

The Temporal Application of the Vienna Convention on the Law of Treaties

Shabtai Rosenne

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Rosenne, Shabtai (1970) "The Temporal Application of the Vienna Convention on the Law of Treaties," *Cornell International Law Journal*: Vol. 4: Iss. 1, Article 1.

Available at: <http://scholarship.law.cornell.edu/cilj/vol4/iss1/1>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

The Temporal Application of the Vienna Convention on the Law of Treaties

SHABTAI ROSENNE*

Respectfully dedicated to Prof. Herbert W. Briggs in friendship

I. GENERAL

Any examination of the Vienna Convention on the Law of Treaties of 23 May 1969¹ must commence by recalling the obvious truism that this Convention is never applied alone, but always in conjunction with another treaty for which it may supply residual rules. That being so, application of the Vienna Convention will always bring into play certain aspects of what might be called for convenience the relativity of treaties. The relativity may be one of substance such as when, in the words of article 30,² it concerns the rights and obligations of parties to different treaties relating to the same subject matter, or there may be other relativities, governed by their own logic and legal principles. Our major concern here is the temporal relativity of the Vienna Convention in relation to another treaty, the rules for the temporal conflicts of laws. An examination of this aspect will demonstrate that it is insufficient to speak merely of the retroactivity or the non-retroactivity of the Vienna Conven-

*Ambassador, Deputy Permanent Representative of Israel to the United Nations, Chairman of the Delegation to the Conference on the Law of Treaties; Member of the International Law Commission; Associate of the Institute of International Law.

1. For the full text and notes on its history, see ROSENNE, *LAW OF TREATIES: GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* (1970). References to the meetings of the International Law Commission and the Vienna Conference are given in accordance with the manner described on p. 15 of that publication. For the final draft articles on the law of treaties of the International Law Commission, see *Report of the International Law Commission on the Work of its Eighteenth Session*, 21 U.N. GAOR, SUPP. 9, [1966] 2 Y. B. INT'L L. COMM'N 172, U.N. Doc. A/6309/REV. 1 (1966) and *Vienna Convention on the Law of Treaties*, A/CONF 39/27 (1969).

2. See *Vienna Convention on the Law of Treaties*, *supra* note 1 at 15.

tion. In each case one must establish the space of time within which any one of the rules contained in the Convention controls another treaty, whether absolutely, as a residual rule, or as a matter of procedure.

As in most cases of the relativity of treaties, the determination of this effect, which can never be a categorical one, will be found in the convergence of two types of provisions, to be sought simultaneously in the Vienna Convention itself and in the treaty actually or notionally related to it. One set of provisions is of an inwards-looking, substantive character: in this case they are derived from the general law of treaties as it applies to the treaty in question. The general law of treaties is here assumed (the reasons will appear later) *grosso modo* to be incorporated in, or consolidated by, the Vienna Convention. Essentially, the intellectual exercise to be performed revolves around the intermingled processes of the application and the interpretation of the treaty in question. The second set of provisions are of an outwards-looking, procedural character. They are found in the clauses of the treaty in question which govern its application in time and the quality of being "in force" as a matter of time taken in the light of the corresponding rules of the Vienna Convention. The fact that these rules emanating from so many diffuse sources have to be captured and concentrated on a single point, is enough to demonstrate how unwise it would be to scatter oversimplified "principles," such as that of the non-retroactivity of laws or maxims such as *lex posterior derogat priori*, as if they embodied all that was relevant and resolved all problems.

In the case of the Vienna Convention this operation is even more complicated due to the fact that we are dealing with what is openly presented as a convention for the codification and progressive development of the law of treaties.³ The Convention reposes on a thick layer of customary international law and rules of international law deriving from other "sources" of law which are themselves characterized by considerable doubt and confusion. The International Law Commission has alluded to this in formal terms in all its reports on the law of treaties since 1962. Stating that its work constituted *both* codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute, the I.L.C. concluded that it was not practical to determine into which of these categories each provision fell.⁴ A few of the Commission's commentaries, however, indi-

3. Cf. paragraph 7 of the preamble of the *Vienna Convention*: "Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, * * *," (See *Vienna Convention on the Law of Treaties*, *supra* note 1 at 1).

4. For the introduction of that statement, which has since become standard practice (and for good reasons) see the discussion at the 667th meeting, §§ 93-96, [1962]

cate that certain new rules, or relatively new rules, were being proposed for inclusion in the convention, and naturally, as part of the processes of application and interpretation of the Vienna Convention, due account will have to be paid to all such indications. It may also be presumed that as far as provisions introduced by the Vienna Conference, itself, are concerned, any indications furnished by their sponsors as to the character as *lex lata* or *lex ferenda* of the new matter will be determining. From this it would follow that regardless of the formal provisions contained in the Vienna Convention, those of its provisions which can be established as being codificatory will be of unlimited temporal application. In principle this is so stated in the eighth paragraph of the preamble to the Convention, according to which "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention."⁵ The same principle also underlies the somewhat awkwardly worded provisions of articles 38 and 43 of the Vienna Convention.⁶

Treaty provisions derived from the general law of treaties which can be characterized as being of an inward-looking, substantive character,

1 Y. B. INT'L L. COMM'N U.N. DOC. A/CN.4/L.101/ADD. 1. For recent insertion of this paragraph in connection with other topics, throwing further light on the Commission's motives, see the decision reached at the 821st meeting (§§ 18-28) on special missions [1965] 1 Y. B. INT'L L. COMM'N 313 at §§ 18-28, U.N. Doc. A/CN.4/L.111/ADD. 3-5, and at the 1038th meeting (§§ 48-49) on relations between States and international organizations. [1969] 1 Y. B. INT'L L. COMM'N 254 at 948-49, U.N. Doc. A/CN.4/L.143-148 and Add. By article 15 of the *Statute of the International Law Commission*: "In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine."

5. See *Vienna Convention on the Law of Treaties*, *supra* note 1 at 1.

6. The concept of rules of law being "enshrined in an article of a Convention prepared on the basis of a draft submitted by the International Law Commission, though quite independent of it, has been endorsed by the International Court of Justice, notably in the North Sea Continental Shelf Case, [1969] I. C. J. 3, 22.

In our opinion, the formulation adopted by the Institute of International Law in its resolution of 14 September 1967, is more felicitous than the texts of these two articles. "The Institute of International Law expresses its desire: That the codification should reaffirm the principle according to which, when an obligation embodied in a treaty is binding also by virtue of another rule of international law, the fact that a State has not become a party to that treaty, that the treaty has lawfully terminated or that a party has lawfully withdrawn from that treaty does not as such affect the existence of that obligation." *Resolutions adopted by the Institute at the Session at Nice*, Sept. 7-16, 1967, 52 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, t. ii, 561, 562 (1967). On the possibility of amalgamating the two articles of the International Law Commission, see the present writer's observations at the 856th (§ 80) and 868th (§ 95) meetings. [1966] 1 Y. B. INT'L L. COMM'N PART II at 92, U.N. Doc. A/CN.4/83 and Add. 1-4, and at 178, U.N. Doc. A/CN.4/186 and Add.

were to a large extent treated in depth by the International Law Commission. Article 30 of the Vienna Convention concerning successive treaties related to the same subject matter (which has already been mentioned) deals with the application of successive treaties *relating to the same subject-matter* and therefore its relevance to the problems of the relationship between the Vienna Convention and another treaty may be limited and marginal, except perhaps as regards the "treaty-law" provisions of that other treaty — the type of provisions relating to the life of the treaty. The Vienna conference singled out these provisions for special treatment in article 24, paragraph 4 of the Convention, regarding the entry into force of what are frequently denominated the "final provisions" of a treaty.⁷

One may place article 28 of the Vienna Convention into the same category of interpretive guides. With disarming oversimplification entitled "Non-retroactivity of treaties," this provision lays down that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.⁸

This rebuttable negative presumption really does little more than say that in general the backwards temporal application of a treaty is a matter to be established either directly from the treaty itself, or indirectly by the process of interpretation — a rule of law which is certainly not a new one even if the Vienna Convention contains its first internationally agreed formulation. In any event, it is clear that the controlling factor is the intention of the parties and not any so-called general principle or maxim.

Obviously the intention of the parties is to be established by the totality of the terms of the treaty in question. This general principle is set forth categorically in article 31, paragraph 1 of the Vienna Convention: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁹ There is no doubt that this is as applicable to the Vienna Convention itself as it is to any other treaty.

7. Derogating from the generality of the rules regarding the entry into force of a treaty, article 24, paragraph 4, which was added by the Vienna Conference, states that: "The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of text." *Vienna Convention on the Law of Treaties*, *supra* note 1.

8. See *Vienna Convention on the Law of Treaties*, *supra* note 1 at 14.

9. *Id.* at 16.

II. PROVISIONS CONTROLLING TEMPORAL APPLICATION OF THE CONVENTION

This brings us to the provisions referred to previously as being of an outwards-looking procedural character. Unlike the previous ones, these articles of the Vienna Convention were not the subject of dispassionate examination by the International Law Commission, which apparently did not regard them as matters to be considered within the context of the general law of treaties. On the contrary, they were introduced directly by the Vienna Conference almost at its end, when the inevitable political tensions generated by the Conference were reaching their climax. This fact alone indicates that these provisions have a more pronounced political character than the others. On the other hand, the fact that some general rules on the same topics appear in the body of the Convention adds to the confusion.

For instance, article 4 on the non-retroactivity of the present Convention, provides:¹⁰

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

This provision corresponds, with minor drafting changes, to a proposal sponsored after extensive debate in the Committee of the Whole towards the end of the second session by Brazil, Chile, Kenya, Iran, Sweden, Tunisia and Venezuela.¹¹ That proposal was adopted at the Committee's

10. *Id.* at 4.

11. U.N. Doc. A/CONF.39/C.1/L.403. This replaced the following earlier proposals:

(i) By Venezuela, "The provisions of the present Convention shall apply only to treaties concluded in the future." U.N. Doc. A/CONF.39/C.1/L.399.

(ii) By Brazil, Chile, Kenya, Sweden and Tunisia, "Without prejudice to the application of the rules of customary international law codified in the present Convention, the Convention will apply only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States." U.N. Doc. A/CONF.39/C.1/L.40.

(iii) By Spain, to replace the opening words in the Brazilian proposal up to "in the present Convention" by "Without prejudice to the application of the principles and rules of international law set forth in the present Convention." U.N. Doc. A/CONF.39/C.1/L.401.

(iv) By Iran, to insert, in the five-power proposal, after the words "in the present Convention" the words: "and the provisions as generally declaratory of established principles of international law." U.N. Doc. A/CONF.39/C.1/L.402.

These proposals were all withdrawn or not voted upon, and were replaced by the seven-power proposal, subsequently adopted. U.N. Doc. A/CONF.39/C.1/L.403. These and other Conference documents cited in this article will be published in 3 UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS [hereinafter U.N. CLTOR]. On the political significance of the decisions on this article, see Gibson, *Contemporary Practice of the United States Relating to International Law* 64 AM. J. INT'L L. 165, 170 (1970).

104th meeting on a roll-call vote by 71 votes to 5, with 29 abstentions. The sponsors of the article proposed its inclusion among the final provisions, as article 77.¹² The Drafting Committee, however, decided to place it in the introductory Part I of the Convention "since it concerned a general question governing the convention as a whole."¹³ In the course of the discussion a number of important issues were raised and certain interpretations and explanations were given by the sponsors, and other understandings were placed on record.

The formal debate on the proposal was initiated by the representative of Venezuela who considered that in view of the changes made by the Vienna Convention in the established rules of law¹⁴ it seemed essential, if the largest possible number of accessions was to be ensured, to state clearly and precisely that the provisions of the convention would apply only to treaties signed in the future. In his view, there were many cases that would not be covered by the general provisions of article 28, which was ambiguous and inadequate.¹⁵ On the other hand, the Venezuelan proposal itself was found to be over-simple,¹⁶ and indeed vague, since it should be stated that the convention applied only to treaties the texts of which were established after its entry into force, without prejudice to States applying its provisions to earlier treaties by agreement between them,¹⁷ and without prejudice to the application of the rules of custo-

12. See *Report of the Committee of the Whole on its Work at the Second Session of the Conference*, U.N. Doc. A/CONF.39/15, §§ 136-143.

13. The Chairman of the Drafting Committee, Ambassador Yasseen (Iraq), at the 30th plenary meeting, 2 U.N. CLTOR 165 at § 8, A/CONF.39/16 (1969). Then the article was adopted by an even larger majority, 81 votes to 5, with 17 abstentions. On the general character of Part I of the Convention, as indicating the scope, the instruments excluded from that scope, and the use of terms in the Convention, see the explanation of the Special Rapporteur, Sir Humphrey Waldock, at the 886th meeting of the International Law Commission, [1966] 1 Y. B. INT'L L. COMM'N PART II 283 at § 48, U.N. Doc. A/CN.4/L.107, L.115 (1966). On that occasion doubts were even expressed whether the provisions of Part I were, strictly speaking, rules. Rather they made clear what the articles did and did not cover and what certain terms meant, their function being to keep certain matters separate from the main scheme and to provide certain information necessary to the understanding of the text as a whole. Statements by Messrs. Ago, Bartos and Yasseen, *id.* §§ 58-61 at 284.

14. The representative referred specifically to the provisions now appearing in articles 12, 14, 49, 50, 53, 56, 60 and 64 of the Convention (see note 1, *supra*) as examples of new rules, but the records of the Conference, leaving aside those of the International Law Commission, show that this assessment is controversial.

15. *Committee of the Whole*, 100th meeting, 2 U.N. CLTOR 316-17 at §§ 64-65, A/CONF.39/15 (1969), repeated at 103rd meeting, 2 U.N. CLTOR 333 at § 39. See further, with regard to article 28: Greece, 102nd meeting, *id.* 327 at § 34; and the statement of Sir Humphrey Waldock, *infra* at 337. For contrary views (which we are inclined to share), see Iran, 102nd meeting, 2 U.N. CLTOR 329 at § 51; China, 103rd meeting, *id.* 333 at § 37.

16. Australia, *Committee of the Whole*, 101st meeting, 2 U.N. CLTOR 317 at § 6, A/CONF.39/15 (1969).

17. For an illustration see the *American Convention on Human Rights* of November

mary international law to which the convention sought to give expression.¹⁸ Another representative, pointing out that the Convention contained two elements: new rules representing the progressive development of international law and the expression of existing rules of customary law, said, "The question of which articles represented rules of customary law could be left to future interpreters of the convention."¹⁹ An important point of view was that of the representative of Sweden who had introduced the original version of the five-power draft which later became article 4.

His delegation considered that it would be wise to establish expressly that the present convention, qua convention, did not operate retroactively. Sweden had stated during the discussion on article 62 *bis* [66] that the article and the machinery it provided did not apply retroactively to old treaties or disputes. Similarly, other articles of the convention did not, as a matter of treaty law, apply retroactively to treaties concluded by States before the present convention had entered into force for them.

It was generally agreed that most of the contents of the present convention were merely expressive of rules which existed under customary international law. Those rules obviously could be invoked as custom without any reference to the present convention. But to the limited extent that the convention laid down rules that were not rules of customary international law, those rules could not be so invoked. The position could be regarded as already made clear from the general rule contained in article 24 [28] of the convention. It might, nevertheless, be safer to make the point explicit. . . .²⁰

He directed criticism at the Venezuelan proposal primarily because it did not include the vital qualification that the rules of customary international law, which formed the major part of the convention, continued to govern treaties concluded in the past and lacked the necessary indication that the convention, as a convention, would apply not generally to treaties concluded in the future, but only to treaties concluded by States after the convention had entered into force for them.

For the representative of Greece, the principle of non-retroactivity laid down in the proposed new article had the advantage of encouraging more States to ratify the convention, since the obligations prescribed were more limited. For him, it would be a means of working towards universality. He explained that the adoption of the article would mean

22, 1969, article 75 of which provides: "The Convention shall only be subject to reservations in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969."

18. *Committee of the Whole*, Ceylon, 101st meeting, 2 U.N. CLTOR 319 at §§ 26-27, A/CONF.39/15 (1969). See also Uruguay, 102nd meeting, *id.* 323 at § 2; Guyana, 102nd meeting, *id.* at §§ 7-8; Czechoslovakia, 102nd meeting, *id.* 324 at §§ 17-18; Iraq, 102nd meeting, §§ 19-21, *id.* 325 at §§ 19-21; El Salvador, 102nd meeting, *id.* 325 at § 24; Ecuador, 103rd meeting, *id.* 329 at §§ 1-3.

19. Italy, *Committee of the Whole*, 101st meeting, *id.* 320 at § 36.

20. *Committee of the Whole*, 101st meeting, *id.* 321 at §§ 42-44. See also Greece, 102nd meeting, *id.* 327 at § 36; Spain, 102nd meeting, *id.* 328 at §§ 43-45; Iran, 102nd meeting, *id.* 329 at § 52; Liberia, 103rd meeting, *id.* 330 at § 6; Switzerland, 103rd meeting, *id.* 330 at §§ 7-10; Cambodia, 103rd meeting, *id.* 332 at §§ 25-28; Cyprus, 103rd meeting, *id.* 334 at §§ 43-46.

nothing more than the acceptance of that which would exist even without it. In any case, the principle of non-retroactivity, even when explicitly laid down, could not prevent certain awkward questions from arising, but that was inevitable; and it was preferable to state the principle explicitly.²¹ Indonesia thought that the only justifiable solution would be to declare non-retroactive certain special provisions that might be agreed upon during the Conference, such as, for instance, the provision on the compulsory settlement of disputes.²² Tunisia, another co-sponsor, explained that the new article reaffirmed the principle of non-retroactivity; it has long existed in customary law and was generally recognized, but it should be re-stated in any codification of universally accepted rules, in order to make them more stable and, as far as possible, applicable *erga omnes*.²³ For the delegation of Bolivia the question was extremely delicate. It would be dangerously restrictive to imply that existing treaties were excluded from the application of the convention since that would be tantamount in many cases to setting the seal of approval on certain agreements which were the cause of continual controversies that required a solution in keeping with the principles of international law enshrined in the convention. If the Conference decided that it must include the new article, it must do so in a way that would safeguard the principles of customary law and those derived from other sources of international law at present in force for the settlement of disputes which in large measure the convention was attempting to codify.²⁴

As a result of the debate, all the original proposals were replaced by the seven-power draft ultimately accepted as article 4. Introducing that text on behalf of the co-sponsors, the representative of Sweden explained that in form it was similar to article 3 (b) of the convention which had already been approved by the Committee of the Whole and the Drafting Committee.²⁵ The new text no longer referred only to the rules of customary international law codified in the convention, but rather to all the rules of international law, in the widest sense, which existed inde-

21. *Committee of the Whole*, 102nd meeting, *id.* 327 at §§ 34-38.

22. *Committee of the Whole*, 103rd meeting, *id.* 332 at § 32. This is a somewhat idealistic approach. It is obvious from the record of the Conference that it would have been extremely difficult to have obtained any meaningful votes along these lines, except as regards article 66.

23. *Committee of the Whole*, 103rd meeting, *id.* 334 at § 52.

24. *Committee of the Whole*, 103rd meeting, *id.* 335 at §§ 55-58.

25. By that provision: "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law, or to international agreements not in written form, shall not affect: . . . (b) the application to them of any of the rules set forth in the present convention to which they would be subject under international law independently of the Convention." The original suggestion to structure the new article on the same lines had been made by Greece at the 102nd meeting of the *Committee of the Whole*, *id.* 327 at § 36. See also Spain, *id.* 328 at § 44, and Venezuela, 103rd meeting, *id.* 333 at § 41.

pendently of the convention.²⁶

The discussion was concluded by an important statement by Sir Humphrey Waldock, in his capacity of expert consultant, which warrants ample quotation:

The problem of non-retroactivity was only one aspect of the problem of the temporal application of international law. The International Law Commission had found it to be an exceedingly delicate and troublesome problem, not only in connection with article 24 [28] on that very point, but also with respect to the interpretation of treaties. The Commission had tried at one stage to consider the inter-temporal element in the application of international law when interpreting treaties. It had in the end concluded that the whole problem of the relation between treaties and customary law was one which called for searching inquiry before the Commission could be on safe ground in formulating rules in connection with interpretation.

It could be seen from the text of article 27 [31], which the Committee [of the Whole] had accepted, that there was merely a reference, for the purpose of the interpretation of treaties, to 'any relevant rules of international law'; no attempt was made to solve the problem of the temporal element. The Commission had left that element to be determined according to each case in accordance with the principle of good faith. That being the general position in the Commission on the temporal element, the Commission had provided, in article 24 [28] after some difficult discussions, the basis of the rule on non-retroactivity which the Committee of the Whole had approved.²⁷

Some speakers in the debate had thought that the article would suffice to cover the question of non-retroactivity in connection with the convention on the law of treaties. That was probably the correct view. The provision was a general one setting out the general principle of non-retroactivity, and it was flexible in that it did not foreclose the question of the temporal element in the development of international law. It might therefore serve the purpose. He had been very glad to hear the representative of Switzerland emphasize the inter-temporal element in international law, because that element was his particular preoccupation. Conventions such as the one under consideration had their own consolidating force, and even matters that might or might not have been international law at the time of the codifying convention thereby gained authority. Rules which it might not be possible, on the basis of a very strict view of codification, to consider as international law at the time of the convention might be so considered at a later date. He was very anxious, in connection with the proposals before the Conference on the question of non-retroactivity, that nothing should be done to damage the very important impact which all great conventions had as instruments for consolidating and settling international law.

26. *Committee of the Whole*, 103rd meeting, *id.* 335 at §§ 59-60. The same representative later explained that the words "independently of the Convention" were essential since the convention as such would be part of international law, binding on all those who became parties to it. 104th meeting, *id.* 340 at § 25.

27. *Committee of the Whole*, 103rd meeting, *id.* 337 at §§ 78-81. On the role of the expert consultant at this conference, see our work cited *supra* note 1 at 58.

Referring to the proposals before the Committee, he supported the seven-power text which left open the question of the temporal element sufficiently for it to be a satisfactory solution of the problem. He recognized that many representatives had a certain preoccupation as to the need for a non-retroactivity provision in this convention although that need had not been felt in the other codification conventions. However, a convention on the law of treaties was perhaps a rather peculiar instrument and it might be that the justification existed in that particular case.

On the final adoption of article 4, several understandings were recorded. The representative of Cuba believed the article carried the principle of non-retroactivity beyond what was reasonable. Further, denying the law of treaties, as such, any power to govern prior provisions which came under its authority, would maintain a persistent uncertainty with respect to the scope of certain customary rules of international law established in the convention.²⁸ For the representative of Cyprus, rules of international law adopted for the first time through the convention could not have retroactive effect, but it was self-evident that rules already in existence and incorporated in the convention should continue to be applicable to international agreements, whether the agreements were entered into before or after the adoption of the convention. Most of the substantive, as distinct from the procedural, rules set out in the convention fell into the latter category.²⁹ The representative of France asserted that the article was to be interpreted as meaning that a treaty concluded before the entry into force of the convention in respect of a State party to it might be invalidated by virtue of the rules set forth in the convention, but existing independently of it; on the other hand, if a case of voidability had been created by the convention, for example in a case arising out of a peremptory norm of *jus cogens*,³⁰ a treaty concluded prior to the entry into force of the convention in regard to a State party to it was not voidable on that account.³¹ An ingenious explanation was advanced by the representative of Ecuador. He understood that the rules referred to in the first part of the article included the principle of the peaceful settlement of disputes as set forth in article 2, paragraph 3, of the Charter of the United Nations, whose *jus cogens* character conferred

28. Thirtieth plenary meeting, 2 U.N. CLTOR 165 at §§ 9-16, A/CONF.39/15 (1969). Note also the statement of the same delegation on the relation between articles 4 and 28 on the occasion of the adoption of that article (then numbered 24). Thirteenth plenary meeting, *id.* 54-55 at § 41-47.

29. *Id.* 166 at § 17.

30. See articles 53 and 64 of the Geneva Convention on which France had voted negatively.

31. Thirtieth plenary meeting, *supra* note 22, 166 at § 18 (this appears clearly in the Convention, from a combined reading of articles 53, 64 and 71).

upon that rule a universal, peremptory force. Consequently his Government considered that the first part of the article was applicable to existing treaties and it was clear that the article contained the incontrovertible principle that when the convention codified rules of *lex lata*, the latter, being pre-existing rules, could be invoked and applied to treaties concluded before the entry into force of the convention, the instrument in which they were codified.³² Similarly the representative of Czechoslovakia understood that it followed clearly from the article that non-retroactivity in no way affected the need to apply all the rules stated in the convention to which treaties would be subject under international law, and thus ensured that the principles of international law codified by the convention would be fully applied independently of the coming-into-force of the convention. Those principles of international law necessarily applied to all treaty relations at the time they were established, for in such cases it was not possible to speak of the principle of non-retroactivity, only of the need to apply legal principles existing at the time of the establishment of the treaty obligations.³³ Finally, the representative of Sweden added another element of interpretation by clarifying his delegation's understanding that, when applied to a multilateral treaty, the article meant that the convention would be applicable between States which participated in the conclusion of a multilateral treaty after the convention had come into force for them, although there might be other parties to the same multilateral treaty for which the convention had not come into force.³⁴

A general reference to "international law,"³⁵ found in article 4, is echoed elsewhere in the Convention clarifying the meaning to be given to the term. For example, article 2 (1) (a) explains the term "treaty" as used in the Convention as an international agreement "governed by international law." Article 3, apart from the passage already quoted, refers to "subjects of international law." Article 31 requires "any relevant rules of international law applicable in the relations between the parties" to be taken into account in the interpretation of a treaty. Article 43, closely resembling in certain respects articles 3 and 4,³⁶ provides:

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair

32. *Id.* 166 at § 20.

33. *Id.* 166 at § 21-22.

34. *Id.* 167 at § 23.

35. For the antonym, *internal law*, cf. articles 2(2), 27, 46, *supra* note 1.

36. Cf. Professor H. Briggs, speaking as the representative of the United States, at the 40th meeting of the *Committee of the Whole*, introducing the amendment of the United States, U.N. Doc. A/CONF.39/C.1/L262 (1968), at § 75, U.N. CLTOR 227 at 75, A/CONF.39/11 (1968). On the recommendation of the Drafting Committee to model article 43 also on article 3, see the Chairman of the Drafting Committee at the 16th plenary meeting, 2 U.N. CLTOR 73 at § 9, A/CONF.39/15 (1969).

the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.³⁷

On the other hand, deliberate and specific references to *customary* international law³⁸ appear in the eighth preambular paragraph of the Vienna Convention already quoted; by which the States parties to the Convention affirm "that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention";³⁹ and in article 38, by which nothing in the provisions on treaties and third States (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."⁴⁰

It is clear from the discussions in the International Law Commission, where these differentiations originated, and at the Vienna Conference where they were retained and sharpened, that these formulations were deliberate and that the more general formulation, such as is found in article 4, was intended to implicate all the elements of international law, or the sources of international law as they are sometimes called, as are set forth in a general way in article 38 of the Statute of the International Court of Justice. That being the case, and that moreover clearly being the meaning attributed at the Vienna Conference to article 4 by its sponsors and supporters, it is obvious that the exclusionary effect of article 4 will be very much less than a cursory reading of its provision might suggest.

III. PROVISIONS WITH SPECIFIC RULES FOR TEMPORAL APPLICATION

In the draft articles on the law of treaties submitted by the Interna-

37. See *Vienna Convention on the Law of Treaties*, *supra* note 1 at 21.

38. The Convention also refers to the "principles of international law embodied in the Charter of the United Nations" in article 52, and "a peremptory norm of general international law" in articles 53, 64 and 71 (*Vienna Convention on the Law of Treaties*, *supra* note 1). These are obviously more limited categories.

39. A similar paragraph, based on the fifth preambular paragraph on the *Vienna Convention on Diplomatic Relations* of 18 April 1961, had been included in the proposals for the preamble submitted by Mongolia and Romania, U.N. Doc. A/CONF.39/L.4, and by Switzerland, U.N. Doc. A/CONF.39/L.5, but had been omitted in the preamble submitted by the Drafting Committee, U.N. Doc. A/CONF.39/18, for reasons not explained by the Chairman of the Drafting Committee when he introduced the preamble at the 31st plenary meeting, 2 U.N. CLTOR 169 at §8, A/CONF.39/15 (1969). The paragraph was then introduced in an amendment proposed by Switzerland, U.N. Doc. A/CONF.39/L.45, and after oral revision by Iraq was adopted by 77 votes to 6, with 11 abstentions. The Swiss amendment, following the precedents, referred to questions not expressly regulated by the Convention. However, objection was taken that despite the precedents the inclusion here of the word "expressly" would be prejudicial since it would limit unduly the scope of the Convention, which regulated some matters indirectly or implicitly. The representative of Iraq at the 31st plenary meeting, 2 U.N. CLTOR § 68 at 174, A/CONF.39/15 (1969).

40. See *Vienna Convention on the Law of Treaties*, *supra* note 1 at 18.

tional Law Commission,⁴¹ specific references to the temporal application of a provision, and more particularly its retroactivity, were sparse. In fact they were made only in connection with two of its proposals.

A. THE INVALIDATION OF CONSENT BY COERCION

The Commission's approach to the issue of the coercion of a State by the threat or use of force as a defect in the consent of that State to be bound by a treaty⁴² was based on its appreciation of the evolution of legal doctrine in three epochs: (i) prior to the Covenant of the League of Nations; (ii) the period of the Covenant and the Pact of Paris;⁴³ (iii) the consolidation of the law in the Charter of the United Nations and the practice of the United Nations itself. This approach, and the reactions to it by Governments, required the Commission to furnish answers to two sets of problems relating to the temporal application of the rule which it was proposing.

1. *Treaties concluded Prior to Modern Law*

There was no question of the article having retroactive effect on the validity of treaties concluded prior to the establishment of what the Commission called the "modern law."⁴⁴ Here the Commission relied on the well-known exposition of the rules of the inter-temporal law contained in the celebrated *dictum* of Judge Huber in the *Isle of Palmas* arbitration,⁴⁵ to the effect that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The Commission was quite categorical in stating that its draft article on the matter "codified" the law and could not properly be understood as depriving of validity *ab initio* a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force.

41. *Id.*

42. Draft article 49, adopted by the Vienna Conference as article 52 of the Convention. See *Vienna Convention on the Law of Treaties supra* note 1 at 25. See also the declaration on the prohibition of military, political or economic coercion in the conclusion of treaties, annexed to the *Final Act of the Vienna Conference A/CONF.39/26* (1969). For particulars regarding its transmission to its various addressees in accordance with a resolution adopted by the Conference, see our work cited *supra* note 1 at 289.

43. *General Treaty for the Renunciation of War as an Instrument of National Policy (the Briand-Kellogg Pact)*, signed at Paris on August 27, 1928, 46 STAT 2343, T.S. No. 796; 94 L.N.T.S. 57.

44. Commentary to article 49, paragraph (7), *supra* note 1.

45. [1928] 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 829, 845 (1949).

2. Date of the Commencement of Modern Law

As to the date from which the modern law should be considered as in force for the purpose of the article, the Commission was of the opinion that it would be illogical and unacceptable to formulate the rule as one applicable only from the date of the conclusion of a convention on the law of treaties. It therefore limited itself to the temporal indication implicit in the reference in the draft article to the "principles of the Charter of the United Nations."⁴⁶

It may be thought that this carefully drawn retroactivity of what is generally (although perhaps not universally) regarded as a rule which was not in existence in 1914 and the date of the birth of which cannot be accurately pinpointed, before 1945, has been underscored by events since the finalization of the draft articles by the International Law Commission. The Vienna Conference itself reworded the article in somewhat more emphatic terms; the language now used is "the principles of international law embodied in the Charter of the United Nations." In the same general direction, and virtually at the same time, the Draft Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, in its formulation of the principle that States 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, stresses *inter alia* that nothing in the formulation of the principle should be construed as affecting "provisions of the Charter or any international agreement prior to the Charter regime and valid under international law."⁴⁷

B. ARTICLES CONCERNING "JUS COGENS"

More complex, as concerns the time factor, are the articles concerning the so-called *jus cogens*, or peremptory norms of international law. Many of these contain built-in provisions relating to their temporal application and do not entirely leave this to the combined processes of interpretation and deduction. In the mind of the Commission there was no question that the basic rule invalidating a treaty conflicting with a rule of *jus cogens* was governed by the rule of non-retroactivity.⁴⁸ The com-

46. See *Vienna Convention on the Law of Treaties*, *supra* note 1.

47. 25 U.N. GAOR, SUPP. 18, § 83, U.N. Doc. A/8018 or A/AC.125/12 (1970). It is anticipated that final decisions on this draft declaration will be taken during the 25th session of the General Assembly.

48. Commentary to article 50, paragraph (6), *Vienna Convention on the Law of Treaties*, *supra* note 1.

mentary made it plain that this provision only brought into play the rules of *jus cogens* existing at the time of the conclusion of the treaty in question. The Vienna Conference took this up and for the sake of clarity transferred those same words from the commentary to the final text of what became article 53 of the Vienna Convention.⁴⁹ On the other hand, the possibility of evolution of the rules of *jus cogens* is dealt with in article 64 of the Vienna Convention, which provides for the termination of a treaty which becomes void because of a conflict with a rule of *jus cogens* which emerges *after* the conclusion of the treaty, sometimes called *jus cogens superveniens* or *jus cogens emergens*.⁵⁰ This differentiation is itself consolidated in article 71 of the Convention. Paragraph 1 of that article deals with the consequences of an initial invalidity of a treaty on this ground, and paragraph 2 with the consequences of an emergent invalidity and termination of a treaty, on the ground of conflict with a rule of *jus cogens*, according to the relationship in time of the rule of *jus cogens* involved and the treaty in question.⁵¹

C. REMAINING PROVISIONS NOT CONTAINING SPECIFIC TEMPORAL APPLICATION RULES

The reticence of the International Law Commission to attach labels to its proposals as being codification or progressive development⁵² (assuming this differentiation to be relevant or fully relevant to the question of the retroactivity of a formulation of a rule by the International Law Commission) or indeed to express itself at all on the possible retroactive implications of any of its proposals was justified. It is submitted that it would be a singularly futile exercise to attempt to draw up a sort of

49. See *Vienna Convention on the Law of Treaties*, *supra* note 1 at 25.

50. *Id.* at 31.

51. *Id.* at 36.

52. For a curious and unexpected departure from the Commission's usual practice, notice paragraph (2) of the commentary of article 14 of the draft articles on representatives of States to international organizations, adopted by the Commission in 1968. *Report of the Commission on the Work of its Twentieth Session*, 23 U.N. GAOR, SUPP. 9, CHAPTER II, [1968] 2 Y. B. INT'L L. COMM'N 191, 207, U.N. Doc. A/7209/REV. 1. That article deals with full powers to represent a State in the conclusion of treaties, and it picks up a theme which the Commission had originally included in 1962 in article 4 of the draft articles on the law of treaties then adopted. *Report of the International Law Commission on the Work of its Fourteenth Session*, 17 U.N. GAOR, SUPP. 9, [1962] 2 Y. B. INT'L L. COMM'N 157, U.N. Doc. A/5209 (1962). The idea was subsequently dropped by the Commission and later reinstated in a somewhat different form in article 7 (2) (c) of the Vienna Convention, *supra* note 1 at 5. Referring to its new proposal in 1968, the Commission stated that it had not taken a definite position on whether it merely reflected existing practice or laid down a rule entailing progressive development of the law. However, it is questionable whether the antithesis is really between existing practice and progressive development; preferably it is between existing law and progressive development. It is to be hoped that this confusing paragraph will be clarified at a later stage of the Commission's work on the topic.

Kantian *schema* allocating to each specific rule now contained in the Vienna Convention its own defined sphere of temporal application, whether retrospective or prospective, or even timeless. The invitation of one of the representatives at the Vienna Conference to future commentators on the Convention to undertake this examination would be found in all likelihood to be leading them to embark upon a Sisyphean task of extraordinary uselessness. Nor is it likely to be fruitful or worthwhile to attempt to apply article 28 of the Vienna Convention to this end, because that would mean to apply to the Vienna Convention its own provisions which, in this respect, consist of the rather obvious *petition de principe* of article 4, or of what can be "otherwise established," an expression which presumably refers to the intentions of the States participating in the Vienna Conference.⁵³ This for its part assumes that such a common intension existed and that it can be established. But how illusory that supposition might turn out to be can be illustrated by two observations attributed to the United Kingdom delegations concerning what is now Part V of the Vienna Convention, on the various grounds for the invalidity and the termination of treaties. Speaking in one of the earlier debates in the 786th meeting of the Sixth Committee, one representative of that country referred in somewhat all-embracing terms to what she called the "bold and constructive approach" of the International Law Commission towards the "formulation of new rules" in that part of the draft articles.⁵⁴ The language there used was certainly sweeping enough to cover what is now article 60 of the Vienna Convention, on the termination or suspension of the operation of a treaty as a consequence of its breach, and it has been so taken by one who is a cautious and painstaking commentator on the work of the International Law Commission on the law of treaties.⁵⁵ On the other hand, at the Vienna Conference, itself, another representative of that country pointed out, at the 61st meeting of the Committee of the Whole, that in article 60 the International Law Commission had "codified existing law."⁵⁶

No doubt many other examples of this kind of vacillation, not very

53. Cf. the discussion at the 894th meeting of the International Law Commission between Messrs. Rosenne, Tunkin and Sir Humphrey Waldock, *Draft Report of the Commission on the Work of its Eighteenth Session*, [1966] 1 Y. B. INT'L L. COMM'N, PART II, 346, U.N. Doc. A/CN.4/L.116/Add. 18 (1967). Also Haak, "Unless the Treaty Otherwise Provides" and Similar Clauses in the International Law Commission's 1966 Draft Articles on the Law of Treaties, 27 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT AND VOLKERRECHT 540 (1967).

54. See comments of Miss Joyce Gutteridge as reported in 18 U.N. GAOR, 6TH COMM. 25, U.N. Doc. A/5509 (1963).

55. Schwelb, *Termination or suspension of the operation of a treaty as a consequence of its breach*, 7 THE INDIAN JOURNAL OF INTERNATIONAL LAW 309, 312 (1967).

56. See comments of Sir Francis Vallat as reported in 1 U.N. CLTOR 257, A/CONF.39/11.

important in itself, can be extracted from a meticulous and critical study of the various *Summary Records*. The significance of the example given is that it is attributed to a delegation notorious for the high technical level and professional (legal and diplomatic) competence of its representatives. It has been given only by way of illustrating how well-nigh impossible it would be to deduce from the *travaux préparatoires*, in most cases, any clear ideas about the intention of the participating States at the Vienna Conference with regard to the nature of any given provision, as being codification or progressive development.

IV. THE PRACTICAL VALUE OF THE VIENNA CONVENTION IN SETTLING DOUBT AND CLARIFYING THE TEMPORAL APPLICATION OF TREATIES

Up to this point the writer has assumed that a clear cut polarity exists between codification and progressive development, the former being timeless so-to-speak, and the latter being in principle, prospective and not retroactive. (The question arises whether rules coming within the second category "speak" from the date of their formulation by the International Law Commission or from the date of the adoption of the Vienna Convention or only prospectively, from the date of its entry into force, as would apparently be required from a strict reading of article 4.) This clear-cut distinction is itself open to question, for the problem becomes more complicated, both as a philosophical matter and as a practical one, in light of the true character of the Vienna Convention as one "consolidating" the law. The Commission seems first to have used that expression in connection with the law of treaties in its 1962 report, the first submitted under Sir Humphrey Waldock's guidance as special rapporteur.⁵⁷ Moreover, even if the Commission did not go into any depth in explaining what it meant by this, there is no doubt that the term was deliberately employed;⁵⁸ and that it was accepted initially in the Sixth Committee of the General Assembly, and subsequently in the Vienna Convention itself, that in the case of this Convention the theoretical distinction between "codification" and "progressive development" is even more blurred than it has been in the other codification conventions. Indeed, a useful illustration of this appears in the discussion in the 894th

57. *Supra* note 42, CHAPTER II, § 17. The expression seems to have originated with Sir Humphrey, who prepared the draft of this chapter of the Commission's report. U.N. Doc. A/CN.4/L.101/ADD. 1. Repetition of that idea appears in the *Report of the Commission on the Work of its Seventeenth Session*, (PART I), CHAPTER II, § 16. 20 U.N. GAOR, SUPP. 9 at 8 [1965] 2 Y. B. INT'L L. COMM'N 155, 157, U.N. Doc. A/6009 (1967); and in CHAPTER II, § 24, of its *Final Report on the Law of Treaties*, *supra* note 1.

58. See the discussion on the initial adoption of that paragraph at the 668th meeting, *Draft Report of the Commission on the Work of its Fourteenth Session* [1962] Y. B. INT'L L. COMM'N 262, U.N. Doc. A/CN.4/L.101/ADD. 1 (1964).

meeting of the International Law Commission over the commentary of what Sir Humphrey called the "progressive provision" of what is now article 78 of the Vienna Convention — a provision deliberately designed to eradicate "prevailing uncertainty over the *exact* [italics supplied] position of depositaries in the matter of notifications and communications."⁵⁹ The truth is that virtually all the Commission's formulations, dealing with established and experienced hypotheses of international law and relations, stem from the aspiration (shared also by the General Assembly of the United Nations) to eradicate prevailing uncertainties and to introduce into the law of treaties the maximum attainable degree of precision and clarification. It is for this reason, as much as for any other, that the Vienna Convention, like the draft articles of the International Law Commission, must be examined not only from the point of view of what it omits but also from the point of view of what it contains, bearing in mind that it is a closely integrated instrument and constitutes a single whole. Each provision must be considered on its own intrinsic merits, in its context in the Convention as a whole and in the light of the requirements of the present-day international society, and not on the basis of preconceived and possibly outdated notions of what the law is or purely idealistic conceptions of what it ought to be. One must avoid going too far in dividing the articles into categories and attaching to them epithets having a doctrinal nuance, a process which could easily deflect attention from the real issues that each article poses.⁶⁰

For example, a legal opinion of the United Nations Secretariat, dated December 4, 1967, to the Director of the Division on Narcotic Drugs on the question of whether the Single Convention on Narcotic Drugs of 1961 replaced as between the parties to it the earlier narcotics treaties mentioned in it, and whether the obligations of these earlier treaties continued as between parties to them who were not parties to the Single Convention, relied upon article 26 of the International Law Commission's final draft articles (now article 30 of the Vienna Convention).⁶¹ The opinion pointed out that "The rule thus stated by the International Law Commission seems to have been generally accepted by Governments, and can be taken as representing existing law."⁶²

The interest of the preceding example, and many others which could be

59. *Report of the Commission to the General Assembly* [1966] 1 Y. B. INT'L L. COMM'N PART II, 358 U. N. Doc. A/6309/REV. 1 (1967). For hesitation in regarding codified international law as being exclusive and coterminous with the conventions adopted on the basis of proposals advanced by the International Law Commission, note discussion at the 1081st meeting of the Commission, to be published in [1970] 1 Y. B.

60. Cf. the present writer's statement, quoted with apologies, at the 609th meeting of the Sixth Committee. 21 U.N. GAOR, 6th COMM. 45 U.N. Doc. A/C.6371 (1966).

61. See *Vienna Convention on the Law of the Treaties*, *supra* note 1 at 15.

62. 1967 U. N. JURID. Y. B. 335, 337, U.N. Doc. ST/LEG/SER.C/5 (1969).

made, lies in the vivid demonstration which it furnishes of two things: (i) the consolidating effect which the codified law of treaties, even in its preliminary formulations by the International Law Commission, has as a matter of practice, and correspondingly, the little weight which attaches to the formal questions of the time from which the consolidated rule took effect; and (ii) the interest occasionally displayed in the attitudes of Governments towards the conclusions reached by the International Law Commission, even in the preliminary phases.⁶³ That last factor can now be supplemented — and doubtless will as time goes by — by interest in the size and even the composition of the majorities by which individual articles and parts of articles were adopted by the Vienna Conference (and every article was adopted by a vote in the Plenary meetings during the second session of the Conference) as evidencing the extent and the political significance of consensus on the governmental level over the textual formulation of a given rule.

In this respect, it is believed that the effectiveness of the Vienna Convention as an instrument for consolidating the law lies in its power to decide the conventional definition of the rule of customary international law which is superimposed upon the unwritten rule, regardless of the "source" (in terms of Article 38 of the Statute of the International Court of Justice) of that latter, much in the same way that in the legal system of the Anglo-American common law a statutory formulation of a rule of law may be superimposed on the common law definition without necessarily doing away, or doing away entirely, with that latter. It will then always be an open question whether, and to what extent, in such circumstances the written law is declaratory of existing law or constitutive of new law. But one thing is clear: the written text usually has the general effect of making the law more clear than it was in its unwritten state, and the positive text will take the place of the usage *even regardless of its formal status as being "in force" or not*. The new text has a profound influence upon the future development of the law and upon the practice of States and of the international organizations, which in one sense it fetters and in another diverts into new channels. It is commonplace that the international law of treaties was characterized by considerable un-

63. In addition to the references given in notes 53 through 63, it may be recalled that similar use has been made since 1962 of the reports of the International Law Commission and the work of the Vienna Conference in the current activity of the International Court of Justice. Illustrations of this appear in the opinions of Members of the Court as well as in the pleadings of the parties. For some examples of the former, see the following separate or dissenting opinions: Jessup in *South West Africa Case* [1962] I.C.J. 319, 402; Spender and Fitzmaurice (jointly), *id.* at 475; Lachs in *Continental Shelf Case* [1969] I.C.J. 3, 227 (reference to the draft of the International Law Commission as amended by the Committee of the Whole at the first session of the Vienna Conference); Ammoun in *Barcelona Traction Case* [1970] I.C.J. 3, 303, 312 (reference to the Vienna Convention).

certainty and confusion on many cardinal points (although one must be careful not to exaggerate this) which it was precisely the primary objective of the codification effort as a whole, and the intention of the negotiating States at the Vienna Conference in particular, to reduce as much as possible. It would hardly be consistent with the Vienna Convention itself or with the intention of its draftsmen, to attribute to article 4 an interpretation so rigid and literal that it would reduce to naught some twenty years of concentrated international effort, in which all Governments were able to participate fully at all stages.

V. SUMMARY AND CONCLUSIONS

Before attempting to formulate conclusions of a practical nature, two general sets of observations may be made.

First: Whatever may have been the law before the adoption of the Vienna Convention on 22 May 1969, a significant process of the definition and consolidation of the customary international law of treaties has taken place through the work of the International Law Commission, the reactions of Governments to that work and the proceedings of the Vienna Conference; and this customary law, whether emerging or not, became crystallized through the adoption of the Vienna Convention. It is recognized that a contention along those lines, relating to part of the Geneva Convention of 1958 on the Continental Shelf, had been rejected by the International Court of Justice in the Continental Shelf Case, but only in respect of one single article of that Convention, an article moreover which, on close analysis, had been found to set forth a new rule of law and one in respect to which reservations were expressly permitted by the Convention. According to the Court, that article had been proposed by the Commission with considerable hesitation, somewhat on an experimental basis. Its status was at best *de lege ferenda* and not *de lege lata* or an emerging rule of customary international law.⁶⁴ It will be noted that the Court reached its conclusion on one particular provision of that Convention. (The Convention did not contain any preamble or any other statement regarding the relationship between its own provisions and other rules of international law.) The Court was careful to keep the position open in general, even as regards other provisions of that Convention, thereby indicating that ultimately the status of a rule appearing in the Convention depends to a large extent on the processes that led the International Law Commission to propose it in the form submitted.

Subsequently in that judgment the Court furnished some general indi-

64. North Sea Continental Shelf Cases [1969] I.C.J. 3, 38. On the influence of the faculty to make reservations, see *id.* at 26, 39.

cations on how such a rule could become generally binding even for countries which have not become parties to the Convention — a process which is one of the recognized methods by which new rules of customary international law may be formed, although this result is not lightly to be regarded as having been attained. Among the elements to which the Court would look in its inquiry as to whether this had occurred, the judgment mentioned first that the provision should be of a fundamentally norm-creating character and could be regarded as forming the basis of a general rule of law. Second, the Court would look for a very widespread and representative participation in the Convention. The Court at the same time recognized that non-ratification may sometimes be due to factors other than active disapproval of the Convention.⁶⁵ As regards the time element, 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 that period in question, State practice, including that of the States whose interests are specifically 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.⁶⁶

While some may think that the court may have been unduly severe, the underlying message is a firm warning against the euphoria that may be generated by the successful outcome of a codification conference. Such a warning is always timely, this being the difference between the processes of legislation and law-making on the internal level, and those processes on the international plane.

Second: It is important to ensure that article 4 of the Vienna Convention is given a meaning consonant with the intention of the Conference and that it should not, by an excess of literalism, be deprived of all reasonable sense. Taken literally, article 4, including that part of it which safeguards the rules of international law in general, would not have any force until the Convention itself had entered into force in accordance with article 84; and then article 4 would only apply to treaties concluded by States after the date on which the Convention shall have entered into

65. For a preliminary and somewhat diffuse discussion of this aspect in the International Law Commission, see memorandum by Robert Ago, *The Final Stage of the Codification of International Law* [1968] 2 Y. B. INT'L L. COMM'N 171, U.N. Doc. A/CN.4/205/REV. 1 (1970) and discussions at the 959th (§ 88), 974th (§§ 78-90) 977th (§§ 81-82), 978th (§§ 1-89) and 987th (§§ 27-44) meetings [1968] 1 Y. B. INT'L L. COMM'N passim. And see the *Commission's Report on the Work of its Twentieth Session*, *supra* note 42, at CHAPTER V, § 102. See further, *Wider Acceptance of Multilateral Treaties*, U.N. ITAR SER. NO. 2 (1969).

66. North Sea Continental Shelf Cases, *supra* note 71 at 41-43.

force for them. There is nothing that indicates this to have been the intention of the Conference when it adopted article 4 and it is believed that too literal an interpretation of its text, in the context of the Convention as a whole, may easily lead to results which are manifestly absurd or unreasonable.

The following conclusions emerge:

(i) There is, of course, no hesitation in saying that virtually every rule contained in the Vienna Convention is, at all events, potentially of a fundamentally norm-creating character which can form the basis of a general rule of international law. That was the political intention behind the codification of the law of treaties. In a series of resolutions adopted since 1962, the General Assembly of the United Nations had repeatedly asked for the law of treaties to be "placed upon the widest and most secure foundations,"⁶⁷ and the terms of reference of the Vienna Conference called on it to consider the law of treaties, taking the International Law Commission's report as the "basic proposal for consideration by the Conference."⁶⁸ On the other hand, due weight must be accorded to the abandonment by the Commission of the distinction between "codification" and "progressive development," as those terms are used in the Commission's Statute. No doubt, should a concrete dispute arise on the precise character of a given rule appearing in the Vienna Convention, one side would argue one way and the other in a different way and each would find grist to its mill through painstaking research into the legislative history of that provision. The result is likely to be pure sophistry of negligible value in settling the dispute. This means that, in many cases empirical and arbitrary solutions will have to be reached to disputed questions of the general law of treaties. Considering the manner in which the articles on the law of treaties were prepared and the meticulousness of their study by Governments and by the International Law Commission, surely only an exceptionally arid formalism would today withhold from them the standing of "rules of international law" as that expression is used in article 4 of the Vienna Convention, and for that reason discard them as the key for the solution of general disputes.

(ii) The abandonment of the distinction between "codification" and "progressive development" is, however, replaced by another, based on the characteristic of each article which has already been noted here, between provisions denominated residual or procedural rules — procedural here being used in the sense of *establishing a process*⁶⁹ — and pro-

67. G. A. RES. 1765, 17 U.N. GAOR, SUPP. 17, at 65, U.N. Doc. A/5287 (1962); G. A. RES. 1902, 18 U.N. GAOR, SUPP. 15, at 69, U.N. Doc. A/5601 (1963); G. A. RES. 2045, 20 U.N. GAOR, SUPP. 14, at 88, U.N. Doc. A/6090 (1965).

68. G. A. RES. 2166, 21 U.N. GAOR, SUPP. 16, at 95, U.N. Doc. A/6516 (1966).

69. This corresponds to what has been aptly identified as an "*opération à procédure*."

visions setting forth absolute rules. There should be no difficulty in attributing to the rules in the first category immediate validity and effect as rules of general international law: it would be quite unreasonable to endow article 4 of the Vienna Convention with any suspensory effect with regard to such rules. The experience of the treatment of reservations since 1950 shows that no real inconvenience is caused when, by avoiding the relatively abstract and difficult-to-comprehend conceptions of the time factor in relation to the development of the law, workable solutions to concrete international difficulties are attained. On the other hand, as regards articles framed in absolute terms, effect must be given to any temporal limitations upon which the International Law Commission or the Conference itself insisted, because it was on that basis that the participating States at the Vienna Conference cast their votes.

It is in this respect that the relationship between the Vienna Convention and the treaty in question will be of cardinal importance. For, as stated, it will never be the Vienna Convention alone that is being applied or interpreted, but the Vienna Convention together with another treaty. For that reason, it would be a rash legal adviser who, on the technical ground that the Vienna Convention is not yet in force, either generally or for a particular country, failed to have regard for the Vienna Convention at least as regards any international treaty concluded since May 22, 1969.

(iii) The only part of the Vienna Convention on which the record shows general agreement that it was not to apply retroactively before the entry into force of the Convention for the State concerned, is article 66 dealing with procedures for judicial settlement, arbitration, and conciliation. This corresponds to the classic view that a treaty conferring jurisdiction on an existing or future international tribunal does not actually endow that tribunal with such jurisdiction until it is in force; without prejudice, however, to the retroactive jurisdiction of that tribunal after that date, depending on the proper construction of the title of jurisdiction. That — the classic problem of jurisdiction *ratione temporis* — is a large issue, not confined at all to the law of treaties, and it comes outside the scope of this article. An explanation of these two aspects of retroactivity, limited to the law of treaties, is contained in the commentary made by the International Law Commission on article 24 of its final draft articles on the law of treaties.⁷⁰

(iv) If it is accepted that there is some sort of general principle of

I Rousseau, "Principes Generaux du Droit International Public" 142 (PEDRONE ED., FRANCE 1944); Fitzmaurice, [First] Report on the Law of Treaties [1956] 2 Y. B. INT'L L. COMM'N 104, 106, U.N. Doc. A/CN.4/101 (1956).

70. See *Vienna Convention on the Law of the Treaties*, *supra* note 1.

non-retroactivity in the international law of treaties, it would at most operate as a rebuttable presumption of interpretation. Indeed it is so postulated in article 28 of the Vienna Convention.⁷¹ Article 4 in fact rebuts the presumption insofar as rules of international law exist parallel to those contained in the Convention.⁷² That, indeed, is the true measure of the difference between article 4 and article 28, and the justification for what at first sight may be taken as mere duplication.

(v) The foregoing leads to the general conclusion that the Vienna Convention on the whole speaks not *ex tunc*, from some unascertainable date in the future, but for all practical purposes concerned with the law of treaties as such, *ex nunc*, from the date of its formulation. The nature, object and purpose of the Vienna Convention, together with the specific terms of article 4, require minimizing and not maximizing the negating effect of that article, to the extent consonant with good faith and the intention of the negotiating States.

71. *Id.* at 14.

72. *Id.* at 4.