The Persistent Objector Doctrine: Identifying Contradictions

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Abstract

The persistent objector doctrine (POD) in international law provides that a rule of customary international law (CIL) will not oblige a state that has persistently objected to the development of the rule. The doctrine requires that the objection be "persistent" and "consistent" and that it not be contradictory. Yet, while in this context the meaning of persistency and consistency, in this context, has been discussed in the legal literature, the term "contradiction" has not. Therefore, it is not clear what type of behavior would represent a contradiction that would disqualify a state from persistent objector (PO) status. In practice, this indeterminacy leads to a too wide understanding of the term, undermining the possibility of PO status altogether.

This Article offers a novel understanding of "contradiction": it suggests that while substantive contradictions should negate a state's PO status, not all contradicting behaviors should count as such. As this Article argues, the current understanding of contradiction is flawed because it does not always require a logical correlation between objection and contradiction. This encourages states to radicalize their positions in order to achieve PO status, while making it virtually impossible to successfully achieve such status.

Therefore, this Article suggests guidelines to differentiate valid, objection-maintaining behavior within the POD framework from actual contradictions. The proper understanding of POD contradictions should require logical relations of contradiction between the behavior and the previous objection. The contradiction must include an acknowledgment that the statement reflects the state's position. The assessment of the contradiction must be done in a genuine manner and not invoked merely as a means of enforcing CIL rules on an objecting state.

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I. INTRODUCTION

The persistent objector doctrine (POD) provides that if a state "persistently and consistently objects to a newly emerging norm of customary international law during the period of the 'formation' of that norm . . . the objecting state is exempt from the customary norm in question once it has crystallized and for so long as the objection is maintained."[1] POD, however, does not apply to *jus cogens* norms even if the requirements for POD are met, as no derogations are permitted from peremptory norms.[2] POD is based on freedom of choice and diversity in international law. It enshrines the idea of states' consent to take on international obligations, but consequently compromises universal conformity with CIL norms.[3]

Despite some criticism of POD—mainly that it favors the interests of the Global North[4] and that it lacks practical utility[5]—the persistent objector (PO) rule is "undeniably part of the *language* of modern international law"[6] and is "firmly

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1 JAMES A. GREEN, THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW 1 (2016). For other variations of POD definition, see Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 538 (1993) ("[I]f a state objects to the establishment of a norm while it is becoming law and persistently objects up to the present, it is exempt from that norm."); Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495, 495 (2005) ("[I]f a state persistently objects to the development of a customary international law, it cannot be held to that law when the custom ripens.").

2 *See* GREEN, *supra* note 1, at 191 (describing the notion of "peremptory norms trump the persistent objector rule" as a "majority view"); Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 213 (2010) ("*Jus cogens* norms cannot be overridden, even by treaty, and there is no right to opt out of them by prior persistent objection."); Dino Kritsiotis, *On the Possibilities Of and For Persistent Objection*, 21 DUKE J. COMPAR. & INT'L L. 121, 132–34 (2010) (discussing the inapplicability of POD to *jus cogens* norms).

3 BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 229 (2010):

> Because of the value attached by fundamental ethical principles to the overall freedom of action of states and respect for diversity, if a state so strongly believes that an emerging rule of customary law is not desirable to recognize that it repeatedly objects to it, the value of respecting that state's wishes should often – but not always – be considered to outweigh the community values that would be served by obligating the state to adhere to the rule.

4 *See, e.g.*, B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1, 24 (2018) ("The rule of persistent objector was developed to safeguard the concerns of western capitalist powers after the beginning of the Cold War.").

5 J.H.H. Weiler, *Editorial*, 24 EUR. J. INT'L L.1, 3 (2013) (noting that POD is a "theoretically interesting but practically almost irrelevant doctrine."); Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 429 (2014) ("[T]hough lawyers may value the persistent objector doctrine as a rhetorical resource and for its theoretical role in reconciling CIL formation with state consent, the doctrine is, in fact, of limited practical significance.").

6 GREEN, *supra* note 1, at 4.

established in the orthodox doctrine on the sources of international law."[7] Nevertheless, the application of POD is still somewhat vague. While the topic of how frequently an objection should be made has received some scholarly attention,[8] the question as to *what behavior constitutes a contradiction to an objection*, thus preventing a state from receiving a PO status, has not. Legal authorities have not suggested thus far what conduct exactly will contradict a state's objection.

Imagine the following situation: the state of Arcadia has persistently objected to the rule of CIL prohibiting the use of crossbows in armed conflict. However, after years of establishing its status as a PO, Arcadia's ambassador in Utopia states in an interview that the use of crossbows in armed conflict is indeed prohibited. Does such a statement by the ambassador disqualify Arcadia from maintaining its PO status? Would the answer be different if such a statement were carried out by Arcadia's Minister of Foreign Affairs or by a Supreme Court judgment? Would a refusal by military authorities to use crossbows on the battlefield constitute a contradiction to Arcadia's objection? The proposed research aims to establish what practices and statements can be regarded as contradictions to a persistent objection that thereby disqualify a state from holding a PO status regarding a rule of CIL.

This Article proceeds as follows: Section II describes the development of POD and its early and modern sources. Section III describes the current understanding of POD and its requirements. It analyzes the temporal, persistency, and consistency requirements of POD. The main focus of this Section is that consistency, as a contradiction, is a form of inconsistency. Section IV catalogs the forms of state behavior (both practice and statements) that have been claimed to form a contradiction to the persistent objections of states, thus constituting inconsistency, and consequently disqualifying such states from a PO status. Finally, Section V offers a new understanding of which behaviors constitute contradictions and which should be facilitated within the framework of the POD without impairing PO status.

II. THE PERSISTENT OBJECTOR DOCTRINE

The Section below will provide an overview of the early development of POD and of its modern understanding. While there are notable differences between the early version of the doctrine and the modern version, understanding POD's modern manifestation requires understanding its early theoretical

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7 Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 463 (1985).

8 *See* David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 967 (1986); Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 INT'L & COMPAR. L. Q. 779, 781 (2010) ("A State is also required to actively, unambiguously and consistently maintain such an objection.").

underpinning. Furthermore, a careful reading of POD's history and an understanding of its origin counters some misconceptions of POD as a "new" doctrine lacking roots in international law.[9]

A. Early Sources of POD

When Ian Brownlie coined the term "persistent objector" in his 1966 masterpiece, "Principles of Public International Law," he described POD as somewhat of a given fact in international law but did not support his endorsement of POD with legal authorities.[10] However, the doctrine itself has been a part of international law since long before the 1960s.

The International Law Association (ILA)[11] described Cornelius van Bynkershoek's 1721 work as an example of the acceptance of POD as early as the eighteenth century.[12] Bynkershoek argued that a dissenting state may be exempt from a rule of CIL by expressing its will not to be bound by it:

> Can a nation abolish the immunities of ambassadors, which they are enjoying in accordance with the common law of the nations? . . . [I]t can if it makes a public announcement in regard to them, because these immunities owe such validity as they have not to any law but only to a tacit presumption. One nation does not bind another, and not even a consensus of all nations except one binds that one, isolated though it be, if it is independent and has decreed to use other laws . . . The law of nations is nothing but a presumption based on custom, nor has this presumption any validity in the face of a definitely expressed wish on the part of him who is concerned.[13]

James A. Green, a professor of public international law at the University of Reading who has conducted some of the most prominent research regarding POD in recent years, revealed two additional sources from the eighteenth century that may be used as evidence of early incarnations of POD.[14] The first source is Emer de Vattel's 1758 book, in which he argued that:

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9 *See, e.g.*, Chimni, *supra* note 4, at 6, 23 (describing POD as a new "invention" of "recent origin").

10 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8 (1966). *See also* Bradley & Gulati, *supra* note 2, at 236.

11 ILA is a nonprofit organization founded in 1873. *About Us,* INT'L L. ASS'N, h https://perma.cc/VD5Q-W4LB. Its objectives include promoting "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law." *See* ILA CONSTITUTION, art. 3.1(2016), https://perma.cc/S6EA-JC7Q.

12 COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW, FINAL REPORT OF THE COMMITTEE, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, INTERNATIONAL LAW ASSOCIATION, LONDON CONFERENCE 27 n.68 (2000), https://perma.cc/2F3H-KV8Q.

13 *See* GREEN, *supra* note 1, at 24–25 (citing CORNELIUS VAN BYNKERSHOEK, DE FORO LEGATORUM LIBER SINGULARIS: A MONOGRAPH ON THE JURISDICTION OVER AMBASSADORS IN BOTH CIVIL AND CRIMINAL CASES, 106–07 (G.J. Laing trans., 2d ed. 1744) (1721)).

14 GREEN, *supra* note 1, at 25.

> When a custom or usage is *generally* established . . . between all the civilized nations in the world . . . it becomes obligatory on all the nations in question, who are considered as having giving their consent to it, and are bound to observe it towards each other, *as long as they have not expressly* declared their resolution of not observing it in future.[15]

The second source indicating the existence of an eighteenth-century version of the POD is Georg Friedrich von Martens' contention from 1788:

> As to rights founded on simple custom, each power may discontinue them whenever it makes a timely declaration, either express or tacit, of its intention so to do. Such rights may also cease by giving place to others, established by the mutual will of the nations concerned: but this change made by some powers cannot oblige other powers to change their conduct.[16]

Green concluded that, while the sources above do resemble what we recognize today as POD, they lack POD's modern requirements of persistence, consistency, and at least in the cases of Bynkershoek and Vattel, timeliness.[17] Therefore, "[i]t is ultimately something of a stretch to identify the persistent objector rule per se in the eighteenth-century writings of scholars such as Bynkershoek, Vattel, or Martens; these theorists did not endorse the rule as we know it."[18] However, this author's opinion is that it was expected that a legal doctrine would develop over the years. Therefore, it is reasonable to find that eighteenth-century POD differs somewhat from modern POD.

In the nineteenth century, POD transitioned from being relegated to the theoretical musings of legal scholars to becoming an actual legal practice. In the 1817 case of *Le Louis*, Senior Judge in the High Court of Admiralty Sir William Scott indirectly considered whether international law obliged France to prohibit the slave trade.[19] Scott concluded that while the practice had been abolished in some other states, like Britain, such a rule did not apply to France as it had "rejected any such prohibition."[20]

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15 *See* GREEN, *supra* note 1, at 25 (citing EMER DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS lxv, ¶ 26 (Joseph Chitty ed., 6th ed. 1844) (1758)).

16 *See* GREEN, *supra* note 1, at 25–26 (citing G.F. VON MARTENS, A COMPENDIUM OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE 356 (W. Cobbett trans., 1802) (1788)).

17 GREEN, *supra* note 1, at 25–26.

18 *Id.* at 26.

19 *See* Tara Helfman, *The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade*, 115 YALE L.J. 1122, 1150–51 (2006) (describing Sir William Scott's holding that "no state could claim the right to interrupt foreign navigation," which "dealt a deathblow to Thorpe's efforts to impose a unilateral international ban on the West African slave trade."). *See also* GREEN, *supra* note 1, at 27.

20 *See* GREEN, *supra* note 1, at 25–26 (citing JOHN DODSON, A REPORT OF THE CASE OF THE LOUIS, FOREST, MASTER, 1817, APPEALED FROM THE VICE ADMIRALTY COURT AT SIERRA LEONE, AND DETERMINED IN THE HIGH COURT OF ADMIRALTY 48–52 (London, J. Butterworth & Sons 1817)).

The 1825 decision of the U.S. Supreme Court in *The Antelope*[21] has also been considered by some writers to reflect the notion of POD.[22] *The Antelope* case required the Court to determine whether the seizure of a Spanish slaving vessel by U.S. privateers was lawful.[23] Justice Marshall established that, while slave trading is against the law of nature, states that had not accepted the law of nations prohibition on slave trading did not violate such a law by trading in slaves.[24] Green observed that Justice Marshall focused on the lack of acceptance of the rule prohibiting the slave trade rather than on its rejection and objection, thus making *The Antelope* another imperfect example of POD.[25] Indeed, POD's rationale seems to exist in *The Antelope* even if its construction differs from the modern understanding of POD.

In the Supreme Court's famous 1900 case *The Paquete Habana*, the Court established that CIL applied to the U.S. "where there is no treaty, and no controlling executive or legislative act or judicial decision."[26] Curtis A. Bradley and Mitu Gulati offer that "a possible explanation for this qualifying language in *The Paquete Habana* is that the Court viewed the CIL rule in question as binding on the United States only to the extent that the country had not opted out of it."[27]

Green found another potential early use of POD in the 1903 *Fischbach and Friedricy* Cases reviewed before the Mixed Claims Commission (Germany-Venezuela).[28] The Commission was established primarily to consider German claims originating from foreign debts and damages suffered during the Venezuelan civil wars of 1898 to 1900.[29] In particular, the Commission considered whether international law holds states responsible for seizure by revolutionary

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21 23 U.S. 66 (1825).

22 FRANCISCO FORREST MARTIN, THE CONSTITUTION AS TREATY: THE INTERNATIONAL LEGAL CONSTRUCTIONALIST APPROACH TO THE US CONSTITUTION 76 (2007) ("[T]he U.S. Supreme Court in The Antelope appears to have recognized the Rule [POD]"); Maurice H. Mendelson, THE FORMATION OF CUSTOMARY INTERNATIONAL LAW 232–33 (1998) (offering *The Antelope* case as an example for POD endorsement).

23 *The Antelope*, 23 U.S. at 123. *See also* GREEN, supra note 1, at 28.

24 *See id.* at 120–21:

> That [the slave trade] is contrary to the law of nature will scarely be denied. . . . Throughout Christendom, this harsh rule has been exploded, and war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them.

25 GREEN, *supra* note 1, at 28.

26 The Paquete Habana, 175 U.S. 677, 700 (1900).

27 Bradley & Gulati, *supra* note 2, at 224. It is important to note that Bradley and Gulati admitted that this was not the common understanding of such a quotation, which has usually been understood to imply that "domestic institutions . . . can violate CIL on behalf of the United States." *Id.*

28 Fischbach and Friedericy Cases, (Ger. v. Venez.), 10 RIAA 357 (Mixed Claim Comm. 1903); GREEN, *supra* note 1, at 29.

29 *Fischbach and Friedericy Cases*, 10 RIAA at 359.

forces. Umpire Duffield asserted that "[a]ny nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations."[30] However, Duffield eventually concluded that, in the case at hand, Venezuela could not exempt itself from the CIL rule in question because Venezuela had previously accepted responsibility over the revolutionaries.[31] Therefore, Green argued that "the decision provides, at most, limited support for the persistent objector rule."[32]

The examples provided above suggest that some version of POD, or more accurately, the idea behind POD (that a state may opt out of CIL rules) has existed for some time in public international law. While the definition of POD suggested by the examples is not identical to that which exists in modern international law, these early examples demonstrate the roots of POD, which would later develop into POD as it is recognized today.[33]

B. The *Asylum* and the *Fisheries* Cases

Modern POD manifested only after World War II.[34] Two major cases established the status of POD in modern international law: the *Asylum*[35] and the *Fisheries*[36] cases of the International Court of Justice (ICJ). Whether one considers POD's roots to extend earlier than the *Asylum* and the *Fisheries* cases, or takes these cases to mark the beginning of the POD, it cannot be denied that the ICJ has shaped the modern conception of the POD.

1. The *Asylum* Case

The *Asylum* case concerned the granting of political asylum to Víctor Raúl Haya de la Torre, a Peruvian opposition leader. Peru issued an arrest warrant against Haya de la Torre "in respect of the crime of military rebellion."[37] In January 1949, "Haya de la Torre sought asylum in the Colombian Embassy in Lima."[38] Colombia argued that it was entitled to grant Haya de la Torre asylum as a political offender[39] and that consequently Peru must facilitate the safe departure of Haya

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30 *Id.* at 397.

31 *See id.* at 397–98. *See also* GREEN, *supra* note 1, at 29.

32 *Id.* at 30.

33 *See id.* at 33 ("[W]hile the 'roots' of the persistent objector rule can be traced back well before 1945, there is insufficient evidence to assert that the rule in its modern incarnation had emerged prior to the Second World War.").

34 *Id.*

35 Asylum (Colom. v Peru), Judgment, 1950 I.C.J. 266.

36 Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116.

37 Asylum, 1950 I.C.J. at 272.

38 *Id.* at 273.

39 *Id.* at 273–76.

de la Torre from Peru.[40] Colombia based its argument on international treaties, including the Bolivarian Agreement of 1911 and the Havana Convention on Asylum of 1928, as well as on "regional or local custom peculiar to Latin-American States."[41] Peru opposed this position, contending that Haya de la Torre committed common crimes and thus was not entitled to asylum as a political offender.[42] Furthermore, Peru argued that Colombia did not properly establish the existence of a regional American custom binding the states.[43]

Colombia's submissions were rejected by the ICJ. In its decision, the court referred to the lack of a treaty law basis for such a determination[44] and to CIL.[45] Most importantly for the understanding of POD, the ICJ opined:

> The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.[46]

This quotation suggests that if there were a CIL rule regarding asylum, Peru chose to opt out of it. This statement is commonly considered a milestone regarding the acknowledgment of POD.[47]

2. The *Fisheries* Case

In the *Fisheries* case of 1951, the ICJ was required to determine whether Norway's method for the baseline delimitation of its territorial sea was compatible with its international law obligations.[48] The applicant, the U.K., was aggrieved by the Norwegian delimitation method because "a considerable number of British trawlers were arrested and condemned" by Norwegian fishery patrol vessels.[49] The U.K. argued that Norwegian baselines were in violation of CIL with regard to the customary "ten-mile rule," which provides that the length of baselines drawn

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40 *Id.* at 271.

41 *Id.* at 274–276.

42 Counter-Memorial Submitted by the Government of the Republic of Peru, Asylum (Colom. v. Peru), 1950 I.C.J. Pleadings 154 (Mar. 21).

43 *Id.* at 118.

44 *Asylum*, 1950 I.C.J. at 274–76 (establishing that neither the Bolivarian Agreement of 1911, nor the Havana Convention on asylum, nor the Montevideo Convention on Political Asylum, supported Columbia's argument).

45 *Id.* at 276–77.

46 *Id.* at 277–78.

47 *See* GREEN, *supra* note 1, at 25 ("This unquestionably vague statement is commonly referenced as the first invocation by the ICJ of the persistent objector rule.").

48 *Fisheries*, 1951 I.C.J. at 120–23.

49 *Id.* at 125.

across a bay should not be longer than ten nautical miles.[50] The ICJ determined that the ten-mile rule had not yet crystalized into a binding rule of CIL:

> [A]lthough the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.[51]

Then, the ICJ concluded that even if it had considered the ten-mile rule as CIL, Norway would have been exempt from it: "In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."[52]

It is important to note that a minority of authors have considered such sources insufficient.[53] For example, Patrick Dumberry argues that "[t]he only ICJ decision that ever dealt with the question of persistent objector in the context of 'general' customary law is the *Fisheries Case*."[54] He considers the *Asylum* case to be irrelevant since it deals with a regional custom.[55] The relevant quotation in the *Fisheries* case, he provides, is "a mere *obiter dictum*; the Court had already decided to reject the existence of any customary rule on other grounds."[56] Holning Lau has similarly noted 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."[57]

Despite such remarks, both the *Asylum* and the *Fisheries* cases are considered leading authorities regarding POD validity, as "the majority of writers on persistent objection have regularly cited the *Fisheries* and *Asylum* cases over the last sixty-plus years to evidence the rule."[58]

C. POD's Rationale

Traditionally, POD has been linked with the voluntarist theory of international law. This account defines international law as "a system of equal and

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50 *See id.* at 131 ("[The] United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles."). *See also* GREEN, *supra* note 1, at 36.

51 *Fisheries*, 1951 I.C.J. at 131.

52 *Id.*

53 GREEN, *supra* note 1, at 37 ("a (vocal) minority of scholars have questioned the extent to which these cases provide any genuine support for [POD]").

54 Patrick Dumberry, *The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?*, 23 LEIDEN J. INT'L L. 379, 387 (2010).

55 *Id.*

56 *Id.*

57 Lau, *supra* note 1, at 500.

58 GREEN, *supra* note 1, at 37.

sovereign states whose actions are limited only by rules freely accepted as legally binding."[59] Where CIL is concerned, voluntarism assumes that silence implies consent.[60] Therefore, POD, which allows states to opt out of CIL rules they did not consent to take upon themselves, has been described as "the clearest, most firmly established, expression of voluntarist conception of obligation in the accepted doctrine of sources."[61] Indeed, POD is linked with voluntarism and "constitutes the acid test of custom's voluntarist nature."[62]

However, the theory of voluntarism has since been challenged by the communitarian theory. H.C.M. Charlesworth explains that the communitarian approach provides that international law is binding not due to consent, but rather due to the greater good that it provides to the international community:

> The expansion of the international community to include a great number of states and international organisations, and recognition of the applicability of international law to individuals and groups within states, has allowed the purely voluntarist account of international law to be challenged by one based on communal interests, solidarity and idealism. On this "new" view international law binds because it is necessary for stability and communication in the international community.[63]

While the voluntarist approach has not disappeared from legal thought and still holds "considerable influence and imaginative power,"[64] even the greatest supporters of voluntarism admit that in practice there is at least some shift towards the communitarian approach:

> For the past several years, the degree of generality required of a practice, to enable it to serve as the basis of a customary rule, has been steadily diminished, while, on the contrary, the binding character of such a rule once formed is being conceived of as increasingly general in scope. The result is a

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59 Shelton, *supra* note 2, at 299. For an expression of the voluntarist approach in the *Nicaragua* case, maintaining that "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception," see Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 269 (June 27).

60 *See* John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 HARV. J.L. & PUB. POL'Y 7, 9 (2006) ("[N]ations do not have to assent affirmatively to the creation of a principle of customary international law. Instead, nations are considered to have consented to a principle if they simply failed to object."). *See also* Samantha Besson, *State Consent and Disagreement in International Law-Making*, 29 LEIDEN J. INT'L L. 289, 295 (2016) ("In international law, like in domestic law and politics, consent can be express, as in the signature or ratification of a treaty, but also tacit, as in the absence of objection to a reservation or to a custom in the making.").

61 Stein, *supra* note 7, at 470.

62 Prosper Weil, *Toward Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 433–434.

63 H. C. M. Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTL. Y.B. INT'L L. 1, 2–3 (1991).

64 *Id.* at 3.

> danger of imposing more and more customary rules on more and more states, even against their clearly expressed will.[65]

However, even if a shift towards communitarianism is present, that does not mean that states have relinquished the principle of consent. Such contestation of approaches might affect POD's legitimacy. While POD's rationale is very clear through the lens of voluntarism, it makes less sense through the communitarian lens. Indeed, POD offers a rationale that is contrasted with that of communitarianism—it allows the individual state to put its interests above those of the global community.

Green offers that instead of trying to match the rationale of POD to either approach, the advantages of POD should be considered on their own merits.[66] Green describes the advantages and qualities of POD to provide the following account of POD:[67] (1) it "spreads the costs of situations of minority opposition to emerging norms between the objector and the wider community";[68] (2) it allows objecting states a sense of security from changes in CIL they oppose;[69] (3) it reduces "the risks of violation, disengagement, or escalation" by powerful states objecting to a rule, as it gives them a legal outlet to object rather than to violate such a rule;[70] (4) it gives objecting states time to adjust to the new emerging rule of CIL;[71] (5) it is a negotiation tool that can facilitate or slow customary international law development;[72] (6) it provides predictability to CIL development as it shines light on the potential emergence of a new rule;[73] (7) it improves the "scrutiny and quality" of CIL norms;[74] and (8) it can be used as a face-saving mechanism to maintain a sense of autonomy.[75]

Not all of the advantages Green offers are equally convincing, but they all have some merit. This author finds that the third and fifth advantages (that POD reduces risks of CIL violation and supports CIL development) are the most convincing.

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65 Weil, *supra* note 62.

66 GREEN, *supra* note 1, at 272 ("[T]he persistent objector rule must be assessed, not in relation to sweeping theoretical claims, but in relation to its functional benefits, both to the objector and to the international legal system.").

67 *Id.* at 258–72.

68 *Id.* at 258.

69 *Id.* at 261.

70 *Id.* at 261–64.

71 *Id.* at 264.

72 *Id.* at 265–68.

73 *Id.* at 268–69.

74 *Id.* at 269–71.

75 *Id.* at 271–72.

On the third advantage (POD reduces risks of CIL violation), powerful states "may well simply violate a new norm to which they are strongly opposed once it has emerged."[76] Powerful states bluntly violating CIL is not just damaging with regard to the rule in question but also with regard to the entire project of CIL. POD provides a legal mechanism to deal with an objection to a rule without upsetting the entire apple cart. However, Dumberry offers that the very existence of POD undermines CIL because "[i]f dissention is allowed, it simply means that the rule is not custom. There is no possible middle ground."[77] Such a counterargument seems to avoid the difference between POD and the specially affected states doctrine (SASD), which provides that "[i]f several 'States whose interests are specially affected' object to the formation of a custom, no custom can emerge."[78] If a dissention under POD would prevent a rule from crystalizing into a custom, then SASD would be completely redundant. This is so because:

> While a "normal" persistent objector would exclude the custom from applying to the objector alone, the absence of rule-affirming practice by specially-affected states (including those specially-affected states that may object to practice of other states affirming the rule) would prevent the putative rule from crystalizing into a custom at all, so that the putative rule would bind neither the objectors nor other states.[79]

Via the fifth advantage (POD improving CIL development), POD promotes the development of CIL by allowing states that endorse a rule of CIL to move on "without having to wait for the slowest vessel."[80] Indeed, POD allows an objecting state to put less effort into the prevention of the overall emergence of a norm if that state knows it can be exempt from its application.[81]

One could argue that even if one endorses the communitarian approach, the requirements of POD are exceedingly difficult to meet, and thus it does not undermine communitarianism in an unbearable manner. It might actually facilitate communitarianism as states would be more willing to see the global good as obliging if they have a dissenting option in some circumstances.

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76 *Id.* at 261.

77 Dumberry, *supra* note 8, at 800.

78 Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 82 INT'L L. STUD. SER. US NAVAL WAR COL. 99, 109 (2006).

79 Shelly Aviv Yeini, *The Specially-Affecting States Doctrine*, 112 AM. J. INT'L L. 244, 244–45 (2018).

80 GREEN, *supra* note 1, at 265 (citing COMM. ON FORMATION OF CUSTOMARY (GENERAL) INT'L L., INT'L L. ASS'N, FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 28 (2000), https://perma.cc/ZS8N-Z8MF).

81 *See* GREEN, *supra* note 1, at 265. This assumption is not overwhelming, as due to the onerous requirements of POD there is still a great incentive to lobby against the emergence of an undesired emerging norm; however, the possibility of POD may somewhat lessen such interest.

III. POD REQUIREMENTS AND THE PROBLEM OF CONSISTENCY

For a state to receive PO status, its objection must satisfy three requirements: a temporal requirement,[82] a persistency requirement,[83] and a consistency requirement.[84] The temporal requirement and the persistency requirement are quite clear, and there is relative agreement within academia regarding their application.[85] The consistency requirement, on the other hand, is at the crux of the literature gap when it comes to POD. The requirement for consistency is the most important aspect of POD for the purposes of this Article. The concern here with breaching an objection may also be described as dealing with inconsistency. As will be described, the consistency requirement has been analyzed by legal authorities in a binary manner—a state has either been consistent or inconsistent—without considering which statements or deeds, by which authorities, count for such purpose.

A. The Temporal Requirement

The temporal requirement of POD provides that a "[s]tate which objects to an *evolving* rule of general customary international law can be exempted from its obligations."[86] To receive PO status, the objection must be made "during the process of the rule's emergence," rather than after such a rule has been recognized as a rule of CIL.[87] Once a rule has crystallized into CIL, "objection will no longer avail a state wishing to exempt itself from the law in question."[88] Such late objections are called "subsequent objections," and subsequent objectors are not exempted from the applicability of the rule to which they object.[89] Michael Akehurst, a leading British international law scholar, offers an alternative approach: the temporal requirement includes the early stages of a rule (after its crystallization as CIL) so that POD applies if a state "opposes the rule in the early days of the rule's existence (or formation) and maintains its opposition consistently thereafter."[90] While the general opinion is that subsequent objections

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82 *See* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 2 (1985).

83 *See* GREEN, *supra* note 1, at 91.

84 *See* Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U. C. DAVIS J. INT'L L. & POL'Y 147, 151 (1996).

85 *See* Section III.A. and III.B.

86 *See* Charney, *supra* note 82, at 2.

87 Stein, *supra* note 7, at 458.

88 GREEN, *supra* note 1, at 137.

89 *Id.*

90 Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 24 (1975).

do not allow for an exemption, it should be noted that such objections may nevertheless affect the development of a rule because "custom is necessarily altered by states adopting an attitude apart and indeed, at least initially, by states violating the existing law."[91] Additionally, determining the exact time of crystallization of CIL rules may prove to be difficult in some cases, and therefore it is problematic to determine whether an objection has taken place during crystallization or at the early stages of the rule's existence.

The roots of the temporal requirement may be attributed (by means of expansive interpretation) to the ICJ in the *Fisheries* case, as the court established that Norway had "always oppose[d]" the ten-mile rule.[92] The temporal requirement was further discussed by the ICJ in the *North Sea Continental Shelf Cases*, as Judge ad hoc Sørensen stated in his dissenting opinion that the Federal Republic of Germany did not object to the principle of equidistance "[a]t a decisive stage of the formative process," and thus, could not be considered a PO.[93] In the 2002 *Domingues* decision, the Inter-American Commission on Human Rights provided that "[o]nce established, 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*."[94] The temporal requirement of POD was also recognized in the *Restatement (Third) of the Foreign Relations Law of the United States*, which established that "a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures."[95]

The temporal requirement proves to be especially problematic for new countries. This is because new countries are bound by the existing rules of CIL, despite being denied a chance to object to these rules.[96]

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91 GREEN, *supra* note 1, at 138.

92 *Fisheries*, 1951 I.C.J. at 131. *See also* GREEN, *supra* note 1, at 138–39.

93 *See* North Sea Continental Shelf (Ger. v. Den.; Ger./Neth.), 1969 I.C.J. 242, 248 (dissenting opinion of Judge Sørensen). Though dissenting, Judge Sørensen's opinion still bears some weight. *See* SARMIENTO LAMUS, THE PROLIFERATION OF DISSENTING OPINIONS IN INTERNATIONAL LAW: A COMPARATIVE ANALYSIS OF THE EXERCISE OF THE RIGHT TO DISSENT AT THE ICJ AND IACTHR, 4 (2020), https://perma.cc/NU4J-LXZT ("[T]he dissenting opinion [ ] constitutes an important tool for the development of the law.").

94 Domingues v. United States, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Serv.L./V/II.1117, doc. 70 rev. 2 ¶ 48 (2002) (emphasis added). *See also* GREEN, *supra* note 1, at 138–39.

95 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (AM. L. INST. 1987) [hereinafter Restatement].

96 *See* Allen Buchanan, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 79, 92 (Samantha Besson & John Tasioulas eds., 2010) (pointing out that "CIL norms apply to states that did not exist at the time of their emergence"); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 199 (2008) (asserting that "[u]nder current doctrine, new states are bound by existing rules of CIL.").

Even for existing states, the temporal requirement might pose some difficulties, as it could be "difficult to fix the precise date at which any customary law norm is established. Thus, the ability of a state to object in a timely manner is limited."[97] Indeed, some debate might take place as to whether a rule has crystalized into CIL at the time of an objection. Akehurst's proposition, which includes the early stages of an existing CIL rule, seems to offer a solution to such a problem.[98] Controversy is more likely to take place in the earlier stages, rather than long after a rule has been recognized as CIL.

B. The Persistency Requirement

As can be expected given the name of POD, persistency is a key requirement for the establishment of a PO. "Obviously, the word 'persistence' indicates the need for a degree of repetition to a state's objection"—a key element of the *persistent* objector rule.[99]The vast majority of writers consider the requirement of persistency—that is, of repeating a state's objection—to be a central part of POD.[100] However, Jonathan Charney, a preeminent expert on international law, observed that there is "a difference of opinion as to whether the objection must be persistent."[101] Charney's implication that the requirement of repetition is under debate has been referred to as "something of an exaggeration,"[102] since "there is no longer any debate in doctrine (if, indeed, there ever was) as to whether objection must be persistent."[103] The strongest support for a single objection may be derived by negation from the text of the U.S. Restatement (Third), which does not mention the requirement for repetition.[104] However, "this element of the rule [repetition] has not been explicitly *rejected*: it simply has not been noted."[105]

Given the relative agreement on the existence of a persistence requirement, the real question is just how persistent a PO should be, or more precisely, how often an objection should be repeated. While it is widely accepted that an

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97 Charney, *supra* note 1, at 538.

98 *See* Akehurst, *supra* note 90, at 24.

99 GREEN, *supra* note 1, at 91.

100 *See e.g.,* Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 875 (2006) ("The 'persistent objector' exception exempts from a CIL norm nations who, in the period before the custom 'matures' into law, repeatedly and vocally made their opposition known."); Charney, *supra* note 1, at 539 ("The objection must be persistent and must run to the present."); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 166 (2005) ("[T]he persistent objector doctrine puts such a significant burden on the objector not only to demonstrate its lack of consent, but to do so repeatedly and during the emergence of the rule.").

101 Charney, *supra* note 82, at 3 n.8.

102 GREEN, *supra* note 1, at 91.

103 *Id.* at 92.

104 *See* Restatement, *supra* note 95.

105 GREEN, *supra* note 1, at 91.

objection should be persistent, the actual substance of "persistency" remains very unclear.[106]

According to David Colson, then an assistant legal adviser for the U.S. State Department, the answer to this question varies in accordance with the situation at hand. He explains that "not every legal action needs an equal and opposite reaction to maintain one's place in the legal cosmos."[107] Colson further argues that "the more isolated a State becomes in its legal perspective, the more active it must be in restating and making clear its position."[108] Colson's theory provides that in traditional PO situations, wherein a state finds itself quite isolated in its position, "it seems apparent that the objector needs to be especially vigilant in protecting its legal position."[109] However, on special occasions, when there is an interest of the international community in solving a specific dispute peacefully, "[r]estraint in legal statement and actions, intended to encourage negotiation, should not be penalized by international law."[110] In cases in which the number of states supporting and objecting to a rule is more balanced, the objection may be less aggressive.[111] Finally, in a situation in which a state aims to discourage a change in a stable legal situation, the state "may find it desirable to state its position emphatically through deeds. In doing so, it not only protects its legal position in regard to the State making the new claim, but it serves notice to other States that it will strongly resist any change in customary legal relationships."[112]

Brian Lepard, a professor of law at Nebraska College of Law, similarly asserted that the level of persistence varies according to context, but without dividing those levels of persistence into categories:

> [I]t is not possible to assert that objection . . . must manifest a certain level of intensity in every case. Depending on the beliefs of the generality of states an objection may not even need to be 'persistent,' so that the very term 'persistent objector exception' itself might be a misnomer.[113]

Green criticized Lepard, maintaining that he "goes too far in claiming that the persistence requirement might, on occasion, be dispensed with entirely."[114]

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106 *See id.* at 98 ("Academic commentary and state practice both point towards the need for objection to be persistent . . . but . . . it is entirely unclear how many separate instances of objection are enough to qualify: exactly how persistent is 'persistent'?").

107 Colson, *supra* note 8, at 969.

108 *Id.*

109 *Id.* at 967. *See also* GREEN, *supra* note 1, at 97.

110 *Id.* at 968.

111 *See id.* at 967–68.

112 *Id.* at 969.

113 Lepard, *supra* note 3, at 238.

114 GREEN, *supra* note 1, at 104.

Therefore, while it seems that the requirement for persistency of objection may change according to the context, it is not exactly clear just how much repetition will suffice. As the creation of CIL rules does not provide a clear threshold for participants, it is fitting that the amount of persistency in POD is also manifestly unclear:

> It is well known that there is no set 'amount' or 'quality' of state practice necessary for a new norm to form . . . It should therefore come as no surprise that, for good or ill, this is also true of the persistence criterion in relation to the persistent objector exception to the binding force of customary international law. Indeed, it cannot be otherwise: an arbitrary threshold of any set number of objections would be just as objectionable (as it were) as is the context-specific approach.[115]

C. The Consistency Requirement

1. Consistency vs. Persistency

While POD's name refers to the criterion of persistency, some writers have pointed out that consistency is actually the doctrine's leading requirement, and have even replaced the notion of persistency with that of consistency.[116] The requirement for consistency provides that "[a] state may not object some of the time, apply the rule at other times, and still be a persistent objector."[117] While the notion of persistency indicates repetition, the notion of consistency implies uniformity: a demand that a state would not contradict its own objection. Thus, a state could potentially be persistent in its objection, but not consistent, and would thus be disqualified as a PO.[118] A common example of such situation is the U.S.'s objection to the CIL rule prohibiting capital punishment for juvenile offenders.[119] The U.S. claimed PO status regarding this prohibition before the Inter-American Commission on Human Rights (IACHR)[120] in the *Domingues* case.[121] The U.S.

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115 *Id.* at 104–05.

116 *See* Lau, *supra* note 1, at 498 ("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"); Guzman, *supra* note 100, at 142–43 ("[T]he state must make its objections widely known, must do so before the practice solidifies into a rule of CIL, and must make the objection on a consistent basis.").

117 Loschin, *supra* note 84, at 147, 151.

118 *See* GREEN, *supra* note 1, at 109.

119 *See id.* at 109–11; Dumberry, *supra* note 8, at 789.

120 The IACHR is an organ of the Organization of American States (OAS), whose objective is to promote and protect human rights in the American hemisphere. *See What Is the IACHR*, OAS, https://perma.cc/Y33Z-HEXQ.

121 *See Domingues*, Case 12.285 ¶ 14. *See also* Roach & Pinkerton v. United States, Case 9647, Inter-Am. Comm'n H.R., Report No. 3/87, OEA/Serv.L./V/II.71, doc. 7 rev. ¶ 38(h), (i) (1987) (The U.S. is arguing for PO status in the context of juvenile executions.).

claimed PO status regarding the prohibition on executions of juvenile offenders altogether, and more specifically, to setting the threshold for the prohibition at eighteen years of age rather than sixteen: "[e]ven if the execution of sixteen and seventeen-years old offenders were prohibited by customary international law . . . the United States has consistently and persistently objected to the application of such a principle to the United States."[122]

The U.S. relied on its domestic law to support its position, as "the laws of many states within the United States provide for the prosecution of juveniles as adults for the most serious crimes,"[123] as well as its assertions in the international arena: "the United States has persistently asserted its right to execute juvenile offenders in multiple international fora."[124]

The IACHR, while using the term "persistently," substantially argued that U.S. objections had not been consistent enough:

> [T]he United States . . . rather than persistently objecting to the standard, has in several significant respects recognized the propriety of this norm by, for example, prescribing the age of 18 as the federal standard for the application of capital punishment and by ratifying the Fourth Geneva Convention without reservation to this standard.[125]

Eventually, the IACHR established that POD did not apply in this case, since the juvenile execution prohibition was a *jus cogens* norm.[126] However, it is evident that, despite the confusion of terminology, the IACHR "viewed the objections of the United States as insufficiently consistent, in spite of these objections being repeated a significant number of times."[127] Green's analysis indicates that *Domingues* is, therefore, a good example of two POD-related issues: the importance of consistency and the confusion between persistency and consistency in POD.[128]

2. The Level of Consistency

There are two different approaches that relate to the required level of consistency for POD. The first approach, which is called "absolute

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122 Response of the United States Government, dated 18 October 2001, 9–10, *in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 303, 310 (Sally J. Cummins & David P. Stewart eds., 2001). *See also Domingues*, Case 12.285 ¶ 101.

123 CUMMINS & STEWART, *supra* note 122, at 311.

124 *Id.* (such international submissions include U.S. submissions to the United Nations General Assembly, the United Nations Commission on Human Rights, responses to U.N. Special Rapporteurs, the Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of American States, and the IACHR).

125 *Domingues*, Case 12.285 ¶ 85.

126 *Id.*

127 GREEN, *supra* note 1, at 111.

128 *See id.*

consistency,"[129] is a "one strike out" sort of approach, requiring that "a state wishing to avail itself of the persistent objector rule must not, *at any point* during the new law's formation, affirm or accept that new norm."[130] The second approach, which is called "general consistency," provides that if a state has maintained its objection in most instances, "one isolated occasion (or perhaps a small number of occasions) of affirmation will not necessarily be enough to undermine its overall persistent objector status."[131]

While international tribunals have not discussed POD in such resolutions, legal scholarship has leaned strongly toward absolute consistency.[132]

However, legal scholarship has thus far considered the issue of inconsistency in a rather general manner, without cataloging the types of contradictions that form inconsistency. As this Article will demonstrate, this leads to unreasonable results, whereby minor contradictions are equal to substantive ones, and to inconsistency in the analysis of consistency itself. Before offering guidelines to differentiate the types of contradictions that would constitute inconsistency, the different contradictions identified in the literature must be catalogued.

IV. TYPES OF CONTRADICTIONS CONSTITUTING INCONSISTENCY

This Section catalogues the contradictions to objections as identified in legal literature. Surely, in some of the cases, the very initial identification of a successful PO claim may be challenged. For example, some of the objections are arguably *jus cogens* norms. However, my intention here is not to analyze the initial determination that PO status has been achieved, but rather to identify the moment such PO status has been described as lost. Therefore, the assumption of PO status will be taken at face value for purposes of this analysis. Such examples will be later analyzed and incorporated in the main thesis of the article.

A. Voting in International Fora

A common genre of contradiction to objections is voting in international fora in favor of decisions that contradict the state's previous POD objection.

For example, China's claim to PO status regarding the rule eliminating the war nexus requirement for crimes against humanity has been contested.[133] China has "clearly voiced its objection to the customary law status of crimes against

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129 *Id.* at 116–17.

130 *Id.* at 117.

131 *Id.*

132 *See id.* at 107–34.

133 *See* Dan Zhu, *China, Crimes Against Humanity and the International Criminal Court*, 16 J. INT'L CRIM. JUST. 1021, 1033–35 (2018).

humanity without a linkage to armed conflict."[134] However, its voting record in the U.N. General Assembly (UNGA), as well as in the U.N. Security Council (UNSC), is inconsistent with this prior objection: China voted in favor of G.A. Resolution A/33/PV.93,[135] adopted in 1979, which states that "apartheid is a crime against the conscience and dignity of mankind,"[136] and thus establishes the existence of such a crime against humanity outside of armed conflict. Further, China voted in favor of UNSC resolutions establishing the hybrid tribunals in East Timor,[137] Sierra Leone,[138] and Cambodia,[139] whose instruments "omit[] a connection between crimes against humanity and armed conflict."[140] Therefore, it has been argued that China should be disqualified from having PO status to the CIL rule that a crime against humanity can exist in the absence of a war.[141]

Another example is the U.S.'s and Israel's objections to the application of international human rights law (IHRL) during an armed conflict. Both the U.S. and Israel claim to consider IHRL and international humanitarian law (IHL) as mutually exclusive bodies of law that do not overlap.[142] However, both states have voted in favor of resolutions to the conflicts in the Democratic Republic of Congo and Sudan, which assume the overlapping applicability of both bodies of law.[143]

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134 *Id.* at 133–34.

135 *See Voting Summary on A/33/PV.93*, UN DIGIT. LIBR., https://perma.cc/56JG-3KQZ.

136 G.A. Res. 33/183, at 27 (Jan. 24, 1979).

137 S.C. Res. 1272 (Oct. 25, 1999).

138 S.C. Res. 1315 (Aug. 14, 2000).

139 S.C. Res. 745 (Feb. 28, 1992).

140 Zhu, *supra* note 133, at 1034.

141 *See id.*

142 *See* Second Periodic Rep. of the Gov't of Israel, at ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (2001) (Israel argues that the "the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human right"); Permanent United States to the U.N., Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the Secretariat of the Commission on Human Rights, U.N. Doc. E/CN.4/2003/G/73 (Apr. 7 2003). For examples in literature, see Francoise J. Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT'L REV. RED CROSS 549, 550–51 (2008); Nigel S. Rodley, *Detention as a Response to Terrorism*, *in* COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 457, 461 (Ana Salinas de Frías et al. eds., 2012); Ilia Maria Siatitsa & Maia Titberidze, *Human Rights in Armed Conflict: Ten Years of Affirmative State Practice within United Nations Resolutions*, 3 J. INT'L HUMAN. LEGAL STUD. 233, 242–43 (2012).

143 *See* G.A. Res. 60/170, § 4(a) (Dec. 16, 2005) (condemning "the ongoing violations of human rights and international humanitarian law" in the Democratic Republic of the Congo); G.A. Res. A/RES/57/230 (18 December 2002) § 3(b) (urging the parties "to respect and protect human rights and fundamental freedoms, to respect fully international humanitarian law, in particular the need to ensure the protection of civilians and civilian premises, thereby facilitating the voluntary return, repatriation and reintegration of refugees and internally displaced persons to their homes, and to

The U.S. and Israel also voted in favor of resolutions condemning Iraq for the violation of IHL and IHRL norms, implying the applicability of IHRL during armed conflict.[144] Siatitsa & Titberidze have subsequently concluded that the voting records of the U.S. and Israel disqualify both states from PO status regarding this rule of CIL.[145]

Inconsistency in objection as a consequence of voting in international fora was also attributed to the U.K. regarding its past objection to the right to self-determination in the U.N. Convention on the Law of the Sea (UNCLOS) dispute from 2010 between Mauritius and the U.K.[146] Mauritius initiated proceedings against the U.K. under the UNCLOS dispute settlement provisions, requesting that the establishment of a marine protected area up to the outer limit of the exclusive economic zone of the Chagos Archipelago be declared in violation of UNCLOS.[147] Mauritius further argued that the detachment of the Chagos Archipelago in 1965, while Mauritius was still a colony of the U.K., and the retention thereof in 1968, violated its customary right to self-determination.[148] The U.K. argued to the contrary, stating that at the time of declaration it retained PO status regarding the right of self-determination, and thus was not bound by it.[149]

Mauritius, which did not agree that the U.K. was exempt from its international obligations as a result of its PO status, pointed out that the U.K. had contradicted its own objections, thus engaging in inconsistency because of its vote in favor of 1961 G.A. Resolution 1723 (XVI) affirming the right of

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ensure that those responsible for violations of human rights and international humanitarian law are brought to justice").

144 *See* G.A. Res. 57/232, § 5(a) (Dec. 18, 2002); G.A. Res. 56/174, § 4(a) (Dec. 19, 2001); G.A. Res. 55/115 § 4(a) (Dec. 4, 2000).

145 *See also* Siatitsa & Titberidze, *supra* note 142, at 243–44, 261:

> [T]he US had voted in favour of resolutions explicitly affirming the application of HRL and condemning the violations thereof in times of armed conflicts on numerous occasions. Even if we were to accept the doctrine of a persistent objector, who is exempt from the development of a rule of international law, the two States (Israel and the US), that oppose the application of HRL would not be able to rely thereon, as their own practice does not reveal consistency as is required under the doctrine of the persistent objector.

146 Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), 31 R.1.A.A. 359, ¶¶ 209, 211 (Perm. Ct. Arb. 2015), https://perma.cc/ED7F-CFHF.

147 *Id.* ¶¶ 5–6.

148 *Id.* ¶¶ 61, 393. *See also* GREEN, *supra* note 1, at 112.

149 *See* Arbitration Under Annex VII of the 1982 United Nations Convention on the Law of the Sea (Mauritius v. U.K.), Counter-Memorial of the U.K., ¶ 7.17 (Perm. Ct. Arb. July 15, 2013), https://perma.cc/G3GU-6JQK ("The United Kingdom had consistently, throughout the 1950s and 1960s, objected to references to a 'right' of self-determination in United Nations instruments, including in the drafts of the International Covenants of 1966. It did not, in 1965, accept that the principle of self-determination had hardened into a legal right.").

self-determination.[150] While the tribunal did not decide on the matter of the U.K.'s PO status in terms of the right of self-determination, the discussion between the U.K. and Mauritius during the course of proceedings—with both arguing that voting records in international fora proved or rebutted consistency—demonstrates the centrality of voting records in establishing this requirement of POs.

B. Entering into International Agreements

Sometimes, when the objector state signs a treaty in which it agrees to act in a manner that contradicts its former objection, this has been considered a contradiction to such an objection. This constitutes an inconsistency, and thus disqualifies the state from PO status.

Turkey has traditionally claimed PO status regarding the CIL rule prohibiting the use, production, and stockpiling of antipersonnel landmines (AL).[151] According to Green, Turkey's agreement with Bulgaria obliging the states "not to use under any circumstances antipersonnel mines and to destroy or remove all stocked or emplaced antipersonnel mines from the area of application as defined in the Agreement"[152] contradicts Turkey's prior objection.[153] While Green considered such an agreement proof of inconsistency, this is not necessarily the case. The fact that Turkey is opposed to the rule of CIL prohibiting the use of ALs does not mean Turkey should actively endorse ALs. However, it may be suggested that to avoid claims of inconsistency, Turkey merely had to add a reservation to the treaty providing that it was maintaining its objection. Indeed, treaty reservation is a valid manner of establishing and maintaining PO status.[154]

C. Judicial Decisions

Domestic judicial decisions that are in line with a state's objection strengthen that state's PO claim.[155] Colson provided that the domestic adjudication arena is a good platform to present arguments supporting the state's position:

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150 *See* Arbitration Under Annex VII of the 1982 United Nations Convention on the Law of the Sea (Mauritius v. U.K.), Reply of the Republic of Mauritius, 143–48 (Perm. Ct. Arb. Nov. 18, 2013), https://perma.cc/N9S6-TTLZ.

151 *See* GREEN, *supra* note 1, at 117–19.

152 Joint Statement, H.E. Ismail Cem, Minister of Foreign Affairs of the Republic of Turkey, & H.E. Ms. Nadezhda Mihhailova, Minister of Foreign Affairs of the Republic of Bulgaria (Mar. 22, 1999), https://perma.cc/T95W-SQ4Z.

153 GREEN, *supra* note 1, at 119.

154 Dumberry, *supra* note 8, at 781 ("Objections can thus be made in various circumstances, including . . . reservations made when signing/ratifying treaties, etc.").

155 Loschin, *supra* note 113, at 165 ("Is there domestic legislation or court decisions that are consistent with the objection? If so, the objector's position is strengthened.").

> Pronouncements upon international law by domestic courts, or by the government before such courts, are certainly candidates for citation in the international courtroom. In this setting, legal rationale, distinctions, and the fine points of the law are more likely to be honed to a sharpness not found in extra-judicial situations. Therefore, these are particularly useful situations for the practitioner to put the national legal position, on the record; and, thus, is another excellent opportunity for the persistent objector.[156]

This observation refers to the positive effect of domestic case law. However, the situation is not as clear where domestic case law contradicts a state's objection. As will be described below, judicial decisions that contradict a state's former objection to a rule of CIL have sometimes been described as constituting inconsistency in a state's objection. As can be inferred by the examples below, judicial decisions constitute inconsistency when they (1) are provided by the highest judicial body and (2) have a practical effect on a state's actions. This is not a binding rule, but more of a deduction.

For example, Curtis Bradley, a professor of law at the University of Chicago, described U.S. practice regarding juvenile executions, demonstrating that throughout American history, juvenile executions were carried out regularly, constituting almost 2% of the total number of executions.[157] However, Bradley observed that "[n]o juvenile executions were carried out . . . between 1965 and 1984, in part because of the Supreme Court's 1972 decision in *Furman v. Georgia* . . . which effectively stopped any use of the death penalty in the United States for a number of years."[158]Green referred to Bradley's analysis, arguing that "[o]ne might, for example, point to the domestic case law of the United States as evidence of inconsistent practice in relation to the application of the juvenile death penalty."[159]

In addition, researchers Lapidot, Shany, and Rosenzweig suggested that Israel considers itself a PO regarding the Additional Protocols (AP) of the Geneva Conventions.[160] However, because the Supreme Court of Israel has relied on these Protocols, Israel may have lost its PO status in this context.[161] Israel has mostly

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156 Colson, *supra* note 8, at 961.

157 Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 493 (2002).

158 *Id.* at 493 (footnote omitted).

159 GREEN, *supra* note 1, at 110.

160 *See* RUTH LAPIDOT ET AL., ISRAEL AND THE TWO PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS v–vi (2011).

161 *See, e.g.*, Pub. Comm. Against Torture in Israel v. Gov't of Israel, HCJ 769/02, 465–66 (2016) (Isr.):

> A prohibition of this kind derives also from the duties of the occupying power in an occupied territory vis-à-vis the occupied population, which constitutes a protected population under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, and also according to the two additional protocols to the convention that were signed in 1977. All these laws reflect norms of customary international law and they bind Israel.

objected to issues concerning national liberation conflicts.[162] Its objections resonate in the context of Article 1(4) of Additional Protocol 1 (AP1), which provides that AP1 applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."[163] Israeli representative Hess, in the voting session on AP1, reiterated the following objections: (1) "reference to the motives and cause for which belligerents were fighting" was "in clear contradiction to the spirit and accepted norms of international humanitarian law and to the preamble to [AP1]";[164] (2) the clause is impractical as "a party would have to admit that it was either racist, alien or colonial—definitions which no State would ever admit to";[165] (3) article 1, § 4 of AP1 requires the amendment of other AP1 provisions to suit non-states;[166] (4) the article represents an attempt "to introduce political resolutions that were properly the responsibility of political organizations such as the United Nations into rules of international humanitarian law."[167]

However, Lapidot, Shany, and Rosenzweig did not demonstrate that the Israeli Supreme Court's rulings contradicted this objection; rather, they argued that the targeted killing case made the objection *irrelevant* by classifying the Israeli-Palestinian conflict as an international armed conflict (IAC) rather than a non-international armed conflict.[168]

Another PO issue that may be raised with reference to Israel is its claimed PO status concerning the overlapping application of IHL and IHRL.[169] While arguments regarding Israel's disqualification from PO status have arisen in relation to its voting record in international fora, one may also point out that the Israeli Supreme Court requires IHRL norms to be applied under IHL settings. Such inferences can be drawn from cases of targeted killing, as the court established in one such case that "[w]here this law has a lacuna, it can be filled by means of

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162 *See* LAPIDOT ET AL., *supra* note 160, at iv.

163 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1(4) (June 8, 1977).

164 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva*, 36th plen. mtg., 41 ¶ 60, CDDH/SR.36 (May 23, 1977), https://perma.cc/LQ43-85TY.

165 *Id.* at 41 ¶ 61.

166 *Id.* at 41 ¶ 62–63.

167 *Id.* at 41 ¶ 64.

168 *See* LAPIDOT ET AL., *supra* note 160, at vi:

> Moreover, the interpretation of the High Court of Justice . . . according to which the Israeli-Palestinian conflict is in some respects international in character—renders it unnecessary to determine whether the present conflict falls under article 1(4) of the First Additional Protocol (the article with respect to applicability to a war for national liberation) and greatly restricted, if it did not completely obviate, the practical implications of the Israeli objection to this article.

169 *See supra* Section IV.A. *See also supra* note 142.

international human rights law."[170] A similar inference can be drawn from *Yesh Din v. Chief Prosecutor*, a recent case dealing with the Gaza border demonstrations, in which the court accepted the existence of a law enforcement paradigm under the rules of armed conflict.[171] This, too, may be offered as evidence for Israel's inconsistency in arguing that IHRL and IHL are two mutually exclusive bodies of law that do not overlap.

D. Passive Contradictions

Other forms of contradictions to objections are passive contradictions. Passive contradictions can be divided into two major groups—omissions and silence. The term, "omission," in the POD contradiction context usually refers to a lack of practical behavior. For example, the fictional state of Acadia described above argues that crossbows are not forbidden yet refrains from using crossbows in combat. This is not actually a contradiction, but as will demonstrated, is often mistakenly portrayed as such. Silence indicates a failure to express dissent against the objected rule of CIL—for example, if a state objects to a rule forbidding the use of crossbows, yet does not submit its reservations while signing a treaty, that may affect the status of crossbows in international law. To clarify the difference, the avoidance of contradiction by omission would demand that a state act practically in accordance with its objection; to circumvent contradiction by silence, a state would be required to voice its objection when necessary (corresponding with the persistency requirement of POD).

1. Contradiction by Omission

There are various examples of contradictions by omission in the legal literature, as will be described in this Subsection. In such examples, legal scholars have expected states to actually and practically act upon their objections; thus, they have argued that that states are required to not only object to the prohibition in the objected rule of CIL, but to also act upon the prohibited behavior in order to maintain PO status. Refraining from being bound by a particular rule prohibiting a particular behavior does not equate with being required to act upon that prohibited behavior.

A striking example presented by David Glazier, Zora Colakovic, Alexandra Gonzalez and Zacharias Tripodes, is that the U.S.'s PO claim with regard to the prohibition of the use of expanding bullets (dumdum bullets) has weakened because of its refusal to procure such bullets (even when its own expert study

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170 *See Pub. Comm. Against Torture in Israel*, *supra* note 161, ¶ 18.

171 Yesh Din v. IDF Chief of Staff, HCJ 3003/18, 3250/18, ¶ 40 (2018) (Isr.). *See generally* Shelly Aviv Yeini, *The Law Enforcement Paradigm under the Laws of Armed Conflict: Conceptualizing Yesh Din v. IDF Chief of Staff*, 10 HARV. NAT'L SEC. J. 461 (2019).

team advised their procurement).[172] In other words, the authors expected the U.S. to actively purchase (and supposedly use) expanding bullets to maintain its PO status.

Another example refers to Hong Kong's PO claim regarding the CIL norm of non-refoulement that forbids states from sending back refugees to countries in which they would be in danger of persecution on various grounds.[173] In the case of *C v. Director of Immigration*, brought before the Hong Kong Court of First Instance, Justice Hartmann provided that "by consistent and long-standing objection, Hong Kong has refused to accede to the rule and the rule, being contrary to Hong Kong's laws, has not been incorporated into its domestic law."[174] Oliver Jones, an Australian barrister, criticized Justice Hartmann's conclusion, arguing that "[t]he obvious difficulty with Hartmann J's finding was the evidence that Hong Kong had consistently refrained from repatriating people to face persecution."[175] Green echoed Jones's argument, noting that Hong Kong's objection was inconsistent, as "Hong Kong has regularly refrained from repatriating people to face prosecution in circumstances that would entail the application of the rule."[176] Green provided that such a practice "can be seen as rather undermining the Director of Immigration's claim that Hong Kong was exempt."[177] Both Jones and Green expected Hong Kong to actively send refugees to their countries of origin to maintain PO status. However, one must recall that Hong Kong does not argue that it must send refugees back to their countries, but merely that it is *not obliged* to refrain from it. More simply put, Hong Kong considers that it has the discretion to determine under which circumstances it can return refugees; it does not desire to *always* return them. Once again, the approach that considers omission as a form of contradiction pushes countries to radicalize their behavior to maintain their objections.

A third example is that of China's objection to the rule eliminating the war nexus requirement for crimes against humanity.[178] Dan Zhu referred to China not using its veto power in the UNSC to block its referral to the International Criminal Court (ICC) in situations that are not clearly classified as armed conflict:

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172 David Glazier, et. al., *Failing Our Troops: A Critical Assessment of the Department of Defense Law of War Manual*, 42 YALE J. INT'L L. 216, 252–54 (2017).

173 *See generally* Seline Trevisanut*, International Law and Practice: The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea*, 27 LEIDEN J. INT'L L. 661 (2014).

174 C v. Director of Immigration, [2008] 2 HKC 165, ¶ 194(iii) (H.K.).

175 Oliver Jones, *Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective*, 58 INT'L & COMPAR. L.Q. 443, 451 (2009).

176 GREEN, *supra* note 1, at 114.

177 *Id.*

178 For discussion regarding China's objection, see *supra* Section IV.A.

> When the Security Council acted quickly outside clear armed conflict, China did not use its veto power to block the Council's referral of situation in Libya to the ICC, which issued arrest warrants for crimes against humanity without mentioning "armed conflict." To sum up, even though China raised its objection towards eliminating the war nexus requirement for crimes against humanity at Rome, it cannot be considered to be a persistent objector.[179]

While China's use of veto power would have strengthened its objection, it is problematic to expect China to use its veto power solely to maintain its objection, as there are wider considerations for the use of the veto power, which should not be so easily deployed.[180] It is absurd to encourage permanent five (P5) states to use their veto power, as this is contrary to international interests, especially in cases concerning mass atrocities and violations of human rights.[181]

2. Contradiction by Silence

Contradiction by silence is a form of inconsistency, but perhaps more so a lack of persistency. It is evident when the objecting state has neglected to voice an objection when such an objection would have been warranted. While silence may constitute an objection or a contradiction thereof, "[g]enerally, 'louder' forms of objection that explain the objector's position are more likely to qualify as persistent objection than passive and ambiguous statements or objection in the form of silence."[182]

For example, it has been rightfully argued that to maintain PO status with regard to the overlapping statuses of IHL and IHRL, the U.S. and Israel should have to make reservations or declarations to expressly exclude the application of IHRL in armed conflict:

> One would expect to find not only reservations at ratification but also objections to general comments which directly or indirectly deal with the issue. That is particularly true of the United States, which criticized general

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179 Zhu, *supra* note 133, at 1034. Note that this is one of few examples Zhu provided for China's failure to maintain its objection.

180 It has been argued that sometimes P5 members have a responsibility not to use their veto power. *See* Ariela Blatter & Paul D. Williams, *The Responsibility Not to Veto*, 3 GLOB. RESP. PROTECT 301, 304–05 (2011).

181 *See id.* It could be argued that in this example, unlike the other examples, the use of a UNSC veto takes place in the international arena, in which a country should be aware of the way its behavior shapes its CIL positions. Therefore, one could expect that if China had chosen not to use its veto power, it should at least have verbally clarified that it nevertheless objected to the relevant principle. However, a claim that China failed to explain that it maintained its objection, despite its lack of deployment of veto power, would be a claim of contradiction by silence and not of contradiction by omission.

182 Molly C. Quinn, *Life without Parole for Juvenile Offenders: A Violation of Customary International Law,* 52 ST. LOUIS UNIV. L.J. 283, 309 (2007).

> comment No. 24 but has submitted no observations on general comments Nos. 29 and 31.[183]

The absence of a declaration of objection would not usually manifest a contradiction disqualifying a state from its PO status[184]; rather, it might impair the state's persistency, which is a context-specific requirement rather than an absolute requirement.[185] Clearly, the two categories are not completely distinct, and a lack of persistency will lead to inconsistency. However, "[c]onsistency does not require that an objection, however lodged, be senselessly repeated" [186]; therefore, not all cases of silence would disqualify a state from its PO status. The answer here is that the result would depend on the context.[187]

E. Domestic Legislation

Statements of a national legal position that can either strengthen or contradict a state's objection fall within the domestic lawmaking setting, as "[n]ational legislation or proclamations from officials of the responsible branches of government often contain clear-cut statements of national position on international issues."[188]

An example of domestic law strengthening a state's claim for PO status may be found in Botswana's law book, in which several statutes allow corporal punishment in some circumstances, though it is prohibited under CIL.[189]

However, it is more difficult to find examples of domestic legislation undermining a PO status. This may be because domestic lawmaking is a complicated process in which a state's position is carefully tailored; thus, mistakes or lapses are not likely. However, when a domestic act expressly contradicts a former objection, this is considered a form of contradiction sufficient to disqualify PO status.

The case of Mauritania and its objection to the rule forbidding female genital mutilation (FGM) is a good example of such a situation. Green argued that Mauritania has been considered a PO to the emerging norm forbidding FGM, a

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183 Francoise Hampson & Ibrahim Salama, *Working Paper on the Relationship between Human Rights Law and International Humanitarian Law, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2005/14, ¶ 70 (June 21, 2005).

184 LEPARD, *supra* note 3, at 237–239.

185 Colson, *supra* note 8, at 967–69 ("The actions required of a persistent objector depend on the category of the situation.").

186 J. Brock McClane, *How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object*, 13 ILSA J. INT'L L. 1, 2 n.2 (1989).

187 *See supra* Section III.B for the context of persistency.

188 Colson, *supra* note 8, at 959.

189 Bugalo Maripe, *The Recognition and Enforcement of Children's Rights in Domestic Law: An Assessment of the Child Protection Laws in Botswana in Light of Prevailing International Trends*, 9 INT'L J. CHILD. RTS. 339, 350 (2001).

claim largely supported by the fact that Mauritania had refused to pass a law criminalizing FGM.[190] However, in 2005, Mauritania reversed its position by adopting Ordonnance No.2005-015 criminalizing FGM.[191] Green stated that "[t]his act of domestic law-making has been considered enough to undermine any possible persistent objector status [by Mauritania]."[192]

It may be suggested that while some types of contradictions may reflect a lapse or an error (or even contradicting voices within state branches) in maintaining a state's PO status, domestic legislation could actually be considered a planned change in position—that is, a way by which the state deliberately accepts the rule to which it once objected.

F. Statements by Officials in Different Ranks

Statements made by state officials may serve as tools to articulate a state's objection to a particular international norm. Such statements include, but are not limited to, "statements made in formal debates of international organizations or other similar fora."[193] Indeed, official statements deliberately aimed at solidifying a state's objection in international fora during debates regarding such norms are a classic form of strengthening a state's objection and are quite common. For example, New Zealand's PO position regarding Indigenous rights to land Indigenous peoples have traditionally owned, occupied, or used has extensively articulated by official statements in international fora.[194] In the same way, statements carried out in such fora contradicting a state's objection will create inconsistency, thus disqualifying that state from its PO status. Returning to the New Zealand example, official statements supporting Indigenous rights to land have disqualified New Zealand from its PO status.[195] The U.S. position regarding the mutually exclusive applicability of IHRL and IHL has also been undermined by official statements at international fora: Mary McLeod, then Acting Legal Adviser for the U.S. Department of State, stated in the U.N. Committee Against Torture that the IHRL right not to be tortured continues to apply during armed conflict.[196]

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190 GREEN, *supra* note 1 at 87–88.

191 Ordonnance No. 2005-015 of Dec. 5, 2005 (Maur.).

192 GREEN, *supra* note 1 at 88.

193 *Id.*

194 *See, e.g.*, Kiri Toki, *Maori Rights and Customary International Law*, 18 AUCKLAND U. L. REV. 250, 258–59 (2012).

195 *Id.* at 260.

196 Mary E. McLeod, Acting Legal Adviser, U.S. Dep't of State, Opening Statement at the U.N. Committee Against Torture (Nov. 12, 2014) ("[A] time of war does not suspend operation of the Convention Against Torture, which continues to apply even when a State is engaged in armed

The question as to whether greater weight should be given to a "situation falling within the domain of international relations, or to some actual incident or episode of claim-making (as opposed to assertions *in abstracto*)" has been raised in the field of CIL state practice and dismissed as too narrow.[197] However, as POD requires states to object by statement and aims for claim-making behavior, such statements are important in the POD context. This does not negate the fact that statements made in the domestic arena may carry significant weight as well. Nonetheless, it becomes more difficult to find instances in which state officials have provided contradictions in the domestic arena without a link to international (or legal) deliberations. It is difficult to tell whether such a paucity of examples in the literature can be attributed to the lack of importance of such statements to the POD or to the lack of accessibility of such statements. Naturally, domestic statements given to domestic media in a state's own language are not as accessible to legal scholars as those provided in English in international fora.

V. CONSIDERATIONS FOR THE IDENTIFICATION OF CONTRADICTIONS

While it is widely accepted that a state's objection should be consistent to constitute a valid PO claim, it is not clear which instances constitute contradictions forming inconsistency or indicate legitimate behavior that would not damage a PO claim. On the one hand, some behaviors definitely constitute a contradiction. For example, voting on an international platform in favor of a rule that had been previously objected to would be clearly contradictory. However, other behaviors that have been considered contradictions should not necessarily be deemed so. One such example is claiming that a certain piece of weaponry is not prohibited by CIL but not purchasing it.

This is not to undermine the idea that POD requires absolute consistency. However, it is necessary to separate an actual "lapse" from behavior that might not reflect rejection, but nevertheless does not contradict it.

This Section offers considerations to take into account when assessing whether the behavior of an objecting state constitutes a contradiction to its prior objection. Such considerations aid in separating contradictions forming inconsistency from behavior not impairing consistency.

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conflict. The obligations to prevent torture and cruel, inhuman, and degrading treatment and punishment in the Convention remain applicable in times of armed conflict.").

197 Michael Wood (Special Rapporteur), Int'l Law Comm'n., *Second Report on Identification of Customary International Law*, ¶ 37, U.N. Doc. A/CN.4/672 (May 22, 2014).

A. The Logical Connection between Objection and Contradiction

To accurately assess whether a state has contradicted its objection, we must ask, *what is the state objecting to*? This may sound like a trivial inquiry; however, some of the cases in which it has been claimed that states have lost PO status seem to exhibit a flawed analysis of the object of the objection. The next step is to properly identify the substance of the argued contradiction and to assess whether the state's objection and the claimed contradiction are actually contradictory.

For example, in the case of the U.S. objection to the rule prohibiting dumdum bullets, Glazier et al. argue that, because the U.S. did not purchase such bullets (even when advised to do so), it contradicted its objection.[198] However, does the U.S.'s objection to the rule prohibiting the use of dumdum bullets actually suggest that it considers that it *must* use dumdum bullets? More reasonably, the U.S. assumes it has the *discretion* to determine whether to use such bullets—even if their use will seldom be necessary. Therefore, a refusal to acquire such bullets does not actually contradict the objection, since the objection assumes that the U.S. *may* use such ammunition and not that it *must* do so.

Both Jones and Green consider that Hong Kong may be disqualified from PO status since it had refrained from sending refugees back to places of persecution.[199] However, Hong Kong never argued that its refugees must return to places where they may be persecuted; rather, it held that it had the discretion to choose whether to return them.[200] In fact, the core of the objection by Hong Kong is that it intended to protect the "unfettered discretion to the Director" with regard to the non-refoulement of refugees.[201] Therefore, the fact that the discretion of the director has so far not entailed returning refugees to countries where they risk persecution does not actually contradict the objection made by Hong Kong.

In the case of Turkey, it has been claimed that Turkey's behavior falls short of PO status with regard to the prohibition of ALs because of its agreement with

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198 Glazier et al., *supra* note 172, at 252–53.

199 Jones, *supra* note 175, at 451("The obvious difficulty with Hartmann J's finding was the evidence that Hong Kong had consistently refrained from repatriating people to face persecution, including within the meaning of the Convention and Protocol"); GREEN, *supra* note 1, at 114: ("The objections…had notably been inconsistent, as had Hong Kong's own practice. For example, Hong Kong has regularly refrained from repatriating people to face prosecution in circumstances that would entail the application of the rule.").

200 *Director of Immigration*, 2 HKC ¶ 38 ("Further, even if there were such an international law of non-refoulement of refugees, it is contradicted by domestic legislation, as the Ordinance has given the Director the discretion whether to permit a person to land or remain in Hong Kong.").

201 *Id.* at ¶ 96.

Bulgaria to maintain their shared border in the absence of ALs.[202] Turkey's position has been that it objects to the CIL rule forbidding ALs since its security concerns might require their use.[203] Surely, this does not mean that Turkey *must* use ALs. Moreover, if Turkey feels that its relations with Bulgaria are stable, and that this stability allows it to remove all ALs from the shared border, it still may be that on other borders, with less stable relations, security reasons may nevertheless justify the use of ALs. Turkey should be able to maintain the position that it is not bound by international law to remove ALs, but rather has chosen to remove them, or refrain from using them, voluntarily.

The need to differentiate between the total rejection of a principle and discretion regarding its application has been addressed in the context of the U.S. PO position regarding the imprisonment of juveniles for life without parole. Quinn examined whether the recent decrease in such punishment is indicative of the U.S.'s objection:

> In 2000, the last year for which data is available, 91 juvenile offenders were sentenced to life without parole, a number that is less than sixty percent of the number sentenced in 1996. Of course, the decreased usage of life without parole sentences does not necessarily indicate that the United States has changed its position in terms of its right to sentence youth offenders to such sentences.[204]

Quinn rightfully identified the U.S.'s argument that it had discretion whether to sentence juveniles to life without parole, and therefore, observed that a decrease in such sentences would not logically contradict the objection.[205] Discretion may lead to greater or fewer sentences of life without parole, and thus should not be considered a contradiction.

Scholars often misidentify contradictions by assuming that states object to an issue—as in reject it all together—and do not exhibit discretion regarding its applicability. However, occasionally states object to an issue entirely, rather than assuming discretion. For example, the U.S. and Israel do not argue that IHRL and IHL sometimes overlap, but on the contrary, that they are always mutually exclusive.[206] The arguments that "X never applies" and that "there is discretion to decide whether X applies" are not the same. It is important to understand the

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202 GREEN, *supra* note 1, at 119 (citing Richard Price, *Emerging Customary Norms and Anti-Personnel Landmines*, *in* THE POLITICS OF INTERNATIONAL LAW 106, 124 (Christian Reus-Smit ed. 2004)).

203 INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 1999: TOWARD A MINE-FREE WORLD 818 (explaining that Turkey cannot sign the Mine Ban Treaty due to border security concerns).

204 Quinn, *supra* note 182183, at 313 (internal citations omitted).

205 *Id.*

206 *See* sources cited *supra* note 142. This is not to say the U.S. and Israel are indeed POs with regards to the overlapping application of IHRL and IHL, but rather to demonstrate their argument of total rejection.

substance of the objection, and only then to analyze whether the behavior in question logically contradicts it.

B. The Global Interest in Not Radicalizing States' Stands

POD is often analyzed using a context-specific approach; for example, persistency is "based on a range of factors . . . including extra-legal ones."[207] Thus, it is not unreasonable that consistency may be assessed via a contextual approach as well. The interest of the international community is a relevant factor in the shaping of POD. For example, in statements made during negotiations, states are not likely to be required to aggressively maintain their objections "due to the international interest in seeing such disputes resolved peaceably."[208] The same logic that applies to peace talks should also apply to other instances affecting the global community, such as the use of veto power in the UNSC, disarmament, and other similar instances. This does not mean that contradictions should be disregarded and overlooked on account of the global interest, but rather that an overly strict understanding of which behaviors constitute a contradiction harms the global interest, and thus, a more nuanced approach is preferred.

It is important to consider that POD contradictions should not be understood in a manner that would require states to radicalize their positions to maintain their objections. Instead, the expectation should be for states to object in an honest manner, reflecting their stance regarding an emerging rule of CIL, rather than to adopt a radically contradictive position. This is most clearly apparent in cases of contradiction by omission. The argument that the U.S. should be disqualified from PO status regarding the prohibition of dumdum bullets because of its refusal to obtain such bullets is an apt example.[209] Expecting the U.S. to actively purchase dumdum bullets to maintain its objection radicalizes the U.S.'s position, which assumes discretion regarding the acquisition of such ammunition, and it further contradicts the global community's interest as it ironically encourages the U.S. to purchase these bullets.

Similarly, expecting China to actively use its veto power for the sole purpose of maintaining its objection is clearly contradictory to the international interest.[210] As the veto power should be used carefully, the state's own objection to a rule of CIL is not a powerful enough reason to veto a UNSC decision of a much wider scope, especially in cases where lives are endangered and the deployment of a veto

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207 GREEN, *supra* note 1, at 91. *See also* Lepard, *supra* note 3, at 238; Colson, *supra* note 8, at 967-69.

208 Colson, *supra* note 8, at 968.

209 *See* Glazier et al., *supra* note 172, at 253 (arguing that U.S. not purchasing dumdum bullets when advised to do so disqualifies it from PO status regarding the CIL rule prohibiting the use of expanding bullets).

210 *See* Zhu, *supra* note 133, at 1034 (illustrating an instance when China used its veto power for this purpose but not discussing the contradictory nature here discussed).

would prevent relief. Adopting an unrealistic standard whereby P5 states must use their veto power to maintain an objection is by no means desirable.

States should not be encouraged to use various types of harmful weapons. The U.S.'s preference not to use dumdum bullets is a positive development. That China does not allow its narrow interests to interrupt an important UNSC decision is positive as well. A reading of POD as requiring states to actively purchase weapons and requiring P5 states to veto important decisions is strictly against the interests of the international community. However, this does not mean that contradictions should not be recognized as such just because they do not align with the global interest. However, the question of what qualifies as a contradiction should be answered in a manner that will not encourage states to radicalize their positions simply to maintain PO status.

C. Does the Objection Reflect the State's Position?

Another important aspect of identifying inconsistency is whether the arguable contradiction reflects the position of the state. Even behavior that indeed logically contradicts a state's conduct may not actually reflect the state's stance.

Over the years, philosophers have developed different theories regarding the voice of the state, and whether the state should speak in one or various voices. When exploring the position whereby the state speaks in one voice, one may first refer to Hobbes, as "Hobbes was the first major philosopher to organise a theory of government around the person of the state."[211] According to Hobbes, the state can be defined as "One Person."[212] While naturally, a state comprises many people, it is "the Unity of the Representer, not the Unity of the Represented, that maketh the Person One."[213] Quentin Skinner explains that Hobbes's "One Person"—the sovereign—may be "a natural person, as in the case of monarchy, or an assembly of natural persons, as in the case of aristocracy or democracy."[214] However, the sovereign is always "the absolute Representative of all the subjects."[215]

In such a Hobbesian state, identifying who has contradicted an objection should be simple, as the state is one and speaks with one voice. However, this theory does not seem to capture the way liberal democracies actually work, and therefore, is only partially helpful in unraveling contradictions reflecting the positions of states. A modern, well-grounded, separation-of-powers jurisprudence

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211 Quentin Skinner, *Hobbes and the Purely Artificial Person of the State*, 7 J. POL. PHIL. 1, 2 (1999).

212 THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME, AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL 121 (Richard Tuck ed. 1996).

213 *Id.* at 114.

214 Skinner, *supra* note 211, at 20.

215 HOBBES, *supra* note 212, at 156.

is widely characterized by normative pluralism, and the thick political context consists of "institutional contestation inside and around the three branches."[216] In a democracy, "some measure of contestation over norms and policy is not only desirable, but probably necessary."[217] While states have often aimed to prevent a plurality of voices from creating internal contradictions,[218] in reality, a plurality of statements and actions, sometimes reflecting different normative values and beliefs, may often be found within a single system.[219] However, not all statements and actions are created equal, as some may carry greater weight and significance than others.

For example, it is clear that if a low-ranking government officer of the state of Arcadia states that he believes that Arcadia is obligated under the CIL rule prohibiting the use of crossbows, despite previous objections, such a statement does not reflect the position of the state and thus will not form a contradiction disqualifying Arcadia from PO status. However, should the prime minister of Arcadia convey the same statement in a U.N. speech, all would surely agree that the statement contradicted Arcadia's former objection and thus disqualified it from PO status. While the examples above presented extreme differences in rank, modern states have a wide spectrum of state officials—ambassadors, ministers, legal advisers, military personnel, and other state officials—who could make statements on different platforms contradicting the state's prior objection. However, in these intermediate cases, unlike statements by a prime minister, it is less clear whether these statements represent the true position of the state.

Clearly, the rank of the person delivering the statement, or the capacity of the institution carrying out the decision, has weight in the determination of whether the statement or decision reflects the state's position. This is not to say that a low-ranking official will never contradict a state's objection; rather, contradictory behaviors by high-ranking officials, who, by definition, have the capacity to represent state policy, will always constitute a contradiction. For low-ranking officials or institutions, such contradictory behaviors may nevertheless reflect a state's position, especially if the statements or decisions have

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216 Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 352 (2016).

217 *Id.* at 426 n.371.

218 *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 217 (1962) (discussing states' concerns regarding "[t]he potentiality of embarrassment from multifarious pronouncements by various departments on one question").

219 *See* Adam Shinar, *With How Many Voices Does the State Speak - On Granting Status to Dissenting Agencies in Legal Proceedings*, 38 TEL AVIV U. L. REV. 361, 363 (2016) (describing how the parliament, government offices, and courts often send contradicting messages regarding a single rule in question).

been delivered in an arena designated to reflect the state's position,[220] if such a decision practically affects the issue at hand,[221] or if the field of the contradicted objection falls within the professional capacity of the official delivering the statement.[222] For example, a lower court judgment will not likely reflect a state's position by itself; but if such judgment has had actual influence on the state's behavior concerning the issue at hand, it will matter for the POD assessment. In addition, statements delivered at arenas of international relations, such as the U.N. or an international tribunal, will be understood to reflect a state's position.[223]

D. POD Should be a Realistic Possibility

If POD has a role to play in international law, which is the stance of most authorities, it should be realistic to successfully argue for PO status. POD is characterized by rigorous theoretical engagement alongside very little utility in practice.[224] In fact, while states have attempted to argue for PO status, it is difficult to do so successfully "because the criteria for the rule's operation are so onerous."[225] It has been argued that states manage to benefit from POD, even if it is not successfully invoked, as a "face-saving device . . . [to] present [themselves] as sovereign and autonomous."[226] However, reducing POD to such usage misses its true purpose as an opt-out mechanism allowing exemption from an objected-to CIL norm.

Ted Stein, a law professor at the University of Washington, predicted that POD will find more expression in modern international law;[227] however, nearly four decades after Stein's predictions, no such advancement has occurred.[228] It

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220 *See* GREEN, *supra* note 1, at 88. (listing "official statements (including, but not limited to, statements made in formal debates of international organizations or other similar fora)" as one of the "instances of 'objection' for the purposes of the persistent objector rule").

221 *See* Bradley, *supra* note 157, at 493 (attributing importance to the practical effects of judicial decisions in the assessment of POD).

222 For example, a statement made by an official in the Department of Agriculture is not very likely to reflect the state's position regarding issues concerning IHL, even if relating thereto. However, in the Department of Defense, statements relating to an IHL objection delivered by an official in the National Security Council are more likely to reflect state's position. This does not mean that contradicting statements would always be carried out by the relevant office but rather that a statement that is outside the capacity of the official delivering the statement is less likely to reflect state's position.

223 *See, e.g.*, Toki, *supra* note 193, at 258–59 (discussing New Zealand's PO position regarding Indigenous rights to land previously owned which has been extensively articulated by official statements in international fora).

224 *See supra* note 5.

225 GREEN, *supra* note 1 at 15.

226 *Id.* at 271–72.

227 *See* Stein, *supra* note 7, at 463.

228 *See supra* note 5.

seems that the approach to POD, specifically from the perspective of legal writers, is very much directed at finding lapses. Writers who wish to oblige states in CIL norms claim POD contradiction too easily, setting an impossible standard for objection. This phenomenon can be attributed to the fact that the legal community has not properly identified what POD contradictions mean and, more importantly, what behaviors are permitted within the POD framework that would not disqualify a state from PO status.

Therefore, the final step in the interpretation of the term "contradiction" in the context of POD inconsistency is keeping in mind that an overly narrow interpretation that renders POD practically unavailable to states is undesirable. Indeed, POD should not be easily argued; it is not an easy outlet from the application of CIL.

However, while it should not be simple to achieve PO status, it should not be impossible. The factors suggested above—(1) maintaining a logical connection between objection and contradiction, (2) not expecting states to radicalize their stands just for the sake of maintaining a PO status, and (3) ensuring that the contradiction in question was delivered by an authority that actually reflects the position of the state—are all important for reinforcing POD as a realistic option for states. To make POD relevant, scholars should approach POD with integrity and should not use it as tool for achieving a desired conclusion. The temptation to declare a rule of CIL as obliging all states is admittedly great; however, the difference between *lex lata* and *lex ferenda* should not be artificially erased by a manipulation of POD. POD is unique in the sense that it has been widely developed by legal scholars;[229] therefore, legal scholars have a great responsibility to assess its application fairly.

VI. CONCLUSION

POD is recognized by the vast majority of legal authorities as an inseparable part of modern international law,[230] embedded in the "orthodox doctrine of the sources of international law."[231] Despite the centrality of POD in international theory, it is rarely invoked, and even more rarely successfully invoked, because of the nearly impossible criteria it requires.[232] As legal sources have not yet determined what behavior constitutes a contradiction to an objection, thus preventing a state from receiving PO status, it is common to find false identifications of PO contradictions, as there is no accepted standard for the identification of PO contradictions.

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229 Critics of POD went so far as to argue that it is an academic fiction. *See* GREEN, *supra* note 1, at 21.

230 *See* GREEN, *supra* note 1, at 4.

231 Stein, *supra* note 7, at 463.

232 *See* GREEN, *supra* note 1, at 15.

For POD to come into expression and to be more than a dead letter in the international law canon, the term "contradiction" must be rethought. While legal scholarship has engaged with the positive requirements for POD, such as persistency and consistency, the Achilles heel of POD is actually the point at which a state lapses out of PO status—the moment that it contradicts its objection. In the absence of any clear definition of what behavior constitutes a contradiction (which consequently disqualifies the state from PO status), it seems that contradictions are defined too broadly, making it almost unrealistic to successfully invoke POD.

Therefore, the following considerations should be taken into account when assessing whether a state has contradicted its objection to an emerging rule of CIL:

First, the behavior in question must logically contradict the objection to constitute a contradiction. The substance of the objection must be understood—specifically, it must be determined whether the state argues that the rule in question *never* applies or that it has discretion to decide *whether* it applies. Then, it must be assessed whether the objection is indeed in contradiction with the behavior in question.

Second, it is necessary to consider that an understanding of POD that radicalizes a state's position is against international interests. POD should be understood to require states to honestly reflect their objections. An overly easy identification of contradictions might push states to radicalize their stances to maintain a PO status. A reading of POD as requiring states to purchase weapons or to veto important decisions is against the interest of the international community. Therefore, and especially in the case of contradictions by omission, such omissions should not be identified as contradictions.

Third, one needs to consider whether the behavior in question reflects the position of the state. In modern democracies, wherein the state is represented through a plurality of voices, it is necessary to separate statements that represent the state's stance from those that do not.

Fourth, the identification of contradictions should be performed carefully and with integrity. Contradictions should not be identified carelessly, simply to achieve the desired conclusion of obliging the relevant state in a rule of CIL. While the temptation to declare a rule of CIL as obliging all states is significant, POD should not be manipulated for such purposes.

PO status should not be easily maintained – but rather, PO status should be *realistically possible to maintain*. POD has a role to play in international law. It reduces risks of CIL violation, supports CIL development and enhances CIL's legitimacy. For POD to be able to fulfil its purpose it needs to be revived, and the term "contradiction" needs to be rethought and reconstructed. If such transformation

would take place, then Stein's prediction the POD will find more expression in modern international law[233] may still be proven correct.

233 *See* Stein, *supra* note 7, at 463.