

Vladimir—Đuro DEGAN*

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TWO MODES OF GENERATING CUSTOMARY RULES OF GENERAL INTERNATIONAL LAW

1. INTRODUCTION

Unlike general principles of law, which are common to all law (municipal legal systems, international law, transnational and supranational law), customary international rules are peculiar to international law only. They emerge in practice of States and other international bodies and are aimed at regulating specific international relations.

Most general principles of substantive law,¹ as well as basic principles of judicial procedure,² have for a long time been embodied in customary international law, too. Thus they can be treated at the same time as general principles of law and as customary rules of general international law. We shall treat here only customary legal rules.

In spite of its logical inconsistency, most authors still adopt the notion of international customary rules from Article 38 (1b) of the *Statute of the Permanent Court of International Justice* of 1920, »as evidence of a general practice accepted as law«. This definition is obviously illogical, because a general practice which is accepted as law can be evidence of international customary rules, and not *vice versa*.

* Associé de l'*Institut de Droit international*.

¹ Principles of good faith, and prescription; or in the law of treaties — *pacta sunt servanda*, *clausula rebus sic stantibus*, facts vitiating consent by parties to a treaty or contract: coercion, fraud, error; or circumstances precluding wrongfulness of an act: Act of god (*force majeure*), distress, necessity, self-defense; etc.

² Equality of the parties before a tribunal, binding force of final decision of the tribunal (*res judicata*), pendency of a case (*litispendingence*), principle that judgment must have relevant grounds and reasons, etc. The lack of some of these rules, or their deliberate violation, affects the judicial character of the procedure and of the final award, as well.

However, this definition resisted the revision of the *Statute of the Permanent Court* in 1929 and was literally accepted into Article 38 of the *Statute of the new International Court of Justice* in 1945. It accurately indicates two elements of customary international rules, a material element: practice, which can be general, or common to two or more international persons in their mutual relations only; and a psychological element: *opinio juris sive necessitatis*, i. e. the fact that a uniform, consistent and durable practice (or »usage«) has been »accepted as law« by its participants.

These two elements³ have been criticized in doctrine and especially the psychological element.⁴ However, this notion of customary legal rules has survived all its critics. The International Court of Justice insists on both elements from Article 38 (1b) of its Statute.⁵ There are, therefore, no rational reasons to disregard this concept of customary international law. This, however, does not mean that all peculiarities of practice and of *opinio juris* are clear in the process of ascertaining and identification of customary international legal rules in force.

It is clear that practice of subjects of international law is the only relevant factor in generating customary rules. These are first of all States, then intergovernmental organizations, but also recognized insurgents within their limited capacity to act. Most authors are inclined to ascribe the practice of political bodies of

³ Anthony A. D' Amato replaced these two elements of customary law by »articulation« as its qualitative element, and by »act or commitment« as its quantitative element. Cf., *The Concept of Custom in International Law*, 1971, pp. 73—98, 270—272. However, his theory of custom is too hard to comprehend in order to be related to the practice of International Court of Justice. Therefore, that what he calls »traditional views« in the theory of custom seems to remain parsimonious in regard to his own.

⁴ Cf., Hans Kelsen: *Principles of International Law*, New York 1952, p. 307; Paul Guggenheim: *Traité de Droit international public*, tome I, Genève 1953, pp. 47—48. This author has, however, changed his position recognizing, like most other authors, both elements of customary rules. — *Traité de Droit international public*, tome I, 2ème édition, Genève 1967, p. 107.

⁵ Cf., Permanent Court of International Justice, *Lotus case*, Series A, No 10, p. 31; International Court of Justice, *Rights of Passage, Reports* 1960, p. 40; *North Sea Continental Shelf, Reports* 1969, p. 44, §77; *Continental Shelf* (Libya v. Malta), pp. 29—30, §27; *Nicaragua, Reports* 1986, pp. 97—98, §184; 99—103, §§188—193; p. 106, §202; oo, 108—109; §207; p. 111, §211. For other cases see *infra* n. 10. Cf., presentations of the practice of the Court — Karol Wolfke: *Custom in Present International Law*, Wrocław 1964, pp. 29—42; Krzysztof Skubiszewski: »Elements of Custom and the Hague Court«, *Zeitschrift für Ausländisches und Öffentliches Recht und Völkerrecht* 1971, pp. 810—854; Peter Maggenmacher: »La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale«, *Revue générale de droit international public* 1986, pp. 5—125.

intergovernmental organizations, such as the UN General Assembly or Security Council, to States whose representatives act in these bodies, rather than to organization itself.⁶ That means that most customary rules are created in practice of States to regulate relations between States. States are in this capacity at the same time creators and addressees of customary norms of international law. This does not, however, exclude practice of administrative agencies on behalf of respective organization within its own capacity as relevant in customary process. It is, nevertheless, hard to believe that this kind of practice of international organizations can affect rights and duties of sovereign States.⁷

However, other aspects of practice as an element of customary rules are still not free from doubts. Does it consist of formal, written acts, or of simple conduct, or even of omissions to act?⁸ What kind of State bodies can be involved in relevant practice generating customary rules? Are they only bodies competent to assume legal obligations on behalf of the State, having at the same time the treaty making capacity, or even a larger group of persons can act in its own name? Even more difficult is the question of density, uniformity, consistency and duration of a common State practice capable to generate a customary legal rule.

Opinio juris is the most delicate question. It is obvious that States do not have their own mind. Only a legal conviction that a uniform practice has generated a customary rule by the policy makers inside a State can be relevant.⁹ However, different persons at different levels of State administration can have at different times different convictions concerning existence and contents of customary legal rules. Nevertheless, the International Court of Justice makes a sharp difference between *opinio juris*, i. e. belief that a settled practice is »accepted as law«, and various extra-legal factors, e. g. considerations of convenience or political expediency, or a temporary acquiescence expecting the final settlement of a problem, or a simple courtesy.¹⁰ Therefore, a State cannot have different will at the same time. What one administration has »accepted as law« cannot be neglected by future administra-

⁶ Cf., Max Soerensen: »*Principes de droit international public*«, *Recueil des Cours* 1960, t. 101, p.; Mark E. Villiger: *Customary International Law and Treaties*, Martinus Nijhoff 1985, pp. 5—10.

⁷ This conclusion is not to be confused with responsibility of a State for breach of an agreement concluded with an international organization.

⁸ For the conclusions of the Permanent Court of International Justice in this regard in *Lotus* case, see *infra*, n. 15.

⁹ Cf. a discussion on this problem — A. A. D' Amato, *op. cit.*, n. 3, pp. 33—41.

¹⁰ Cf., *Asylum* case, *Reports* 1950, pp. 277, 286; *Rights of US Nationals in Morocco*, *Reports* 1952, pp. 200—201; *North Sea Continental Shelf*, *Reports* 1969, p. 44, §77.

tion by a simple change of conviction on what the law does consist of.

In spite of qualification of »international custom« as being evidence of »general practice« accepted as law, the International Court has for a long time recognized the existence of particular customary rules, giving rise to rights and obligations for a limited number of international legal persons.¹¹

But the main practical problem has remained concerning the conditions for generating customary rules of general international law, which are binding for all international bodies. If we neglect general principles of law, which as an autonomous source have a very limited scope in present international law, custom is the main process in which rules of general international law arise, modify and terminate. No other law-creating process in this domain exists. Treaties cannot create rules of general international law on their own. The same applies to resolutions of the UN General Assembly, and in particular to unilateral acts of States. For every legal rule of this kind a general practice and an *opinio juris communis* must be proved.

However, there is an old doctrinal controversy here. Authors of positivist inspiration deny obligatory character of any legal rule for a State which did not accept it either expressly in form of a treaty, or tacitly as a customary rule of law.¹² And this concept of custom as *tacitus consensus*, which respects the sovereignty of all States, is hardly compatible with the existence of general international law. For every such rule it would be necessary to prove participating in practice and in *opinio juris* practically of all States. It would be wrong to deny the very possibility of generation of such customary rules,¹³ but they would be never-

¹¹ Cf., G. Cohen — Jonathan: »La coutume locale«, *Annuaire français de droit international* 1961, pp. 119—140; Anthony A. D' Amato: »The Concept of Special Custom in International Law«, *American Journal of International Law* 1969 (AJIL), pp. 211—223.

¹² Cf., Dionisio Anzilotti: *Cours de droit international*, I-er vol., Paris 1929, pp. 73—74; Arrigo Cavaglieri: *Corso di diritto internazionale*, terza edizione, Napoli 1934, p. 63; Karl Ktrupp: *Elements du droit international public*, 2e édition, vol. I, Paris 1930, p. 14. For Soviet views see Дурденевский — Крылов (ред.): *Международное право*, Москва 1947, стр. 20—28; П. И. Луккин: *Источники международного права*, Москва 1960, стр. 15; F. I. Kozhevnikov (Ed.): *International Law*, Moscow 1961, p. 12; Grigory Tunkin (Ed.): *Contemporary International Law*, Moscow 1969, I. I. Lukashuk: »Sources of Present-Day International Law«, pp. 174—179; A recent view — Prosper Weil: »Towards Relative Normativity in International Law«, *AJIL* 1983, pp. 413—442.

¹³ There is no State of present which does not assume — by may of the UN Charter or by one or more other international instruments, the duty to respect principles of *pacta sunt servanda*, sovereign equality of States, non-intervention, peaceful settlement of disputes, refraining of threat or use of force, etc.

theless too rare and too scarce that their sum could constitute a complete system of legal rules.

But some domains of international regulation have a meaning only if they consist of rules of general international law. Because all seas and oceans are interconnected and constitute a whole, it is useful for international navigation, fisheries and other peaceful uses of the sea, that uniform rules of universal scope of application regulate all the main problems of the law of the sea. The same applies to the rules of diplomatic and consular contacts. The necessity of maintenance of international peace and security requires some rules of general international law aimed at restricting otherwise unlimited sovereign will of States in regard to their use of force. Finally, humanitarian reasons have imposed many general and peremptory rules of the law of warfare with regard to the protection of wounded, sick shipwrecked, prisoners of war, civilians, etc.

The existence of rules of general international law is proved by some treaties, by declarations of the General Assembly and by some decisions of the International Court. And many States in their official declarations recognize these rules as such, having a universal scope of application, and regardless the conditions of their creation.

It is therefore generally admitted that general practice does not mean universal practice.¹⁴ Silence of States in a process of generation of these rules is construed as their acquiescence, even when there is no proof of their tacit acceptance.¹⁵ It is, therefore, considered that in the formation of a new general customary rule it is sufficient that a minority of States which are ready to act, do take part, provided they include States having special interest in the matter. Such a law-creating practice does not usually meet opposition and protests by a larger number of other States. Few individual protests must be isolated and overcome. In such a case a newly emerged customary rule will become binding on all States, except the so-called «persistent objectors» who succede to create a particular customary rule exempting themselves from the universal scope of the general rule.

The foregoing does not however relate to the so-called peremptory norms of general international law (*jus cogens*) for the

¹⁴ Cf., Sir Humphrey Waldock: «*General Principles of Public International Law*», *Recueil des Cours* 1962, t. 106, p. 44. Even Soviet positivist Tunkin makes a concession here claiming «unanimous or almost unanimous practice». Cf., Г. И. Тункин: *Теория международного права*, Москва 1970, стр. 141.

¹⁵ Thus, the assertion of the Permanent Court of International Justice in *Lotus* case of 1927, that abstention of States to act would only provide evidence of a customary rule, if it could be shown that it did not prove accurate that it has been based on their being «conscious of a duty to abstain». Cf., PCIJ, *Series A*, № 10, p. 31.

purposes of the *Vienna Convention on the Law of Treaties* of 1969. Its Article 53 qualifies a norm of this kind, as »a norm accepted and recognized by the international community of states as a whole and as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character«.¹⁶

This concept of *jus cogens*, which makes void any existing or new treaties conflicting with it, and with specific customary rules as well, is not all embracing. Such norms could be named as *jus cogens ex tunc*. There is another kind of peremptory customary rules which for reasons of convenience can be named *jus cogens ex nunc*. They preclude practices or treaties contrary to them only for future and until they do not suffer the changes themselves. However, these peremptory and general rules respect all acquired individual rights of States based on prescription, on historic title or on particular customary rules, as exceptions to them. That is for instance the relationship between general and customary rules on bays (including the peremptory rule of the breadth of territorial sea), and of the so-called »historic bays«. The general rules of peremptory character of this kind are not *jus dispositivum*, because States cannot dissociate from them in their specific treaty or particular customary relations. They are neither *jus cogens* for the purpose of the *Vienna Convention on the Law of Treaties*, because they do not make null and void historic and other acquired rights.

2. GRADUAL CUSTOMARY PROCESS

In such a way, the generation of customary legal rules is a continuous, gradual and progressive social process which in fact never ends.¹⁷ Normally that process begins with a particular practice of one or a few States joined by the practice or acquiescence of a larger number of other States until it attains necessary generality, uniformity, density, continuity and duration. It is normal that in an unknown moment such a practice crystallizes into

¹⁶ Following this qualification such a norm can only be a customary norm of general international law. Treaties cannot by themselves create norms »accepted and recognized by the international community of States as whole«. However, a subsequent norm, modifying a peremptory norm in force, can first be laid down in a multilateral treaty in order to be transformed into new general customary law of the same character.

¹⁷ Cf. on custom as a social process in general — François Geny: *Méthode d'interprétation et sources en droit privé positif*, seconde édition, tome 1er, Paris 1919, pp. 316—446 (especially pp. 345—350, 355—356). This is so far one of the best presentations of custom in law, which has much influenced doctrine and practice of international law. Max Soerensen, *op. cit.*, n. 6, asserts that custom is being »le résultat d'un processus social«.

a binding rule of law by means of conviction of its participants that exactly such a conduct is in accordance with law, and that its disregard provokes international responsibility for violation of a legal obligation.

This is however not a process of degree. There are many usages which have never been transformed into customary rules of international law. Thus, the International Court of Justice in its Judgment in the *North Sea Continental Shelf* cases of 1969, has concluded that:

»... The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e. g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.«¹⁸

Max Soerensen has explained an even more trivial example:

»No practice is as consistent as using white paper for writing diplomatic notes. Nevertheless, no Government will transgress international law if it adopts a different colour. That means that a choice between different categories of practice is ineluctable.«¹⁹

However, when this gradual customary process comes to its end, it is almost impossible to ascertain precisely when a settled practice crystallizes into a new legal rule. Many scholars quote familiar metaphors of the formation of a path across a common where it is difficult to pin-point the precise moment at which the route acquired the character of an acknowledged path.²⁰ As Sir John Fisher Williams put it: »The Rubikon which divides custom from law is crossed silently, unconsciously and without proclamation«.²¹ Thus, Sir Humphrey Waldock is right while saving that the formation of customary law is a misterious phenomenon.²²

The same applies to adaptating of a customary rule already in force to changing social and political conditions, with its possible termination, or its substitution by a new and different customary legal rule.

Generally speaking, due to its fluctuating and unstable character, it is much more difficult to establish the responsibility for breach of a customary rule of international law than the responsibility for violation of an obligation from a written treaty. Always and again it is necessary to prove the very existence of a

¹⁸ I. C. J. Reports 1969, p. 44, §77.

¹⁹ Op. cit., n. 6, p. 50.

²⁰ Cf., Pitt Cobbett: *Cases and Opinions on International Law*, 3rd Edition, London 1909, pp. 5—6.

²¹ Cf., Sir John Fisher Williams: *Aspects of Modern International Law*, London 1939, p. 44.

²² Op. cit., n. 14, p. 41.

customary rule and the fact that the State which is charged for its infringement did not succeed in exempting itself from its general scope of validity. The ascertainment of all these facts may in the last resort be one of impression.²³ And all these complexities of the rise of binding customary law and its application, »can be solved only by an examination of concrete situations and by an attempt at evaluating, by reference to general standards, the bearing of these manifestations upon the requirement of consistency of conduct and conviction of legal necessity.«²⁴

Due to the fluctuating nature of customary process, the deviation from an existing customary rule by a large group of States bears a very sharp dilemma: whether it is a breach of legal obligation producing international responsibility; or just a new practice generating a new customary rule. The two solutions have quite opposite legal implications, and the choice between them can sometimes be a question of discretion of the agency called to decide the respective dispute.

In case of an initially unlawful practice, which at a latter stage transforms into a new legal rule, the question remains open: does the ultimate creation of the new law retroactively convalidate past illegal acts. And even if we come to a negative answer, nobody can ascertain the very moment from which a formerly unlawful practice becomes legitimate. This problem has a special importance with regard to unilateral practices of many coastal States exercising exclusive fisheries and jurisdiction up to 200 miles from the baselines, prior to creation of the new institute of exclusive economic zone in the law of the sea.

It would not be right, however, to conclude that such gradual process of formation of new customary law is entirely unconscious and free from interests of particular States. In the choice of particular practices by a State's decision makers, the considerations of reciprocity and interests can be decisive.

Until 1876 the United Kingdom exercised jurisdiction over foreign ships for smuggling up to eight leagues from its coast. By its *Customs Consolidation Act* of that year it confined its customs and revenue laws inside a 3-mile zone only. It was, however, not an act of self-sacrificing its interests for the thirst of the freedoms of the seas. Being the strongest maritime power at the time, the United Kingdom had a strong interest in imposing the conviction to all other coastal States that exercising of any kind of jurisdiction beyond the zone of territorial waters of 3 miles was unlawful — in which it has never entirely succeeded. And

²³ Cf., Sir Hersch Lauterpacht: *The Development of International Law by the International Court*, London 1958, p. 377.

²⁴ *Ibid.*, p. 390.

larger maritime areas under the regime of the high seas were more important for this maritime power than its own zone of customs control up to eight leagues, or 24 miles.

Thus, *Max Soerensen* was right while asserting that first a practice arises, inspired by the desire to find a reasonable solution which takes into account the different interests, and the possible chance to prevail one's own national interests over the interests of other States. As the practice progressively sets up and consolidates, a legal conviction appears of its obligatory character and it ends up by taking roots in the spirits.²⁵

Yet, it would not be quite right to identify *opinio juris* with the will of States taking an active part in a practice generating a customary rule of law. The two notions meet closely in case of existence of a particular customary rule, which is a genuine *tacitus consensus* and in relevant legal consequences are very similar to an unwritten agreement.

However, a conviction that a usage is legally binding as being a customary rule of universal validity, is something less than a common will or intention of all parties to a treaty to create a legal obligation in time of its conclusion. Some States, participating in a customary process can have a strong will to convince all others on the existence of a customary rule, just as the foregoing example of the United Kingdom indicates. But for the creation of a rule of law of this kind it is sufficient to have a widespread conviction that a particular practice is legally binding, and nothing more than that.²⁶

The question is how to find out evidence of State practice and of *opinio juris*, necessary for the formation of a customary legal rule. Article 38 (1d) of the Statute of the International Court mentions judicial decisions and the teachings of the most highly qualified scholars of various nations — »as subsidiary means for the determination of rules of law«. These subsidiary means refer first of all to customary rules of law, because with a written treaty its text is the main means for determining rights and duties of the parties.

In this sense the foregoing provision of the Court's Statute is not exhaustive. Besides judicial practice and doctrine, relevant in various stages of customary development are the following: multilateral and bilateral treaties, concordant unilateral acts of a number of States, final acts of diplomatic conferences, unilate-

²⁵ Cf., *Max Soerensen, op. cit.*, n. 6, pp. 50—51.

²⁶ *Karol Wolfke, op. cit.*, n. 5, pp. 157—165, finds the basis of the binding force of general international law in »presumed acceptance of a practice as an expression of law«.

ral or joint statements of heads of State and government, resolutions of the UN General Assembly, etc.

Depending on the stage of customary development and other circumstances, some of these acts can be an evidence of practice, but they can even consist of their actors' practice. At a higher stage of this development some of these acts — if precise enough and if they manifest the intention of the parties — can be the evidence of *opinio juris*. Therefore, all these acts are not simple »subsidiary means«, but they can be material sources, as parts of customary process. And if such a process is accomplished and amounts to a new rule of law, these texts can sometimes be documentary evidences on existence and contents of the rule in question. They should be therefore best described as »material sources and documentary evidences« in customary process,²⁷ because, depending on circumstances, they can be both.

However, due to the vague nature and unpredictability of customary process, none of the foregoing acts is a reliable evidence in itself of the existence of a given customary rule. They are thus not of the same documentary value as the text of a treaty in regard to rights and duties of its parties. Nevertheless, there are today very few customary rules of general international law if any, which literally remained »unwritten«. For most of them one or more written documentary evidences can be identified.

3. ARTICULATED CUSTOMARY PROCESS

René — Jean Dupuy has qualified this slow and gradual customary process in which facts (or practice) precede the law (*«l'existence précède l'essence»*), as being *«coutume sage»*.²⁸ He differs this kind of customary rules from the so-called *«coutume sauvage»*, or revolutionary custom, or *«instant custom»*, where idea precedes facts. In his view new States with their specific economic and social needs want to throw down the old international legal order, based on slow custom, and to replace traditional voluntarism based on tacit consent by a new *«voluntarisme projectionnel»*, affirming rights of poor peoples in opposition to the rest of international community. This new customary process is articulated by unilateral acts of these States and declarations, which are often confirmed by municipal legislation. Sometimes this action is corroborated with adoption of joint resolutions largely diffused, and by the UN General Assembly resolutions.

²⁷ Cf., H. Lauterpacht: *«Decisions of Municipal Courts as a Source of International Law»*, *British Year Book of International Law* 1929, p. 81.

²⁸ Cf., René-Jean Dupuy: *«Coutume sage et coutume sauvage»*, *Mélanges offerts à Charles Rousseau*, Paris 1974, p. 77.

R. — J. Dupuy has found in the law of the sea the main domain of challenging established order. Appropriations by Latin-American and some African States of zones of exclusive fisheries and other rights are detrimental to the old principle of freedom of seas, set up by great maritime powers in the past.²⁹

This argumentation, published in 1974 did not prove entirely accurate. It is not poor and underdeveloped nations, but the United States themselves which have defied several times in this century the freedoms of the high seas, by their unilateral acts, always looking their short-term national interests. The Tariff Act of 1922 and a number of bilateral »Liquor Treaties« concluded between 1924 and 1930, resulted into the new institute of the contiguous zone up to 12 miles from the baselines. Two *Proclamations of President Truman* of 28 September 1945, concerning establishment of conservation zones in areas of high seas contiguous to the coast of the United States, and on the U. S. jurisdiction over natural resources of continental shelf, have opened the door to unilateral actions of Latin-American States. They all followed this example of unilateralism, based on their own national interests.

And the exclusive economic zone itself could never transform into general customary law, but for the fact that in 1976 the United States, Canada, France, the E. E. C. and the Soviet Union proclaimed their own exclusive fisheries zones up to 200 miles.³⁰

And finally, there were again the United States which first adopted on 28 June 1980 their *Deep Sea Hard Mineral Resources Act*, entitling their national agency for issuing permissions for exploration and exploitation of areas of sea-bed and subsoil of the high seas. A number of other industrial States then followed the example. These unilateral acts of temporary, but durable appropriations of the richest sites of mineral resources for purpose of their exclusive exploitation, which are not renewable, are in contravention to the obligations of all these States from the 1958 *Geneva Convention on the High Seas*.³¹

²⁹ *Ibid.*, pp. 83—84.

³⁰ Due to their privileged geographic position, the very countries from this group appropriated the largest areas which used to be parts of the high seas. First ten of them in decreasing order are: United States; Australia, Indonesia, New Zealand, Canada, Soviet Union, Japan, Brazil, Mexico and Chile. Cf., Gilbert Apollis: *L'emprise maritime des Etats cotiers*, Paris 1981, pp. 15—16, 20. Thus, among first seven of them only Indonesia is a big receiver. However, this most privileged group includes three other developing States having large coastal façades.

³¹ Its Article 2(1) says that: »The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty...«. There is little difference between sovereignty and appropriation for exclusive exploitation of parts of its sea-bed for more than twenty years. It cannot be, in addition, reasonably asserted that the right to exclusive exploitation of its mineral resources has become a

However, such political debates for the purpose of theoretical considerations are generally useless. R. — J. Dupuy has correctly noticed important innovations in customary process after the second World War. It is less and less spontaneous and becomes more and more intentional.

As already mentioned, the customary process is practically the only substitute for a world-wide legislation in regard to emerging, modifying and terminating rules of general international law. The intensified international co-operation, as well as growing necessities and problems which cross national frontiers, require an increasing number of legal rules of this kind which for reasons of legal security must be couched in very precise terms.

When important individual interests of States are at stake, the development of these rules can hardly be left to slow, gradual and predominantly spontaneous customary process, where the final results often remain uncertain. Therefrom the trends in its articulation and acceleration by some willful acts. Several ways in this regard proved to be effective.

Judicial decisions

Some judgments and advisory opinions of the International Court of Justice resolved important dilemmas in general international law, where pending customary process was undecisive. They crystallized hitherto uncertain, vague or contradictory practices into new rules of law. It is not difficult to find such examples.

By its Advisory Opinion of 1949 on *Reparation for Injuries* the Court established that the U. N. Organization is a subject of international law and capable of possessing international rights and duties, and of maintain its rights by bringing international claims. It possesses objective international personality with regard to all States.³²

By its Judgment of 1951 in *Norwegian Fisheries* case, the Court set up a number of general rules on drawing straight baselines for measuring territorial sea in localities where the coas-

new freedom of the seas, in face of the international regime provided in Part XI of the 1982 Convention which has 150 signatories and more than 35 contracting States. Article 2(1) of the 1958 Geneva Convention provides explicitly that freedoms of the high seas, other than cited four, have to be »recognized by general principles of international law«. And finally, nor a rule of international law, neither a convention with extra-territorial scope of application, has so far permitted any temporary appropriations, excluding all other States, of any area of the sea, or outer space, beyond national territory of the respective State. National territory includes here the continental shelf and exclusive economic zone. Therefore, permissions for exclusive mining activities crossing a State's borderlines are acts *ultra vires*.

³² Cf., Reports 1949, pp. 179, 185.

line is deeply indented and cut into, or where there is a fringe of islands along the coast.³³ Only seven years later these rules became Article 4 of the Geneva Convention on the Territorial Sea and Contiguous Zone, codifying customary rules of general international law that nobody denied. With very slight innovations these rules were confirmed by Article 7 of the 1982 UN Law of the Sea Convention.

Similarly, conclusions of the Court in its Advisory Opinion of 1951 in *Genocide Convention* case, concerning admissibility of reservations on general conventions containing no provisions on this subject,³⁴ became Articles 19 (c) and 20 (4a and b) of the 1969 *Vienna Convention on the Law of Treaties*, as statements of general law in force. Since 1951 all States adjusted their practices in regard to admissibility of reservations to that statement of the Court.

And by its Judgment of 1969 in the *North Sea Continental Shelf* cases, the Court stated that the »equidistance-special circumstances principle«, set up in Article 6 of the 1958 *Geneva Convention on the Continental Shelf*, has never been and did not become a rule of general customary international law. This was thus a negative statement on customary law. Instead, the Court provided a series of so-called »equitable principles« as allegedly being principles and rules of international law concerning delimitation of areas of continental shelf.³⁵ However, it failed to prove either character of customary law or of general principles of law of these »principles and rules«, and it even failed to apply them consistently in subsequent cases of delimitation in its own practice. By this laying down entirely new legal rules, which have previously not been corroborated by any practice of States, the Court in fact overruled itself. There can hardly be legal rules leading to predictable results in the domain of delimitations, except the disallowed »equidistance-special circumstances principle«.³⁶

In conclusion, notwithstanding the principle *sententia jus facit inter partes*, which is embodied in Article 59 of the Court's Statute, every statement of the Court on customary law will be

³³ Cf., Reports 1951, pp. 133, 135, 142.

³⁴ *Ibid.*, pp. 24, 26, 27, 29—30.

³⁵ Cf., Reports 1969, p. 42, §69; p. 46, §81; then pp. 47—48, §85; pp. 50—53, §§90—99; and pp. 54—55, §101.

³⁶ We do not criticize, however, fitness of directives by the Court to the disputing parties in this Judgment as to how to reach an equitable delimitation of their continental shelf, but only their nature of allegedly being »principles and rules of international law«. For more details see — V. D. Degan: »Equitable Principles« in *Maritime Delimitations*, *International Law at the Times of its Codification*, Essays in Honour of Roberto Ago, vol. II, Milano 1987, pp. 107—137. Moreover, the Court's conclusions on customary law, and especially on relationship between codifying conventions and customary process seem equally to be well established.

accepted as law in force by all States whose interests correspond to it. And the States with different interests would have difficulties to prove the contrary. That is sometimes impossible, especially when previous practice of States was scarce, vague or contradictory.

Unilateral Acts of States

The oldest way of influencing customary process have been unilateral actions of States having special interests in the matter. However, as our previous examples indicate, unilateralism bears heavy risks in the development of rules of general customary law. States follow first of all their narrow national and egoist interests. Unilateral action of one State does not impede, but encourage unilateral actions by other States with different interests. In such a situation the international legal order crumbles with little chances for reasonable solutions. In the law of the sea unilateralism has brought about in this century great expansion of sovereignty, sovereign rights and exclusive jurisdiction by coastal States, incessantly diminishing areas of the high seas. The same applies with areas of its sea-bed and sub-soil which were originally intended to become common heritage of mankind.

Resolutions of the UN General Assembly

The next way of willful influencing general customary process is the adoption of resolutions or declarations by the UN General Assembly, formulating general and abstract rules of conduct of States. The Institut de Droit international has recently dealt with this problem on the basis of excellent and exhaustive reports prepared by its Member *Krzysztof Skubiszewski*. During its 1987 Cairo Session the Institute adopted Conclusions of its Commission on this subject-matter. They will be the basis of our explanation here.³⁷

»Although the Charter of the United Nations does not confer on the General Assembly the power to enact rules binding on States in their relations *inter se*, the Assembly may make recommendations contributing to the progressive development of international law, its consolidation and codification. This may be accomplished through a variety of resolutions.«

The Commission of the Institut divides *law* — *declaring* resolutions purporting »to state an existing rule of law«, from *law* — *developing* resolutions contributing *inter alia* »to the creation of international custom«.

³⁷

Parts of the text which follow in quotation marks are from the Conclusions of the Commission.

A *law — declaring* resolution »may serve as a supplementary means for determination of a rule of international law, particularly where evidence of State practice or of *opinio juris* is not otherwise readily available«. It »may constitute evidence of customary law or of one of its ingredients (custom-creating practice, *opinio juris*), in particular when that has been the intention of States in adopting the resolution or when the procedures applied have led to the elaboration of a statement of law.« However: »Evidence supplied by the resolution is rebuttable.«

»Principles and rules proclaimed in a *law—developing* resolution may influence State practice, or initiate a new practice, that constitutes an ingredient of new customary law. — A resolution may contribute to the consolidation of State practice, or to the formation of the *opinio juris communis*.«

In addition, a »resolution or a series of resolutions may express or reveal tendencies in the development of international law. Such resolutions may determine policies as to the substance of law to be made, whether by formulating principles or detailed rules or by expressing the main ideas and concepts of prospective law.«

It should be appropriate to add that a *law—developing* resolution, couched in terms of principles and rules of mandatory character, becomes in time a *law—declaring* one if the customary process which it spurs on successfully amounts to the creation of the intended customary legal rule.

These Conclusions therefore indicate a number of functions which some resolutions may perform in customary process. It does not mean that each and any of them can be useful in this regard. The Commission has enumerated some of the elements which help to identify a resolution as falling under one of the following categories: (a) the intent and expectations of States; (b) respect for procedural standards and requirements; (c) the text of the resolution; (d) the extent of support of the resolution; (e) the context in which the resolution was elaborated and adopted, including relevant political factors; and (f) any implementing procedures provided by the resolution.

However, the rest of the text of these Conclusions, as well as the reports of Dr. Skubiszewski, do not always provide sufficient guidance for interpreting each of these relevant elements.

(a) *The intent and expectations of States* is the most controversial issue. It is not clear whether these are intentions and expectations of original sponsors of the draft-resolution or of all States which voted in favour of it,³⁸ or even of the General Assem-

³⁸ Due to various political reasons for which each State casts its vote in favour of a resolution, the common intention of all of them very often does not exist, particularly when its text is couched in vague terms.

bly as a whole. In this last case »intent and expectations« would be merely a fiction. It would be better to formulate this element as »object and purpose of the resolution«, which is closer to its text than to presumed common intention of States. This would in addition open the door for teleological interpretation of resolutions depending on changing social and political circumstances.

In the context of these Conclusions the only reasonable solution would be that the intent and expectations of States are estimated on the basis of the sum of elements which follow, but first of all of — (e) »the context in which the resolution was elaborated and adopted, including relevant political factors«.

(b) *Respect for procedural standards and requirements* refers to resolutions which were drafted by an *ad hoc* body such as the International Law Commission. Such resolutions have undoubtedly a higher value in customary process, and the Commission of the Institut has formulated some recommendations in this regard:

»When appropriate, resolutions referred... should be based on a negotiated arrangement...« — »If the elaborating organ is not composed of all the Members of the United Nations, equitable geographical representation, presence of the main legal systems, and legal expertise are factors which favour the formulation of universally applicable principles and more detailed rules. — Moreover, it is desirable that States particularly interested in the matter be enabled to take part in the deliberations of the organ and in the elaboration of the draft.« — »The circulation of drafts for comment in the process of the elaboration of some resolutions is desirable.«

(c) *The text of the resolution* is one of the most important elements.

»The language and context of a resolution help to determine its normative purport. Reference to international law or equivalent phrase, or their deliberate omission, are relevant but not in themselves determinative.«

»The legal status of resolutions designated as declarations is not different from that of other resolutions. Yet this particular form may emphasize the importance of the norms enunciated. Declarations are suitable for a comprehensive treatment of a subject or for expressing principles the purpose of which is to influence the progressive development of international law.«

The language of a resolution, in addition, reflects the intensity of will of States supporting it, in customary process. Thus, the use of the word »shall« points to the statement of legal obligation,³⁹ and the word »should« places the conduct of States on the plan of wishes and recommendations.⁴⁰

The formulation of political objectives or postulates, programmes of cooperation subject to future specific agreements or statements of certain more or less accurate facts, are of no use in

³⁹ This is the accurate conclusion of the reporter. Cf., *Annuaire de l'Institut de Droit international 1985, Session d'Helsinki*, vol. 61—I, p. 230.

⁴⁰ *Ibid.*, p. 320.

customary process, even if expressed in terms of legal rules. If such formulations are mixed in a resolution with statements of genuine rules, its persuasive value can be weakened and even ruined.

Also not useful for customary process are extensive texts of resolutions and excessively detailed enumerations of illegal acts and conduct.⁴¹ Short, synthetic and clear definitions of a legal rule, with essential elements constituting their violation, should have priority over extensive and enumerative definitions which can never be all-inclusive.

It can be sometimes harmful for customary process to adopt subsequent resolutions on the same subject—matter without essential improvements in their text, and especially if there are no chances that the new resolution be approved unanimously or by consensus.⁴² Every new debate and chance to vote offers the opportunity to malignant Governments to challenge the general character of legal principles laid down and thus to defy even the fundamental rules of general international law.

(d) *The extent and support for the resolution.* Although the support and vote in favour of a resolution by a State is not an un rebuttable evidence of its practice nor of *opinio juris*, because resolutions are not the same as treaties enunciating normative rules of general international law, the result of vote is an extremely important element in identifying the importance of a resolution in customary process.

The Conclusions of the Commission of the Institute in this regard are very helpful and there is nothing to add to them.

»A law-declaring resolution, adopted without negative vote or abstention, creates a presumption that the resolution contains a correct statement of law. That presumption is subject to rebuttal.«

»In situations where a rule of customary law is emerging from State practice or where there is still doubt whether a rule, though already applied by an international organ or by some States, is a rule of law, a resolution adopted without negative vote or abstention may consolidate a custom or remove doubts that might have existed.«

»The authority of a resolution is enhanced when it is adopted by consensus.« It is furthermore enhanced »when it is adopted by a representative majority that includes the main legal systems.«

⁴¹ That is the trait *inter alia* of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (2131 [XX] of 21 December 1965), and of the Declaration of the Inadmissibility of Intervention and Interference in the Internal Affairs of States (36/103 of 9 December 1981).

⁴² Whereas the foregoing Declaration of 1965 was adopted unanimously with only five abstentions, the subsequent Declaration of 1981 was adopted by majority of 120 votes, with 22 votes against, 6 abstentions and 8 absentees.

However, if »the number of negative votes or abstentions is large, or qualitatively significant, the law-stating or rule-developing effect of the resolution is weakend.«

»Where a resolution may be subject to reservations either in the explanation of votes or in other statements, the effect of such reservations is to qualify or limit the extent of approval by the reserving State. Depending on its contents a reservation may mean less than rejection of the rule. It may be merely an expression of doubt.«

»If a resolution expresses existing law, a State cannot exclude itself from the binding force of that law by making a reservation.« However, the appraisals of States on what existing law is, and what is *lex ferenda*, may differ.

(e) *The context in which the resolution was elaborated and adopted, including relevant political factors.* The Conclusions do not provide guidance as to how to grasp this important element. It can be done first of all by examination of preparatory works (*travaux préparatoires*) of the elaborating organ if any, of comments of governments on drafts which were circulated, and of records on debates in the General Assembly.

(f) *Implementing procedures provided by the resolution.* »The inclusion in a resolution a provisions on implementing procedures, or on supervision of compliance with a resolution, may contribute to the interpretation or application of law, or to the emergence of new law.«

Thus, by the *Resolution 1654 (XIV)* of 1961 a committee was set up to review the implementation of the *1514 (XV) Declaration on the Granting Independence to Colonial Countries and Peoples*. This procedure was of crucial importance for final affirmation of the principle of equal rights and self-determination of peoples.

Implementation and strict observation of legal rules in force is ultimate goal of every law. These implementing procedures are thus even more important than the law-creating and law-declaring activities of the General Assembly themselves.

In conclusion it must be said that, unlike treaties and customary law itself, resolutions of the General Assembly are not a particular source of international law as such. But although they are in principle not more then recommendations, it would be wrong to deny any legal effect of any of them. Just the contrary, some of them have proved to be effective means of articulation of customary process. The International Court of Justice was right when asserting in its 1986 Judgment in the *Nicaragua* case, that:

»... *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled »Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United

Nations«. The effect of consent to the text of such resolutions cannot be understood as merely that of a »reiteration or elucidation« of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.⁴³

The Court largely quoted in this Judgment the parts of the said Declaration,⁴⁴ as well as 1965 *Declaration on the Inadmissibility of Intervention* [2131 (XX)],⁴⁵ and *Definition of Aggression* [resolution 3316 (XXIX) of 1974]⁴⁶ — all of them as having law—declaring effect.

The Court in addition cited as an evidence of the law in force another non—conventional instrument, namely the *Helsinki Final Act* of 1975.⁴⁷ That proves our previous statement that some final acts of diplomatic conferences, as well as joint statements of heads of State and government may be also material sources and documentary evidence of customary law.

Codifying Conventions

But far the most important mode of intentional articulation and acceleration of customary process after the Second World War has been drafting, conclusion and entry into force of conventions on »codification and progressive development« of a part of international law. The process of preparation of draft—articles involves either the International Law Commission or *ad hoc* organs composed by State representatives. Draft convention circulates among governments for their comments, and usually a diplomatic conference is convoked for adoption and for signature of the convention in question. Its entry into force is subject to deposit of a number of instruments of ratification or accession, which goes from two for 1949 *Geneva Conventions on humanitarian law* and for Protocols additional to them of 1977, up to 60 for the 1982 UN Law of the Sea Convention.

These conventions have a double function. Like all other agreements, they operate between the parties according to rules of the law of treaties. However, their main function is at influencing customary process. Their essential provisions are in principle couched in form of normative rules, providing rights and duties to all States, and not to their parties only. They are thus aimed to be transformed into rules of general customary international law, unless some are codifications of already existing law.

⁴³ Cf., *Reports 1986*, pp. 99—100, §188.

⁴⁴ *Ibid.*, p. 101, §191; p. 106, §202; p. 107, §203; p. 119, §228; p. 133, §264.

⁴⁵ *Ibid.*, p. 107, §203; p. 134, §266.

⁴⁶ *Ibid.*, p. 103, §195.

⁴⁷ *Ibid.*, p. 107, §204; p. 133, §264.

Article 13 (1) of the *UN Charter*, as well as the *Statute of the International Law Commission* of 1947, distinguishes between progressive development of international law and its codification. However, due to different stages of the customary process attained at the time of signature of the convention in question, the relevant rules must be divided into three different categories. Each convention of this kind provides in addition provisions of strictly contractual character which are not intended to be transformed into customary law, but provide rights and duties to its parties only.

Since the law of the sea proved to be the most dynamic discipline of the Law of Nations after the Second World War, we shall try to explain all four categories of treaty provisions from the 1982 *UN Law of the Sea Convention*. But similar analysis can be made in regard to provisions of any other convention of this type.

(a) Some of these impersonal rules are pure *codification*. The convention embodies, namely, already accepted rules of customary law, in the sense that it is merely declaratory of existing rules. Its parties do not assume new obligations, nor they acquire new rights otherwise enjoyed by all other States on the ground of general customary law. Such provisions serve mainly as documentary evidence of the existence and contents of customary law in question. Legal validity of these customary rules does not depend on the entry into force nor on termination of the convention in which they were laid down. Among all other categories of conventional rules, only they serve as the means of — *la conversion des règles coutumières en un corps de règles écrites coordonnées et systématisées*.⁴⁸

In the law of the sea it is not difficult to identify rules of this character, because only this branch of international law has been the object of codification and progressive development by means of general conventions two times after the Second World War. The parties to one or more *Geneva Conventions* of 1958 are practically all important maritime States, which for one reason or another have refused to become parties of the 1982 Convention. And in return, the 1982 *UN Law of the Sea Convention* has up to now 155 signatories and about 35 contracting States, mostly from the Third World. Thus, if the same normative rules of general scope happen to be embodied both in one of four *Geneva Conventions* of 1958, and again in the 1982 Convention, there is a strong presumption in favour of the existence of generally recognized customary rules of the law of the sea, unless an evidence to the contrary.

⁴⁸ Cf., Charles Rousseau: *Droit international public*, tome I, Paris 1971, p. 345.

Almost all provisions concerning legal regime of the high seas belong to this category. Already the parties to the 1958 *Geneva Convention on the High Seas* expressed in its preamble their desire »to codify the rules of international law« in this domain, and recognized that the adopted provisions were »as generally declaratory of established principles of international law«. Thus, the matter was pure codification already in 1958. Identical provisions in the 1982 Convention only confirm that the customary law in this sphere of the law of the sea did not suffer changes at least since 1958.

Belonging to this category are identical provisions of normative character concerning the legal regimes of the territorial sea, of the contiguous zone and of the continental shelf, as well as *inter alia* provisions on the baselines for measuring the breadth of territorial sea, including almost all provisions concerning straight baselines.⁴⁹ The provisions of this kind are undoubtedly parts of the international legal order at seas.

(b) Our second category includes normative rules aimed at being a factor of *progressive development* of general customary law. These rules confirm some existing practices of States which before the adoption of the convention did not achieve a degree of uniformity; namely, the norms in question have not yet been »accepted as law« (*opinio juris*) by a necessary majority of States.

The International Court of Justice dealt in its Judgment of 1969 on the *North Sea Continental Shelf* with conditions that norm-creating provisions from a convention pass into the *general corpus* of international law, and are accepted as such by the *opinio juris*, so that they become binding even for third States. These conditions are: (i) »It would in the first place be necessary that the provision concerned should, at all events potentially be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.«⁵⁰ (ii) These rules »by their very nature, must have equal force for all members of the international community, and cannot therefore be subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.«⁵¹ In other words, these rules cannot be subject to unilateral reservations. (iii) Then, »a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.«⁵² (iv) It is necessary that »State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of

⁴⁹ For more details see — V. D. Degan: »Internal Waters«, *Netherlands Yearbook of International Law* 1986, pp. 4—5, 37—39.

⁵⁰ Cf., *Reports* 1969, pp. 42—43, §72.

⁵¹ *Ibid.*, pp. 39—40, §63.

⁵² *Ibid.*, p. 43, §73.

the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.« (v) And finally, »the passage of only a short period of time is not necessarily, or of itself, a bar for the formation of a new rule of customary international law.«⁵³

The first two conditions relate to the rules of codification as well. But all five conditions relate *a fortiori* to rules on »legislation« of general international law which will be discussed later on.

And although nearly six years after the signing of the 1982 *UN Law of the Sea Convention* nobody knows whether and when it will come into force, many of its norm-creating rules convolute actual practices by coastal States, extending their sovereignty, sovereign rights, jurisdiction or control over areas which used to be parts of the high seas. The 1982 Convention has strongly intensified this process of national appropriations.

This group encompasses provisions from the 1982 Convention concerning the breadth of territorial sea, of contiguous zone and of continental shelf, as well as all rules forming Parts IV and V of the Convention concerning archipelagic waters and exclusive economic zone. And finally — most rules from its Parts XII and XIII on protection of the marine environment and on marine scientific research, because they also provide new jurisdiction in favour of coastal States.

The customary process related to all these rules is in full progress. It cannot be impeded by a simple non-participation of some States to the 1982 Convention. Most of third States have taken part in this practice too. Thus, most of these rules have already been transformed into new customary law, regardless of the entry into force of the Convention. They provide rights and duties to all States, being parties there of or not.

(c) Our third category includes norm-creating rules set up in a convention of this type which cannot be corroborated by any actual practice of States, and in regard to which the customary process has not yet begun at the time of its adoption. The rules of this kind are unavoidable since practically all States in the world want to harmonize and reconcile their individual interests, and by these new rules they want to influence the direction of future customary process.

The purpose of these rules too is their transformation into new customary rules, to be valid as such for the entire international community of States. They thus have to be of fundamentally norm-creating character and, by their nature, applicable to all States and cannot be the subject of reservations. Convention stipulating them must be open for accession to all States.

⁵³ *Ibid.*, p. 43, §74.

Unlike two previous categories, these rules have a genuine »legislation« character.⁵⁴ This term has however to be understood in a quite different manner than in municipal law. Legislature inside a State enacts new laws by a due majority of votes which afterwards oblige all its citizens. In international community of States there is no organ of this kind. The only substitute are diplomatic conferences which adopt general and open conventions »on codification and progressive development«. In case of a very widespread and representative participation in the convention, provided it includes States whose interests are specially affected, it could reasonably be assumed that all its norm-creating rules, including these on »legislation«, have been transformed into new customary law. That is the main aim of States participating at the diplomatic conference.

However, stipulation of these »legislative« provisions is not stimulative for widespread accession by States to conventions of this kind. Malignant governments can gain more by a *mala fide* »pick and choose« gain. A third State to the convention does not assume obligations provided for its parties by its contractual provisions. It can claim rights from its »legislative« norms, pretending that they have already been transformed into new customary law, and refusing other on its own will, alleging that they are valid for its parties, and only after the entry into force.

That is exactly the fate of the 1982 UN Law of the Sea Convention. Important maritime States were very active throughout the negotiations at the Third UN Law of the Sea Conference, protecting all their essential interests, and giving some concessions to the claims of the Third World countries. Nevertheless, near the end of the Conference the United States dissociated from solutions previously agreed on, requiring new concessions for their industry in the activities of the international sea-bed area, and even extorting significant rights in favour of so-called »pioneer investors«. Nevertheless, this country voted against the text of the Convention as a whole, and with the United Kingdom and the Federal Republic of Germany refused to sign and ratify it.

Because of the opposition to Part XI of the Convention concerning the international sea-bed area by the these and other industrial States which signed the Convention but did not intend to become its parties, its entry into force became very questionable. Still all these States which refuse to become parties to

⁵⁴ First steps in »international legislation« were multilateral treaties made by European Great Powers during 19th century *inter se*. Important legal rules with lasting effect were laid down by these treaties (*e. g.*, Regulations on Classes of Diplomatic Officials of 1815, the Declaration of Paris respecting warfare on sea of 1856), on which no third State ventured to oppose. Since the First Hague Peace Conference of 1899 this process has been democratized, but brought many new problems.

the Convention claim from the rest of the world all rights provided in all its parts except Part XI.

The refusal of this Convention by important maritime States is an obstacle in itself for a quick transformation of its »legislative« norm-creating rules into new customary law. And the identification of these rules, in regard to which customary process did not begin, from others which codify existing law or crystallize existing practices into new customary rules, has become of utmost importance in relation to the rights of third States.

In fact the 1982 Convention provides only two sets of »legislative« norm-creating rules important for the maintenance of legal order at seas and oceans. First are the rules on transit passage through straits used for international navigation (Articles 37—44), but not rules concerning archipelagic sea lane passage which form an inalienable part of the new institute of archipelagic waters. The second are rules concerning rights of coastal States to continental shelf beyond 200-mile limit, which is in regard to all States linked with the entry into force of the Convention.

The third States in relation to the 1982 Convention cannot prevail with the preexisting high seas freedoms in international straits out of 3-mile limit of territorial sea,⁵⁵ because this very limit of territorial sea has never attained the authority of a peremptory norm of general international law (*jus cogens*).⁵⁶

Respective provisions on transit passage from the 1982 Convention can neither be interpreted as *stipulations pour autrui*. There has never been an express intention for conferring this kind of »absolute« rights in favour of third States following the requirements laid down in the Vienna Convention on the Law of Treaties of 1969. The common aim of all participants at the Third UN Law of the Sea Conference is expressed in the preamble of the Convention, namely: »desirability of establishing through this Convention... a legal order for the seas and oceans...« This goal implies the most widespread participation in the Convention itself, and not providing absolute rights in favour of States not willing to become its parties. And most of present — day signatories and contracting States have expressly declared their opposition to actions of third States to apply selectively the Convention

⁵⁵ For arguments in favour of this claim see — Luke T. Lee: »*The Law of the Sea Convention and Third States*«, *AJIL* 1983, pp. 541—568.

⁵⁶ For instance, four Scandinavian States have always had their territorial sea 4 miles large. In the *Norwegian Fisheries* case before the International Court of Justice, the United Kingdom has acknowledges to Norway this limit (*Reports* 1951, p. 126). And the conclusions of the Court in this Judgment in regard to the width of mouths of bays do not go in favour of 3 miles rule for territorial sea. Equally, the United States, by their various motions during all three UN Law of the Sea Conferences have estopped themselves from the right to claim 3 miles limit in their favour from other coastal States.

while continuing to reject its provisions relating to the international sea — bed area.⁵⁷ Due to all these reasons all States are entitled to enjoy, on the basis of general customary law, only the right of innocent passage through all straits used for international navigation. The right to transit passage is enjoyed only by the parties to the Convention after its entry into force, on condition that States bordering international straits become its parties too.

(d) Finally, like all other treaties, conventions on codification, progressive development and »legislation« of international law cannot be without »contractual« provisions, providing rights and duties to their parties only. This »contractual« character is expressed in the very text of the rules in question. This category includes standard final provisions on signature, ratification, accession, entry into force of respective convention, admissibility of reservations, etc, which apply immediately after the convention is adopted.

The same category encompasses also special provisions on settlement of disputes concerning interpretation and application of the convention, and on other issues if any, which cannot be the matter of rules of general international law.

The 1982 Convention provides in addition in its Part XI the rights to the activities in the international sea-bed area strictly for its States parties, or for their State enterprises or their natural or juridical persons, subject to permission and control by the Authority. However, »Principles Governing the Area«, forming Section 2 of Part XI, are couched in general terms and in terms of peremptory legal norms providing obligations and restrictions for all States.

4. CONCLUSIONS

There exist at present two modes of customary development, each having its advantages, but also important shortcomings.

In the slow, gradual and predominantly spontaneous process, practice of States precedes *opinio juris communis*. By repeated actions of States, followed by *opinio juris*, a small number of customary rules appears. Their content cannot be very precise, and the moment of their creation is never certain. However, general legal rules of this kind are based on *reason*. They have usually a meaning large enough to allow necessary exceptions. And although slow, this process is adaptable to changing technological, political or social circumstances. Nevertheless, it became to-

⁵⁷ Cf., Declaration of the Group 77, and Statement of the Group of Eastern European Countries, *Law of the Sea Bulletin*, № 1, September 1983, pp. 83—85.

tally inadequate to meet new needs of international community of States, in order to remain the only mode of generating legal rules.

The intentional and articulated customary process, as the only substitute to genuine world-wide legislation, bears all defects of human voluntarism in law-creating. Compromises between disparate interests of a large number of States are sometimes insincere and ill-founded, and open to grave abuses. The case of the Third UN Law of the Sea Conference has gravely compromised the process of progressive development of general international law by means of conventions.

Even some solutions which may seem to be rational and adequate for a particular problem can prove to be detrimental for the maintenance of the international legal order. For instance, the provision of Article 2 (3) of the 1958 *Geneva Convention on the Continental Shelf*, on behalf of which the rights of coastal State over its shelf do not depend on any effective or national occupation, or on any express proclamation, was originally proposed in good faith by the International Law Commission. It seemed to be at that time the most rational solution to that problem in face of a prospect that mineral resources of continental shelf belong to the first occupant. However, the entire abandonment of effectiveness in appropriations by coastal States of new areas at the sea profoundly disturbed the existing legal order. Since that Convention the total area of the high seas, including its bed and sub-soil, did not stop in diminishing. Similar fate is shared by the formulation of the International Court of Justice of »equitable principles« in maritime delimitations as alleged »principles and rules of international law«, which simply cannot operate as legal rules.

However, at present there is no other mode of enacting precise legal rules of universal validity.