Is General International Law Customary Law Only?

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I. Introductory Remarks

Is general international law customary law only? At first glance this problem seems to be of purely academic interest. However this is not so.

It is gratifying that the twentieth century has seen enormous leaps forward in international law. However, these gains far from satisfy the needs of the international community for legal regulation. The decade of international law proclaimed by the United Nations General Assembly testifies that the international community is aware of an urgent need for further progressive development of international law, and that measures need to be taken to ensure its effectiveness. This means first of all the further development of general international law, which is the foundation of the whole system of international law. The problem is whether we should rely on the development of general international law by custom only, or if it may also be achieved by multilateral treaties.

The second important problem is whether, in attempting to create a new world order based on the rule of law, we should exclude the possibility of an international treaty becoming a kind of constitution of the international community. It is hoped that these two questions suffice to illustrate that the problem I am going to discuss is also of great practical political importance.[1]

II. The Prevailing Theory

When the science of international law first appeared a few centuries ago it was evident that general international law, at that time European international law, was customary

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1 I partially dealt with this problem in 'Politics, Law and Force in the Interstate System', 219 *RdC* (1989) 235.

law only. There was not a single international treaty embracing all European states, or even one that was intended to do so. It was also evident that treaties only created particular international rules. Vattel wrote:

> As soon as it is evident that a treaty binds only the contracting parties, conventional international law is not general but particular law.[2]

In the main this theory prevails even now, and it follows as a necessary consequence that international treaties create only particular norms. General international law is customary law only. Conventional norms, even if all States are parties to a treaty, need the *opinio juris* of these States to become norms of general international law. In other words, treaty provisions must be converted into customary norms, in order for them to become norms of general international law.

This postulate is accepted by most international lawyers. For example, Baxter in his lectures at the Hague Academy on 'Treaties and Custom' did not use the term 'general international law'.[3] Brownlie speaks of 'customary (or general) international law',[4] which means that treaty law cannot be general international law.[5]

2 E. Vattel, *Law of Nations* (1960) 24.

3 Baxter, 'Treaties and Custom', 129 *RdC* (1970) 33.

4 Brownlie, 'Problems Concerning the Unity of International Law, in A. Giuffrè (ed.), *International Law in the Time of its Codification. Essays in Honour of Roberto Ago* (1987) Vol. I, 154.

5 Professor Suzanne Bastid is of the opinion that 'a treaty may change customary norm. On the other hand it may be a basis for creating a customary norm'. See S. Bastid, *Les traités dans la vie internationale: conclusion et effets* (1985). In the same vein Professor Boss writes: 'A special type of state practice to be mentioned in the context of custom is treaty practice. Treaty practice, indeed, is of some relevance to the creation of custom, for as provided in Article 38 of the Vienna Convention on the Law of Treaties "nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such".' See N. Boss, *A Methodology of International Law* (1984) 67. In the opinion of Giuliano there are 'norms of general or customary international law and norms of particular or conventional international law'. See N. Giuliano, *Diritto internazionale* (1974) 235. Professor Diez de Velasco maintains that 'practically all general international law consists of customary norms and general principles of law' and that 'conventional international law has no universal character'. See M. Diez de Velasco, *Instituciones de derecho internacional publico* (1985) 84. Professor Carillo Salcedo stresses the role of general multilateral treaties 'as the most appropriate instrument of codification and progressive development of international law'. See J.A. Carillo Salcedo, *El derecho internacional en un mundo en cambio* (1984) 108. It is simultaneously asserted that 'the absence of a legislator leads to a situation when international legal norms are essentially of customary nature', at 105. Some Western authors partially abandon the outdated concept that general international law is customary law only. Kelsen wrote in 1952: that '[t]he term "general international law" designates norms of international law which are valid for all the states of the world, whereas the term "particular international law" designates norms of international law valid only for certain states. General international law is as a matter of fact, customary law. As treaties are in principle binding upon the contracting parties, and there is no treaty concluded by or adhered to by all the states of the world, there is only customary, not conventional general international law.' See H. Kelsen, *Principles of International Law* (1952) 188. The words 'as a matter of fact' mean that Kelsen did not exclude that norms of general international law might be of conventional character, but at the time there were no treaties to which all the States were parties. Lauterpacht in the eighth edition of Oppenheim made a step forward by asserting that: '*[u]niversal* international law is created when all

It is regrettable but not unexpected that the International Court of Justice has also contributed to the maintenance of this doctrine. In its otherwise historic judgment on the *Nicaragua* case the Court stated:

> Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one binding upon them; but in the field of customary international law, the shared view of the parties as to the content or what they regarded as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.[6]

Similar pronouncements can be found in other judgments of the Court.[7]

The prevailing theory actually leads to the conclusion that there are two separate and actually independent branches or bodies of international law, customary law and conventional law. General international law cannot be changed by international treaties and conventional international law cannot be changed by custom. This is in flagrant contradiction with the present-day realities of international law.

III. General Multilateral Treaties

The main innovation in the relationship between general, customary and conventional international law lies in the appearance of general multilateral treaties as a new type of multilateral treaty.

Some multilateral treaties nowadays become quasi international legislation. This is dictated by the necessity of solving global problems.

In the course of drafting articles on the law of treaties in the years 1962-1966 the UN International Law Commission felt that there was something new and important in the law of treaties, but at first it was not clear what it was.

or practically all the members of the *Family of Nations* are parties to these treaties... Many law-making treaties have been concluded which contain *general* international law because the majority of states, including the leading Powers, are parties to them.' See L. Oppenheim, H. Lauterpacht (ed.), *International Law* (1955) 28. Lauterpacht, therefore, recognized that there are treaty norms in general international law. It was a step forward but not a sufficient step. There was also a significant shift in the position of Verdross. The 1959 edition of his *Völkerrecht* defined the Charter of the United Nations as a treaty and therefore particular international law. See A. Verdross, *Völkerrecht* (1959) 555. However, in 1973 he said of the Charter: 'It may be considered as universal constitution because it has a tendency to become almost universal.' See A. Verdross, *Die Quellen des universellen Völkerrechts* (1973) 21. Jimenes de Arechaga has pointed out that: '... an opposition or differentiation between treaty law and customary international law is not one to be made or applied too rigidly, since a rule contained in a treaty may be or become a rule of customary law. In this sense a rigid distinction between the two, as though they existed in sealed compartments, would be incorrect.' See Jimenes de Arechaga, 'International Law in the Past Third of a Century', 159 *RdC* (1978) 13.

6 *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986) para. 183.

7 See, for instance, *North Sea Continental Shelf Cases*, ICJ Reports (1969) para. 70.

The term 'general multilateral treaty' was not present in the Special Rapporteur's Waldock First Report of 1962. However he felt that something should be done in this field. He suggested dividing multilateral treaties into two categories: those which concern a few States only and those which are of interest to all States. During the discussion he proposed to call the first group 'plurilateral treaties' and the second group 'multilateral treaties'.[8]

The term 'general multilateral treaty' was not used during the discussion and the draft article was referred to the drafting committee. This term first appeared in the report of the drafting committee presented to the Commission. I do not remember who suggested this term in the drafting committee, probably it was Waldock himself. The formulation proposed by the drafting committee was as follows:

> 'General multilateral treaty' means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole.[9]

This wording was adopted and included in the draft articles which were circulated to governments for comment. In their observations on the Commission's draft the governments of the United States and Great Britain expressed their opposition to this provision. As a result it was not included in the final draft.[10]

The principal problem concerning the relationships between customary and conventional international law was in this case overshadowed by a cold war political issue. The first draft included the following provision:

> In a case of a general multilateral treaty, every State may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.[11]

But at that time western powers, especially the United States, were vigorously opposed to the participation in such treaties of the German Democratic Republic, the Korean People's Democratic Republic and the Democratic Republic of Vietnam.

So the problem of general multilateral treaties remained outside the Convention on the Law of Treaties of 1969. In fact, the whole process of codification and progressive development of international law was intended to achieve this purpose by way of general multilateral treaties which would consolidate, develop and change general international law. A great partisan of codification of international law, judge Roberto Ago, years ago rightly stated that codification means 'codification of general international law'.[12]

During my membership in the International Law Commission from 1957 to 1967 I never noticed any doubt among the members of the Commission that we were called

8 See ILC Yearbook (1962) 77.
9 ILC Yearbook (1962) 239.
10 For more detail see G. Tunkin, *Theory of International Law* (1974) 137-142.
11 ILC Yearbook (1962) II, 167-168.
12 R. Ago, 'La codification du droit international et les problèmes de sa réalisation', *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968) 97.

upon to prepare draft articles intended to be part of general international law. And the Commission never used the terms 'general international law' and 'customary international law' as synonymous.

Primarily as a result of the codification and progressive development of international law, a number of general multilateral treaties have become or are becoming part of general international law.[13] Think, for example, of the Briand-Kellog Pact of 1928 that prohibited the recourse to war. This norm abrogated the right of States to wage war that had existed in international law for centuries, and had become a norm of general international law before the beginning of World War II. It was a historic change in general international law effected by an international treaty. Another striking example is the Charter of the United Nations. It went much further than the Briand-Kellog Pact by introducing the prohibition on the use and threat of force in relations among States, and many other innovations. The principles of the Charter are fundamental principles of contemporary general international law. The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations of 1970 states:

> The principles of the Charter which are embodied in this Declaration constitute basic principles of international law...

More modest examples may also be usefully quoted, such as the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on the Law of Treaties of 1969. As a member of the International Law Commission I took part in drafting articles of these conventions, and recall that we never hesitated to introduce innovations into existing law required by changed circumstances. Both conventions contain such innovations. And although up to now not all States are parties to these conventions, their norms are considered as norms of general international law.[14]

How does it come about that rules of some general multilateral treaties become binding upon non-participating States? First, these treaties foresee the participation of all States. Second, when not all States are parties to these treaties, their provisions may be accepted by non-parties as binding upon them by custom. The Vienna Convention of 1969 contains the following provision on the subject:

13 I expressed this opinion for the first time in 1958 See '40 Years of Coexistence and International Law', *Soviet Yearbook of International Law* (1958) 19 and then developed it in my other writings. See also N. Ulyanova, *Obshie mnogostoronnye dogovory v sovremennych mejdunarodnych otnoshenyach/ General Multilateral Treaties in Contemporary International Relations* (1981). At that time it was probably more a prediction which was supported later by state practice.

14 It would have been of great interest to see whether the governments that are not parties to, for instance, the Vienna Convention on Diplomatic Relations of 1961 and the Convention on the Law of Treaties of 1969, consider the rules of these conventions binding upon them as part of general international law.

> Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such (Article 38).

Although the words 'recognized as such', added at the Vienna Conference, are somewhat confusing, the sense of this provision remains clear enough: provisions of a treaty may become binding upon non-participating States through a customary process.

IV. Mixed Rules in General International Law

What is the situation when provisions of a treaty become binding upon non-participating States by a customary process? For States parties to a treaty the norms are conventional, but for States non-parties they are customary. I suggested long ago to name such norms 'mixed norms', treaty-customary norms.[15]

Partisans of the concept according to which general international law is customary law only sometimes refer to the usefulness of this concept from the point of view of the stability of international law. They argue that international treaties may be terminated by States, whereas customary norms may be amended only by State practice accepted as law. There is a grain of truth in this assertion. But it is a fact that customary norms may be amended or abrogated by treaties, and a growing number of general international treaties do not contain provisions on their termination. According to Article 56 of the Vienna Convention on the Law of Treaties:

> A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

General multilateral treaties concluded in recent decades, with the exception of treaties on the limitation of armaments, contained no provision on termination, denunciation or withdrawal. From the point of view of stability such treaties are in fact on the same level as customary norms.

Some authors argue that treaty norms are rigid whereas customary norms are more flexible. This is true only to a certain extent. If there is a norm of international law admitting, within certain limits, the amendment of a treaty by subsequent practice, this objection against conventional norms practically vanishes.

15 See G. Tunkin, *Voprosy teorii mejdunarodnogo prava* (1962) 110 and G. Tunkin, *Droit international public. Problèmes théoriques* (1965) 93 where it was translated in the following terms: 'Il s'agirait en quelque sorte de normes mixtes, à la fois coutumières et conventionnelles'.

Opinions on the subject differ. I expressed my view in 1962 in the following terms:

> Cases where a treaty is changed by customary way are relatively rare, because treaties as a rule contain provisions for their denunciation and amendment. But legally such an amendment is possible by the consent of all the parties.[16]

Now I would make only one amendment to this opinion. Cases where treaty provisions are changed by subsequent practice are very frequent, especially as far as bilateral treaties are concerned.

The question was thoroughly examined by the International Law Commission. As a result the Commission adopted the following article:

> A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.[17]

I supported this draft article, as it contained in my view two useful elements: (1) not any practice could modify the provisions of a treaty, and (2) only subsequent practice accepted by all parties to the treaty was susceptible to change of its provisions; their *opinio iuris* was to be established[18]

It may well be that the Commission went too far and frightened the Conference by such a sweeping proposal. The draft article was rejected at the Conference on the Law of Treaties. It is certainly regrettable that this problem was left unsettled by the Vienna Convention. As stated earlier, cases of changes in the provisions of a treaty as a result of the parties' susequent practice – in other words, changes brought about by custom – are not rare and nobody considers this unlawful. On the other hand, it is doubtful that there is a rule of international law allowing any change of treaty provisions, or that such an unlimited rule is advisable *de lege ferenda*.[19]

At the same time one should not lose sight of the fact that conventional norms are more precise than customary norms. This is their great advantage in comparison to customary norms.

16 G. Tunkin, *Questions of Theory of International Law* (1962) 111. French ed., *Droit international public. Problèmes théoriques* (1965) 94.

17 ILC Yearbook (1966) 236.

18 In its comments on the article the Commission pointed out: 'in formulating the rule in this way the Commission intended to indicate that the subsequent practice, even if every party might not itself have actively participated in the practice, must be such as to establish the agreement of the parties as a whole to the modification in question'.

19 The opinion of Capotorti, who argues that, 'there is a general norm that a treaty may be amended by the subsequent practice of the parties', cannot be accepted without reservation. See F. Capotorti, 'Sul valore della prassi applicativa dei trattati secondo la Convention de Vienna', *Essays in Honour of R. Ago*, *supra* note 4, at 206. As Professor Rousseau points out, although 'custom may abrogate or modify a treaty, one should not exaggerate this idea. See Ch. Rousseau, *Droit international public* (1970) 344.

V. Concluding Remarks

It follows that, although the prevailing theory discussed above is still strongly rooted in the minds of international lawyers, there are sufficient reasons for re-examining the problem of the relationship between general international law, customary international law and conventional international law.

I believe that international lawyers should accept that general international law now comprises both customary and conventional rules of international law. This would have implications at two levels:

(1) codification and progressive development of international law, which is today commonly effected by treaties, would take its proper dignified place;

(2) the Charter of the United Nations, which is the basic document of contemporary general international law, would be accepted by international law doctrine as a kind of constitution of the international community – and this would be of considerable importance for the future of mankind.