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Statute of the International Law Commission), this paragraph of the preamble puts the interpreter on notice that the Convention as a whole was not on its adoption, in the minds of those who negotiated and drafted it, to be sharply categorized as being wholly one of codification, simply restating in written form what the customary law is, nor wholly one of progressive development constitutive of rules to be binding upon States which give their consent to be bound by it, whatever be the future evolution and development of the law and of the Convention. Quite the contrary. In order to establish whether a Convention rule exists as a rule of general international law binding States regardless of whether the rule is included in the Convention, following the hypothesis of Articles 34 and 40 of the Vienna Convention on the Law of Treaties (which would normally be a codified rule of customary law), a given provision must be most carefully examined and tested in accordance with the established techniques of international interpretation (including the techniques of the intertemporal law as applied to public international law).15 This is particularly important when the interpreter is confronted with the type of situation which faced the International Court in the North Sea Continental Shelf cases16 or the Arbitral Court in the English Channel Continental Shelf case.17 In this connection, the following passage from the report of the International Law Commission in 1946 retains its relevance:

In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established by the Statute [of the Commission] between these two activities [codification and progressive development] can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice," but also several of the provisions adopted by the Commission, based on a "recognized principle of international law," have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Com-

The importance to be attached to the techniques of the intertemporal law is great. The origins of some of the provisions of the Convention go back to the 1908 Convention referred to in the Hague Codification Conference of 1930, and others, as the 1948 Commentary of the International Law Commission indicates, even earlier. On the relationship of the texts of 1930 with the draft articles on the law of the sea of the International Law Commission of 1954, see Articles concerning the Law of the Sea, Reference Guide prepared by the Secretariat, GAOR, eleventh session, annexes, addendum item 53 (A/ C.6, 378). On the intertemporal law, see the resolution on the intertemporal problem in international law adopted by the Institute of International Law, Institu de Droit International, Session de Wiesbaden, 56 Annual Meeting 356 (Wiesbaden, 1971).

15See Note 13 above.
Preamble

Statute of the International Law Commission), this paragraph of the preamble puts the interpreter on notice that the Convention as a whole was not on its adoption, in the minds of those who negotiated and drafted it, to be sharply categorized as being wholly one of codification, simply resting in written form what the customary law is, nor wholly one of progressive development constitutive of rules to be binding upon States which give their consent to be bound by it, whatever be the future evolution and development of the law and of the Convention. Quite the contrary. In order to establish whether a Convention rule exists as a rule of general international law binding States regardless of whether the rule is included in the Convention. Following the hypotheses of articles 34 and 40 of the Vienna Convention on the Law of Treaties (which would normally be a codified rule of customary law), a given provision must be most carefully examined and tested in accordance with the established techniques of international interpretation (including the techniques of the intertemporal law as applied to public international law). This is particularly important when the interpreter is confronted with the type of situation which faced the International Court in the North Sea Continental Shelf case. In this connection, the following passage from the report of the International Law Commission in 1956 retains its relevance:

In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain as in any rule, the distinction established by the statute of the Commission between these two activities (codification and progressive development) can hardly be maintained. Not only must there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice," but also several of the provisions adopted by the Commission, based on a "recognized principle of international law," have been framed in such a way as to place them in the "progressive development" category. Although it is hard to specify which articles fell into one and which into the other category, the Com-

In this connection, it may be noted that article 398, subparagraph (b), enables States to exclude disputes relating to military activities from the dispute settlement provisions.

For indications leading speakers of the "Third World" concerning the new order of the seas, see the statements of the President of Venezuela, Sr. Carlos Andrés Pérez, and the President of Mexico, Sr. Luis Echeverría Álvarez, at the 43rd and 45th sessions, respectively, of the Conference in Canada, UNCLOS III, Off. Rec. I. Those speeches were delivered before the expression "new international economic order" had acquired wide currency.

The importance to be accorded to the techniques of the international law is great. The origin of some of the provisions of the Convention go back to the 1954 Convention, some to the Hague Codification Conferences of 1950, and others, as the 1956 Commentary of the International Law Commission indicates, even earlier. On the relationship of the text of 1950 with the draft articles on the law of the sea of the International Law Commission of 1956, see Articles concerning the Law of the Sea: Reference Guide prepared by the Secretary-General, GA/49, 49th session, annexes, agenda temp. 53 (at C/44/L.79). On the international law, see the publication on the intertemporal problem in international law adopted by the Institute of International Law, Institut de Droit International, Session de Winterthur, 56 Annuaire 576 (Basle, 1977).

Note 13 above.

well-used expression. During the 98th session (para. 4) the representative of Switzerland (which had proposed the introduction of the corresponding paragraph in the preamble to the Vienna Convention on the Law of Treaties in 1969) stressed that the objective of the reference to customary international law should not be to neutralize the new international law but to establish a link between it and existing law—"in other words to ensure the most effective application of the provisions of the future Convention by establishing a set of rules without any lacuna. Accordingly, the Swiss delegation considered that a reference to the principles of international law was indispensable. The draft preamble by Fiji (L.3) suggested a new turn of phrase, namely: "Affirming that the other generally acceptable rules of international law not incompatible with the present Convention, continue to govern matters not expressly regulated by the provisions of the present Convention." In Preamble I the President suggested a slightly abbreviated text: "Affirming that the rules of international law not incompatible with the provisions of the present Convention shall continue to govern matters not expressly regulated by the present Convention." Neither of them was generally acceptable and in Preamble I Rev. 1 this was revised to read: "Affirming that the rules of international law not incompatible with the provisions of the present Convention shall continue to govern matters not expressly regulated by the present Convention." Many regarded this as stating the obvious and after further consultations the present formulation was adopted, using the expression "rules and principles of general international law." Suggestions were still expressed, and these doubts were not alleviated by the President's comment that the paragraph was formulated for purposes of clarity with the inclusion of the word "principles" after the reference to the rules of international law as found support in Article 38 of the Statute of the International Court of Justice (A/CONF.62/11/Add.2, paras. 9)."

(f) To be noticed also is the dropping from the preamble of any reference to the Declaration of Principles of International Law concerning...