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Multilateral Treaties and the Formation of Customary International Law*

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International law is based upon two apparently contradictory assumptions: first, that the states, being sovereign, are basically not subject to any legal restraint; second, that international law does pose such restraints.

Joseph Frankel¹

There is an understandable temptation to assume that international law must match the model of a legal system associated with domestic law. There is also, however, a crucial distinction between the two that indicates it might be wise to avoid the temptation. International law, it is commonly supposed, imposes obligations upon states and by so doing constrains the range of proper state behavior. But states also make international law; they author the obligations to which they are bound. They are both sovereign and subject at the same time, a condition quite foreign to domestic legal systems.²

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1. JOSEPH FRANKEL, *INTERNATIONAL RELATIONS IN A CHANGING WORLD* 23 (4th ed. 1988).

2. This point may seem controversial since, after all, people make laws even in domestic legal systems. But legislators are not ordinarily considered to be both sovereign and subject at the same time. Strictly speaking, it seems impossible for a sovereign to be subject to the law. A sovereign who wanted to disobey some law he had made could simply declare a new law for the moment or make a legal exception in this instance. Legislators, as citizens, are subject to the laws of democratic societies like everyone else; thus they lack sovereign authority in themselves.

It might also be suggested that states are bound to obey the requirement of their own legal systems. In the United States, for example, the Constitution is the supreme law of the land and it places constraints upon state action. In this sense, we may speak of sovereign authority as limited. But there are some notorious problems with this way of speaking. Public officials tend to have their own views about the nature of constitutional limits that apply to them and even about when they apply to them. If we think of these limits as self-imposed, the attempt to square the judicial circle by holding that constitutional governments are both sovereign and subject at the same time begins to decay.

This curious feature of international law raises a host of problems in need of clarification and discussion. For example, how do states create international law in the first place? If a state opts to disobey international law, is it acting illegally or is it creating new law? And how can a state come to stand under an obligation to obey international law anyway? We do not intend to attempt a frontal assault on these questions here. Instead, we will concern ourselves with an examination of one particular context in which they arise.

According to one rather popular view, treaties are a source of international customary law.³ This view has become particularly popular in recent years because of pressing global problems requiring globally cooperative solutions. Cooperative solutions are most easily and quickly effected by the treaty process, but treaties, as such, obligate only those states that are parties to them and participation in these treaties is often not widespread enough to be effective. The solution, then, is to envision these treaties as creating customary international law, which, it is believed, obligates all states. Popular though this view may be, it is hardly accepted by all, and so there is reason to examine what there is to be said for it. We shall argue that those parts of multilateral treaties which are generalizable beyond the particulars of the treaty can serve as a source of customary international law provided three basic conditions are met:

- 1) The treaty is accepted by a sufficient number of states in the international system.
- 2) Among the parties to the treaty there are a significant number of those states whose interests are most affected by the treaty.
- 3) The treaty provisions are not subject to reservations by the accepting parties.

I. CUSTOM, OBLIGATION, AND CONSENT

Law obligates, at least in the traditional view. It is generally agreed that international law obligates as well. This is the source of some confusion. If states are sovereign, and hence answerable to no higher authority, how do such obligations come into being? The question has a more exact nature with regard to multilateral treaties: How could a treaty between states B, C, D, . . . N, obligate state A to abide by the substance of the treaty? If international law does obligate, it must be possible to make sense of this. Therefore, we will consider this problem, as a matter in need of preliminary clarification, before exploring how multilateral treaties might create customary international

3. See e.g., R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965-66); ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971).

law.

One classic way to formulate the problem of the imperative nature of customary international law calls attention to the apparent hypostasis at work here. States are not persons, so what sense does it make to treat them as such and ascribe actions and obligations to them? This characterization is a rather commonplace feature of legal systems in general, of course, and not just of international law.⁴ But noting this does little to solve the problem, since one can wonder about the propriety of all such characterizations. Obligations, like actions, are properly predictable of persons and not of things like states or corporations. This difficulty dissolves, however, if we speak of state obligations as a shorthand for the obligations that adhere to their official representatives. Such obligations are not owed by these representatives as individuals, of course, but rather as a consequence of the position they have assumed. They are, in effect, a type of positional duty — an obligation that rides with the position of authority one occupies.⁵ Talk of the obligation of states thus becomes a metaphorical way of speaking about the obligations owed by the officers and official spokespersons of the state.

However, this is not the problem of state obligation that we wish to address. Instead, we want to question how states come to stand under an obligation to obey customary international law in the first place. There is a parallel with the classic problem of political obligation familiar to students of political philosophy. As subjects of a given legal jurisdiction, persons are presumed—particularly by legal authorities—to have an obligation to obey the law. The obligation, moreover, holds because the law is *law* and not because of any moral merit that a particular law might have. But people cannot be naturally subject to civil law since the state is an artificial construct rather than a natural set of human relationships.⁶ Then, how do people, *qua* citizens, come to have such obligations?

Certain conceptual points make this question, and the cognate question of how legal obligations adhere to states, more troublesome. Moral philosophers frequently note that obligations, unlike duties, must be voluntarily assumed.⁷ A person who stands under an obliga-

4. For example, the law has for some time treated corporations as fictional persons, and there is no reason why states cannot be similarly treated.

5. A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 16-24 (1979).

6. This is, at any rate, the classic liberal view. See THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* (Michael Oakeshott ed., Collier-MacMillan Ltd 1962); HUGO GROTIUS, *DE JURE PRAEDAE COMMENTARIUS: COMMENTARY ON THE LAW OF PRIZE AND BOOTY* (James Brown Scott ed. & Gwladys I. Williams trans., The Clarendon Press 1950) (1604); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 87 (Thomas P. Perdon ed., The Liberal Arts Press 1952) (1764).

7. See Richard Brandt, *The Concepts of Obligation and Duty*, 73 *MIND* (1965);

tion must first have done something to incur it. If so, then obligations cannot be imposed from without; they come into being only with the voluntary consent of the obligee. Viewed historically, this reliance upon consent emerges with the rise of modern liberalism and the concurrent secularization of western political thought.

Pufendorf, who helped develop the early impetus of these trends in western political discourse, supposed that an obligation throws a "moral bridle" over the will.⁸ This aptly characterizes the sense in which an obligation is a type of moral constraint that precludes choice and determines conduct. But he also held that obligations can have two separate sources.⁹ First, they can be assumed, through consent, by individuals who place the bridle upon themselves. Second, obligations can be imposed on one by a superior authority. Thus God imposes His law on human beings, and that law obligates, according to Pufendorf, simply because of His moral authority. The substance of this distinction remains current in moral and political theory, although reference to God is frequently replaced, in the post-Kantian world, by a reliance upon Reason as the authoritative voice. Additionally, the distinction now takes a significantly different form, and one that emphasizes the voluntary dimension of obligations. It is now customary to understand the "moral bridle" imposed upon the will by Reason or God as a natural or moral duty, while a self-imposed bridle, i.e., one to which a person consents, is understood to be an obligation.¹⁰

We are not concerned with whether states stand under a duty to obey international law, or whether international law is built upon or reflects certain fundamental elements of natural law. It does not appear, however, that multilateral treaties can give rise to natural duties in this sense. Suppose there is a natural duty binding upon states to do X (perhaps a principle of *jus cogens*), and suppose further that a preponderant majority of the states of the world ratify a multilateral treaty stipulating the need to do X. The treaty provides an additional normative reason why the states that ratify it ought to do X; they have both a natural duty and an obligation to do so. States that have chosen not to participate in the treaty, on the other hand, are still duty bound, from the standpoint of natural law, to do X. But it is less clear that the presence of the treaty means that they also have an obligation to do X brought into force by the treaty. The treaty cannot create the natural duty; nor for that matter is there any reason for it to do so.

John Ladd, *Legal and Moral Obligation*, NOMOS XII: POLITICAL AND LEGAL OBLIGATION 3 (1970).

8. Samuel Pufendorf, *Elements of Universal Jurisprudence*, in THE POLITICAL WRITINGS OF SAMUEL PUFENDORF, 50 (Craig L. Carr ed. & Michael J. Seidler trans. 1994).

9. *Id.* at 167. In this, as in other things, Pufendorf followed Grotius. See GROTIUS, *supra* note 6, at 15.

10. SIMMONS, *supra* note 5, at 11-16.

The duty exists and holds against all states independently of the treaty. So, appeals to natural duty fail to shed any light on whether multilateral treaties can create obligatory customary international law.

Since treaties are voluntary agreements, it is not hard to understand why they obligate their signatories.¹¹ By signing a treaty, a state consents to obey its provisions.¹² Moreover the fact that a state has consented solely determines the state's obligation. Suppose the substance of a treaty requires the signatories to do X, and suppose further that doing X is generally regarded in the international community as a good idea. The fact that X is a good idea provides a reason why states *ought* to do X, but it does not also establish that states which have not signed the treaty are *obligated* to do X. The existence of an obligation to do X supplies a strong reason of its own why a state ought to do X independently of the fact that it is a good idea.¹³ In the absence of a showing of consent, however, even good ideas do not obligate.

The consent requirement raises an obvious barrier to the idea that multilateral treaties create customary international law and thereby obligate non-signatories to abide by their terms. Consider, for example, a hypothetical situation, of the sort imagined by Baxter, where all states in the state-system, minus one, sign a multilateral treaty requiring that they do X.¹⁴ Baxter supposes that X would also constitute a rule of customary international law, presumably by virtue of its general acceptance, that would obligate the one state that failed to sign the treaty. This reveals something of the logic of customary international law, to be sure, but it also complicates the problem of obligation. Absent a foundational principle of majority rule, as a type of "secondary rule," it is simply not clear why the remaining single state should be said to stand under an obligation to adhere to X.¹⁵ Such general acceptance might show that most states in the system think adherence to X is a good idea and correspondingly that all states ought to adhere to it. But something more must be added if we want to insist that states have an obligation to adhere to X, and this something more

11. Corbett notes, "Treaties considered as agreements are acts of consent; considered as documents they are records of evidence of consent." P. Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 BRIT. Y.B. INT'L L 22, 25 (1925). Peace treaties are arguably an exception to this.

12. I.M. Lobo Souza, *The Role of Consent in the Customary Process*, 44 INT'L & COMP. L.Q. 521 (1995). Rex J. Zedalis, *Protection of Nationals Abroad: Is Consent the Basis of Legal Obligations?*, 25 TEX. INT'L L.J. 209 (1990).

13. The fact that X is an obligation also qualifies as a reason for action, and perhaps the controlling reason at that. See J. RAZ, *THE AUTHORITY OF LAW* 234 (1979).

14. R. BAXTER, *TREATIES AND CUSTOM* 38 (1970). *But see*, C. Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195, at 268-73 (1993 IV).

15. H.L.A. Hart, *THE CONCEPT OF LAW* 77-96 (2d ed. 1994).

must satisfy the consent requirement necessary to establish an obligation.

We want to suggest, but to suggest only, how the consent condition can be met, and thus to point toward a theory of obligation capable of accounting for the obligatory character of customary international law. Consent is something that is given; in this sense, all consent is expressed.¹⁶ But consent can be expressed in a variety of ways, perhaps the most familiar of which is the type of formal expression of consent associated with the law of contracts. The law has long recognized, however, that consent can be expressed tacitly as well.¹⁷ Both Grotius and Pufendorf relied heavily on the notion of tacit consent to explain how certain conventional relationships came into being and why they continue to obligate those who participate in them.¹⁸ Pufendorf, for example, supposed that tacit consent is "clearly inferred from the nature of the affair and other circumstances."¹⁹ He used as an example the attractive instance of a person ordering a meal at a restaurant. By ordering the meal the person tacitly consents to pay for it. This is an act of participation or involvement in a social practice that carries with it a tacit expression of consent to the rules and procedures of the practice itself.²⁰ To participate in the practice simply is to consent to obey the rules of the practice. Therefore, one who makes obvious moves of participation in some practice thereby incurs an obligation to obey its rules.

Thus understood, tacit consent can be used to explain how individuals who come together and participate in rule-governed associative practices incur obligations to adhere to the rules. Imagine several youths join forces and invent a game. The rules of play will be understood as obligatory for all participants, although the youths can alter the rules during the course of play as they see fit. Here, participation signals consent to follow the rules even if some of the youths dislike some of the rules adopted by the group as a whole. There is an obvious analogy here with relations between states. As participants in the inter-state system, states can be understood to tacitly signal their consent to obey those rules considered by the elements of the system to be of great importance. If the status of international law is invoked to indicate the importance many states attach to certain rules, identified as rules of the inter-state system, then participation in the inter-state system provides adequate grounds for concluding that states incur an

16. J. PLAMENATZ, *CONSENT, FREEDOM, AND POLITICAL OBLIGATION* 4 (1968).

17. *Cf.* FRIEDRICH KESSLER & GRANT GILMORE, *K. KESSLER AND G. GILMORE, CONTRACTS* 116-17 (2d. ed. 1970); P. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACTS* 34 (1981).

18. GROTIUS, *supra* note 6, at 19; PUFENDORF, *supra* note 8, at 171.

19. Pufendorf, *supra* note 8, at 171.

20. The sense of tacit consent introduced here has been developed more fully by Craig Carr. See Craig Carr, *Tacit Consent*, 4 *PUB. AFF. Q.* (1990).

obligation to adhere to these rules.

Some may object that the element of voluntarism which many philosophers think is associated with displays of consent is lacking in the case of states.²¹ If one of the youngsters involved in developing a particular game does not care for some of the rules, she can decide not to participate, and if she opts not to participate, she has no obligation to obey the rules of play. Since it looks as if states cannot decide not to participate in the inter-state system, it might seem wrong to conclude that their participation entails consent to obey the rules of customary international law. But this objection does not seem to get very far. A state can always declare its intention not to participate in the ordinary relations of states. It can even welcome a general identification as a rogue or lawless state, thereby demonstrating its unwillingness to participate in the ordinary relations of states. But states rarely do this. Instead, they often invoke international law on their own behalf, make law-like arguments in defense of their actions, and proceed to conduct their international affairs according to the standard practices of the international system. When a state behaves this way and eschews behavior patterns that would indicate it wants to be recognized as a rogue state, it is fair to say that it is participating in the inter-state system and thus incurs an obligation to abide by those rules considered important enough to be regarded as binding law by the states of the system.²²

There is a second, and rather familiar objection to this argument. It suffers the standard problem of imprecision that troubles the subject of international law in general. How many states must regard a rule as important before it can properly be recognized as a general rule of international law? How important must a norm be before it qualifies as a rule of international law? However, these are not questions about whether international law obligates, but about what counts as international law. We have offered some reasons to think that if X qualifies as a rule of customary international law, states have an obligation to obey it. This returns us to the more traditional problem of how X might come to qualify as a rule of customary international law. More specifically, it returns us to the question, posed at the outset, whether multilateral treaties give rise to customary international law. If it turns out that such treaties do generate customary international law, we now have reason to conclude that even states that are not parties to the treaty stand under an obligation to adhere to the terms of the treaty.

21. SIMMONS, *supra* note 5, at 93-100.

22. One possible exception to this might be found in notions about persistent objectors. For an excellent discussion of the various viewpoints regarding the persistent objector rule, see Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985).

II. TREATIES AND THE FORMATION OF CUSTOMARY INTERNATIONAL LAW

Two issues orbit the question of whether treaties make customary international law. The first issue is whether treaties "create" customary international law or are merely to be taken as a piece of evidence, perhaps of state practice and/or *opinio juris*, that is no more compelling than any other piece of evidence regarding the establishment of customary international law.²³ If we suppose that treaties do sometimes make customary international law, the second issue is whether such treaties create "instant custom" or whether their conditions must "harden" or "ripen into" customary international law.²⁴

We will argue that treaties do present evidence of customary international law and that this evidence can be, in some instances, more important than other pieces of evidence. Depending upon the issue, a treaty may be the most important, indeed may be the only, evidence of customary international law, or it may present only minor evidence compared with other state practices and *opinio juris*. We will argue also that one cannot decide in the abstract if or when treaty provisions become part of customary international law. Rather, there must be some test or index by which each treaty and its provisions can be judged in making this determination. Applying this test to some treaties may indeed show that they become instant custom upon entry into force, applying it to others may show that they need to "ripen" beyond their force date before they can be said to create customary international law.

Since his very influential work on customary international law, Anthony D'Amato has become the champion of the school of thought that argues that treaties should be thought of as creating customary international law.²⁵ As D'Amato himself states regarding his 1971 book, "I leaped to the radical position that treaties directly generate customary rules."²⁶ D'Amato has many critics, however, who claim that the role of treaties in the formulation of international law has been greatly overstated by D'Amato and his followers.²⁷ This contentious issue crystallized in a debate between Arthur M. Weisburd and D'Amato first published in 1988 and D'Amato has reaffirmed his position in his more recent work.²⁸ But, the debate over this question is not new; it has received attention since the beginnings of challenges to

23. See generally A.M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L. L. 1 (1988).

24. D'AMATO, *supra* note 3, at 139.

25. See generally *id.*

26. Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L. L. 459, 461 (1988).

27. See Weisburd, *supra* note 23. Michael Akehurst, *Custom As a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-75).

28. INTERNATIONAL LAW ANTHOLOGY 95-101 (Anthony D'Amato ed., 1994).

legal positivism.²⁹

The debate concerns both bilateral and multilateral treaties, but we will concern ourselves here only with a subset of multilateral treaties, or as they have been referred to in the past, the so-called "law-making treaties."³⁰ While we agree with D'Amato that bilateral treaties also can create customary international law, this point seems more straightforward and seems mostly to be based on magnitudes or quantities. That is, if there are few bilateral treaties covering a particular subject, these treaties do not provide strong evidence of the formation of customary law. Conversely, if there are large numbers of treaties on a subject and these treaties treat the subject in the same way, they do provide strong evidence of both state practice and *opinio juris*.³¹

It is held by certain authors that global treaties (i.e., those that are open for participation by all states) with general provisions create law that is binding on all states in the international system, irrespective of whether they are parties to the treaty. Just how these treaties create obligations for third parties has been a matter of considerable discussion among international law scholars.³²

One of the ways suggested is that these treaties create "instant customary international law" and since all states are obligated to obey customary international law, states are, *ipso facto*, obligated by the customary law created by the law-making treaty. Or as D'Amato has put it,

The claim made here is not that treaties bind nonparties, but that general provisions in treaties give rise to rules of customary law binding upon all states. *The custom is binding, not the treaty*.³³ (emphasis added)

This is one way, of course, to avoid confrontation with the well known principle of customary international law, *pacta tertiis nec nocent nec prosunt*. This principle, formally restated in articles 34 through 37 of the Vienna Convention on the Law of Treaties, has long been understood by states, international courts, and scholars alike as a

29. See generally D'AMATO, *supra* note 3.

30. D'AMATO, *supra* note 3, at 161. In one sense this term is a redundancy because all treaties create law for their parties. D'Amato has noted that this term has fallen into disuse in recent years, however, we think it useful to convey the meaning that we are referring only to those treaties that seem to have as their purpose the creation or codification of international law. *Id.*

31. D'Amato points out that by sheer numbers alone bilateral treaties must be taken as evidence of customary international law. He states, "yet, as I argued in my book on custom in 1971, if we look at the matter mathematically, a multilateral convention among ten states is the equivalent of forty-five similarly worded bilateral treaties among the same ten states." D'Amato *supra*, note 28, at 99.

32. D'Amato, *supra* note 28.

33. D'AMATO, *supra* note 3, at 107.

customary principle of treaty law.³⁴ The Convention, however, may have added to the confusion surrounding the application of treaty provisions to third parties. Article 38 of the Convention concerning "Rules in a Treaty Becoming Binding on Third States Through International Custom" states, "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, *recognized as such*."³⁵ (emphasis added)

Whether article 38 states that customary international law, already established, is what binds states, remains unclear. The Convention itself does so by restating such customary international law principles as *pacta tertiis* (Articles 34-37) and *pacta sunt servanda* (Article 26), or whether the treaties in question can create customary international law by the means of "instant custom."³⁶ The words, "recognized as such" seem to give weight to the notion that the treaties themselves cannot create law binding on third states, but can only articulate already recognized principles of customary international law. But the first part of the sentence, "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from *becoming binding* upon a third State as a customary rule of international law . . ." (emphasis added) suggests another possibility. Treaties can "suggest" new customary international law or articulate nascent customary international law, but in either case recognition by a substantial number of states in the international system is required before it can be converted into customary international law obligating all states.³⁷

Since World War II there have been increasing numbers of global multilateral treaties in the international system. Most of them have come into force; the remainder remain "unperfected."³⁸ One of the main issues surrounding these treaties involves clarifying the point at which they create customary international law. That is, do they create customary international law — and thus obligations — for third states when the treaty comes into force, or do they require some broader acceptance among states, and particularly "pertinent" states, before the customary law obligation emerges?

To argue, following D'Amato, that these treaties create customary

34. Vienna Convention on the Law of Treaties, U.N. DOC. A/CONF.39/27, May 23, 1969 as reprinted in 63 AJIL 875 (1969).

35. *Id.* at 887.

36. "The Convention is not simply declaratory of general international law, since in part it involves the progressive development of the law. However, particular articles reflect the existing rules or practice." BASIC DOCUMENTS IN INTERNATIONAL LAW 389 (Ian Brownlie ed., 4th ed. 1995).

37. *But see* Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1139-40 (1982).

38. *See generally* CHRISTIAN L. WIKTOR, UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA, 1776-1976, vol. I-IX (1976).

international law when they come into force³⁹ is also to argue that a small percentage of the world's states should be able to create law for the entire system. In other words this argument is not even an argument in favor of *majority* rule in the international system, a concept itself not thoroughly or perhaps even widely accepted,⁴⁰ because often a minority of states can bring a treaty into force. Moreover, in many instances this minority of states, as we shall demonstrate below, may not even include those states that are most concerned with the particular obligations being created, e.g. major maritime powers and law of the sea provisions.

In spite of the fact that D'Amato at times argues that multilateral treaties create customary international law upon ratification, he also says,

To the extent that a widely adopted multilateral convention represents the consensus of states on the precepts contained therein those precepts are part of international law by that fact alone. In this sense, multilateral treaties are and historically have been more important than bilateral ones. But this effect is not due to anything connected with the concept of custom; it involves a separate phenomenon — 'consensus' — which deserves separate study as to its nature, identification, and provability.⁴¹

We think, however, that the determination of consensus among the states of the world has much to do with the formation of customary law from treaty provisions and we will deal with that issue here.

Some authors argue that the most important thing in determining whether a treaty can become part of customary international law is the intent of the parties to the treaty. They argue that the intent of the treaty can be ascertained from the language of the treaty itself or from an examination of the *travaux préparatoires*.⁴² D'Amato correctly argues against the use of either the intent as manifested in the text of the treaty or in the *travaux préparatoires*,⁴³ partly because in both of these the true intent of the parties may not be shown accurately. More importantly, he argues that it is not the intent of the parties to the treaty that matters, but rather what the rest of the community of states makes of the contents of the treaty. Accordingly he argues, "International law proceeds on the basis of community expectations, not

39. D'AMATO, *supra* note 3, at 164. "If treaties do at any point in time pass into customary law, they pass at the moment they are ratified. The passage of a period of time simply makes the treaty as a secondary rule more persuasive." *Id.*

40. STEVEN SCHWEBEL, AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS, CONTEMPORARY VIEWS ON THE SOURCES OF INTERNATIONAL LAW: THE EFFECT OF UN RESOLUTIONS ON EMERGING LEGAL NORMS 301 (1979).

41. D'AMATO, *supra* note 3, at 165.

42. *Id.* at 156-60.

43. *Id.* at 154-57.

the 'will' of particular members of the community."⁴⁴ On this basis, can we not say that multilateral treaties themselves cannot generally create "instant" customary international law for all of the states in the international system, but rather must await their subsequent reactions.

D'Amato objects to theories suggesting that treaty provisions must "harden into" customary law before they can obligate all states.⁴⁵ But, while he would likely not appreciate our drawing such an inference from his statement quoted above, the only way that we can be sure that the will of the community of states manifests, concerning provisions in treaties that are meant to be suggestive or creative of customary international law, is indeed to await the necessary state acceptance for them to "harden into" customary international law.⁴⁶

Perhaps one exception to this would be a treaty declaring law on a subject that had not yet been dealt with in international law. Examples of this phenomenon might be found in some of the provisions contained in treaties dealing with outer space.⁴⁷ Perhaps when existing customary international law is silent on a matter the treaty would constitute the only existing evidence of state practice and *opinio juris* on that particular subject. Absent any negative response on the part of states, the treaty might be said to be creative of customary international law in the sense that it represents the only existing evidence of law dealing with the issue. At the very least, we might expect that should a dispute arise over the subject matter relevant to the "new law" and if that dispute is to be decided by third party arbitration or adjudication, then, the dispute settler would probably use the relevant treaty provisions as evidence of customary international law on the subject. Moreover, this might hold even if neither of the disputant states were party to the treaty. Certainly the World Court has availed itself of this method in past cases where customary practice and *opinio juris* were in doubt.⁴⁸

As we have noted above, D'Amato objects to the idea that treaties need to "harden into" customary international law. His main problem with this concept lies in its imprecision. That is, if we subscribe to this

44. *Id.* at 151.

45. *Id.* at 139 & n.109.

46. *Id.* at 139-40.

47. See, e.g., Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410; 610 U.N.T.S. 205; Convention on Liability for Damage Caused by Space Objects, March 29, 1972, 24 U.S.T. 2389; 961 U.N.T.S. 187 [hereinafter Space Object Convention].

48. For a summary of cases, see D'AMATO, *supra* note 3, at 116-21. He notes, among others, the following cases as evidence of the court's reliance on treaties as customary international law: *The Lotus Case*, 1927 P.C.I.J. (ser. A) No. 10, *Asylum Case*, 1950 I.C.J. 266, *Fisheries Case*, 1951 I.C.J. 116.

notion, then we do not have a definitive way of knowing just when and how the conventional law becomes customary international law.⁴⁹ Insofar as the passage of an indefinite period of time is concerned, we see no particular reason to disagree with D'Amato. Time passage alone, no matter how long, will not make conventional law metamorphose into customary international law. Beyond that, however, two responses may be made to D'Amato's objections to the imprecision created by the notion that treaties need something more than ratification and entry into force to evolve or "harden" into customary international law.

The first response is that customary international law is not a precise entity in the first place.⁵⁰ Ample evidence of this is to be found in the numerous writings of scholars on the subject and in the lengths to which courts go in trying to discover what customary international law is on any particular subject at any particular time. So trying to make precise that which has never been precise may be chasing an illusion. Even D'Amato, who says that treaties create customary international law upon their ratification,⁵¹ notes that the law developed by treaties does not remain static, but is affected by state practice that can modify or even eliminate the law originally stated in the treaty.⁵² If this is so, then the entry-into-force of a treaty, at best, has given us only momentary precision about the law.

The second possible response to the problem of imprecision is to try to add precision by specifying a more reasonable index for gauging if and when conventional law has become part of customary international law. In other words, when a treaty has come into force with only the ratifications of a small percentage of the world's states, is there another benchmark, beyond the point of ratification suggested by D'Amato, with which we might be more comfortable in asserting that the treaty provisions have become accepted as customary international law? While another index may not have the same definitive time line enjoyed by entry-into-force, it might be more realistic in claiming with some certainty that the law stated in the treaty has been accepted by the community of states. If international law does indeed proceed "on the basis of community expectations," and not on the will of a minority of states, there then needs to be a way to determine more accurately and realistically whether the community of states has accepted the nascent law put forward in the treaty as having become part of the corpus of customary international law. If such a method can be created and achieves some acceptance, then availing oneself of that method

49. D'AMATO, *supra* note 3, at 140.

50. As Michael Akehurst notes, "The attitude of international lawyers towards customary international law is somewhat similar; they invoke rules of customary international law every day, but they have great difficulty in agreeing on a definition of customary international law." Akehurst, *supra* note 27, at 1.

51. D'AMATO, *supra* note 3, at 164.

52. *Id.* at 142.

should lend strong evidence, pro or con, to the issue of whether one can consider certain treaties, or provisions thereof, to be customary international law.

Such an index has already been suggested by the ICJ in the *North Sea Continental Shelf Cases*.⁵³ We believe this index can be stated more specifically and can be applied in a systematic way in order to get us closer to the determination of when customary law is generated by treaty provisions. The Court's ruling in this case suggests three criteria to be used in the determination of whether treaty provisions could become part of customary international law. These three criteria are: 1) the number of states in the international system that have formally accepted the treaty by whatever means specified in the treaty for formal acceptance, e.g., ratification;⁵⁴ 2) the presence or absence of "pertinent" states among the parties to the treaty;⁵⁵ and 3) the existence of reservations to any provisions by the parties.⁵⁶ We will deal with each of these in turn and provide examples of their application below.

A. *Parties to the Treaty-Sufficient Numbers*

It is generally believed that widespread acceptance of a legal principle is necessary for it to be understood as part of customary international law. Though D'Amato believes that the Court's mention of insufficient adoption in the *North Sea Continental Shelf Cases*⁵⁷ "also suffers from imprecision,"⁵⁸ there is no particular reason that this somewhat-less-than-precise magnitudinal statement cannot be made more precise by setting specific quantifiable standards.

The relevance of magnitude has long been established in international law and, as Peter Rohn has pointed out, "Quantitative notions permeate all law."⁵⁹ The ICJ itself has found numerous instances where reference to magnitude or to quantity was found to be of relevance to the judicial decision.⁶⁰ There have been several cases in which the Court found particular need to cite quantities in order to

53. *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3 Feb. 20).

54. *Id.* at 43.

55. *Id.*

56. *Id.* at 44.

57. *Id.*

58. D'AMATO, *supra* note 3, at 112 n.12.

59. 1 PETER H. ROHN, *WORLD TREATY INDEX* 16 (2d ed. 1984).

60. *Id.* at 18. The cases listed by Rohn in which magnitude or quantity played a role in the Court's decision were: *Corfu Channel Case*, (U.K. v. Alb.) 1949 I.C.J. 4; *Asylum* (Colom. v. Peru) 1950 I.C.J. 266; *Rights of U.S. Nationals in Morocco* (Fr. v. U.S.A.) 1952 I.C.J. 176; *Temple of Preah Vihear* (Cambodia v. Thail.) 1962 I.C.J. 6; *South West Africa* (Eth v. S.Afr.; Liber. v. S. Afr) 1966 I.C.J. 6; *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3.

determine if a rule in a treaty had achieved widespread enough acceptance to become a part of customary international law. In the *Asylum Case*, Columbia "... invoked conventions which have not been ratified by Peru."⁶¹ The Court was called upon to determine if the conventional law contained in certain treaties had attained the status of regional customary international law for the Americas and would thus be valid against Peru. Referring to the Montevideo Conventions of 1933 and 1939⁶² the Court noted, "The Convention of 1933 has, in fact, been ratified by not more than 11 States and the Convention of 1939 by two States only."⁶³ The Court concluded that because of the limited number of states ratifying these agreements they were not applicable to Peru as customary international law.⁶⁴

In the *North Sea Continental Shelf Cases*,⁶⁵ the Court was concerned with the question of whether Article 6 of the Geneva Convention on the Law of the Sea,⁶⁶ had passed into customary international law. On the general question of whether a treaty provision could pass into customary international law and thus become binding upon third states, the Court stated:

There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. *At the same time this result is not lightly to be regarded as having been attained.* (emphasis added)⁶⁷

In speaking of whether the treaty itself had received sufficiently widespread and representative participation the Court noted that "... the number of ratifications and accessions so far secured is, though respectable, hardly sufficient."⁶⁸ The Court went on to say that although there are reasons beyond disapproval that may cause non-ratification of treaties, these reasons "... can hardly constitute a basis on which positive acceptance of its principles can be implied."⁶⁹ Thus it should be clear that a sufficiently large number of states is required to cause the Court to imply *opinio juris* concerning any treaty provision sufficient to turn it into customary international law.

61. *Asylum (Colom. v. Peru)* 1950 I.C.J. 266, 277 (Nov. 20).

62. Convention on Political Asylum, Dec. 26, 1933 *reprinted in* 6 MANLEY O. HUDSON, INTERNATIONAL LEGISLATION 607 (1932-34). Treaty on Political Asylum and Refuge, Aug. 4, 1939 *reprinted in* 8 MANLEY O. HUDSON, INTERNATIONAL LEGISLATION 404 (1938-41).

63. *Asylum*, *supra* note 61, at 277.

64. *Id.*

65. *North Sea Continental Shelf*, *supra* note 53.

66. Convention on the High Seas, Apr. 29, 1958, *reprinted in* 52 AM. J. INT'L L. 842 (1958).

67. *North Sea Continental Shelf*, *supra* note 53, at 41.

68. *Id.* at 42.

69. *Id.*

That a treaty accepted by a minority of states should be given the ability to create customary international law seems non-sensical. Interestingly, third world objections to customary international law in general have noted the creation of law by a small minority of states as one basis of their objections to the current body of customary international law.⁷⁰ One good example of the minority rule phenomenon, that follows from the acceptance of the notion that the coming-into-force of a global treaty creates customary international law, is the above mentioned Vienna Convention on the Law of Treaties.⁷¹ The Convention was completed and open for signature and ratification in 1969. It required only thirty-five ratifications to come into force.⁷² In 1969 this represented only 25% of the existing states of the world. The Convention did not enter into force until January 27, 1980, eleven years after its completion. By then, the states that brought the treaty into force represented only 21% of the world's states. Even more startling is the fact that these states accounted for slightly over 25% of the total of the world's treaties.⁷³ Moreover, only three of the top ten treaty-making states of the world, the United Kingdom, Spain and Italy had ratified the treaty.⁷⁴ These three states alone accounted for 30% of all of the treaties to which the thirty five ratifying states were parties.⁷⁵

Assuming that the Vienna Convention on the Law of Treaties contained provisions that were new to customary international law at the time of its ratification and that the ratification of the treaty turned these rules into customary international law, then 21% of the world's states, including only three of the top ten treaty making states, can be said to have created customary international law. This new law would now be binding on the other 79% of the world's states, a group composed of all but three of the world's major treaty making states whose members account for nearly 75% of the world's treaties.

At this writing, only seventy-six states are parties to the treaty, less than half of the world's existing states. The world's leading treaty-making states — including the United States as a party to 7% of the world's treaties — are not accounted for among these seventy-six states.⁷⁶ The U. S. total is nearly twice that of the next leading state. It surely is a leap of faith to assert that this treaty, which concerns itself with treaty law, could have established law for its non-parties

70. J. Patrick Kelly, *The Changing Process of International Law and the Role of the World Court*, 11 MICH. J. INT'L L. 129, 156 (1989).

71. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N.DOC. A/CONF.39/27, (1969) reprinted in 63 AM. J. INT'L L. 875 (1969).

72. *See Id.*, at art. 84.

73. ROHN, *supra* note 59, at 111-17.

74. Multilateral Treaties Deposited With the Secretary-General, Status as at 31 December 1994 at 757, U.N. Doc.ST/LEG/DRT.E/13 (1995).

75. ROHN, *supra* note 59, at 111-17.

76. ROHN, *supra* note 59, at 84.

representing a significant number of the world's states and accounting for a large portion of all of the world's treaties.

Many of the provisions of this treaty present no particular problem since, as noted above, they reflect rules and practices that already existed at the time and were simply incorporated into the treaty. In other words, they were already accepted as part of customary international law governing treaty relations. But, what of those rules that are not reflective of state practice and which attempt to create new law? Would any third party state be satisfied with the assertion that 21% of the world's states are able to create customary international law and thereby the obligation to obey, especially when these states do not include most of the world's largest treaty making states?

In addition to a magnitudinal requirement, the Court has suggested what might be referred to as a qualitative requirement as well, ". . . a very widespread and representative participation in the convention might suffice of itself, *provided it included that of States whose interests were specially affected.*"⁷⁷ (emphasis added) This brings us to our second condition, the participation of pertinent states.

B. *Pertinent States*

It has been argued by some authors that law making treaties cannot successfully create obligations for third parties through the creation of customary law if the pertinent states are not parties to the treaty.⁷⁸ Other authors like D'Amato argue that regardless of the number of parties and regardless of which parties they are, customary international law can be generated by a treaty, thereby obligating third states.⁷⁹ Political and legal reality, however, would seem to support the argument in favor of the necessity of pertinent states being part of the agreement. As suggested by our example of the Vienna Convention on the Law of Treaties, it makes little sense to think of treaties creating customary law for states when those states most concerned with the particular treaty are not parties to it. We might call these states *sine qua non* states (SQN states) for without their participation in the law, the law would have no realistic meaning. If, for example, most of the major maritime powers are not party to a treaty governing the uses of the sea, those treaty-based laws would not obligate these states and thus would not regulate their behavior. If treaty provisions are not followed in practice by the non-party SQN states, then there seems little point in declaring them to be creative of customary international law obligating all states.⁸⁰ It remains simply

77. North Sea Continental Shelf, *supra* note 53, at 42.

78. Schwebel, *supra* note 40. C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401 (1953).

79. D'AMATO, *supra* note 3, at 165.

80. We are not necessarily arguing here, as does Weisburd, that mere violations

an idealistic notion.

Many other issues can be found where the identification of SQN states is rather easy. In the Vienna Convention on the Law of Treaties, the SQN states would be the world's major treaty-making states. Without the participation of most of the world's largest treaty-makers it can hardly be said that the treaty can create new provisions of customary international law relevant to treaty law. Certainly, many of the new law creating provisions of this treaty may have been accepted in practice by the major treaty making states, but the treaty itself cannot provide evidence of this fact. One must rely instead on the traditional means of determining whether something has become a part of customary international law, state practice, and *opinio juris*. Likewise, states with deep sea bed mining capabilities would have to be regarded as SQN states for that part of UNCLOS III which sets up the deep sea bed mining regime.⁸¹ The fact that an extra protocol was later added to UNCLOS III to accommodate these states and bring them into the treaty in general gives support to the importance of SQN states in this particular treaty.⁸²

Sometimes the number of SQN states may even be rather small. In the Convention on International Liability for Damage Caused by Space Objects,⁸³ for example, only states with space launch capabilities would be SQN states. This would be true not only in that section of the treaty dealing with liability for collisions between space objects,⁸⁴ but also in the section dealing with absolute liability for objects falling to earth.⁸⁵ By viewing this treaty as having created cus-

of the law constitute evidence that the law does not exist, but rather that widespread acceptance must include the major relevant actors in the issue area. If these actors ratify a treaty and then violate its provisions, they are, as D'Amato notes, lawbreakers and not necessarily new law creators. For a cogent debate see Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L L. 459 (1988). Anthony D'Amato, *A Brief Rejoinder*, 21 VAND. J. TRANSNAT'L L. 489 (1988). A.M. Weisburd, *A Reply to Professor D'Amato*, 21 VAND. J. TRANSNAT'L L. 473 (1988).

We should also note that the idea of SGN states is not a "yes or no" issue, but rather one of degree. Some states, depending upon the issue, may be more important as participants than others. As one moves down the scale from most obviously important to least obviously important the judgments will become more difficult towards the middle of the scale. The importance of the participation of certain states, however, is not something that one can decide abstractly, but depends on the specific issue and on the judgment of judges, scholars, and statesmen.

81. United Nations 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 UNCLOS Treaty].

82. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, U.N. GAOR, 48th Sess., Annex Agenda Item 36, U.N. Doc. A/RES.48/263 (1994).

83. Space Objects Convention, *supra* note 47.

84. See Space Objects Convention, *supra* note 47.

85. Space Objects Convention, *supra* note 47, art. II.

tomary international law, because of the participation of all launch capable states, all states are eligible for liability claims for any damage caused by space objects, regardless of whether they have participated in the treaty.

The requirement that SQN states be a significant part of the treaty for the treaty to take effect is not without precedent in international law.⁸⁶ The International Convention for the Prevention of Pollution from Ships (hereinafter MARPOL)⁸⁷ requires that the treaty will "... enter into force twelve months after the date on which not less than 15 states, the combined merchant fleets of which constitute not less than fifty percent of the gross tonnage of the world's merchant shipping, have become parties . . ." ⁸⁸ By 1990, "... the Convention had attracted participation by States representing over 85% of gross merchant tonnage."⁸⁹ MARPOL is global in scope, being open to all states for ratification or accession. At the time of this writing ninety-one States had ratified or acceded to MARPOL. While this represents fewer than half of the world's states, it represents 85% of the world's significant shipping states⁹⁰ and, as noted above, over 85% of the world's gross merchant tonnage. In this particular instance the treaty ratifications by SQN states can serve as convincing evidence that its provisions may also become fixed as customary international law.

An objection might be raised to our position that SQN states need to be parties to a treaty before it can be regarded as part of customary law. If all pertinent states are parties to a certain treaty, then what need is there to assert that its provisions have become part of customary law, since the treaty itself already obligates all of its parties? If *all* states in the international community are parties to a treaty then this objection might have merit. With the exception of wishing to obligate states that might later withdraw from the treaty, there would be little gained by saying that the treaty had become part of customary international law. The point in asserting that a treaty has become part of

86. The concept of SQN states was an important part of the United Nations Charter. Article 110(3) requires that, "The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, The United Kingdom of Great Britain and Northern Ireland, and the United States, and by a majority of the other signatory states." U.N. CHARTER art. 110, para. 3. See also L. M. GOODRICH AND E. HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS, 43 (2d ed. 1949).

87. International Convention for the Prevention of Pollution from Ships (MARPOL) *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ENVIRONMENTAL LAW at 762-76 (Harold Hohmann ed., 1992).

88. *Id.* art. 15, para. 1.

89. THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS: A SURVEY OF EXISTING LEGAL INSTRUMENTS 161 (Peter H. Sand ed., 1992).

90. U.S. Dept. of Transportation, Maritime Administration, Merchant Fleets of the World: Ongoing Steam and Motor Ships of 1,000 Gross Tons and Over as of January 1, 1987 (1988).

customary international law lies in obligating all states. In a universally accepted treaty, that has already been done by the treaty itself. But, this is hardly realistic. The United Nations Charter is probably the closest thing to a universally accepted treaty.⁹¹ Thus, even if all of the SQN states are parties to a certain treaty, the international community would probably wish to see the behavior of other states regulated by the treaty provisions. Alternatively, the treaty might be accepted by only some or most of the SQN states, but they might also wish to see the treaty provisions become part of customary law in order to obligate the non-parties.

Returning to the MARPOL treaty, we find that seventeen out of twenty of the world's largest shipping states have become parties to the convention. This probably constitutes a sufficient portion of this treaty's SQN states to assert, on grounds of SQN state participation, that the treaty provisions are part of customary international law. Interestingly, the three states of the top twenty non-parties are three of the world's largest oil producing states.⁹² Given their potential for disastrous spills, the remainder of the community of states might wish the imposition of customary international law, generated by MARPOL, on these three states despite their non-party status. Even if all of the top twenty shipping states were parties to MARPOL, sufficient shipping and subsequent potential for marine pollution exists beyond the major shipping states. This also gives rise to the desire that the MARPOL provisions would obligate nonparties through the creation of customary law.

The test of SQN states as parties to the treaty, then, does not necessarily require that all SQN states be parties, but that a sufficient number of them have accepted the treaty to have considered it as having formed part of customary international law. "Sufficient number" is obviously not a precise concept, but as a generic term it cannot be. When applied to a specific treaty however, it should be easier to decide how many is sufficient. In some treaties, like UNCLOS III, sufficiency may require only most (e.g. two-thirds) of the major maritime powers. In other treaties, like the various outer space treaties, sufficiency may require all of the launch-capable states. By applying the test of whether the SQN states are parties to the treaty we have a second piece of evidence to test whether a treaty or any of its provisions have become part of customary international law.

91. U.N. CHARTER.

92. U.S. Dept. of State, TREATIES IN FORCE 253-254 (1983). The major oil producing states that have not ratified the treaty are Saudi Arabia, Iran, and Kuwait.

C. Reservations

Our third condition for whether treaty provisions directly can become part of customary international law has been noted by Baxter and subsequently restated more definitively by the ICJ in the *North Sea Continental Shelf cases*.⁹³ Referring to the Geneva Gas Protocol of 1925,⁹⁴ Baxter noted: "The reservations are persuasive evidence that a number of the parties did not initially regard the Protocol as declaratory of a rule of customary international law placing an unqualified obligation upon all States to refrain from the use of such methods of warfare."⁹⁵ In the *North Sea Continental Shelf cases*,⁹⁶ the Court stated that any treaty provision subject to reservations by states cannot be said to be formative of customary international law.⁹⁷ In this case, the Court distinguished between Articles One through Three of the 1958 Geneva Continental Shelf Convention,⁹⁸ which did not allow reservations and the remaining articles in the treaty which did. The article in question in this case was Article Six. The Court noted:

Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention.⁹⁹

In other words, provisions in treaties that allow reservations may become part of customary international law by other means, but the treaty itself cannot be taken as creative of customary law. Moreover, the Court has stated, ". . . it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations . . . has been exercised only sparingly and within certain limits."¹⁰⁰ Thus, it is not whether states *have made reservations* that is

93. For a discussion of the Court's methodology for determining when treaty provisions can become a rule of customary law, see D'AMATO, *supra* note 3, at 109-12.

94. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65.

95. Baxter, *supra* note 3, at 284.

96. *North Sea Continental Shelf*, *supra* note 53, at 42.

97. D'AMATO, *supra* note 3, at 111. "The Court is basically saying in the *Continental Shelf* case that any rule from which a state can unilaterally withdraw does not rise to the level of being a legal rule of general validity." *Id.*

98. *Law of the Sea: Convention on the Continental Shelf*, Apr. 29, 1958, 15 U.S.T. 471, 400 U.N.T.S. 311.

99. *North Sea Continental Shelf*, *supra* note 53, at 42.

100. *Id.* at 43. One interesting side note to the issue of treaty provisions becoming part of customary international law relates to the Vienna Convention on the Law of Treaties, and in particular, Article 38. We see that the treaty does allow reservations and that at least one state (Costa Rica) has made a reservation concerning this article. According to the Court's wisdom then, Article 38, which allows that a rule in a treaty can become binding on third states if it is part of customary

important, but rather whether the provisions in the treaty are *subject to reservations*. The logic behind this finding by the Court should be clear. Any provision in a treaty that states are allowed to treat as not applying to themselves should not become a part of customary international law where states do not have the option of treating the law as *res inter alios acta*.

Of our three conditions, the reservations test is the most stringent and will no doubt eliminate many global treaties from contention as being creative of customary international law. For example, all of the treaties discussed above, with the exception of UNCLOS III, are among those which allow reservations but which are accepted by many authors as having created customary international law. Perhaps then this test is too restrictive of the development of customary law through the convention process. Although it is restrictive, the Court has indicated that the derivation of customary law from treaty law is a result "not lightly to be regarded as having been attained."¹⁰¹ Perhaps restrictiveness is not a major problem then, and for reasons of conflict avoidance¹⁰² and practical application it might best be retained; little, it seems, would be lost. Treaties are the major source of international law in the contemporary world. They create legal obligations for their parties and most often the parties to certain treaties are also the states most concerned to obey them, the SQN states. To attempt to extend these treaty obligations to other states through the asserted generation of customary international law probably makes little difference in most instances. In those few instances where it seems important for the international community to see a customary law established that has been put forth originally in a treaty, (perhaps because a pressing problem needs international cooperation¹⁰³) there is still reason to be rigorous and realistic when asserting that such a norm does exist.¹⁰⁴ Moreover, treaties of this sort can be created without allowing reservations, as has been done with UNCLOS III.¹⁰⁵ The original logic that omits treaties allowing reservations from directly becoming part of customary international law still remains.

international law, must itself not be able to pass into customary international law solely on the basis of the treaty. Its presence within the corpus of customary international law must therefore depend upon the usual imprecise methods of determining if something has become part of customary international law, state practice and *opinio juris*. Multilateral Treaties Deposited With the Secretary-General, Status as at 31 December 1994 at 758-59, U.N. Doc. ST/LRH/DRT.E/13 (1995).

101. *Id.* at 42.

102. Jenks, *supra* note 78.

103. United Nations: Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (1987).

104. A.M. Weisburd, *A Reply to Professor D'Amato*, 21 VAND. J. TRANSNAT'L L. 473, 476-81 (1981).

105. UNCLOS Treaty, *supra* note 81, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982).

III. CONCLUSION

We argued at the outset that it makes some sense to think that customary international law imposes obligations on states. We suggested that a state's participation in the international system is a way of giving tacit consent to obey the rules of customary international law. We then turned to the problem of whether treaties, which normally bind only their parties, can become part of customary international law, thus binding all states. We have argued that while it is possible for treaty provisions to form a part of customary international law, such formation requires something more, in most cases, than simply the entry into force of the treaty. We devised a three-part test, relying upon decisions of the Court and writings of various authors. Our test requires that a sufficient number of states be party to the treaty, that they include among their numbers those states that are most concerned with the provisions of the specific treaty, and finally that the provisions of the treaty do not allow reservations. This three-part test, while likely eliminating most multilateral treaties from contention for conversion to customary law, nonetheless, seems properly stringent because conflicts are likely to arise by attempting to apply treaty law too broadly as customary law.¹⁰⁶

Though the notion of treaties becoming part of customary international law has gained considerable credibility in the past two decades, it remains a controversial topic. Because of many pressing global problems it has often been seen as necessary to create laws rather quickly that obligate all states in the international system. Treaties are the quickest way to create law, but they often suffer from lack of universal acceptance. Given the *pacta tertiis* principle, one way around this problem is to argue that the treaty provisions establish customary international law obligating all states. Additionally, states that cooperate to solve global problems with treaties that obligate only themselves, probably do not wish to be disadvantaged relative to the non-participants. The stratospheric ozone depletion issue, for example, was one where cooperating states would have been economically disadvantaged if states producing significant quantities of chlorofluorocarbons remained outside the confines of the treaty and also were not bound by customary international law to refrain from the production of these ozone depleting agents.¹⁰⁷

While we are sympathetic to these problems and understand the proposed solution, we cannot be sanguine about the likely success of trying to apply this concept without the widespread acceptance of

106. Jenks, *supra* note 78.

107. Gary L. Scott, Geoffrey Reynolds, & Anthony Lott, *Success and Failure Components of Global Environmental Cooperation: The Making of International Environmental Law*, 2 ILSA J. INT'L & COMP. L. 23, 46-58 (1995); Weisburd, *supra* note 80, at 476-81.

states and particularly those states most affected by the new laws. We think then that the three-part test we have suggested holds out the most realistic way of judging whether treaty provisions have become part of customary international law.