's departure from the current custom is motivated by the attempt to reduce the burden of immediate compliance and to minimize the impact of higher compliance costs in the future. The third-party state shares the motive to reduce the future effect of higher compliance costs. Thus, the subsequent objector has incentives to depart more

extensively from the existing custom than the third-party state would likely permit. For the second-party state, the net effect of an exogenous change in costs depends on whether the presence of an immediate benefit for the second-party state is offset by the increase in future performance cost. If the immediate benefit dominates, the second-party state is either content with the current customary rule or prefers a level of custom higher than the current level. The second-party state opposes any departure by the subsequent objector from the current custom, and the relationship between the two states remains governed by the existing customary rule. If the impact induced by the increase in future performance cost dominates, the second-party state's private optimum falls below the existing customary law. Still, the second-party state's private optimum exceeds the level preferred by the subsequent objector. In this case, a partial convergence between the interests of the subsequent objector state and the second-party state takes place. The second-party state foregoes part of the immediate benefit from the custom by providing partial acquiescence. The custom governing the relationship between the two states changes from the existing customary law to the level desired by the second-party state. This analysis reveals a potential factor of inertia in the process of custom formation. When exogenous changes affect the states' ideal levels of customary law, opposition from second-party states may hinder the adaptation of customary law to such changes in circumstances. Second-party states may oppose the subsequent objector's departure not so much because they value the current custom, but because they are attracted by the immediate benefit from custom compliance. This further justifies the workings of the subsequent objector doctrine, allowing the bilateral obligations of first- and third-party states to adapt to changed circumstances in spite of second-party states' opposition.

The third case is characterized by asymmetric exogenous changes for the states involved. We consider the case in which the subsequent objector chooses a level of departure effort below the existing customary law effort, either for strategic reasons or for reasons induced by environmental changes. Given that the problems confronting a second-party state and a third-party state are similar except for the extra immediate benefit factor enjoyed by the second-party state, we discuss only the problem confronting the third-party state. If the exogenous changes in the third-party state are such that its new optimal level of effort is greater than the existing customary law effort, the third-party state would like to raise the content of the custom obligation to its privately optimal value. But this is not an option for the third-party state. Consequently, the

third-party state does not acquiesce. Next, consider the case in which the exogenous changes in the third-party state induce an effort level less than the existing customary law level. Clearly, there is no reason for the third-party state to acquiesce to any change in current custom that brings the level of customary obligation below its privately-optimal value. Thus, when the subsequent objector's desired level is larger than the third-party state's optimal value, the third-party state provides full acquiescence. The subsequent objector's desired level becomes the content of the bilateral custom that governs the relationship between the first-party state and the third-party state. In the opposite case, the third-party state is only willing to provide partial acquiescence. The third-party state's privately-optimal value characterizes the bilateral custom between the third-party state and the subsequent objector.

6.3. Change and stability in customary law

Both the persistent and subsequent objector doctrines assure that any new rule of customary law or any change to existing customary law affects only those states for which the new rule or the change in existing rule constitutes a Pareto improvement. A state facing a net prejudice from a newly-emerging custom can opt out from that rule by persistently objecting. Likewise, any state facing a prejudice from a departure from an existing custom can oppose the departure and enforce the current rule. There are, however, limits to custom formation when heterogeneous states are involved. Through the application of the persistent objector doctrine, high-cost states effectively constrain the emergence of new custom in their relationships with other states. The resulting level of custom-formation may be suboptimal compared to the alternative scenario in which high-cost and low-cost states effectively bargain with one another for the choice of a value-maximizing customary effort. The subsequent objector doctrine creates the opposite problem. By allowing the acquiescences of other states to serve as constraints, this doctrine may lead excessive customary obligations to outlive the circumstances that justified their emergence. In the presence of heterogeneous states, the persistent and subsequent objector doctrines allocate control of the resulting level of customary law among different states. By doing so, these doctrines promote stability in customary relations, but may fail to induce first-best social optima obtainable via compromise solutions. These results are consistent with the traditional wisdom that custom is an effective source of international law when homogeneous states are involved, but that alternative

sources, such as treaty law, may be better instruments for the pursuit of first-best outcomes when heterogeneous parties are involved.

7. Concluding remarks

Most of the economically-inspired literature on customary international law is quite recent, and room remains for exponential growth in this field of academic research. For instance, theoretical extensions could investigate the influence of reputational costs on the formation of customary norms. Objector states may face reputational costs when objecting to customary law, and second- and third-party states may also face reputational costs when opposing another state's departure from an exiting custom. The practice of customary law is heavily affected by considerations of diplomatic and political expediency, and such costs may create frictions and biases in the process of custom-formation that are worthy of consideration. Further, if reputational costs differ from state to state, this may create a systematic advantage for states that place less weight on reputation. The process of custom formation is further affected by free-riding and opportunistic behavior by second- and third-party states, none of which fully internalize the benefit of monitoring other states' compliance with custom. When states face a private cost in opposing departures from customary law and generate a public benefit for the international community, a public good problem may arise. As a result, states may fail to oppose other states' departures more often than is desirable for the world community as a whole. Future research should verify the relevance of this analysis for understanding other social and legal settings where social norms or customary rules are created through the spontaneous interaction of parties in society.

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