

## Treaties and Custom

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As we have seen, creation and change of customary law are aspects of the same general phenomenon: the establishment of articulated precedential situations which are new when custom is being created and which represent departures from previous lines of conduct when custom is being changed. In both cases, an innovating state runs a legal risk, for it cannot be certain either that it is acting with respect to a previously unregulated area or, in the event that its policy represents a departure from previously established customary behavior, that other states may not exact a high price in diplomatic bargaining for the legal violations. To safeguard themselves from such risks, states that are about to introduce new patterns of international behavior have a great incentive to secure in advance the agreement of foreign governments who will be affected by the contemplated actions. For this and other reasons, states have historically resorted to treaties (in the sense of all explicit agreements, pacts, bargains, whether written or oral<sup>1</sup> with other states in matters of mutual concern. The growth of treaty regulation of international behavior has so accelerated with the passage of time that today there are few areas of international law untouched by the complex network of international treaty law.

A treaty, in short, may be viewed as a convenient device for guaranteeing in advance that interested or affected states will allow the treaty-specified conduct to take place as planned. Where international law is crystal clear, there is no need for a treaty; but short of crystal clarity, or where existing law is undesirable from the parties' viewpoints, a treaty is a handy instrument for effectuating modification in the law. Under customary international law, treaties have immediate binding effect on the parties thereto. Thus they serve an extremely useful primary function in regularizing patterns of conduct and expectations among signatory states.

What has not been sufficiently recognized in the literature of international law is a secondary, yet significant, effect of treaties. Not only do they carve out law for the immediate parties, but they also have a profound impact upon general customary law for nonparties. For a treaty arguably is a clear record of a binding international commitment that constitutes the "practice of states" and hence is as much a record of customary behavior as any other state act or restraint. International tribunals have clearly recognized this effect of treaties upon customary law, and historically treaties have a decisive impact upon the content of international law.

This chapter argues that generalizable provisions in bilateral and multilateral treaties generate customary rules of law binding upon all states. There is no suggestion that if nation-state officials and/or their legal counsel for international-law matters were asked today whether provisions in treaties they have not ratified are nevertheless a "source" of law to them, they would agree wholeheartedly with the proposition. One might indeed predict that many would flatly disagree, if asked the question off-hand and out-of-context. Of course, this observation simply reinforces the previously noted difficulty of approaching an analysis of the content of the secondary rules of international law by public-opinion polls. For in a real dispute, one might safely predict that one side or the other would find it convenient to agree that treaties generate international customary law, if the proposition would help advance that side's legal position. In any event, the most any writer can ask is that his readers view his arguments on their

merits, if any, and form their own predictions as to whether others-subsequent scholars, nation-state officials, legal counsel, and courts-will be persuaded by such arguments or similar arguments when they have occasion to consider them. Hopefully, and at best, the present chapter may contribute to the development of the science of international law by helping to make that science reflect more accurately the behavior of states.

### *Parametric Considerations*

Not every variety of treaty *can* give rise to a rule of customary law; rather, only those bilateral or multilateral treaties that contain generalizable rules can have this effect. It is useful to bear in mind that treaties are subject to the same limitations as other acts of states, and many things that states do are not capable of generating custom. For example, when one state gives economic or military aid to another or when two or more states engage in trade, these exchanges are outside the realm of law; surely a state need not continue to give aid in like circumstances if it has once done so (which is what we would say of a rule of law), or two states need not continue to trade goods or services if they have done so in the past. A treaty such as the General Agreement on Tariffs and Trade that institutionalizes trade is similarly incapable of giving rise to rules of customary law binding upon nonparties.<sup>2</sup> Moreover, some types of state acts, to be examined in chapter 8, give rise to "special custom" binding upon a particular group of states. Treaties that do the same thing, such as those multilateral treaties that set up objective regimes (e.g., internationalizing waterways or neutralizing states and territory) or constitute so-called international servitudes, are likewise incapable of giving rise to *general* custom.<sup>3</sup> So, too, are constitutive instruments of international organizations to the extent that these instruments regulate the internal functions and competences of the organization. For instance, the United Nations Charter does not generate customary law for all nations when it deals with the functions of the Security Council (indeed, how *could* such rules be generalizable into norms of universal application?), but other provisions of the Charter, such as Articles 1 and 2, may indeed help to generate rules of customary law of applicability even to nonmembers. Finally, the specific question of the effect of treaties on third-party states is quite separate from the question here concerning us-the impact of treaties upon general customary law applicable to all states despite an early and influential work by Roxburgh which tended to confuse third-party effects of treaties.<sup>4</sup> The Vienna Convention on the Law of Treaties of May 23, 1969, makes this separation; after dealing with the *pacta tertiis* problem in Articles 34 to 37, Article 38 reads "Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such."<sup>5</sup>

The term "binding," correctly used in this quotation, may create some conceptual difficulties. Clearly treaties are binding, in all their richly detailed provisions, upon parties to them. The claim made here is not that treaties bind nonparties, but that generalizable provisions in treaties give rise to rules of customary law binding upon all states. The custom is binding, not the treaty. Thus, a party to the 1967 Convention on Outer Space is directly bound by the treaty provision that outer space, including the moon, is not subject to national appropriation by claim of sovereignty or by occupation.<sup>6</sup> That same party is also bound by a customary rule of international law to the same effect that has arguably been generated by this treaty. This double source of obligation could be significant, for example, if the party withdraws from the treaty; it would still be bound by the customary rule of law. The withdrawing party would, of course, no

longer be bound by the treaty itself, and hence the particular rules for implementation found in many treaties would not be relevant to it. The same result would follow if a party to a treaty made a reservation to any of its provisions. Despite a claim by Richard Baxter in a recent article that it would be "paradoxical in the extreme" to have a different obligation for a reserving party as opposed to a nonparty, the present analysis suggests that the reserving party (or the withdrawing party) is only freed from the particular treaty obligations that may spell out implementation and compliance procedures connected with the provision in question, but that party is not in a preferred position vis-a-vis nonparties; all alike are bound by customary law (whether or not that customary law had been generated by the particular provision in the treaty).<sup>7</sup>

This duality of obligation is fully consonant with the operative language of Article 38 of the Statute of the World Court:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law.

Despite the arguments of some commentators that this wording separates conventional from customary law, clearly the statute simply requires the Court first to apply treaties to which the contesting states are party or have acceded, and then to apply general custom. The statute does not attempt to separate treaties from custom, nor to exclude the effect of one upon the other. The opposite may be closer to the truth. Paragraph (a), in the first place, is restricted to rules in treaties that are "expressly recognized." Obviously many rules in treaties are not "expressly recognized": i.e., rules in treaties to which the contesting states are not party, as in a *pacta tertiis* situation. Moreover, paragraph (a) speaks of conventions "whether general or particular." This inclusiveness is appropriate for treaties that the contesting states have expressly recognized. But the language does not contemplate the effect of treaties upon general custom; here "particular" treaties such as those that set up "objective regimes" do not create general custom. Hence, paragraph (a) does not exhaust the category "treaties," but simply refers to a subset of treaties, those "expressly recognized" by the contesting states. Considerable room is left in paragraph (b) for the impact of treaties upon general custom, the custom that evidences a "general practice." Although we should not make too much of the language of Article 38, as Lissitzyn has shown, it is still significant to note that this Article does not act as a barrier to the present thesis.<sup>8</sup>

Certainly not all provisions within a particular treaty are generalizable as customary norms. An easy example of a nongeneralizable provision found in nearly every treaty is the clause, usually at its end, providing for the specific means of ratification. Sometimes, however, opposing views are possible upon whether on the basis of general concepts of international law a particular provision in a treaty could become a rule of custom. The World Court has recently provided, in a major opinion, a methodology for solving this problem in certain instances. In the North Sea Continental Shelf Cases,<sup>9</sup> the Court outlined what might be labeled a test of manifest intent: If the structure of a treaty is such that it manifests an intent to have certain provisions generalizable into rules of customary international law while reserving other provisions solely to the treaty, then that intent should be given weight in assessing whether a particular provision can

be cited as having generated a rule of customary law.

The particular problem facing the Court was whether the equidistance principle in Article 6 of the 1958 Geneva Convention on the Continental Shelf<sup>10</sup> was applicable to the Federal Republic of Germany, which had not ratified that convention. Section 2 of Article 6 provided:

Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

In looking at this particular text, the Court found several reasons why the equidistance principle mentioned therein was not of the same "norm-creating character" as some other provisions in the convention, such as the principle of sovereignty of the coastal state over the continental shelf mentioned in Article 2 or the definition of the continental shelf in Article 1. First, Article 6 makes the obligation to use the equidistance method secondary to an obligation to effect delimitation by agreement. This "unusual preface" to a rule of law, in the words of the Court, casts doubt upon whether the equidistance principle was manifestly intended by the Convention to be a generalizable rule of customary law. Moreover, the Court briefly hinted at the question of *jus cogens*,<sup>11</sup> implying perhaps that, whereas some rules of international customary law may eventually become rules of *jus cogens* from which states are not permitted to deviate, the equidistance principle as stated in Article 6 could never become such a binding rule by virtue of the unusual preface encouraging deviation by agreement. Thus, further doubt is cast upon the norm-creating character of the equidistance principle as enunciated in Article 6. Second, the reference in the text to justification by special circumstances for another boundary line, and the ambiguities involved in determining what constitutes "special circumstances," make the case for norm-creation weaker still. Thus Article 6, taken alone, carries little if any persuasion as to the generalizability of the principle of equidistance.

The Court also looked at the structure of the treaty as a whole in assessing its manifest intent. Article 12 provides that at the time of signature, ratification or accession, any state "may make reservations to articles of the Convention other than to Articles 1 to 3 inclusive." Thus the convention is internally divided between the first three articles and all the rest. The Court found that the division corresponded to a manifest intent to have the first three articles enunciate general norms of international law and the others deal only in particular rules for the parties. The ease with which reservations can be made to the latter group of articles suggests that they do not generate norms of law binding upon all states. The Court is basically saying in the Continental Shelf case that any rule from which a state can unilaterally withdraw does not rise to the level of being a legal rule of general validity. Moreover, the Court pointed out that an inspection of the rules involved in the first three articles of the convention substantiates the claim that they enunciate general principles of international law in a manner quite different from the subsidiary way in which the equidistance principle is brought out in Article 6. For instance, Article 2 contains the provision that "the rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation," and Article 3 says

that "the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters." In the words of the Court, these articles "possess . . . [a] norm-creating character."<sup>12</sup> In sum, the structure of the Convention as a whole firmly negates whatever persuasion Article 6 alone might have had in enunciating an equidistance principle of general validity.

Thus the World Court has, in the North Sea Continental Shelf Case, explicitly recognized that some rules in treaties may create or generate norms of general international customary law, and has also provided a method by which such rules may be differentiated from other provisions in treaties. The importance of the case in this respect transcends its subject matter—a dispute over sovereignty in a small area in the North Sea.

### *Judicial Decisions*

In addition to the North Sea Continental Shelf Cases, other international adjudications almost without exception validate the theory that treaties, like acts or omissions of states, generate international customary law. Turning first to the World Court, we note at the outset that the Court has not often had occasion to pronounce upon questions of general international law and its formation. Yet, remarkably, when such questions have arisen in the course of litigation counsel have nearly always invoked treaties not directly binding upon the contesting states as evidence of general custom. Moreover, in its own researches, the Court has cited such treaties. In the *Nottebohm Case*, the *only* specific references to *any* precedent or state practice in the entire judgment were those in the majority opinion to the bilateral nationality treaties concluded between the United States and other states since 1868, including the Bancroft treaties, the Pan-American Convention of 1906, and also the Hague Convention of 1930 on the Conflict of Nationality Laws.<sup>13</sup> Earlier in the opinion the Court referred vaguely to arbitral decisions and other municipal-law cases involving the handling of nationality problems, but these references were not *specific*, and in any event the Court was plainly referring to cases of *dual* nationality. Dual nationality was not an apposite issue in the *Nottebohm Case*, which involved the question whether Mr. Nottebohm's Liechtenstein nationality could be invoked against Guatemala, a state of which Mr. Nottebohm was not a national. But the treaties cited by the Court were indeed pertinent in that they dealt with cases of naturalized citizens returning to the country of their birth.<sup>14</sup> The citation of the Bancroft treaties was particularly remarkable because they were bilateral treaties (some writers feel that bilateral treaties cannot generate international custom), and because the treaties were abrogated when the United States entered the first World War in 1917.<sup>15</sup>

Since *none* of the treaties cited by the Court was shown to be in force between the litigating states, the Court clearly relied upon the treaties as precedential facts for deriving a rule of custom that has become known as the "genuine link" rule in cases of nationality.

I contended in an essay written in 1961 under the supervision of Richard Baxter that the *Nottebohm Case* was clear and significant evidence of a rule that treaties may give rise to customary rules of law affecting nonparties.<sup>16</sup> Although Baxter has taken issue with this thesis, he has given initial and prominent mention in his article to the *Nottebohm* result.<sup>17</sup> He argues, in effect, that the result is impossible and should not have occurred, since there is no showing with respect to any of the treaties cited in *Nottebohm* that they were intended by their draftsmen, or that they purported on their face, to be declaratory of existing customary international law.

Baxter is willing to concede that only in the latter instances-involving intent or a purported declaration-can treaties give rise to general customary law, and then only if the treaty is "consistent" with other evidence of existing international law. But such qualifications on Baxter's part rob treaties of all or nearly all usefulness in the formation of custom. If other evidence of customary law exists, and if the treaty that is cited must be consistent with that evidence, then what need is there for a litigant or a court to cite the treaty at all? The other evidence would itself be enough; the treaty would be surplusage. Yet in the *Nottebohm Case*, the Court cited only the treaties; there was no showing of the state of customary law *dehors* the treaties. Indeed, the case achieved considerable notoriety as a path-breaking decision precisely because, apart from the treaties cited, there did not appear to be any such rule of customary law.<sup>18</sup> Even Baxter concedes that the relevant provisions in the Hague Convention of 1930 cited by the Court in the *Nottebohm Case* "had not been free from doubt" up until that decision.<sup>19</sup> Yet he does not go on to draw the conclusion that the treaties in *Nottebohm* generated customary international law; rather he suggests that the views of the Court on this point "might be open to criticism." In a case, in other words, where the clear reasoning of the World Court is at variance with the theory of one of its leading analytical commentators, the Court is wrong and not the theory.

Of course Baxter could have argued that the *Nottebohm* result was inconsistent with other opinions of the World Court or indeed with other opinions of other tribunals. But he did not make that argument. Quite to the contrary, he listed numerous cases in international tribunals where the same application of the same provisions in the Hague Convention of 1930 to nonparties were the bases for the decisions reached. And he offered no evidence that the World Court had ever thought otherwise of the use of treaties as generating rules of custom binding upon nonparties. The following arguments are intended to show, indeed, that such evidence is simply unavailable.

In the famous *Lotus Case*, for example, the Court referred to the French agent's citation of several conventions dealing with the policing of the seas, such as those concerning the slave trade, damage to submarine cables, and fisheries.<sup>20</sup> The Court then went on to give three reasons why in this case a rule of general international law should *not* be derived from these treaties. First, the Court found it unclear whether the treaties articulated (the Court used the term "expressed") a "general principle of law" rather than a mere exception to an exception--the extraordinary jurisdiction due to the special nature of the "policing" conventions. Second, the *Lotus Case* dealt with the common-law offense of manslaughter, whereas the treaties that were cited dealt with the "policing" of the high seas and thus were substantively inapposite.<sup>21</sup> Finally, and "above all," the conventions concerned only a single ship, rendering it "impossible therefore to make any deduction from them" with respect to the *Lotus* facts involving a collision between two ships of different states. The Court quite clearly went to some length to raise and deal with these conventions and to distinguish them. If it had felt, on the other hand, that the conventions were irrelevant because most of them did not involve both contesting states, they could have been dismissed for that reason alone, saving the Court the trouble to distinguish them substantively.<sup>22</sup>

In the much-analyzed *Asylum Case*, the Court similarly found that "a large number of extradition treaties" cited in the pleadings by the Colombian agent could "have no bearing" on the question in the case which concerned asylum and not extradition.<sup>23</sup> By implication, the Court was saying that, if substantively apposite, the treaties would have been relevant as evidence of a

general principle of law. Later in the opinion the Court cited other treaties, this time concerning asylum, but noted that their conflicting provisions yielded no clear line of practice. In the words of the opinion, there was too much "inconsistency in the rapid succession of conventions on asylum." This is no different from saying that state practice on a given point is too inconsistent to yield any clear rule of customary law.

The Court in the Fisheries Case at one point examined the question of a general rule of customary international law laying down a ten-mile closing line for the indentation of bodies of water in order that they be called "bays."<sup>24</sup> The Court found that "although the ten-mile rule has been adopted by certain States . . . in their treaties and conventions," other states "have adopted a different limit." Consequently, the Court held, the ten-mile rule "has not acquired the authority of a general rule of international law." In short, as in the conventions on asylum, the Court found that substantive inconsistency of the treaties rather than their possible irrelevance to the determination of custom prevented them from giving rise to a general precept of law.

The customary law of treaty-interpretation, an important part of general customary international law, might be said to have two components, one "substantive" and the other "procedural." There are many customary international law "procedural" rules of treaty-interpretation, such as the rules about interpretation, termination, suspension, denunciation, duress, and so forth. But there are also numerous specific "substantive" rules generated by the provisions of other treaties that can be brought to bear in the interpretation of the treaty at hand. Here the interpreting body is in effect taking a rule originating in other treaties and applying it, by virtue of customary law, to the interpretation of a given treaty. The World Court did this in three cases. In the S.S. Wimbledon, the question presented was whether the passage of foreign ships carrying contraband through the Kiel Canal, of which Germany was the riparian sovereign, would compromise Germany's standing as a neutral nation.<sup>25</sup> The Court, by examining Article 380 of the Peace Treaty of Versailles which had set up the regime of the Kiel Canal, held that neutrality would not be jeopardized. To interpret this general article, the Court turned to two outside treaties, those establishing the Suez and the Panama Canals. Despite the considerable substantive differences between the Suez and Panama treaties on the one hand and the Kiel Canal provision of the Versailles Treaty on the other hand,<sup>26</sup> the Court held that the two were precedents for the one because all involved "artificial waterway[s] connecting the two open seas." In the words of the Court, the "precedents therefore afforded by the Suez and Panama Canals invalidate in advance the argument that Germany's neutrality would have necessarily been imperilled." Thus, in its first judgment, the Court in the Wimbledon Case relied upon two treaties not involving the defendant state as party in the establishment of a rule of law binding upon the defendant.

Another case of treaty-interpretation concerned the jurisdiction of the International Commission of the Oder under the Versailles Treaty.<sup>27</sup> To interpret the treaty, the Court found it necessary to inquire into "principles governing international fluvial law in general." This inquiry resulted in a finding that international law required a "community of interest of riparian States." Interestingly, the Court did not look to the practice of states apart from treaties to discover this principle, but rather considered only conventions. In the Court's words, "It is on this conception [of community of interest] that international river law, as laid down by the Act of the Congress of Vienna of June 9th, 1815 and applied or developed by *subsequent conventions*, is undoubtedly based."<sup>28</sup> Finally, in the Mavrommatis Case, the Court noted that the "reservation made in many

arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty" combats the contention that jurisdiction under the specific Mandate in the case at hand, which made no explicit jurisdictional reservation, should not cover disputes arising after the Mandate entered into force.<sup>29</sup> In this as in the Oder Case, the Court looked to treaties not involving the contesting states for general customary principles of treaty-interpretation.

The World Court's most explicit opinion regarding the concept of treaty-generation of customary international law is the recent judgment in the North Sea Continental Shelf Cases.<sup>30</sup> The narrow holding was that Article 6 of the Geneva Convention of 1958 on the Continental Shelf was not binding vis-a-vis the Federal Republic of Germany, which was not a party to that convention. We have already seen in this chapter why this particular article did not generate a general rule of customary international law. But the Court went to considerable pains to affirm that provisions in treaties can generate customary law, and that Article 6 was exceptional. Indeed, the Court found that other provisions in the same treaty were norm-creating in the general sense. In the words of the Court, the first three articles were

regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.<sup>31</sup>

Even apart from what may be inferred as the manifest intent of the Geneva Convention of 1958, the Court refers to the "norm-creating" effect of treaty provisions, which is "indeed one of the recognized methods by which new rules of customary international law may be formed." This norm-creating character is explicitly attributed, in the Court's opinion, to the first three articles of the convention.<sup>32</sup>

The preceding cases drawn from World Court history include all the relevant instances. They point with clarity to the proposition that provisions in treaties, whether bilateral or multilateral, may generate international customary law.

Similar results have been reached in leading cases in other tribunals, both international and domestic. The international military tribunal at Nuremberg in 1947 handed down a judgment which applied to the defendants the provisions relating to the conduct of land warfare contained in the Hague Convention of 1907 and in the Geneva Convention on Prisoners of War of 1929.<sup>33</sup> The Hague Convention was applied despite first, the "general participation" clause (Article 2), which made the convention inapplicable to the circumstances of World War II; second, the fact that the convention prescribed only civil penalties, not criminal sanctions; and third, the limitation of the convention to nations, not individuals. One reason given by the International Military Tribunal for the Far East, in a judgment generally affirming the reasoning of the Nuremberg Tribunal, was that the Hague Convention constituted "good evidence of the customary law of nations."<sup>34</sup> A second reason given at Nuremberg was that "by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as

being declaratory of the laws and customs of war."<sup>35</sup>

If the convention was "good evidence" of customary law, the Tribunal made no attempt to prove it by citing other examples of state practice. Thus what the Tribunal meant by "good evidence" was that the convention taken alone constituted evidence of state practice--which of course it did, in the sense that its signatories committed themselves to obeying its provisions. Similarly, the Tribunal gave no independent confirmation of the argument that by 1939 civilized states recognized the Hague Convention as being declaratory of the laws and customs of war. In the absence of such independent evidence--which surely the Tribunal, with all its resources, would have adduced had it been available--the opinion may fairly be read as saying that the Hague Convention itself, despite its formal direct inapplicability to the circumstances of World War II and to individual persons accused of war crimes, generated international customary law of universal validity.

Additional evidence that this is what the tribunals had in mind is the great wealth of detail contained in the Hague Convention of 1907 and the Geneva Convention of 1929. The tribunals obviously found these detailed provisions important in substantiating the charges against various defendants;<sup>36</sup> thus they "can hardly be accepted as merely expressing accepted usages and customs of war."<sup>37</sup> It strains credulity to suppose that state practice had become so detailed by 1939--particularly *between* 1929, the date of the Geneva Convention, and 1939!--that the conventions were merely "declaratory" of such practice. Rather, the more reasonable interpretation is that the conventions "declared" what the practice is by virtue of the fact that the signatories undertook to declare that practice operative under the conventions themselves.

In one of the most famous municipal-law opinions involving customary international law, the United States Supreme Court in the case of the *Paquete Habana* relied heavily upon treaties not involving the flag country of the captured fishing vessels, the subject of the prize condemnation.<sup>38</sup> The Court held that coastal fishing vessels are exempt from capture as prizes of war. In reaching this determination, the Court cited twenty-four precedential situations (exclusive of the opinions of publicists, which were fairly well divided). Of these, two examples of the acts of states were consistent with the holding reached by the Court, whereas three contradicted it.<sup>39</sup> Three municipal law cases were cited to support the Court's holding, but a leading decision by Lord Stowell reached a contrary result.<sup>40</sup> Five statutes or edicts and one joint edict were consistent with the Court's holding, whereas one contradicted it.<sup>41</sup> These examples present a fairly mixed picture, but the Court had another category of state practice at hand--treaties concluded between various states at various times. The Court cited seven treaties and one statute contingent upon the conclusion of a treaty, all of which exempted coastal fishing vessels from capture as prizes of war.<sup>42</sup> No treaties were cited by the Court or by counsel in the case that took an opposing view. Interestingly, the first two of the twenty-four precedents cited by the Court were treaties concluded between the monarchs of France and England in 1403 and 1521.<sup>43</sup> Moreover, one of the examples of contrary practice cited was action taken in violation of a treaty.<sup>44</sup> Since the Court made no comment on this piece of negative evidence, the inference is that the treaty was more important in the eyes of the judges than its subsequent violation. The *Paquete Habana* Case has received considerable fame for the method it employed in reaching a

conclusion as to customary law, and because of this method is regularly quoted in case-books on international law.<sup>45</sup> Significantly, a tally of the precedents cited by the Court shows that the category most influential in its decision was that of bilateral treaties not involving the state of nationality of the vessels.

Federal courts in the United States have on several occasions cited treaties not directly binding upon the contesting parties as evidence of general customary international law. Alan Schechter has uncovered four such cases;<sup>46</sup> they involve the immunity of diplomats *in transitu*,<sup>47</sup> a rule in the Warsaw Convention applied to a nonparty,<sup>48</sup> whether a seaplane was a vessel subject to salvage within general maritime law (the controlling precedents were conventions not in force in the United States at the time of the action),<sup>49</sup> and a question of the determination of nationality.<sup>50</sup> Although Schechter finds these cases puzzling because the treaties cited therein do not reflect a "general consensus of thought"<sup>51</sup> he thinks that the cases (and he discovered no contrary instances) accord perfectly with the view that treaties generate international custom.

Numerous instances can be found of national courts of other countries citing treaties as authority for general norms of international customary law. A 1927 decision by an Egyptian mixed tribunal applied as general law binding upon Egypt a provision in a convention neither signed nor adhered to by Egypt.<sup>52</sup> In a number of extradition cases, national courts have found that similar provisions in bilateral extradition treaties have become applicable to states which have not expressly accepted the treaties.<sup>53</sup> In 1949 the Court of Appeals of Chile held that a treaty signed but not ratified by Chile was nevertheless a source of a principle of international law that governs the right of Chile to restrict freedom of movement of political refugees in the country.<sup>54</sup> Six years later the Supreme Court of Chile in another case held that Chile must pay full compensation for the Danish ships seized under the right of angary.<sup>55</sup> To support this finding, the Court cited a number of bilateral treaties, including those between Great Britain and the Netherlands of 1654, the United States and Prussia of 1799, the Netherlands and Guatemala of 1856, Chile and France of 1846, and Chile and Belgium of 1846. In so holding, the Court said, "These treaties, as a whole, reveal the existence of sufficient international practice so as to demonstrate the existence of custom. In the last analysis, it is practice which counts. The treaty is only the manifestation of a practice which forms an integral part of custom."<sup>56</sup> To similar effect were two cases decided in 1953 by the Tribunal of Rome. In the first case, two treaties to which Italy was not a party were held to be evidence of a rule of customary international law exempting an American diplomatic agent from liability for a private tort against an Italian national.<sup>57</sup> This decision was easily reached, since it is in accord with general international practice.<sup>58</sup> However, four months later the same court held that a subordinate staff member of the United States Embassy in Rome, even though he was chancellor of the Embassy, is liable for his private acts.<sup>59</sup> According to a prominent textbook writer, a staff member shares the immunity.<sup>60</sup> How, then, did the Court reach its conclusion? It cited two treaties, the only relevant evidence adduced, in favor of its holding: the Agreement Between the League of Nations and the Swiss Federal Council of 1926, and the Agreement of Sinaja Between the European Danube Commission and the Rumanian Government of 1938. Neither the United States nor Italy was party or acceded to these treaties. However, the Court explicitly found that the treaties were citable to demonstrate a rule of "customary" international law.<sup>61</sup> In this as in the preceding cases, national and international courts have realized that treaties, far from being irrelevant to the content of international law, in

fact are the records of state acts and commitments that continually shape, change, and refine the content of customary law.

### *Examples from State Practice*

The judicial decisions just examined should be placed in the context of the substantial historical contribution that treaties have made to general customary law. Georg Schwarzenberger has repeatedly called attention to the number of rules of customary law that "have their origin in standards of conduct which were developed over centuries in a multitude of international treaties,"<sup>62</sup> and he has undertaken elaborate historical research in this area.<sup>63</sup> Of course not all rules of customary law have had their origin in treaties. The personal safety accorded to diplomatic envoys, for example, was purely customary in origin, since the conclusion of a treaty presupposes a safe mission of treaty-negotiation. (Even so, the ambit of "safe-conducts" and later that of diplomatic immunities became the subject of detailed provisions in the early treaties.) Although some treaties may be found which have had no impact upon custom, one must be cautious in accepting the claims of writers that this or that treaty constitutes law solely and exclusively for the parties and has no impact upon general custom. As we shall see later, writers who make such claims often adduce no evidence, other than their own opinions, to support their claims. And, in many instances, the exact opposite of their conclusions can be found upon a close examination of the actual practice of states.

In his study of legal history Schwarzenberger found at least twenty-one treaties concluded by the kings of England with foreign princes during the twelfth century providing what amounted to an international law of peace. In those days, peace depended upon treaties; in their absence, "any foreign prince or merchant was an enemy and, as such, liable to suffer any form of arbitrariness and violence." Schwarzenberger's examination of medieval English practice uncovers a "predominance of treaties as compared with international customary law." Would this predominance be due, he asks, to the greater difficulties in preserving knowledge of the unwritten law? No, for two basic reasons. First, a wealth of rules of customary law were preserved at that time in records such as the *Consolato del Mare*, the Laws of Oléron, and the Black Book of the Admiralty; these represented fields where customs existed, that is to say among merchants. Second, diplomatic correspondence in early days refers to treaties, principles of justice, equity, and reciprocity; surely resort would have been had to customary law with the same frequency had such customs existed, in useful specificity, apart from treaty.<sup>64</sup>

What areas of general customary law were originated and developed in the early treaties? The clearest example is the customary law of treaties. The early treaties, in Schwarzenberger's words, "contained elaborate provisions regarding duration, interpretation, participation of third parties, relations between treaties, and consequences of breach of treaty by one of the contracting parties." Many of these rules today have been telescoped into short phrases or dispensed with altogether, but evidently they originated in misunderstandings in practice that had to be straightened out by explicit elaboration in the treaty instruments themselves. Even the principle *pacta sunt servanda* initially derived from the treaty. Early treaties were elaborately signed and sealed, solemn oaths were added, supernatural sanctions invoked in the preambles, and so forth.<sup>65</sup> The very making of a treaty in a logical sense entailed its binding force, since without a strong expectation of compliance treaties would never have arisen in the first place. Similarly, the meaning of the "most-favored-nation clause" has been spelled out in a number of treaties,

forming the standards that the clause "is incompatible with discrimination against the beneficiary, that it does not exclude discrimination in favor of the beneficiary, that third States constitute the *tertium comparationis*, and that it does not require compliance with any definite and objective rules of conduct."<sup>66</sup> On the other hand, the most-favored-nation clause itself has not given rise to a customary rule requiring most-favored-nation treatment for the simple and logical reason that its usefulness, and hence its meaning, would be destroyed if it applied to all states indiscriminantly. Like other standards, such as that of identical treatment and that of national treatment, the most-favored-nation clause is not a norm of general law but a method referring to differential economic relationships.

Another area of especial historical interest is the law of war. Here, too, treaties have had the greatest impact in shaping general rules. The concept of neutrality was given birth in, and developed by, treaties.<sup>67</sup> "Contraband" was defined in various treaties in the thirteenth and fourteenth centuries. Even the idea of reprisals, which might superficially seem to be a practice *en dehors* the treaty, was developed and elaborated in countless treaties. Indeed, through time treaties have limited the scope of reprisals, have increasingly shielded the state against reprisals for the wrongdoings of its citizen merchants, and finally have become "milestones on the road to the contemporary international customary law of tort."<sup>68</sup> The Hague Conventions of 1899 and 1907 and the various Geneva conventions on prisoners of war today constitute practically the entire general customary law of warfare.<sup>69</sup>

Even the rules underlying the principle of freedom of the seas, according to Schwarzenberger, originated in treaties.<sup>70</sup> Koster has shown that laws relating to piracy on the high seas derive from treaties of the seventeenth and eighteenth centuries.<sup>71</sup> Interestingly, Lauterpacht's Oppenheim finds it "difficult to say that customary International Law condemns" the traffic in slaves.<sup>72</sup> This difficulty is admitted in the face of numerous citations of international conventions that outlaw slave-trade. Lauterpacht's failure to find in all these treaties a customary rule of international law is not repeated by the International Law Commission in its commentary to Article 53 of the new treaty convention. The Commission not only finds trade in slaves to be prohibited by customary international law, but it finds this trade to be one "of the most obvious and best settled rules of *jus cogens*," since any treaty purporting to allow it would be invalid!<sup>73</sup>

The uncertainties and risks associated with the formation of custom apart from agreements have in recent years accelerated the tendency to solve problems by means of conventions.<sup>74</sup> An example is the principle of national sovereignty over superjacent airspace. Article 1 of the Paris Convention on Aerial Navigation of 1919 flatly stated that "every Power has complete and exclusive sovereignty over the air space above its territory."<sup>75</sup> From that point on there was no doubt about the customary law of exclusive sovereignty, even in the United States, which was not a party.<sup>76</sup> Prior to 1919 there had been sharp division of opinion,<sup>77</sup> and although the sovereignty concept in fact was operative during World War I, debate turned on whether it represented a general principle or simply a response to an extraordinary wartime situation.<sup>78</sup> The accomplishment of some nineteenth-century treaties was less dramatic, but constituted a sharper reversal of previous practice. They forged a new rule for the dividing line in river boundaries, establishing that the thalweg, or middle of the main channel, was the boundary line instead of the middle of the stream, as medieval rules had held.<sup>79</sup> By virtue of these treaties alone, the thalweg rule became accepted in customary international law.<sup>80</sup> The

United States, in a river dispute with Mexico, cited a great many treaties concluded between various nations in the 1772-1878 period and argued formally in the Chamizal Arbitration that the "general practice of nations" was "embodied in the principles of international law and conventional arrangements."<sup>81</sup>

International fluvial law has become increasingly concerned with the diversion of river waters by an upstream riparian state. In 1895 Attorney General Harmon delivered an opinion based primarily upon language in an early Supreme Court case involving jurisdiction over a foreign vessel within United States territory.<sup>82</sup> Justice Marshall in that case said that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute."<sup>83</sup> Harmon used Marshall's language to argue that upper riparians were under no international obligation to downstream countries with respect to the diversion and utilization of the waters of international rivers such as the Rio Grande. Perhaps this statement accurately presented customary international law in 1895; indeed, a writer relying heavily upon diplomatic positions taken by the United States, Charles Cheney Hyde, stated as late as 1945 that "a State may divert for its own purposes waters of a river within or passing through its territory."<sup>84</sup> But it is an extremely dubious proposition to rely upon the *arguments* of governments, expressed either through their attorneys or foreign offices, rather than their *acts*. So far as diversion of rivers is concerned, many bilateral treaties have appeared since 1895 that regulate water uses in international drainage basins, and over a hundred such treaties are operative today.<sup>85</sup> The practice of the United States itself is significant. The United States and Mexico signed a 1906 treaty on the Rio Grande under which the United States agreed to deliver at its expense to Mexico 60,000 acre feet of water annually.<sup>86</sup> Since the treaty preserves the formal legal position of each government, William L. Griffin of the Office of the Legal Adviser to the Department of State has written that the treaty is not based upon the recognition by the two governments of the Harmon opinion.<sup>87</sup> Actually, the United States government did not rely upon Harmon's opinion.<sup>88</sup> And in 1909 the United States concluded the Boundary Waters treaty with Canada,<sup>89</sup> setting up a joint commission for some boundary rivers and an appointment system for the Niagara River. In the records of all the negotiations leading to this treaty, Griffin was unable to find any mention of the Harmon opinion. Canadian parliamentary debates of 1910 indicated that the treaty was not framed on the theory of the Harmon opinion.<sup>90</sup> In 1944 a new treaty with Mexico concerning the equitable use of the waters of the lower Colorado Rivers was placed before the Senate Committee on Foreign Relations. Counsel for the United States Section of the International Boundary Commission testified that "Attorney-General Harmon's opinion has never been followed either by the United States or by any other country of which I am aware."<sup>91</sup> An assistant to the Legal Adviser of the Department of State distinguished Harmon's opinion as overly relying upon Chief Justice Marshall's language in an entirely different context, and argued instead that the United States could not properly refuse to arbitrate a demand by Mexico for additional waters of the Colorado in part because of "the practice of states as evidenced by treaties between various countries, including the United States, providing for the equitable apportionment of waters of international rivers."<sup>92</sup> The ensuing treaty, signed in 1949, obliged the United States to deliver to Mexico 1.5 million acre feet of water annually; the treaty contained no formal reservation of legal position.<sup>93</sup>

These, and the many other bilateral treaties concerning equitable apportionment of waters of international rivers, speak for themselves. "It is accepted legal doctrine," argues Griffin in a

Department of State memorandum, "that the existence of customary rules of international law, i.e., of practices accepted as law, may be inferred from similar provisions in a number of treaties." He adds that the number of these treaties on apportionment of rivers-well over one hundred-makes them "persuasive evidence of law-creating international customs."<sup>94</sup> In 1958 the International Law Association reported that "each co-riparian state is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin,"<sup>95</sup> a resolution that has had important bearing in the India-Pakistan negotiations concerning diversion of the Indus River<sup>96</sup> and which writers today generally agree states the customary rule of international law on the matter.<sup>97</sup>

Many other areas of international law shaped largely by treaties could be cited, including consular rights,<sup>98</sup> the minimum standard of treatment of aliens,<sup>99</sup> obligations of new states,<sup>100</sup> extradition,<sup>101</sup> and so forth. Let us conclude with two examples of types of treaties that are assuming increasing importance. First, international codification conventions, such as the various Geneva conventions on the law of the sea, have a direct and immediate impact upon international law. In considering any problem arising since 1958, one can hardly avoid referring to the Geneva conventions, regardless of whether the interested parties have signed them.<sup>102</sup> Second, the United Nations Charter, itself a treaty, has in Articles 2(4) and 51 irrevocably shaped international law relating to the use of force,<sup>103</sup> and in Article 2 the general principles of law. Article 2(6) states that the United Nations organization "shall ensure that states which are not Members of the United Nations act in accordance with these Principles [contained in Article 2 as a whole] so far as may be necessary for the maintenance of international peace and security." This statement shows in a sense the Charter's own awareness that treaty principles may extend to nonparties. It follows the explicit reference in the Preamble to "treaties and other sources of international law."

### *Opinions of Writers*

The opinions of writers on international law do not constitute the "practice of states" nor even "evidence" of it.<sup>104</sup> Nevertheless, at least two useful purposes are served by a brief examination of written opinions on the relation of treaties to custom. First, general trends of opinion may be revealed which in turn may reflect similar views among the nation-state officials directly concerned with applying international law and evaluating the claims of others. Second, some writers may base their opinions on interpretations of state practice that must be reevaluated if the arguments in the present chapter are to be maintained.

In the nineteenth and early part of the twentieth centuries, the many publicists who considered treaties "a fountain of law to others than the signatory states"<sup>105</sup> included writers such as Bluntschli, Despagnet, Calvo, Fiore, Fauchille, Hautfeuille, Pradier-Fodéré, Phillimore, Nys, Lawrence, Smith, Westlake, Wheaton, Cavaglieri, and more recently Politis.<sup>106</sup> These jurists obviously were aware of the great historical impact of treaties upon custom, but since they were never entirely clear about the theoretical underpinnings of their position, the new "contract" theory of Oppenheim and Hall at the turn of the century swung jurisprudential opinion in the opposite direction. Hall and Oppenheim, among others, argued that treaties can be either declaratory or in derogation of the underlying customary law, but in both cases the underlying law remains unchanged.<sup>107</sup> The contract view has persisted strongly among British authors,<sup>108</sup> but in recent years has increasingly been chipped away by the consensus that treaties in some sense "ripen into" or "harden into" or eventually "form part of" customary international law.<sup>109</sup>

This view is reflected in Article 34 of the International Law Commission's draft on the law of treaties, which refers to rules in treaties "becoming binding upon a third state" as customary international law.<sup>110</sup> Even so, neither the International Law Commission nor the recent publicists cited have come up with any evidence showing the amount of time it takes for a treaty to "harden into" international law, what the rule of law is while the treaty is "hardening," or even theoretically how anyone can determine when, if, or how treaty provisions "become" part of customary law. Thus, some writers have avoided the "hardening" or "ripening" arguments, stating directly that treaties form part of customary international law.<sup>111</sup> G. I. Tunkin has lectured at The Hague that "norms of international law may be created by treaties," and that a "treaty is a more suitable means of creating norms of international law than custom."<sup>112</sup> He adds that the majority, if not all, of Soviet authors agree on this point. Of course, a basic difficulty with Tunkin's position, to be considered in chapter 7, is that by "international law" he means "general international law," and by the latter he means rules of law agreed to by particular states. On the other hand, by his choice of the words just quoted, he aligns himself with many recent views on the nature of treaties and custom. More explicit though qualified views on this subject have been expressed in the debates in the International Law Commission during the drafting of the report on treaty law. Gilberto Amado stated in 1964 that the draft article which became Article 34 "confirmed one of the more remarkable phenomena of international law: the fact that certain treaties could lead to the formation of an international custom."<sup>113</sup> Manfred Lachs followed Amado's statement with the observation that the article should be "confined to treaties creating new principles or rules of customary law." J. M. Ruda later said that the principle in the draft article "was incontestable and generally accepted." In his view, "treaties forming international custom acquired binding force for States not parties to them and were a source of rules of law."<sup>114</sup> Earlier, the Yugoslavian delegate, Milan Bartos, said that treaties could "contribute to the formation of a new international custom," and that rules embodied in bilateral treaties could "come to be regarded as the expression of rules of customary international law."<sup>115</sup> In a most significant wording, Special Rapporteur Sir Humphrey Waldock commented in 1966 that treaty provisions could affect third states "by becoming a generator of international custom."<sup>116</sup> Perhaps writers are beginning to abandon the vagueness in the position that treaties "harden" into customary law in favor of a new consensus that treaties, like acts or omissions of states, themselves are a "generator" of international custom.<sup>117</sup>

Several writers looking specifically at the relation between treaty and custom have hedged their positions because of certain treaties which they have claimed did not affect customary law. A previous special rapporteur for the International Law Commission's report on treaties (who left his position to join the World Court), Judge Fitzmaurice, made a list of law-making treaties that have acquired the status of customary rules of law. However, he added, "There have been treaties essentially of a law-making character, which have been signed by a considerable number of countries, but which have nevertheless failed to secure universal acceptance as embodying generally received rules of law, such as the Brussels convention on State-owned ships."<sup>118</sup> Of course, any specifically named treaty might not today represent customary law; a practice subsequent to the treaty, or even a subsequent treaty among other states taking an opposing viewpoint, might have canceled its custom-creating effect. However, Judge Fitzmaurice cited only one treaty that has not, as far as can be determined, been canceled by subsequent contrary practice. The question is thus whether Judge Fitzmaurice is correct in his appraisal of the impact of the Brussels Convention. In the famous "Tate Letter" of 1952, the

Brussels Convention, which waived immunity for government-owned merchant vessels, is cited as a very strong indication of a change in state practice toward the "restrictive theory" of sovereign immunity.<sup>119</sup> The letter presents a cogent case for a general movement away from the absolute theory to the restrictive theory and cites many cases subsequent to the Brussels Convention where national courts adopted the restrictive theory.<sup>120</sup> Although the letter itself acknowledges that the restrictive theory embodied in the Brussels Convention has not achieved *universal* acceptance, the trend in that direction is very strong, and only a few countries, who apparently are re-examining their policy, have not gone along with it. Thus, although Judge Fitzmaurice is correct in saying that the Brussels Convention has not secured "universal acceptance," it has clearly exerted a pressure in favor of a restrictive theory in customary international law. In this sense it is like any other rule of custom. Customary international law is not always obeyed by all states, a situation true of any law in any legal system. But it exerts a significant pressure in the direction of universality, and thus the role that the Brussels Convention has played and continues to play is just as important as the actions of states or their courts with respect to the question of sovereign immunity.

Paul Guggenheim has questioned whether treaties lead to the creation of customary international law because, in his opinion, consular and extradition treaties have not done so.<sup>121</sup> Unfortunately, he has not adduced any evidence to support his contention that similar provisions in these treaties have not led to customary law. In fact, one can hardly say anything about consular law without having recourse to treaties; nearly all the practice of states in this area, as Hyde has given ample testimony,<sup>122</sup> stems from provisions in treaties. Earlier in this chapter, two cases decided by the Tribunal of Rome on diplomatic immunities were cited, in which the court freely looked to provisions in treaties among other states for the relevant customary rule.<sup>123</sup> In the area of extradition, Starke writes that the many extradition treaties of the nineteenth century gave rise to general rules such as those that the nationals of the state demanding extradition and nationals of third states are extraditable.<sup>124</sup> Some courts have found that similar provisions in extradition treaties have become applicable to states which have not expressly accepted the treaties.<sup>125</sup> Whether or not there is a treaty, a state usually surrenders common criminals, although it has no duty to extradite in the absence of a treaty.<sup>126</sup> Perhaps this fact is what Guggenheim had in mind. However, the failure of two states to conclude an extradition treaty can conceivably be interpreted as the constructive conclusion of a "treaty" to grant reciprocal asylum. As McClure writes, "an extradition treaty stipulates an exception to the right to grant asylum."<sup>127</sup> Alona Evans has emphasized that internal legislation and policy bar the United States government from granting extradition in the absence of a treaty with the requesting state;<sup>128</sup> this in effect creates an asylum treaty in the absence of an extradition treaty. Thus, extradition has been articulated to be the contrary of an equally valid norm of customary law, that of asylum. Unless and until the characterization changes, the numerous extradition treaties will continue to crystallize the scope and methods of extradition but will not elevate extradition to the status of an international obligation.

Kaplan and Katzenbach have--significantly--joined other writers who argue that treaties "may have a much wider effect" than simply constituting obligations for the parties thereto.<sup>129</sup> "States are hesitant to make arrangements with one another that are offensive to others," they add, thus arguing that the content of treaties is not at all irrelevant to international law in the way that the content of contracts might be irrelevant to the common law in municipal legal systems.<sup>130</sup> Moreover, the authors point out that general treaty provisions tend to *simplify* the law of nations;

without conventions on the laws of warfare, for example, there might seem to be "different sets of rules for every possible combination of belligerents." However Kaplan and Katzenbach state that some agreements have a direct effect upon customary law and others do not. Which ones do not? They give solely two examples: an agreement by South American nations to apply the vector principle to land claims in Antarctica, and conventions "on the use of tributary rivers." But these examples are clearly special treaties, giving rise to particular regimes having applicability to specific geographic locations. The authors recognize this exceptional category by stating that conventions on tributary rivers are related to "local conditions," and therefore generalizations from such treaties "may serve no useful purpose."<sup>131</sup> Thus, the only two examples given by the authors are not intrinsically related to general custom and can hardly constitute disconfirmatory instances.

The reasons that Kaplan and Katzenbach give for deciding which treaties give rise to custom and which do not, are worth examining. The reasons constitute variations on the "interests approach," which has found a certain currency among American scholars associated with the "Yale" approach to jurisprudence. The vector agreement for Antarctica would fail, the authors assert, because it would "exclude claims by important nations having a strong interest in Antarctic claims." It is clear, they add, "that many important nations have an interest in not accepting the vector principle."<sup>132</sup> Even assuming that this unproved generalization is true, which it probably is, its persuasiveness lies in the fact that specific real estate is at issue. The "vector principle" may sound like a fair generalization but in fact is geared to allowing some claims and disallowing others. This would be true of any generalization about specific real estate if it would operate to destroy some claims and enhance others. As we shall see in chapter 8 on special custom, a strong showing of consent is needed before a nation may be said to have lost its claims to a particular geographic area. The vector principle would fail to work simply because some states would not consent to it, and not because Kaplan and Katzenbach feel that it would be against the interests of such states.

The treaties on tributary rivers would not be generalized to other rivers, the authors contend, "because there is no international interest in extending the particular rule." Treaties will not give rise to customary law unless they regulate "some aspect of behavior the international community (or its most important members) has an interest in enforcing."<sup>133</sup> Here too, the authors have generalized from an instance of special custom (rivers constitute "objective regimes" for navigation purposes) to universal international law by means of an "interests" approach which they are unable to specify. Although nations may have an "interest" in refusing to generalize from examples of particular treaties or special custom, their interest may be due simply to the fact that, short of consent, their positions and claims to particular situations are improved if they do not agree to broad rules that would operate to exclude their claims.

A more basic drawback of the "interests approach" is that it is ultimately circular. To say that certain treaties are not given universal scope because certain states lack an interest in doing so is to beg the question. Every state has some "interest" both in what other states do and in the content of the general rules of international law binding upon all states. There is no ascertainable dividing line between various degrees of interest and, in any event, no way of discovering what each state's interest would be. Short of additional examples not found in the work under discussion, the "interests approach" begs the question and thus is not useful in this area of research.

Probably the most influential hedged statement on the subject is William Bishop's that

"treaties between states not parties to the instant controversy must be used with caution as sources of international law."<sup>134</sup> This statement is important because it appears in a leading American casebook of international law. To support it, Bishop cites one example only,<sup>135</sup> a memorandum by the United States Department of State instructing its ambassador in London to protest against the removal by British authorities of certain enemies of Great Britain from neutral American ships on the high seas during World War I.<sup>136</sup> The particular incident involved the removal of twenty-eight Germans and eight Austrians from the United States steamer *China*. In defense of its action, the British government had argued that a number of treaties of the seventeenth, eighteenth, and nineteenth centuries represented international practice and hence international customary law. The treaties involved groups of signatories such as France-Netherlands (1678), France-England-Spain-Holland (1697), France-England (1713), France-United States (1778, 1800), Sweden-United States (1783), Prussia-United States (1785), the United States and several South American Republics (1825-1887), France-Great Britain (1786), France-Ecuador (1843), and so on. None of the treaties included as parties both the United States and Great Britain. Although, as may be expected, the treaties were not uniform in their stipulations, they did allow for the removal of certain classes of persons from neutral vessels on the high seas without bringing such persons in for adjudication. In its memorandum, the United States argued: "If these treaties can be regarded as representing a practice of nations, as the British Government suggest, it was a practice recognized as permissible only under treaty agreement.... [The treaties] represent an exception to the general practice of nations."<sup>137</sup> Since Bishop's casebook does not state the outcome of this diplomatic argument between the United States and Great Britain, the impression is unfortunately left that the United States' position represents a generally accepted view. However, the particular controversy concerning the removal of enemy personnel from neutral ships on the high seas, in part reflecting the more general problem at that time of British visit-and-search practices<sup>138</sup>, can only be said to have been resolved decisively in favor of the British position. Great Britain never deviated from her legal position, and the incidents were closed when the United States entered the war on the side of Great Britain in 1917.<sup>139</sup> No accounting or adjustment was made on this point at the end of the war. In short, to quote the American position in this controversy is much like an attempt by a domestic lawyer to cite the arguments of losing counsel in a prior case rather than the court's decision in that case. In the years after Attorney General Harmon had given his opinion on the diversion of international river waters, the government of the United States did not hesitate to treat that opinion as only an argument and not a reflection of state practice. The entire history of the concept of custom in international law suggests that states are willing to be bound by rules of law generalizing from previous acts and practices--of which treaties form a part--but not also by the argumentative positions they may have assumed in the past with respect to some of those practices. Otherwise a state might frequently find itself in the impossible dilemma of being bound by contradictory norms: those arising from previous state practice and those arising from the state's own prior argumentative objections to that practice.

### *Theoretical Considerations*

Perhaps the main stumbling block to acceptance of the impact of treaties upon customary law is for some writers their propensity, noted in the preceding section, to analogize treaties to contracts in municipal law. Yet in light of the rapid development of modern international law, as Louis Sohn has written, "one must be more cautious than in the past about analogies from

domestic law."<sup>140</sup> In what ways do treaties resemble contracts? Both are, of course, examples of express agreements, but so are constitutions, charters, and even statutes (as agreements among legislators). Contracts are circumscribed by many laws in domestic legal systems, but treaties historically have had no limitations: treaties have created sovereign states which in turn become capable of entering into treaties; treaties have created mandates and trust territories, international waterways, and many permanent changes in status.<sup>141</sup> Treaties have set up international organizations and international tribunals; their power is of a greater order of magnitude than that of the ordinary contract.

Although there are some similarities in the interpretation of treaties and contracts, basic differences can be found as well. The validity of treaties of peace is an example: the war leading to the treaty cannot be pleaded as a situation of duress invalidating the treaty obligations of the vanquished state. Another example is the doctrine of *rebus sic stantibus*, which may have a much broader effect on treaties than the analogous doctrines of impossibility and frustration in contract law.<sup>142</sup> Contract analogies are not particularly helpful on the question of the conflict of law-making treaties,<sup>143</sup> and in some ways they are misleading in the examination of *travaux préparatoires*.<sup>144</sup> The complex rules relating to reservations to multilateral conventions seem to have no common-law contract analogue.<sup>145</sup>

Some writers may feel that, whether or not treaties are analogous to contracts, their effects must be confined to the immediate parties because that is what the parties *intended*. As an argument, this is open to two basic objections. First is the difficulty of determining what the parties to a treaty intend should be the scope of the treaty. Since the signatories are interested primarily in creating mutual obligations, it is unlikely that convincing evidence can be found pointing to a feeling of exclusiveness on their part. Indeed, many treaties on their face indicate an intention to give the rules that they contain a wide application. The United Nations Charter, the various Geneva conventions on the law of the sea, and other multilateral conventions provide numerous instances of such provisions. All international conventions that have as their aim the codification or progressive development of international law obviously fall into this category. So do many bilateral conventions, an example cited by Bishop being the "Liquor Treaties" made by the United States between 1924 and 1928 with Great Britain, Germany, Panama, The Netherlands, Cuba, and Japan, which provided that the parties "declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters."<sup>146</sup> Second, even if we assume hypothetically that the parties intend to restrict the scope of a treaty to themselves, their intention is fundamentally irrelevant. International law proceeds on the basis of community expectations, not the "will" of particular members of the community.<sup>147</sup> If states A and B act in a manner that other states regard as precedential for the formation of customary law, or if A and B sign a treaty, the intentions of A and B are not significant, but rather the value placed upon the A-B transaction by the rest of the states. If all the states choose to evaluate the A-B transaction as precedential for customary law, then what A and/or B intend, or seem to, is truly beside the point. To put the matter in different words, no "law" compels states to accede to the intentions of particular groups of states with respect to the legal effect of their actions. States in the aggregate are free to interpret in any way they find convenient the particular actions of smaller groups of states. The interpretation placed upon treaties concluded by subsets of the community of states, as the preceding sections of this chapter have endeavored to show, has been to ascribe general customary law consequences to the provisions of those treaties. Such an

interpretation does not frustrate the primary purpose of the parties to a treaty--the delineation of direct obligations for the parties. Rather, what is being ascribed to the treaties is a secondary role, as chosen by the international community, to give effect to the treaties in developing the body of customary law.

If one may not productively argue that parties to a treaty intend to confine the effects of the treaty to themselves, might it be possible to shift ground somewhat and argue that the only treaties that generate custom are those in which the parties intended the treaties to do so? This position would be subject to the same infirmities as the previous one, since parties rarely make it clear that they intend to create new general customary law by their treaties, and even if they do so intend and manifest their intention, no reason appears to place such treaties in a preferred position to all other treaties in which the intent is not clear. The only thing accomplished would be to place a high premium upon draftsmanship that indicates that a given treaty is supposed to have customary-law consequences. But then, why not go a little further and argue that the only treaties which generate custom are those whose parties have indicated an intention for the treaties to be declaratory of existing international law? There are many treaties, such as the international codification conventions, in this category. Should only these treaties and no others generate custom, as Baxter argues in his article mentioned at the beginning of this chapter?<sup>148</sup>

An immediate conceptual problem would then arise: What if a treaty states on its face that its provisions are intended to be, and are, only declaratory of existing customary law, whereas in fact they are obviously sharp departures from it? Unless we take the factual variance into consideration, we are placing a premium upon dishonesty. We are stating that treaties that purport on their faces to "codify" existing international law should be given effect even if in fact they change that law, while those that frankly state that they intend to "change" existing law should not be given any effect at all! Clearly the only way to avoid this absurd result is to adopt, in addition to the subjective test of the intent of the framers of the treaty, an objective test of whether the treaty in fact is consistent with existing rules of customary law. And indeed, Baxter's reasoning obviously leads him to this conclusion. He lays down first a test of intent and second a criterion of consistency (or, at least, not clear inconsistency) with the state of customary international law evidenced from sources other than the treaty.

A further examination of Baxter's important article is necessary at this point. Let us consider first the objective test and then the subjective intent test.

The objective test certainly renders futile the resort to the treaty in the first place as "evidence" (in Baxter's terminology) of customary international law. For if the treaty is a "source" (again his terminology) of customary law only to the extent that it is consistent with proof of such law *dehors* the treaty, then if such proof is available to a litigant what need is there for him to cite the treaty at all? (The notion is analogous to the mysterious procedure examined in previous chapters whereby many scholars in the classic tradition have claimed that if a state's actions are to generate custom, then the actions must be consistent with prior customary law.) To be sure, Baxter realizes the near futility of his objective test when he writes that if the provision of the treaty in question "is to be proved declaratory of customary international law by way of showing the state of customary international law in the absence of a treaty, the value of the treaty lies only in its confirmation of, or failure to depart from, the rule of customary international law."<sup>149</sup> But, we may object, is there any value in this sort of value? What difference can it make to anyone other than a pedant whether a given treaty confirms or departs from existing customary law? Under Baxter's objective test, if the treaty departs from existing customary law,

it has little value as a generator of custom, and if it confirms customary law, there is no need laboriously to find this out because we already know, in that case, what that customary law is.

Nevertheless, Baxter attempts to salvage this objective test by indicating in several places in his article that when external evidence of customary law is not clear, then the treaty carries some presumptive weight in favor of the rule it sets forth. In other words, the treaty can make a difference in advocacy in the many cases where there is a substantial dispute as to the content of customary law *dehors* the treaty. While this might appear to be a sensible resolution of the problem, upon analysis it contradicts the motivating logic of the objective test. That test, it may be remembered, is necessary if one adopts as his overriding criterion the intent of the parties to the treaty as declaring existing law or departing from it. A presumption in favor of the treaty rule when the underlying customary law is unclear, advocated by Baxter, will encourage drafters of treaties to announce falsely that their treaty provisions are declaratory of existing customary law when they know or have reason to know that existing customary law on those points is unclear. Similarly, it will penalize those treaty drafters who honestly reveal on the face of treaties or in the *travaux* that they do not know in which direction customary law points in the absence of the treaty.

Even if we assume somehow that these basic difficulties with the objective test can be surmounted, remaining is the necessity of examining Baxter's subjective test. Only on the premise that the treaty was intended to be declaratory of existing customary law and not constitutive of new law can it be used in Baxter's schema as "evidence" of that customary law. Yet this sort of intent would appear to be extremely difficult to determine, not only for the reason previously given that at best it is a secondary intent in most treaties (where the primary purpose is to carve out clear rules for the parties), but also because framers of a treaty are unlikely to reveal in the negotiations for the treaty their true feelings on this question. In the practical world of international bargaining, one party who wants to convince another to adopt his draft of a treaty provision will probably argue that the other party is not losing anything, or giving up anything, in accepting his draft because, he claims, his draft simply restates what existing international law already is apart from the treaty. If a negotiator, on the other hand, were to admit that his draft is a departure from underlying customary law, then he would have to expect to pay a higher price for its acceptance by the other side. An experienced negotiator would not normally do this. Thus we may reasonably expect both sides to argue that their own drafts incorporate existing international law, and the *travaux préparatoires* will reflect these claims. Indeed, when a compromise final draft is agreed upon, both sides will most probably continue to assert that the final draft, incorporating to a large extent both sides' positions, is consonant with the underlying customary law. In a different setting, the same negotiating strategy is apparent in the debates of the International Law Commission whose mandate it is to codify and to develop progressively international law. Despite the possibility of progressive development, the most successful argument that any member of the Commission can ordinarily adduce in favor of his draft of a convention provision is that it simply restates with accuracy the present customary international law on that subject.

The likelihood is high, therefore, that a scholar looking for a differentiation of treaties according to the intent of their framers will be misled by the many statements in the *travaux préparatoires* that appear genuinely to claim that the intent is no more than a clear restatement of existing law. In his lengthy article devoted to proving the worth of this intent test, Baxter was

noticeably unable to uncover a single instance where an examination of the *travaux préparatoires* revealed an intent on the part of the drafters to create new law. Whatever their real intent, they were prudent enough, and experienced enough, not to reveal any purpose of creating new law. This is indeed true of the Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws, cited by Baxter. Faced with what may have been a masking of true intent in the *travaux préparatoires*, Baxter suggests that this convention must have been intended to create new law because of the provisions it contained. "[T]here can be little doubt [he writes] that the provisions regulating such matters as the nationality of married women and of children imposed on States obligations that had not existed prior to 1930."<sup>150</sup> Yet by examining only the provisions of the treaty, Professor Baxter is, perhaps inadvertently, jettisoning his direct test of intent in favor of an implied intent based solely upon the strictly objective test-whether the treaty itself reflected existing contemporary international law. Yet if this tack is taken, then the entire emphasis on intent is misplaced, and we come down to the simple and uninteresting query of whether a treaty is consistent with or departs from customary international law. Moreover, in the particular case of the Hague Convention of 1930, even the test of constructive or implied intent does not serve Baxter's thesis that a treaty which departs from existing customary law has little or no effect upon the state of that law. For the *Nottebohm Case*, mentioned earlier in this chapter, drew upon provisions in the Hague Convention in establishing law for nonparties. Baxter recognizes this case but fails to explain it; in addition, he fails to explain a long line of cases involving tribunals such as the Italian-United States Conciliation Commission and the Court of Appeal of Cologne that also found that the Hague Convention of 1930 could be cited as proof of general customary law.<sup>151</sup> Thus, in the one example Baxter found where the *travaux préparatoires* might and should have, but did not, reveal an intent to change the law, he is forced to rely upon a textual circumvention of his own test of intent. Moreover, the treaty he used was cited by the World Court and other highly respected international tribunals to advance a proposition quite the opposite of Baxter's thesis on the effect of treaties upon customary law!

Baxter's subjective test of intent, it may be remembered, has two modes of proof-what the framers intended, as evidenced by the *travaux préparatoires*, and what the treaty purports on its face to intend. In this latter category, for roughly the same reasons adduced in the case of the *travaux préparatoires*, very few treaties indeed can be expected to state in terms that they are a departure from existing rules of customary international law. As drafters of treaties become more sophisticated, we may expect treaties either to be silent on the point, or to contain language to the effect that they restate or reinforce existing customary international law. The Genocide Convention is an example of the latter type;<sup>152</sup> although it makes certain acts between a state and its own nationals within the state's own territory an international offense, the treaty purports only to declare what is already existing international law. By virtue of this strong declaratory statement, Baxter is led to conclude that the "burden" of "overcoming the presumption" that the Genocide Convention is evidence of customary law is "yet more difficult to discharge" than in most treaties. Clearly he is reluctant to accept the fact that the convention creates custom, but he reaches almost the same result by his hierarchy of "presumptions." The discomfort that reaching this conclusion must have caused is indicated by Baxter's statement, on the same page as the language just cited but in a more general context, that "it is conceivable that the draftsmen of treaties will attempt to disguise a change in the law as a mere expression of existing law" by the "inclusion of self-serving words of declaration."<sup>153</sup> In short, the very sort of treaty that might

change the law would apparently be the one to purport simply to restate it, but this turns out to be precisely the case in which, trapped by his own logic, Baxter must reluctantly concede that the treaty is very difficult to rebut as evidence of existing law.

The other side of the coin is just as interesting. When Professor Baxter uncovers some treaties (from bygone days when the draftsmen were not quite so sophisticated) that frankly stated their concern with changing the law, these treaties embarrassingly prove to have been accorded as strong a reception as generators of customary law as any other treaties. Baxter cites the Hague Convention of 1907, the Kellogg-Briand Pact of 1928, and the Declaration of Paris of 1856; the first two of these were used in the Nuremberg cases examined earlier in this chapter, and the third, Baxter concedes, has come to be taken as evidence of customary law.<sup>154</sup>

Baxter's thesis would in effect consign future counsel and scholars to the laborious task of discovering the actual intent of the framers of any given treaty whose provisions might be helpful in establishing the existence of a rule of customary law--despite the extreme difficulty of ascertaining the real intent--and then to the task of proving whether the treaty was consistent with customary international law as proved from other sources--despite the fact that, if so, there was no need to cite the treaty in the first place. Counsel before international tribunals have rejected this procedure; rather, they simply cite the provisions in treaties as evidence of rules of customary international law. Nor do courts go through this laborious procedure; they too just cite the treaty provisions (as in the *Nottebohm Case*) or add to the citation some gratuitous language to the effect that the treaties reflected the underlying customary law (as in the Nuremberg cases). Even in this latter instance, the tribunal's language in the Nuremberg cases at least was *dicta*, for the judges evidently relied upon the cited treaties precisely because of the lack of satisfactory evidence concerning the state of customary law *dehors* the treaty. Baxter's entire thesis is possibly the result of what some courts *say*, rather than what all courts *do*. We may more easily conclude that the courts, counsel, and states are right when they cite treaties in support of their arguments concerning rules of customary law, for the treaties simply give rise to such custom. Thus we may avoid the logical difficulties and the laborious and apparently futile procedures suggested by Baxter, while substantially agreeing with what must have given him the impetus to write his article in the first place--the undeniable fact that counsel and courts often and repeatedly resort to the provisions in treaties to substantiate proof of customary rules of international law. The theory underlining the fact that treaties generate customary law is also simple. As we have seen, customary law contains a quantitative element and a qualitative one. With respect to the former, treaties clearly supply the necessary *commitment* to act, as well as, in most cases, subsequent implementation. Using an old theory that the acts of states are evidence of the states' implicit consent to the rules of law generalizable from such acts, James Madison argued in 1806 that bilateral treaties constituted *express* consent and then asked, "Can *express* consent be inferior evidence?"<sup>155</sup> In his opinion, treaties were just as much evidence of customary law to nonparties as were acts of states. Recently Tunkin has written: "An international treaty possesses a quality which makes it especially fit to be a mean of creating norms of international law in the epoch of co-existence: it is an express agreement between States. This is of considerable importance for proving the fact of an agreement and also the contents of this agreement."<sup>156</sup> The other component of custom, the qualitative element, is if anything more evident in treaties than in ordinary acts of states. Nearly all the substantive provisions in multilateral conventions contain formulations of norms of international law that meet all the requirements of *articulation* specified previously. Not all the provisions of bilateral

conventions have this capacity, as the North Sea Continental Shelf Cases have demonstrated, but an examination of their terms in any given case will show whether their provisions do articulate generalizable norms. Some treaties, perhaps including the Bancroft treaties analyzed earlier in this chapter, constitute simply the acts of states for which previous or contemporary articulation might be necessary to complete the qualitative requirement of custom. The old, and generally conceded to be useless, distinction between "law-making" (*Vereinbarung*) and "contract-type" (*Vertrag*) treaties indicates a line which, for the purpose of the present study, separates the articulation of norms from the simple exchange of goods or services.<sup>157</sup> Perhaps the persistence of this distinction in much of the old literature of international law indicated a deeply felt position that "law-making" treaties in fact did just that, despite the gloss of commentators that they were "law-making" for the parties only.<sup>158</sup>

States are, of course, free to disavow in their treaties the articulation component (though not the *fact* that they reached agreement). The United States-Mexican treaty of 1906 on its face explicitly preserved the formal legal position of the two signatories.<sup>159</sup> However, in the draft version of the treaty by the United States, there was a phrase that the action of the United States in entering into the treaty "is prompted only by considerations of international comity."<sup>160</sup> Had that phrase survived in the final version, it might have constituted a clear example of a contra-articulation of the norm of equitable apportionment of waters, a norm which, as we have seen earlier in this chapter, in fact gathered strength from the final version of the 1906 treaty.

Both the commitment and the articulation components of treaties, it is evident, are used as data to validate alleged norms of international law in claim-conflict situations. In the statement that treaties generate custom, which has been used frequently in this chapter, the term "generate" is strictly speaking inaccurate. It is a shorthand device which was perhaps first used by Waldock.<sup>161</sup> Treaties actually stand in a parallel relationship to acts or omissions of states, all of which are data used in the structured sets or arguments herein called "secondary rules." Positive actions and practices of states are no different from treaties as far as the formation of customary law is concerned. Omissions of states--failures to act--are more ambiguous than treaties which prohibit certain actions. The treaty speaks with clarity that a state has agreed to abstain from an action, whereas mere abstention without a treaty does not necessarily mean that states feel a duty to abstain. Finally, treaties are well suited to bringing about change in customary law. A state desiring change is well advised to enter into a treaty, thus eliminating in advance the risk of adverse diplomatic reactions of affected states.

Many writers, as we have seen, admit that treaties tend to generate customary law, but stop short of saying that treaties establish custom "*tout d'un coup*."<sup>162</sup> They either feel that it takes a while for treaties to "harden" into law,<sup>163</sup> or that, by some mysterious process subsequent customary law will arise having exactly the same content as the treaties.<sup>164</sup> To these Alf Ross has answered that to attribute the third-party effect of treaties "to a later formulation of customary law will often be illusory."<sup>165</sup> Ibrahim Shihata counts himself among those who feel that treaties do not give rise to custom immediately, but he cautiously echoes others by saying "it is not possible to specify a certain period of time in which a treaty provision passes into general law."<sup>166</sup> From a claim-oriented point of view, however, one may certainly suppose that a greater degree of persuasiveness will attach to an argument that cites a treaty ratified ten years ago rather than one only a week old. The older the treaty, the more time other states have had to sign a contrary agreement or act in a contrary manner in order to defeat the impetus given to general customary law in the treaty they disliked. This fact, which applies also to ordinary custom,

suggests the psychological phenomenon that one will more likely agree to something which he had a chance to change than to something which is new and has caught him by surprise. But this is only a behavioral theory and not a difference in kind. It would make no sense to say that a treaty has no effect upon customary law for the first four years and six months of its existence, but in the seventh month of the fifth year suddenly becomes transmuted into customary law. One can only look with suspicion upon a statement such as Shihata's, quoted above, that a treaty does become custom at a particular time, but no one can tell when the time comes; rather, the fact that no one can specify a time is a strong argument in support of the proposition that there *is no* such dividing line. Although as a practical matter an older treaty may be better to cite than a new one, a new one is clearly better than none at all. If treaties do at any point in time pass into customary law, they pass at the moment they are ratified. The passage of a period of time simply makes the treaty as a secondary rule more persuasive.

Similarly, it is probably more persuasive to cite a multilateral convention than a bilateral treaty in the attempt to marshal one's proof of customary law. A multilateral convention among ten states is the equivalent of forty-five similarly worded bilateral treaties among the same ten states. Moreover, multilateral treaties are likely to better articulate their principles, in terms of generalizable rules of law, than bilateral treaties. However, there would seem to be "really no differences in principle," as Gihl writes, between the bilateral and the multilateral treaty.<sup>167</sup> Although Baxter cautiously confines his recent article to the impact of multilateral conventions upon customary law, he draws no substantive difference between bilateral and multilateral treaties in his analysis, and indeed his evidence seems to show that both types have the same effect.<sup>168</sup>

On the other hand, multilateral conventions, particularly those that claim to codify existing international law, may be important to general international law from quite another viewpoint. It was previously argued that the term "international law" only has meaning insofar as it reflects the consensus of states about rules affecting them (see chapter 2). As a primary matter, if the international consensus says that a given rule is indeed a rule of international law, then that is the end of the matter; one need not resort to the structured set of validating arguments called "secondary rules" to prove the content of custom. To the extent that a widely adopted multilateral convention represents the consensus of states on the precepts contained therein those precepts are part of international law by that fact alone. In this sense, multilateral treaties are and historically have been more important than bilateral ones. But this effect is not due to anything connected with the concept of custom; it involves a separate phenomenon--"consensus"--which deserves separate study as to its nature, identification, and provability.<sup>169</sup>

In conclusion, we may ask why there has been resistance, such as Baxter's, to the proposition that treaties generate customary international law. A possible ground for reluctance is that states might hesitate to acknowledge that what other states say in their treaties can possibly affect the nonsigners. States tend to be jealous of their sovereignty and are not likely to admit, outside of a legitimate dispute, that they are bound by anything. In actuality, states recognize that they are bound by customary law--by what other states do or refrain from doing. Custom-generation by means of treaty does not add anything to what would otherwise be accomplished without the treaty, and indeed tends to modernize on a continuous basis the content of customary law. Moreover, changing law by treaty affords states a positive alternative for combatting what they think are outmoded rules of customary law. Dissatisfied with the underlying customary law, two or more states enter into a treaty which changes the law for them

and which becomes a factor in changing the law for all. Were it not for this process, boosted in recent years by the International Law Commission, international law would be deprived of most of its modern content. Treaties spell out, in the aggregate, the modern reciprocal interests of most or all of the states, and the deposit and publishing of treaties in the United Nations, and the collection of their provisions in databanks,<sup>170</sup> will serve to increase awareness of the role of treaties. But even short of explicit and general awareness of the process of customary-law creation by means of treaties, one may safely predict that this process will be acknowledged by one side or the other in future claim-conflict situations where a bargaining advantage can be gained by citing rules in treaties. The present chapter may be justified if it contributes in a small way to the formulation of a rationale for such citations.

### Footnotes to Chapter 5

1 "It is of no legal consequence . . . whether an agreement between or among states is called a treaty, a convention, a statute, an agreement, a protocol, or a covenant or charter." Jessup, *A Modern Law of Nations* 123 (1948).

2 For the text see 3 GATT, *Basic Instruments and Selected Documents* (1958).

3 Waldock, for the International Law Commission, has listed those types of treaties that should be excluded from the category of "general law-making treaties": treaties "creating international regimes for the use of a waterway or piece of land or attaching a special regime to a particular territory or locality; . . . treaties providing for the navigation of international rivers or waterways, for the neutralization or demilitarization of particular territories or localities, for mandates or trusteeships of particular territories, for the establishment of a new State or international organization, treaties of cession and boundary treaties, etc." 2 Int'l Law Comm'n, *Yearbook* 27 (1964). See also Berber, *Rivers in International Law* 149-54 (1959) ("regional variations").

4 See Roxburgh, *International Conventions and Third States* 74-95 (1917). In the case of the German Interests in Upper Silesia, the World Court was specifically referring to a *pacta tertiis* situation--the possibility of Polish rights under the Armistice Convention or the Protocol of Spa--when it stated, "A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States." Ser. A, No. 7, at 4, 29 (1926). See also McNair, "Treaties Producing Effects 'Erga Omnes,'" 2 *Scritti di Diritto Internazionale in onore di Tomaso Perassi* 23 (1957).

5 Vienna Convention on the Law of Treaties, 63 *A.J.I.L.* 875, 887 (1969).

6 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, January 27, 1967, 61 *A.J.I.L.* 644, 645 (1967).

7 Baxter, "Multilateral Treaties as Evidence of Customary International Law," 41 *B.Y.I.L.* 275, 285 (1965-66).

8 Lissitzyn, *International Law Today and Tomorrow* 38 (1965).

9 1969 I.C.J. Rep. 4.

10 Text in 52 *A.J.I.L.* 858 (1958).

11 1969 I.C.J. Rep. 4, at 43. The Court said: "Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,-but this is not normally the subject of any express provision, as it is in Article

6 of the Geneva Convention."

12 *Ibid.* The Court found in addition that the number of states that had participated in the convention between 1958 and 1968 was not sufficient to give rise to a general recognition that a rule of law is involved in Article 6. *Id.* at 44. But this argument would apply equally to Articles 1 to 3 which the Court did say were of a norm-creating character. The argument of insufficient adoption also suffers from imprecision; at best it indicates that the Court was not sufficiently persuaded by the number of states ratifying the convention to reverse its stand on the primary argument that Article 6 was not couched in such a way as to be generalizable into customary international law.

13 Nottebohm Case, Second Phase, 1955 I.C.J. Rep. 4, 21-23.

14 Between 1868 and 1928 the United States concluded bilateral treaties with about eighteen countries, not including Liechtenstein, which limited the power of protecting naturalized persons who returned to their countries of origin. The "Bancroft Treaties" were bilateral treaties concluded in 1868 between the United States and Wurtemberg, Bavaria, Baden, Hesse, and the North German Federation, and abrogated on April 6, 1917.

15 The main purposes of the "Bancroft Treaties" were to annul the effects of American nationality granted to persons who had no wish to reside in the United States and who returned to their country of origin frequently in order to evade the obligations of military service. The treaties applied different specific tests. For instance, residence for more than two years creates a rebuttable presumption of intent to stay there-Naturalization Convention with Ecuador, May 6, 1872, 1 Malloy, *Treaties* 434,435 (1910). Or, mere return to the native country constitutes recovery of the former citizenship-Naturalization Convention with Belgium, November 16, 1868, 1 Malloy, *Treaties* 80, 81 (1910). *Cf.* Pan American Convention of 1906, 37 Stat. 1653, U.S.T.S. No. 575 (1906).

16 D'Amato, "Treaties as a Source of General Rules of International Law, 3 *Harv. Int'l. L.J.* 1 (1962).

17 Baxter, *op. cit. supra* n. 7.

18 See Kunz, "The Nottebohm Judgment," 54 *A.J.I.L.* 536 (1960).

19 Baxter, *op. cit. supra* n. 7, at 295-96.

20 P.C.I.J. Rep., Ser. A, No. 10, at 4, 27 (1927), treaties cited in P.C.I.J. Docs., Ser. C, No. 13-II, at 206-07 (1927). The slavery treaty of 1841 included France but not Turkey; the Brussels Convention of 1809 included both; the treaty of 1880 on slave commerce suppression was a bilateral treaty of Turkey and Great Britain; also the 1843 treaty of France and Great Britain with respect to fisheries; the convention on policing fisheries in the North Sea of 1882 not involving Turkey; and the Paris Convention of 1884 on underwater cables involving, among others, France and Turkey.

21 P.C.I.J. Rep., Ser. A, No. 10, at 4, 27 (1927). "[T]he conventions relate to matters of a particular kind . . . and not to common-law offenses."

22 In his famous dissent, Judge Nyholm, P.C.I.J. Rep., Ser. A, No. 10, at 59, 64 (1927), agreed with the Court on the necessity to "examine conventions" as a criterion for the "establishment of a rule of positive law," by which he means customary law (at 59).

23 1950 I.C.J. Rep. 266, 277.

24 1951 I.C.J. Rep. 116, 131.

25 P.C.I.J. Rep., Ser. A, No. 1, at 15, 28 (1923).

26 See the dissents by Judges Anzilotti and Huber, P.C.I.J. Rep., Ser. A, No. 1, at 35,

39-40 (1923), and the dissent of Judge Schükking, *id.* 43, at 46.

27 P.C.I.J. Rep., Ser. A, No. 23, at 5, 26, 27 (1929).

28 *Ibid.* *Italics added.*

29 P.C.I.J. Rep., Ser. A, No. 2, at 6, 35 (1924). To the same effect, see the case of the Muscat Dhows, in Wilson, *The Hague Arbitration Cases* 73-77 (1915), in which the term "protégé" in one treaty was interpreted by reference to its use in completely distinct treaties.

30 1969 I.C.J. Rep. 4.

31 *Id.* at 40.

32 *Id.* at 42, 43.

33 International Military Tribunal, *Judgment* 83 (1947), in Nazi Conspiracy and Aggression: *Opinion and Judgment* (1947).

34 International Military Tribunal for the Far East, *Judgment* 65 (1948).

35 I.M.T., *op. cit. supra* n. 33, at 83. For similar statements, see 4 *Trials of War Criminals before the Nuernberg Military Tribunals* 459-60 (1951) (Ohlendorf Case); 5 *id.* at 153 (Greifelt Case); 11 *id.* at 1240 (von List Case).

36 See 11 *Trials of War Criminals before the Nuernberg Military Tribunals* 462, 535-38 (1950) (von Leeb Case); 1 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* 1-4 (1949) (Netherlands Temporary Court-Martial in Macassar, 1947).

37 15 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* 13 (1949) (commentary). Baxter in his recent article, *op. cit. supra* n. 7, devotes considerable attention to the use of the 1929 Geneva Convention relative to the Treatment of Prisoners of War in the Nuremberg proceedings. In the von Leeb Case, *op. cit. supra* n. 36, the tribunal listed nineteen paragraphs of the 1929 Convention that were binding upon the defendants because they were declaratory of existing customary international law in 1929. For example, as Baxter points out, "the clause of Article 7 which provides that 'prisoners of war shall be evacuated within the shortest possible period after their capture, to depots located in a region far enough from the zone of combat for them to be out of danger' was included by the tribunal but not the requirement that 'prisoners shall not be needlessly exposed to danger while awaiting their evacuation from the combat zone.'" Baxter, *op. cit. supra* n. 7, at 281. The implication of Baxter's analysis is that, if the tribunal excluded certain provisions of the convention on the ground that they did not reflect customary international law in 1929, then it was implicitly agreeing with the thesis propounded by Baxter that only those provisions in treaties which are declaratory of customary law can be cited as evidence of that customary law. However, there are two basic problems with such an analysis in this context. First, there is no showing that the tribunal needed to exclude certain provisions of the 1929 convention in order to reach the judgments it in fact reached concerning the guilt of the defendants. The fact that the tribunal said it relied upon some provisions and not others renders their view as to the latter mere *obiter dicta*. Perhaps these provisions were excluded to make the opinion seem "reasonable" to the defendants without sacrificing any supportive reasons for the judgment. Second, it is far more significant that the tribunal thought it necessary to rely directly upon other provisions of the 1929 convention, for it is likely that if, with all the research facilities and time at their disposal, the prosecutors at Nuremberg had found *anything* in prior customary law on the point they would not have cited the 1929 convention at all. Indeed, the only prior law on the subject appeared to be the Hague Regulations. Yet as Baxter admits, "The fact was that those clauses of the 1929 treaty that were declared to reflect customary law went far beyond the somewhat primitive

provisions of the Hague Regulations dealing with prisoners of war." *Id.* at 282.

38 175 U.S. 677, 686 (1900).

39 Specification here is desirable in light of the widespread misinterpretation of the case. In the opinion, supporting practice adduced on this point consisted of the wars of the French Empire and the United States-Mexican War. Contrary practice: French treaty violation, the wars of the French Revolution, and the Crimean War. *Id.* at 689-99.

40 In support: *The John and Sarah, La Nostra Signora de la Piedad* cases cited by Calvo. *Contra: The Young Jacob and Johanna. Id.* at 690-703

41 In support: French Order in Council, 1780, British Order in Council, 1806, British Order in Council, 1810, France general orders, Japanese ordinance 1894, joint edict of France and Holland, 1536. *Contra: British admiralty order, 1780. Id.* at 688-700.

42 Treaties in support: England-France, 1403, England-France, 1521, France-Holland, 1675, United States-Prussia, 1785, United States-Prussia, 1799 and 1828, United States-Mexico, 1848. Edict subject to the conclusion of a treaty: French ordinance of 1543, repeated in 1584. *Id.* at 687-99.

43 *Id.* at 687. Curiously, this portion of the Court's opinion is completely misread by Shihata, "The Treaty as a Law-Declaring and Custom-Making Instrument," 22 *Egyptian Revue Int'l L.* 51, 73-74 (1966). The opinion states that the early orders of the King of England were made pursuant to a treaty recited in the orders themselves; thus the orders were simply instances of implementing legislation. Shihata apparently has failed to notice this, for he states that the practice with respect to fishing smacks did not start from treaties!

44 175 U.S. 677, 689 (1900).

45 E.g., Bishop, *International Law* 24 (1962); Briggs, *The Law of Nations* 30 (1952).

46 Schechter, "Towards a World Rule of Law-Customary International Law in American Courts," 29 *Fordham L. Rev.* 313 (1960).

47 *Bergman v. DeSieves*, 71 F. Supp. 334 (S.D.N.Y. 1946), *aff'd*, 170 F. 2d 360 (2d Cir. 1948).

48 *Glenn v. Compania Cubana de Aviacion*, 102 F. Supp. 631 (S.D. Fla. 1952).

49 *Lambros Seaplane Base, Inc. v. The Batory*, 215 F.2d 288 (2d Cir. 1954)

50 *Murarka v. Bachrack Bros.*, 215 F. 2d 547 (2d Cir. 1954).

51 Schechter, *op. cit. supra* n. 46, at 327.

52 *Crichton v. Samos Navigation Co.*, 201 *Gazette des tribunaux mixtes d'Egypte* 211 (Trib. Comm. Alexandria, 1927), 3 *Ann. Dig.* 3 (1925-26).

53 *In re Tsirias*, 5 *Ann. Dig.* 276 (1929-30); *In re Placido Martinez Areal*, *id.* at 277; *In re Dilasser*, 19 *I.L. Rep.* 377 (1952); *In re Múnoz*, 14 *Ann. Dig.* 137 (1947); Extradition Case (Germany & Czechoslovakia), 1 *Ann. Dig.* 259 (1919-22). see Puente, "Principles of International Extradition in Latin America," 28 *Mich. L. Rev.* 655, 680-91 (1930).

54 *In re Lechin*, 16 *Ann. Dig.* 1 (1949).

55 *Lauritzen v. Govt. of Chile*, 23 *I.L. Rep.* 708, 729 (1956).

56 *Id.* at 730.

57 *Lagos v. Baggianini*, 22 *I. L. Rep.* 533 (1955).

58 1 *Oppenheim, International Law* 810 (8th ed. Lauterpacht 1955).

59 *Società Arethusa Film. v. Reist*, 22 *I.L. Rep.* 544 (1955).

60 2 *O'Connell, International Law* 969 (1955).

61 22 *I.L. Rep.* 544, at 549.

62 1 Schwarzenberger, *A Manual of International Law* 28 (4th ed. 1960).

63 See Schwarzenberger, *The Frontiers of International Law* (1962).

64 *Id.* at 125-26. Schwarzenberger does not say "in useful specificity," but this qualification may be inferred from his book as a whole.

65 *Id.* at 51.

66 Schwarzenberger, "The Most-Favoured-Nation Standard in British State Practice," 22 *B.Y.I.L.* 96, 119-20 (1945).

67 Schwarzenberger, *op. cit. supra* n. 63, at 112-14.

68 *Id.* at 97.

69 See, e.g., Baxter, "The Duty of Obedience to the Belligerent Occupant," 27 *B.Y.I.L.*

70 1 Schwarzenberger, *op. cit. supra* n. 62 at 28.

71 Kosters, Les fondements du droit des gens, in 4 *Bibliotheca Visseriana* 119 (1925).

72 Oppenheim, *op. cit. supra* n. 58, at 733-34.

73 Int'l Law Comm'n, *op. cit. supra* n. 5. The question whether treaty-law can ever abrogate a rule of *jus cogens* casts doubt on whether there can be such a concept in international law. See Riesenfeld, "Jus Dispositivam and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court," 60 *A.J.I.L.* 511 (1966); Schwarzenberger, "International *Jus Cogens*?", 43 *Texas L. Rev.* 455 (1965). From a claim-oriented point of view, it should be possible to argue that a rule of *jus cogens* simply means a *very strong* rule of customary international law, one that might be changed by a number of treaties having contrary provisions (a large number, or a broad multilateral convention) but is not likely to be changed.

74 See 1 O'Connell, *International Law* 26 (1965).

75 11 *L.N.T.S.* 173

76 See Roper, "Recent Developments in International Aeronautical Law," 1 *J. Air Law & Comm.* 395, 405 (1930); Haley, *Space Law and Government* 40-54 (1963).

77 4 Hackworth, *Digest of International Law* 357-58 (1942).

78 See Latchford, "Freedom of the Air: Early Theories," 1 *Dept. of State, Documents & State Papers* 303 (1948); Kuhn, "The Beginnings of an Aerial Law," 4 *A.J.I.L.* 109 (1910). A summary of many wartime governmental contentions is found in 7 Hackworth, *op. cit. supra* n. 77, at 549-53 (1943). Wartime precedents need not necessarily apply to peacetime, nor *vice versa*. Cf. "freedom of the seas is substantially today a peacetime concept," Jessup & Taubenfeld, *Control for Outer Space* 213 (1959).

79 Treaties cited in 1 Hyde, *International Law* 444 n. 1 (2d ed. 1945).

80 *Id.* at 443-49; 1 Oppenheim, *op. cit. supra* n. 58, at 532; *New Jersey v. Delaware*, 291 U.S. 361, 379 (1934).

81 Chamizal Arbitration, *Argument of the United States of America* 9-25 (1911).

82 21 *Ops. Att'y Gen.* 274 (1898).

83 *Schooner Exchange v. McFaddon*, 7 *Cranch* 116 (1812).

84 1 Hyde, *op. cit. supra* n. 79, at 567.

85 Griffin, "Legal Aspects of the Use of Systems of International Waters," *Dept. of State Memorandum*, S. Doc. No. 118, 85th Cong., 2d Sess. 63 (1958).

86 U.S.T.S. No. 455, 34 *Stat.* 2953 (1906).

87 Griffin, "The Use of Waters of International Drainage Basins Under Customary International Law," 53 *A.J.I.L.* 50, 51 (1959).

- 88 Smith, *The Economic Uses of International Rivers* 145-46 (1931).
- 89 U.S.T.S. No. 548, 36 Stat. 2448 (1909).
- 90 Griffin, *op. cit. supra* n. 87, at 53.
- 91 Hearings Before the Senate Committee on Foreign Relations on Treaty With Mexico Relating to Utilization of Waters of Certain Rivers, 79th Cong., 1st Sess., pt. 1, at 97-98 (1945).
- 92 *Id.*, pt. 5, at 1740-41
- 93 U.S.T.S. No. 994, 59 Stat. 1219 (1949).
- 94 Griffin, *op. cit. supra* n. 85, at 63. A curiously argued counter-contention appears in Berber, *op. cit. supra* n. 3, at 128-59, in a chapter entitled "Treaties as a Source of the Law." Citing many of the same treaties, Berber argues that some create regional customary law and others do not, depending largely on their wording. Berber purports to deduce from the language of the various treaties the *motivations* of the parties--whether they acted from "particular and concrete political or other motives" or from a feeling of *opinio juris*. *Id.* at 135.
- 95 Int'l Law Ass'n, *Report of the Forty-Eighth Conference* ix (1959)(Resolution, para. 2, Sept. 1958, New York.)
- 96 See Laylin, "Indus River System--Comments," 1960 *A.S.I.L. Proceedings* 144,147.
- 97 See Bourne, "The Right to Utilize the Waters of International Rivers," 3 *Canadian Y.B.I.L.* 187 (1965).
- 98 See 3 Hyde, *op. cit. supra* n. 79, at 1323.
- 99 See Schwarzenberger, *op. cit. supra* n. 62, at 219.
- 100 "[T]he agreement between States reflected in the treaties [by which independence is granted to former colonial territories] goes far in the direction of crystallising custom." 1 O'Connell, *op. cit. supra* n. 74. at 23
- 101 See n. 53, *supra*; n. 124, *infra*.
- 102 See Sørensen, "Principes de droit international public," 101 *Recueil des Cours* 5, 80 (1960).
- 103 See Brownlie, *International Law and the Use of Force by States passim* (1963).
- 104 See *The Queen v. Keyn*, 2 Ex. D. 63, 202-04 (Crown Cases Reserved 1876), excerpted in Bishop, *op. cit. supra* n. 45, at 35-36.
- 105 Hall, *International Law* 7 (5th ed. Higgins 1924).
- 106 Bluntschli, *Le droit international codifié* 5 (4th ed. 1886); Despagnet, *Droit international public* 76-77 (4th ed. 1910); 1 Calvo, *Le droit international théorique et pratique* 160 (5th ed. 1896); 1 Fiore, *Trattato di diritto internazionale pubblico* 147 (4th ed. 1904); 1 Fauchille, *Traité de droit international public* §§ 53-54 (8th ed. Bonfils 1922); 1 Hautfeuille, *Droits des nations neutres* xiv-xv (3rd ed. 1868); 1 Pradier-Fodéré, *Traité de droit international public* 82-86 (1885); 1 Phillimore, *Commentaries on International Law* 53 (3rd ed. 1879); 1 Nys, *Le droit international* 161-66 (2d ed.1912); Lawrence, *The Principles of International Law* 99 (7th ed.1910); Smith (Earl of Birkenhead), *International Law* 25 (6th ed.1927); 1 Westlake, *International Law* 16 (2d ed. 1910); Wheaton, *Elements of International Law* 24 (8th ed. Dana, 1866); Cavaglieri, *Lezioni di diritto internazionale* 25-27 (1925); Politis, *The New Aspects of International Law* 16 (1928).
- 107 Hall, *op. cit. supra* n. 105 at 7-8; 1 Oppenheim, *op. cit. supra* n. 58, at 27.
- 108 See Parry, *The Sources and Evidences of International Law* 29-32 (1965); Waldock, "General Course on Public International Law," 106 *Recueil des Cours* 3, 84 (1962).
- 109 See Hudson, *The Permanent Court of International Justice* 609 n.38 (1942) ("forms

part of"); Corbett, "The Consent of States and the Sources of the Law of Nations," 6 *B.Y.I.L.* 20, 24 (1925) ("hardening into"); Baxter, *op. cit. supra* n. 7, at 49 ("transmuted into"). See also Kopelmanas, "Custom as a Means of the Creation of International Law," 18 *B.Y.I.L.* 127, 136-38 (1937); Sørensen, *Les sources du droit international* 95-98 (1946); Jenks, "State Succession in Respect of Law-Making Treaties," 29 *B.Y.I.L.* 105, 108 (1952); Schwarzenberger, "The Inductive Approach to International Law," 60 *Harv. L. Rev.* 539, 563 (1946).

110 Int'l L. Comm'n, *op. cit. supra* n. 5, at 375.

111 See McClure, *World Legal Order* 149 (1960); Tunkin, *Droit international public* 90 (1965); Kopelmanas, *op. cit. supra* n.109, at 136; Séfériadès, "Aperçus sur la coutume internationale et notamment sur son fondement," 43 *Revue Générale de Droit International Public* 129, 135 (1936); Pollock, "The Sources of International Law," 2 *Col. L. Rev.* 511, 512 (1902).

112 Tunkin, "Co-Existence and International Law," 95 *Recueil des Cours* 5, 8, 22, 23 (1959).

113 1 Int'l Law Comm'n, *Yearbook* 110 (1964).

114 *Id.* at 111.

115 1 Int'l Law Comm'n, *Yearbook* 257, 258 (1961).

116 Sixth Report on the Law of Treaties, G.A.O.R., A/CN.4/186/ add.2, at 22 (1966).

117 For an earlier view by the present author, see D'Amato, "Treaties as a Source of General Rules of International Law," 3 *Harv. Int'l L. J.* 1 (1962).

118 2 Int'l Law Comm'n, *Yearbook* 95 (1960).

119 Letter of Acting Legal Adviser, Jack B. Tate, to Dept. of Justice, May 19, 1952, 26 Dept. State Bull. 984 (1952).

120 See Bishop, "New United States Policy Limiting Sovereign Immunity," 47 *A.J.I.L.* 93 (1953)

121 1 Guggenheim, *Traité de droit international public* 51-52 (1953).

122 3 Hyde, *op. cit. supra* n. 79, at 1322-26.

123 See nn. 57, 59, *supra*.

124 Starke, *An Introduction to International Law* 44 (6th ed. 1967).

125 See n. 53, *supra*.

126 Morgenstern, "The Right of Asylum," 26 *B.Y.I.L.* 327, 329 (1949); Jacobini, *International Law* 107 (1962).

127 McClure, *op. cit. supra* n. 111, at 150 n.41.

128 Evans, "Acquisition of Custody Over the International Fugitive Offender-Alternatives to Extradition: A Survey of United States Practice," 40 *B.Y.I.L.* 77, 93 n. 154 (1964).

129 Kaplan & Katzenbach, *The Political Foundations of International Law* 240 (1961).

130 *Id.* at 243. The contents of contracts in municipal-law systems are not always irrelevant to the formation of general common law of contracts; they provide precedential situations for "business practices" and "business expectations" that many Anglo-American courts, particularly in England with respect to the law merchant, have acknowledged in judicial decisions.

131 *Id.* at 240-42.

132 *Id.* at 240 146.

133 *Id.* at 241.

134 Bishop, *op. cit. supra* n. 45, at 32.

135 Perhaps Bishop leans to the view that treaties generate customary law, for he follows his single example with two quotations from writers to the opposite effect. *Id.* at 32-33.

136 1 U.S. Foreign Rel. Supp. 632, 669 (1916), quoted in part in Bishop, *op. cit. supra* n. 45, at 32.

137 1 U.S. Foreign Rel. Supp. 669 (1916).

138 See Tucker, *The Law of War and Neutrality at Sea* 338-43 (1957).

139 See 1 U.S. Foreign Rel. Supp. 526 (1917).

140 Sohn, "The Many Faces of International Law," 57 *A.J.I.L.* 868, 869 (1963)

141 See McNair, "The Functions and Differing Legal Character of Treaties," 11 *B.Y.I.L.* 100, 103-04 (1930).

142 The doctrine of *clausula rebus sic stantibus*, if applied to commonlaw contracts, "would have a devastating effect." McNair, "So-Called State Servitudes," 6 *B.Y.I.L.* 111, 122 (1925).

143 Jenks, "The Conflict of Law-Making Treaties," 30 *B.Y.I.L.* 401, 406 (1953).

144 Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties," 48 *Harv. L. Rev.* 549 (1935).

145 See the advisory opinion on Reservations to the Genocide Convention, 1951 I.C.J. Rep. 15; Lissitzyn, "Efforts to Codify or Restate the Law of Treaties," 62 *Col. L. Rev.* 1166, 1200-04 (1962).

146 Bishop, *op. cit. supra* n. 45, at 483-84.

147 For a similar argument with respect to the "will" of a legislator, see Kelsen, *General Theory of Law and State* 34 (1945).

148 Baxter, *op. cit. supra* n. 7.

149 *Id.* at 291

150 *Id.* at 294.

151 *Id.* at 295 nn. 1 and 2.

152 78 U.N.T.S. 277 (1948).

153 Baxter, *op. cit. supra* n. 7, at 291.

154 *Id.* at 279-85. Baxter says, without adducing evidence, that the Declaration of Paris of 1856 was "firmly regarded as constitutive of new law" at the "time of its adoption," though it passed into customary law later. *Id.* at 278. This is a wholly gratuitous remark in the absence of evidence that the provisions in the convention at the time subsequent to 1856 were cited by any party in any dispute only to have its claim *rejected* on the basis that the new law of the convention had not yet passed into the realm of custom.

155 Madison, "Examination of the British Doctrine," in 2 Madison, *Letters and Other Writings* 262 (1867).

156 Tunkin, *op. cit. supra* n. 112, at 22.

157 See Starke, "Treaties as a 'Source' of International Law," 23 *B.Y.I.L.* 341 (1946); Scelle, *Le pacte des nations et sa liaison avec le traité de paix* 49 (1919); Gihl, "The Legal Character and Sources of International Law," 1 *Scandinavian Studies in Law* 53, 58-60 (1957).

158 For an article that restates these positions, see Levi, "Law-Making Treaties," 28 *Minn. L. Rev.* 247, 250-54 (1944).

159 U.S.T.S. No. 455, 34 Stat. 2953 (1906).

160 Griffin, *op. cit. supra* n. 87, at 51-52.

- 161 Sixth Report on the Law of Treaties, G.A.O.R., A/CN.4/186/ add.2, at 22 (1966).
- 162 1 O'Connell, *op. cit. supra* n. 74, at 24.
- 163 See n. 109, *supra*.
- 164 1 O'Connell, *op. cit. supra* n. 74, at 24.
- 165 Ross, *A Textbook of International Law* 84 (1947).
- 166 Shihata, *op. cit. supra* n. 43, at 80.
- 167 Gihl, *International Legislation* 72 (1937).
- 168 Baxter. *op. cit. supra* n. 7.
- 169 See D'Amato, "On Consensus," 8 *Canadian Y. B. Int'l L.* 141 (1970).
- 170 See Rohn, "The United Nations Treaty Series Project," 12 *Int'l Studies Q.* 174 (1968). An interesting attempt to quantify substantive issues in this computerized jurisprudence project is Vaughn, "Finding the Law of Expropriation: Traditional vs. Quantitative Research," 2 *Texas Int'l L. Forum* 189 (1966).