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# INTERNATIONAL AGREEMENTS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW

Jonathan I. Charney\*

For years many states have asserted that resolutions of the United Nations General Assembly can make instant international law. Others have argued that resolutions cannot provide the necessary state practice and *opinio juris* to establish new norms. Still other observers maintain that certain resolutions can contribute important evidence to support new norms but that resolutions alone may not make new law. This dispute remains unresolved.<sup>1</sup>

A similar conflict has now arisen with regard to the role that the negotiation, adoption, and conclusion of international agreements may play in developing new norms of customary international law. It has long been recognized that international agreements have an important role in the development of such norms.<sup>2</sup> Recently, however, writers, international courts, and statesmen have given support to the view that international agreements, with little more, could give rise to new customary international law that is binding on all states regardless of whether or not they participated in the negotiations or became parties to the agreement.<sup>3</sup> There is even some support for the view that international agreements that are not yet in force could give rise to instant international law.<sup>4</sup> Such developments in the rules for establishing customary international law could have profound implications for the international legal system.

Traditionally, the International Court of Justice identified three relatively uncontroversial circumstances in which international agreements may be relevant to finding customary international law: they can codify the existing law, they can cause the law to crystallize, and they can initiate the progressive development of new law.<sup>5</sup> In each of these circumstances states' negotiation and adoption of certain international agreements can add to the evidence of customary international law. But with the exception

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1. See *infra* notes 91-93.

2. See Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L 1 (1974-75); Baxter, *Treaties and Custom*, 129 REC. DES COURS 25, 899-101 (1970); Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L 275 (1965-66); A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 107, 164 (1972); H. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 80-81 (1972).

3. See *infra* notes 83-88.

4. See *infra* notes 85-86 and accompanying text.

5. *North Sea Continental Shelf Cases (W. Ger. v. Den., W. Ger. v. Neth.)*, 1969 I.C.J. 3, 37-38.

of some recent judgments, the Court had been clear that state practice dehors the agreements, that *opinio juris* were the principal considerations, and that international agreements played limited roles.<sup>6</sup>

It has never been clear, however, which circumstances of negotiation and conclusion of international agreements contribute to new rules of customary law. The issues can be appreciated if one goes beyond generalities and explores the relationship of specific agreements to customary law. Such an examination has been facilitated by the American Law Institute's Restatement of the Foreign Relations Law of the United States (Revised) which contains a contemporary review of a wide range of public and private international law topics.<sup>7</sup> This Restatement represents the views of some of the best international law experts of the United States and abroad. It is also an extremely important contribution to the law in its own right.<sup>8</sup>

6. *Id.* Some contrary indications may be found in the recent judgments in ocean boundary cases before the Court. The negotiations at the Third United Nations Conference on the Law of the Sea and the resulting Convention on the Law of the Sea appear to have been given considerable importance. *See* Continental Shelf (Malta v. Libyan Arab Jamahiriya), 1985 I.C.J. 13, 29–30; Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 294; Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 3, 38, 48–49.

7. There were seven tentative drafts of the Restatement. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Draft No. 1, 1980), (Tent. Draft No. 2, 1981), (Tent. Draft No. 3, 1982), (Tent. Draft No. 4, 1983), (Tent. Draft No. 5, 1984), (Tent. Draft No. 6, 1985), (Tent. Draft No. 7, 1986) [hereinafter cited as RESTATEMENT (Tent. Draft No. (Number))]. The Restatement was adopted, with some amendments, at the Annual Meeting of the American Law Institute at its meeting in May, 1986. The final version is not yet published. *See Annual meeting of the American Law Institute*, 54 U.S.L.W. 2593, 2595 (May 27, 1986).

8. The Restatement's role in domestic and international law is more powerful than in any other area in which the ALI issues restatements. Unlike other areas of the law, judges of the United States consider themselves to be less than expert in finding international law necessary to decide cases before them. As a consequence, courts rely heavily on the Restatement of the Foreign Relations Law of the United States. Even though the revised version of the Restatement has not been issued in its final form, courts have already begun to rely upon it. *See, e.g.,* Weinberger v. Rossi, 456 U.S. 25, 29 n.5 (1982) (definition of the word "treaty"); United States v. Davis, 767 F.2d 1025, 1027 n.3, 1036–37 n.21 (2d Cir. 1985) (fact that the United States has negotiated a number of treaties on the subject of the exchange of information in criminal matters); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1114 n.13 (5th Cir. 1985) (act of state doctrine); Allied Bank Int'l v. Banco Credito Agricolo de Cartago, 757 F.2d 516, 520 (2d Cir. 1985) (same); Pfeiffer v. Wrigley, Jr., 755 F.2d 554 (7th Cir. 1985) (jurisdiction to prescribe); Beattie v. United States, 756 F.2d 91, 105 (D.C. Cir. 1984) (jurisdiction over nationals abroad); Denby v. Seaboard World Airlines, Inc., 737 F.2d 172, 176 n.5 (2d Cir. 1984) (rules for treaty interpretation); *In re* Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985) (extradition).

The prior Restatement, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965), has been used often. *See, e.g.,* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 259–60 (1984) (interpretation of the Warsaw Convention by state practice); Dames & Moore v. Regan, 453 U.S. 654, 680 (1981) (settlement of international claims); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976) (foreign sovereign immunity); Transamerican Steamship Corp. v. Somali Democratic Republic Somali Shipping Agency, 767 F.2d 998, 1004 (D.C. Cir. 1985) (jurisdiction to prescribe); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 (5th Cir. 1985) (foreign sovereign immunity); Frolova v. U.S.S.R., 761 F.2d 370, 380 (7th Cir. 1985) (jurisdiction to prescribe).

It is also true that, unlike other areas of the law, the Restatement's characterization of a rule as

## Development of International Law

For these reasons, this article will use the Restatement as a starting point for examination of the function served by international agreements in the development of customary law. This examination shows the difficulties that are presented when international agreements are so used. It may be possible, however, to identify some factors which would help to distinguish those agreements which may appropriately give rise to customary international law and those which may not.

### I. BACKGROUND

#### A. *The Restatement's General Rule*

In its general provision on customary international law, the Restatement states that international agreements may lead to the creation of customary law when they are intended for general adherence and are widely accepted.<sup>9</sup> The Comment goes further and states that some widely accepted multilateral agreements and wide networks of similar bilateral arrangements which are widely accepted, "may come to be law for non-parties . . . by virtue of state practice and *opinio juris* resulting in customary law."<sup>10</sup> Such

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international law is legitimate evidence of the law itself. The Restatement directly contributes to the development of the international law. The Restatement's report that a certain rule is the law can provide a conception of the rule, writers' opinions, and, perhaps, even evidence of practice and *opinio juris*.

Courts take judicial notice of international law. Yet, many judges have had little exposure to international law, and its sources are different from other law. Accordingly, many courts receive the testimony of experts to help them identify international law relevant to the matters before them. *See, e.g.,* *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 n.4 (2d Cir. 1980); *United States v. Louisiana*, 420 U.S. 529 (1975). *See also* C. McCORMICK, *McCORMICK ON EVIDENCE* 944 (3d ed. 1984).

9. RESTATEMENT § 102 (Tent. Draft No. 6) states in part:

(1) A rule of international law is one that has been accepted as such by the international community of states

(a) in the form of customary law . . . .

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

10. *Id.* comment f. The comment states in part that:

some multilateral agreements designed for adherence by states generally, widely accepted and not rejected by a significant number of important states, and in some instances a wide network of similar bilateral arrangements on a subject, may come to be law for non-parties . . . by virtue of state practice and *opinio juris* resulting in customary law.

*Id.*

international agreements themselves are viewed as state practice which can contribute to the growth of customary international law.<sup>11</sup>

A textual analysis of these statements reveals a number of issues:

1. When the Restatement speaks in Section 102(3) of "international agreements" which may lead to the creation of customary international law, is it referring to entire international agreements or particular rules found within such agreements? Could a separate rule in an agreement move into customary law independent of the context of the agreement, and, if so, under what circumstances could this occur?

2. Are there considerations in addition to those set out in the Restatement that would determine whether an international agreement, or a part thereof, is suitable for becoming customary law?

3. If the negotiation and adoption of international agreements serve as state practice and if, as the Restatement reports, a finding that states conform to a rule from a sense of legal obligation (*opinio juris*) requires no explicit evidence and may be inferred from acts or omissions,<sup>12</sup> can the

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11. One comment states in part: "International agreements are practice of states and as such can contribute to the growth of customary international law under § 102(2)." *Id.* comment i. See also *id.* reporters' notes at 5. Even the negotiation of some international agreements appears to provide relevant evidence:

International conferences, especially those engaged in codification of customary law, provide an occasion for expressions by states as to the law on particular questions, and general consensus as to the law at such a conference confirms customary law or contributes to its creation. See, e.g., as to the law of the sea, Introductory Note to Part V.

RESTATEMENT § 102 reporters' notes at 2 (Tent. Draft No. 6).

12. *Id.* at comment c. Judge Manfred Lachs, in his dissent to the Judgment in the North Sea Continental Shelf Cases, 1969 I.C.J. 3, supported the view that positive evidence of *opinio juris* is not required.

In sum, the general practice of States should be recognized as prima facie evidence that it is accepted as law. Such evidence may, of course, be controverted—even on the test of practice itself, if it shows "much uncertainty and contradiction." (*Asylum, Judgment, I.C.J. Reports 1950*, p. 277). It may also be controverted on the test of *opinio juris* with regard to "the States in question" or the parties to the case.

*Id.* at 231. The majority of the Court, however, took the opposite view:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.*, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. 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.

*Id.* at 44.

The function of *opinio juris* in customary lawmaking is discussed particularly in Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law*, in INTERNATIONAL LAW: TEACHING AND PRACTICE 237, 250-54 (B. Cheng 1982), reprinted in 5 INDIAN J. INT'L L. 23, 35-41 (1965). See also Walden, *Customary International Law: A Jurisprudential Analysis*, 13 ISRAEL L. REV.

negotiation and adoption of an international agreement lead to customary law without more evidence?<sup>13</sup>

Section 102 does not directly answer these questions. Perhaps the answers are found within the substantive portions of the Restatement in which the general provision is applied to specific international agreements.

*B. Application of the Restatement's General Rule*

*1. The Effect of Multilateral Agreements on Customary International Law*

The Restatement identifies a number of areas in which multilateral agreements are important in the identification of customary international law. Those areas include the law of treaties, human rights, diplomatic immunity, and the use of force. The treatment of each of those areas provides valuable insights into the role such agreements may play in international law making.

Perhaps the least controversial subject in which this question arises is in the law of international agreements.<sup>14</sup> Even though the United States is not a party to the Vienna Convention on the Law of Treaties,<sup>15</sup> the Restatement finds that customary law on the subject is dominated by that Convention.<sup>16</sup> The Convention undoubtedly meets the Restatement's criteria of an agreement intended for widespread adherence. That effort has been successful.<sup>17</sup> In part, the Convention codified existing law derived from other sources. It also helped to crystallize and progressively develop the law.<sup>18</sup>

The Restatement treats the whole Convention as highly authoritative but does not adopt the view that all rules found in the Convention have merged into customary law.<sup>19</sup> Rather, the Restatement considers state practice and

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86, 95–100 (1978).

13. D'Amato has argued that this question should be answered in the affirmative. A. D'AMATO, *supra* note 2, at 164; D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1146 (1982). *Contra* H. THIRLWAY, *supra* note 2, at 81–86; Akehurst, *supra* note 2; Baxter, *Treaties and Custom*, *supra* note 2.

14. RESTATEMENT pt. III (Tent. Draft No. 6).

15. U.N. Doc. A/Conf. 39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969) (into force Jan. 27, 1980).

16. *See* RESTATEMENT pt. III introductory note at 2–7 (Tent. Draft No. 6); *see also* RESTATEMENT § 102 reporters' notes at 5.

17. RESTATEMENT pt. III introductory note at 2–7 (Tent. Draft No. 6) (international agreements).

18. Particularly noteworthy are the Vienna Convention's contributions to the rules for determining the permissibility of reservations to agreements and the effect of peremptory norms on inconsistent international agreements.

19. The Restatement takes the position that the reservation rules found in the Convention are not yet customary law. RESTATEMENT § 325 comment a (Tent. Draft No. 6); *id.* pt. III introductory note at 5; *id.* § 313 reporters' notes at 3.

*opinio juris* dehors the Convention to determine whether particular rules found in the Convention have merged into law. Such evidence of independent state practice and *opinio juris* is possible in this case. The Convention was concluded more than sixteen years ago. States, courts, and writers have applied the Convention rules during that sixteen-year period, even though the Convention did not come into force until 1980.<sup>20</sup>

A similar case is presented in the human rights field. The Restatement does find that a series of declarations and conventions intended for widespread adherence have given rise to certain rules of customary international law.<sup>21</sup> These findings, however, do not rest solely on the formal international instruments. Rather, the Restatement refers to various institutions, and to positions of state representatives, courts, and writers to support the conclusion that certain human rights are part of customary international law.<sup>22</sup> The Restatement does not hold that the entirety of any specific human rights agreement has merged into customary international law. Rather, the agreements and declarations are considered supportive of the finding that individual general rules have become customary law.<sup>23</sup>

The case of diplomatic and consular immunity presents another situation in which existing international agreements support customary law.<sup>24</sup> As the International Court of Justice demonstrated in the *Iranian Hostages* case,<sup>25</sup> there are few rules of customary law that have been the subject of such long-term and universal acceptance. The numerous international agreements on

20. See, e.g., Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 47 (Advisory Opinion); T. ELIAS, THE MODERN LAW OF TREATIES (1974); S. ROSENNE, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION (1970); I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed. 1984); Briggs, *The Travaux Preparatoires of the Vienna Convention on the Law of Treaties*, 65 AM. J. INT'L L. 705 (1971); Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

21. RESTATEMENT pt. VII introductory note at 449 (Tent. Draft No. 6) (protection of persons—natural and juridical).

22. *Id.* § 701 reporters' notes at 2.

23. RESTATEMENT comment a & § 702; *Filartiga v. Pena-Irela*, 630 F.2d 876, 884 (2d Cir. 1980).

24. RESTATEMENT §§ 462–463 introductory note at 21–24 (Tent. Draft No. 4) (diplomatic and consular immunities); *id.* § 461.

25. *Iranian Hostages Case (U.S. v. Iran)*, 1980 I.C.J. 3. The Court wrote:

The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions.

*Id.* at 24. Later in the Judgment it stated this conclusion even more strongly:

Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm.

*Id.* at 42.

the subject, both multilateral and bilateral, are complements to a plethora of state practice, court judgments, and writers' opinions supporting these rules.<sup>26</sup>

It is more difficult to apply the Restatement's general rule concerning the relationship between international agreements and customary law to the United Nations Charter provisions that restrict the use of force.<sup>27</sup> The Restatement reports that the restriction on the use of force has become customary law, but it only refers to the United Nations Charter as the basis for the rule.<sup>28</sup>

No reference is made in the comments and reporters' notes to a network of agreements, state practice dehors the Charter, court judgments, or statements of state officials or writers to support the conclusion that the rule on the use of force is customary law. As presented, the Restatement relies solely on the United Nations Charter for the conclusion that the Charter's "rules in respect of the use of force are . . . binding as customary law and are *jus cogens*."<sup>29</sup>

On its face, the Restatement's treatment of the use of force rule raises troubling questions about the role of international agreements in the development of customary law. Does the United Nations Charter, standing alone, provide a clear basis for the customary international law restrictions on the use of force? Certainly, the prohibition as found in Article 2(4) would appear to be generalizable.<sup>30</sup> Is it generalizable, however, outside of the context of the entire United Nations Charter? Can one argue that adherence to the entire United Nations Charter by states represents state practice in support of the rule in the same way that we expect of nations when a nontreaty based rule evolves? What is the basis for an *opinio juris* in support of the particular isolated rule in question? Can one ever find an *opinio juris* or state practice in support of a specific rule based on states' adherences to a broad international agreement?

Fortunately, the authors of the Restatement were not required to rest their controversial conclusion solely on the basis of one international agreement; other evidence to support the conclusion might have been invoked. Such

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26. See RESTATEMENT Ch. 3 introductory note & bibliography at 21–24 (Tent. Draft No. 4). A more cautious approach was taken by the Restatement in the cases of privileges and immunities of member representatives to international organizations, diplomatic agents in transit, and special missions due to the conflict in state practice. *Id.* § 467 reporters' notes at 1; *id.* § 461 reporters' notes at 11, 13.

27. RESTATEMENT § 905 comment g (Tent. Draft No. 6).

28. *Id.*

29. *Id.* comment g. See also *id.* § 102 comment k; RESTATEMENT pt. IX introductory note at 159 (Tent. Draft No. 5) (remedies in international law).

30. Article 2(4) states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. U.N. CHARTER art. 2, para. 4.



evidence, albeit controversial, could have included state practice, as well as a multitude of official and unofficial statements of government officials, international organizations, and writers to the effect that the Charter's restrictions on the use of force reflect general international law binding on all states as *jus cogens*.<sup>31</sup>

Furthermore, there is no doubt that the Charter was intended for widespread acceptance and has received that acceptance. It is also clear that states' use of force in international relations was the predominant reason for the establishment of the United Nations. Limitation of the use of force was the centerpiece upon which the Charter system was built.<sup>32</sup> This situation is unlike the usual case in which a number of more or less equal rules are found within a single agreement. Accordingly, acceptance of the Charter by states might be viewed as approaching a specific adherence to that important principle.

This brief review of the Restatement's treatment of the law of international agreements, human rights, diplomatic immunity, and the use of force, demonstrates that Section 102, as applied, permits specific rules found within broad international agreements to contribute to evidence of customary law. Such a contribution would presumably be in the nature of

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31. When the International Court of Justice held that a customary rule of international law on the use of force did exist, notwithstanding the U.N. Charter provisions on the same subject, it purported to rely heavily on independent evidence of state practice and *opinio juris*. Military and Paramilitary Activities in and Against Nicaragua, Merits (Nicar. v. U.S.), 1986 I. C. J.—, paras. 183–201. In dissent, Judges Swebel and Jennings argued that the necessary state practice was absent. Since the entry into force of the United Nations Charter there have been many occasions when states have used force despite the restrictions in Article 2(4). Some authors construe this history to establish the absence of a prohibition on the use of force. See Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809 (1970); Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984). Others find that nations accept the obligation to refrain from the use of force subject to certain acknowledged exceptions. State practice is found to conform generally to this obligation. See L. HENKIN, *HOW NATIONS BEHAVE* 135–64 (1979); Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971); Schachter, *International Law in Theory and Practice*, 178 REC. DES COURS 9, 133–79 (1982); Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

In response to the United Kingdom's claim that it had a right to sweep the Corfu Channel for mines despite the fact that the Channel was territorial waters of Albania, the International Court of Justice stated:

The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization find a place in international law.  
Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 35.

The question of the use of force might have been addressed in the Hostages case after the United States aborted rescue attempt, but the Court avoided the issue. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 43.

32. U.N. CHARTER preamble, arts. 1, 2. See H. KELSEN, *THE LAW OF THE UNITED NATIONS* 3–19 (1st ed. 1950); Schachter, *International Law in Theory and Practice*, 178 REC. DES COURS 133–66 (1982); Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984); Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

state practice and would be based upon adherence of states to the agreement as a whole.<sup>33</sup> Section 102 has also been applied in a way that suggests the acceptance of an agreement as a whole may provide state practice and *opinio juris* for a specific rule found within an agreement to be considered customary law.<sup>34</sup>

While the Restatement, perhaps unnecessarily, made such use of an international agreement in one unique case—the use of force—others would not necessarily be so restrained. Equating acceptance of the agreement in its entirety with support for an isolated rule presents a number of difficulties. First, the provision might be linked to other provisions in the agreement either for functional reasons or for political reasons arising out of the trade-offs negotiated during the development of the agreement.<sup>35</sup> Second, acceptance of the agreement by states might be motivated by support for other provisions. Thus, the adherence would not form a reliable basis for concluding that states have accepted the specific rule outside of the context of the agreement.<sup>36</sup> Third, adherence to the agreement as a whole would have little relevance to a conclusion that there is an *opinio juris* relating to the specific provision.

The review of the four substantive areas above does not clearly resolve these questions. The Restatement's reliance on broad agreements to establish specific rules does support the view that general participation in an international agreement provides particularized support for isolated rules found within the agreement. On the other hand, the Restatement was careful to select only certain rules for this treatment and its conclusions that those rules had become customary law were, or might have been, supported by evidence derived from sources independent of the agreements.

### 2. *The Effect of Networks of International Agreements on Customary International Law*

The discussion above focused on the role that major international agreements may play in the development of customary international law. In

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33. In the North Sea Continental Shelf Cases (*W. Ger. v. Den., W. Ger. v. Neth.*) 1969 I.C.J. 3, 26–27, the Court addressed the argument of Denmark and the Netherlands that the Federal Republic of Germany's signing of the Convention on the Continental Shelf and its acceptance of the fundamental concept of coastal state rights in respect of the continental shelf caused it to become bound to the Convention's equidistance rule for delimiting continental shelf boundaries. The Court found that insufficient evidence was presented to particularly establish the equidistance rule as customary law.

34. See RESTATEMENT § 102 comment c (Tent. Draft No. 6).

35. See *infra* notes 36–48, 60–64, and accompanying text.

36. Walden writes: “the *opinio juris* of a state can sometimes be identified with what it has said, or would, under certain circumstances, probably say. But it can not be identified with what some other body has said, without further evidence that it does in fact endorse this formulation.” Walden, *supra* note 12, at 100. See also materials cited *supra* note 12.

addition, the Restatement reports that networks of bilateral agreements may also give rise to such law.<sup>37</sup> An analysis of such networks and the Restatement's conclusions, provides a further insight into the role of international agreements in the development of customary international law. Interestingly, in every one of the three areas of networks addressed by the Restatement—extradition, taxation, and international trade—the Restatement found no resulting customary international law.

In the case of extradition, a widespread network of extradition treaties exists.<sup>38</sup> They employ many similar generalizable rules such as those relating to specialty, political offenses, and double jeopardy, as well as procedures for initiating a request. Nevertheless, the Restatement concludes that international law does not obligate a state to extradite persons absent an international agreement to do so.<sup>39</sup> This conclusion is reached notwithstanding the fact that states do extradite even in the absence of such agreements.<sup>40</sup>

Similarly, there exists a comprehensive network of international tax treaties that conforms to an underlying principle proscribing double taxation of income.<sup>41</sup> Many of these agreements are patterned after model treaties developed by the League of Nations and the Organization for Economic Cooperation and Development (OECD) or the guidelines developed by the United Nations.<sup>42</sup> Despite these commonalities and the presence of a generalized principle, the Restatement concludes that, absent a binding international agreement, international law imposes no duty on states to avoid double taxation.<sup>43</sup>

The same conclusions are reached in the case of international trade relations, an area that is largely dominated by the General Agreement on Tariffs and Trade (GATT).<sup>44</sup> Generalized principles relating to most favored nation treatment, prohibitions on indirect barriers to imports, subsidies and countervailing duties, and dumping are found within the GATT and are implemented through a widespread network of international agree-

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37. RESTATEMENT § 102 comment i (Tent. Draft No. 6).

38. See M. BASSIOUNI, INTERNATIONAL EXTRADITION, UNITED STATES LAW AND PRACTICE (1983); M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974).

39. RESTATEMENT Ch. 4 introductory note at 64 (Tent. Draft No. 5) (extradition); *id.* § 486.

40. *Id.* comment b. See M. BASSIOUNI, *supra* note 38, at I. §§ 6-1, 6-2. Bassiouni is of the opinion that in regard to international crimes the network of international agreement imposing a duty to prosecute or extradite has given rise to duties under customary international law. *Id.* at ch.I, § 2-5.

41. RESTATEMENT § 413 comment a & reporters' notes at 3 (Tent. Draft No. 6).

42. *Id.* § 413 reporters' notes at 3; Whittaker, *An Examination of the OECD and UN Model Tax Treaties*, 8 N.C. J. INT'L L. & COMM. REG. 38 (1982).

43. RESTATEMENT § 413 (Tent. Draft No. 6).

44. RESTATEMENT pt. VIII introductory note at 249-53 (Tent. Draft No. 4) (general agreement on tariffs and trade).

ments among large numbers of states.<sup>45</sup> Nevertheless, no principle of international law is derived from this network.<sup>46</sup>

What is the basis for the conclusion that no customary international law is derivable from the networks of agreements found in the areas of extradition, taxation, and international trade? It is not the lack of generalizable principles, nor is it the lack of a sufficient number of participants.<sup>47</sup> One answer might be that the treaty parties have spoken and have made it clear that they do not recognize a customary law obligation. That type of obligation will be assumed only when it is the subject of an individualized international agreement. Such an answer would be sufficient. Even if such statements have been uttered it is important to know why there is reluctance to accept into customary law rules that have received widespread adherence in networks of international agreements.

In most cases such clear restrictions on the rules used in international agreements subject to widespread participation will not be found. In addition, if participation in the multilateral agreement or network of agreements is truly widespread as required by the Restatement, state practice dehors the agreement will be unlikely. There will be few such events, and those events may involve the least important international actors or unique circumstances. Thus, conclusions about the customary law effect of these agreements may have to be based largely on the nature of the rule itself or interpretive, self-serving statements of officials.

Accordingly, the nature of the legal obligations found in the network of agreements on extradition, double taxation, and international trade which the Restatement held had *not* become customary law ought to be explored in contrast with the multilateral agreements that the Restatement held *did* contribute to customary law. In the former cases, the central principles are generalizable or, at least, no less so than the rules of treaty obligation, human rights, diplomatic immunity, or the use of force. They are also subject to widespread participation. On the other hand, these obligations are more closely the result of a quid pro quo arrangement that may not permit their use outside the fabric of the agreement.

The Vienna Convention on the Law of Treaties and the agreements on diplomatic immunity do provide integrated sets of rules. Many of these

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45. RESTATEMENT §§ 802, 805, 806 (Tent. Draft No. 4). See A. LOWENFELD, VI INTERNATIONAL ECONOMIC LAW, PUBLIC CONTROLS ON INTERNATIONAL TRADE 23–27 (1983). The recent efforts of the U.S.S.R. to participate in the GATT illustrates, perhaps, the universal importance of the system. *Soviet Seeks Status in GATT*, N.Y. Times, Apr. 7, 1986 at 24, col. 1.

46. RESTATEMENT pt. VIII introductory note (Tent. Draft No. 4).

47. D'Amato focuses on the question of whether or not the GATT is generalizable. A. D'AMATO, *supra* note 2, at 105–06. The Restatement focuses on the question of whether the agreement was formulated for states generally. RESTATEMENT § 102.

rules, however, are separable and were already part of customary law. Those agreements do not present a situation in which the participants negotiated trade-offs of state interests in order to reach new, integrated compromise results. The human rights conventions represent situations in which the negotiators focused on high aspirations of humanity rather than the compromise of individual state interests. While certain state interests were at stake, those interests were minor compared to the more general aspirations of the negotiators.

The restrictions on the use of force found in the United Nations Charter are, perhaps, more troublesome. While the aspirations were equally noble, some real and direct state interests were under negotiation. A highly negotiated Security Council system was developed to complement the limitations on the use of force. Adherence to the United Nations Charter represents a commitment to the larger United Nations system and not necessarily to one, albeit important, portion of the system. This circumstance makes it problematic whether adherence to the Charter alone should be considered sufficient to promote the rule of the use of force. Only if one relies on substantial information that is external to the Charter for more specific evidence of state practice and *opinio juris*, could one credibly begin to distinguish the case of the use of force from extradition, double taxation and economic relations.<sup>48</sup>

Thus, the Charter's restriction on the use of force is more comparable to the agreements on extradition, taxation, and international trade than to the agreements on the law of treaties, diplomatic immunity, and human rights. Real and traditional state interests were directly at stake in the former. Codification of existing law or noble generalized aspirations were not the primary focus of those provisions. Despite widespread adherence to those networks of agreements, there is insufficient evidence of state practice and *opinio juris* dehors the agreements to sustain the heavy burden of proof required to bring individual rules found within these networks into customary international law. The same proof also may be necessary to support the conclusion on the use of force restriction.

An additional consideration that may have helped to support the conclusion that the taxation and international trade agreements, and perhaps the extradition treaties, could not easily give rise to customary international law concerns the technical nature of the obligations. While one might be able to articulate generalized rules prohibiting double taxation or proscribing certain trade practices, the essence of the rules will be found in the

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48. See the literature cited in RESTATEMENT § 905 reporters' notes at 7 (Tent. Draft No. 6). In *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J.—, the International Court of Justice purported to rely heavily on this evidence to support its customary international law finding. *Id.* at paras. 183–201.

technical arrangements that implement those principles. Thus, it is difficult to merge a generalized principle of this sort into international law without the accompanying detail that must be negotiated individually.<sup>49</sup> The same is not true for most of the Vienna Convention's rules relating to international agreements; nor is it necessarily true in the case of human rights obligations or diplomatic immunity.<sup>50</sup>

Thus, the law does permit some individual rules found in international agreements to merge into customary law apart from the overall agreement. Certain factors are appropriately considered when determining whether a rule found within an international agreement may give rise to new customary international law. These factors include:

1. *The nature of the subject matter.* An agreement which addresses generalized interests and aspirations of the international community may be more likely to produce new law than an agreement which focuses on specific state interests.

2. *The nature of the negotiations.* A particular rule that was the product of compromises across the range of provisions in the agreement may be less appropriate for merger into customary law than a rule that resulted from a more atomized negotiation.

3. *The nature of the obligation.* A rule that is interlinked with other provisions in the agreement would be less able to be considered as a customary rule separated from the fabric of the agreement than a rule that is independent of other obligations.

4. *The nature of the rule.* A rule that requires highly technical methods of implementation would require the specificity of an international agreement, as contrasted with more generalized obligations that are possible to implement as custom. Furthermore, if international institutions are required to be used or established, customary law is inappropriate.

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49. The International Court of Justice wrote recently in the Gulf of Maine maritime boundary case:

A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.

Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 299.

50. For example, the International Court of Justice recognized the generalized nature of the human rights obligations set out in the Genocide Convention. The major focus of that convention was not specific technical rules of behavior. Rather, the Convention sought to assure that behavior conformed to the more general goal of the Convention: to eliminate genocide. This conception of the Genocide Convention played a major role in the Court's determination that a liberal rule on reservations to the Convention was appropriate. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (Advisory Opinion of May 28). The same is true in the case of other human rights conventions.

These factors may help to explain why some of the agreements discussed above are consonant with customary law and others are not. The sole exception might be the rule concerning the restrictions on the use of force. That conclusion of the Restatement may be explained in one of the following ways: (1) the Restatement's conclusion on the customary law is wrong; (2) while the rule is less appropriate for customary law, state practice and *opinio juris* is so strong that the rule is now custom despite the factors suggesting that is inappropriate; or (3) the Restatement accepts the view that rules found in international agreements may create international law, notwithstanding the absence of independent state practice and *opinio juris*, and the contrary indications of the factors listed above. An examination of the treatment of the law of the sea may shed more light on the role that international agreements may play in the making of customary law.

### C. *The Law of the Sea*

#### 1. *Substantive Treatment*

Throughout the history of international law, writers and statesmen have found the law of the sea to be the prototype for the study of international law. The interplay of custom and international agreements in this area has a long history. This area has experienced considerable change in the years subsequent to World War II. Three United Nations Conferences on the law of the sea have produced five conventions.<sup>51</sup> For many years, the most recent conference, the Third United Nations Conference on the Law of the Sea, constituted one of the major activities of the United Nations system. The Conference produced the 1982 Convention on the Law of the Sea (LOS Convention). This convention is not yet in force, but as of April, 1986 there were 159 signatures and twenty-seven ratifications.<sup>52</sup> The United States and

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51. The First United Nations Conference on the Law of the Sea produced four Conventions: Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962); Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (entered into force June 10, 1964); Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* Apr. 29, 1958, 15 U.S.T. 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964); Convention on Fishing and Conservation of the Living Resources of the High Seas, *opened for signature* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (entered into force Mar. 20, 1966).

The Third United Nations Conference on the Law of the Sea produced the Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf. 62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter cited as LOS Convention].

52. LOS Convention, *supra* note 51; Status of the United Nations Convention on the Law of the Sea, LAW OF THE SEA BULL. No. 7, at 1-6 (Apr. 1986).

some other countries have announced that they will not be parties to it.<sup>53</sup>

The Restatement devoted considerable attention to the law of the sea and the changes which the recent negotiations and the 1982 Convention may have made in customary law. In its introduction to the law of the sea chapter, the Restatement reports that although the LOS Convention is not in force and the United States is not a signatory, it is an important basis for the customary law of the sea now in effect.<sup>54</sup> This conclusion is consonant with the view recently expressed by the Chamber of the International Court of Justice that determined the Gulf of Maine boundary dispute between the United States and Canada.<sup>55</sup>

The Restatement points out that much of the Convention merely restates the law found in the previous 1958 Law of the Sea Conventions which in part codified customary law existing at that time.<sup>56</sup> More importantly, the Restatement reports that the LOS Convention has given rise to new rules of customary international law: "Other provisions in the Convention set forth rules that, whether or not they were law in 1958, became law since that time, as they were accepted at the Conference by consensus and have influenced, and by now reflect, the practice of states."<sup>57</sup>

According to this statement, the Convention provides a convenient codification of existing law that is derived from other sources, although the negotiations at the Conference played a role in the development of that law. On its face, this statement suggests that the Convention and the negotiations standing alone would not be sufficient to establish customary law.

The Restatement cautiously declares that the entire Convention has not merged into customary law. Thus, it points out that a few parts of the

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53. President's Statement Concerning the Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 9, 1982).

54. RESTATEMENT pt. V introductory note at 164-65 (Tent. Draft No. 6) (law of the sea).

55. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 294. The Judgment states:

The Chamber notes in the first place that the Convention [on the Law of the Sea] has not yet come into force and that a number of States do not appear inclined to ratify it. This, however, in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone . . . were adopted without any objections . . . This concordance of views is worthy of note . . . In the Chamber's opinion, these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question.

*Id.*

56. "[M]any of the provisions of the Convention follow closely provisions in the 1958 conventions (on the law of the sea) to which the United States is a party and which very largely restate customary rules as of that time." RESTATEMENT pt. V introductory note at 164-65 (Tent. Draft No. 6) (law of the sea).

57. *Id.*



Convention, such as the deep seabed regime, have not merged into customary law due to the lack of supporting evidence dehors the Convention.<sup>58</sup> The Restatement is therefore admittedly selective in its use of rules found in the LOS Convention.

Caution is particularly appropriate in this case. Some of the reasons that justify such caution are:

1. *The nature of the subject matter.* Much of the law of the sea under negotiation concerned real state interests, not noble aspirations of a general humanitarian kind.<sup>59</sup>

2. *The nature of the negotiations.* It is beyond dispute that the negotiations at the Law of the Sea Conference were conducted on the basis of a package deal. Trade-offs between subjects were common.

3. *The nature of the obligation.* All portions of the Convention were thereby linked together as a political matter.<sup>60</sup>

4. *The nature of the rule.* The Convention establishes international organizations and sets out detailed obligations, sometimes with numerical specifications. Such institutions and requirements are not susceptible to implementation by customary international law.

In addition to these considerations a few other facts suggest care should be taken before concluding that the LOS Convention has given rise to customary international law. First, many of the provisions of the Convention embody new concepts created at the negotiations, and states have not implemented them in practice.<sup>61</sup> Second, the views of authorities about the effect of the Convention on customary law differ. Some have declared it to be evidence of existing law while others refuse to accept it as law except in regard to states which become parties to the agreement.<sup>62</sup> Third, the Convention was adopted only three years ago by the Law of Sea Conference on a split vote; it has not come into force for any state.<sup>63</sup> In the face of these reasons for caution, the Restatement does find that a number of rules found

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58. See *id.* at 165-67 & n.4.

59. See Charney, *The United States and the Law of the Sea After UNCLOS III—The Impact of General International Law*, 46 L. & CONTEMP. PROBS. 37 (1983).

60. See Caminos & Molitor, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871 (1985); see also Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 AM. J. INT'L L. 324 (1981).

61. See Charney, *supra* note 59; Treves, *The United Nations Law of the Sea Convention of 1982: Prospects for Europe*, IX GREENWICH F. 166, 171 (1984).

62. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246, 294; *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 171 (Judgement of Feb. 24, 1982) (Oda, J., dissenting); Text of Declarations, LAW OF THE SEA BULL. NO. 5, at 3-15 (July 1985) (various declarations of states when signing the LOS Convention in Jamaica); Charney, *supra* note 59; Macrae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CALIF. W. INT'L J. 181, 182 (1983).

63. See RESTATEMENT pt. V introductory note at 164 (Tent. Draft No. 6) (law of the sea).

## Development of International Law

in the Convention have contributed to the development of customary law and now reflect the law.

### a. *The Exclusive Economic Zone*

The Restatement reports that the regime of the Exclusive Economic Zone (EEZ) that was developed at the Law of the Sea Conference and written into the Convention is now customary law.<sup>64</sup> This finding not only includes the right of the coastal state to claim a 200-mile zone but also includes many of the detailed rights and obligations relating to the zone that are contained in the Convention.<sup>65</sup> According to the Restatement, only a limited number of specific provisions relating to the details of the regime are not customary law.<sup>66</sup>

Any review of state practice with respect to the 200-mile zone will show that the vast majority of coastal states have claimed some jurisdiction in the 200-mile zone as a right under international law. Beyond the general claims there is precious little commonality. State claims vary tremendously on the nature and extent of rights claimed in the zone; few such claims match the regime found in the Convention.<sup>67</sup> Thus, the state practice dehors the treaty does not support the view that the details of the Convention's economic zone regime are custom.

The EEZ regime was a result of difficult negotiation which linked a number of issues. For example, the major maritime states only accepted the regime on the condition that the waters within it were subject to many high seas rights. Other states strongly resisted that effort.<sup>68</sup> While a consensus was reached at the negotiations as a result of compromise, the same consensus has not been found in practice outside the Convention.<sup>69</sup>

The regime of the EEZ negotiated at the Conference produced an agreement that established basic technical rules for the conservation and exploitation of living resources in the zone. This included the requirement that the coastal states engage in a process of evaluating the fish stocks and their own resources in order to manage the fishery for optimum utilization.

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64. *Id.* § 514.

65. *Id.* comments a & i, reporters' notes at 1.

66. *See id.* comment f, reporters' notes at 4.

67. *See* Charney, *The Exclusive Economic Zone and Public International Law*, 15 OCEAN DEV. & INT'L L. 233, 239 (1985); Juda, *The Exclusive Economic Zone: Compatibility of National Claims and the UN Convention on the Law of the Sea*, 16 OCEAN DEV. & INT'L L. 1 (1986).

68. RESTATEMENT § 511 reporters' notes at 7 (Tent. Draft No. 6). *See also* Charney, *supra* note 59, at 44.

69. The diversity of state actions as reflected in domestic legislation, proclamations, and other activities of coastal states is explored in Charney, *supra* note 67. *See also* Juda, *supra* note 67.

They are to provide other states access to excess resources.<sup>70</sup> While the concept is clear, the enforceability of this regime even under the Convention is questionable. It is doubtful that states can be found to have implemented the technical details of this regime which, according to the Restatement, has merged into customary international law.<sup>71</sup>

The duties of the coastal state to foreign state scientific research in the EEZ is another area in which intense negotiations took place. The highly negotiated solution contained in the Convention has yet to be found in the practice of states *dehors* the Convention.<sup>72</sup>

### *b. The Continental Shelf*

Similar problems arise with respect to the seaward limit of the continental shelf regime. The Restatement reports that the agreement to extend the continental shelf regime to the limit of the continental margin was accepted by consensus.<sup>73</sup> This agreement was predicated upon a rather technical definition of that limit and a specific procedure for fixing that limit on the seabed. In addition, the Convention sets out certain rules applicable to coastal states' activities on the margin beyond the 200-mile limit and a requirement that there be revenue sharing from that area.<sup>74</sup> No state practice can be found to support a conclusion that these detailed provisions have been implemented or accepted by states independent of the Convention. It appears that even the United States might extend its continental shelf jurisdiction without regard to some related obligations.<sup>75</sup>

### *c. The Transit Regimes*

The same problem arises in the context of the militarily and economically important provisions for transit passage through straits used for international navigation, as well as the provision for passage through archipelagic waters.<sup>76</sup> The willingness of the United States and other major

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70. LOS Convention, *supra* note 51, arts. 61–70; RESTATEMENT § 514 comment f (Tent. Draft No. 6). See Charney, *supra* note 59, at 48.

71. See Charney, *supra* note 67.

72. See LOS Convention, *supra* note 5, arts. 245–55; RESTATEMENT § 514 comment h (Tent. Draft No. 6); Charney, *supra* note 67; Report of the Committee on the Law of the Sea, PROC. & COMM. REP. AM. BRANCH INT'L L.A. 148, 173–175 (1983–84).

73. See RESTATEMENT § 511 & reporters' notes at 8 (Tent. Draft No. 6); *id.* § 515 comment a.

74. See LOS Convention, *supra* note 51, arts. 76, 82; RESTATEMENT § 511 comment a, reporters' notes at 8 (Tent. Draft No. 6); *id.* § 515 comment a; Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AM. J. INT'L L. 211, 227–31 (1981).

75. See generally Ralph, *Defining the Boundaries of the Outer Continental Shelf to Establish Jurisdiction Over Resources*, OCEANS '84 EXCLUSIVE ECONOMIC ZONE SYMPOSIUM 122 (1984).

76. RESTATEMENT § 513 (Tent. Draft No. 6).

maritime countries to accept the twelve-mile territorial sea and the establishment of archipelagic waters was linked to these transit provisions.<sup>77</sup> None of these new formulations developed at the Law of the Sea Conference has yet seen widespread implementation consistent with the Convention.<sup>78</sup> In these cases detailed provisions of the Convention require particularized technical methods of application, such as the mathematical limitations on archipelagic baselines and specific limitations on navigation routes and traffic separation schemes in straits.<sup>79</sup> Can such provisions become customary law independent of the fabric of the Convention when there is a paucity of independent state practice dehors the Convention?

*d. The Environment*

Finally, the Restatement adopts as customary law the LOS Convention's provisions for the protection of the marine environment. The Convention contains many generalizable standards of care with respect to the marine environment. There are also rules that specify the duties and powers of the coastal state with respect to foreign vessels in adjacent waters.<sup>80</sup> Few, if any, of these specific provisions have been implemented by states.

2. *Conclusions on the Law of the Sea*

In its treatment of the law of the sea the Restatement assigns international treaty negotiations a greater role in the formation of customary law than in any other substantive area of international law. First, the Restatement permits the selective use of portions of an international agreement that are the result of a compromise of real and direct state interests. Second, highly technical solutions to state relations that, in other substantive areas, had limited the impact of treaty relations on customary law, presented no obstacle to finding new customary law of the sea. Third, the complex behavior at the Law of the Sea Conference, and the controversial adoption of the Convention, provided virtually the sole basis for finding new rules of customary law. It is thus presumed that a conference and a multilateral convention that is not yet in force can, without additional evidence, provide the necessary state practice and *opinio juris* for the establishment of new rules of customary law. This conclusion is inconsistent with the treatment which the Restatement gives such agreements in other substantive areas.

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77. *Id.* reporters' notes at 3–4.

78. See Charney, *supra* note 67, at 254–55; Charney, *supra* note 59, at 44–48.

79. See LOS Convention, *supra* note 51, arts. 41, 47; RESTATEMENT § 513 comments i & j, reporters' notes at 3–4 (Tent. Draft No. 6).

80. See RESTATEMENT pt. VI introductory note at 167 (Tent. Draft No. 4) (law of the environment); *id.* § 612 comments d, e.

## II. ANALYSIS

The question, therefore, is what role should international law give to the negotiation and conclusion of international agreements when a search is to be made for the operative rules of customary international law. Conferences held to negotiate international agreement provide a vehicle by which states communicate their views for the purpose of producing rules of law. Agreements reached at such fora do change nations' perceptions of their rights and duties. If this process were irrelevant to customary law development, some law may become frozen in time and fail to reflect movement realized at international negotiations. The gap that could develop between custom and treaty law might complicate interstate relations.

The Restatement's treatment of the law of the sea and the use of force may be interpreted as supporting the controversial view that the circumstances surrounding the negotiation and adoption of an international agreement may, with little more, produce customary international law. Section 102 can be read to support this conclusion since the agreement may be deemed state practice and may provide the necessary evidence of *opinio juris*.<sup>81</sup>

Alternatively, it may be argued that the authors of the Restatement do not maintain that international agreements, standing alone, can create new customary international law. With the sole exception of the rule on the use of force, the Restatement has made reference to state practice and other evidence dehors the international agreements supporting the customary law conclusions. Such references, albeit sometimes unproven, are made in the introduction to the chapter on the law of the sea. One could thus conclude that Section 102 requires more than the negotiation and adoption of an agreement to establish a new norm of customary law.

There are difficulties with either interpretation of the Restatement. The conclusion that more than the agreement itself must be shown before customary law is found presents problems for one seeking to find evidence of state practice and *opinio juris*. In cases where the required widespread adherence to the agreement exists, substantial evidence of state actions taken in circumstances where the agreement is not directly applicable may be hard to obtain. As a consequence, support for new rules of customary law will have to be found in the agreement and in secondary evidence derived from writers, and perhaps in self-serving official state policy statements. It is this dilemma that may force some to use tenuous evidence in support of new norms of customary international law.<sup>82</sup>

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81. This approach is supported by D'Amato. See *supra* note 13.

82. It is the same dilemma that supports Professor Anthony D'Amato's controversial theory that generalizable international agreements, with little more, can give rise to customary international law.

If, however, an isolated rule contained within an agreement can form the basis upon which customary law is established, then one must assume that the negotiation and acceptance of the agreement as a whole can be relied upon to provide the elements of customary law. This would be difficult. For example, it is not clear how such proof can support the conclusion that there has been acceptance or *opinio juris* with respect to a rule that is isolated from the context of the agreement as a whole. In the unique circumstance of the restrictions on the use of force found within the United Nations Charter, the centrality of that rule might permit such a conclusion. In cases where the rule is not preeminent, such a conclusion would be highly questionable in the absence of independent evidence dehors the agreement. Furthermore, this approach might lead in the direction of establishing ad hoc multilateral negotiations as de facto international legislatures.

Professor Louis Sohn has taken the view that the negotiation of international agreements can readily develop new norms of international law.<sup>83</sup> He has suggested that this development arises out of the difficulty faced by authorities seeking to distill patterns of state practice and *opinio juris* from the overwhelming quantity of public and secret information generated by states.<sup>84</sup> In seeking a more manageable method for finding and defining customary international law, he has suggested that the international community may be expanding the role which conferences called to negotiate international agreements may play in developing new customary international law. He maintains that when a rule is the subject of agreement at a conference, that rule is presumed to give rise to custom once a number of interested states behave in conformity with the rule and no state objects.<sup>85</sup> He also suggests that the international community might decide that "consensus at a conference plus a signature by a vast majority of the participants creates a general norm of international law. . . . binding on [states] from the very moment of [the] adoption [of the international agreement]." <sup>86</sup>

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See *supra* note 13.

83. Sohn, *The Law of the Sea: Customary International Law Developments*, American University Washington College of Law Edwin A. Moors Lecture (Oct. 11, 1984), 34 AM. U.L. REV. 271 (1985) [hereinafter cited as Sohn, *Developments*]; Sohn, "Generally Accepted" *International Rules*, 61 WASH. L. REV. 1073 (1986).

84. Sohn, *Developments*, *supra* note 83, at 275.

85. Sohn writes:

If a sufficient number of States having a special interest in the application of a new rule start acting in accordance with it, and no States object to it, there is a clear presumption that the rule agreed on at the conference, although the agreement has not yet been ratified, has become an accepted rule of customary international law.

*Id.* at 279.

86. *Id.* This thesis may even draw support from a Judgement of a Chamber of the International Court of Justice. See *Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 294

Professor Prosper Weil reaches a similar conclusion:

[T]he conventional norm has not been frontally assaulted but cunningly outflanked. The principle remains that an international treaty binds only the states that have become parties to it, and cannot create obligations incumbent upon third states. Yet behind the mask of classicism thus retained there has been a change of substance: in reality, the conventional norm itself may now create obligations incumbent upon all states, including those not parties to the convention in question.<sup>87</sup>

Unlike Sohn, Weil does not appear to be pleased with this development.

As a method to facilitate the establishment of new rules of international law, this approach has much appeal. Unfortunately, it also presents certain difficulties. Some of these difficulties have been identified above. How, for example, would one determine whether a rule developed in a negotiation can be separated from the fabric of the agreement? How could one distinguish between actions and statements of officials that support the negotiated agreement as an agreement, and statements intended to support the rule as customary law? The answer to both of these questions might be that one looks to the official statements of state representatives at the negotiations for *opinio juris* supporting the rule as a norm of international law.

The record of the negotiations may be clear on the question, but that is unlikely. It certainly was not clear in the case of the Law of the Sea Conference that was the focus of Sohn's article.<sup>88</sup> Even if the record were clear, such strong reliance on the intent of the negotiators to create international law may weaken the foundations of customary international law.

It is well understood that international law, being a rudimentary system of law, is fragile. To the extent that customary law is effective as law, it must reflect the real interests of the members of the international community. To a certain extent, it must also reflect the normative aspirations of the community. At the same time, it must not be so divergent from actual state practice and true state interests that it becomes an unrealistic dream.<sup>89</sup> As a consequence, the traditional rules for determining whether there is a rule of customary international law seek to make the most accurate appraisal of

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para. 94.

87. Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 438 (1983).

88. See Sohn, *Developments*, *supra* note 83. It is widely recognized that the Law of the Sea Conference negotiations were conducted largely off the record. Consequently, the official records of the conference are of limited use. At the signing of the Convention, nations took different positions on the legal effect of the Convention. These declarations are collected in LAW OF THE SEA BULL. NO. 5, *supra* note 62, and LAW OF THE SEA BULL. NO. 6, *supra* note 52. All the participants knew they were speaking for posterity, and were trying to make a record that would serve their particular interests.

89. See I H. KELSEN, GENERAL THEORY OF LAW AND STATE 120 (1945); K. MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 554 (2d ed. 1968).

states' positions. This is why it is important to consider the actual behavior of states in real situations.<sup>90</sup>

Statements of officials faced with real situations have been very significant. Information on states' views derived from abstract situations has provided less authoritative information on their true positions. While resolutions of international organizations, such as those of the United Nations General Assembly, have become accepted evidence to support rules of international law,<sup>91</sup> there is much debate over their utility. The debate arises because resolutions are likely to represent highly politicized positions of state representatives divorced from the reality of international life.<sup>92</sup> Even when a resolution is utilized as evidence of international law,

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90. In 1969 the International Court of Justice emphasized the importance of state practice in the North Sea Continental Shelf Cases (*W. Ger. v. Den.*, *W. Ger. v. Neth.*), 1969 I.C.J. 3, 44:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of 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.

Judge Read wrote in the *Anglo-Norwegian Fisheries Case* (*U.K. v. Nor.*), 1951 I.C.J. 116, 191: "The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship . . ." The required consistency of the state practice was explained in the recent Judgment on the Merits in *Military and Paramilitary Activities in and Against Nicaragua* (*Nicar. v. U.S.*), 1986 I.C.J. at para. 186. See H. THIRLWAY, *supra* note 2, at 31, 58; Akehurst, *supra* note 2, at 2. *Contra* A. D'AMATO, *supra* note 2, at 66. See also Scott & Carr, *The International Court of Justice and the Treaty/Custom Dichotomy*, 16 *TEX. INT'L L.J.* 347, 348–49 (1981).

91. Higgins wrote in 1963:

The United Nations is a very appropriate body to look for indications of developments in international law, for international custom is to be deduced from the practice of states, which includes their international dealings as manifested by their diplomatic actions and public pronouncements. With the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law. Moreover, the practice of states comprises their collective acts as well as the total of their individual acts . . . [C]ollective acts of states, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law. The existence of the United Nations—and especially its accelerated trend towards universality of membership since 1955—now provides a very clear, very concentrated, focal point for state practice.

R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 2 (1963).

92. See *Western Sahara* 1975 I.C.J. 12, 29–36 (Advisory Opinion of Oct. 16); RESTATEMENT § 102 reporters' notes at 2 (Tent. Draft No. 6); M. BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 134–44 (1979); G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 165, 170, 172 (1974); Agrawala, *The Role of General Assembly Resolutions as Trend-Setters of State Practice*, 21 *INDIAN J. INT'L L.* 513 (1981); Cheng, *supra* note 12; Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 *AM. J. INT'L L.* 782 (1966); Gross, *The United Nations and the Role of Law*, 19 *INT'L ORG.* 537, 555–58 (1965); Hiyashi, *The Role of Resolutions of the United Nations General Assembly in the Formative Process of International Customary Law*, 25 *JAPANESE ANN. INT'L L.* 11 (1982); Schachter, *The*



care should be taken to determine the specific nature of the resolution and the facts surrounding its adoption.<sup>93</sup>

The negotiation of international agreements at international conferences falls somewhere between actions of states faced with specific real situations and votes to adopt resolutions at meetings of international organizations. Some negotiations are closer to real and pressing international disputes than others, and positions taken at the former are more likely to represent real decisions of the participating states. Adherence to an international agreement by a state represents an even stronger decision. But negotiations and agreements do differ. Those like the United States-Iran agreements that led to the freeing of the hostages, are based strictly on specific live disputes.<sup>94</sup> Others, like the human rights conventions, are not focused on any specific incident.<sup>95</sup> While the former may closely reflect what states are willing to do in real situations, it is the latter that are more likely to be considered as forming the basis for new rules of international law. The latter, however, are least likely to reflect the reality of state policy. But it is the reality of state policy that should be given the greatest attention when searching for customary international law, not the more abstract activities of state representatives at multilateral fora.

It is this paradox that the legal community must face if greater reliance is to be placed on international agreements in defining customary international law. The negotiation and conclusion of international agreements

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*Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 3-6 (1976) [hereinafter cited as Schachter, *Evolving Law*]; Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 REC. DES COURS. 165, 173-84 (1963).

93. See *Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Republic*, reprinted in 17 I.L.M. 1, 27-31 (1978). In this case Libya claimed that its right to nationalize all of the rights, interests, and property of two international oil companies was not subject to limitation by international law. Libya argued that its position was supported by rules of international law relating to the sovereignty of states over natural resources established by various United Nations resolutions including the Charter of Economic Rights and Duties of States. The Award examined the text of the resolutions, the voting patterns, and statements by interested states before rejecting the Libyan proposition. See also Schachter, *Evolving Law*, *supra* note 92; other materials cited *supra* note 92.

94. These agreements include: Declaration of the Government of the Democratic and Popular Republic of Algeria, 75 AM. J. INT'L L. 418 (1981) (relating to the comments made by Iran): Undertaking of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Democratic and Popular Republic of Algeria, 75 AM. J. INT'L L. 425 (1981); Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 75 AM. J. INT'L L. 422 (1981); Escrow Agreement, 75 AM. J. INT'L L. 426 (1981).

Articles on these agreements include: Belman, Owen & Lowenfeld, *Remarks, The U.S./Iranian Settlement*, 75 AM. SOC'Y INT'L L. PROC. 236 (1981); Norton & Collins, *Reflection on the Iranian Hostage Settlement*, 67 A.B.A. J. 428 (1981); Note, *Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822 (1981); Note, *The United States-Iran Hostage Agreement: A Study in Presidential Powers*, 15 CORNELL INT'L L. J. 149 (1982).

95. See *supra* notes 21-23.

might allow one to posit new rules of international law. Unfortunately, those rules may not reflect the true normative standards that guide states in reality.

It is, perhaps, for these reasons that the importance of state practice as a critical element in establishing customary international law, even when the norm is found in multilateral conventions, has received renewed emphasis in the words of the most recent judgments of the International Court of Justice. In its 1985 Judgment on the ocean boundary between Libya and Malta, the Court wrote: "It is of course axiomatic that the material of customary international laws is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."<sup>96</sup> Most recently, in its Judgment on the Merits in *Military and Paramilitary Activities in and Against Nicaragua*,<sup>97</sup> the Court emphasized that the U.N. Charter's rule on the lawfulness of the use of force and the evidence of an *opinio juris* in support of the norm were not sufficient to establish customary international law. It stated: "The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice."<sup>98</sup> It then went on to explore the state practice issue further.<sup>99</sup> Unfortunately, the judgments in both of these cases do not identify the actual evidence of state practice upon which they purport to rely. Since the state practice was unproven, and possibly unprovable, the statements in support of the importance of state practice may be *obiter dictum*.

Of course, law should not reflect merely what the subjects of the law would do in the absence of law.<sup>100</sup> The function of law is to promote positive behavior by setting a normative standard toward which the subjects of the law will strive. Rules derived from international negotiations may reflect ideals that are unsullied by the realities of normal international discourse. The risk, however, is that these ideals may be so removed from the reality of

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96. *Continental Shelf (Malta v. Libyan Arab Jamahiriya)*, 1985 I.C.J. 13 (construing First United Nations Conference on the Law of the Sea). See *supra* note 51.

97. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1985, I.C.J.—.

98. *Id.* at para. 184.

99. *Id.* at paras. 185–186. Despite this support for state practice, the Court relied heavily on writers and resolutions for the necessary *opinio juris* and for the details of the rule. *Id.* at paras. 188–95. It even found that the U.N. Charter's requirement that actions in self defense be reported to the Security Council neither carried over into the customary law rule, nor presented an obstacle to the existence of such a rule. *Id.* at para. 200.

100. It should not pierce Kelsen's "superior limit." H. Kelsen, *ALLGEMEINE STAATSLEHRE* 18–19 (1925) [hereinafter cited as H. Kelsen, *ALLGEMEINE*]; H. Kelsen, *supra* note 89, at 120. See also K. Marek, *supra* note 89, at 554.

international behavior that they would not serve effectively as legal norms.<sup>101</sup>

This conclusion does not require the rejection of international conference negotiations and international agreements as evidence of international law. Rather, before it is concluded that such negotiations provide useful evidence of new rules of international law, they should be carefully viewed in the context of state practice and *opinio juris*. The subsidiary rules suggested above<sup>102</sup> may help to discriminate between those international agreements that could be invoked to support new rules of international law and those that ought not to be so utilized.

Such a cautious approach may result in findings that customary law is substantially different from obligations states assume under international agreements. If that difference becomes unacceptable, states can certainly take the necessary actions and make new customary law. The rules found in international agreements support the development of new law. But in the absence of significant additional actions, it is unwise to presume that new customary law arises out of international agreements even with some state practice. It would risk defining customary law rules that do not reflect reality and do not effectively influence the actions of states.

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101. It would reach what Kelsen has characterized as the "inferior limit." H. KELSEN, *ALLGEMEINE*, *supra* note 96; H. KELSEN, *supra* note 89. *See also* K. MAREK, *supra* note 89. Care must be taken to be certain that the rules identified as law fall within the narrow range between the "inferior" and "superior" limits of law.

102. *See supra* notes 47-49 and accompanying text.