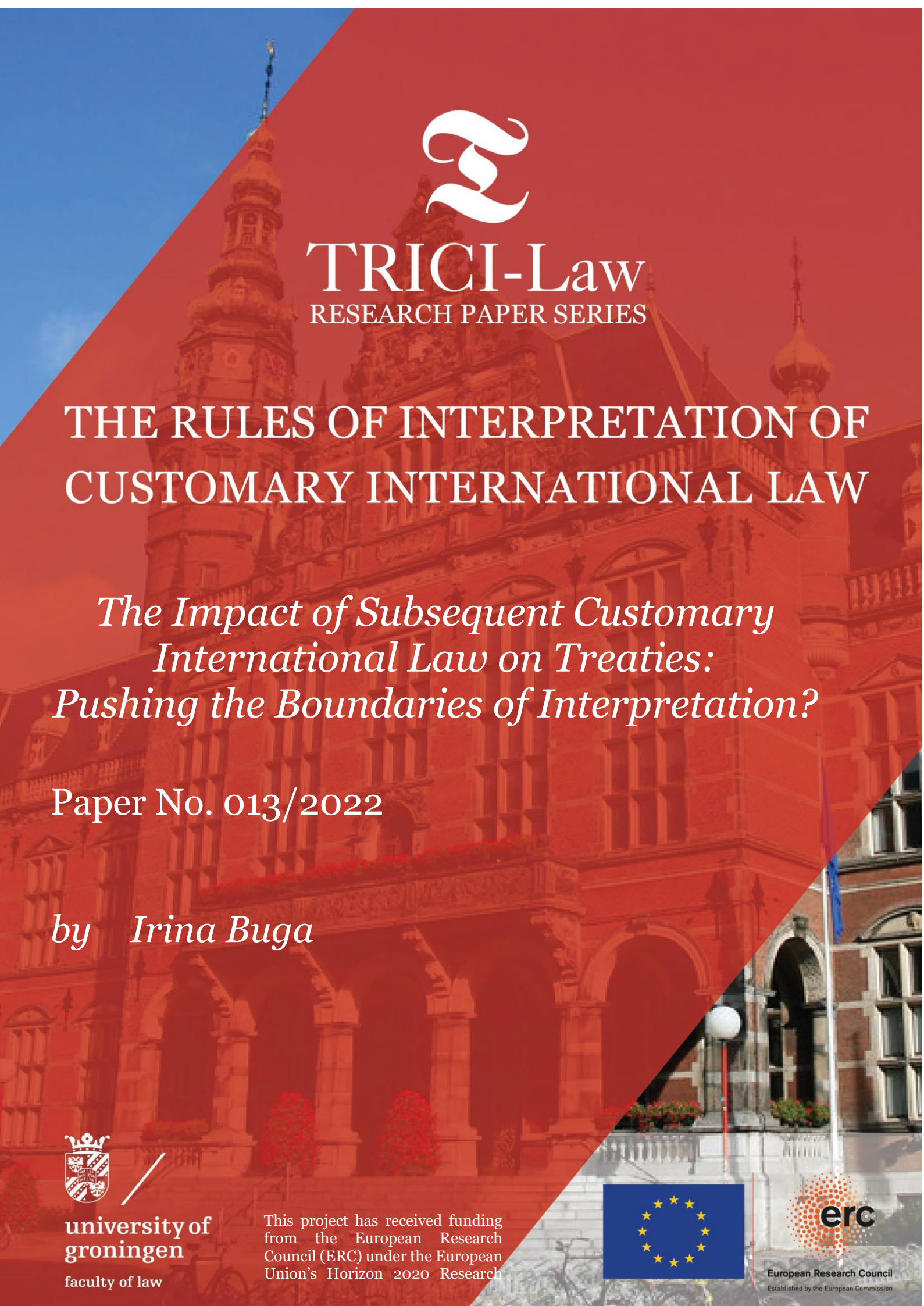

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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

The Impact of Subsequent Customary International Law on Treaties: Pushing the Boundaries of Interpretation?

Paper No. 013/2022

by Irina Buga

university of groningen
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The Impact of Subsequent Customary International Law on Treaties: Pushing the Boundaries of Interpretation?

Irina Buga[1*]

Abstract

Conflicts between treaty and customary norms are endemic to international law and increasingly frequent. Yet there is nothing automatic or mechanical about interpreting and resolving such conflicts, which require a high degree of contextual sensitivity. Their identification and interpretation test the limits of the rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties, particularly where treaty modifications by subsequent customary law are concerned. This article endeavours to sketch how the latter phenomenon occurs, and the interpretative and evidentiary challenges involved – many of which remain underexplored. The analysis begins with the identification and interpretation of newly emerged customary norms, before delving into the process of determining their treaty modifying potential. This involves the side-by-side interpretation of the pre-existing treaty and the customary norm to assess whether there is a genuine incompatibility that cannot be resolved through harmonious interpretation. The final inductive step is to ascertain the parties' consent to displace the treaty norm in favour of the customary norm, subject to certain crucial requirements. Against the backdrop of the organic and continuous interplay between treaties and customary international law, these interpretative and evidentiary steps serve to ensure that the parties' intention remains paramount.

Keywords

customary international law – interpretation – rules of interpretation – customary rules of interpretation – treaty modification – customary modification – Vienna Convention on the Law of Treaties – genuine conflict – Article 31(3)(c) VCLT

1 Introduction: interpreting the limits of the rules of interpretation and the case study of subsequent customary international law[2**]

Discussions on the evolution of the rules of interpretation as reflected in the 1969 Vienna Convention on the Law of Treaties (VCLT) are pervasive and important. Interpretation itself is, after all, a crucial means of allowing the law to evolve with its

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[2**] Many of the ideas presented in this article are expanded upon in Buga (2018a).

ever-changing environment.[3] As one commentator observed, 'one might well quip that interpretation is the continuation of treaty negotiations by other means'.[4] For the same reason that treaty terms do not become set in stone upon a treaty's conclusion, the rules of interpretation are subject to evolution through interpretation, as discussions regarding their content and application abound.

The International Court of Justice (ICJ) first declared that Article 31 VCLT constitutes customary international law in the 1994 *Libya/Chad* case[5] – a decision reaffirmed countless times since. However, interpretations vary as to the precise application of the structure of Article 31 VCLT.[6] The elements of the rules of interpretation – more akin to a set of open-ended 'norms' – have thus been likened to 'sacred texts that are often difficult to apply but are constantly invoked'.[7]

A formative part of the discussion on the evolution of the rules of interpretation as codified in the VCLT is the question of the content of the corresponding rules of interpretation under customary international law. It is difficult to discern how the content of the VCLT rules and that of the corresponding customary rules of interpretation interact. This difficulty stems from multiple factors, not least from the widespread acceptance of the VCLT, blurring the line between practice in relation to the VCLT versus practice outside of it. From a practical standpoint, this problem of discernibility is exacerbated by the lack of specificity in the application of the different elements of the rules of interpretation in the case law.

A particularly intriguing element of the rules of interpretation in this respect is subsequent practice.[8] Subsequent practice provides a key tool for treaty change not only as an element of treaty interpretation in the VCLT,[9] but also as a constitutive element of subsequent customary international law, and, in both capacities, as a means of treaty modification.[10] The on-going discussions on the nature, form and content of subsequent

[3] McLachlan (2005), p. 282.

[4] Klabbers (2005), p. 406.

[5] *Territorial Dispute* (*Libyan Arab Jamahiriya/ Chad*), Judgment of 3 February 1994, ICJ Reports 6, para. 41.

[6] Villiger (2009), p. 440.

[7] Sorel and Boré Eveno (2011), p. 807.

[8] For present purposes, the term 'subsequent practice' will be taken to encompass both subsequent practice in the sense of Article 31(3)(b) VCLT and 'subsequent agreements' under Article 31(3)(a) VCLT. See further e.g. Buga (2018a), Section 2.3.3.

[9] The classification of practice as either 'subsequent practice' within the narrower meaning of Article 31(3)(b) or as a supplementary means under Article 32 pertains to the interpretative weight accorded to practice in a given case. See e.g. Nolte (2013b), p. 235. A number of elements distinguish subsequent practice under Article 31(3)(b) from other types of practice under Article 32. Article 31(3)(b) requires the practice to be 'in the application of the treaty' and – depending also on the extent to which it is 'concordant, common and consistent' – capable of establishing the agreement of the parties to the interpretation in question, as well as a certain intentionality or awareness of the implications of the practice. See Buga (2018a), Section 2.3. Practice that does not meet these requirements can still play a role under the broader scope of Article 32. See e.g. Torres Bernárdez (1998), p. 726; Villiger (2009), p. 446; Crema (2013), p. 17. Article 32 can also include the practice of international organizations, which goes to show that Article 31(3)(b) is not necessarily suited for the interpretation of any type of treaty. In fact, a significant challenge lies in determining how to take into account new forms of practice in the evolution of present-day international law, 'much of which takes place outside the strict terms of art 31(3)(b).' – McLachlan (2005), p. 81. See further Buga (2018a), Section 2.4.

[10] Thus '[g]reat changes in international law stand in stark contrast to relatively little new treaty text.' – Venzke (2012), p. 197.

practice are an example of where the *interpretation* of the rules of interpretation themselves is taking place in the case law and literature.[11] In turn, the discussions on subsequent practice as a means of treaty *modification* are an example of where the interpretation of the *limits* of the rules of interpretation is taking place – an inherently difficult process. Namely, subsequent practice can diverge from treaty provisions to such an extent that it can no longer be said to constitute an act of treaty interpretation or application, but rather of modification.

Determining when the 'switch' from interpretation to modification occurs is in itself an act of interpretation. The difficulty of pinpointing this transition – a subject upon which the VCLT is silent – stems from the fact that interpretation and modification ultimately fulfill the same function as part of a continuous process of treaty change: safeguarding the prevalence of the parties' (original and later) intentions.[12] A cautious analysis of perceived modifications is thus required to ensure that the result remains bounded by the parties' intentions.

Importantly, subsequent practice can give rise to new rules of customary international law, which in turn may impact pre-existing treaty provisions.[13] The interpretation of the rules of interpretation, as well as their limits, with regard to subsequent practice is thus intricately connected to the question of treaty interpretation in accordance with subsequent customary international law and its treaty modifying potential. For one thing, interpretation of a treaty in accordance with customary law requires interpreting the pre-existing treaty as well as the subsequent customary rule in question; it thus requires the application of the customary rules of interpretation to non-treaty sources. The phenomenon also raises the question of the distinction between identification and interpretation of customary international law at various stages of the analysis. Moreover, where a potential modification has occurred, the treaty impact of subsequent customary law entails an interpretation of the *limits* of the rules of treaty interpretation, in order to be able to determine where the effect of customary law has gone beyond the bounds of interpretation.

The ensuing sections will endeavour to sketch how treaty modification by customary international law occurs, and the challenges that it poses to the processes of identification and interpretation involved. After setting out the discussions in the International Law Commission (ILC) on treaty modification by subsequent customary law and the complex interaction between treaties and customary norms (Section 2), the analysis begins with the challenges of identifying and interpreting newly emerged customary norms (Section 3). Next, the focus turns to the challenges of establishing the existence of a genuine conflict – and therefore the potential for modification – between a treaty and a subsequent customary norm (Section 4). The key step is to identify

[11] The topic has been receiving increasing attention in recent years and has notably been taken up by the ILC. See most recently ILC, Report of the International Law Commission on the work of its 70th session, UN Doc A/73/10 (2018) Chapter IV.

[12] While the initial aim of subsequent practice is to shed light on the parties' original intention (see e.g. McNair (1961), p. 424), subsequent practice can develop away from that original intention in accordance with the parties' contemporary understanding of the treaty (see e.g. Crema (2013), p. 23; Arato (2013), p. 307).

[13] While the processes of treaty modification by subsequent practice and subsequent customary law are distinct, subsequent practice is the 'raw material' that fuels both, in conjunction with the crucial requirement of the parties' intention. Subsequent customary law could thus be regarded as one of the multiple potential outcomes of subsequent practice in relation to a treaty – Buga (2018a), p. 235.

whether a treaty modification by subsequent customary norm can actually be said to have occurred – an inductive process that, at least theoretically, imposes high evidentiary thresholds (Section 5).

As will be touched upon in the final remarks (Section 6), these questions are of more than just conceptual significance, given the current gap in understanding how customary international law can be applied in individual cases once it has been formed, and of the circumstances in which it can lead to treaty modification[14] – a process that, despite drawing increasing attention, remains underexplored.

2 The ILC background on treaty modification by subsequent customary law and the complex interaction between treaties and customary norms

2.1 The ILC draft provision on treaty modification by subsequent customary law

In the course of its work leading up to the Vienna Convention on the Law of Treaties, the ILC) considered a range of draft provisions on the treaty impact of subsequent practice and subsequent customary law that, many decades ago, already set the scene for the discussions being had today.

During the ILC discussions in 1964, ILC Special Rapporteur Sir Humphrey Waldock proposed a draft Article 56 on the two branches of the inter-temporal law, a reflection of Judge Huber's famous *dictum* in the *Island of Palmas*[15] arbitration:

> Article 56 – The Inter-Temporal Law
>
> 1. A treaty is to be interpreted in light of the law in force at the time when the treaty was drawn up.
> 2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.[16]

Thus, according to the inter-temporal law, a treaty must be viewed not only in light of the rules prevalent at the time of its conclusion, but also those in force at the time of its application.[17] The rationale of these two branches of inter-temporality – one looking to the past, the other to the present – is difficult to contest, but their placement side-by-side 'caused shock at first sight'.[18] As one ILC member pointed out, both 'legs' of inter-

[14] It is well established that customary international law can lead to treaty modification. For an extensive list of cases and literature on the matter, see Buga (2018a), p. 195 fn 1.

[15] *Island of Palmas Case (Netherlands/USA)*, Award of 4 April 1928, 2 RIAA 829, p. 845.

[16] ILC, 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (1964) II YBILC 5 [Waldock, Third Report on the Law of Treaties], p. 8.

[17] Interpretation could be described as the process of determining the meaning of the text, while application entails determining the consequences that follow from that meaning in a given case. See e.g. Gardiner (2008), pp. 27-28. The act of application of a treaty always presupposes its interpretation. See e.g. Distefano (1994), p. 41; Sands and Commission (2010), p. 40. The debate on the interrelation of these two notions goes beyond the scope of the present article.

[18] ILC, 'Summary record of the 729th meeting', *Summary records of the 16th session* (1964) I YBILC 34 [Summary record of 729th meeting], para. 28 (De Luna).

temporal interpretation operate for the same reason, namely to give precedence to the parties' actual intention:

> The intention of the parties should be controlling, and there seemed to be two possibilities so far as that intention was concerned: either they had meant to incorporate in the treaty some legal concept that would remain unchanged, or, if they had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belong. The free operation of the will of the parties should not be prevented by crystallizing every concept as it had been at the time when the treaty was drawn up.[19]

Other members pointed out that the substance of Article 56(2) required addressing the relation between treaty and non-treaty rules to try and reconcile 'the stability of conventional international law and the flexibility of customary international law'.[20] Indeed, they underscored that Article 56(2) raised the 'problem of the possible transformation of the clauses of a treaty by custom and tacit agreement of the parties'.[21]

A notable remnant of the second 'leg' of the inter-temporal law in the VCLT rules of interpretation is Article 31(3)(c) on 'any [other] relevant rules of international law applicable in the relations between the parties'. This principle of 'systemic integration' requires that the interpretative process take into account rules that have developed subsequent to the treaty's conclusion, including customary law. Its relevance for the present subject matter will be discussed further below.[22] It suffices to note here that the questions raised by the inter-temporal law already hint at the complexities involved in distinguishing between treaty interpretation and modification by subsequent customary law.

At the ILC's sixteenth session in 1964, Waldock proposed draft Article 73 in lieu of Article 56(2):

> **Article 73 – Effect of a Later Customary Rule or of a Later Agreement on Interpretation of a Treaty**
>
> The interpretation at any time of the terms of a treaty […] shall take account of:
>
> (a) the emergence of any later rule of customary international law affecting the subject-matter of the treaty and binding upon all the parties;
> (b) any later agreement between all the parties to the treaty and relating to its subject-matter;
> (c) any subsequent practice in relation to the treaty evidencing the consent of all the parties to an extension or modification of the treaty.[23]

The ILC members hardly questioned the substance of draft Article 73, and focused instead on its phrasing and placement. Waldock considered it 'prudent to state only the broad principle and not to attempt to define its results'.[24] The provision was therefore

[19] ILC, 'Summary record of the 728th meeting', *Summary records of the 16th session* (1964) I YBILC 33, para. 10 (Jiménez de Aréchaga).

[20] Summary record of 729th meeting, paras. 10 (Reuter), 24 (Tsuruoka).

[21] Summary record of 729th meeting, para. 43 (Tunkin).

[22] See in particular Section 4.3 below.

[23] Waldock, Third Report on the Law of Treaties, p. 53 (emphasis added).

[24] Waldock, Third Report on the Law of Treaties, p. 61, para. 32.

silent as to how the emergence of customary international law, or its treaty impact, was to be determined.

The provision was then redrafted to expressly include subsequent customary law (and subsequent practice) as a means of treaty *modification*:

> **Article 69A – Modification of a Treaty by a Subsequent Treaty, by Subsequent Practice or by Customary Law**
>
> The operation of a treaty may also be modified:
> (a) By a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible;
> (b) By a subsequent practice of the parties in the application of the treaty establishing their tacit agreement to an alteration or extension of its provisions; or
> (c) By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.[25]

Once again, the provision did not specify how a treaty rule could become impacted by such a modification through subsequent customary law, nor how such an effect could be discerned.[26]

The draft provision was adopted unanimously at the ILC's 1964 session. Discussions on the provision (renumbered as part of Article 68) then resumed at the Commission's eighteenth session in 1966.

During the discussions, the Special Rapporteur characterized the process of modification by subsequent customary international law, as opposed to modification by subsequent practice, as the 'accidental modification of the operation of the treaty by subsequent events'.[27] His reasoning was that modification by subsequent customary law did not involve an intention to change the text of the treaty, but rather concerned the 'impact on a treaty done outside and in relation to it'.[28] This statement is controversial. It prompted the United Kingdom's remark that treaties should not be modified without the parties' consent.[29] Indeed, as we shall see, the modification of a treaty by a customary norm requires the parties' intention to that effect – an issue upon which there was widespread agreement among ILC members.[30] One member argued that parties to a treaty may even contribute to the formation of a new rule of customary

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[25] ILC, 'Summary record of the 769th meeting', *Summary records of the 16th session* (1964) I YBILC 308; ILC, 'Summary record of the 770th meeting', *Summary records of the 16th session* (1964) I YBILC 315, p. 318 (emphasis added).

[26] ILC, 'Draft articles on the law of treaties' (1964) II YBILC 176, p. 198 para. 3; ILC, 'Summary record of the 866th meeting', *Summary records of the 18th session* (1966) I(2) YBILC 163 [Summary record of the 866th meeting], para. 41 (Yasseen).

[27] ILC, 'Summary record of the 859th meeting', *Summary records of the 18th session* (1966) I(2) YBILC 112, para. 35 (Waldock).

[28] ILC, 'Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (1966) II YBILC 51 [Waldock, Sixth Report on the Law of Treaties], p. 97, para. 14.

[29] Waldock, Sixth Report on the Law of Treaties, p. 88. The United Kingdom also emphasized the difficulty of pinpointing the precise moment when a new rule of customary law can be said to have emerged. Albeit a problematic aspect of customary law in practice, this point does not and cannot constitute a reason to deny the treaty impact of subsequent customary law in general. The Special Rapporteur did not regard such concerns as a 'cogent objection', insisting that customary law 'looms large' in international law and its constant and undeniable impact on the operation of treaties 'unquestionably exists' – Waldock, Sixth Report on the Law of Treaties, p. 90, para. 11.

[30] See e.g. Summary record of the 866th meeting, paras. 50 (Ago) and 51 (Amado).

law without intending to derogate from the treaty provisions as *lex specialis*.[31] Thus, except for when a new rule of *jus cogens* has emerged, 'if the parties agreed to modify the treaty so as to bring its provisions into conformity with the new rule of customary law, they were at liberty to do so; otherwise, the emergence of a new customary rule of general international law would have no effect on the existence of the treaty.'[32]

Some governments saw no use for a separate provision on treaty modification by subsequent customary law, and proposed instead to transfer its contents to the provision on interpretation.[33] They focused, for instance, on the impact of the emergence of a new customary rule on the interpretation of the treaty in accordance with the second branch of the inter-temporal law,[34] namely that treaties are to be applied in accordance with the evolution of international law.[35] It was furthermore suggested that modification by subsequent customary law is already subsumed by the notion of modification by subsequent practice.[36] This recognition of the conceptual and practical overlap between the two notions also raises the distinction between customary law originally developed through treaty-oriented subsequent practice and customary law developed outside of the treaty regime, but with the potential to eventually impact upon its application.[37]

The Special Rapporteur was keen to point out that no government questioned the content of the provision.[38] Ultimately, however, it never made it into the VCLT. Although States and ILC members recognized the validity of the process,[39] many of them were wary of the 'controversial' and 'extremely difficult problems'[40] that it entailed – not least due to the 'confusion in the ILC as to the intertemporal implications, and the distinction between the application and interpretation of treaties'.[41] The only remaining codification of the treaty impact of subsequent customary law in the VCLT is Article 64 VCLT, which provides that any pre-existing treaty provision in conflict with a newly emerged rule of *jus cogens* will become void.[42] The ILC drafting history nevertheless serves as a reminder that the broader process of customary modification must be further explored.[43]

2.2 The interplay between treaties and customary international law

The other principal reason for the deletion of the draft article on subsequent customary law was the fact that it went to the heart of the complex interaction between treaties and customary international law, a subject the ILC considered to go 'beyond the scope of a

[31] Summary record of the 866th meeting, para. 24 (De Luna). See further Section 5 below.
[32] Summary record of the 866th meeting, para. 50 (Ago).
[33] Waldock, Sixth Report on the Law of Treaties, p. 90, para. 12.
[34] See text to fn 17 above.
[35] Waldock, Sixth Report on the Law of Treaties, p. 97, para. 11.
[36] Summary record of 866th meeting, para. 20 (Tunkin).
[37] See Sections 4.1 and 4.3 below.
[38] Waldock, Sixth Report on the Law of Treaties, p. 89, para. 7.
[39] Villiger (1985), para. 298.
[40] Summary record of 866th meeting, para 24 (De Luna).
[41] Villiger (1985), para. 298.
[42] This is different from the treaty impact of other types of customary norms, which is not automatic and only displaces the conflicting treaty provision, as will be discussed in Section 4.1 below.
[43] Villiger (2009), p. 15; Crawford (2013), p. 29.

convention on the law of treaties'.[44] The provision 'touched on a problem of capital importance, the competition between sources of international law', but failed to clarify the conditions under which customary law can take precedence over conventional law,[45] let alone by what interpretative processes such conditions could be established.

The conceptual starting point in analysing such processes is that no hierarchy exists between these two formal sources of international law. The order in which treaties and customary international law are listed in Article 38 of the ICJ Statute is one of logical progression, reflecting the degree of certainty with which their existence can be established. Thus, where a treaty and a customary norm are found to conflict, the determination of which norm prevails in the given case will require a holistic analysis of their content , context, and the parties bound by them.[46]

Each of the two sources continuously impacts the other. Treaties,[47] as 'records' of State practice,[48] may evidence or codify existing customary law, but may likewise help crystallize a customary norm in *statu nascendi*[49] or trigger a new customary rule altogether.[50] Conversely, as we will see,[51] customary international law can lead to an expansive interpretation, modification, or even termination of treaty provisions.[52]

Naturally, conflicting norms of customary and conventional law can co-exist or derogate from each other. One scenario is where a new treaty derogates from pre-existing customary international law while the customary norm remains binding for non-treaty parties.[53] Conversely, it is not inconceivable for a customary norm to be more specific than a treaty norm or for a 'particular'[54] customary rule binding a small number of States to conflict with a multilateral treaty with many more parties, in which

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[44] Villiger (1985), para. 298. See also Waldock, Sixth Report on the Law of Treaties, p. 97, para. 12.

[45] Summary record of 866th meeting, paras. 40-41 (Yasseen).

[46] Kivilcim-Forsman (1996), p. 212. See further Sections 4.3 and 5 below.

[47] Not all treaty provisions have the same norm-generating potential; some may not be capable of generating customary international law, such as specific procedural clauses, whilst other provisions may only give rise to 'particular', 'regional', or 'local' customary norms, like those setting up 'objective regimes', such as treaties regulating navigational rights on a river or specifying inter-State boundaries. See e.g. D'Amato (1971), pp. 105, 108.

[48] D'Amato (1971), pp. 105, 115.

[49] ILC, 'Third Report on Identification of Customary International Law, by Michael Wood, Special Rapporteur', UN Doc A/CN.4/682 (2015) [Wood, Third Report], para. 38, citing e.g. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, Dissenting Opinion of Judge Sørensen, ICJ Reports 241, p. 243.

[50] See e.g. ILC, *Report of the International Law Commission on the work of its 70th session*, UN Doc A/73/10 (2018) Chapter V [ILC, Draft Conclusions on Customary International Law (2018)], Conclusion 11, para. 1.

[51] See Section 4 below.

[52] See e.g. ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi', UN Doc A/CN.4/L.682 (2006) [ILC, Fragmentation Report], para. 224; Bowman (2007-2008), p. 305; Byers (2001), pp. 172-180.

[53] It is generally difficult to imagine the termination of a customary norm by treaty, except in the case of treaties of near-universal nature; the modification would then more likely occur by subsequent customary law.

[54] This refers to a customary rule that, by its nature, applies only to a smaller set of States. See e.g. Wood, Third Report, para. 80 (noting that 'particular' customary law 'has been recognized by the International Court of Justice and by individual judges of the Court, as well as national courts, Governments and writers').

case the customary rule will derogate from the treaty as *lex specialis*. This capacity for co-existence is what complicates, but also necessitates, the careful identification of the treaty impact of subsequent customary law.

3 Identifying and interpreting newly emerged customary international law

The process of creation of customary international law is highly dynamic and inherently imprecise on account of its unwritten nature – hence the term '*coutume sauvage*'.[55] Thus, in the realm of customary norms, even more than in the realm of treaties, the interchange and juxtaposition between stability and change, specificity and flexibility, and the evolution of the law through deliberate planning versus its organic development, feature prominently.

It is therefore unsurprising that the identification of new customary norms presents certain inherent difficulties, which have been the subject of increasing attention.[56] Article 38 of the ICJ Statute sets out its two formative elements, *usus* ('a general practice') and *opinio juris* ('accepted as law').

As to the first element, the meaning of 'practice' is extremely broad, and can include physical and verbal action or inaction on the international and domestic plane. The weight to be accorded to practice in a given case will depend on the specific circumstances.[57] Practice capable of giving rise to a customary norm must be sufficiently determinate,[58] 'general',[59] and consistent,[60] and must include the practice of 'specially affected States'.[61] Absolute universality or consistency is not required.[62] The frequency and duration of the practice, and the absence of protest by interested States, are important, though by no means individually determinative.[63] For instance, as highlighted in the *North Sea Continental Shelf* cases, the duration must be sufficient to allow States to become aware and react to the practice, which can occur over a short period of time.[64] Once a customary norm has formed, 'subsequent objectors' are not

[55] Dupuy (1974).

[56] This topic was taken up by the ILC in 2013, led by Special Rapporteur Sir Michael Wood. See most recently ILC, Draft Conclusions on Customary International Law (2018).

[57] See e.g. ILC, 'Second Report on Identification of Customary International Law, by Michael Wood, Special Rapporteur', UN Doc A/CN.4/672 (2014) [Wood, Second Report], para. 49.

[58] Buga (2018a), Section 2.3.1(b).

[59] Article 38 of the ICJ Statute. See also ILC, Draft Conclusions on Customary International Law (2018), Conclusion 8.

[60] See e.g. Wood, Second Report, para. 59.

[61] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, ICJ Reports 3 [*North Sea Continental Shelf*], para 73. See also Worster (2013), p. 63. On the meaning of 'specially affected', see Meijers (1978), p. 7; Danilenko (1993), p. 95.

[62] Wood, Second Report, para. 57, citing e.g. Fitzmaurice (1953), p. 45. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 14 [*Nicaragua v US*, Merits], para. 186.

[63] Buga (2018a), Section 2.3.5(c).

[64] *North Sea Continental Shelf*, para. 74.

allowed,[65] but could indicate the gradual emergence of a new customary rule modifying or terminating the previous one.[66]

Meanwhile, the concept of *opinio juris*, the psychological element of customary law, requires that the practice reflect an awareness of, or be motivated by, the existence or creation of a legal rule. In particular, the practice must be motivated by the formation of a *customary* rule, rather than, for example, solely by the need of the treaty parties to comply with the treaty's rules.[67] The requirement of *opinio juris* may therefore make it more difficult to identify new customary norms in relation to a pre-existing treaty, since the parties' practice could be attributed solely to the treaty's existence.[68] The notion of *opinio juris* can be ambiguous, and grasping its meaning and function as the '"extra ingredient" necessary to transform a repetitive practice into a binding norm' is a 'central problem' with the provability of customary law.[69] Yet provability is not always an issue, particularly in the case of express statements or treaties.[70] The ICJ, for instance, has applied a high threshold for establishing *opinio juris*, often seeking support in treaties, UN resolutions, or ILC reports.[71]

While it goes beyond the scope of the present article to expound on the debate regarding the 'two-element approach',[72] it is submitted that both practice and *opinio juris* remain indispensable to the process of customary international law formation. Without *opinio juris*, practice would not amount to a rule of international law, and without practice, a rule would not be one of customary law.[73] In reality, however, the two elements are deeply entangled, as the same act could evidence both.

Strictly speaking, the identification of new customary norms is not a process of interpretation in itself.[74] The same goes for the identification of subsequent practice in the interpretation of a treaty. Establishing the existence of customary international law involves an inductive process premised on the presence, content, and degree of

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[65] Wood, Third Report, para. 93.

[66] Villiger (1985), para. 52, citing Fitzmaurice (1953), p. 99.

[67] *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, Judgment of 27 August 1952, ICJ Reports 176, pp. 199-200; *North Sea Continental Shelf*, para 76; Wood, Second Report on Customary International Law, para 62. See also e.g. Schachter (1989), p. 729; Orakhelashvili (2008), p. 81.

[68] Cryer (2006), p. 244.

[69] Kadens and Young (2013), p. 907.

[70] Wood, Second Report, paras. 75-76.

[71] *Nicaragua v US*, Merits, paras. 187ff.

[72] A wide range of opinions have been expressed regarding the interplay between the two elements of customary international law, ranging from indivisibility, to a 'sliding scale' approach according to which the stronger the evidence of one of the two elements, the less evidence is required for the other to prove the existence of a customary rule, to the clear dominance of one of the two elements over the other, and the notion of 'instant custom'. For an overview, see ILC, 'First Report on Formation and Evidence of Customary International Law, by Michael Wood, Special Rapporteur', UN Doc A/ CN.4/ 663 (2013), paras. 97-101. See also e.g. Guzman (2005), p. 153; Lillich (1995-96); Meron (2011), p. 32; Schabas (2009), p. 77 (focusing on the element of *opinio juris* in relation to customary law formation the fields of human rights, humanitarian law, and international criminal law, respectively); D'Amato (1998) (positing that *opinio juris* is difficult to prove, making it less relevant for the actual identification of customary international law); Kirgis (1987), pp. 146-151 (on the 'sliding scale' approach); Cheng (1965), p. 36 (on 'instant custom', requiring only *opinio juris*).

[73] Van Hoof (1983), p. 93, citing Meijers (1978), p. 13.

[74] See e.g. Merkouris (2017), p. 128; Orakhelashvili (2008), p. 496.

uniformity of the formative practice underlying it. This is not to say, of course, that no real interpretation takes place at this stage. Rather, what is being interpreted is not the customary norm (or subsequent practice) as such, but the individual sources comprising the underlying evidence for its existence. Such evidence often consists of verbal or written sources, including treaties.[75] Thus, to identify new customary norms, the interpreter will frequently resort to textual interpretation, comprising treaty and non-treaty sources alike.[76] The distinction between the ascertainment of customary international law and the interpretation of the underlying evidence may seem largely conceptual (the same may be said of debates on the interpretability of customary norms once formed, as unwritten rules predominantly identified and understood through the prism of textual sources). Yet the distinction is relevant: for one thing, even once there is agreement that a customary norm has formed, different interpreters may disagree as to its meaning in a specific case – for example, in relation to a potentially overlapping or conflicting treaty norm.

The threshold required to establish the emergence of customary law will vary per case. It may be higher depending on the 'strength of the prior rule which is purportedly overthrown', if there is one.[77] This applies generally whenever a change entails an alteration, rather than an extension, of existing rules.[78] As we shall see, the same can be said of the threshold required for treaty modification by subsequent customary law in cases where customary law comes to displace existing treaty rules.[79]

The process of identifying (the formation of) customary international law is distinct from the process of interpreting its content,[80] i.e. the process of identifying the rights and obligations applicable in the given case. The deductive process of *interpreting* customary international law – premised not on the VCLT rules of interpretation as such, but on their customary counterparts – is still very much akin to the process of treaty interpretation.[81] However, interpreting the content of customary international law arguably requires more contextual sensitivity than the 'classic' exercise of treaty interpretation, given its unwritten nature. This is further complicated by the fact that, through subsequent practice, customary international law is in a constant state of flux. Thus, both identifying and interpreting it is a continuous process. Yet, as discussed, many customary rules have their roots in written sources, including treaties. Customary rules can, moreover, sometimes be more specific than a treaty rule. In any case, both

[75] See e.g. ILC, Draft Conclusions on Customary International Law (2018), Conclusions 6, 10, and 11. See also Ammann (2019), pp. 199-200.

[76] Cf. e.g. Treves (2006), para. 2.

[77] Shaw (2008), pp. 56, 78.

[78] See Section 4.1 below.

[79] See Sections 4.1 and 5 below.

[80] See e.g. Merkouris (2017), p. 127.

[81] See e.g. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, Dissenting Opinion of Judge Tanaka, ICJ Reports 172, p. 181: 'The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law.' See also ILA, Study Group on the Content and Evolution of the Rules of Interpretation, Final Report (29 November-13 December 2020, Kyoto), p. 34: '[T]he VCLT has had an undeniably significant impact on the form that the discussion on interpretation takes, with most [international courts] referring to Articles 31-33 VCLT and its elements (also using the language adopted in the VCLT) even in cases where customary rules of interpretation were the applicable law.'

treaties and customary norms can be indeterminate or vague, and both are impacted by subsequent practice, requiring a holistic interpretative exercise.

The formation and identification of customary international law, as well as the interpretation of customary international law once formed, are complex but necessary steps towards understanding the treaty modifying potential of customary norms. The ensuing sections take the analysis a step further in identifying the latter process.

4 Identifying and interpreting the treaty modifying potential of subsequent customary international law: determining the existence of a 'genuine conflict'

4.1 Definitions and distinctions

Treaty modification by subsequent customary law is taken to refer to a situation whereby a non-identical, conflicting norm of customary international law emerges in respect of the subject matter covered by a pre-existing treaty, and the parties intend for it to be overriding. A classic example is the modification of the 1958 Geneva Convention on the High Seas by the newly emerged concept of the 200-mile exclusive economic zone in the wake of the Third United Nations Conference on the Law of the Sea.[82] This implies the existence of a 'genuine' conflict[83] – conflicts, after all, serve as 'conduits for legal change'[84] – between the pre-existing treaty provision and the contents of the customary norm, such that the two cannot be reconciled through 'harmonious interpretation'.[85] Reference can be made here to the principle of 'systemic integration' reflected in Article 31(3)(c) VCLT,[86] to which we will return shortly.[87]

The term 'modification' is defined for present purposes as the displacement of treaty provisions by subsequent customary international law.[88] The result of such

[82] See Buga (2018a), Section 5.3.2(a).

[83] There are three types: conflicts between successive norms (e.g. *lex posterior*), conflicts between general and special law (*lex specialis*), and conflicts with higher norms (*lex superior*). Numerous provisions deal with resolution or consequences of conflict (notably, Article 103 of the UN Charter, Articles 30 and 59 VCLT, and countless conflict clauses in individual treaties), but there is no official definition of 'conflict' under international law. Likewise, the case law is not explicit as to criteria for defining and ascertaining the existence of a conflict, with the major exception of WTO case law.

[84] Ranganathan (2013), p. 91.

[85] See e.g. Mus (1998), p. 211; Klabbers (2011), p. 193.

[86] ILC, Fragmentation Report, para. 413.

[87] See Section 4.3 below.

[88] During the drafting of the VCLT, the ILC considered 'extensions' of treaty provisions as a form of treaty modification, in addition to treaty 'alterations'. See ILC, 'Draft Articles on the Law of Treaties' (1964) II YBILC 176, p. 198, Article 68(b). See also ILC, 'Summary record of the 764th meeting', *Summary record of the 16th session* (1964) I YBILC 267, para. 104 (De Luna): 'a modification was not always necessarily the reversal of a rule in the amended instrument (amendment *contra legem*); the effect of the modification might be to add something that was consistent with that instrument (amendment *secundum legem*) […] [or] to remove doubts which had arisen (amendment *praeter legem*).' Accordingly, customary international law can also modify a treaty by supplementing it with a novel element or direction, particularly if the extension of the treaty is far-reaching, such that it adds a new 'dimension' to the treaty or its object and purpose(s). For instance, in *Fisheries Jurisdiction (UK v Iceland)*, Merits, Judgment of 25 July 1974, ICJ Reports 3, para. 52, the ICJ found that '[t]wo concepts have crystallized as customary law in recent years arising out of the general consensus revealed at [the

'modification' is mainly one of disapplication rather than validity: the treaty rule is set aside to the extent it conflicts with the customary norm (by contrast, a conflict with a *jus cogens* norm would render the treaty rule invalid[89]). The supervening customary norm does not become an integral part of the treaty but maintains a separate existence.[90]

There are two sources of subsequent customary law that can come to modify a treaty: 'treaty-related' subsequent practice of the parties that eventually diverges from the treaty (which coincides with the process of modification by subsequent practice),[91] or their subsequent practice in relation to a conflicting 'external' customary norm that initially comes into existence through the practice of States outside of the treaty regime, but is eventually taken up by the parties.[92] An example of the former process has occurred in relation to Article 118 of the Third Geneva Convention, which provides that '[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities' – a provision that represents 'one of the most important Articles in the Convention'.[93] At the time of drafting, a proposed amendment to give prisoners a choice of whether or not to return to their home country was rejected by a large majority,[94] and was thus clearly not meant to be part of the treaty. However, through 'treaty-related' customary law generated by the parties' subsequent practice

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Second UN Conference on the Law of the Sea]', namely the right of States to establish 12-mile fishing zones and the principle of 'preferential rights' of fishing. On both counts, the effect was the extension of the provisions of the 1958 Geneva Convention on the High Seas, Article 2 of which, for example, did not foresee any restriction on the freedom of the high seas other than the 'reasonable regard' principle. By contrast, where an issue is not covered by the terms of a treaty and subsequent customary law is merely used to fill in the gap through harmonious interpretation – as discussed further in Section 4.3 below – the outcome is more likely to be interpretation than modification. See e.g. Greig (2003), pp. 91-92. Where subsequent customary law comes to supplement the treaty text, no pre-existing rule is actually being displaced. It may therefore require a lower evidentiary threshold than in cases where subsequent customary law results in a modification with a *contra legem* character, i.e. derogating from *existing* treaty provisions. On the evidentiary threshold required for modification, see further Section 5 below.

[89] Article 64 VCLT.

[90] It therefore differs from treaty modification by subsequent practice, which presumably modifies the treaty's substance, and the result of which in most instances will not be regarded as an independent source of obligation. See Buga (2018a), Sections 3.3.6(a) and 4.6. For this reason, a new customary norm is not as such capable of leading to the desuetude of the treaty (or a provision thereof). The term 'desuetude' refers to the termination of a treaty (or provision thereof) by means of the parties' tacit consent. It constitutes a special form of modification by subsequent practice, whereby the treaty-related conduct of the parties demonstrates their consent to render the treaty (or provision thereof) obsolete. To the extent that customary international law is generated by the practice of the parties in the application of the treaty, the new customary rule will coincide with the process of modification of the treaty through the parties' subsequent practice (see text to fn 91), the effect of which can be desuetude. For instance, Article 5 of the 1944 Chicago Convention on International Civil Aviation prescribes that charter airlines do not have to seek permission to land where they are not carrying passengers or cargo. However, the parties' unopposed and recognized practice has developed to require that airlines request permission in all cases, rendering Article 5 'a virtually dead provision in international air law' – Haanappel (2003), pp. 110-111; see also Feldman (2009), p. 664; Aust (2013), pp. 194, 242. This 'treaty-related' practice can also be taken to reflect a supervening customary norm – see e.g. Pauwelyn (2003), p. 50.

[91] See e.g. Bos (1984), p. 67. See also Article 38 VCLT, which prescribes that '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'.

[92] Waldock, Third Report on the Law of Treaties, p. 34, para. 24; Villiger (1985), para. 284; Dinstein (2006), para. 217.

[93] ICRC Commentary on the 1949 Geneva Conventions (1960), pp. 540-541.

[94] ICRC Commentary on the 1949 Geneva Conventions (1960), pp. 542-544.

over time, Article 118 was modified to such an extent that the practice of granting prisoners of war the choice of whether to be repatriated has now become the norm.[95]

An example[96] of modification by an 'external' customary norm concerns Article 23 of the Fourth Geneva Convention, which relates to the free passage of consignments of, *inter alia*, medical supplies, food, and clothing. The provision has come to be partially displaced (and significantly expanded[97]) by subsequent customary international law as reflected in Article 70 of Additional Protocol I, to which not all parties to the Fourth Geneva Convention are party.[98] Article 70 of the Additional Protocol expands the obligations related to relief operations beyond the originally-envisaged scope of Article 23 of the Fourth Geneva Convention to cover 'rapid and unimpeded passage of all relief consignments, equipment and personnel' and restrict exceptions. This 'broadening is generally accepted, including by States not […] party to Additional Protocol I.'[99]

Subsequent practice diverging from a treaty could also generate (hence 'treaty-related') 'particular' customary law.[100] Moreover, a treaty can come to be modified by an 'external' (general or 'particular') customary norm between certain of the parties only – i.e. *inter se* modification by subsequent customary international law.[101] The *Spanish Fishermen* cases brought before the European Court of Justice are an example.[102] There, the Court found that the law on fishing in the high seas had 'progressively developed with the concurrence of the Spanish authorities'.[103] This evolution had brought about a modification of the pre-existing fisheries regime between Spain and the EC. The resulting regime on fishing in the high seas was 'superimposed on the régime which previously applied'.[104] In other words, subsequent customary norms modified multilateral treaty provisions between only a subset of the parties in relation to Spain's fishing rights in EC waters.

Thus, several different outcomes can be envisioned with regard to the interaction between treaty and subsequent customary norms: (i) a conflicting customary rule may emerge independently of a treaty regime through the practice of non-parties, leaving the treaty unaffected (no modification); (ii) the external customary norm may come to modify the treaty if the practice of the parties so dictates (modification by 'external'

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[95] Dinstein (1982), p. 102; ICRC Commentary on the 1949 Geneva Conventions (1960), pp. 546-547.

[96] Another example is the practice of the United States on targeting military objects. While it is a party to the 1907 Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, its practice relates instead to the customary norm corresponding to Article 57 of Additional Protocol I, to which it is *not* a party, and which consequently impacts upon the contents of the 1907 Hague Convention. See Nolte (2013c), p. 351.

[97] See fn 88 above.

[98] Crootof (2016), p. 272.

[99] ICRC, Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul> accessed 28 April 2022, Rules 55 and 56.

[100] See the definition in fn 54 above.

[101] On the evidentiary threshold for such modification, see further Section 5 below.

[102] See e.g. *Attorney General v Juan C Burgoa* (Case C-812/79) [1980] ECR 2787; *Tome v Procureur de la République, Procureur de la République v Yurrita* (Joined Cases 180 and 266/80) [1981] ECR 2997; *Procureur général près la Cour d'Appel de Pau and others v José Arbelaiz-Emazabel* (Case C-181/80) [1981] ECR 2961.

[103] *Procureur général v Arbelaiz-Emazabel*, para. 30.

[104] *Attorney General v Juan C Burgoa*, para. 24.

custom); (iii) modifying subsequent customary law may emerge as a direct result of the 'treaty-related' practice of the parties, potentially also coupled with the practice of third States (modification by 'treaty-related' customary law); (iv) or treaty provisions may be displaced by a supervening customary norm among certain of the parties only (*inter se* modification by subsequent customary law). The circumstances in which these outcomes occur, and the identification and interpretation processes involved, will be explored further below.

4.2 Validity and practical considerations

Conflicts between treaty and customary law are endemic to international law,[105] particularly since international obligations are continuously expanding and increasingly complex and intertwined. At the same time, it is often difficult if not impossible to formally amend treaties.[106] In the words of one commentator, 'codification may sometimes prove to have been the purchase of immediate consistency and order at the price of later difficulty and divergence'.[107] This increases the likelihood of conflicts between treaties and customary norms, and with it, the need for harmonization through interpretation as well as informal modification, including modification through subsequent customary law. Yet there is nothing automatic or mechanical about interpreting and resolving such normative clashes.

An evident practical issue is that, just as treaties do not usually specify departures from existing customary international law, States are for many reasons reluctant to admit that their practice constitutes a departure from the provisions of a treaty in favour of a new customary norm. This reluctance stems in part from the fact that modification implies deviation from the treaty and, at least initially, might appear to violate the principle of *pacta sunt servanda*. Whether an initial derogation constitutes a breach may depend on the nature of the acts involved and the abruptness of the change. In any case, continual breaches of a treaty by its parties may indicate newly emerging customary law, which can come to modify or even terminate the instrument.[108]

Due consideration must be given to the general presumption against change, but also to the parties' intention. Thus, while the principle of *pacta sunt servanda* may give rise to a – rebuttable – presumption against treaty modification by subsequent customary law, it could be understood in the sense that the interpreter must strive to reconcile the conflicting norms through interpretation. A similar presumption was also expounded by the ILC in the context of its work on 'Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties'[109] – albeit with a focus on the treaty

[105] ILC, Fragmentation Report, para. 486.

[106] See e.g. Buga (2015), pp. 46ff.

[107] Thirlway (1972), p. 143.

[108] Dinstein (2006), para. 216.

[109] See e.g. ILC, 'Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, by Georg Nolte, Special Rapporteur', UN Doc A/CN.4/671 (2014), para. 142 ('States and courts should make every effort to conceive an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way.'); ILC, Report of the International Law Commission on the work of its 70th session, UN Doc A/73/10 (2018) Ch IV ('Subsequent agreements and subsequent practice in relation to the interpretation of treaties') [ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice (2018)], pp. 14 ('Conclusion 7', para. 3) ('It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it.') and 63 ('while the principle of *pacta sunt servanda* is not formally called into question by […] [a] modification of a treaty by subsequent practice [and, by analogy, by customary

impact of subsequent practice rather than customary international law.[110] The strength of the presumption may depend on many factors connected with the nature of the treaty regime and provision in question,[111] as well as the extent to which the modification can be said to displace pre-existing provisions.[112]

In any case, the principle of *pacta sunt servanda* must be viewed in the context of the overarching principle of legitimate expectations. After all, customary international law, like the duty to perform obligations as agreed, is rooted in State consent: 'Given the necessity of combining legal stability with innovation while avoiding abrupt change, modification represents a desirable process for the international legal order, *a fortiori* since customary law corresponds by definition with the interests of States.'[113] As observed by St Thomas Aquinas, an accumulation of acts constituting custom *contra legem* (contrary to existing law) can amount to custom *praeter legem* (alongside the law) where, in light of social development, 'the law is found wanting, and yet so to act will not be wrongful'.[114]

Thus, '[t]here is no reason to feel any unease about custom trumping a treaty (with the tacit consent of the Contracting Parties).'[115] The possibility must exist, and legitimate expectations stemming from subsequent customary law should under certain circumstances be capable of rebutting the presumption against change.[116]

Other issues invoked in relation to the notion of treaty modification by subsequent customary law include the internal constitutional argument that treaties should be modified by the same State organ responsible for their ratification.[117] Yet treaty modification by subsequent customary law is not different in this sense from the process of emergence of customary international law. Customary international law often becomes binding upon States without the active involvement of most States' legislative

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international law] that establishes the agreement of all the parties, it is equally true that the stability of treaty relations may be called into question if an informal means of identifying agreement as subsequent practice could easily modify a treaty.'). Cf. ILC, 'Provisional summary record of the 3205th meeting', UN Doc A/CN.4/SR.3205 (2014), p. 7 (Forteau), arguing that the presumption as to an interpretative rather than modifying effect 'depended on the circumstances'. See further Section 4.3 below on the presumption against conflict.

[110] For a discussion on the extent to which modification by subsequent practice and subsequent customary international law differ, see Buga (2018a), Section 4.6.

[111] See e.g. by analogy ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice (2018), p. 62 para. 35, citing Buga (2018b). The presumption against modification by ('particular') customary international law is higher, for instance, in the case of boundary treaties, in light of the principle of stability of boundaries. Thus, in *Cameroon v Nigeria*, the ICJ effectively held that, where a boundary has previously been delimited, there is a presumption against modification in favour of the title-holder under the treaty – *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v Nigeria: Equatorial Guinea intervening*), Judgment of 10 October 2002, ICJ Reports 303, para. 68. See also Nolte (2013a), p. 205.

[112] See text to fns 77-79 and fn 88 above: where subsequent customary law merely *supplements* the content of the treaty, no pre-existing rule is displaced. The strength of any presumption against change is therefore lower than in cases where subsequent customary law results in a modification with a *contra legem* character, i.e. derogating from the content of existing treaty provisions.

[113] Villiger (1985), para. 333.

[114] As cited in Thirlway (1972), p. 146.

[115] Dinstein (2006), para. 277.

[116] Villiger (1985), para. 345; Byers (2001), pp. 109, 176.

[117] See e.g. Kivilcim-Forsman (1996), p. 215. See also the similar discussion in relation to modification by subsequent practice in Buga (2018a), Section 3.3.2(a).

or executive organs, even when its content diverges from that of existing norms. Once again, it must be emphasized that modification by customary international law becomes established on the basis of the parties' intention, which can in turn be evidenced by their practice at the national level – in other words, the legislative, executive, or judicial branches of State act in a sufficiently consistent manner, whether expressly through special domestic procedures or not, such that their overall combined practice transpires at the international level as an intention to modify the treaty. Therefore, while this argument may be a (political) concern, it does not refute the modifying potential of subsequent customary law.

It should also be mentioned that the possibility of modification by subsequent customary law does not undermine the option of recourse to formal amendment processes. Rather, the two can be regarded as complementary or alternative adaptation mechanisms.[118] For one thing, modification by customary law, like modification by subsequent practice, may be better suited for very gradual change given its inherent flexibility and informal nature.

Indeed, from a practical and political standpoint, customary modification is necessary in view of the fact that treaties may be nearly impossible to formally amend, '[giving] over the development of international law almost entirely into the hands of custom, operating upon and beyond the codifying treaties.'[119] Certain customary rules may become so well established that States do not consider it necessary to codify them or amend conflicting older treaties anymore. Moreover, denying the possibility of treaty modification through customary law ultimately goes against the very purpose of the numerous treaties declarative of customary law.[120]

It is therefore submitted that modification by subsequent customary international law is a reality, and oftentimes a practical necessity, in treaty relations. Nevertheless, the modifying effect of newly emerged customary law must not be presumed, and must be qualified by certain important considerations. These are dealt with in the ensuing section.

4.3 Establishing the existence of a 'genuine' conflict between treaty and customary norms: distinguishing interpretation from modification

Determining the extent to which subsequent customary international law impacts a pre-existing treaty – and indeed whether such impact transcends the realm of what can be reconciled through interpretation – is not only a matter of ascertaining the existence of that customary norm. It is also a matter of determining the extent to which the customary norm diverges from the contents of the treaty and potentially veers outside of the interpretative realm into modification – which is a process of interpretation in itself.[121]

Making the distinction between interpretation and modification is of more than just theoretical interest. For one thing, the impact of customary international law upon a

[118] See by analogy Buga (2018a), Section 3.3.4.

[119] Thirlway (1972), p. 146.

[120] Byers (2001), p. 177.

[121] As we shall see in Section 5 below, the final determination of whether such modification has actually occurred requires the establishment of the parties' specific consent to that end.

treaty can have far-reaching consequences and radically alter its obligations, like entirely changing the mandate of an international organization.[122] It can also have jurisdictional implications for dispute settlement bodies with regard to the underlying basis of the dispute. If a customary norm has displaced a treaty provision and created an independent obligation, the dispute may no longer be about the treaty's 'interpretation and application' as the jurisdictional clause may require, requiring the dispute settlement body to decide whether it is dealing with a supervening customary norm or not.[123]

As discussed, the term 'modification' is taken to refer to the displacement of treaty provisions by subsequent customary international law.[124] It entails the existence of a 'genuine' conflict between the contents of a treaty provision and a subsequent customary norm. This is the case when the norms in question cannot sensibly be read together or complied with simultaneously.[125] The existence of a 'genuine' conflict (and, hence, the scope for modification by subsequent customary law[126]) is not to be presumed.[127] Accordingly, conflicts, and therefore potential perceived displacements of treaty provisions by subsequent customary norms, must be construed narrowly. Nevertheless, the presumption is 'against the existence of conflict, not a presumption in favour of the earlier rule in the event there is a real conflict'.[128] Of course, determining the existence of a conflict is precisely the root of the problem, since it is itself a matter of interpretation: '[r]ules appear to be compatible or in conflict *as a result of interpretation*.'[129] The determination begins with the side-by-side interpretation of the treaty and the customary norm, in application of the VCLT rules of interpretation and their customary counterparts.

One must first attempt to reconcile a treaty rule with a seemingly conflicting subsequent customary norm through harmonious interpretation, and in line with the principle of effectiveness, in a way that causes 'minimal disturbance' to the functioning of the

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[122] One can for instance think here of the normative transformation – through a process of modification by ('particular') customary law – of key provisions of the UN Charter over time, the expansion of the mandate of the North Atlantic Treaty Organization from collective defence to a much broader set of security-related tasks, or the expansion of the original scope of operation of the World Bank beyond its Articles of Agreement to tackle modern social and governance issues in the post-1945 era. See Buga (2018a), Sections 5.3.1(a), (b), and (e).

[123] Note e.g. the argument that a modifying later customary rule may not be able to form the basis for a claim of breach before a WTO panel with substantive jurisdiction covering only claims strictly regarding the WTO agreements (to the extent that it cannot be read into the WTO regime through interpretation). See Pauwelyn (2003), p. 142.

[124] See Section 4.1 above. See in particular fn 88 above: where subsequent customary law merely *supplements* the content of the treaty, no pre-existing rule is displaced. See also Section 4.2 above regarding the general presumption against change.

[125] See e.g. Article 59(1)(b) VCLT. See also e.g. Villiger (1985), para. 311; Sadat-Akhavi (2003), p. 241. The definition of a 'genuine' conflict as the impossibility of joint compliance applies regardless of whether the conflict is only between mutually exclusive *obligations* (strict view) or between mutually exclusive *norms*, i.e. rights and obligations (broader view).

[126] Since the modification of treaty provisions by subsequent customary law is distinguished from interpretation in accordance with subsequent customary law by assessing the extent to which there is a *conflict* between the original treaty provisions and the substance of the subsequent customary norm, a presumption against conflict entails a presumption against modification by subsequent customary law.

[127] ILC, Fragmentation Report, para. 37; Pauwelyn (2003), p. 240.

[128] Pauwelyn (2003), p. 242.

[129] ILC, Fragmentation Report, para. 412.

international legal system.[130] This could be done by reference to 'collision rules' or 'conflict-resolution' techniques such as *lex specialis derogat lege generali* and *lex posterior derogat priori*, although they arguably constitute policy arguments rather than organizing principles.[131] Collision rules do not render themselves applicable in any automatic or mechanical way. For instance, it may not necessarily hold true that the norm that is more concrete takes better account of the particular context in which it is to be applied.[132] The result will always be subject to the intention of the parties and depend, *inter alia*, on the status and degree of generality of the treaty,[133] as well as the nature of individual provisions and, evidently, their normative status (such as *jus cogens* norms).[134] In the case of a conflict between human rights norms, for example, 'the one that is more favourable to the protected interest is usually held overriding'.[135] As to the more straightforward issue of *lex superior*, a customary norm that represents *jus cogens* will automatically invalidate any contrary pre-existing treaty provision. The same is true of Article 103 of the UN Charter and most likely also of *erga omnes* obligations.[136]

A convenient point of departure to distinguish between interpretation and modification – and determine whether one can speak of a 'genuine' conflict – is by assessing whether the content of the customary norm diverges significantly from a plausible interpretation of the 'natural and ordinary meaning' of the treaty terms.[137] The same can be said of situations in which the substance of the subsequent customary norm conflicts with the treaty's (original) object and purpose(s).[138] In cases involving the creation of new maritime zones in contradiction of key provisions of the 1958 Geneva Conventions, for instance, divergence from the original treaty provision leaves little doubt that subsequent customary law has led to modification.[139]

However, the line between interpretation and modification can be blurred even when dealing with seemingly clear situations or terms,[140] let alone in relation to ambiguous treaty provisions. The wider the range of interpretations available, the more difficult it will be to tell when a modification has occurred.[141] Therefore, '[m]odification can arguably be defined as the situation where the new rule cannot be fit into <u>any</u> of the plausible meanings that could be given to the treaty text [Article 31(1) VCLT], nor into the special meaning [Article 31(4) VCLT] which the parties intended to give to the text at the time of its adoption.'[142] The same can be said of terms that are inherently 'evolutionary' or which can be expanded by means of the doctrine of implied powers.[143]

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[130] Ibid. para. 410.

[131] Ranganathan (2013), p. 94.

[132] ILC, Fragmentation Report, para. 224 fn 289.

[133] Ibid. para. 259.

[134] Ibid. para. 108.

[135] Ibid.

[136] Ibid. para. 241.

[137] See e.g. Waldock, Third Report on the Law of Treaties, p. 61, para. 25.

[138] ILC, Fragmentation Report, para. 24; Pauwelyn (2003), p. 50.

[139] See e.g. the examples in the text to fn 82 and in fn 88 above.

[140] Nolte (2013a), p. 180.

[141] See e.g. Ford (1999), p. 104.

[142] Ruys (2011), p. 23 (emphasis in the original).

[143] See Buga (2018a), Section 3.5.2, on evolutionary interpretation and implied powers as alternative adaptation mechanisms in relation to subsequent practice.

That is where Article 31(3)(c) VCLT (or its customary counterpart[144]) becomes important in interpreting the interaction between pre-existing treaties and subsequent customary norms, though it has been argued that it 'scarcely covers this aspect with the degree of clarity requisite to so important a matter'.[145] Article 31(3)(c) requires the interpreter to take into account 'any relevant rules of international law applicable in the relations between the parties', also when there is 'an inconsistency, a conflict, an overlap between two or more norms, and no other interpretative means provides a resolution'.[146] Its formulation is broad enough to include relevant customary norms applicable between the parties.[147] New norms from different legal fields can be read into the treaty as long as the treaty itself is open to such an evolutionary interpretation, thus facilitating the 'cross-fertilization' of international law.[148] The overall process of Article 31(3)(c) therefore already includes techniques such as *lex specialis* and *lex posterior*.[149]

This principle of 'systemic integration' provides an alternative mechanism for treaty adaptation – particularly in relation to evolutionary interpretation, which at least partly has its roots in Article 31(3)(c) VCLT.[150] Treaty provisions can therefore undergo change in line with subsequent customary law without the need for actual modification.[151] For example, investment tribunals have considered that the meaning of certain declaratory provisions in investment treaties, such as the 'fair and equitable treatment' standard, are constantly evolving in accordance with changing customary international law.[152] Another, more controversial, example is the characterization by multiple tribunals of the NAFTA Free Trade Commission's 2001 Interpretation of the 'minimum standard of treatment' in NAFTA Article 1105 as evolutionary interpretation rather than modification by subsequent customary law.[153]

And yet evolutionary interpretation has its limits. 'Harmonious' interpretation can only resolve apparent, not genuine, conflicts:

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[144] In fact, it has been noted that recourse to the *customary counterpart* of Article 31(3)(c) VCLT entails using Article 31(3)(c) *VCLT* itself as a 'relevant rule' for the purposes of interpreting the customary counterpart of that VCLT rule of interpretation – Merkouris (2017), p. 149.

[145] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, Separate Opinion of Vice-President Weeramantry, ICJ Reports 88, p. 114.

[146] ILC, Fragmentation Report, para. 420.

[147] See e.g. Sands (1998), p. 95. On the other hand, it could be argued that where a customary rule and a treaty rule clearly differ in that the latter is much more stringent than the former, the customary norm, as *lex generalis*, should not be read into treaty provisions intended precisely to provide a different standard as *lex specialis* – Paparinskis (2012), p. 23.

[148] Sands (1998), pp. 85ff.

[149] Merkouris (2010), p. 186; Borgen (2012), p. 454.

[150] See Buga (2018a), Sections 2.5.3 and 3.5.2.

[151] Nolte (2013c), p. 353.

[152] *Pope & Talbot Inc v Canada*, UNCITRAL Arbitration under Chapter Eleven of NAFTA, Award on Damages, 31 May 2002, paras. 46, 54-62; *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, Award of 9 January 2003, para. 184; *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Award of 26 January 2006, para. 194.

[153] See e.g. *Mondev v US*, para. 125; *ADF v US*, para. 179; *Waste Management v Mexico*, paras. 91-93, 98; *International Thunderbird Gaming*, para. 194.

> [W]ords are not infinitely elastic. As new norms become widely accepted, certain inflexible treaty obligations will appear progressively more absurd or impractical, and proposed [evolutionary] interpretations attempting to resolve discrepancies between treaty law and state action will appear less plausible and convincing.[154]

Article 31(3)(c) entails that the customary norm is read into the treaty provision, not applied instead of it. Its scope does not extend to modification by subsequent customary law. Accordingly, treaty modification by customary law can be said to have occurred where a non-identical customary rule emerges in respect of the treaty's subject matter, and interpretation pursuant to Article 31(3)(c) is no longer sufficient to account for the observed practice.[155] Put slightly differently, the demarcation between interpretation on the one hand, and modification by customary law on the other, lies where the customary norm can no longer be regarded as 'secondary' to the treaty provision in question.

If such an incompatibility between the treaty provision and the subsequent customary norm, irreconcilable through interpretation, is proven to exist, the customary norm can come to displace the conventional norm if the parties' so intended. This latter requirement will be the focus of the next section.

5 Identifying and interpreting treaty modifications by subsequent customary law: the evidentiary threshold of 'double consent'

Building on the previous discussion, determining the extent to which subsequent customary international law is relevant for a pre-existing treaty is not only a matter of ascertaining the existence of the customary norm in the first place, or of then determining the extent to which that customary norm diverges from the treaty. It is also a matter of establishing the consent of the parties to displace the treaty provision in favour of the subsequent customary rule – a deductive process in essence similar to determining the existence of the customary norm. It is the *consent* of the parties, *not* the customary rule *as such*, that is capable of modifying the treaty. Without this step, the normative conflict between the treaty and subsequent customary norm cannot result in modification; the treaty would simply remain unaffected.

The requirements for treaty modification by subsequent customary law are strict, also in light of the general presumption against change.[156] The parties' practice must attain the necessary evidentiary threshold.[157] This threshold is understood to contain a 'double consent' requirement: the practice must not only confirm the contents of the customary norm, but also that it is meant to modify the provisions of the treaty.[158] Such intention must be clearly demonstrated, since 'the guiding principle must be that the more we move up the interpretive continuum towards overt modification, the higher the

[154] Crootof (2016), pp. 247-248.

[155] Sands (1998), p. 86.

[156] See the discussions in Sections 4.2 and 4.3 above on the presumption against change and conflict.

[157] The evidentiary threshold for treaty modification may generally be higher depending on the nature of the treaty and provision concerned, looking for example at its object and purpose, any special provisions on non-derogation, and other considerations like third-party rights created by that treaty. A full discussion of these issues goes beyond the scope of this article. See further Buga (2018a), Sections 3.5 and 4.4.2.

[158] See e.g. Orakhelashvili (2008), p. 129; Akehurst (1974-1975), pp. 275-276; Kontou (1994), pp. 132-133, 145-146.

evidentiary standard that must be reached in terms of State practice and *opinio juris*'.[159] Thus, for instance, in the 1977 *UK-France Continental Shelf Arbitration*, the Court of Arbitration recognized 'the importance of the evolution of the law of the sea […] and the possibility that a development in customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations.'[160] Nevertheless, it considered that – given how recently the 1958 Geneva Convention on the Continental Shelf had entered into force and in light of indications that the parties still regarded it as such – 'only the most conclusive indications of the intention of the parties to the 1958 Convention to regard it as terminated could warrant this Court in treating it as […] inapplicable'.[161]

Of course, detecting 'double consent' may be tricky, since parties presumably demonstrate their intention to override the treaty precisely by adhering to the new customary rule. Therefore, 'it may be difficult to assess whether a certain practice by a state [party] […] constitutes subsequent practice to the respective treaty or adds to a development of customary law, or both'.[162]

Modification by 'external' customary law may be more controversial than by 'treaty-related' customary law in this respect.[163] 'Treaty-related' customary modification is fuelled by the practice of the parties 'in the application of the treaty'. By contrast, modification through 'external' customary law is initially triggered by the parties' practice in relation to the external norm. It is even conceivable that parties may continue applying a certain treaty rule between them, while at the same time contributing to the emergence of a conflicting customary rule in relation to non-parties to the treaty.[164] Any extrinsic rule has no treaty modifying effect unless it comes to be applied by the parties in relation to the treaty. Modification by 'external' customary law therefore presumably requires a higher evidentiary threshold for modification than 'treaty-related' customary law. The exception is if the treaty is of near-universal participation, in which case the notions of 'treaty-related' and 'external' norms effectively coincide.

Where *declarative* treaty provisions are concerned, modification may entail altering not only the contradictory treaty rule, but also the pre-existing customary norm.[165] The modification of two parallel rules may take longer and require a higher evidentiary threshold in terms of practice. This is because they require the creation of a 'completely

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[159] Ruys (2011), p. 29.

[160] *Delimitation of the Continental Shelf (United Kingdom/ France)*, Decisions of 30 June 1977 and 14 March 1978, 18 RIAA 3, para. 47.

[161] Ibid.

[162] Nolte (2013c), p. 352.

[163] See e.g. Thirlway (1972), pp. 132, 139; Byers (2001), p. 242. See also Kammerhofer (2011), p. 136, on the preference to 'accord the privilege of modificability only to "treaty-specific" (inter se) customary law'. This approach appears to be premised on a misunderstanding of 'external' customary law: if the latter initially develops independently of the treaty, but is eventually taken up by the treaty parties, there is no reason why it may not also come to modify the treaty in accordance with the parties' will.

[164] See text to fn 31 above.

[165] This may be further nuanced by the fact that the threshold required for a modification by subsequent customary law entailing the displacement of existing treaty provisions is presumably higher than the threshold for customary law that expands or supplements (the scope of) the treaty. See fns 88 and 115 above.

new body of State practice', coupled with *opinio juris*, in favour of the new customary rule.[166]

Moreover, the case law suggests that the threshold of proof for modification by 'particular' customary law is higher still: such a modification only becomes binding on those States who have (tacitly) agreed to it through their subsequent practice in deviation from the treaty, and who are regarded as members of the same 'community' in which the 'particular' customary rule has been established, as long as they have not consistently protested against it.[167] Applying the conditions set out in Article 41 VCLT by analogy, an *inter se* modification must not affect the other parties' enjoyment of their rights or performance of their obligations under the treaty, nor relate to provisions derogation from which would be incompatible with the execution of the object and purpose of the treaty.

However, these conditions should not be applied so prohibitively that they impede legal development.[168] In fact, this higher threshold is not often applied in practice. For instance, the ILC found the 'non-responsibility rule' in Article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, which previously codified customary international law, to have been modified by 'the present customary rule' on 'effective nationality' reflected in Article 7 of the 2006 Draft Articles on Diplomatic Protection.[169]. Despite the fact that the parties' practice had contributed to the customary modification of the Hague Convention,[170] as supported by the case law, the ILC did not substantiate its conclusion based on an actual evaluation of practice.

6 Final remarks

It has been shown that it is only after the existence and substance of a customary norm have been ascertained, that its relation to a pre-existing treaty can be assessed to determine whether there is potential for modification, subject to certain crucial requirements. The modifying potential of customary law must be examined by reference to its non-hierarchical relation to treaties. Normative conflicts such as those between subsequent customary law and pre-existing treaties are highly sensitive to context and require a balanced, holistic analysis of the norms involved. They must be resolved on a case-by-case basis with regard to the quality and quantity of practice, the nature of the treaty and provisions affected, and that which poses 'minimal disturbance to the operation of the legal system'.[171] Accordingly, the pre-existing treaty norm and the customary norm must be interpreted side-by-side to determine whether the customary and treaty norms can be reconciled through harmonious interpretation or whether there is a genuine incompatibility between them – thus testing the limits of the rules of interpretation.

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[166] Villiger (1985), para. 331.

[167] Thirlway (1972), p. 139.

[168] Villiger (1985), para. 329.

[169] ILC, 'Draft Articles on Diplomatic Protection with commentaries', UN Doc A/61/10 (2006), Article 7, Comment 4.

[170] Nolte (2013c), p. 350 and fn 276.

[171] ILC, Fragmentation Report, para. 410.

The final inductive step of the process is to ascertain the parties' consent to modify the treaty in line with the customary norm as a separate requirement. While the practice evidencing the parties' consent to the treaty modification may be difficult to distinguish in certain cases from the practice of the parties in relation to the customary norm itself, it is nevertheless important to direct the inductive and interpretative exercise with this objective in mind. Against the backdrop of the organic and continuous interplay between treaties and customary international law, safeguarding the parties' intention is paramount.

Dispute settlement bodies do not tend to approach these inductive and deductive steps methodically or indeed even explicitly. With regard to the *identification* of newly formed customary international law, the international case law demonstrates a 'marked tendency to assert the existence of a customary rule more than to prove it'.[172] Moreover, while it is safe to say that dispute settlement bodies frequently engage in the *interpretation* of customary international law and sometimes even explicitly label the operation they engage in as such, in many cases this interpretative process is not expressly acknowledged or in any event differentiated from the 'default' process of treaty interpretation through the VCLT rule.

When it comes to the further step of acknowledging and unpacking the concept of treaty *modification* by customary international law, the case law gets more obscure. It shows that many dispute settlement bodies have effectively, if not explicitly, recognized the possibility of treaty modification by subsequent customary law.[173] Yet even where dispute settlement bodies recognize that such a modification has occurred, there is insufficient consistency in explaining the underlying analysis. The relevant passages are often too brief to draw generalizable conclusions and only indicate how the change affects the content of the specific treaty, without setting out criteria or circumstances used to determine that a treaty modification has occurred. That makes it more difficult to find a consistent approach to identifying and interpreting 'customary modifications'.

It is not surprising that dispute settlement bodies are perhaps especially reluctant to deal head-on with a potential displacement of treaty provisions by customary law. That reluctance may stem, at least in part, from the perception that States are wary of dispute settlement bodies using modification explicitly, but 'are quite happy amongst just themselves to view a treaty as modified based on mutual understandings'.[174] While some dispute settlement bodies have pointed out their duty to interpret rather than to revise treaties,[175] this consideration does not prohibit them from recognizing modification by subsequent practice where it has occurred, *ipso facto* based on the will of the parties. But dispute settlement bodies may also be wary of the contentious process of identifying potential instances of 'customary modification'. This is understandable given the multi-layered interpretative and evidentiary processes (at least theoretically) involved in determining the potential effect of clashing customary and conventional norms, requiring findings as to the contents of the customary norm, their relation to the treaty, as well as evidence of the parties' intention to modify the latter. Dispute settlement bodies must nevertheless do so from a judicial and legal perspective:

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[172] Pellet (2011), p. 1076.

[173] See for examples: Buga (2018a), Sections 2.5.1, 5.2.2, and 5.2.3(a).

[174] Murphy (2013), p. 83.

[175] See e.g. *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania (Second Phase)*, Advisory Opinion of 18 July 1950, ICJ Reports 221, p. 229; *Rights of Nationals*, p. 196.

'[Just as] it is the duty of a tribunal "to interpret treaties, not to revise them", it is equally the duty of a tribunal to interpret them as revised, and to give effect to any revision arrived at by the parties'.[176]

Ultimately, while the potential treaty modifying effect of customary international law may be generally recognized in theory, the recognition and application of the treaty impact of customary international law in specific cases may depend on the extent to which it can withstand a more systematic examination based on certain interpretative steps and evidentiary standards. This ensures that the outcome follows the ultimate intention of the treaty parties – and strikes the balance between stability on the one hand, and the organic evolution of, and norm interaction within, the framework of international law on the other.

[176] Fitzmaurice (1957), p. 225. See also Gardiner (2008), pp. 225-249; Arato (2013), p. 309.

LIST OF REFERENCES

Akehurst M (1974-1975) ‘The Hierarchy of the Sources of International Law’. BYBIL 47: 273

Ammann O (2019) Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example. Brill/Nijhoff, Leiden/Boston

Arato J (2013) ‘Treaty Interpretation and Constitutional Transformation’. Yale JIL 38: 289

Aust A (2013) Modern Treaty Law and Practice, 3rd edn. Cambridge University Press, Cambridge

Borgen CJ (2012) ‘Treaty Conflicts and Normative Fragmentation’. In: Hollis DB (ed) The Oxford Guide to Treaties. Oxford University Press, Oxford, 448

Bos M (1984) A Methodology of International Law. Elsevier Science Publishers, Amsterdam

Bowman MJ (2007-2008) ‘“Normalizing” the International Convention for the Regulation of Whaling’. MJIL 29: 293

Buga I (2015) ‘Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification and Regime Interaction’. In: Rothwell DR et al. (eds) The Oxford Handbook on the Law of the Sea. Oxford University Press, Oxford, 46

Buga I (2018) Modification of Treaties by Subsequent Practice. Oxford University Press, Oxford

Buga I (2018) ‘Subsequent Practice and Treaty Modification’. In: Bowman MJ and Kritsiotis D (eds) Conceptual and Contextual Perspectives on the Modern Law of Treaties. Cambridge University Press, Cambridge, 363

Byers M (2001) Custom, Power and the Power of Rules: International Relations and Customary International Law. Cambridge University Press, Cambridge

Cheng B (1965) ‘United Nations Resolutions on Outer Space: “Instant” International Customary Law?’. IJIL 5: 23

Crawford J (2013) ‘A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties’. In: Nolte G (ed) Treaties and Subsequent Practice. Oxford University Press, Oxford, 29

Crema L (2013) ‘Subsequent Agreements and Subsequent Practice Within and Outside the Vienna Convention. In: Nolte G (ed) Treaties and Subsequent Practice. Oxford University Press, Oxford, 13

Cryer R (2006) ‘Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study’. JCSL 11: 239

Crootof R (2016) ‘Change Without Consent: How Customary International Law Modifies Treaties’. Yale JIL 41: 237

D’Amato AA (1971) The Concept of Custom in International Law. Cornell University Press, Ithaca/London

D'Amato AA (1998) 'Customary International Law: A Reformulation'. ILT 4: 1

Danilenko GM (1993) Law-Making in the International Community. Martinus Nijhoff, Dordrecht/Boston

Dinstein Y (1982) 'Refugees and the Law of Armed Conflict'. IsrYbHR 12: 94

Dinstein Y (2006) 'The Interaction between Customary International Law and Treaties'. RC 322: 243

Distefano G (1994) 'La pratique subséquente des États parties à un traité'. AFDI 40: 41

Dupuy R-J (1974) Coutume sage et coutume sauvage. In: Mélanges offerts à Charles Rousseau: la communauté internationale. Pédone, Paris, 75

Feldman AM (2009) 'Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement'. NYU J Intl L & Pol 41: 655

Ford S (1999) 'Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of Treaties'. JCSL 4: 75

Fitzmaurice G (1953) 'The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law'. BYBIL 30: 1

Fitzmaurice G (1957) 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points'. BYBIL 33: 203

Gardiner RK (2008) Treaty Interpretation. Oxford University Press, Oxford

Greig DW (2003) Intertemporality and the Law of Treaties. British Institute of International and Comparative Law, London

Guzman AT (2005) 'Saving Customary International Law'. MJIL 27: 115

Haanappel PPC (2003) The Law and Policy of Air Space and Outer Space: A Comparative Approach. Kluwer Law International, The Hague

Kadens E and Young EA (2013) 'How Customary Is Customary International Law?'. Wm & Mary L Rev 54: 885

Kammerhofer J (2011) Uncertainty in International Law: A Kelsenian Perspective. Routledge, New York, 132

Kirgis FL (1987) 'Custom on a Sliding Scale'. AJIL 81: 146

Kivilcim-Forsman Z (1996) 'Principe d'egalité entre le traité et la coutume en droit international public'. J Faculty of Law, Ankara Univ, 45: 211

Klabbers J (2011) 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organisation'. NJIL 74: 405

Klabbers J (2011) ‘Beyond the Vienna Convention: Conflicting Treaty Provisions’. In: Cannizzaro E (ed) The Law of Treaties Beyond the Vienna Convention. Oxford University Press, Oxford, 192

Kontou N (1994) The Termination and Revision of Treaties in the Light of New Customary International Law. Clarendon Press, Oxford

Lillich RB (1995–96) ‘The Growing Importance of Customary International Human Rights Law’. Ga J Intl & Comp L 25: 1

McLachlan C (2005) ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’. ICLQ 54: 279

McNair AD (1961) The Law of Treaties. Clarendon Press, Oxford

Meijers H (1978) ‘How Is International Law Made? The Stages of Growth of International Law and the Use of its Customary Rules’. NYBIL 9: 3

Merkouris P (2010) ‘Article 31(3)(c) of the VCLT and the Principle of Systemic Integration’. PhD, Queen Mary University of London

Merkouris P (2017) Interpreting the Customary Rule on Interpretation. ICLR 19: 126

Meron T (2011) The Making of International Criminal Justice: A View from the Bench: Selected Speeches. Oxford University Press, Oxford

Murphy SD (2013) ‘The Relevance of Subsequent Agreements and Subsequent Practice for the Interpretation of Treaties’. In: Nolte G (ed) Treaties and Subsequent Practice, Oxford University Press, Oxford, 82

Mus JB (1998) ‘Conflicts between Treaties in International Law’. NILR 45: 208

Nolte G (2013) ‘Introductory Report for the Study Group on Treaties over Time: Jurisprudence of the International Court of Justice and Arbitral Tribunals of Ad Hoc Jurisdiction Relating to Subsequent Agreements and Subsequent Practice’. In: Nolte G (ed) Treaties and Subsequent Practice. Oxford University Press, Oxford, 169

Nolte G (2013) ‘Second Report for the ILC Study Group on Treaties over Time: Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice’. In: Nolte G (ed) Treaties and Subsequent Practice. Oxford University Press, Oxford, 210

Nolte G (2013) ‘Third Report for the ILC Study Group on Treaties over Time: Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings’. In: Nolte G (ed) Treaties and Subsequent Practice. Oxford University Press, Oxford, 307

Orakhelashvili A (2008) The Interpretation of Acts and Rules in Public International Law. Oxford University Press, Oxford

Paparinskis M (2012) ‘Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules’. In: Fauchald OK and Nollkaemper A (eds) The Practice of International and Nationals Courts and the (De-)Fragmentation of International Law. Hart Publishing, Oxford, 87

Pauwelyn J (2003) Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law. Cambridge University Press, Cambridge

Pellet A (2011) Shaping the Future of International Law: The Role of the World Court in Law-Making. In: Arsanjani MH et al. (eds) Looking to the Future: Essays on International Law in Honor of W. Michael Reisman. Martinus Nijhoff, Boston, 1065

Ranganathan S (2013) 'Between Philosophy and Anxiety? The Early International Law Commission, Treaty Conflict and the Project of International Law'. BYBIL 83: 82

Ruys T (2011) 'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice. Cambridge University Press, Cambridge

Sadat-Akhavi SA (2003) Methods of Resolving Conflicts between Treaties. Martinus Nijhoff, Leiden/Boston

Sands P (1998) 'Treaty, Custom and the Cross- Fertilization of International Law'. Yale HR & Dev LJ 1: 85

Sands P and Commission J (2010) 'Treaty, Custom and Time: Interpretation/Application?'. In: Fitzmaurice M et al. (eds) Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On. Martinus Nijhoff, Leiden, 39

Schabas W (2009) 'Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals'. In: Doria J et al. (eds) The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko. Martinus Nijhoff, Leiden, 77

Schachter O (1989) 'Entangled Treaty and Custom'. In: Dinstein Y and Tabory M (eds) International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne. Martinus Nijhoff, Dordrecht/Boston, 717

Shaw MN (2008) International Law, 6th edn. Cambridge University Press, Cambridge

Shihata I (2000) 'The Dynamic Evolution of International Organizations: The Case of the World Bank'. J Hist Intl L 2: 217

Sorel M and Boré Eveno V (2011) 'Article 31 (1969)'. In: Corten O and Klein P (eds) The Vienna Conventions on the Law of Treaties: A Commentary, vol I. Oxford University Press, Oxford, 805

Thirlway HWA (1972) International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law. A.W. Sijthoff International Publishing, Leiden

Torres Bernárdez S (1998) 'Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties'. In: Hafner G et al. (eds) Liber Amicorum Professor Seidl-Hohenveldern in Honour of his 80th Birthday. Kluwer Law International, The Hague, 721

Treves T (2006) 'Customary International Law'. In: Wolfrum R (ed), Max Planck Encyclopedia of Public International Law. Oxford University Press, Oxford

Van Hoof GJH (1983) Rethinking the Sources of International Law. Kluwer, The Hague

Venzke I (2012) How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, Oxford

Villiger ME (1985) Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties. Martinus Nijhoff, Dordrecht

Villiger ME (2009) Commentary on the 1969 Vienna Convention on the Law of Treaties. Martinus Nijhoff, Leiden/Boston

Worster WT (2013) 'The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law'. BU Intl LJ 31: 1