VALUE OF OBJECTION DOCTRINES UNDER INTERNATIONAL LEGAL SYSTEM

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I. INTRODUCTION

Under International law, States can become parties to a treaty by giving their consent i.e. they freely agree to be bound by the provisions of treaty after ratifying it. However, sometimes a State might reserve certain provisions of the treaty as a result of which they will not be bound to follow those provisions. When it comes to the customary International law, its binding value is still a debatable topic, but the general rule is that the customary International law binds all the States. Even the new States are bound by the existing customary law, despite the fact that their consent is not taking into consideration at the time of its formation or thereafter. This practice is known as' tacit acceptance' or 'tacit acquiescence'.

Intention to be bound by any customary law can be expressed by States through a public declaration which is much like appending signature to a treaty. They also can oppose it, in a public manner, for ex- any acts of a State which are in contradiction to an established or establishing customary law which would give a justifiable reason for other States to assume that the opposing State recognizes the customary nature of the law and thereby consenting to the application of the customary rule to itself. Now having already discussed on the premise that States can consent to be bound by customary law either explicitly or through tacit manner, it becomes important to discuss the situation where a State withhold its consent which is quiet normal in treaty relation where a State party does not wish to be bound by treaty or any provision of it may refuse to ratify or accept the treaty or withdraw from the treaty of which it was already a part of after following the procedures established by the treaty or in International law.

II. RULE OF PERSISTENT OBJECTOR

In Customary International law, when a State party makes an attempt to refuse to be bound by the provisions of customary International law at its very inception is known as ***persistent objector*** while on other hand, an attempt to refuse to be bound by the customary International law after its enforcement is known as ***subsequent objector***. The major difference between a

treaty and customary International law in this regard is that a treaty ceased to have an effect on that party which withdraws with an exception of continuing obligation but subsequent objector remains bound by the customary law principles that is seeks to reject.[1]

The International Court of Justice for the first time dealt with the question of persistent objector in the case of *Anglo Norwegian Fisheries*[2] wherein, it held that *"even if a customary law rule existed it would appear to be inapplicable if State has always opposed any attempts to apply it domestically*". In other judgment in *Asylum case*,[3] ICJ held that *"State is not bound by customary law rule when it refrains from becoming a party to a convention that was first to introduce the rule that has become a custom now*." After looking at both cases, it can be argued that whether this can be applied as a general rule because there might be many reasons like political, economic, or moral etc. for which a State might refuse to sign a convention. Moreover, one cannot make assumption unless there is a clear expression from the State clarifying its position behind refusing to sign a particular treaty because it refutes the legality of a particularly provision within the treaty. In both the above mentioned cases, ICJ did not set any criteria to determine if a State is a persistent objector. However it did elude a certain criteria to determine the same in Anglo-Norwegian fisheries case jurisprudence which supports the idea that an existing customary law rule won't apply to a State if:

i. It objected to any outside attempts to apply the rule to itself at initial stages and in consistent manner.

ii. If other States did not object to its resistance.

The basis of persistent objector, in academic literature appears to be that the objecting State claims an exemption from a potential and actual rule. For e.g. - In Norway Fisheries Case, the State government invoked historical factors in addition to other factors to justify the way in which it applied the general law. In its view these rules of International law take into account the diversity of facts and hence, conceded that drawing of baselines must be adapted to the special conditions prevailing in different regions of Norway. It also viewed the system of delimitation,

[1] T. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 Harvard International Law Journal, 1985, p. 457.
[2] The United Kingdom v. Norway, [1951] ICJ 3.
[3] Columbia v. Peru, [1950] ICJ 6.

applicable since 1935,[4] which is characterized by the use of straight lines, does not infringe the general rule. In other words it means that Norway did not claim any such exemption to the rule that its practice was not in contrary to the provisions of International law but rather in conformity of the same. A sate cannot plead for an exception of rule that it does not recognize to exist in the first place. Therefore what Norway did was instead a pleading to the court that its actions are in conformity with International law.

Now a question may arise here that what if a rule has been already crystallized into a general customary International law rule? In such cases, irrespective of the fact whether it has been recognized or not by a State, the rule would exist and any State wishing to obtain benefit, as a persistent objector, would undoubtedly claim an exception to the rule. However looking at the existing records, in realty there have not been many cases that have been come before ICJ in this regard, where a State claim exemption from customary law after it has been formed. If this is the position then possibly one can argue that Court envisaged a so- called persistent objector rule only at the time of formation of customary International law? However it is to be kept in mind that in both the above mentioned cases, ICJ was dealing with a customary law, the existence of whose was uncertain. In fact, these cases which appear to support the persistent objector rule both arose in circumstances where the new rule itself was in substantial doubt.[5] Thus, it was significantly easier for the rule to maintain its status at that particular point of time but lately there is no case on record that is cited for a circumstance in which it has effectively been used after the rule became well accepted in International law. In fact it is very unlikely that such a status is maintainable in the light of current International settings. An example can be certainly the plight that befell the US, UK and Japan in the law of seas. Their objections to expand the coastal State jurisdiction were ultimately led to no avail and they have been forced to follow the general rule territorial water which extends to 12 mile territorial seas and 200 miles Exclusive Economic Zones.

[4]UNCLOS, 'Submission in Compliance with the Deposit Obligations pursuant to the United Nations Convention on the Law of the Sea', July 12, 1935.
[5]Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 BYIL, 1985, p. 1.

III. WHY THE RULE IS ABSURD IN CURRENT SCENARIO?

The absurdity of the persistent objector continuing to benefit from its objector status can be demonstrated in the following examples:

i. Firstly let's consider that a customary law rule pertaining to the citizen's right to use the territorial waters upto 12 mile exclusively for fishing is formed. If a country A considers itself as persistent objectors to this rule, then they are not bound to follow it and in the lieu of the same the citizen of country A ventures into Country B's territorial waters to carry out fishing. In this situation, Country B has an absolute right to arrest these people and prosecute them as per their domestic laws. Country A has no recourse before any International court because B's action was to enforce a customary law right.

ii. Secondly, many argue that persistent objector cannot absolve one's obligation of jus cogens norms which is also consistent with the position in treaty law which disallows any State to make any reservations that conflict with jus cogens norms. However this argument does not take into consideration other basic fundamental norms that fall short of norms of jus cogens. For ex- if a State starts curbing citizen's freedom of speech and expression or start persecuting religious or ethical minorities, can a State, then, be excused if it violated people's fundamental rights just because the State chose the path of persistent objector?

iii. What if a rule is an obligation that a persistent objector is refusing to be obliged by? For example the use of weapons of mass destruction is prohibited under a treaty and customary law. Now let us assume country A has been consistently objecting to this prohibition and continues to use nuclear weapons even after the rule of prohibition becomes a customary International law right. It does not mean that State A is now absolved from this.

However it is the opinion of the author that 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 a new rule is wide enough the convoy of the law's progressive development shall be move forward without having to wait for the resisting State.

IV. RULE OF SUBSEQUENT OBJECTOR

As already mentioned above subsequent objector is one who objects any rule after it has become a part of customary law rule. Any State which does not still continues to be bound by the customary law and it acts contrary to the law, it leads to violation for which a State can be held responsible under the International law. However it is also true that if a number of States agree to deviate from the set norm then these State could create another customary law rule as a local custom or if a sufficient number of affected States participate, a general custom.[6]For any subsequent objector to develop a new customary law rule an existing norm must be broken. A State wishing to amend customary law must either **[a]** violate it and hope to be acquiesce by other States but until such time the State would be in breach of customary International law or, **[b]** without violating the existing law the State must ***(i)*** get a sufficient number of other States to accept that a new customary law had developed before choosing to adopt its State practice accordingly or ***(ii)*** use the existing framework and creative interpretations to bring the violation within the existing law. In time, this creative interpretation would allow for the formation of new law or it would be rejected by States preventing such formation. However there has been no such instance where in any State or group of States have objected to be bound by any rule of International customary law after it was formed.

V CONCLUSION

In view of the above discussion, it may be prudent and practical to say with regards to the persistent objector rule that it a State can only avail its benefit as the time of the formation of customary law which is consistent with the norm that existing customary law binds every new State and that they cannot withdraw from customary law after they attain Statehood. It also goes without saying that if a number of States affected by a particular custom object to the newly emerging customary rule this would prevent its formation or it will lead to the formation of a different customary law rule. Pertaining to the rule of subsequent objector, it has become a part of customary International law and still holds good. The creative interpretation of the subsequent objector rule opens the door for the formation or rejection of a new law which would provide an opportunity to the State to not repudiate the customary law before adopting a contrary practice.

[6]Bradley et al., 'Customary International Law and Withdrawal Rights in the Age of Treaties', Duke Journal of Comparative and International Law (2011).