The Termination and Revision of Treaties in the Light of New Customary International Law

NANCY KONTOU

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Editor's Preface

THE work of Dr. Kontou originated as a doctoral thesis prepared at Cambridge under the supervision of Professor D.W. Bowett, C.B.E., Q.C., then the Whewell Professor of International Law. The result is a lucid account of certain classical problems which are of considerable practical significance.

The essential question addressed is in what conditions supervening custom can terminate or modify prior incompatible treaties as a result of the exercise by one party of a right to that effect. This issue was left aside in the final text of the Vienna Convention on the Law of Treaties, and has been neglected by writers. The study necessarily involves the exploration of a family of interrelated issues involving the relations of treaties and custom, and the relevance of fundamental circumstances and desuetude.

The study invokes a substantial amount of State practice and the relevant jurisprudence, which is considerable. The examination of State practice includes a substantial exploration of the impact of developments in the law of the sea upon prior fisheries agreements, which provides an added attraction to a most helpful work.

All Souls College,
OXFORD.
14th September 1994

IAN BROWNLIE

Preface

THIS book is an amended version of a doctoral thesis submitted at the University of Cambridge, England, in 1990.

This work is aimed at readers interested in fundamental questions concerning the sources of international law. It examines in particular the effect of new customary law on prior incompatible treaties, a topic that is not satisfactorily covered in the literature. State practice in the law of the sea and other areas of international law contains a number of examples of treaties that have been terminated or revised on account of the emergence of subsequent conflicting custom. Decisions of international tribunals have also dealt with this issue. This book attempts to develop a theory that adequately explains the state of international law on the matter.

I would like to thank the members of the Law Faculty of the University of Cambridge as well as my fellow Ph.D. students and other researchers in Cambridge from whose comments and discussion I benefited greatly. I am also grateful to the staff of the Squire Law Library for their assistance. Above all I would like to thank my supervisor, D. W. Bowett, Member of the International Law Commission and former Professor of International Law at the University of Cambridge, for his guidance and encouragement. A special mention should be made of the 'Onassis Foundation', Athens, Greece, for its financial support, without which this work could not have been completed. Finally, I am grateful to my family and friends for their support during the period of my research.

NANCY KONTOU

Brussels
August 1993

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Abbreviations

AIDI	*Annuaire de l'Institut de droit international*
AFDI	*Annuaire français de droit international*
AJIL	*American Journal of International Law*
Br. & For. State Papers	*British and Foreign State Papers*
BYIL	*British Yearbook of International Law*
CYIL	*Canadian Yearbook of International Law*
EC	European Community
ECHR	European Court of Human Rights
ECOSOC	UN Economic and Social Council
EEC	European Economic Community
FAO	Food and Agriculture Organization
GAOR	General Assembly of the United Nations, Official Records
GYIL	*German Yearbook of International Law*
HC Deb.	*Hansard, House of Commons Debates*
HL Deb.	*Hansard, House of Lords Debates*
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tuna; International Convention on the Conservation of Atlantic Tunas
ICJ	International Court of Justice
ICJ Reports	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICNAF	International Commission for the North-West Atlantic Fisheries; International Convention for North-West Atlantic Fisheries
ILC	International Law Commission
ILM	*International Legal Materials*
ILR	International Law Reports
INPFC	International North Pacific Fisheries Commission
Iran–US CTR	Iran–US Claims Tribunal Reports
Keesing's	*Keesing's Contemporary Archives* (continued as *Keesing's Record of World Events*)
LNTS	*League of Nations Treaty Series*
NAFO	North-West Atlantic Fisheries Organization

NILR	*Netherlands International Law Review*
NIOC	National Iranian Oil Company
ODILJ	*Ocean Development International Law Journal*
OJ	*Official Journal of the European Communities*
ÖZöR	*Österreichische Zeitung für öffentliches Recht*
PCIJ	*Publications of the Permanent Court of International Justice*
PRC	People's Republic of China
PYIL	*Polish Yearbook of International Law*
RC	*Recueil des cours de l'Académie de droit international*
RGDIP	*Revue générale de droit international public*
UKTS	*United Kingdom Treaty Series*
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNTS	*United Nations Treaty Series*
YBWA	*Yearbook of World Affairs*
YILC	*Yearbook of the International Law Commission*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

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Introduction

1.1. THE ISSUE

Treaties and Customary Law

The consent of States to be legally bound internationally may be expressed in different forms. States may create legal rights and obligations *inter se* by concluding a treaty, or their consistent practice in a certain area may be the basis for the creation of customary law, if it is also accompanied by an *opinio juris*.

Treaties are concluded in the context of general international law in force at the time of the parties' agreement. They can repeat the general norm, refine and complete it, or apply special rules in the relations between the contracting parties.

A treaty codifying State practice in a certain area repeats the general customary norm in the interest of clarity, legal certainty, and ease of proof. A treaty can refine or complete a general principle by specifying the details of its application. Consider, for instance, the Capitulatory treaties based on the general principle of the personality of laws providing that the laws of the home State applied to merchants wherever in the world they may be. The treaties implemented this principle by creating the institution of consuls who were empowered to apply to foreign residents the laws of their country of origin.

A treaty may apply special rules in the relations between the parties in derogation from ordinary customary law. If, for instance, under general customary law coastal States have sovereign rights over fisheries adjacent to their coasts, a treaty may give third States access to these resources, from which they would otherwise be excluded. Or, if States are free under general customary law to decide whether or not to extradite each other's nationals, a treaty may impose on them the duty to do so.

Conflict of a Treaty with Supervening Custom

Customary law may continue to evolve outside the treaty leading to the establishment of new rules conflicting with the treaty text. In cases where supervening custom is incompatible with a prior treaty, the attitude of the contracting parties may vary. The parties may decide to continue applying the treaty rule in their *inter se* relations as an exception from the general norm. Or the treaty may be revised or even terminated in the light of the new custom.

There are different ways in which supervening custom may bring the treaty to an end or cause its revision. All contracting parties may decide to terminate or revise the treaty by express or implied agreement (*desuetude*) in order to take account of the new general rules. Or one of the contracting parties may claim that the treaty should be revised or terminated on account of supervening custom. In this case it is important to specify in what circumstances a party has the right to do so and what legal means can be used, if necessary, to enforce this claim against the will of the other parties.

The Vienna Convention on the Law of the Treaties provides that new custom is a ground of treaty termination if it has the character of the *jus cogens*. This book examines whether and under what conditions the emergence of new custom other than *jus cogens* may also be a ground of termination or revision of prior incompatible treaties. By way of introduction, the remainder of this chapter defines certain basic concepts relating to this issue—that is, the notions of customary law and treaty termination or revision—and explains its importance.

As a starting-point for the examination of the effect of supervening custom on prior treaties, Chapter 2 offers a brief overview of the relevant literature. We shall see that the analysis of the literature reveals general agreement on the principle of treaty termination on account of supervening custom, but divergence as to the details of its operation.

The following chapters (Chapters 3 and 4) review a number of incidents from the law of the sea and other fields of international law where treaties became incompatible with supervening customary law. In our view, the manner in which they were resolved supports the proposition that one party has the right to call for the termination or revision of a treaty on account of the development of new custom. Chapter 5 examines a number of judgments of international tribunals dealing with the effect of supervening custom on prior incompatible treaties.

In Chapter 6 we anticipate and answer some objections to the notion of supervening custom as a ground of termination or revision of prior incompatible treaties. The final chapter draws on State practice and international case law to argue that supervening custom may, under certain conditions, be a ground of termination or revision of prior incompatible treaties in the sense that it gives one party the right to call for the necessary adjustments to be made to the treaty relationship.

1.2. DEFINITIONS

1.2.1. Customary Law

Customary law is unwritten international law based on a general and consistent practice of States accepted by them as legally binding. Customary law is based on the consent of States in general, but not necessarily of each and every State. Unlike treaties, customary law is the product of general consensus and not of the meeting of wills of individual States.[1]

Customary law has general application, because it binds all States with the exception of persistent objectors. General customary law admits derogations in the form of special customary rules that bind only a limited number of States. When special customary rules are formed, they apply to the relations of the groups of States bound by them *inter se*. The relations between the members of the different groups, as well as the relations between each of them and the rest of the international community, are governed by general customary law. In this sense it can be said that general customary law provides the unitary element of the component parts of the international legal system, and forms the legal background against which special customary rules are created and treaties are concluded.

(a) The Formation of Customary Law

Article 38, para. *c*, of the ICJ Statute provides that 'the Court whose function is to decide in accordance with international law such disputes as are submitted to it shall apply . . . international custom as evidence of a general practice accepted as law'. According to this Article, which is generally considered to be a more-or-less authoritative statement of the law,[2] there are two requirements for the formation of custom, State practice and *opinio juris*.

State practice

It is generally agreed that state practice establishes customary law only if it is general and consistent.

State practice is general if it is extensive and representative and includes the practice of States whose interests are specially affected.[3] State practice need not be universal; a few dissenters cannot prevent the creation of

[1] See e.g. H. Lauterpacht, *International Law: Collected Papers*, ed. E. Lauterpacht, i (Cambridge, 1970), at 66; J. L. Brierly, *The Law of Nations*, ed. H. Waldock (6th edn., Oxford, 1963), at 61; R. Y. Jennings, 'General Course on Principles of International Law', 121 *RC* (1967-II), 323, at 335–6; E. Jiménez de Aréchaga, 'General Course in Public International Law', 159 *RC* (1978-I), 1, at 28–9; M. R. Villiger, *Customary International Law and Treaties* (Dordrecht, 1985), at 27. Cf. A. A. D'Amato, 'The Authoritativeness of Custom in International Law', *Rivista de diritto internazional* (1970), at 491; A. V. Lowe, 'Do General Rules of International Law Exist?', 9/3 *Review of International Studies* (1983), at 207. For a voluntarist perception of customary law, see e.g. G. I. Tunkin, 'Co-existence and International Law', 95 *RC* (1958-III), 1, at 13–14; *Theory of International Law* (London, 1974), at 118 *et seq*.

[2] See e.g. the latest Restatement of the Law of the Foreign Relations of the United States (1986), §102 (2): 'Customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation.'

[3] See *North Sea Continental Shelf Cases*, ICJ Reports (1969), at 43; Villiger, *Customary International Law*, at 14–15; M. Akehurst, 'Custom as a Source of International Law', 47 *BYIL* (1974–5), 1, at 16, 23.

customary law.[4] Failure to protest to an emerging practice in circumstances where a reaction would be expected contributes to the formation of new custom.[5]

Since general customary rules are the product of general consensus and not of the will of every single State, once they are formed, they are binding *erga omnes*.[6] It is, however, generally accepted that a State may opt out of an *evolving* rule of general customary law by expressing its opposition to it in a timely and consistent manner (persistent objector).[7]

State practice is consistent if the various manifestations of a State's conduct support one and the same rule. While few uncertainties and contradictions may not prevent the transformation of a certain practice into a rule of law,[8] discontinuity[9] or substantial inconsistencies undermine the establishment of custom.[10]

Although time may be necessary for a practice to gain general acceptance and for any inconsistencies to sort themselves out, it is generally accepted that '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'.[11] On the other hand, opinions differ as to whether repetition of a certain practice is required for the formation of customary law.[12] In our view, it is conceivable that a single act involving a large number of States and revealing a clear *opinio juris* may at least constitute prima-facie evidence of customary law.[13]

According to the prevailing view in the literature, statements or non-physical acts in general are included in the definition of State practice, at least as evidence of a presumptive nature.[14] If there are, however, discrepancies between what States say and what they actually do,[15] State practice is not consistent enough to support the establishment of custom.

[4] Judge Tanaka in *South West Africa Cases* (Second Phase), ICJ Reports (1966), at 291.

[5] See *Anglo-Norwegian Fisheries Case*, ICJ Reports (1951), at 138; *Right of Passage Case*, ICJ Reports (1960), at 40; M. Sørensen, 'Principes de droit international public', 101 *RC* (1960-III), 1, at 41; Tunkin, *Theory of International Law*, at 129; Villiger, *Customary International Law*, at 18–20; M. Virally, 'The Sources of International Law', in Sørensen (ed.), *Manual of Public International Law* (London, 1968), 116, at 130–1; H. Waldock, 'General Course on Public International Law', 106 *RC* (1962-II), 1, at 50–1.

[6] *North Sea Continental Shelf Cases*, at 38.

[7] See *Anglo-Norwegian Fisheries Case*, ICJ Reports (1951), at 131; Akehurst, 'Custom', at 23 *et seq.*; I. Brownlie, *Principles of Public International Law* (4th edn., Oxford, 1990), at 10; Villiger, *Customary International Law* at 15 *et seq.* *Contra* A. A. D'Amato, *The Concept of Custom in International Law* (Ithaca, NY, 1971), at 261; J. I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 *BYIL* (1985), at 1; T. L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard Journal of International Law* (1985), 457, at 459 *et seq.*

[8] See *North Sea Continental Shelf Cases*, at 43; *Anglo-Norwegian Fisheries Case*, at 137–8.

[9] See Virally, 'Sources', at 132; hesitantly, Tunkin, 'Co-existence', at 10–11; Akehurst, 'Custom', at 20–1.

[10] *Asylum Case*, ICJ Reports (1950), at 276.

[11] *North Sea Continental Shelf Cases*, at 43; *Fisheries Jurisdiction Case (UK–Iceland)*, ICJ Reports (1974), at 23; R. R. Baxter, 'Treaties and Custom', 129 *RC* (1970-I), 25, at 67; Akehurst, 'Custom', at 15–16; G. I. Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law', 49 *Californian Law Review* (1961), 419, at 420; Villiger, 'Sources', at 24–5.

[12] Akehurst, 'Custom', at 12 *et seq.* See also D'Amato, *The Concept of Custom*, at 91–8.

[13] See Akehurst, 'Custom', at 14; Tunkin, 'Remarks', at 419.

Opinio juris

State practice establishes custom only if it is accompanied by an *opinio juris*: 'not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it . . . The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even the habitual character of the acts is not in itself enough.'[16] *Opinio juris* allows us to distinguish between conduct with legal implications and acts motivated by considerations of morality or courtesy that are not intended to be legally binding.

Explicit evidence of a sense of legal obligation, such as official statements, is not necessary. *Opinio juris* may be inferred from the circumstances surrounding particular acts or omissions.[17] In any event, what is required is *opinio juris communis*. The *opinio juris* of one State only is not sufficient, but other States must also follow the rule or fail to protest in the belief that their conduct is legally obligatory.

(b) Special Customary Law

We have so far discussed customary law of general application—that is, rules binding *erga omnes* with the exception of persistent objectors. However, customary rules may also be special if they bind only a limited number of States.[18]

Special customary rules may be created in the first stages of the development of new general custom, or if State practice supporting the new rule

[14] See e.g. Akehurst, 'Custom', at 1 *et seq.*; Villiger, 'Sources', at 6 *et seq.*; US Restatement (1986), §102, comment (*b*), reporter's note no. 2; *US Nationals in Morocco Case* (diplomatic correspondence), ICJ Reports (1952), 200; Anglo-Norwegian *Fisheries Case* (national laws), at 131; *Asylum Case* (official views as to diplomatic asylum), at 277; *YILC* (1950-II), at 370–1; Brownlie, *Principles*, at 5. *Contra*, dissenting opinion of Judge Read in the *Anglo-Norwegian Fisheries Case*, at 191; A. A. D'Amato, *The Concept of Custom in International Law* (Ithaca, NY, 1971), at 88. Hesitantly, H. W. A. Thirlway, *International Customary Law and Codification* (Leiden, 1972), at 58.

[15] In this sense Judge Read, *Anglo-Norwegian Fisheries Case*, 191.

[16] ICJ Reports (1969), at 44; *Lotus Case* (1927), *PCIJ* Ser. A, No. 10, at 28; Judge Hudson, *YILC* (1950-II), at 26.

[17] US Restatement (1986), §102; comment (*c*).

[18] See Akehurst, 'Custom', at 28; D'Amato, 'The Concept of Special Custom', at 211; J. G. Cohen, 'La Coutume locale', 7 *AFDI* (1961), at 119; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–1954: General Principles and Sources of Law', 30 *BYIL* (1953), 1, at 68; P. Guggenheim, 'Locales Gewohnheitsrecht', 11 *ÖZöR* (1961), at 327; I. C. MacGibbon, 'Customary International Law and Acquiescence', 33 *BYIL* (1957), at 115; Thirlway, *International Customary Law*, at 135.

is not extensive enough. If the new rule eventually becomes general custom, the old rule may still apply as special custom *vis-à-vis* persistent objectors. Special customary rules may also be established with a view to creating an exception to the prevailing general rules because of special circumstances peculiar to certain States only.

In all cases, special customary law governs only the relations of the States bound by it *inter se*. By contrast, general customary law governs the relations between States bound by a special customary rule and States bound by the general rule, as well as the relations between States bound by different special customary rules.

Special customary rules can be regional or localized,[19] or they may bind as few as two States[20] with no other links between them 'apart from the fact that they follow a particular custom'.[21] The term special customary law is also used to describe special historic rights 'built up by a particular State or States, through a process of prescription' and 'acquired as against the world in general'.[22]

Special customary rules are by definition a derogation from existing general law. As a result, 'a party which relies on a custom *of this kind* must prove that this custom is established in such a manner that it has become binding on the other party'.[23] While general customary law requires proof only of general acceptance, a State relying on a special customary rule must therefore prove that the party against which the rule is invoked has expressly or implicitly consented to it or recognized it.[24]

(c) Two Examples of State Practice Establishing Customary Law

General Assembly Resolutions

In exercising its powers to make recommendations,[25] the General Assembly of the United Nations adopted resolutions laying down general and abstract rules of conduct for States.[26]

[19] *Asylum Case*, at 266. [20] *Right of Passage Case*, at 39–40.

[21] Akehurst, 'Custom', at 31.

[22] Fitzmaurice, 'Law and Procedure', at 68–9; K. Wolfke, *Custom in Present International Law* (Wroktaw, 1964), at 90–1; MacGibbon, 'Customary International Law', at 122–3; the *Anglo-Norwegian Fisheries Case*, at 130.

[23] *Asylum Case*, at 276–8. See also *US Nationals in Morocco Case*, at 200.

[24] See Akehurst, 'Custom', at 29; D'Amato, 'The Concept of Special Custom', at 211; Jennings, 'General Course' at 336; Villiger, *Customary International Law*, at 33.

[25] See e.g. Articles 11 and 13 of the UN Charter.

[26] See e.g. Report of the Institute of International Law, 'Resolutions of the General Assembly of the United Nations', 61 *AIDI* (1985-I), at 29 *et seq.*; G. Aranzio-Ruiz, 'The Normative Role of the General Assembly and the Declaration of Principles of Friendly Relations', 137 *RC* (1972-III), at 419; J. Castañeda, *Legal Effects of United Nations Resolutions* (New York, 1969); B. Cheng, 'United Nations Resolutions on Outer Space: Instant International Customary Law?', in Cheng (ed.), *International Law: Teaching and Practice* (London, 1982), at 237; R. A. Falk, 'On the Quasi-Legislative Competence of the General Assembly', 60 *AJIL* (1966), at 782; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford, 1963); 'The Development of International Law by the Political Organs of the United Nations', *Proc. Am. Soc. Int. Law* (1965), at 116; 'The United Nations and Law-Making: The Political Organs', ibid. (1970), at 37; Jiménez de Aréchaga, 'General Course', at 30; D. H. N. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations', 32 *BYIL* (1955), at 97; B. Sloan, 'General Assembly Resolutions Revisited', *BYIL* (1987), at 39; O. Schachter, 'The Relation of Law, Politics and Action in the United Nations', 109 *RC* (1963-II), at 169; M. Virally, 'La Valeur juridique des recommendations des organisations internationales', 2 *AFDI* (1956), at 66; P. Weil, 'Towards Relative Normativity in International Law', 77 *AJIL* (1983), at 413.

The term UN resolution or declaration covers a wide variety of instruments, whose legal effects may differ. Some resolutions may, for instance, purport to state the law, while others may intend to create new rules.[27] It is thus suggested that the value of resolutions as a source of customary law must be assessed in the light of the particular circumstances of each case, including the wording of the resolution, the conditions of its adoption, such as voting patterns and statements made by States with regard to its legal character, and its relationship to pre-existing law and/or subsequent State conduct in the same field: 'What is required is an examination of whether resolutions with similar content, repeated through time, voted by overwhelming majorities, giving rise to a general *opinio juris*, have created the norm in question.'[28] Consistency with subsequent State practice will also be required in order to establish that a rule generated by a resolution still remains in force.

Although opinions differ on the subject, it is generally accepted that law-declaring resolutions, if not a source of law, at least constitute prima facie evidence of existing customary law, while resolutions purporting to create new rules may provide the basis for the generation of customary law by initiating or influencing State practice leading to its formation.[29]

In the *Nicaragua Case* the Court examined the existence of an *opinio juris* with regard to the principles enunciated by a number of UN resolutions, such as the Resolution 2625 on the the Principles of Friendly Relations and Resolution 3314 on the Definition of Aggression. The Court took the view that 'the effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves'.[30] Having inferred the existence of a customary rule from the relevant UN resolutions, the Court examined

[27] See e.g. Report of the Institute of International Law, 81 *AIDI* (1985-I), at 314–5.

[28] Higgins, 'The United Nations and Law-Making', at 43; see also Jiménez de Aréchaga, 'General Course', at 31; Report of the Institute of International Law, 61 *AIDI* (1985-I), at 315 *et seq.*; the *Texaco Case*, 53 *ILR* (1979), at 486 *et seq.*; C. Greenwood, 'State Contracts in International Law: The Libyan Oil Arbitrations', 53 *BYIL* (1982), 27, esp. at 55 *et seq.*

[29] Report of the Institute of International Law, 61 *AIDI* (1985-I), at 330; Weil, 'Towards Relative Normativity', at 16–17.

[30] ICJ Reports (1986), para. 188 at 99–100; see also paras. 193, 202; less emphatically, ibid., para. 191: 'the adoption by States of this text affords an *indication* of their *opinio juris* as to customary international law on the question' (emphasis added). For a presumption in favour of the existence of *opinio juris*, para. 203.

state practice in order to establish whether a modification of the rule had taken place.[31]

Treaties

The possibility of interaction between treaties and customary law is recognized by Article 38 of the Vienna Convention on the Law of Treaties providing that a rule set forth in a treaty can become binding upon a third State as a customary rule of international law, recognized as such. In the *Nicaragua Case* the International Court of Justice held that the incorporation of a rule in a treaty does not exclude its parallel existence and application *qua* customary law.[32]

It is thus generally accepted that treaties may be declaratory of customary law in force at the time of their conclusion.[33] Rules originating in treaties may pass 'into the general corpus of international law', and become 'accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention'.[34]

In order to conclude that a treaty has since its adoption generated customary law, courts must be satisfied that 'there exists in customary international law an *opinio juris* as to the binding character' of the relevant treaty provisions.[35] In the *Continental Shelf (Libya* v. *Malta) Case* the Court thus stated that, although 'the 1982 Convention is of major importance, having been adopted by an overwhelming majority of states', it was its duty 'to consider in what degree any of its relevant provisions *are binding upon the parties as a rule of customary international law*'.[36]

1.2.2. Treaty Termination and Treaty Revision

Termination is the ending of a treaty and of the binding force of the rights and obligations it has created.[37] When a treaty is terminated the parties are

[31] Paras. 206 *et seq*. For criticisms of the judgment, see A. A. D'Amato, 'Trashing Customary International Law', 81 *AJIL* (1987), at 101; F. L. Morrison, 'Legal Issues in the Nicaragua Opinion', 81 *AJIL* (1987), at 160–2.

[32] Paras. 175, 177, *et seq*.

[33] See e.g. with regard to the Vienna Convention on the Law of Treaties, the *Fisheries Jurisdiction Case*, ICJ Reports (1973), at 18, Article 62 (fundamental change of circumstances)'; Namibia Advisory Opinion, ICJ Reports (1971), at 47, *Jurisdiction of the ICAO Council*, ICJ Reports (1972), at 67, Article 60 (treaty termination on account of material breach). See also *Nicaragua Case, ICJ Reports* (1986), para. 212 (principle of State sovereignty in Art. 2, para. 1, of the UN Charter).

[34] *North Sea Continental Shelf Cases*, para. 71. See also *Libya* v. *Malta (Continental Shelf) Case*, ICJ Reports (1985), at 29.

[35] The *Nicaragua Case*, para. 188; see also para. 185.

[36] ICJ Reports (1985), at 30 para. 27; the *North Sea Continental Shelf Cases*, para. 70; *US Nationals in Morocco Case*, at 200.

[37] See e.g. S. Bastid, *Les Traités dans la vie internationale* (Paris, 1985), at 169 *et seq*.; F. Capotorti, 'L'Extinction et la Suspension des traités', 134 *RC* (1971-III), 427, esp. at 464–5; R. K. Dixit, 'Amendment or Modification of Treaties', 10 *Indian JIL* (1970), at 37; T. O. Elias, *The Modern Law of Treaties* (Leiden, 1974), at 89–100.; A. D. McNair, *The Law of Treaties* (Oxford, 1961), at 534–5; M. Morelli, 52 *AIDI* (1967-I), at 290; W. Karl, *Vertrag und*

discharged from any obligation further to perform it; any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination is not affected.[38] The concept of termination differs from that of invalidity, because an invalid treaty is considered never to have had any legal force.[39]

In the case of a multilateral treaty, the situation may arise where only one or some of the parties withdraw from it or denounce it, with the result that they are discharged from their treaty obligations in their *inter se* relations.[40] The treaty, however, continues to apply between them and the remaining parties as well as between the remaining parties *inter se*. The expression 'treaty termination' will be used in this book to cover also this type of situation.

The process of treaty termination is distinct from that of amendment, which entails the alteration of the provisions of a treaty that remains in force subject to whatever modifications are introduced into it, and continues to be the legal basis of the relations between the parties.

The terms 'revision'[41] and 'modification' are also used in State practice and writings to denote the alteration of the provisions of a treaty by agreement of the parties. The term 'revision' is sometimes used to describe in particular the review of the treaty as a whole, as opposed to the amendment of certain treaty provisions, and 'modification' sometimes denotes an agreement between some of the parties to a multilateral treaty that is intended to apply *inter se*, as opposed to a formal amendment intended to alter the treaty provisions with respect to all the parties.[42] However, these distinctions are not always made in writings or State practice.[43] Hereinafter the terms 'revision', 'amendment', or 'modification' will be used interchangeably in respect of bilateral and multilateral treaties to cover both the alteration of certain treaty provisions and the review of the treaty as a whole.

Legal Basis and Methods of Treaty Termination

A treaty can be terminated:

(i) on the basis of the consent of all parties, express or implied; or
(ii) on the basis of a rule of general international law.[44]

Spätere Praxis im Völkerrecht (Berlin, 1983), 2.1.3., at 11; C. Parry, 'The Law of Treaties', in M. Sørensen (ed.), *Manual of Public International Law* (London 1968), 175, at 222; C. Rousseau, *Droit international public*, i (Paris, 1970), at 230 *et seq*.

[38] See Article 70 of the Vienna Convention on the Law of Treaties.

[39] See Article 69 of the Vienna Convention on the Law of Treaties; *YILC* (1966-II), at 265.

[40] See Article 70, para. 2, of the Vienna Convention.

[41] Sometimes with negative connotations, see *YILC* (1966-II), at 232.

[42] See Articles 40–1 of the Vienna Convention; *YILC* (1966-II), at 232.

[43] See *YILC* (1966-II), at 232; Brownlie, *Principles*, at 625.

[44] Fitzmaurice's Second Report on the Law of Treaties, *YILC* (1957-II), at 23 *et seq*.; same, 52 *AIDI* (1967-I), at 267; Capotorti, 'L'Extinction', at 471–2; Morelli, 52 *AIDI* (1967-II), at

The parties' consent to the termination of a treaty can be expressed:

(i) in the treaty itself in the form of expiry, denunciation, or other termination clauses; or
(ii) in a separate subsequent agreement between all the parties, either express or implied (*desuetude*).

As to the methods of treaty termination, a treaty can be brought to an end:

(i) automatically, by virtue of general international law, or as a result of expiry clauses; or
(ii) by specific acts of the contracting parties.

In cases where termination requires a specific act, this may be:

(i) an act of one of the parties, in exercise of a legal power conferred upon it by general international law or by the treaty itself (denunciation provision); or
(ii) a joint act, such as an agreed decision of all parties to terminate the treaty or the conclusion of a new treaty.

In cases where customary law becomes incompatible with a prior treaty, the treaty can be brought to an end by a joint agreed decision of all contracting parties, that is on the basis of their consent. Or one of the parties may denounce or withdraw from the treaty in accordance with its terms. By contrast, when we ask whether supervening custom is a *ground* of termination of a prior incompatible treaty, we attempt to answer the question whether one of the contracting parties has the right to call for the termination of the treaty in exercise of a legal power conferred by general international law.[45]

1.3. IMPORTANCE OF THE ISSUE

1.3.1. Occurrence in Practice

A convention, however wide its membership and general its acceptance, cannot freeze the development of the law. State practice may continue evolving outside the convention in response to changing conditions or perceptions of interests, and new conflicting custom may emerge as a result. The likelihood of this situation arising in practice will depend on the

325; *AIDI* (1967-I), at 292; S. Rosenne, 'The Settlement of Treaty Disputes under the Vienna Convention of 1969', 31 *ZaöRV* (1971), 1, at 52; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, 1984), at 181.

[45] For the effects of the grounds of treaty termination provided by the Vienna Convention, see Articles 65–8 of the Convention.

duration of particular treaties and the pace of legal developments outside the treaty.

In practice the speed of customary law developments varies. We have seen that customary law can be formed even after the passage of only a short period of time. The law of the sea is an example of a field that underwent rapid transformation in the course of the twentieth century. State practice in this area moved away from the concept of a three-mile territorial sea prevailing at the beginning of this century towards wider jurisdictional zones, first of twelve miles, and subsequently of 200 miles from the shore.[46] In other areas customary principles remained unchanged for long periods of time until they were transformed or replaced by new concepts through a process of varying length. For instance, some of the fundamental principles of the post-Second World War legal order laid down by the UN Charter, such as the concept of universal protection of human rights, did not exist under traditional international law, while others, such as the principle of intervention in another State's internal affairs or the prohibition of the threat or use of force, existed, but were different in content.[47]

Treaties concluded in perpetuity or for a very long term are likely to become obsolete at some point as a result of supervening developments in customary law. Consider, for instance, the Capitulatory treaties concluded between the sixteenth and nineteenth centuries whose validity was challenged in the twentieth century on account of developments in the general rules on State jurisdiction; or the Treaty on the Panama Canal concluded in perpetuity at the beginning of the twentieth century and containing jurisdictional restrictions which were considered to be incompatible with post-Second World War perceptions of the duty of non-intervention in another State's affairs.

In areas where customary law changes rapidly, even treaties concluded for a shorter period of time may become incompatible with new general norms. Some of the fisheries agreements examined below in Chapter 3 fall within this category. Similarly, treaties concluded towards the end of the period of validity of long-standing concepts may become incompatible with new custom within a short period from their entry into force. Consider the case of the minorities treaties that were concluded under the League of Nations system and were regarded as having been superseded by the concept of human rights when the UN Charter was adopted; or the Antarctica Treaty regime which was alleged to have become incompatible with legal developments taking place in the course of the two decades following its adoption.

[46] See Ch. 3.

[47] See A. Cassese, *International Law in a Divided World* (Oxford, 1986), esp. at paras. 76 *et seq.*

1.3.2. The Problem of Peaceful Change

The problem of peaceful change, that is the alteration of the *status quo* without the use of force, also arises in cases where a treaty is overtaken by customary developments. It is important to examine the methods of peaceful adaptation of treaties to changes in the law, because at present there is no effective international legislation that can repeal or revise obsolete agreements.[48]

The term international legislation is used in this context to denote a procedure for introducing changes in the *status quo* that go beyond the agreement of the parties. Claims for the revision of the law are considered by a central authority in the light of the general interest of the international community that overrides any conflicting individual interest.

Article 19 of the Covenant of the League of Nations is often cited as 'the first deliberate attempt to create an institution of peaceful change within the framework of a comprehensive system of legal organisation'.[49] Under this Article the Assembly of the League had the power to advise from time to time 'the reconsideration by the members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world'. This formulation was wide enough to embrace all claims for revision, including the reconsideration of treaties that had become incompatible with supervening customary law.

However, the effectiveness of Article 19 was limited by its own terms, because it did not empower the Assembly to alter obsolete treaties without the consent of the contracting parties. Its authors only contemplated the situation where the Assembly would investigate claims for revision and make non-binding recommendations to all interested. These recommendations could be of value as authoritative findings to the effect that a change of the *status quo* was required, but did not change the fact that the existing procedures were primarily based on persuasion. Consequently, they were 'definitely limited in the face of established attitudes and conceptions of vital interests'.[50] Article 19 was never applied by the Assembly and was rarely invoked by States.

If Article 19 fell short of being an instrument of international legislation, the procedures available under contemporary international law are equally limited. Article 19 was not repeated in the UN Charter, and its nearest equivalent is Article 14 empowering the General Assembly to recommend

[48] See ibid., esp. at 13–14; F. S. Dunn, *Peaceful Change* (New York, 1937); H. Lauterpacht, 'Peaceful Change: The Legal Aspect', in C. A. W. Manning (ed.), *Peaceful Change: An International Problem* (London, 1937), 133, at 153; Q. Wright, 'Article 19 of the League Covenant and the Doctrine *rebus sic stantibus*', *Proc. of the American Society of International Law* (1936), 55, at 65 *et seq.*

[49] Lauterpacht, 'Peaceful Change', at 156.

[50] See Dunn, *Peaceful Change*, at 107.

measures for the peaceful adjustment of 'any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations'. The General Assembly's recommendations may contain proposals for the revision of existing treaties but it is up to the contracting parties to accept or reject them.

The Security Council may intervene at the request of any Member of the United Nations in cases where the continuance of the dispute 'is likely to endanger the maintenance of international peace and security' and attempts to settle by other peaceful means under Article 33 of the Charter have failed. It may also intervene in any other dispute, provided that all parties have so requested (Article 38 of the UN Charter).

The Security Council may recommend appropriate procedures or methods of adjustment (Article 36) or even the actual terms of settlement it may consider appropriate. In all cases it is up to the parties to the dispute to consider the substance of these recommendations and decide on the course of action to be followed.

It follows that the international system lacks a legislative process for the revision of treaties. In the absence of a central authority charged with creating and changing international law, these functions are entrusted to individual States.

1.3.3. Lack of Codification

The 1969 Vienna Convention on the Law of Treaties[51] is one of the major instruments of codification and progressive development of international law. It is generally regarded as an authoritative guide to treaty law for members and non-members alike and several of its provisions are considered to be declaratory of existing customary law on the subject.[52]

The Vienna Convention covers a wide range of treaty topics, including treaty amendment and modification (part IV), invalidity, termination, and suspension (part V). The Convention does not deal with the effect of

[51] Opened for signature on 23 May 1969; entered into force on 27 Jan. 1980; 1155 *UNTS* 331; 8 *ILM* (1969), 679. See R. Ago, 'Droit des traités à la lumière de la Convention de Vienne', 134 *RC* (1971-III), at 297; P. Reuter, *La Convention de Vienne du 23 mai 1969 sur le droit des traités* (Paris, 1970); S. Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (Leiden, 1970); *Developments in the Law of Treaties: 1945–1986* (Cambridge, 1989); Sinclair, *The Vienna Convention.* For the history of the Convention, see Yearbooks of the ILC and *UN Conference on the Law of Treaties*, Off. Records, First and Second Sessions (1968 and 1969), UN Docs. A/CONF. 39/11 and Add. 1.

[52] See, *inter alia*, the cases cited above, n. 33, and the Beagle Channel Arbitration (*Argentina v. Chile*) 52 ILR (1977), at 93, the *Young Loan Case*, 59 ILR (1984), at 529 (rules of treaty interpretation), United Kingdom v. France Continental Shelf Arbitration (First Decision), 54 ILR (1979), paras. 38, 58, 61 (Articles 19–23 of the Convention). See also Transmittal of the Vienna Convention to the US Senate, Message from President of the United States, Senate Executive L (92nd Congress, 1st Session) of 22 Nov. 1971, reproduced in *ILM* (1972), at 234.