Issues of customary international law

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A. Introduction

1 Various issues of customary law arise in the interpretation and application of the Convention. The present chapter aims at bringing the relevant aspects together.[1] As such, the chapter complements the commentaries on various Convention provisions. In particular, it provides the starting point for the section "Customary Basis" in the commentary of each Article.

B. Formation and Identification of Customary Law

1. What Constitutes State Practice?

a) Notion of State Practice

2 State practice is the raw material of customary law. The constituent elements of State practice are, therefore, of considerable relevance in establishing a customary rule. There is some disagreement as to whether State practice

[1] This section is based on Villiger, Manual *passim*.

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should consist merely of concrete actions, or whether it may also include abstract verbal (*i.e.,* written or oral) statements of State representatives, or their votes, *e.g.*, at diplomatic conferences or in the Sixth Committee of the UN General Assembly. In particular, there is a certain apprehension at the notion that one body or conference could "make" law.[2]

3

This study proceeds from a broader concept of State practice,[3] which includes in particular the statements of State representatives. This view is reflected in the Court's case-law.[4] A majority of writers regularly refer to

[2] See Judge READ's dissenting opinion in the *Fisheries (UK/Norway) Case*, ICJ Reports 1951 191 ("[c]ustomary law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims... Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time... The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship"); THIRLWAY, International Customary Law 57 f ("the fact that the practice is 'against interest' gives it more weight than the mere acceptance of a theoretical rule in the course of discussion by State representatives at a conference, and considerably more weight than the assertion of such a rule... [The] occasion of an act of State practice contributing to the formation of custom must always be some specific dispute or potential dispute. The mere assertion *in abstracto* of the existence of a... legal rule is not an act of State practice"); LANG, Le Plateau continental de la Mer du Nord 93, has warned that if statements constituted State practice, States would hesitate to make comments at conferences so as to avoid being "engagés définitivement par leurs prises de position"; CASSESE quotes a member of the US Judge Advocate's Office: "State practice on humanitarian law and the laws of warfare is the practice of the battlefield... You do not want to pay too much attention to the official statements made in the nice relaxed atmosphere of New York or Geneva. It is we who are engaged in the battle who by our behaviour can show whether our respective States consider that a particular rule of international law is, or is not, binding, has, or has not, emerged"; CASSESE/WEILER 24; ROBERTS, AJIL 95 (2001) 789, for whom it is not feasible to include "paper practice".

[3] TOMUSCHAT, RC 241 (1993 IV) 277 ("consent to an international obligation can display the most diverse features").

[4] See the *Military and Paramilitary Activities (Nicaragua/USA) Case*, ICJ Reports 1986 100, para. 189 ("[a] further confirmation for the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations [lies] in the fact that it is frequently referred to in statements of State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law"); the Court then referred to other written texts, *e.g.*, resolutions of the UN General Assembly, constitutions of international organisations and treaties when establishing the customary nature of a norm, *ibid.* 104, para. 196 f, 107 para. 203, and 111, para. 212. In the *Gulf of (USA/Canada) Case* the Court confirmed the impact of UNCLOS III on pre-existing customary law, *ibid.* 1984 294, para. 94. In the *Nuclear Weapons Advisory Opinion*, the Court examined "the conditions of adoption" of a resolution in order to establish its "normative character", *ibid.* 1996 26, para. 70.

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abstract verbal acts when establishing the existence of a customary rule.[5] A number of reasons militate against the narrow view described above (N. 2), *inter alia*:

> *(i)* The term "practice" (as *per* Article 38 of the ICJ-Statute) is sufficiently general to cover *any* act or behaviour of a State, and a narrower interpretation would not do justice to the term; *(ii)* traditional instances of State practice such as opinions of legal advisors, diplomatic notes, or instructions to State representatives, may well be equally abstract and verbal. Indeed, even so-called factual practice contains, in many cases, an abstract statement by the State in question on the applicable law;[6] *(iii)* the restrictive view on State practice has not accommodated sufficiently the immense changes of the past 50 years in the State community regarding its organisation and multilateral treaty-making processes. For most members of that community, the UN and similar bodies have become the most important *fora* where they can express themselves collectively or individually; *(iv)* the conditions for the formation of customary law are such that one instance of practice, or a few instances on one occasion, cannot create law. Rather, a qualified series of instances is required, and statements at a conference would lose their value if not followed by uniform and consistent practice: (*v*) the abundant and easily accessible records of the UN, the ILC and diplomatic conferences render obsolete problems formerly associated with the paucity or unavailability of State practice; and last, but not least, *(vi)* the above authorities cannot support their views *on* State practice *with* State practice or with recent judicial decisions.

b) Written Texts (Treaties etc.) as State Practice?

4 A further question concerns the value of texts such as ILC drafts, resolutions, draft treaties, or treaties which have been adopted, signed or have entered into force.[7] It is submitted that it is not the written text which contributes to customary law, but those instances where States apply, refer to or vote upon those rules in concrete cases.[8] When the customary rule has eventually developed, the written text may reflect, or provide evidence of, the customary rule.

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[5] See, *e.g*, Jiménez de Aréchaga, Cassese/Weiler 2; Bernhardt, RC 205 (1987 V) 266 f, Sassòli, Bedeutung 136 ff; Bos, GYBIL 25 (1982) 22 f, 30; Sloane, BYBIL 58 (1987) 72 f, Evensen, RC 199 (1986 IV) 502 f; Müllerson, Essays Eric Suy 162 ff.

[6] Bleckmann, Festschrift H. Mosler 90 ff, and *passim*.

[7] Akehurst, BYBIL 47 (1974/75) 43, "has no difficulty in regarding treaties as State practice. But State practice, in order to give rise to customary law, must be accompanied by *opinio juris*".

[8] Jennings, SJIR 37 (1981) 68, has pointed out that in the *Continental Shelf (UK/France) Arbitration (1977)*, the Tribunal barely analysed the great body of bilateral State agreements put before it: "[this] was eminently sensible. It would be absurd to try to arrive at the general law of continental shelf boundaries by looking at these agreements for 'usage' and *opinio juris*"; *per contra* Aust, Modern Treaty Law 11 ("[a]n accumulation of bilateral treaties on the same subject, such as investment, may in certain circumstances be evidence of a customary rule").

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c) State Practice qua Contractual Obligation

The significance of State practice *qua* treaty-based contractual obligation on the formation of customary law as an expression of *opinio juris*, is, as confirmed by the Court's case-law, diminished for three reasons:[9] 5

(i) States may enter into a treaty for opposing reasons, *i.e.*, either because there already existed identical customary rules, or, on the contrary, because they intended to abrogate *inter se* in the treaty any non-identical customary rules on the particular matter; *(ii)* acceptance of a treaty as customary law would involve recognition of an indeterminate number of rules contained therein. Yet, in order to be effective, an expression of *opinio juris* will be directed towards a concrete legal rule; *(iii) opinio juris* embodies the conviction that the conduct in question is based upon customary law. By contrast, ratification and accession are the means by which a State expresses its "consent to be bound by a treaty" (*Article 11, q. v.*). A State ratifying a treaty is, at that stage, concerned first and foremost with its contractual obligations and not with any conviction *vis-à-vis* a customary rule.

For the signature or ratification of a treaty to influence the formation of customary law, the *opinio juris* will have to be demonstrated beyond mere contractual obligation.[10] 6

Such cases are conceivable, *e.g.*, if, upon acceptance, States maintain that in their view the treaty rules were also (or in any event) customary, or if parties to a treaty applied its rules towards non-parties or towards other parties before the treaty's entry into force. After entry into force, States may maintain that they adhered to a treaty rule on account of the customary rule embodied therein.

2. Material Requirements of Customary Law

a) General Practice

The formation and existence of a customary rule requires at the outset general State practice as mentioned in Article 38, subpara. 1(b) of the ICJ-Statute. This condition refers to the number of States which must, 7

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[9] In the *North Sea Cases* the Court stated: "over half the States concerned... were or shortly became parties to the [1958 Geneva Continental Shelf] Convention, and were therefore presumably... acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law", ICJ Reports 1969 43, para. 76. In the *Military and Paramilitary Activities (Nicaragua/USA) Case* the Court found that "[w]here two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule... binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough", ICJ Reports 1986 98, para. 184.

[10] See the apt distinction made by CHENG, in: B. CHENG (ed.), International Law: Teaching and Practice (1982) 224 f, between *opinio juris* and *opinio obligationis conventionalis*; also WEISBURD, Vanderbilt JTL 21 (1988) 25.

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either actively or passively, contribute towards the customary rule. The term "general" indicates that common and widespread practice among many States is required.[11] Such general practice may be active, *i.e.*, States expressly or implicitly adhere to, or dissent from, a customary rule, or passive (N. 11), *i.e.*, they do nothing.

b) Dissenting States

8 Not all active practice will adhere to a customary rule. When certain patterns of practice emerge, States confronted with the opportunity may wish to diverge from such practice. They can do so expressly in their statements or votes (N. 2–3), or by means of protests, or implicitly by abstaining from practice or by adhering to a different practice.

9 States may dissent from a customary rule from its inception onwards. The feasibility of such dissent was acknowledged by the Court in the *Fisheries (UK/Norway) Case*.[12] Thus, a persistently objecting State is not bound by the eventual customary rule if it fulfils two conditions:

> (*i*) the objection must have been maintained from the early stages of the rule onwards, up to its formation, and beyond; (*ii*) the objection must be maintained consistently, given that the position of other States, which may have come to rely on the position of the objector, has to be protected.

10 A second situation concerns States dissenting from a customary rule after its formation. Their position is difficult to maintain, since other States may have come to rely on the subsequent objector having originally conformed to the rule. General customary law is binding on all States and cannot, in the words of the Court, be the subject of "any right of unilateral exclusion exercisable at will by any one of (the States) in its own favour".[13] The subsequent objector digresses from, and possibly violates, the customary rule. In fact, as the Court pointed out in the *Nicaragua Case*, inconsistent State practice "would actually confirm the existence of customary international law".[14] Still, large numbers of subsequent objectors, even if their actions amounted to breaches of obligation, may lead to desuetude or modification of the original rule.

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[11] See the *North Sea Cases*, ICJ Reports 1969 42, para. 73; on "specially affected States", see TOMUSCHAT, RC 241 (1993 IV) 280 f.

[12] ICJ Reports 1951 131, 138 ("consistently and uninterruptedly"); TOMUSCHAT, *ibid.* 284 ff.

[13] *North Sea Cases*, ICJ Reports 1969 38 f.

[14] *Military and Paramilitary Activities (Nicaragua/USA) Case*, ICJ Reports 1986 98, para. 186.

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c) Passive Conduct

11 Passive conduct signifies that States do nothing, *i.e.*, neither accept, nor dissent from, the rule. If qualified (in particular if a State knew about the circumstances), such silence can be considered as acquiescence on which other States may come to rely. The passive State may then be precluded from subsequently contesting its own position. Such tacit acceptance (N. 7) constitutes part of the "general" practice required for the formation of a customary rule which, once it has come into existence, will also bind inactive States.

d) Uniformity and Consistency of Practice

12 As an additional requirement, the Court has stipulated the uniformity and consistency of the practice in question.[15] The relevant instances of State practice will apply or refer to (and thereby express) the same customary rule. A substantial, virtual uniformity or consistency of practice suffices.

e) Duration of Practice

13 It transpires from the *North Sea Cases*[16] that the duration of practice is a relative requirement, and that customary law may come into being within a comparatively short space of time. The reasons herefor are seen in the quickening pace of international relations, technological progress and social change, and in improvements in communications between States.

> The functions of "constant" practice have to be viewed in the context of the formative process of customary law as a whole: (*i*) duration of practice is necessary to distinguish consistent from inconsistent practice (N. 12), and to enable the content of the customary rule to crystallise; (*ii*) duration is required to enable other States to become aware of the practice, to respond thereto, and to monitor whether other States react similarly. Duration alone enables a certain stability of practice upon which States may come to rely; (*iii*) constant practice is one test as to whether or not States engage in such conduct out of a sense of legal conviction. In this light, the necessary duration of practice would depend mainly on the generality and consistency of practice.

3. *Opinio juris*

14 *Opinio juris sive necessitatis* is the conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from that practice, some form of sanction would, or ought to, fall on it.[17] The *opinio* has to concern a concrete norm.[18] General or vague formulations are less

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[15] See the *Nicaragua Case, ibid.*; the *North Sea Cases*, ICJ Reports 1969 43, para. 74.

[16] ICJ Reports 1969 42, para. 73, and 43, para. 74.

[17] *Ibid.* 44, para. 77; BRIERLY/WALDOCK, The Law of Nations 59.

[18] ICJ Reports 1969 43 f, para. 76; see also the *Military and Paramilitary Activities (Nicaragua/USA) Case*, ICJ Reports 1986 109, para. 207, where it was found that "statements

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effective. Moreover, the *opinio* will have regard to the rule's general binding force *erga omnes*, and not to one State's specific relations with other States.[19]

15 The *North Sea Cases* confirm that a customary rule requires both material practice and *opinio juris*, and that there is a close affinity between the two. In particular, State practice should "show a general recognition that a rule of law is involved".[20] From this it can be inferred that the *opinio* has to be widespread (rather than concern only a few States), but that it need not be found in every State, or in particular States (except in specially affected States).

16 The express statement by a State that a particular rule is obligatory (or customary) furnishes evidence as to the State's legal conviction. A similar result is achieved if a State non-party engages in practice and thereby invokes a treaty rule. The difficulties of ascertaining *opinio juris* have been mitigated in the context of the UN drafting process (N. 3). Here, States may expressly or implicitly disclose their conviction that a rule is obligatory (or codificatory).[21] A vote cast in favour of a rule indicates a State's legal conviction, just as large majorities may serve as one indicator of a *communis opinio juris*.

17 This view of *opinio juris*, examined together with the requirement of general State practice as well as the implications of passive conduct, suggests that the basis of the binding character of customary law arises from the general consensus of States, *i.e.*, from the *communis opinio* that a rule has "passed into the general corpus of international law"[22] and that *consuetudo, sicut jus accepta, est servanda*. The essential difference from a contractual obligation derives from the fact that customary law requires general agreement, not unanimity of will.

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of internal policy [rather than] an assertion of rules of existing international law" did not suffice to demonstrate the *opinio*.

[19] See the *North Sea Cases*, ICJ Reports 1969 41, para. 71.

[20] *Ibid.* 43, para. 74 (*italics added*); see also 44, para. 77.

[21] See the *Military and Paramilitary Activities (Nicaragua/USA) Case*, ICJ Reports 1996 99 f, para. 188, whereby consent to a UN General Assembly resolution "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution".

[22] The *North Sea Cases*, ICJ Reports 1969 41, para. 71.

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C. Interrelations between Customary Law and Treaties

1. Codification and Progressive Development

a) Codification

Codification signifies the transformation of an existing rule of international law, *lex lata*, into the written form; of *jus non-scriptum* into *jus scriptum.*[23] In itself, codification constitutes neither a formal source of law nor of obligation, and has no binding force *per se.* In the light of Article 38, para. 1 of the ICJ-Statute, the normative material for codification is customary law. Codification is not limited to any particular subject and can embrace any field of customary law. 18

b) Progressive Development

Progressive development may be defined as the writing down of new rules (*lex ferenda*).[24] Where these new rules no longer correspond to pre-existing customary law, progressive development can also mean substantial alteration or the complete reform of existing rules. 19

c) Practice of the ILC

As a rule, the International Law Commission (ILC) has refrained from determining whether the provisions of its drafts fall into the category of progressive development or codification, and it regularly maintains that its efforts involve both categories.[25] 20

In respect of the ILC Draft of 1966 on the law of treaties the ILC found that its work "[constituted] both codification and progressive development of international law in the sense in which those concepts are defined in Article 15 [of the ILC-Statute]".[26] Indeed, the Convention itself, in its *seventh* preambular para. (*Preamble*, N. 14), refers without further distinction to "the codification and progressive development of the law of treaties achieved in the present Convention".

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[23] Article 15 of the ILC-Statute defines codification as "the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". See generally Kohen, RGDIP 104 (2000) 577 ff.

[24] Article 15 of the ILC-Statute defines progressive development as "the preparation of draft treaties on subjects which have not yet been regulated by international law".

[25] On the work of the ILC regarding the Convention, see *History of the Convention* (N. 2–13).

[26] YBILC 1966 II 177, para. 35 (*footnotes omitted*).

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d) Methods of Codification

21 A separate question arises as to the method or form—the vehicle as it were—to accomplish *jus scriptum*.[27] International law provides for three methods: a code of normative rules (N. 22); a resolution of an international body, *e.g.*, the UN;[28] and a treaty (N. 23). All three methods share the written element. Their differences lie in the binding nature of their content.

22 A code is a written statement of rules (or principles) often endowed with considerable scientific authority. What, if any, binding force a code may have is derived from other sources of law.[29] Thus, code rules which are codificatory set forth existing customary law. If a code rule constitutes progressive development, however, it creates a new rule without binding force *qua* customary law and thus remains *a priori* ineffective.[30] The primary scope of a code is, hence, codification.

Typically, ILC Drafts, including those on the Convention (*History of the Convention*, N. 2–12) constitute codes. Treaties in force also amount to codes as regards non-parties, since the legal effects of treaties, if any, towards third States are solely of a customary nature. *A fortiori*, this remains true for treaties which have not entered into force.[31]

23 Treaties constitute an independent source of (contractual) obligation in international law. As a result, treaty rules constituting progressive development obtain the necessary binding (contractual) force. To accomplish codification by means of a treaty is to add to the validity of a customary rule a contractual obligation. There are, then, two rules with binding force: the codificatory treaty rule; and the underlying customary rule. Although they may possess identical contents, each is separate and independent from the other. As a result, treaty texts may offer evidence of a customary rule. Like codes (N. 22), such texts merely reflect, but (on account of the independence of sources) do not actually constitute, the underlying customary rule, the existence of which depends on the conditions of State practice and *opinio juris* (N. 7–17) and which does not require an additional contractual basis for its binding force.

[27] R.Y. Jennings, The Progress of International Law, BYBIL 24 (1947) 303; Kohen, RGDIP 104 (2000) 580 ff.

[28] Villiger, Manual N. 183 ff.

[29] W. Kägi, in: K. Strupp/H.-J. Schochauer (eds), Wörterbuch des Völkerrechts II (1966) 230: "es fehlt die…rechtlich verpflichtende Wirkung".

[30] See the *North Sea Cases*, ICJ Reports 1969 23: "if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be".

[31] Wetzel/Rauschning 18.

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e) Embodiment of the Law of Treaties in the Convention

24 Occasionally, difficulties have been predicted from the point of view of sources if the law of treaties was to be codified by means of a treaty rather than of a code (N. 22). Objections have been raised in particular as regards the basis of legal obligation.

FITZMAURICE embodied his reports on the law of treaties in a code because "it [seemed] inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it [seemed] more appropriate that it should have an independent basis"[32] (*History of the Convention*, N. 4). Similarly, an observation by the *Austrian* Government to the ILC in 1965 pointed out "that there would be no way of distinguishing [the later Vienna Convention] from other multilateral treaties to which, nevertheless, it would always thereafter be applicable".[33]

25 In reply, it can be argued that domestic law may equally provide for a statute on the form and promulgation of statutes, or individuals may enter a contract to regulate future contracts *inter se*. On the international level, the contractual obligation is independent of both customary law and other treaties, while guaranteeing the binding force of the new rules it embodies. The Convention is residual, the parties may at any time enter a subsequent agreement which, *qua lex posterior*, may abrogate or modify the Convention. Indeed the Convention has organised its relationship to other treaties along these lines in *Article 30* (*q.v.*) and by establishing a presumption of non-retroactivity (*Articles 4* and *28*, *q.v.*).

26 Similarly, it has been maintained that the Convention itself can only be governed by antecedent (possibly different) rules of customary law and not by its own provisions.

SØRENSEN observed in the context of the Havana Convention of 1928 that "([t]he question, whether Article 18 can be applied to the convention of which it is itself a part ... must probably be answered in the negative in conformity with the general principle of logic that a statement as to the validity or invalidity of a logical proposition cannot be applied to itself—a principle which, like all other principles of logic, must be observed in all legal interpretation".[34] At the Vienna Conference on the Law

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[32] YBILC 1956 II 107. See also FITZMAURICE's comments in the Sixth Committee, GAOR 14 (1958) 6th SR 610th meeting 51, para. 25: "theory and practice were so inextricably bound up with one another that the [ILC] would meet with serious drafting difficulties" if it chose the convention method; see also *ibid.* 52: "the law of treaties did not lend itself to codification consisting of a series of obligations and prohibitions ... [a] statement of abstract principles seemed more appropriate"; see also KARL, Vertrag 358 ff; HAVATSCH/SCHMAHL, ZöR 58 (2003) 113 ff; D.F. VAGTS, The United States and Its Treaties: Observance and Breach, AJIL 95 (2001) 326.

[33] *Ibid.* 8.

[34] The Modification of Collective Treaties Without the Consent of all the Contracting Parties, Acta Scandinavica Juris Gentium 9 (1938) 153. See MAREK, ZaöRV 31 (1971) 510, who, in Relations internationales 371, holds that this point is "too obvious to be emphasized".

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of Treaties in 1968, the *Greek* delegation upheld this view as regards the rules on interpretation (*Article 31, q.v.*): "[e]ven if a treaty provided rules for the interpretation of clauses regarding interpretation, those provisions would require to be interpreted by means not contained in the treaty. There was a vicious circle and thus it would be vain to set down rules about interpretation".[35] Authors have maintained this view also in respect of reservations to the Convention (*Article 19*, N. 8).[36]

27 However, self-regulatory effects are practised in all treaties containing provisions, *inter alia*, on their own entry into force, reservations, interpretation and termination.

The Convention was to bring to all treaties a uniform and workable set of rules in an area where much uncertainty prevailed. It would be absurd if the Convention should envisage for itself a different set of (possibly non-identical) rules on the law of treaties. Indeed, the records of the ILC and the debates at the Vienna Conference of 1968/1969 (*History of the Convention*) do not confirm these fears, and it is of significance that no subsequent State practice supports any dichotomy of rules. In any event, *Article 24, para. 4* provides for the application of various procedural provisions of a treaty (and, hence, also of the Convention) as from the time of its adoption (*q.v.*, N. 12–13).

2. Generating a New Rule of Customary International Law (Article 38 of the Convention)

28 Generating a new rule of customary law through a treaty rule is the subject of *Article 38 (q.v.).* A new customary rule arises on the basis of the treaty rule, binding *erga omnes* and with the same substance as the written rule.[37] *Ex hypothesi* this presupposes a written rule. The interaction between a customary rule of international law and a treaty rule is not limited to any particular stage of a treaty's life. However, the treaty text itself contains *eo ipso* no legislative powers. Rather, generation *via* treaty rules forms part of the general theory of customary law (N. 7–17). As a result, generation cannot be viewed as a "short cut"[38] to customary law, though present conditions of international organisation may contribute favourably towards an accelerated development of customary law (*Article 38*, N. 7).

29 All State practice is relevant when ascertaining whether a treaty rule has generated a customary rule, though the practice of treaty parties *inter se* is less helpful, since they will thereby as a rule be invoking the treaty rule *qua* contractual obligation (N. 5).

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[35] OR 1968 CoW 172, para. 7.

[36] *E.g.* Sztucki, GYBIL 20 (1977) 277 ff.

[37] See on this section the *North Sea Cases*, ICJ Reports l969 41 ff; Akehurst, BYBIL 47 (1974/75) 49 and *passim*; Sassòli, Bedeutung *passim*; Schachter, Essays Sh. Rosenne 717 ff; Sohn, Essays W. Riphagen, 23l ff; Torrione *passim*.

[38] Jennings, Essays W. Friedmann 168.

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3. Modification of Treaty Rules By Means of Customary Law; Article 68, para. (c) of the ILC Draft 1964

30 Modification of a treaty rule by means of customary law implies the development of new, non-identical customary rules with regard to a subject-matter originally covered by treaty rules.[39] The written rule may, accordingly, undergo amendment or modification or even pass out of use completely.[40] The Convention makes no mention of such developments, though they subsequently played an important part in the context of UNCLOS III.

31 Previously, however, the ILC expressly acknowledged the process of modification in Article 68, para. (c) of its 1964 Draft:

> "*Article 68*
>
> *Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law.*
> The operation of a treaty may also be modified…
>
> (c) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties".[41]

32 Like Article 38 (*q.v.,* N. 8), Article 68, para. (c) does not indicate the scope and conditions of the process of a customary rule modifying a treaty rule. It serves as a reminder, or reservation, that such a process is possible. The *travaux préparatoires* confirm this conclusion: the ILC justified deletion of the provision by noting the complexity of the relationship between customary law and treaties.[42] An additional factor in favour of deletion was the confusion in the ILC itself as to other unrelated issues, namely, intertemporal matters, and the distinction between the application and the interpretation of treaties. With few exceptions, the principle of modification as such was not called into question in the *travaux préparatoires*.[43] Nor has the concept of modification itself suffered from the deletion of Article 68, para. (c). As a result, and to the extent that the concept of modification exists *qua* (uncodified) customary law, it will continue to do so.

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[39] See on the subject VILLIGER, Manual N. 302 ff; R. BERNHARDT, Custom and Treaty in the Law of the Sea, RC 205 (1987 V) 247 ff; KONTOU, *passim*.

[40] See H.F. KÖCK, Ist der österreichische Staatsvertrag "obsolete"? Grundsätzliche Überlegungen zur Vertragserrichtung und Vertragsendigung nach Völkerrecht, Austrian JPIL 50 (1996) 75 ff.

[41] YBILC 1964 II 198; see KOHEN, RGDIP 104 (2000) 603; A. VAMVOUKOS, Termination of Treaties in International Law. The Doctrines of *rebus sic stantibus* and Desuetude (1985) 219 ff.

[42] YBILC 1966 II 236, para. 3, 177, para. 34.

[43] KONTOU 139.

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33 Importantly, this modification *via* customary law must be distinguished from parties' conduct *qua* contractual obligation which may also modify the original treaty (though the parties' conduct may eventually also lead to a customary rule).

Article 31, *subpara. 3(b)* provides "there shall be taken into account [when interpreting a treaty] together with the context...any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" *(q.v.*, N. 31). *Article 38* of the ILC Draft 1966 on the *Modification of treaties by subsequent practice* was not included in the Convention.[44] It had gone a step further stating that " [a] treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions"[45] (see *Article 39*, N. 14).

The latter provision does not *a priori* concern customary law. It proceeds from a contractual obligation and focuses on the practice of States parties to a treaty, among which parties the treaty rule may eventually be modified. The subsequent practice in fact reflects the contractual agreement of the parties. By contrast, a general customary rule possesses binding force *erga omnes* and requires widespread (active or passive) practice among States, the *opinio* of which must be directed towards the customary rule and not the contractual obligation. However, in their practice States may gradually wander from interpretation and modification, as envisaged in Article 38 of the 1966 ILC Draft, to a new customary rule which is binding upon them and modifies the treaty provision *erga omnes*.

Article 38 of the ILC Draft 1966 (*Article 39*, N. 14) was previously Article 68, para. (b) of the ILC Draft 1964 (*Article 41*, N. 17). Thus, it can be distinguished clearly from Article 68, para. (c) of the same ILC Draft 1964 (N. 31).

4. Declaratory and Non-Declaratory Treaty Rules

34 Codification and progressive development (N. 18) reflect the picture at the time of the adoption of a written instrument. Their distinction does not accommodate the interplay of sources. Thus, codificatory rules may be modified by new, non-identical customary law (N. 30) which no longer reflects the original customary law. New written rules may generate customary law (N. 28) and therefore no longer qualify as progressive development. This study, therefore, employs the notion of "declaratory" rather than "codificatory" rules. New rules constituting progressive development are, therefore, "non-declaratory" rules.

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[44] OR 1968 CoW 215, para. 60.

[45] YBILC 1966 II 236 f; R. Kolb, La modification d'un traité par la pratique subséquente des parties. Note sur l'affaire relative au régime fiscal des pensions versés aux fonctionnaires retraités de l'UNESCO résidant en France; sentence du 14 janvier 2003, Revue Suisse 14 (2004) 9 ff.

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D. Effects of the Declaratory Nature of Treaty Rules

1. Effects Before a Treaty's Entry into Force

35 The written text itself has no direct effect on customary law (N. 4), the existence and binding force of which depend on conditions to be ascertained elsewhere in the practice of States, Thus, if a customary rule has been embodied in a treaty, the existence of the former will not be directly affected by the latter (N. 5). Customary rules are binding upon all States regardless of whether or not the latter have ratified the treaty embodying the customary rule, *i.e.*, even before its entry into force. Non-declaratory rules have no such binding effect and depend for their effectiveness on the treaty's entry into force (N. 23). *Article 4* (*q.v.*, N. 3) reiterates this principle in respect of the Convention itself, and *Article 28* (*q.v.*, N. 7) in respect of all other treaties.

2. Reservations and Customary Law

a) Admissibility

36 May reservations be made to declaratory treaty rules (N. 34)? *Articles 19–23 (q.v.)* concerning reservations shed little light on the topic. A number of authors follow the Court's position in the *North Sea Cases* where it regarded reservations as being incompatible with declaratory rules:[46]

> "it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.... [N]o reservation could release the reserving party from obligations of general maritime law existing outside and independently of the convention".[47]

37 A more recent view, expressed in the *Nicaragua Case*, sees no direct impact of reservations on underlying customary law.

> The Court was confronted with the US treaty reservation according to which the Court's jurisdiction would be excluded in respect of the US in case of "disputes

[46] See, *inter alia*, Marek, ZaöRV 31 (1971) 497; Akehurst, BYBIL 47 (1974/75) 48 at n. 3; Imbert, Les réserves aux traités multilatéraux 244; Jennings, in: Mélanges P. Reuter 352. See also the General Comment of the Human Rights Committee, ILM 34 (1995) 842: "provisions in the Covenant that represent customary international law... may not be the subject of reservations".

[47] ICJ Reports 1969 38 f, para. 63; see Judge *ad hoc* Sørensen's diss. op., *ibid.* 248.

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arising under a multilateral treaty, unless all parties to the treaty affected by the decision are also parties to the case before the Court".[48] The Court made no distinction between a "classical" reservation to a treaty and one to its jurisdiction when it concluded that a reservation had no impact on underlying customary law:

"the jurisdiction conferred upon it by the United States declaration of acceptance of jurisdiction... does not permit the Court to entertain these claims. It should however be recalled that... the effect of the reservation... is confined to barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply.... The fact that the above-mentioned principles [*i.e.* on the use of force, non-intervention etc.] have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions".[49]

38 It is submitted that, in view of the lack of any hierarchy of sources in international law, reservations have no direct impact on customary law, but are also not *a priori* incompatible with declaratory treaty rules.[50] Customary law is not tantamount to *jus cogens*! On the contractual level, parties may at any time agree to abrogate a particular customary rule.[51] They are entitled to do so in view of the lack of hierarchy of rules. To the extent that a State's reservation on the contractual plane is accepted by another State and thus amounts to a particular contractual relationship, the latter will prevail over any differing customary rule *inter se*. The customary rule in general, and the parties' relations *qua* customary law with other States, non-parties or parties (*e.g.*, if other parties contest a reservation), remain unaffected. However, if many States agree to such a reservation, this may have an indirect negative impact on the underlying customary rule in the long term (N. 42).

In this light, para. 2 of Guideline 3.1.8 on Reservations to a Provision Reflecting a Customary Norm of the ILC Report 2007 appears unclear in particular as to the continuing effects of the underlying customary rule as between the reserving and the accepting States. Guideline 3.1.8 states:

"1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.

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48 ICJ Reports 1986 31, para. 42.

49 *Ibid.* 38, para. 56, 93, para. 174, with reference to ICJ Reports 1984 424, para. 73.

50 Sassòli, Bedeutung 181 ff; Danilenko, Law-Making 153 f; Schachter, Essays Sh. Rosenne 727. On the contractual plane, this conclusion will be subject to reservation clauses and the object-and-purpose test as in *Article 19, para. (c)* (*q.v.*, N. 12–14). The *North Sea Cases* cited above (N. 36) appear to attribute to customary international law the status of *jus cogens*.

51 ICJ Reports 1969 248.

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2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State...and other States...which are bound by that norm".[52]

b) Reservation Clauses

39 If, contrary to the above (N. 38), it is assumed that reservations are incompatible with declaratory conventional rules, it could be argued that, if a treaty permits or prohibits reservations to certain rules, these will constitute non-declaratory or declaratory rules, respectively.[53]

40 This study submits, to the contrary, that a reservation clause cannot in itself justify a presumption for or against the declaratory character of conventional rules. The fact that a convention permits or prohibits reservations,[54] or is silent on the matter,[55] may be attributed to considerations wholly apart from customary law.[56]

c) Applicable Law

41 Treaty rules, and reservations thereto, cannot affect the relations of parties *vis-à-vis* non-parties, or among non-parties *inter se*, although the relations of these States may be governed by the customary law underlying the treaty. By contrast, the applicable law with respect to the treaty parties depends on the reactions of other States to the reservation (see also *Articles 20–21*):

– if another State accepts and agrees to the reservation, the treaty enters into force subject to the reservation. If no other intention is discernible, the agreement supersedes *inter se* both the treaty and the customary rule (N. 38);[57]

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[52] YBILC 2007 II/2 88 ff.

[53] Baxter, RC 129 (1970 I) 48. See the *North Sea Cases* ICJ Reports 1969 39, para. 63 ("it is to be expected that when, for whatever reason, rules or obligations [of customary law] are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred"); differently in the *Nuclear Weapons Advisory Opinion*, ICJ Reports 1996 29, para. 82, in respect of denunciation clauses.

[54] *Article 19, paras. (a)* and *(b)* (*q.v.*, N. 10–11).

[55] See the Court in the *Reservations to Genocide Advisory Opinion*, ICJ Reports 1951 22: "it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that contracting States are prohibited from making reservations".

[56] Restrictions in the 1982 Convention on the Law of the Sea are explained by the package deals leading to its adoption. A reservation clause may be omitted so as "not to invite a multiplicity of reservations", *Reservations to Genocide Advisory Opinion, ibid.* Reservations may be excluded because the drafting body regards some provisions as essential for the operation of the treaty.

[57] *Article 21, para. 1* (*q.v.*, N. 3–6).

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– if one party objects to the reservation, without expressing its intention to preclude the entry into force of the treaty as a whole, the "provisions to which the reservation relates do not apply as between the two States to the extent of the reservation"[58] There is no mutual consent to be bound between the reserving and the objecting States—*a fortiori* not *qua* customary law, for which reason any underlying customary rules remain applicable both for the reserving and the objecting States. The *Continental Shelf (France/UK) Arbitration (1977)* aptly illustrates this situation and its consequences;[59]

– if one party objects and thereby definitely expresses its intention to preclude the entry into force of the treaty as a whole,[60] the legal situation is that of two non-parties, and the reserving and objecting State are bound by any underlying customary law.

d) Indirect Effects of Reservations upon Underlying Customary Law

42 Reservations are integrated into a treaty *régime* and operate primarily on the contractual plane. Nevertheless, if States make reservations and thereby modify or exclude a treaty rule, it can be assumed that for the same reason they would equally disagree with, and wish to modify or exclude, any identical underlying customary law. A reservation (though not a reservation clause, N. 39) may hence be an indication of disapproval of the underlying customary law.[61] One such instance cannot affect the customary rule, but many reservations may raise the question whether the *communis opinio juris* (N. 8–10, 14) regarding the customary rule has been eroded.[62]

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[58] *Article 21, para. 3* (*q.v.*, N. 8).

[59] ILR 54 (1979) 2 ff; the Court of Arbitration interpreted the *UK* objection to the *French* reservations as not precluding the entry into force of the 1958 Continental Shelf Convention as a whole, *ibid.* 45 f, para. 44. As a result, the French reservations rendered Article 6 of the Convention "inapplicable as between the two parties to the extent, but only to the extent of reservations", *ibid.* 52, para. 61. The Court thus had recourse to customary law. It concluded, however, that "[t]he rules of customary law [led] to much the same result as the provisions of Article 6", *ibid.* 54, para. 65.

[60] *Articles 20, subpara. 4(b)* (*q.v.*, N. 14–15) and *21, para. 3* (*q.v.*, N. 8).

[61] See Sassòli, Bedeutung 160 f; Akehurst, BYBIL 47 (1974/75) 48; Baxter, RC 129 (1970 I) 63.

[62] See Judge *ad hoc* Sørensen in the *North Sea Cases,* ICJ Reports 1969 252 ("reservations made, and the objections entered against them, are relevant only in so far as the total effect might be to disprove the thesis that Article 6, as part of the [Continental Shelf] Convention, has been accepted as generally binding international law"); already the Brierly Report II of 1951, YBILC 1951 II 3 f ("[f]requent or numerous reservations by States to multilateral conventions of international concern hinder the development of international law by preventing the growth of a consistent rule of general application"); see generally Villiger, Manual N. 411 ff.

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3. Influence of Customary and Treaty Rules on the Interpretation of Each Other

a) Influence of Customary Law on the Treaty Text

The question arises as to the function of a customary rule if it is identical with the treaty rule. It could be argued that the customary rule is rendered obsolete and its identification unnecessary, since the treaty parties will primarily invoke the treaty rule *qua* contractual obligation, and also as the Convention offers in *Articles 31* and *32* (*q.v.*) rules of interpretation as a means to extract meaning and scope from the written term. 43

According to *Article 31, subpara. 3(c)*, interpretation of a treaty text will take into account, *inter alia*, general customary law on the same subject-matter (*q.v.*, N. 33). The full meaning and scope of written terms may become clear by reference to the underlying customary law: the customary rule may supply a plausible meaning, define the context, fill any lacunae or confirm the interpretation of the written terms.[63] 44

b) Influence of the Treaty Text on Customary Law

Due to the merits of *jus scriptum*,[64] States in their practice will generally adhere to the written rule and, with it, also the customary rule underlying the treaty text. The conventional rule thus exerts a stabilising effect on the underlying customary law, even as it evidences that customary rule. Hence, the written text will be of interest to non-parties, if that is where they perceive their customary obligations to be reflected. States and other interpreting bodies may also vary the modes of interpretation of the written text (*Article 31*, N. 6, 47). As a result, the process of interpretation will render a certain flexibility also to the underlying customary law. 45

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[63] In the *Continental Shelf (UK/France) Arbitration (1977)* the Court held that, although Article 6 of the 1958 Geneva Continental Shelf Convention was applicable in the Channel Islands region, "[t]his does not . . . mean that . . . the rules of customary law discussed in the North Sea Continental Shelf cases . . . [are] inapplicable in the present case . . . The rules of customary law are a relevant and even essential means both of interpreting and completing the provisions of Article 6", ILR 54 (1979) 75, para. 75. In the *Military and Paramilitary Activities (Nicaragua/USA) Case* the Court held in respect of Article 51 of the UN Charter: "Article 51 . . . is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover, the Charter . . . does not go on to regulate directly all aspects of its content . . . [I]n the field in question . . . customary international law continues to exist alongside treaty law", ICJ Reports 1986 94, para. 176"; see JENNINGS, SJIR 37 (1980) 62; SASSÒLI, Bedeutung 210 f.

[64] WILDHABER, EPIL 7 (1984) 493.

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4. Subsequent Changes in the Treaty *régime*

46 According to *Article 43* (*q.v.*), customary law underlying a treaty continues to remain binding on States even if they terminate, denounce, withdraw from, or suspend the operation of the treaty. Article *60, para. 5 (q.v.*, N. 23–24) contains a similar rule in respect of humanitarian treaties. This result is generally acknowledged.[65]

47 A related issue is whether treaty clauses concerning the treaty's denunciation or termination have significance in determining the declaratory quality of the treaty rules.[66] It is submitted that such clauses possess no significance, since the underlying customary law exists regardless of whether or not a State withdraws from a convention. Indeed, certain treaties with declaratory rules contain denunciation clauses,[67] whereas other treaties with "new" rules contain no such clauses.[68]

48 Still, if a substantial number of States reject a treaty rule, this may indeed be a strong indication that the *opinio juris* on the rule in question (N. 14) is no longer sufficient, although further evidence in the practice of States would still be required to complete such an assessment.[69]

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[65] See the *Military and Paramilitary Activities (Nicaragua/USA) Case*, ICJ Reports 1986 113 f, para. 218; also *ibid.* 95, para. 178, where the Court found in respect of a State's right under *Article 60, subpara. 3(b)* (*q.v.*, N. 15–16) to terminate or suspend the operation of a treaty: "if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule". See also Barberis, AFDI 36 (1990) 46; Schachter, Essays Sh. Rosenne 727; the 1967 Resolution of the *Institut*, Annuaire IDI 52 (1967 II) 394 ff, 562 (Article I/2).

[66] For Thirlway, International Customary Law 94 such clauses "cast grave doubt on the declaratory status of the rules". For Verdross/Simma N. 807, it is disputed whether a withdrawal from declaratory conventions is permissible if the convention contains no such clause.

[67] See Article 40 of the 1907 Hague Convention *(IV)*; Article 63 of the *first*, Article 62 of the *second*, Article 142 of the *third*, and Article 158 of the *fourth* 1949 Geneva Conventions.

[68] *E.g.*, the 1975, 1978 and 1983 Vienna Conventions. See also the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas of 1958.

[69] In the *Nuclear Weapons Advisory Opinion* the Court referred to the declaratory character of conventions despite "denunciation clauses [existing] in the codification instruments [which] have never been used", ICJ Reports 1996 29, para. 82.

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E. Provisions on Customary Law in the Convention and in ILC Drafts

A number of Convention provisions refer directly or indirectly to, or have implications for, customary law: 49

- the *seventh* preambular paragraph refers to "codification and progressive development achieved in the present Convention" (N. 20; see *Preamble*, N. 14–15);
- the *eighth* preambular paragraph "[*affirms*] that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention" (*original italics*; see *Preamble*, N. 14–15);
- *Article 3, para. (b)* provides that the Convention does not affect the application of "rules set forth in the present Convention to which [parties] would be subject under international law independently of the Convention" (*q.v.*, N. 6);
- *Article 4* states that the Convention only applies to treaties after its entry into force, though this principle is "without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention" (N. 35; *Article 4*, N. 3–5);
- *Article 31, subpara. 3(b)* refers to the parties' subsequent practice in the interpretation of a treaty which may gradually bring about a new customary rule (N. 33; *Article 31*, N. 23);
- for *Article 31, subpara. 3(c)*, the interpretation of a treaty shall take into account "any relevant rules of international law applicable in the relations between the parties" which also includes customary law (N. 43; *Article 31*, N. 25);
- *Article 38* envisages "rules in a treaty becoming binding on third States through international custom" (N. 28; see *Article 38*, *q.v.*);
- *Article 43* concerns a State's obligations, upon the invalidity, termination and suspension of the operation of a treaty, "imposed by international law independently of a treaty" (N. 46; see *Article 43*, *q.v.*);
- *Article 60, para. 5* constitutes a special application of Article 43 in respect of humanitarian treaties (*q.v.,* N. 23–24).

Article 68, para. (c) of the ILC Draft 1964, not embodied in the later Convention, envisaged the possibility of "modification of a treaty ... by customary law" (N. 31). (Conversely, Article 38 of the ILC Draft 1966 concerns the modification of treaties by subsequent practice *qua* contractual obligation, N. 33.) 50

These provisions, concerning customary law rather than the law of treaties, are actually silent on the prerequisites for the formation and continuing validity of customary law (*e.g.*, *Article 38*, N. 9) which have been described above (N. 7–17). They serve as saving clauses, or reminders, of the separate existence of customary law, though they enjoy no binding force *qua* contractual obligation and cannot be opposed towards the Convention 51

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parties. Conversely, the customary rules contained in the Convention and referred to in these provisions apply *qua* customary law to all States, *i.e.*, to parties and non-parties alike.

F. The Convention as Customary Law

1. Introduction

52 Throughout this study Convention articles are examined individually as to their status in customary international law. The question arises, in addition, whether the Convention as a whole may be considered declaratory of customary law.

53 It has been maintained that a whole treaty may, or may not, reflect customary law.[70] It is submitted that such statements, while indicative of general tendencies, are less helpful since the declaratory quality has to be identified rule by rule.[71] The declaratory quality of one conventional rule cannot raise a presumption with respect to others.[72]

54 Thus, recent conventions can hardly be exclusively declaratory if the drafting body, in this case the ILC, expressed no such aspirations (N. 20). Moreover, *opinio juris* relates to concrete rules; and the instances of State practice constitutive of customary law are on the whole disorganised and will hardly lead to entire and organised systems of customary rules. Indeed, in the vast majority of cases before international courts, only single rules are contentious.

55 In any event, if States articulate such sweeping statements, they regard exceptions and qualifications to single rules as unnecessary. In particular, it would become more difficult for a State to maintain a position as persistent objector *vis-à-vis* single customary rules.

Least helpful are assertions that a treaty is "generally" declaratory, which could mean that the State is reserving its right to state, at a later stage, that some as yet unspecified treaty rules are non-declaratory.

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[70] See Akehurst BYBIL 47 (1974/75) 12 ("it is common knowledge that most of the provisions [of certain conventions] were declaratory").

[71] Bernhardt, Thesaurus Acroasium 218 ("it is never sufficient that...certain rules contained in a codification are accepted as customary law for holding the whole text to be an expression of customary norms. It is necessary to scrutinize carefully the different rules in the treaty").

[72] Differently the diss. op. of Judge Sørensen in the *North Sea Cases*, ICJ Reports 1969 249.

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2. General Statements on the Declaratory Character

a) Statements in the Convention Itself

56 The *eighth* preambular para. (*Preamble*, N. 14) speaks of "codification and progressive development" in the Convention, thus assuming that some rules are customary, others not. Various provisions presuppose that a number of its rules were, or had become, declaratory at some stage before or after the Convention's adoption (N. 49).

b) ILC

57 When the ILC commenced its work on the law of treaties, BRIERLY sought in his 1950 Report the "confinement . . . to a statement of what is conceived to be the existing law".[73] LAUTERPACHT regarded his reports "primarily as a formulation of existing law".[74] FITZMAURICE, by selecting a code to accomplish codification, presupposed a customary basis for the rules enunciated in his Reports.[75] (*History of the Convention*, N. 2–12).

58 After 1962, the WALDOCK and ILC Drafts introduced several new rules, and ILC members expressed themselves less frequently on the declaratory nature of the draft rules. There were a number of controversial articles, *e.g.* the rules on procedure in *Articles 66–68* (*q.v.*). In 1966 WALDOCK hinted that the ILC Drafts included some progressive development.[76] At the 1968/1969 Conference, now as Expert Consultant, he emphasised the codificatory nature of the Convention.[77]

c) State Practice

59 At the 1969 Vienna Conference, nearly half the Convention's provisions were adopted unanimously, and most others by vast majorities. The Convention was finally adopted with 79 votes to one (*France*), with 19 abstentions (*History of the Convention*, N. 19; *Article 85*, N. 1). Thirty-six years after its adoption, it is binding on 108 States (*Status of the Convention, q.v.*).

[73] YBILC 1950 II 224, para. 2, 225, para. 5.

[74] YBILC 1953 II 90, para. 3; see Article 9A, *ibid.*, and at 124.

[75] YBILC 1959 II 91, para. 18.

[76] "It was significant that throughout the present session's discussion he himself had not had occasion to consult the leading doctrinal works on the law of treaties: the whole emphasis had been on the views which the Commission itself had reached", YBILC 1966 I/2 296, para. 12.

[77] "[M]any representatives at the Conference [had spoken] of the convention as essentially a codifying instrument. That was the right view if the convention was regarded essentially as a consolidating instrument which took account of differences of opinion but found a common agreement as to the lines to be followed in the law of treaties", OR 1969, CoW 337, para. 77.

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These figures may primarily be viewed *qua* contractual obligation (N. 5). The voting constellations at the 1969 Vienna Conference indicate that the abstaining delegations favoured substantial parts of the Convention but disagreed with a small number of rules. Without doubt, these abstentions were concerned with matters attracting most controversy at the Conference, namely participation in multilateral treaties, the provisions of Part V and the judicial settlement of disputes arising in that context.

60 Since 1969 various States, parties and non-parties, have commented on the declaratory nature of the Convention.[78]

d) Courts and Doctrinal Writings

61 International courts have mainly referred to individual Convention rules.[79] General statements are more frequent in doctrinal writings. Some studies have described the whole Convention "as part and parcel of contemporary international law",[80] others that the Convention is codificatory "for the most part"[81] or that it "will evolve as a whole into general international law... within the not too distant future".[82] Other authorities qualify the Convention as in part declaratory and in part a deliberate exercise in progressive development.[83]

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[78] To mention a few: for the *US Department of State*, the Convention "although not yet in force... is already generally recognized as the authoritative guide to current treaty law and practice", cited in International Lawyer 6 (1972) 430. See also the representative of the *Canadian* Government ("universal compendium of customary law"), CYBIL 19 (1981) 335; the Government of *New Zealand* in the *Nuclear Tests Cases*, ICJ Pleadings 1974 II 270 ("in large part declaratory"); the *Australian* Government in Australian YBIL 7 (1976/77) 498; the *Swiss* Federal Court ("die völkerrechtlichen Regeln über das Vertragsrecht beruhen auf Gewohnheitsrecht, welches in der Wiener Konvention... kodifiziert wurde"), BGE 120 II 365.

[79] To mention a few: the *Continental Shelf (UK/France) Arbitration (1977),* ILR 54 (1979), paras. 38 ff., regarding *Articles 19–23*; the 1978 *Air Transport (France/US) Arbitration*, ILR 54 (1979) 346 (*Article 44); BP v. Libyan Arab Republic Arbitration*, ILR 53 (1979) 332 f (*Articles 26, 42, 65*). See Aust, Modern Treaty Law 13 ("[t]here has as yet been no case where the Court has found that the Convention does not reflect customary law").

[80] See Elias, Modern Law 5; similarly Rosenne, Homenaje Miaja de la Muela I 453; Mosler, RC 140 (1974 IV) 114.

[81] Sir Francis Vallat, The Vienna Convention on the Law of Treaties 1969, YBAAA 40 (1970) XXVII; similarly Rosenne, Law of Treaties 91; Briggs, AJIL 73 (1979) 471; G. Barile, La structure de l'ordre international, RC 161 (1978 III) 9 ff; M. Yasseen, L'interprétation des traités d'après la Convention de Vienne, RC 151 (1976 III) 9, para. 1; Reuter, Introduction para. 32; Wetzel/Rauschning 11.

[82] Mosler, RC 140 (1974 IV) 101.

[83] Sinclair, Vienna Convention 12 ff; Verdross/Simma N. 672.

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3. Appreciation

62 Up to 1968 the ILC and many States regarded the Convention as combining elements of both codification and progressive development. The turning point came at the 1968/1969 Vienna Conference. With the majority of articles having been adopted with surprisingly high numbers of votes, the delegates and, subsequently, the States in their practice came to regard the Convention as mainly codificatory. Since 1969, States, courts and authors have increasingly relied on the Convention, even before its entry into force, as an authoritative guide to the customary law of treaties.

63 All in all, there is a certain probability that the Convention rules are declaratory. The probability is higher regarding rules not embodied in Part V. In other words: ascertainment of the declaratory quality of individual rules will always be necessary, but, if the present trend continues, it will become increasingly difficult to ascertain sufficient *in*consistencies in State practice in order to substantiate claims as to the *non*-declaratory quality of single rules.

A good example of the impact of the Convention *qua* customary law can be seen in the *Mutual Assistance in Criminal Matters (Djibouti/France) Case*, where the Court applied Articles 26, 27 and 31 (*q.v.*) towards *France* although the latter had not ratified the Convention and indeed was the only State in Vienna in 1969 to vote against the Convention (*History of the Convention*, N. 19).[84]

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[84] ICJ Reports 2008, paras. 112 f, 124, 145.

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