The Influence of the Third United Nations Conference on the Law of the Sea on International Customary Law

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This article is divided into two parts. In the first part some general remarks will be made on the changing values placed on customary international law and international treaties in the creation of norms in international law. This leads to the question whether the Third United Nations Conference on the Law of the Sea (UNCLOS III) has altered these values. If it has, the direction in which the balance has shifted must be examined.

The second part of the article examines how the Law of the Sea Conference has influenced customary international law.

I

Is there a swing of the pendulum away from treaty law towards customary law?

It is a commonplace among international lawyers that most of the norms of "classical" international law derive from customary law, treaty law having played only a secondary role during the "classic" period. There is a series of authors who even today place customary international law first on the list of sources of international law[1].

Since the end of the classical period it must, however, be said that the emphasis on customary international law as the principal source of international law has been questioned increasingly. This trend towards emphasis-

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[1] Cf. for example F. Berber, Lehrbuch des Völkerrechts, vol.1 (Berlin, München, 1st ed.1975), p.41.

ing the treaty as the principal source of international law was not initiated by quantitative investigations (or even quantitative suspicions) that greater use of treaties was displacing custom as the instrument creating international law. Rather, the trend was sponsored by those States whose doctrines of international law were increasingly no longer in agreement with the content of norms which had evolved through custom. A disassociation in part from the content of norms evolved through custom gave rise to a disassociation from custom as a source. It is known that this new trend in the weighting of the importance of the source of international law was initiated by the Russian Revolution. Russia, as an old subject of international law and a member of the "classic" community of States had taken part in the creation of the classic international law rules, by custom. However wide-going the changes in the internal legal order of Russia were, the rules of international law could not be changed unilaterally by the new Soviet State[2].

The Soviet policies in creating new international law rules could succeed in the shortest possible time by making use of that instrument in the norm-creating process which was – and is – best capable of producing new norms of international law quickly: the treaty. This was the reason why "the Soviet doctrine of international law has always considered the treaty as the principal source of international law" – to quote Tunkin from his Hague Lecture of 1975[3].

After World War II, the importance of custom as a source of international law was further devalued. Unlike prerevolutionary Russia, the overwhelming number of developing States had not been members of the classic

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[2] The international law practitioner at the People's Commissariat of Foreign Affairs, A. Sabanin indicated as early as 1922 that although the Soviet Power has annulled "all sixteen volumes of the Zvod Zakonov" (the collected domestic laws of Russia), at the same time "it was possible and recognized, that the Soviets would observe the fundamental provisions of international law in their foreign relations, and that they would make reference to this in the official explanations of their diplomacy", A. Sabanin, Sovetskaja vlast' i meždunarodnoe pravo [Soviet Power and International Law], Meždunarodnaja Žizn' 1922 No.15, p.10; a few years later Sabanin even wrote that the Soviets "have recognized the so-called European international law as a normative fact", A. Sabanin, Pervyj sovetskij kurs meždunarodnogo prava [The First Soviet Textbook of International Law], Meždunarodnaja Žizn' 1925 No.2, p.117. Sabanin, however, pointed only to the "fundamental provisions" of international law. This restriction indicated that the new Soviet government was far from recognizing the whole set of the classic international law rules, for it also had the intention to make changes to this set.

[3] G. I. Tunkin, International Law in the International System, RdC vol.147 (1975 IV), p.132. Compare the discussions on customary international law in soviet writings in R. J. Erickson, International Law and the Revolutionary State (Leiden 1972), pp.1–45.

community of States and thus had not even taken part in the creation of the classic international law rules. Entering into the community of States as new subjects, or at least as newly independent subjects of international law, they viewed customary international law with a certain suspicion.

Granted the pertinence of the position held by the "old" members of the community of States, which was that a subject entering into a legal community subjects itself to that community's rules in force and is bound by them, it is on the other hand understandable that a new subject entering an international legal community characterized by the coordination of its members and the shared identity of being both norm creators and being subject to norms, should raise doubts about certain parts of this legal order, given that the legal order has come about without the participation of the new subject. To "raise doubts" here means to press for changes and innovations in the existing legal order. Leaving the exceptional case of "instant customary international law" to one side, and given that the quickest, the most exhaustive and, it would seem, the most unambiguous way of bringing about changes is through the use of the treaty, the value developing countries placed on the international treaty as the principal source of international law was also logical in the light of their international legal policy interests.

The bravura of the "new majority" of developing States in managing the treaty as an instrument to achieve changes in the rules existing at the time of their entry into the international legal community has been breathtakingly demonstrated in the last ten years at UNCLOS III. Here, however, and for the moment, we must look beyond doubts that the entire undertaking will come to a final and successful conclusion.

It was not the rejection of the customary international law that had been handed down, so much as the wave of codification set in motion by the work of the International Law Commission which gave further impetus to the classification of treaties as the principal source of international law. Merely as an example, we may refer to the comment of the late Alfred Verdross who, faced with these conditions, said that »das Vertragsrecht gegenüber dem Völkergewohnheitsrecht in den Vordergrund getreten (ist)«[4]. The way the wave of codification flooded into international law doctrines, washing over the desparately-held last bastions where customary international law was accorded pre-eminence might be illustrated by this example:

[4] A. Verdross, Die Quellen des universellen Völkerrechts (Freiburg 1973), p.38.

In 1971, Krystyna Marek published her "Thoughts on Codification", one of them being a plea for the "superiority of customary over treaty law", on the grounds that "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"[5]. This plea was characterized by B. Simma as mere »quellentheoretische Nostalgie« because »das Gewohnheitsrecht als die klassische Rechtssatzform des Völkerrechts der bloßen Koexistenz aus seinem ganzen Mechanismus heraus insuffizient sein muß, wenn es um den Aufbau des heute lebensnotwendigen Völkerrechts der Kooperation geht, das mit seiner Planungsfunktion die überwiegende Stabilisierungsfunktion des Koexistenzrechts überlagert«[6].

Taking this and other similar statements into account, the time no longer seemed distant when the source of customary international law would be reduced to a trickle, where it would only be able to develop to fill out niches in unimportant marginal areas, leaving the great international legal questions of the day to be regulated exclusively by means of treaty law.

It was the Third United Nations Conference on the Law of the Sea which seemed to offer conclusive proof of the correctness of the proposition that the treaty had achieved pre-eminence over custom as a source of the "international law of cooperation". For centuries, the international law of the sea had developed gradually, mainly on the basis of custom. The end-products of the First United Nations Conference on the Law of the Sea were hardly more than a codification of the customary law of the sea. It has only been in the last two decades of the present era that the rapid developments in fishery, maritime transport and deep-sea mining techniques called for an equally rapid, all-inclusive reform of the law of the sea which had developed as the result of custom. The technical device to carry out this reform could, it seemed, only be the treaty. The speed with which the new, revolutionary rules were formulated, and the suitability of the treaty for the formulation of the "international law of cooperation" are impressive indeed.

The nine years taken by the Conference on the Law of the Sea seems almost momentary when compared with the centuries taken to develop the law of the sea that has come down to us. Customary law, compared with

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[5] K. Marek, Thoughts on Codification, ZaöRV vol.31 (1971), pp.497, 498.

[6] B. Simma, Methodik und Bedeutung der Arbeit der Vereinten Nationen für die Fortentwicklung des Völkerrechts, in: Die Vereinten Nationen im Wandel, W. A. Kewenig (ed.) (Berlin 1975), p.79 *et seq.*, pp.85, 86.

this, seemed insufficient for such a massive reformulation entering so rapidly into effect.

At this point, however, something rather remarkable happened. The tremendous undertaking to rebuild the law of the sea by means of a comprehensive, universal treaty itself developed into a challenging exercise to think about, examine and revitalize custom. Although, as was said, the nine-year duration of the Conference seemed almost momentary, compared with other multilateral treaty conferences and for a number of well-known reasons it was also unusually long. It was this very long duration of the Conference, the identifiable "conference trends" and unilateral statements of legal positions on the law of the sea during the Conference which first prompted questions on the "decline and formation of customary law in the international law of the sea"[7], even before the end of the Conference was in view.

The result of the Conference is such that, now, it is even more important that the questions surrounding the importance of customary international law be addressed. Although it is true that the Conference finally did succeed in translating the last (third) revision of the Informal Composite Negotiating Text (ICNT) into a "Draft Convention on the Law of the Sea"[8] the failure of the Conference to achieve the goal it had set itself – to adopt the Convention by consensus – and the 4 votes against and 17 abstentions (all including very important States)[9] mean that there is no certainty that the Convention will emerge as a universally binding treaty governing the law of the sea in the future. Also, the signature of the Convention on behalf of 117 States on December 10, 1982 cannot be taken as a sure guarantee that the Convention enters into force in the near future and on a truly universal scale[10]. In these circumstances, it is quite possible that one of the great political questions of international law of our era, the reformation of the law of the sea, will come to be regulated by customary international law instead of by treaty. In view of the conflicts of interests which cannot be reconciled by consensual package-deals, the question may well be justified now, at least as far as the present maritime interests are

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[7] See R. Bernhardt, Verfall und Neubildung von Gewohnheitsrecht im Meeresvölkerrecht, in: Recht über See, Festschrift Rolf Stödter (Hamburg, Heidelberg 1979), p.155 *et seq.*

[8] A/CONF.62/L.78, 28 August 1981.

[9] UN Press Release SEA/154, 30 April 1982.

[10] The complete text of the "United Nations Convention on the Law of the Sea" is reproduced in UN Document A/CONF.62/122 of October 7, 1982; see also ILM 1982, p.1261 *et seq.*

concerned, whether the rapid laying down of new international law using universal treaties has not in fact reached its own limits where interests will win through and become law via the path of customary international law, and thus where customary international law "now as before" represents not only an "indispensable" but also an "important" source of international law[11].

Thus the question arises, in respect of the law of the sea, but also in general, whether there is a resurgence of custom. This question arises, it seems, on two grounds. Firstly, it is said that "there are certain reasons to believe that treaties have reached their maximum relative importance. Most things that are amenable to treaty regulation may have already been dealt with. The principal focus then will shift to the implementation and interpretation of those treaties, a process squarely within the realm of customary international law"[12]. Secondly, it is said that it is probable that many newly independent States "now more socialized into the international system, will be more willing to give custom a chance as a source of international law"[13]. In this context it is interesting to discover that recently a prominent Soviet author also emphasized the continuing importance of customary international law. In a pertinent article in one of the most recent editions of the Soviet Yearbook of International Law, Lukašuk says, that "in present international law custom plays an important role and its significance does not at all decrease. The number of customary norms is growing, they regulate a vast circle of international relations"[14].

It would certainly not entirely accord with reality to speak today of a complete swing of the pendulum away from treaty law towards customary law. There are still many areas that are amenable to treaty regulations; to take just one example, there is the vast field of disarmament questions. It is no bad thing to remain circumspect with judgments pronouncing "the superiority of customary law over treaty law" and vice versa. One or the other source will seem the appropriate one depending on what subject it is that requires regulation by international law and what the interests of the States concerned happen to be.

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[11] Cf. Bernhardt (note 7), p.155.

[12] Cf. J. K. Gamble, The Treaty/Custom Dichotomy: An Overview, Texas International Law Journal, vol.16 (1981), p.305 *et seq.*, at p.314.

[13] *Ibid.*, p.315.

[14] I. I. Lukašuk, Customary Norms in Contemporary International law, Sovetskij Ežegodnik Meždunarodnogo Prava 1978 (publ.1980), p.86 *et seq.*, at p.97.

II

Let us now turn to the subject taken in the narrower sense, and examine the question to what extent the Third United Nations Law of the Sea Conference has influenced existing customary international law. We take "influencing customary international law" to mean the changes wrought on the customary international law existing at the time the Conference began, and the formation of new customary international law. The customary international law existing at the time the Conference began is of rather marginal concern to this enquiry since a declaratory statement of it has been provided in the Draft Convention on the Law of the Sea. Thus, much of Part VI, the continental shelf régime, follows the 1958 Convention word for word and has remained unchanged and unchallenged during all the years the Conference has been running.

1. The Conference/Custom Dichotomy

All those concerned with the Law of the Sea Conference, the members of Conference delegations, the various central government home officials directly responsible for the Conference and the observers employed in the specialist fields, all of them agree that even now the Law of the Sea Conference has influenced customary international law. "Whatever the ultimate outcome of the Conference, it is certain that these procedures must leave their mark, and that international law will never be the same again"[15].

From the writings of scholars, as yet none too numerous, who have commented on the influence of the Conference on customary international law it seems clear, as far as individual institutes of the law of the sea are concerned that questions have been raised, rather than answered. Thus, for example, it is said that parts of the Convention, "such as the principle, if not the details, of the Exclusive Economic Zone, are new law, assuredly"[16]. It is only too understandable that comment is, and must be,

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[15] R. Y. Jennings, Law-Making and Package Deal, in: Mélanges offerts à Paul Reuter (Paris 1981), p.348.

[16] R. Y. Jennings, What is International Law and how do we Tell it when we See it?, Schweizerisches Jahrbuch für internationales Recht, vol.37 (1981), p.59, at p.82. Similarly but more reluctantly it is stated in a new study by L. Gündling, Die 200 Seemeilen-Wirtschaftszone, Entstehung eines neuen Regimes des Meeresvölkerrechts (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.83) (Berlin etc. 1983), p.326: »Das Wirtschaftszonenkonzept hat deshalb bisher nur insoweit gewohnheitsrechtsbildende Wirkung gezeigt, als es gegenwärtig nicht mehr als rechtswidrig angesehen werden kann, wenn ein Küstenstaat eine Fischereizone von 200 sm in Anspruch nimmt. Ob und inwieweit das

rather restrained, given that the current situation is in a state of flux, thus obstructing the way of any single observer seeking an overall view. The situation is summarized perceptively by one observer's remark, »stabil wird dann für einen gewissen Zeitraum die Rechtsunsicherheit«[17].

This is not, however, anything fundamentally new. It has never been entirely easy in international law to distinguish with precision between propositions *de lege lata* and propositions *de lege ferenda.*

A well-known and comparable situation to this is the entry into force of a treaty intended to be universal for a reduced number of States only. If the point of reference taken is the strict division between treaty and customary law as expressed in Art.38 of the ICJ Statute, a situation of legal uncertainty ought not to arise: the treaty is valid between the contracting parties only and for all the other States the pre-treaty law remains valid. We then, however, come up against Art.38 of the Vienna Convention on the Law of Treaties according to which a rule set forth in a treaty may become binding upon a third State as a customary rule of international law, recognized as such. We have the application of this idea in the *North Sea Continental Shelf* Case where the ICJ in its judgment of February 20,1969 stated: an article in a treaty can be treated as "a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed"[18].

This formation of customary international law from a treaty is one aspect of the famous treaty/custom dichotomy, a dichotomy which has often been treated in legal literature[19]. It demonstrates firstly that the two sources, treaty and custom, influence each other and secondly, that phases of legal uncertainty are possible between the entry into force of a treaty for

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Wirtschaftszonenregime im übrigen allgemeines Völkerrecht geworden ist, ist zum heutigen Zeitpunkt fraglich«.

[17] T. Eitel, Seerechtsreform und Internationale Politik, Archiv des öffentlichen Rechts, vol.107 (1982), p.100 *et seq.*, at p.123.

[18] ICJ Reports 1969, p.41.

[19] Cf. e.g. K. Doehring, Gewohnheitsrecht aus Verträgen, ZaöRV vol.36 (1976), p.77 *et seq.*

a restricted number of States and the extension of treaty norms via custom onto non-contracting States.

This well-known treaty/custom dichotomy, however, is not approximate to the situation, which concerns us here. Our question concerns the changes wrought on the *lex lata* of the law of the sea, and as yet we are dealing not with a convention in force, but only with an unratified Convention, the signature of which is not an act establishing the consent of the signatory States to be bound by the Convention (Art.306 of the Convention). For the present, from a dogmatic point of view, this Convention is nothing more than a conference document. Instead of the treaty/custom dichotomy we have a conference/custom dichotomy. In other words, it would be premature to begin thinking about the influence of a law of the sea convention being in force. As the subject of this article requires, the question can only be what influence has the almost ten year old Conference had on customary international law.

In the author's view, influence can have been exercised in two possible ways, one directly, the other indirectly. Under direct influence the Conference is understood to represent itself a complete process of norm alteration, or at least part of one. By indirect influence the Conference is understood to have had effects outside its own running process of norm alteration. The direct influence will be dealt with first of all.

2. The Direct Influence of the Conference on Customary International Law

The International Court of Justice, in the *Fisheries Jurisdiction* Case (ICJ Rep.1974, para.53) said "... the Court, as a Court of law, cannot render judgement sub specie legis ferendae, or anticipate the law before the legislator has laid it down". Here, with UNCLOS III in view, Jennings made this comment: "One effect of recent developments has been, through the emergence of new methods of law-making, to make it even more difficult to say when and how 'the legislator has laid it down'. For this problem of identifying law has become inextricably confounded with the prior problem of identifying authoritative law-making processes and procedures"[20].

Thus, let us first pick up "the prior problem" by trying to identify the "authoritative law-making process" of UNCLOS III. It is meant here to

[20] Jennings (note 15), p.348.

delineate the law-making capacity of the Conference. If the law-making capacity of the Conference is comprehensive enough to change the law, it would then be possible for the Conference to have a direct influence on customary international law.

At this point a few remarks will suffice on a possible comprehensive law-making capacity on the part of the Conference. There can be no question of this. What is meant here is the laying down of law through the so-called "formless" or "original consensus of States". There are a few authors who are known to represent the opinion that the "formless" or "original consensus of States" is an additional source of international law, additional to the trio of sources laid down in Art. 38 of the ICJ Statute. It is known that this opinion, which is a proposition on the theory of sources, is discussed and represented in the light of the legal meaning of resolutions and declarations of the UN General Assembly. It is said that the General Assembly is at the disposal of sovereign States as a "communications center", where formless consensus can develop. It is also said that this sort of "communications center" can be any other international body, for example a conference of States with the appropriate universal participation[21]. The Third United Nations Conference on the Law of the Sea is such a universal conference of States. In the sense of our proposition on the theory of sources, it could represent a "communications center". This subject was discussed in great depth not very long ago at two colloquia held at Kiel University[22]. It is not, therefore, proposed to go into this subject except to say that even if one believes it possible for the law to be laid down by the "original consensus of States", it must be admitted, even by those who tend to this theory, that the conditions necessary for it were not fulfiled at the Third Conference on the Law of the Sea. The conditions necessary are that any regulations are adopted universally, without disagreement. If States decline to do so, »so verhindern sie das Zustandekommen eines *inter omnes* rechtsbildenden Konsenses«[23].

At the very latest, by April 1982, the vote adopting the text disclosed the absence of universal consensus. Quite apart from this vote, for present purposes the theory of the "original consensus of States" misses the mark

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[21] B. Simma, Zur völkerrechtlichen Bedeutung von Resolutionen der UN-Generalversammlung, in: Fünftes deutsch-polnisches Juristenkolloquium, vol. 2 (Baden-Baden 1981), p. 45 *et seq.*, at p. 61 note 38.

[22] *Ibid.*; and B. Simma, Die Vereinten Nationen im Wandel, Ed. W. A. Kewenig (Berlin 1975).

[23] Simma (note 21), p. 63.

also because UNCLOS III cannot be seen as a "communications center" under the theory. The Conference is an event which took place fully within the parameters laid down by the trio of sources in Art.38 of the ICJ Statute. The Conference prepared a draft treaty which was intended to lay down law through quite ordinary consensus – through ratification – and not through "original" consensus.

The second way of seeing a possibility of the Conference directly influencing customary international law would be to regard the Conference as a part of the formation of customary international law and to take the "conference trends" as an expression of the *opinio juris*. Thus, for example, it is said: "Insofar as the contents of the negotiating texts ... represent what, after nine sessions of debate and negotiations offers a substantial prospect of a 'consensus', it would seem to follow that it also offers impressive evidence of that 'opinio juris' which is the most important element of established customary law"[24].

In its recent judgments, the ICJ came close to answering the question of what the character of the "trends" at UNCLOS III might be.

In the 1974 *Fisheries Jurisdiction* Judgment the Court was aware of the "various proposals and preparatory documents produced" within the framework of the Conference, but the Court regarded them only "as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law"[25], and, it might be added, rather than expressing consolidated *opiniones juris* of the participating States. Following this statement, the Court added the phrase already cited, that it "cannot render judgement sub specie legis ferendae, or anticipate the law before the legislator had laid it down". Obviously, at that time, in 1974, "the legislator" had neither "laid it down" by means of a treaty nor by means of customary law.

By the time of the most recent judgment of the Court, the *Tunisia/Libya Continental Shelf* Case in 1982, the "various proposals and preparatory documents" of 1974 had already gone into the Draft Convention on the Law of the Sea. Because the Court was authorized by a Special Agreement between Tunisia and Libya to take into account the "new accepted trends" one might have expected it to clarify the question of the character of these "trends" as far as the *opinio juris* was concerned. In its Judgment, the Court stated that it "would have been proprio motu to take account of the progress made by the Conference even if the Parties had not alluded to it in

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[24] Jennings (note 15), p.349.
[25] ICJ Reports 1974, p.23.

their Special Agreement; for it could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law"[26]. However, the Court, if the author's reading of the case is correct, did not take account of the progress made by the Conference in the particular circumstances of the question to be decided; according to the Court, the "new trend" in Art.76, para.1 of the Draft Convention, namely the 200 nautical miles distance criterion as the basis of the coastal State's title over the continental shelf, "affords no criterion for delimitation in the present case", because "both Parties rely on the principle of natural prolongation: they have not advanced any argument based on the 'trend' towards the distance principle"[27].

When we read this judgment we see that the Court did not *proprio motu* take account of the "new trend" in Art.76 of the Draft Convention, even though it could have done so, independently of the arguments advanced by the parties to the case, if it had come to the conclusion that this provision crystallized an emergent rule of customary international law. The reader can only assume that the ICJ did not come to this conclusion. In principle, moreover, the ICJ said nothing about the *opinio juris* nature of the "accepted trends", or, to put it more generally (in the words of Judge Oda's dissenting opinion) the Court failed "to arrive at a proper appreciation of the 'trends' of the Third United Nations Conference on the Law of the Sea"[28]. Thus the ICJ leaves us to our own devices when we have to consider the character of the "trends".

In the author's view, the Conference trends cannot be regarded as an expression of the *opinio juris*, particularly when the unprecedented elements which characterized the Conference are borne in mind: namely the consensus procedure that was adopted and the characterization of the Informal Composite Negotiating Text as a "package-deal".

The evidence that reinforces the author's conviction is what has been said about the package-deal, namely that "insofar as those draft provisions are only elements of a package deal, which package may or may not be realized, it would seem that they are not necessarily evidence of *opinio juris* at all but of elements of a bargain. The I.C.N.T. (was) after all, as (had) been insisted throughout the conference, only a negotiating text; and a

[26] ICJ Reports 1982, p.38 para.24.
[27] *Ibid.*, p.48 para.48.
[28] *Ibid.*, p.157.

negotiating text cannot as such logically be evidence of what is already established"[29].

As far as the ICNT and its coming into existence is concerned, the consequence of the decision to do without voting is that it precludes any *opinio juris* from being identified. To establish a consensus »setzt nicht wie beim Einstimmigkeitsprinzip die positive Zustimmung aller beteiligten Staaten voraus, sondern nur die Abwesenheit ausdrücklicher Gegenstimmen; die Annahme eines Beschlusses im Konsensverfahren erlaubt es einem Staat, diesen Beschluß passieren zu lassen, auch wenn er seiner Auffassung nicht entspricht, sofern wesentliche eigene Interessen nicht beeinträchtigt werden oder er auf einem anderen Gebiet eine Kompensation erwarten kann«[30]. This method of procedure, in facilitating the adoption of resolutions, prevents the development of *opinio juris*.

Has anything changed in this evaluation since April 30,1982, the day when the text of the Draft Convention was adopted? The negotiations at the Conference have been described with a certain Anglo-Saxon vividness: "all this is rather like working in a material like cement, that remains easily plastic for quite a long time; but parts of it gradually and perhaps even unexpectedly, harden beyond any possibility of change"[31]. After the adoption of the text the impossibility of change now extends to the whole Convention. Nevertheless, having established that this is so, the question following this result asking "has it become law?" as well as the more modest enquiry whether the adoption is an expression of an *opinio juris*, at least on the parts of the adopting States, must both be answered with a clear "no". The adoption of the text is a step clearly outside the realm of customary law, but inside the law-generating process via treaty. In the treaty-making process, the adoption of the text designates, it is true, a concordance of the wills of the States. However, this concordance of wills relates only to the contents of the rules of conduct as formulated in the Convention, it does not relate to the recognition of these rules of conduct as legal norms. These two aspects of the process of norm-formation must be clearly distinguished: it is quite easy to distinguish them in the case of law-making by a treaty which is subject to ratification[32]. Thus the consent expressed in the adoption is only a consensus *de lege ferenda*[33]; the "hard-

[29] Jennings (note 15), p.349.

[30] G. Jaenicke, Die Dritte Seerechtskonferenz der Vereinten Nationen, ZaöRV vol.38 (1978), p.438 *et seq.*, at p.451.

[31] Jennings (note 16), p.82.

[32] Cf. here G. I. Tunkin, Theory of International Law (London 1974), p.213.

[33] Likewise Gündling (note 16), p.319.

ening of the cement" only made the formulated rules of conduct unchangeable. It did not, however, make law, and therefore it could not change the existing customary law.

The Third United Nations Conference on the Law of the Sea was such an exciting enterprise because of the various new features of the rule-making process which were introduced. There were many things at the Conference which favoured the view that here we were witnessing an entirely new way of laying down law. One need only think of the way the law of the sea in its entire breadth was tabled at the Conference, the great number of negotiating States, the decision to forego a draft treaty as the Conference's working basis, the preference given to a consensus rather than a voting procedure, the constant description of the massive subject matter of the negotiations as a package-deal, all these could be said to favour such a view.

The gradual way the text was brought into being in the Conference, a hot-house of some 5000 delegates, and the knowledge that nearly each and every article concerned palpable economic and military State interests, all served to arouse the passions of delegates and observers. Now that the time has come to subject the results of the Conference up until the present time to legal analysis, the time is also upon us when passion should play a lesser role.

We may thus say that the procedures adopted at the Conference were indeed without precedent. On the other hand, in essence, the law-making capacity of the Conference was of quite ordinary dimensions.

The law-making capacity of the Conference was confined to the formulation of rules of conduct; the delegates were not empowered to bring about a concordance of the wills of States relating to the recognition of these rules of conduct as legal norms. And, because the delegates were working in the realm of a law-generating process by treaty and not by custom, they were unable to express any *opinio juris* of their respective States as "trends" of the Conference.

The "new accepted trends", accordingly, can only be regarded as the concordance of the wills of States relating to the content of the rules of conduct in the course of an overall treaty-making process. It would, of course, be nothing less than wilful blindness to say, "as of today, nothing has changed". The "new accepted trends", the rules of conduct as formulated in the Convention contain legislative ideas which have partly already made their way into the *corpus juris gentium*, and will in the future continue to do so.

3. The Indirect Influence of the Conference on Customary International Law

The indirect influence of the Conference on customary international law rests on the fact that the Conference has had effects outside its own running process of norm alteration.

No attempt will be made to give a detailed exposition on which areas, thanks to the indirect influence of the Conference, the *lex lata* has already been altered, as the advance upon mere conjecture would require very precise research into each subject area in question. Instead, a few general remarks will be made.

The processes which are outside or parallel to the Conference's own running process of norm alteration are manifested via the usual forms either of the conclusion of treaties or the formation of customary international law.

An interesting example of the former, is the "Treaty on Sovereignty and Maritime Boundaries in the Area between the Countries" of December 18,1978, concluded between Australia and Papua New Guinea[34]. Art.7 (2) of this treaty says:

> "A régime of passage over routes used for international navigation in the area between the two countries, including the area known as Torres Strait, shall apply in respect of vessels that is no more restrictive of passage than the régime of transit passage through straits used for international navigation described in Arts.34 to 44 inclusive of Document A/CONF.62/WP10 of the Third United Nations Conference on the Law of the Sea ... If the provisions of those articles are revised, are not included in any Law of the Sea Convention or fail to become generally accepted principles of International Law, the Parties shall consult with the view to agreeing upon another régime of passage that is in accordance with international practice to replace the régime of passage applying under this paragraph".

This example illustrates how transit passage, one of the legislative ideas from the Conference, has been taken up and used to form the contents of a treaty. Of course, the treaty, for the meantime, can only have an *inter partes*-effect, but it can extend beyond, within the context of the treaty/custom dichotomy, into general customary international law, assuming that third countries recognize the transit passage régime agreed under Art.7 (2) as binding on themselves.

The treaty is also remarkable in that it is clear from the article quoted that although the contracting parties see the transit passage régime as an

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[34] ILM 18 (1979), p.291 *et seq.*

"accepted trend" of the Conference, they by no means regard it as a generally accepted principle of international law. Indeed they are uncertain whether this principle will even establish itself as a generally accepted principle.

Where the formation of customary international law outside or parallel to the Conference is concerned, derogating customary international law is always the issue, since the formation of customary international law of the sea does not take place in a legal vacuum. It is clear that the formation of derogating customary international law is intended to proceed via the many unilateral acts which lay down the law on the territorial waters beyond the three mile limit on the Fishery, Economic and Pollution Zones[35]. Like the bilateral treaty just quoted, these unilateral acts laying down municipal law use the legislative ideas of the Law of the Sea Conference. They anticipate the rules of conduct as formulated in the Convention in that the States who have initiated the unilateral acts do so in the understanding that they are the initial step towards establishing a rule of customary international law.

The question here that must be answered is what element of the formation process of customary international law is represented by these unilateral acts. One tends to answer that this is State practice. However, under State practice is its essence not understood to be certain factual actions which are carried out under a claim that the actions are justified by some legal norm? Is a mere proclamation of an exclusive economic zone by a State enough to enable us to assume that this is State practice, or must the State not take some additional practical measures to attest to the degree of its legal conviction by exercising its claims, for instance, by the inspection of ships provided for under Art.73 of the Convention? These unilateral acts can only be seen as State practice if the background to them is a claimed legal norm which allows the unilateral assumption by a coastal State of an area of jurisdiction.

Thus, for example, President Echeverria justified Mexico's unilateral action in establishing a 200-mile Exclusive Economic Zone in these words:

> "In proposing that the economic zone be put into force before the international treaty is formalized the Executive is firmly convinced that it is not acting counter to international law, but it is applying rules of the new law of the sea as they are inferred from present conclusions of the United Nations Conference,

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35 An overview, in form of a table, setting out the various claims raised before and during the Conference, may be found in A. Akinsanya, The Law of the Sea: Unilateralism or Multilateralism?, Revue Egyptienne de Droit International, vol.34 (1978), p.39 *et seq.*

which rules have been explicitly or implicitly accepted by a great majority of the members of the international community"[36].

The author tends to the view that these unilateral acts are not to be seen as State practice; rather, they are clear expressions of *opinio juris* with which the practice of coastal States will have to conform before both elements of the formation process of customary international law may be seen to be united under the same auspices. The danger of sweeping assertions must, however, be borne in mind, since not every unilateral act can be seen, without more, as a clear expression of *opinio juris*. The Fishery Zones established by the Federal Republic of Germany and by the USSR may be taken as an example. In the proclamation of the Federal Republic of Germany we read, "Independently of the Conference ... many States ... have begun to claim fishery or economic zones extending up to 200 nautical miles off the coasts. This constitutes a very serious threat to the fishery interests of the Federal Republic of Germany"[37]. In the corresponding decree of the USSR we read "immediate action is needed to protect the interests of the Soviet State..."[38]. These formulations sound more like reprisal measures than expressions of *opinio juris* within the formation process of customary international law.

As Verdross has demonstrated, the proposition that there is a single way in which all norms of customary international law come into being, cannot withstand criticism[39].

Here, with the formation of customary international law parallel or outside the Law of the Sea Conference, we are dealing with a formation process which falls into the "claims and tolerances" scheme which is described by D'Amato[40]. Under this, customary international law comes into being as a result of practice which supports a claimed legal stand-point on the part of one or more States and as a result of assent or acquiescence on the part of the community of States[41]. The unilateral acts must be all understood as "claimed legal stand-points", in other words, as claims. What then of assent or acquiescence? Those of the other coastal States whose initial reaction to the first unilateral act was to follow suit and

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[36] Cf. *ibid.*, p.81.

[37] UN ST/LEG/SER.B/19, p.211.

[38] *Ibid.*, p.253.

[39] A. Verdross, Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts, ZaöRV vol.29 (1969), p.635 *et seq.*, at p.636.

[40] A. A. D'Amato, The Concept of Custom in International Law (1971), p.74 *et seq.*

[41] Bernhardt (note 7), p.156; and R. Bernhardt, Ungeschriebenes Völkerrecht, ZaöRV vol.36 (1976), p.50 *et seq.*, at p.63.

to unilaterally declare similiar zones can be described as assenting. Also, those States whose acts seemed more in the nature of a reprisal will find themselves being characterized as assenting, if this is not the case already. The remaining States who have not undertaken comprehensive acts or being land-locked were not able to do so, have remained silent in the face of the claims of coastal States. Insofar as these States now conform with the unilaterally declared régimes of the coastal States (where for example they do not allow their fleets to fish a unilaterally declared fishery zone), they have acquiesced to the claims of coastal States[42]. Here, the law governing unilaterally declared zones may well today already be new derogating customary international law. The question whether there are any States who are not bound by this new customary international law seems to be in abeyance. The only States who could be excepted are the "persistent objectors", yet it is difficult to see any persistent objectors.

In the absence of objections, and thus in the acquiescence to the legal stand-point claimed by the coastal State, we may see the greatest indirect influence of the Law of the Sea Conference on customary international law. The legislative ideas arising out of the Conference have so shaken confidence in the continuing validity of the *lex lata* that no-one is prepared to risk objections.

This indirect influence of the Law of the Sea Conference is circumscribed at the point where the *lex lata* cannot be altered by customary international law, but only by treaty. This is the case where the legislative idea to establish the International Sea-Bed Authority is concerned. An international organization with all its powers and functions cannot be established by custom. Should it be established by treaty, this treaty can change the customary law of the high seas only between the parties. If it turns out that the Law of the Sea Convention enters into force for only a restricted number of States over a lengthier period, a "split system" governing the high seas will be the result. This, however, would be nothing new in the Law of the Sea. In the past, the various fishery conventions also only bound the contracting parties; they were not able to change the status of the high seas as *res communis*. However, the fundamentally new and very serious element in this situation would be on the political level the high degree of conflict potential which would be brought into being[43].

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[42] See A. Verdross/B. Simma, Universelles Völkerrecht (Berlin 1976), p.299.

[43] Cf. in detail W. Graf Vitzthum, Friedlicher Wandel durch völkerrechtliche Rechtsetzung – Zur Problematik des Verfahrens und der inhaltlichen Konsensbildung inter-

To try to sum up in a sentence, the multilateralism of the reformation by treaty of the Law of the Sea has for the moment led to unilateralism on the parts of coastal States and their claims, with the result that it would appear that wide-going changes in the *lex lata* of the Law of the Sea through new customary international law are being brought about.

nationaler Kodifikationskonferenzen, dargestellt am Beispiel der 3. UN-Seerechtskonferenz, in: Völkerrecht und Kriegsverhütung, Ed. J. Delbrück (Berlin 1979), p.123 *et seq.*