ABHANDLUNGEN

Thoughts on Codification

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I. Introductory

To say that we are witnessing a landslide of codification of international law unprecedented in history is a commonplace. Suffice it to mention only the most outstanding milestones in this process: Geneva 1958: the four conventions concerning the law of the sea (Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas, Convention on the Continental Shelf); Vienna 1961: Convention on Diplomatic Relations; Vienna 1963: Convention on Consular Relations; Vienna 1969: Convention on the Law of Treaties[1]). All these conventions are based on drafts prepared by the International Law Commission[2]). Far

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[1]) For a general survey of codification activities under the auspices of the United Nations see Steinberger, Bemühungen zur Kodifizierung und Weiterbildung des Völkerrechts im Rahmen der Organisation der Vereinten Nationen, ZaöRV vol. 28, pp. 617—645; for basic texts see United Nations, Office of Public Information, The Work of the International Law Commission (New York); for the Vienna Convention on the Law of Treaties, see Reuter, La Convention de Vienne sur le droit des traités (Paris 1970).

from resting on well-deserved laurels, the ILC continues its work, the aim and ambition apparently being to codify, in due course, practically the whole body of international law.

Whatever the future may bring, the achievements up to date are impressive enough to justify not only a comment to this or that particular convention but, moreover, an overall reconsideration of the global problem of codification of international law in our time. No single paper can claim to live up to such task. All it can try to do is to initiate a wider discussion on the subject. Any such discussion must of necessity take as a starting point an attempt at a clarification of both terminology and notions.

II. The Notion of Codification

Contrary to widespread belief, the notion of codification is neither clear nor unequivocal. The only thing that can be said with reasonable certainty is that codification means the making of a code, the latter being a comprehensive legal act containing rules governing a given matter[3]). Such a purely formal approach seems perfectly correct, but can scarcely help with the difficulties which arise immediately.

What constitutes a codification? Does codification mean exclusively the process of finding, collecting and systematizing existing rules? Is it, on the contrary, an act of legislation *ex nihilo*? Or, finally, does it contain old rules as well as new[4])? A glance at the known historical examples of the codification of municipal law shows that such questions are justified. For these examples represent a wide variety of types, ranging from the mere collecting and systematizing of the existing normative material (*e.g.* the

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[2]) Hereinafter the ILC. Concerning the ILC, see the leading monograph by Briggs, The International Law Commission (Ithaca, New York 1965).

[3]) «La codification consiste dans la confection d'un code, c'est-à-dire dans un recueil unique qui a la prétention de contenir toutes les règles relatives à certains rapports juridiques», Planiol, Traité élémentaire de droit civil (Paris 1948) vol. 1, p. 49. "In the broadest sense ... it means merely the making of a code", Baker, The Codification of International Law, British Year Book of International Law (BYIL) 1924, p. 40.

[4]) "But to say that codification means the making of a code conceals an ambiguity which it is important for both practical and theoretical reasons to remove. Is the code to be a code of the existing legal obligations of States, or a code of new law? Is it to be the existing law reduced to writing, classified, clarified, freed of confusions and contradictions; or is it to be a re-drafting of the rules of international law in accordance with a new conception of what the relations of States ought to be"? Baker, *op. cit., ibid.* Cf. Sir Cecil Hurst, A Plea for the Codification of International Law on New Lines, Transactions of the Grotius Society (1946), p. 146. Kägi speaks correctly of »... die verschiedenen Begriffe ..., die hinter dem gemeinsamen Ausdruck stehen«, Kodifikation, in: Strupp-Schlochauer, Wörterbuch des Völkerrechts (Berlin 1961) vol. 2, p. 228.

coutumiers of Northern France[5])), through what was probably *ex nihilo* legislation (*e.g.* the law of the twelve tables) up to a simple reception of a foreign code (*e.g.* reception of the French Code civil in a large part of Europe and even in a part of America in the 19th century, reception of the Swiss Civil code by Turkey in 1926). The two most celebrated codifications in history, Justinian's Corpus iuris and Napoleon's Code civil constituted largely a work of systematization of existing material, but even in those two cases such material was subject to considerable elaboration and creative adaptation to the needs of the time.

According to widespread opinion, codification *sensu stricto* means exclusively the finding and systematizing of existing rules of law; all the rest is legislation, not codification[6]). The examples just quoted show that such an absolute formula does not stand up to facts. A chemically pure codification in this sense has probably never taken place in history. It is more than doubtful that it could happen in the future[7]). It is therefore legitimate to enquire into the origin of this distinction and to ask whether it may be either necessary or useful. The answer is different for municipal and international law.

1. Codification in municipal law

Codification of municipal law may — and mostly does — constitute a major political problem. However, once enacted, it presents practically no difficulty from the point of view of legal technique. For internal codifica-

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[5]) See references of the International Court of Justice in the *Minquiers and Ecrehos* case to the Grand Coutumier de Normandie as codification of ancient customs, I. C. J. Reports 1953, pp. 61, 62 and 63.

[6]) Cf. Baker, *op. cit.*, p. 41; Hurst, *op. cit., ibid.* Listing various meanings of the term, the Dictionnaire de la terminologie du droit international (Paris 1960) states *inter alia:* «La codification entendue comme distincte de la législation et comme ayant un caractère déclaratoire, est entendue parfois comme ayant pour objet l'énoncé systématique de règles déjà existantes».

[7]) Koschaker finds »... daß gerade die alten Gesetzgebungen, angefangen vom Kodex Chamurabi in Babylonien über die griechischen Gesetzgebungen eines Lykurgos, Solon, Zaleukos, Charondas bis zu den zwölf Tafeln der Römer, mehr oder weniger Reformgesetze waren«, Europa und das römische Recht (2nd ed. München, Berlin 1953), p. 181. »Kodifikation ist nie allein deklarativ, sondern immer auch konstitutiv«, Kägi, *op. cit.*, p. 229. «Plus fréquemment, la codification est entendue comme comportant non la simple déclaration du droit existant, mais son aménagement, son amendement, sa réforme, ses modifications et compléments suivant les exigences des rapports internationaux et sans chercher à distinguer dans le résultat de cette opération ce qui est consécration du droit existant de ce qui est innovation par rapport à celui-ci», Dictionnaire, *ibid.* «Les conventions internationales dont l'unique objet est de confirmer le droit coutumier existant, celles donc que l'on peut considérer comme purement déclaratives,

tion is the work of the lawmaker, undertaken and imposed *ex auctoritate*. This, in the first place, means laying down of rules which are heteronomous with regard to their addressees, a phenomenon which forms the essence of all legislation [8]). But, moreover, it means that the lawmaker is entirely free not only in the choice of the rules to be codified, but also in the taking of a binding decision concerning the entry into force of the new code, the abrogation of the binding force of old rules, the possible regulation of a transition period, etc. [9]). In other words, a new code enters into force with regard to all subjects of municipal law at the same time and with the same content. Codification of municipal law is thus a one-time operation, it is definitely binding and does not entail any relativization of the normative material either *ratione personae*, or *ratione temporis*, or *ratione materiae*.

Under such conditions, a distinction between old and new law within the new code may be of interest from the historical or political point of view. From the point of view of legal technique it is entirely irrelevant.

2. Codification in international law

Codification of international law is not a work of a single lawmaker and is not performed *ex auctoritate*. Its sole tool has always been and remains a multilateral treaty, "the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions" [10]). The legal technique here is thus totally different from that in municipal law.

In the first place, a treaty rule, even of a codifying nature, does not cease to be an autonomous norm. Secondly, a codification treaty does not enter into force for all subjects of international law (up till now there

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sont rares», Ch. De Visscher, La codification du droit international, Rec. d. C. (1925 I), p. 371. «... le contenu même, la substance, et non pas seulement la forme des règles juridiques se trouvent presque toujours remises en question à l'occasion de la codification» *ibid.*, p. 383.

[8]) Concerning autonomous and heteronomous norms, see particularly Kelsen, Hauptprobleme der Staatsrechtslehre (2nd ed. Tübingen 1923), pp. 33—43; cf. Kelsen, Contribution à la théorie du traité international, Revue internationale de la théorie du droit 1936.

[9]) Thus Art. 7 of the Code civil: «A compter du jour où ces lois sont exécutoires les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts, les règlements, cessent d'avoir la force de loi générale ou particulière, dans les matières qui sont l'objet desdites lois composant le présent Code».

[10]) McNair, The Functions and Differing Legal Character of Treaties, BYIL 1930, p. 101.

has not been one single universal treaty in history), but only for some of them, however numerous. Thirdly, even with regard to accepting States, it enters into force at differing dates, depending on the processes of ratification, accession, etc., just as it may cease to be in force for States subsequently withdrawing from the treaty. Finally, in view of the possibility and practice of making reservations, a codification treaty may not have the same content even within the community of States parties to it.

It thus becomes clear that, under such conditions, there is no way of decreeing either an overall binding force of the codification treaty, or its one-time entry into force, or its identity of content, or, finally, transitory regulations bearing on the relationship between old and new rules. Codification of international law is thus unavoidably a source of an acute relativization of the normative material *ratione personae, ratione temporis* and *ratione materiae.*

Those responsible for codification in the field of international law are thus faced with problems and tasks unknown to the municipal lawmaker. They certainly cannot solve all of them, failing the necessary legislative power. However, they can — and they should — exert a maximum effort, not to eliminate the above-discussed relativization which is not feasible, but at least to narrow it down as far as technically possible. It is in this perspective that a possibly sharp distinction between codification *sensu stricto* and enactment of new rules becomes crucial.

For it is self-evident that new legal rules included in the codification treaty will be binding only and exclusively on States which become parties to the treaty and only for such period of time as they remain parties. It is just as clear that a pre-existing customary rule which had been incorporated into the new treaty will preserve its customary nature and, consequently, its binding force *erga omnes.* These rules will thus have a double legal nature, that is to say, they will, while identical in content, be binding on the parties to the treaty as conventional norms, and on the remaining States as customary norms. The practical aspect of this problem will have to be discussed more thoroughly [11]).

Therefore, a distinction between codification *sensu stricto* and legislation *ex nihilo,* a purely academic question in municipal law, acquires a wholly different significance in international law. It was therefore fully justified to include the distinction in the text which has become the basis of all codification endeavours in our time, namely in Art. 13 of the Charter of the United Nations:

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[11]) See below, pp. 494—496.

"1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a. ... encouraging the progressive development of international law and its codification".

Art. 13 thus distinguishes — though without precision [12]) — between codification and progressive development of international law. An attempt at a more precise definition of the two terms is to be found in Art. 15 of the Statute of the ILC:

"In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

The authors of the Statute have shown both moderation and clear thinking in proposing, with healthy scepticism, the above distinction as a working device — "for convenience" — and not as the enunciation of an absolute truth. For, once again, the drawing of a clear-cut demarcation line between the two operations is in most cases impossible in practice [13]). Even so, authors of international codification are bound to show the greatest possible concern for a maximum precision regarding the character of their own work.

Notwithstanding the purely practical nature of the definitions included in Art. 13 of the ILC Statute, the present paper will from now on use the terms "codification" and "progressive development" in the spirit of this Article.

III. The Practical Aspect of the Problem

A recent decision of the International Court of Justice has illustrated the practical aspect of the question discussed in a particularly striking manner.

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[12]) »Auch diese Unterscheidung brachte nicht die begriffliche Klärung«, Kägi, *op. cit. (supra* note 4), p. 230.

[13]) "... the distinction has proven as impossible to maintain in practice as in theory", Baxter, Treaties and Custom, Rec. d. C. (1970 I), p. 40. Lauterpacht affirms that codification of international law "must be substantially legislative in nature", Codification and Development of International Law, American Journal of International Law vol. 49 (1955), p. 29. "Undoubtedly, it is useful and desirable that in its drafts the Com-

On February 20th, 1969, the Court rendered its judgment in the dispute concerning the delimitation of the continental shelf in the North Sea [14]). The parties to the dispute were, on the one hand, Denmark and Holland, on the other, the Federal Republic of Germany. Failing an agreement between the three States, Denmark and Holland carried out the delimitation of their own continental shelves which *ipso facto* delimited the German shelf. The Danish-Dutch delimitation was based on the equidistance principle, included in Art. 6 of the Geneva Convention on the Continental Shelf of 1958. The Federal Republic was not a party to that Convention, which it had signed but not ratified. Art. 6 could not therefore be binding on her as a treaty rule, — an obvious truth which Denmark and Holland did not contest. The equidistance principle could, in such circumstances, be binding on Germany only and exclusively as a customary rule of international law. Thus, the crucial point for deciding the dispute was the question whether Art. 6 of the Convention constituted codification, *i.e.* an incorporation into the Convention of a pre-existing customary rule, or "progressive development of international law", *i.e.* an enactment of a new rule of an exclusively conventional nature [15]). (The other aspect of the problem, namely, the question whether a new customary rule of the same content as Art. 6 has developed after 1958, while vital for the decision, is less important in this context) [16]). In other words, the extent of the binding force of Art. 6 and, consequently, the Court's decision, depended on the correct appraisal of the legal nature of the rule involved, both the Court and the parties admitting that the binding force of the equidistance principle *erga omnes* could derive only from its customary nature.

The Court found that only the first three articles of the Geneva Convention constituted a codification of pre-existing customary norms, the remaining articles having been included in the ILC's draft *de lege ferenda* and having been adopted as such by the Geneva Conference. This (coupled with the denial of a new customary development a f t e r 1958) meant dismissing the Danish-Dutch claim and, in conformity with the German *petitum*,

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mission should state in what respects and in what parts its work constitutes essentially a re-affirmation, a codification of existing law and how far it amounts to development... There is all the difference between doing that and treating a topic as a whole as being exclusively in the nature of codification or exclusively in the nature of development", *ibid.*, p. 31. "Does it matter that when we try to reduce international law to systematic form we find that we shall be driven to legislate and not merely to codify"? B r i e r l y, The Future of Codification, BYIL 1931, p. 3.

[14]) *North Sea Continental Shelf*, Judgment, I. C. J. Reports 1969, p. 3.

[15]) "Put bluntly, 'progressive development' means change", B a x t e r, *op. cit.*, p. 39.

[16]) But see below, p. 519—520.

referring the dispute back to negotiations between the parties, such negotiations to be based on certain general guide-lines provided by the Court. It may be added that the contested part of the North Sea Continental Shelf appears to be particularly rich in natural resources [17]).

Thus, a judicial decision of great import depended on a correct finding regarding the legal nature of the rule to be applied. The case confirms the above-discussed propositions concerning the different extent of the binding force of customary and treaty law. In this perspective, the problem of codification becomes a problem of sources of international law [18]).

IV. Codification as a Problem of Sources

It is submitted that the "progressive development of international law" constitutes a classical and relatively simple operation of concluding a new treaty, whereas "codification" represents an operation which is far more complex and delicate, consisting, as it does, in a change of the formal nature of the rule, while preserving its content. In other words, codification means a recasting of customary rules in treaty form. The difficulty of such an operation consists not only in a clear articulation of its own nature (the lack of such clarification was precisely the source of the dispute regarding the *North Sea Continental Shelf*), but moreover, in a most careful safeguarding of the customary character of the codified rules. Such rules should be endowed with a double nature, conventional and customary, in a manner as clear as possible. In other words, what is at stake is the safeguarding of customary international law.

For, let us imagine for a moment a situation in which codified rules would not strengthen and render more precise, but, on the contrary, eliminate and replace customary rules of the same content. It is submitted that such a possibility would spell disaster. For there would arise a legal *vacuum* among States which are not parties to the codification treaty (unless they

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[17]) Cf. in an entirely different context, the findings of the Nurnberg Tribunal concerning the declaratory nature of the 1907 Hague Convention, Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Cmd. 6964, pp. 65 and 125. Cf. the International Military Tribunal for the Far East, Annual Digest and Reports of Public International Law Cases (1948) case no. 118, pp. 365—366. Cf. *In re von Leeb and others* (German High Command Trial), U.S. Military Tribunal at Nurnberg, *ibid.*, case no. 119, p. 384.

[18]) Thus Ch. De Visscher, stating that a study of sources constitutes «le préliminaire obligé d'une étude vraiment scientifique du problème de la codification du droit international», *op. cit. (supra* note 7), p. 339.

were prepared to maintain *inter se* the binding force of the rules concerned on the basis of regional customary law), a *vacuum* between those States and States parties to the codification treaty, a *vacuum* between any State withdrawing from the treaty and the rest of the world, and, finally, a general *vacuum* and global chaos among all States of the world in case of the treaty ceasing to be in force for one reason or another. To sum up, failure to safeguard — or inadequate safeguarding of — the customary nature of the codified rules might lead directly to the absence of all legal links among States, in other words, to the liquidation of all international legal order.

This is an admittedly sinister and deliberately exaggerated vision. But, however overemphasized, the argument necessarily points to the affirmation of a superiority of customary over treaty law within the international community. The submission is made here not within the framework of the hierarchy of norms, but from the simple point of view of the respective merits of the two sources. In this perspective, emphasis must be laid in the first place on the incomparably greater extent of the binding force of customary than of conventional law; indeed, general international law *(droit international général, allgemeines Völkerrecht)* exists only and exclusively as customary law; there is no such thing as general treaty law. The voluntarist element in customary law is infinitely weaker than in conventional law; indeed, the notion of "third States" whom legal rules *nec prosunt nec nocent* has no place here. Arising out of this admittedly less voluntarist character, customary law is incomparably less vulnerable than is treaty law to all voluntarist dangers; thus, reservations which have become a source of weakness of more than one multilateral treaty are excluded with regard to customary rules[19]). Nor is it possible to invoke the *clausula rebus sic stantibus* against the continuous validity of these norms[20]). It cannot be imagined that a customary norm can be "denounced" by a State, while the danger of denunciation hovers permanently over a treaty, whether the latter does or does not include a denunciation clause. The now discarded *si omnes* clause was a purely and exclusively conven-

[19]) Thus the I. C. J. in the *North Sea Continental Shelf* case, see I. C. J. Reports 1969, pp. 38—39. Of a different opinion Baxter, *op. cit. (supra* note 13), pp. 47—50. Cf. the opinion of Ch. De Visscher, which is made, however, *de lege ferenda:* «La tolérance des réserves dans les conventions internationales collectives devient vraiment néfaste et doit être absolument reprouvée lorsque les réserves portent sur des règles qui, en réalité, sont déjà consacrées par la coutume. Elles permettent de remettre en question des règles qui devraient être considérées comme établies; elles deviennent une cause de la régression dans le développement du droit international», *op. cit. (supra* note 7), p. 423.

[20]) See Schindler, Contribution à l'étude des facteurs sociologiques et psychologiques du droit international, Rec. d. C. (1933 IV), p. 46.

tional institution. Finally, it is believed that, as a spontaneous phenomenon, particularly recalcitrant to all artificial constructions, customary law adheres much more closely to the infrastructure which it governs, that is to say, that, in the long run, it corresponds better to the genuine needs of the international community[21]).

If this is true, then the argument concerning the superiority of a written text on account of its alleged clarity and precision, can hardly carry decisive weight. Besides, both the theory and the actual practice of treaty interpretation serve as a caution to any exaggerated optimism in the matter.

Thus, a correct solution of the problems of codification depends on both a thorough analysis of the problem of sources and their mutual relationship and interaction, and a highly sophisticated codification technique. The difficulties here are tremendous. However, before attempting even a tentative approach to the question, it seems necessary briefly to discuss the *rationale* of the codification processes.

V. *The* Rationale *of Codification*

It is in the light of such difficulties as well as in the light of the argument concerning the superiority, within the international community, of customary over treaty law, that the obvious question arises: why is this tremendous effort at codification undertaken in our time?

Once again it is necessary to turn to municipal law in search of an answer.

There should be no denying of purely technical reasons for codification in municipal law. There should be no underestimating of difficulties and complications brought about by either a condition of legal uncertainty inherent in customary law, or the existence, within one and the same State,

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[21]) «... la souplesse plus grande de la coutume répond mieux aux caractères et aux besoins d'une communauté qui, n'ayant pas d'organe permanent pour la formation du droit, pourrait difficilement pourvoir aux processus nécessaires de renouvellement juridique et maintenir les règles adoptées dans une constante correspondance avec les exigences diverses et variables de la réalité des choses», Anzilotti, Cours de droit international (Paris 1929), p. 82. «Ce qui fait le prix de la coutume internationale et constitue sa supériorité sur les situations conventionnelles, malgré l'imprécision inhérente à son mode d'expression, c'est que, reposant sur une pratique spontanée, elle traduit une communauté de droit profondément ressentie. De là, la densité de ses règles et leur stabilité. L'origine contractuelle des règles édictées par la voie du traité plurilatéral... reste pour elles une cause de faiblesse; dans la mesure où le traité n'a pas un fondement coutumier, elle les expose aux difficultés d'interprétation et aux risques de caducité qui s'attachent à toute réglementation à base de manifestation de volonté», Ch. De Visscher, Théories et

of a whole range of laws, customs and regional codifications. The example of Poland is here a case in point. On acceding to independence in 1918 that country inherited from the partitioning Powers no less than five different legal systems. Pending codification and in order to stave off the worst difficulties, it was necessary to enact in 1926 a statute on interregional private law. This is true. However, Switzerland still has separate codes of civil and penal procedure in each canton. However, in Great Britain there is still a particular legal system of Roman and feudal origin in Scotland, Scandinavian customary law on the Isle of Man, Norman customary law in the Channel Islands, not to speak of England herself who is still governed by common law, statutory law and, to a much lesser extent, customary law[22]). In none of these countries did reasons of legal technique bring about a codification.

The answer to the question asked seems to lie elsewhere. The decision to codify is a political decision, taken by the lawmaker under the pressure of political factors. These factors may be of a widely differing nature: they may be national, such as the will of a liberated or a united nation to be governed by its own, not by foreign laws. It is such a will rather than matters of legal technique which explains the decision of codification taken by the Polish Constituent Assembly in 1919. It is such a will that explains the first codification of the Italian Risorgimento of 1865. And it is such national considerations — rather than legal romanticism — which would explain Savigny's classical veto to plans for codification in a dismembered Germany, decades before its unification[23]). These factors may be social or outright revolutionary: pressure of oppressed Athenian debtors was the origin of Solon's codification, the latter reaching far beyond mere private law[24]). The revolt of the Roman plebs gave rise to the law of the twelve tables[25]). The French Revolution led to the adoption of

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réalités en droit international public (3rd ed. Paris 1960), p. 197. "Customary law is flexible and adaptable law, responsive to changes in international politics, to the advancement of technology, and to changes in the economic and social structure of the world", Baxter, *op. cit. (supra* note 13), p. 97.

[22]) Planiol, *op. cit. (supra* note 3), p. 82; David, Les grands systèmes de droit contemporain (Paris 1964), pp. 311—395.

[23]) Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (Heidelberg 1814). Any influence of the romantic movement on Savigny is contested by Koschaker, *op. cit. (supra* note 7), pp. 196 and 260.

[24]) Plutarch, The Lives of the Noble Grecians and Romans, translated by John Dryden (New York), pp. 97—117.

[25]) Sohm, Institutionen, Geschichte und System des römischen Privatrechts (16th ed. München, Leipzig 1920), pp. 62—63; Giffard, Précis de droit romain (Paris 1938), pp. 32—34.

the Code civil which consecrated the final victory of the French bourgeoisie. These factors may be of imperial nature, as was the case with Justinian's attempt to recreate the unity of the Empire[26]). The explanation of codification by political motives thus appears as fully justified[27]).

The situation is not different in international law, even though the work of both Hague Conferences of 1899 and 1907 would seem to invalidate such assertion. Indeed, this most important work of codification prior to our time appears rather as the fruit of a historical accident within the framework of classical diplomacy than the result of any major political upheaval[28]). Nevertheless, there seems to be little doubt that the landslide of codification of our day is a direct consequence of a deep crisis of the present international community and international law. For, to begin with a commonplace reminder, for about the last two decades we have been witnessing an explosion of new States unprecedented in history.

Neither the falling apart of existing States nor the creation of new ones constitute in themselves a historical *novum*. What distinguishes contemporary processes from those known in history is, in the first place, an extraordinary quantitative intensity, further, an acceleration in time and finally the global geographical extent. In 1945 the U.N.O. counted 51 member States. To-day, there are about 130 of them, spread all over the continents, and the process has not yet come to a close.

The international law which we inherited is a creation of old Europe whose past and tradition should not be glorified out of reasonable proportions but which, in spite of all religious, political, national and social splits, has generated and more or less efficiently maintained a minimum of cultural community. Only such an infrastructure, endowed with a minimum of homogeneity, could have been able to create a common legal order and to preserve it over centuries in a condition of reasonable effectiveness[29]).

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[26]) Kaden, Justinien législateur, 527—565, Grandes Figures et grandes œuvres juridiques, Mémoires publiés par la Faculté de droit de Genève (Genève 1948), pp. 55 ss.

[27]) In this sense Ago, La codification du droit international, Recueil d'études de droit international en hommage à Paul Guggenheim (Genève 1968), p. 94.

[28]) See Barbara Tuchman, The Proud Tower — A Portrait of the World before the War, 1890—1914 (London 1966), pp.229—288.

[29]) »Die Völkerrechtsgemeinschaft beruht in erster Linie auf dem Bewußtsein kultureller Zusammengehörigkeit bestimmter Völker; dieses Bewußtsein hat dieselben Ursachen wie der Umstand, daß die rechtlichen Beziehungen unter diesen Staaten ähnliche oder identische, weil auf übereinstimmenden Rechtsvorstellungen beruhende sind«, Max Huber, Die soziologischen Grundlagen des Völkerrechts (Berlin 1928), p. 54. »Das Maß solchen gemeinsamen Rechts wird vor allem bedingt sein durch das Maß der Gemeinschaftlichkeit der Kultur«, *ibid.*, p. 22. Cf. Guggenheim: «Il ne suffit pas qu'il y ait un commerce contractuel et régulier; il faut qu'il y ait un minimum d'homogénéité et un certain nombre de conceptions et de principes de droit étatique qui soient communs à

It is not for nothing that in the writings, in the diplomatic correspondence and in treaty texts of the 19th century, international law is called «le droit public de l'Europe» [30]).

This legal order is to a preponderant extent of customary origin, that is, of an origin which — to emphasize it once again — presupposes a minimum cultural community of the infrastructure out of which it grows. Moreover, at least as regards classical international law, it is a system which is relatively weak, decentralized, lacking autonomous organs and functioning on the basis of an anarchical, yet reasonably efficient auto-regulation. A homogenous infrastructure is thus necessary in both stages: that of creating the legal order and that of applying it. A simple yet striking example of this may be found in the law of war, *i.e.* that part of international law which — next to diplomatic law — is perhaps most sensitive to the principle of reciprocity: both the laying down and the observance of norms bearing on the protection of war victims is conceivable only between States which acknowledge in a more or less similar manner the value of the human person. A drastic difference in the hierarchy of values in this field undermines the chance of proper functioning of the reciprocity mechanism which guarantees the effectiveness of such norms.

The European club of international law admitted new members slowly, with restraint and *sub modo*. Even the Christian and European Belgium was authoritatively reminded in a classical text of the duties of a new State in Europe [31]). Turkey, with whom Europe had over centuries maintained political relations in war and peace, was officially admitted to the club only in 1856 [32]). The recognition of the independence of Serbia, Ru-

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tous», Contribution au problème des bases sociologiques du droit international, Recueil d'études en l'honneur d'Edouard Lambert (Paris 1933), p. 121.

[30]) Guggenheim, Droit international général et droit public européen, Annuaire suisse de droit international 1961.

[31]) «Chaque nation a ses droits particuliers; mais l'Europe a aussi son droit... Les Traités qui régissent l'Europe, la Belgique, devenue indépendante, les trouvait faits et en vigueur, elle devait donc les respecter et ne pouvait pas les enfreindre... les événements qui font naître en Europe un Etat nouveau ne lui donnent pas... le droit d'altérer le système général dans lequel il entre», London Protocol of February 19th, 1831, Martens, Nouveau Recueil vol. 10, p. 199.

[32]) About the two "circles" of international law in history see Guggenheim, Droit international, *op. cit. (supra* note 30), p. 13, who, basing himself on Grotius, speaks of a «différence essentielle à faire entre la communauté des Etats d'origine chrétienne et les Etats païens. Tandis qu'à la communauté chrétienne s'applique l'ensemble des règles du droit naturel et des gens, les Etats païens sont limités dans leurs relations avec les Etats chrétiens à la conclusion d'arrangements particuliers, ce qui toutefois présuppose au moins la reconnaissance du principe ‹pacta sunt servanda› dans leurs rapports réciproques».

mania and Montenegro was accompanied by far-reaching demands bearing not only on the respect of treaties but even on elementary principles of their own internal law. As late as 1919, in a famous letter to Paderewski, Clémenceau invoked just those precedents in order to justify the imposition on Poland of the Minorities Treaty [33]).

The explosion of new States in contemporary history could not be coped with by documents or declarations of the type of the London Protocol of 1831 or the Paris Treaty of 1856. The entry of these States into the existing international community has of necessity undermined the homogeneous character of the international infrastructure as it has existed up to date. This is not a value judgment but an attempt at stating facts. And the fact is that new States have all of a sudden found themselves within the framework of a system which had been created without their participation and which included norms of which they approved as well as norms which they considered with indifference and finally norms which they thought contrary to their views or interests. Moreover, in spite of the undoubted growth of treaty law in the last century, all this system remained in its very essence a customary one, by its origin and by its nature. But customary law is the law of the strong, not of the weak [34]). Hence the mistrust of the new members of the international community [35]). Hence symptoms of crisis the list of which is a long one. Suffice it to mention the sharp decline of international arbitration and judicial settlement (though, indeed, the responsibility for this state of affairs does not fall on new States alone). Suffice it to mention, by way of example, the attitude of the Nigerian Government to the International Committee of the Red Cross and other charitable institutions during and after the Biafran conflict: the

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[33]) Strupp, Documents pour servir à l'histoire du droit des gens (Berlin 1923) vol. 4, pp. 591—596. Of particular interest is the following declaration by Waddington at the Berlin Conference: "His Excellency adds that Serbia, who claims to enter the European family on the same basis as other States, must previously recognize the principles which are the basis of social organization in all States of Europe and accept them as a necessary condition of the favour which she asks for". Cf. observations by M. Huber and Guggenheim, *op. cit.* (*supra* note 29).

[34]) »Das Gewohnheitsrecht ist der Freund des Starken. Es unterliegt dem Einfluß der herrschenden Klassen. Das Gesetzesrecht ist der Hort der Schwachen; es bändigt die Macht der Herrschenden durch den geschriebenen Buchstaben. Das Aufkommen des Gesetzesrechts hängt daher ganz regelmäßig mit dem Aufsteigen der Niederen zusammen. Es ist die der Menge zugute kommende ›plebejische‹ Form der Rechtserzeugung«, Sohm, *op. cit.* (*supra* note 25), pp. 62—63.

[35]) «Méfiance à l'égard d'un système juridique à la formation duquel ils n'ont nullement participé et que, à tort ou à raison — parfois plus à tort qu'à raison — ils croient inspiré de conceptions religieuses, morales et juridiques différentes des leurs; méfiance à l'égard des règles dont, en raison même de leur caractère non écrit, ils n'ont pas une

performance by these institutions of humanitarian tasks, *i.e.* of functions constituting their very *raison d'être*, was, in the last analysis, considered by the Nigerian Government as an unfriendly act, because it represented a concept not yet assimilated by that Government. Suffice it to mention criticisms of the distinctive emblem of the Red Cross, dating back to the Geneva Conference of 1949; it was then necessary to defend both the emblem itself and its unity — that emblem which, disclaiming all religious symbolism, expresses a well-established tradition and the highest moral values, and that unity without which the institution cannot function in practice[36]). Suffice it to mention the cult of sovereignty with all its consequences, excessive voluntarism and responsiveness to verbal demagogy.

The fact that under such conditions an international secession on the Aventine could be avoided may rightly be considered as a historical success. What could not be avoided was the embarking on this enormous process of codification of which the creation of new States is the actual *fons et origo*. Three questions seem here to matter: 1) a purely psychological element of prestige: the participation of new States in the creation — or re-creation — of rules of international law, *i.e.* a tendency to submit not to pre-existing norms but to such of which co-authorship can be claimed; 2) the recasting of existing and uncontested customary rules into a written form which would be possibly clear and simple; 3) a revision of contested rules and possible introduction of new ones.

In the light of such considerations, the above-discussed achievements in the field of codification become understandable and clear, just as it becomes clear that most probably all the rest of international law will have to be, sooner or later, the subject of codification[37]). If that is so, it would be perfectly futile to re-open the classical argument between the adherents and the opponents of codification. As is well known, both sides advanced serious and solid arguments. However, since codification seems to be a

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connaissance claire; méfiance à l'égard d'institutions juridiques dont ils craignent qu'elles ne recèlent pour eux un danger grave: le danger de rendre possible, sous une forme ou sous une autre, des atteintes à leur indépendance récemment acquise», Ago, *op. cit.* (*supra* note 27), p. 96.

[36]) Guggenheim, Les principes de droit international public, Rec. d. C. (1952 I), p. 33.

[37]) «Une telle codification des règles coutumières s'impose du fait que la base sociologique du droit international a perdu son caractère traditionnel relativement homogène. Dans une communauté d'Etats basée sur la même civilisation, la coutume a été une procédure adéquate pour la création des règles de droit. Mais pour la communauté internationale devenue globale, qui embrasse un grand nombre d'Etats de civilisations diverses, la coutume ne suffit plus...», Verdross, Discours présidentiel, Annuaire de l'Institut du droit international 1961 II, p. 63.

foregone issue at the present historical stage, the reasonable question is not whether to codify but how to codify. It is at this stage that the discussion of the codifying techniques must be taken up again.

VI. The Techniques of Codification

The whole argument thus far developed and, it is submitted, strongly supported by the *North Sea Continental Shelf* case, leads to the following two interconnected postulates: a) a possibly clear distinction, in a codification treaty, between "codification" and "progressive development" of international law, b) a careful safeguarding of customary international law.

Are these two operations feasible? Are they simultaneously feasible? If not, which should be sacrificed? Pending more detailed examination, it is tentatively submitted that a clear statement as to the legal nature of codified rules *ipso facto* operates as a safeguard of their continued customary validity. But the reverse is not necessarily true. Thus, a general clause, bearing directly on customary law, may safeguard this law while providing no criterion for distinguishing the legal nature of rules actually included in the treaty.

Moreover, what has to be borne in mind is the need for safeguarding customary law both inside and outside the treaty. In other words, if the submission is accepted that, in the long-term interest of the international community, the preservation of customary law is essential, then such preservation should bear on a) the customary nature of rules actually codified, and b) the continuous validity of such customary rules as are not included in the codification treaty.

ad a) The necessity for such safeguarding extends beyond questions of evidence, such as confronted the Court in the *Continental Shelf* case. The problem here is to ensure continued binding force of customary international law with regard to States ceasing to be parties to the codification treaty or in case of the treaty itself ceasing to be in force. If it is said that in such cases customary law will automatically and obviously reassert its binding force, then the proper answer is to be found in Talleyrand's famous saying: «Cela va sans dire, cela va encore mieux en le disant».

ad b) The need for upholding uncodified customary international law hardly calls for comment and seems to be generally recognized [38]).

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[38]) See below, pp. 507—509.

Furthermore, it may be asked whether the lawmaker should not equally concern himself with future growth of customary law. On the assumption that treaty law may, under certain circumstances, both oust customary law and block its further development [39]), the answer should be in the affirmative. One characteristic instance of such concern is to be found in Art. 38 of the Vienna Convention on the Law of Treaties [40]).

The ideal of a good codifying technique would of course be a clear-cut distinction between "codification" and "progressive development", coupled with a safeguarding clause bearing on the non-codified customary rules. In other words, a treaty — or a part of it — should in the first place be as clearly as possible identified as being either declaratory or constitutive of law. How is this to be done? And can it be done at all?

In a searching study on treaties and custom to which reference will have to be frequently made, Baxter suggests three ways in which the law-declaring quality of a treaty may be established:

> "The first is that the treaty, through appropriate language in the preamble or elsewhere would state that it incorporates nothing but customary international law. The second is through the *travaux préparatoires* of the treaty or the instrument under the authority of which the treaty was drawn up. That evidence could make it clear that the treaty was intended to be declaratory of existing customary law. The third would be through comparison of provisions of the treaty with customary international law, whereby it might be established that certain articles of the treaty or all of its contents are, as it were, an accurate photograph of the law" [41]).

The third process, on Baxter's own admission, is hardly helpful because "the declaratory quality of the treaty must be established through the proof of customary international law, and that is the very law to be established through recourse to the treaty" [42]). The resort to *travaux préparatoires* may possibly lead to conclusive results in a given case, but has to be used with caution, as it is attended by well-known dangers inherent in this mode of interpretation [43]).

The treaty should therefore speak itself [44]), even if a *caveat* should

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[39]) See below, pp. 519—520.

[40]) See below, pp. 508—510.

[41]) *Op. cit. (supra* note 13), p. 42.

[42]) *Ibid.*

[43]) See Bernhardt, Die Auslegung völkerrechtlicher Verträge (Köln, Berlin 1963), pp. 115 and 120.

[44]) "... it is first necessary to establish whether the treaty was intended to be declaratory of existing customary international law or constitutive of new law. The silence of the treaty, which may necessitate resort to the *travaux préparatoires,* can make this a

necessarily be entered as to the unfailing conclusiveness of its own assertions[45]). The following analysis will bear on actual treaty texts.

1. Contemporary techniques

Of the four Geneva Conventions on the Law of the Sea of 1958, three (Territorial Sea and the Contiguous Zone, Fishing and Conservation of the Living Resources, Continental Shelf) are silent on the subject of their own nature. It is only the Convention on the High Seas which carries the following preamble:

> "The States Parties to this Convention,
> Desiring to codify the rules of international law relating to the high seas,
> Recognizing that the United Nations Conference on the Law of the Seas, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established principles of international law, ..." [46]).

Why is it that only the High Seas Convention has something to say on the matter? Assuming that it is declaratory of customary international law, is the conclusion to be drawn that the three other conventions are purely constitutive[47])? However, both the assumption and the conclusion are obviously wrong.

In the first place, in spite of the use of the word "codify" in the preamble, the latter goes on to use the term "generally declaratory" of established principles of international law. This in itself would be enough to undermine the allegedly declaratory nature of the Convention. But moreover, as Baxter has convincingly shown[48]), the actual text of the Convention incorporates both old customary rules and new provisions such as those bearing on prevention of pollution or the condition of "genuine link" regarding the flag[49]). This being the case, the expression "generally declaratory" does not seem very helpful, since it precisely refers any

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task of great difficulty", Baxter, Multilateral Treaties as Evidence of Customary International Law, BYIL 1965/66, p. 298.

[45]) See Baxter, Rec. d. C. (1970 I), p. 43.

[46]) Emphasis mine.

[47]) Cf. Baxter, BYIL 1965/66, pp. 287—288, and Baxter, Rec. d. C. (1970 I), pp. 42 and 54.

[48]) Baxter, BYIL 1965/66, pp. 289—290.

[49]) It may, however, be open to doubt whether the Convention introduces a genuine change with regard to the *Lotus* rule. To assert this, it would first be necessary to admit that the Permanent Court in the *Lotus* case had indeed correctly stated the rule with regard to the jurisdiction in cases of collision. Had it?

inquiry into the nature of any single provision back to the cumbersome procedure of proving customary law outside the treaty.

While the High Seas Convention is not, on its own admission, entirely declaratory of customary international law, it is just as true to say that the remaining three — or at least two — conventions are not entirely constitutive of new rules. The Court has authoritatively confirmed the customary nature of the first three articles of the Convention on the Continental Shelf [50]). There is hardly any doubt that there is a number of customary rules in the Convention on the Territorial Sea and the Contiguous Zone. Possibly, the Convention on Fishing and the Conservation of the Living Resources alone represents a pure work of "progressive development of international law".

The texts of the four Conventions thus seem inadequate with regard to the problem discussed in both what they do and what they do not say. They provide none of the safeguards postulated at the beginning of this chapter.

With the Vienna Convention on Diplomatic Relations of 1961, the formula changed to read:

> "Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention ..." [51]).

Here is a formula which can legitimately give rise to considerable anxiety. Except for the 1815 Vienna Règlement, it may be safely said that diplomatic law is customary law *par excellence.* The Convention on Diplomatic Relations is thus at least as "generally declaratory" of customary law as is the Convention on the High Seas [52]). However, the treatment accorded customary law is entirely different in the two instruments. For, whatever its accuracy, the latter deals with the continued customary nature of its own provisions, whereas the former deals exclusively with customary rules outside its own provisions, safeguarding their continuous validity.

Admittedly, a charitable interpretation may be that, while keeping silent on the nature of its own rules which now bind the contracting parties *qua* treaty law, the Convention merely safeguards, as between those same contracting parties, the continued validity of such customary law as has

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[50]) I. C. J. Reports 1969, p. 39.

[51]) Emphasis mine.

[52]) For a detailed discussion of the contents of the Convention see Cahier, Le droit diplomatique contemporain (Genève 1962), *passim.*

not been codified; it is thus merely regulatory as between the parties, without being concerned with wider problems. But a less charitable interpretation may not unjustifiably lead to the conclusion that the rules — all the rules — included in the Convention have now become mere treaty law for the contracting parties, since not even the vague formula of "generally declaratory" was taken over from previous experience. The omission to state, even approximately, the nature of codified rules, combined with the concern for the continued customary validity of rules left out, may cast an ominous shadow on the nature of the former, with all the dangers attending such a procedure. On the face of the text it could be asserted that time-honoured rules of diplomatic law have now, by a stroke of the pen in Vienna, lost their status of customary law.

Exactly the same formula was used again in the preamble of the 1963 Vienna Convention on Consular Relations. It may readily be conceded that, owing to the twilight nature of consular law up to date [53]), the danger of the formula to the continuing validity of the codified rules *qua* customary rules is less acute; the existence of such danger must yet be affirmed, even if it be to a lesser extent.

A corresponding analysis of the Vienna Convention on the Law of Treaties is far more complicated for two reasons of a very different nature. In the first place, its safeguarding provisions, far from being concentrated in the preamble alone, are spread throughout the text, a technique hardly conducive to excessive clarity. Secondly, the Convention constitutes the first attempt in history to regulate conventionally sources of international law. It thus represents a logical and methodical *tour de force* the merits and demerits of which would require a separate study.

The relevant provisions of the Convention are: a) the preamble, b) art. 4, c) art. 38, and d) art. 43.

a) The preamble includes the three following sentences concerning our subject:

> "The States Parties to the present Convention,
>
> ...
>
> Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,
>
> ...
>
> Believing that the codification and progressive development of the law of treaties achieved in the pre-

[53]) See Rapport de la Commission du droit international à l'Assemblée générale, Annuaire de la Commission du droit international 1961 II, p. 94.

sent Convention will promote the purposes of the United Nations set forth in the Charter ...

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention ..." [54]).

In the last-quoted sentence the preamble repeats the doubtful formula of the two preceding Vienna Conventions with its possible ominous implication of the purely conventional nature of the rules included. This time, however, any such implication is clearly offset by the statement introducing the Convention as constituting both "codification and progressive development" of the law — a formula which by itself does not help to identify the nature of individual rules but which at least destroys any suggestion that the rules included have now become purely conventional. Moreover, the customary nature of at least the *pacta sunt servanda* rule as well as the "principles" of free consent and good faith seem to have been expressly safeguarded.

b) Art. 4 reads:

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

In other words, while proclaiming the principle of its own non-retroactivity, the Convention clearly safeguards the customary law of treaties which has governed the matter thus far. Treaties concluded prior to the Convention continue to be subject to customary rules, even if such rules are now incorporated into the Convention. This, however, is an operation *pro praeterito*; it does not of itself safeguard customary law regarding future treaties, concluded after the entry into force of the Convention.

c) Art. 38 reads:

"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".

This provision is of an entirely different nature, bearing as it does not on the relationship between the Convention itself and the existing customary law of treaties, but on a relationship between some future treaty and some future customary law. A re-affirmation of an obvious truth, to wit,

[54]) Emphasis mine.

that a customary rule can grow out of treaty law, is certainly useful, but it is irrelevant to the problem here discussed which is the safeguarding of the customary law of treaties by a treaty on the law of treaties. Art. 38 thus does not safeguard the future development of customary law of treaties as postulated above[55]); but it certainly remains significant proof of the lawmakers concern for future development of customary law in general[56]).

d) Finally, Art. 43 reads:

> "The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty".

Once again, this article bears on the relationship between some future treaty and customary rules which may be incorporated in such future treaty. It safeguards the continued validity of such rules *qua* customary rules after the expiration of the treaty. It does not safeguard the continuing validity of customary rules on the law of treaties after the expiration of the Convention on the Law of Treaties.

For it cannot possibly be argued that the law of treaties laid down by the Convention applies to the Convention itself. Whatever its future destiny, the Convention claims to be a supertreaty governing all future treaties concluded by the parties to it after its entry into force. It cannot govern itself. It remains subject to the customary law of treaties which alone can apply to it in fact and in logic. As Sørensen put it years ago with regard to the 1928 Havana Convention on the law of treaties:

> "The question, whether Article 18 can be applied to the convention of which it is itself a part, or more generally whether the Pan-American convention on Treaties is subject to the rules relating to the conclusion, termination and effect of treaties which it creates itself, must probably be answered in the negative in conformity with the general principle of logic that a statement as to the validity or invalidity of a logical proposition cannot be applied to itself — a principle which, like all other principles of logic, must be observed in all legal interpretation" [57]).

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[55]) See above, p. 505.

[56]) Cf. Baxter, Rec. d. C. (1970 I), pp. 31—32.

[57]) The Modification of Collective Treaties without the consent of all the Contracting Parties, Acta scandinavica juris gentium vol. 9 (1938), pp. 153—154.

If this is true, as it is submitted it is, then only the preamble and Art. 4 are relevant for the relationship between the Convention and the customary law of treaties. These two texts admittedly safeguard the continuous validity of such customary norms as are not included in the Convention itself. It may be deduced from the preamble that they also safeguard such validity of rules actually codified, though they do not provide the distinguishing criterion between "codification" and "progressive development". But they certainly do not safeguard further growth and development of customary law in the matter forming the subject of the Convention.

2. Past techniques

It may be both interesting and instructive to go back in history and to see how the problem was tackled by former codifiers. What may be considered the most celebrated text in this respect is the preamble to the Hague Convention of 1899 (1907) on the laws and customs of war on land, containing the famous Martens clause. Here are the relevant passages:

> "Thinking it important ... to revise the laws and general customs of war, either with the view of defining them more precisely, or of laying down certain limits for the purpose of modifying their severity as far as possible;
>
> ...
>
> In view of the High Contracting Parties, these provisions ... are destined to serve as general rules of conduct for belligerents in their relations with each other and with populations.
>
> It has not, however, been possible to agree forthwith on provisions embracing all the circumstances which occur in practice.
>
> On the other hand, it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military Commanders.
>
> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience" [58]).

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[58]) Texts of the Peace Conferences at The Hague, 1899 and 1907, edited, with an introduction, by James Brown Scott (Boston, London 1908), pp. 47—48 and 203—205. Emphasis mine.

The idea of a "revision" of the laws and customs of the war, expressed in the first quoted sentence, necessarily presupposes the existence of such laws and customs prior to the Convention. The Convention thus presents itself as *grosso modo* the work of codification which seems further borne out by the avowed intention to "define" the existing law "more precisely" [59]). It was this formulation of the preamble which enabled the Nurnberg Tribunal to assert the binding force *erga omnes* of the rules of the Convention as customary rules, and that independently of further growth of customary law on the subject between 1899 (1907) and 1939 [60]).

Generally speaking then, rules included in the Convention should be considered as endowed with a double nature, customary and conventional. Moreover, the Convention clearly says that it covers less ground than is actually covered by customary law, a formula reminiscent of the three Vienna Conventions, discussed previously. Customary law is thus not coextensive with conventional law on which, on the parties' own admission, it was not possible to achieve full agreement. Failing such complete agreement, the parties manifest their concern for "cases not provided for", "cases not included" in the Regulations adopted. For such cases, left outside the Convention, customary law is safeguarded with all desirable firmness by the formula maintaining the "protection and empire of the principles of international law" for both populations and belligerents.

The 1899 (1907) Hague Convention thus satisfies the two requirements stipulated at the beginning of this chapter. It does not seem directly to safeguard further growth of customary international law outside the Convention. However, the insistence of the Martens clause on the overall value of customary law and the respect emphatically paid to it deserve to be noted.

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[59]) Apparently of a different opinion Baxter, BYIL 1965/66, pp. 281 and 299. See, however, Garner, International Law and the World War (London 1920), vol. 1, pp. 1—35. More particularly: "The provisions of the Hague conventions which are merely declaratory of the existing law and practice were therefore no less binding than that other large portion of international law which the Hague conferences did not attempt to define and embody in the conventions which they adopted", p. 21. Cf. Guggenheim, Traité de droit international public (Genève 1954) vol. 2, pp. 306—307; Oppenheim-Lauterpacht, International Law (7th ed. London, New York, Toronto 1952), vol. 2, p. 229.

[60]) "The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt to 'revise the general laws and customs of war', which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which were referred to in Article 6 (b) of the Charter", Judgment, p. 65. Cf. above note 17.

The preamble of the 1907 Hague Convention respecting the rights and duties of neutral powers and persons in case of war on land reads:

"With a view to laying down more clearly the rights and duties of neutral powers in case of war on land and regulating the position of the belligerents who have taken refuge in neutral territory; ..." [61]).

The preamble of the 1907 Hague Convention concerning the rights and duties of neutral powers in naval war reads:

"Seeing that, even if it is not possible at present to concert measures applicable to all circumstances which may in practice occur, it is nevertheless undeniably advantageous to frame, as far as possible, rules of general application to meet the case where war has unfortunately broken out;

Seeing that, in cases not covered by the present convention, it is expedient to take into consideration the general principles of the law of nations;..." [62]).

With regard to both these Conventions, it was argued by the Allied Governments in the *Wimbledon* case that they represented a codification of the existing customary law and were therefore generally binding, notwithstanding the *si omnes* clause [63]), an argument in principle admitted by Germany [64]). Relying on the text alone of the two preambles, it should be observed that it is the former which conveys more clearly the codifying character of the provisions which follow, while the latter, once again, safeguards only customary law outside the Convention. None of them is thus fully satisfactory.

Finally, the preamble to the 1907 Hague Convention relative to certain restrictions with regard to the exercise of the right of capture in naval war recites:

"Recognizing the necessity of more effectively ensuring than hitherto the equitable application of law to the international relations of maritime powers in time of war;

Considering that, for this purpose, it is expedient, in giving up or, if

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[61]) Texts of the Peace Conferences, *op. cit. (supra* note 58), p. 230. Emphasis mine.

[62]) *Op. cit.*, pp. 317—318. Emphasis mine.

[63]) See P. C. I. J., Ser. C 3 — Vol. Suppl., pp. 10, 90 and 91. More particularly, see pleadings by Basdevant: «De l'avis des meilleurs auteurs, de l'avis du rapporteur de ces conventions, ces termes ne font que consacrer le droit existant. Nous sommes ici en présence de règles qui ont la double valeur de règles conventionnelles et de règles coutumières», *ibid.*, pp. 48—49.

[64]) *Ibid.*, pp. 48—49.

necessary, in harmonizing for the common interest certain conflicting practices of long standing, to commence codifying in regulations of general application the guarantees due to peaceful commerce and legitimate business, as well as the conduct of hostilities by sea; that it is expedient to lay down in written mutual engagements the principles which have hitherto remained in the uncertain domain of controversy or have been left to the discretion of governments;

That, from henceforth, a certain number of rules may be made, without affecting the common law now in force with regard to the matters which that law has left unsettled;..." [65]).

This text starts from the assumption that a customary law in the matter does exist, even if it is in part uncertain and controversial, and that the Convention represents its partial codification for the purpose of ensuring its more equitable application. The customary nature of the rules codified is consequently implicitly safeguarded. The last paragraph quoted seems difficult to interpret: on the face of it, it would seem to safeguard contemporary customary law outside the Convention for matters "which that law has left unsettled", in other words, customary rules which do not exist at the moment of the Convention being concluded. However, since it is hardly possible to safeguard non-existing rules, should the paragraph be read to refer to future customary law? If that be true, then the Convention would represent the first instance so far of the codifier concerning himself with the future development of customary law on the subject which he actually codifies.

The unratified London Declaration of 1909 on the laws of war at sea contains the following passages in its preamble:

«Considérant l'invitation par laquelle le Gouvernement Britannique a proposé à diverses Puissances de se réunir en Conférence afin de déterminer en commun ce que comportent les règles généralement reconnues du droit international...

...

Considérant que les principes généraux du droit international sont souvent, dans leur application pratique, l'objet de méthodes divergentes;

Animés du désir d'assurer dorénavant une plus grande uniformité à cet égard;...».

This preamble again takes its stand on the existence of customary law on the matter which it simply proposes to determine more clearly so as to

[65]) *Op. cit.*, pp. 281—282. Emphasis mine.

assure a greater uniformity of its application. The codifying character of the Declaration is once more declared in a *disposition préliminaire*:

> «Les Puissances Signataires sont d'accord pour constater que les règles contenues dans les Chapitres suivants répondent, en substance, aux principes généralement reconnus du droit international» [66]).

The above analyzed texts may not always be shining examples of precision. Even so, it is submitted that they seem to show a much deeper reflection on problems of customary law than is the case with contemporary texts and that they are, consequently, more satisfactory from the point of view here discussed.

It is not without interest to compare this, of necessity rapid and incomplete survey of treaties purporting to codify, wholly or in part, existing customary law, with treaties clearly disclaiming any such purpose and indicating their constitutive nature. Such constitutive nature may in turn consist in either creating new rules where there were none or in being directly derogatory of customary law.

One may perhaps be allowed to quote exceptionally a bilateral treaty, seeing the interest it presents in disclaiming, even though unilaterally, any links with customary law. The Treaty of May 8th, 1871, between Great Britain and the United States, after laying down the three famous "rules of Washington", continues:

> "Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Art. I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provisions for the future, agrees that, in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules" [67]).

The Treaty of Washington thus lays down — at least on the assertion of one party to it — new law and makes it exceptionally retroactive for the purpose of the proposed arbitration. The impact which this unusual

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[66]) Martens, N. R. G. 3e série vol. 7, pp. 39 ss. Emphasis mine. Whether the Declaration was in fact declaratory of the then existing customary law seems to be doubted by Baxter, Rec. d. C. (1970 I), p. 44.

[67]) Martens, N. R. G. vol. 20, p. 698.

construction was to have on further development of the law is a different matter.

The Paris Declaration of 1856 concerning maritime war states:

> "... considering:
> That maritime law, in time of war, has long been the subject of deplorable disputes;
> That the uncertainty of the law, and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties and even conflicts;
> That it is consequently advantageous to establish a uniform doctrine on so important a point;
> That the plenipotentiaries assembled in Congress at Paris can not better respond to the intentions by which their governments are animated than by seeking to introduce into international relations fixed principles in this respect; ..." [68]).

The text seems clear enough regarding its constitutive nature. The aim is not to codify a law which is uncertain, contested and, consequently, dangerous, but to "establish" a uniform doctrine and to "introduce" fixed principles, both operations being clearly creative. This is fully borne out by the operative part of the Declaration. Thus, protection granted to neutral commerce is contrary to both British and French practice to date, while the abolition of privateering is derogatory to existing customary law of the time [69]).

Of the four Geneva Conventions of 1949, the first three identify themselves as being the revision of former Conventions which they obviously are. Only in the case of the fourth Convention, the text of the common preamble changes to read:

> "The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva ... for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War ..." [70]).

As the authorized commentary rightly points out: «Comme on le voit, il s'agit d'une nouvelle Convention» [71]).

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[68]) Texts of the Peace Conferences, *op. cit. (supra* note 58), p. 349.

[69]) See Malkin, The Inner History of the Declaration of Paris, BYIL 1927, pp. 1 ss.

[70]) U. N. T. S. vol. 75, p. 288. Emphasis mine.

[71]) La Convention de Genève relative à la protection des personnes civiles en temps de guerre, Commentaire publié sous la direction de Jean S. Pictet (C. I. C. R. Genève 1956), p. 17.

It is apparently easier to find a happy formula for a constitutive than for a declaratory treaty. The task is, of course, even more formidable with regard to a treaty being at the same time declaratory and constitutive, or, to return to contemporary terminology, representing both "codification" and "progressive development" of international law.

3. The "indifference" formula

Such being the situation, it may be of interest to quote what seems a highly original formula to be found in the Hague Convention on certain questions relating to the conflict of Nationality Laws, of 1930.

Its preamble reads *inter alia*:

> "Being desirous ... of settling in a first attempt at progressive codification, those questions relating to the conflict of nationality laws on which it is possible at the present time to reach international agreement ...".

The Convention thus introduces itself as being "progressive codification", a term very reminiscent of the present "codification and progressive development of international law", with all the attending difficulties. This is how Art. 18 of the Convention, heading the chapter on "General and Final Provisions" meets those difficulties:

> "...
>
> The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.
>
> It is understood that, in so far as any point is not covered by any of the provisions of the preceding articles, the existing principles and rules of international law shall remain in force" [72]).

The last sentence repeats the standard formula safeguarding customary law outside the Convention and does not therefore call for further comment. What is incomparably more interesting is the preceding sentence. It might be called the "indifference formula". Having at the outset declared its character of "progressive codification", the Convention gives up any attempt to disentangle its own provisions and to sort them neatly out into what is old and what is new. Admittedly, by so doing it loses all evidential value, but at least it presents no misleading evidence. The evidence of the customary or non-customary nature of the individual provisions will have

[72]) League of Nations Treaty Series vol. 179, p. 89. Emphasis mine.

to be sought elsewhere, by the admittedly cumbersome procedure of proving customary law and comparing it with the treaty [73]). But at least, the formula lives up to the classical precept of the medical practitioner, the *primum non nocere*. Moreover, the word "already" in the text seems to safeguard the future growth of customary law.

The "indifference formula" leads back to the question which has been asked at the beginning of this chapter. Is it possible to achieve satisfactorily both a distinction between "codification" and "progressive development" in a codification treaty and an adequate safeguarding of customary law? The problem would require far more intensive study and a conscious collective effort. But, should the answer be in the negative, should not the safeguarding of customary law take priority over a distinction which may never be made in an adequate manner? Would not an "indifference formula" of some sort be indeed the best solution of the problem of an overall safeguarding of customary law? As has just been seen, the price to pay for such an operation would be the loss of all evidential value of the treaty, but it may be asked whether this price is not worth paying for securing the safe and uncontested survival of customary law.

The objection may, however, be raised that the "indifference formula" cannot possibly be used when the treaty intends to, and in fact does, derogate from customary law. Suffice it to recall the abolition of privateering by the 1856 Paris Declaration.

The problem of course does not arise when the treaty as a whole is derogatory of customary law, since in such a case there is *ipso facto* no question of safeguarding customary law which is precisely to be ousted. But it does arise when derogatory provisions co-exist in one and the same treaty with codified rules and new rules. An "indifference formula" could in such cases be changed to read:

> "Except for Articles X, Y, Z, the present treaty is without prejudice to (does not affect) customary international law present or future".

VII. Conclusions

The question may — and should — finally be asked whether even the best drafting techniques can eliminate all the dangers to which customary international law is exposed by the codification movement?

In his much quoted study on treaties and custom, Baxter draws

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[73]) Baxter, Rec. d. C. (1970 I), p. 42.

forcefully attention to such dangers. While not overlooking the "healthy influence that treaties may have in the development of customary international law", he points out that the "treaty-making process may also have unwelcome side-effects" [74]). "As the express acceptance of a treaty increases, the number of States not parties whose practice is relevant diminishes. There will be less scope for the development of international law dehors the treaty, particularly if the non-parties include many States with relatively few international links" [75]). This is a serious warning, and one which the recent attitude of the International Court of Justice would seem strongly to support. Indeed, the Court refused to accept as proof of customary law the practice of States either parties to the Continental Shelf Convention or about to become such parties [76]). As against this view it could possibly be argued that, given a consistent actual practice of States over a considerable period of time, such practice could at a certain moment become detached from the treaty to be considered on its own merits. It would appear that even Baxter is not entirely pessimistic concerning the future of customary law, for this is what he says at the end of his study: "Even if all States should expressly assume the obligations of codification treaties, regard will still have to be paid to customary international law in the interpretation of those instruments and the treaties will in turn generate new customary international law growing out of the application of the agreements" [77]).

However, the danger of "crowding out" of customary law by treaties remains and had better be frankly acknowledged. It is submitted that this is one more reason for the utmost effort to be made to counteract any such danger.

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[74]) Rec. d. C. (1970 I), p. 92.

[75]) Rec. d. C. (1970 I), p. 73. Cf. pp. 96—97: "... if a treaty is declaratory or constitutive of customary international law, the customary international law dehors the treaty (but identical in terms with it) is frozen in the same pattern as the law of the treaty. To the extent that customary international law assimilates itself to the treaty, to that same extent the growth and further development of customary international law will be arrested. If the treaty is revised or amended, the customary international law will remain in the image of the treaty as it was before it was revised. The process whereby the treaty exercises its effect as declaratory of the law or passes into customary law must be repeated all over again with the amendment or new treaty".

[76]) "... over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle", I. C. J. Reports 1969, p. 43.

[77]) Rec. d. C. (1970 I), p. 103.

For, an elimination of customary international law would, apart from the above-discussed dangers inherent in such a development [78]) constitute an act of surrender. It would mean an abandonment of all hope of a possible future reconstruction of that minimum of international homogeneity which, once upon a time, made possible the creation and development of international law in Europe. It would be a capitulation which would be the more unnecessary as it would ignore the dynamism of history. It is one thing to admit the historical necessity of passing through a stage of predominance of conventional law; it is another thing to want the whole of international law to be founded on a treaty basis for eternity.

It would be rash to prophesy whether and when a homogenous infrastructure of international law will be reconstructed. This is beside the point. What is not beside the point is the will to leave all doors open for such a reconstruction. It may and should be added that the desired homogeneity is not in any way equivalent to any philosophical, religious, moral or political uniformity. No such uniformity has ever existed in Europe during the whole period of existence of modern international law, that is, from the Treaty of Westphalia. It is neither necessary nor desirable in future. International law is by definition an open system. It has to remain so if it is not to face auto-annihilation. What is postulated therefore is not any kind of uniformization, but a synthesis, in the spirit of full tolerance, of the wealth and diversity of structures, beliefs and ideologies with a minimum of cultural fundamentals in common. As Guggenheim puts it:

> «Admettre une règle comme norme du droit international suppose ... qu'elle est conforme aux aspirations et aux bases idéologiques communes du monde civilisé. Le droit des gens positif est donc fatalement un droit sécularisé, laïque, indifférent à l'égard des doctrines religieuses. Il ne peut en être autrement si l'on tient compte de la variété des conceptions morales et religieuses qui sont celles de différentes communautés constituant la société internationale» [79]).

To achieve such a synthesis, no effort should be spared. While it can certainly not be the work of the lawyer alone, the latter has just as certainly his contribution to make to the process. The present article aims at nothing more than stimulating a discussion about the best ways and means of providing such a contribution.

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[78]) See above, pp. 496—497.

[79]) Les principes du droit international public, Rec. d. C. (1952 I), pp. 32—33.