‘TREATIES ARE TREATIES AND CUSTOM IS CUSTOM AND NEVER THE TWAIN SHALL MEET’?
EXAMINING THE INTERPLAY OF TREATIES AND CUSTOM IN INTERNATIONAL LAW

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I. Introduction

"Well, I shan't go, at any rate", said Alice, "besides that's not a regular rule, you invented it just now".

"It's the oldest rule in the book", said the King.

- Lewis Carrol, *Alice in Wonderland*.

The brief excerpt from the trial scene in *Alice in Wonderland* is illustrative of the misgivings which international law sceptics hold about the nature and structure of the international legal regime. Few issues in law are more important than the question of where a legal rule comes from and how it is proved. However, international law's failure (linked intrinsically with the failure of international lawyers) to provide adequate responses to this vital issue has often provoked arguments questioning the very existence of international "law".1 The apparent indeterminacy of international legal rules, whose content and form is regulated by the very actors it seeks to regulate, can prove to be extremely unsettling to a municipal lawyer, used as he is to statutes and precedent. This confusion is compounded by the existence of several sources and the amorphous and complex manner in which they contribute towards the formation of a particular rule. It is hardly surprising, therefore, that the sceptics believe that, just like the King in *Alice in Wonderland*, publicists create international legal norms to justify the conclusions they desire to reach. It is in this context that the interplay between treaties and custom merits examination. The relationship between both these ‘primary’ sources of international law plays a vital role in the degree of determinacy of international rules and thereby influences the legitimacy of the international legal system itself.

Writing after the Second World War, Sir Robert Jennings regarded the implementation of Article 13 of the United Nations Charter regarding the

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codification and progressive development of international law as a ‘task, the urgency and importance of which yield place to none of the problems that face the international lawyer today’. Consequently, a marked feature of the international law-making process in recent decades has been the increased, and increasing, move towards treaties as the authoritative medium for law-making. Many have explained this phenomenon and linked it to the general misgivings about the continued utility or efficiency of international custom as evidence of international law and as a medium of law-making in the contemporary world. For example, the expansion of the international community this century has meant that there is less homogeneity in the identity as well as the values of the community. Further, states with different interests, as well as sub-State and supra-State actors, now vie for influence in a new and ever changing environment. The nature of customary international law (based traditionally as it is on the accumulation of the individual practices and perceptions of States) and the consequent tardiness in the customary law-making process tend to result in the view that international custom is unable to address these issues satisfactorily. The general response to this problem is, as Simma argues, “to insist upon the fullest possible removal of unwritten international law from controversy through its codification and progressive development in treaty form”. However, this is easier said than done. Firstly, the negotiation and creation of treaties is a prolonged and tedious affair in itself and therefore Simma’s objective of elimination of all unwritten law (read ‘customary international law’) would take a lot of time. Secondly, the vast encompass of international law makes the objective seem improbable and impractical.

However, till the above transition takes place, international lawyers are faced with a more immediate concern. What is the impact of this ever burgeoning mass of treaties on customary international law? Do these treaty norms supervene customary norms in their application to a dispute between two parties? What happens in the case of overlap between the content of treaty norms and customary norms of international law?

These are the questions, amongst others, which are subsequently dealt with in this paper.

3 See Janis, An Introduction to International Law, 11 (1981). The author states that treaties concluded between 1946 and 1978 occupied more than 1115 volumes.
4 For a critique of the role and significance of customary international law in the international law regime see generally infra., n. 25 at p.1.
7 See generally, Janis, Introduction to International Law, 10 (1981).
II. Impact of Treaties on Custom

A. The Traditional Doctrine

The traditional doctrine of international law has been that treaties and custom are two separate and distinct sources and treaties cannot be presumed to give rise to customary rules of international law.

In the Lotus Case, the Permanent Court dismissed the treaties cited by France as irrelevant, but only after it said that “...it is not absolutely that this stipulation found in several treaties is to be regarded as expressing a general principle of customary international law”. The report of the Committee of Jurists on the Aaland Islands stated that “the recognition of this principle of self determination in a certain number of treaties cannot be considered sufficient to put it on the same footing as a positive rule of the law of nations”. In his dissenting opinion in the Nottebohm Case, Judge Guggenheim dismissed the contention that the various treaties cited constituted a precedent “for the decision inasmuch as they were bilateral treaties involving neither of the parties to the case”. His dissenting opinion, on this point, drew approval from commentators. In State (Duggan) v. Tapely, the Irish Supreme Court stated that it “does not accept the view that a principle of customary international law can be established by citing treaties”. In West Rand Central Gold Mining Co. v. The King, Lord Alverstone held that “the reference which certain writers make to stipulations in particular treaties as evidence of international law is as little convincing as the attempt to establish a trade custom by adducing evidence of particular contracts... We have already pointed out how little value particular stipulations in treaties possess as evidence of that which may be termed international common law”.

Thus, as is evident from the above judicial pronouncements, the traditional position of international law argued against treaties possibly giving rise to custom.

B. Publicists and the ‘Paradigm Shift’

As mentioned earlier, initially the publicists of international law generally agreed that the content of the treaties was irrelevant to customary law; therefore, treaties deserved no weight at all in the assessment of custom. Professor Richard

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8 The Case Concerning the SS Lotus (France v. Turkey), PCIJ, Ser. A. No. 10 at 27.
11 Ibid. at p.59.
12 See Kunz, The Nottebohm Judgement (Second Phase), 54 Am. J. Int’l. L. 536 (1960), at 557.
14 [1905] 2 KB 391 at 402.
Baxter summarised the prevailing consensus of that time in a 1961 seminar at a Harvard University by proposing that parties enter into treaties either to carve out a special rule for themselves that derogates from the underlying rule of customary international law, or to reaffirm the underlying rule in contractual form. In the former case, the underlying principle of customary rule is unaffected, since the parties deliberately derogated from it; in the latter case, the underlying rule remains the same by definition. Hence, why look at the treaties at all if the purpose is to discover the general customary rule? The treaty itself can never determine what the general rule is, Professor Baxter concluded, because it is equally likely to derogate from or to affirm the customary rule. Professor Baxter’s student, Anthony D’Amato published his seminar paper furthering the proposition that treaties have a substantive impact on custom. He argued that Baxter’s logical position on treaties seemed to be at variance with the historical reality of the matter: that many rules of customary international law had their origin in treaties. D’Amato’s arguments led Baxter to reconsider his position in an essay published in 1966. He conceded that multilateral treaties, but not bilateral ones, could constitute evidence of international law. D’Amato criticised this distinction between multilateral and bilateral treaties as he could see no difference between the custom creating effects of a multilateral as compared to a bilateral treaty, since a multilateral treaty among ten nations would have the same effect as fifty bilateral treaties between each nation pair of those same nations. Professor Baxter followed with his Hague Lectures entitled ‘Treaties and Custom’ where he modified his position as to a series of bilateral treaties relying upon D’Amato’s example of the Bancroft Treaties. Fundamentally, however, he did not depart from the “establishment” view that treaties can have no necessary effect upon customary law.

The Baxter-D’Amato debates were the first writings in international law to comprehensively examine the impact of treaties on customary international law. Although considered to be academic and hypothetical at the time of their publishing, they acquired significance in light of the decision of the International Court of

16 Ibid. at p.127.
17 Ibid.
19 Ibid. For a more detailed analysis of the same position see also, D’Amato, *The Concept of Custom in International Law* (1971).
21 Ibid. at pp. 277-278, 297.
Justice in the *North Sea Continental Shelf Cases* and later developments. Thus, the writing of these publicists went a long way in bringing about a ‘paradigm shift’ in the conceptualisation of the impact of treaties on customary international law.

C. **Jurisprudence of the World Court**

It is now well established in contemporary international law that treaties have a significant role in the development of customary norms of international law. The International Court of Justice has identified three circumstances in which international agreements may be relevant to the development of custom: they can codify the existing law, they can cause the law to crystallise and they can initiate the generation and the progressive development of the new law. ‘Codification’ is the process when the conventional text merely restates a pre-existing rule of customary international law; ‘Crystallisation’ is the process when the convention gives an emergent rule *in statu nascendi* a concrete form; and ‘Generation’ is the process when a treaty provision may become the focal point of the subsequent practice of states and, in due course, harden into a rule of customary international law. In the *Nicaragua Case*, the Court referred to these three modalities, saying that a rule enshrined in a treaty may also exist as a customary rule “either because the treaty had merely codified the custom, or caused it to ‘crystallise’, or because it had influenced its subsequent adoption”.

(1) **The ‘Codification’ Process**

This process occurs when the rule embodied in a convention is no more than a declaration, or a restatement, of a pre-existing rule of customary international law. The significance of the codification process can be understood by the fact that the Institute of International Law, adopted on 1 September 1995, at its Lisbon Session, the resolution entitled “Problems Arising from a Succession of Codification Conventions on a Particular Subject”, whose Conclusion 12 read as follows:

“The repetition in two or more codification conventions of the substance of the same norm may be an important element in establishing the existence of that norm as customary rule of general international law”.

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27 Ibid.
28 Case Concerning Military and Paramilitary Activities In and Against Nicaragua, 1986 I.C.J. Rep. 3 at 95.
29 Cited from, Degan, The Sources of International Law, 205 (1998).
In the Namibia Advisory Opinion, the Court relied upon Article 60 of the Vienna Convention on the Law of Treaties as declaring customary international law on the subject of termination of a treaty relationship on account of its breach. It applied this provision despite the fact that the Convention was not yet in force. The court held that "the rule laid down in the Vienna Convention on the Law of Treaties concerning termination of treaty relationship on account of breach may in many respects be considered as a codification of existing customary international law on the subject".30

Likewise, in the Appeal Relating to the Jurisdiction of the ICAO Council31 between India and Pakistan, the Court relied upon the same Article 60 of the Vienna Convention on the Law of Treaties in support of the conclusion that only a material breach, as defined in the provision, could cause the termination of the treaty, and that there is no unilateral right to terminate a treaty.32 Again, in doing so, the International Court of Justice relied upon the convention, despite it not having come into force, because it codified the established principles of customary international law.33

Similarly, in the Icelandic Fisheries Cases34, the Court had to examine Iceland’s allegation that the agreement providing for the jurisdiction of the Court had lapsed by reason of change of circumstances. The International Court of Justice based its rejection of this contention on the ground that not all the contentions required by Article 62 of the Vienna Convention on the Law of Treaties were present.35 The Court stated that this provision "may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances".36

In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons37, the International Court of Justice emphasised upon the effect of the Hague Conventions on War on the codification of international humanitarian law and stated that "the laws and customs of war were the subjects of efforts at codification undertaken in the Hague and these conferences succeeded in codifying the customary international law of warfare into a conventional form".38

30 Advisory Opinion on Namibia, 1971 I.C.J. Rep. 1 at 47.
32 Ibid. at p.67.
33 Ibid.
35 Ibid. at p.49.
36 Ibid. at p.63.
37 1996 I.C.J. Rep. 34.
38 Ibid. at para 79.
The 'Crystallisation' Process

In the North Sea Continental Shelf Cases ^9^ Denmark and the Netherlands contended that "although prior to the 1958 Conference on the Law of the Sea, continental shelf law was only in the formative stage, and state practice lacked uniformity, yet the process of the definition and consolidation of the emerging customary international law took place through the work of the International Law Commission, the reaction of the Governments to this work and the proceedings of the Geneva Conference, and this emerging customary law became crystallised in the adoption of the Continental Shelf Convention by the Conference"^40^.

The International Court of Justice accepted the validity of this contention with respect to Articles 1 to 3 of the Convention, although not in regard to Article 6, providing for equidistance as the method of delimitation. The Court remarked that Articles 1 to 3 of the Convention, containing the basic provisions defining the notion of the continental shelf and the rights of States in that respect, were "the ones which, it is clear, were then regarded as reflecting, or as crystallising, received or at least emergent rules of customary international law relative to the continental shelf"^41^.

The International Court of Justice went on to lay down the criteria for a treaty norm to crystallise into a customary norm of international law. These conditions are as follows:

1) "It would be in the first place be necessary that the provision concerned should, at all events potentially be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law"^42^.

2) These rules "by their very nature, must have equal force for all members of the international community, and cannot be therefore be subject to any right of unilateral exclusion exercisable at will by any of them in its own favour"^43^.

In other words, these rules cannot be subject to unilateral denunciation and reservations by parties to a codification convention.

3) Then, "a very widespread and representative participation in the convention might suffice itself, provided it included that of the States whose interests are specially affected"^44^.

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^40^ Ibid. at p.38.
^41^ Ibid. at p.39.
^42^ Ibid. at pp.42-43.
^43^ Ibid. at pp.39-40.
^44^ Ibid. at p.43.
4) It is necessary that “State practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense that of the provision invoked”.45

5) Finally, the “passage of only a short period of time is not necessarily, by itself, a bar for the formation of a new rule of customary international law”.46

The first two above conditions relate to the codification process as well. But all five conditions relate a fortiori to the law generation process which will be discussed later.

In the Fisheries Jurisdiction Case47 between the United Kingdom and Iceland, the Court rejected a 'veiled charge of duress', stating that “there can be little doubt, as is implied in the Charter of the United Nations and recognised under Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void”.48 The Court described these rules as ‘emergent rules’ which crystallised through their general acceptance by states in the process of codification, when being incorporated in a general convention.49

(3) The ‘Generating’ Process

The International Court of Justice has also accepted that the process of codification and progressive development of international law, in addition to declaring a pre-existing rule of customary international law, may also have a generating or constitutive effect, thus playing an important role in precipitating a more rapid growth of custom.50 Certain provisions of a multilateral convention, or even a proposal which has gained a wide measure of support at a plenipotentiary conference, may become the focal point of subsequent conduct of states, the convention serving as an authoritative guide for their practice.51 These provisions thus become the nucleus around which a new set of generally recognised rules may be established.

In the North Sea Continental Shelf Cases, the International Court of Justice admitted the possibility that a rule in a convention may be “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 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 recognised methods by which new rules of customary international law may be formed."\(^5^2\)

In two judgements delivered in 1974 in the *Icelandic Fisheries Cases*\(^5^3\), between Iceland and the UK and Iceland and the Federal Republic of Germany respectively, the Court made a positive finding as to the existence of customary rules which had been generated through such a transformation. In these cases, the Court recognised and applied customary rules which had become established in the practice of states, based on the nucleus of the proposal submitted *de lege feranda* at the 1960 Conference on the Law of the Sea, and which had failed to be adopted by a single vote.\(^5^4\) The Court stated that, in this respect, after that vote "the law evolved through the practice of states on the basis of the debates and near agreements at the Conference. Two concepts have crystallised as customary international law in recent years arising out of the general consensus revealed at the Conference. The first is that of a fisheries zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea. The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal state in a situation of special dependence on its coastal fisheries".\(^5^5\)

III. The Conflict and Coexistence of Treaties and Customary international Law

A. Treaties v. Custom: Who Wins?

An interesting issue which comes up, during an examination of the interplay of treaties and custom in the realm of international law, is the hierarchy between norms enshrined in treaties and those based in customary international law. It is very much possible in the wide realm of international law that there might be a conflict between the content of a treaty norm and an obligation of customary international law. For instance, there is a norm of customary international law which governs the rights and obligations of states in the matter of demarcation of territorial waters. Let us assume that states A and B enter into a bilateral treaty which enunciates certain rules (different from those enshrined in customary international law) regarding demarcation of territorial waters. Now, in case of a dispute arising between A and B regarding the delimitation of territorial waters,

\(^{52}\) *Ibid.*

\(^{53}\) 1974 I.C.J. Rep. 3 at 175.

\(^{54}\) *Ibid.* at p.23.

what is the law governing the dispute: the treaty norm or the rule of general customary international law?

(1) Article 38 of the Statute of the International Court of Justice and the Hierarchy of Sources

An oft quoted argument has been that Article 38(1) of the Statute of the International Court of Justice, which lists the sources of international law, lays down a hierarchy of sources and since treaties are cited before customary international law, treaties would prevail.\(^\text{56}\) However, the question of whether Article 38(1) embodies a hierarchy of sources, thereby giving primacy to treaties, is subject to dispute.\(^\text{57}\)

The Committee of Jurists which drafted the Statute of the Permanent Court of International Justice in 1920 included in their draft a provision that the items listed in the first paragraph of Article 38 should be applied en ordre successif (in successive order).\(^\text{58}\) However, it is not clear whether these words were intended to establish a definite hierarchy of sources or whether they merely reflected the logical sequence in which the rules would occur in the judge’s mind.\(^\text{59}\) The words en ordre successif were deleted by the Sub-Commission of the Third Committee of the First Assembly of the Legal of Nations, but it is not clear whether the deletion was inspired by a feeling that the contained in the words was wrong, or that the ideas was so obvious that it required no stating.\(^\text{60}\)

Thus, although tribunals in practice tend to follow the order enunciated in Article 38(1), there exists no clear cut hierarchy between the sources of international law, within the framework of the Statute of the International Court of Justice, which would give treaties precedence over custom.

(2) General Principles for Resolution of Conflict between Legal Norms

Every legal system has evolved techniques for resolving conflicts between legal rules.\(^\text{61}\) Cassese puts forth the proposition that:

\(^{56}\) For support for the proposition that Article 38 lays down a hierarchy of sources see generally, Right of Passage Over Indian Territory (Portugal v. India), 1960 I.C.J. Rep. 6 at 90, per the dissenting opinion of Judge Moreno Quintana.

\(^{57}\) For support for the proposition that Article 38 does not lay down a hierarchy of sources see generally, British Arguments in the Corfu Channel Case (Albania v. United Kingdom), 1949 I.C.J. Rep. 4 at 99.

\(^{58}\) Infra., n. 63, at p.274.

\(^{59}\) Ibid.

\(^{60}\) Ibid.

\(^{61}\) For a comprehensive survey of such rules, see generally, Singh, Principles of Statutory Interpretation, 68 (1999).
“Since treaties and Custom are on the same footing, it follows that the relations between rules generated by the two sources are governed by those general principles which in all legal orders govern the relations between norms deriving from the source: *Lex Posterior Derogat Priori* (a later law repeals an earlier law), *Lex Posterior Generalis Non Derogat Priori Speciali* (a later law, general in character, does not derogate from an earlier law which was special in character), and *Lex Specialis Derogat Generali* (a special law prevails over a general law)." 62

But, as Akehurst rightly points out, international law poses some unique problems regarding the applicability of the above rules. 63 First, the hierarchy of sources is not as well established in international law as it is in most legal systems. 64 Secondly, the maxim *lex posterior derogat priori* is sometimes difficult to apply in international law, because principles of customary international law come into existence gradually and therefore no precise date can be assigned to their creation. 65 Thirdly, the maxim *lex specialis derogat generali* assumes greater significance under international law, not only because of the difficulties in applying the other two maxims, but also because of the virtual absence of legislation in international law. 66

However, despite the above problems, it is now well accepted that treaties prevail over custom by virtue of the maxim *Lex specialis derogat generali*. 67 The rationale for this principle is that since treaties are explicit written agreements entered into by States, they enjoy precedence over norms of customary international law, which are general in nature and amorphous in formation. 68 The Permanent Court of International Justice in several cases applied treaties which conflicted with customary rules. 69 But this does not imply that treaties invariably prevail over custom; the treaties in the cases in question were probably simply more specific, or later in time, than the conflicting rules of customary international law. It must be kept in mind that it is equally possible that a customary rule may be more specific than a treaty; or that a special custom binding a small number of states

64 Ibid.
65 Ibid.
66 Ibid.
may conflict with a multilateral treaty binding a large number of states; in such cases the maxim

*Lex specialis derogat generali* causes the customary rule to prevail over the treaty.\(^7\)

According to Akehurst, where the maxim *lex specialis derogat generali* provides no clear guidance, or where it is shown not to reflect the intentions of the States concerned, treaties and custom are of equal authority and the later in time prevail.\(^7\)

**B. Rights and Obligations with a Double Foundation: Overlap of Treaties and Customary international law**

As discussed earlier, it is universally accepted that, consideration of *jus cogens* apart, treaty as *lex specialis* is law between the parties to it, in derogation of the general customary international law which would otherwise have governed their relations.\(^7\) Thus, if a treaty provides that the parties, in their mutual relations, shall not be obliged to do something which customary international law would otherwise have required of them, it is established law that the obligation so set aside does not form part of the law between the parties. On the other hand, where the treaty is silent, the customary international law continues to apply. There is however the intermediate possibility, that some or all of the rights and obligations provided for in the treaty correspond exactly to those existing under customary international law. If so, with which legal prescriptions are the parties complying when they give effect to those rights and obligations; and if it is the treaty they are complying with, what has become of the customary international law principles? Are they ousted, along with the provisions of customary international law which conflict with the treaty; or are they suspended; or do they continue to be present on the scene, albeit in the background? The World Court has had to grapple with these issues on several occasions and it would be instructive to analyse the opinions of the Court on this matter.

(1) **Rights of Nationals of the United States in Morocco Case**

The question of the co-existence of customary and treaty rights arose for the first time in the case concerning the *Rights of the Nationals of the United States of America in Morocco*.\(^7\) It was claimed by the United States that rights of

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71 Supra., n. 63 at p.275.


consular jurisdiction enjoyed by it under a treaty, and through the operation of a most favoured nation clause, had also come to have an independent foundation in customary international law, so that when the treaty rights were terminated, the customary rights continued to subsist. The custom had, it was asserted, come into existence after the relevant treaties had been in operation for some time.

The International Court of Justice rejected these contentions for two reasons: firstly, the custom relied upon was a local custom which, under the dictum of the Court in the Asylum Case, had to be proved (with a more stringent burden), and there had not been sufficient evidence to convince the Court of the existence of the custom. Secondly, the Court held:

"This was the case not merely of the United States but most of the countries whose nationals were trading in Morocco. It is true that there were Powers represented at the Conference of Madrid in 1880 and at Algeciras in 1906 which had no treaty rights but were exercising consular jurisdiction with the consent or acquiescence of Morocco. It is also true that France, after the institution of the Protectorate, obtained declarations of renunciation from a large number of other states which were in a similar position. This is not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage".

Fitzmaurice interprets this passage as not amounting to a denial by the Court of the "principle that, apart from treaty, an independent basis of right, founded in customary international law, might exist". It was only on a holding of facts that the Court concluded "that the United States rights in Morocco were based solely on treaty and not on custom or usage".

(2) The Fisheries Jurisdiction Case

The question of co-existence, between the two states, of treaty law and customary law governing the same questions arose in two different forms in the Fisheries Jurisdiction (United Kingdom v. Iceland) case in 1973.

74 Ibid. at p.176.
75 Ibid.
79 Ibid.
The United Kingdom contended that the 1972 Icelandic Fishing Regulations, asserting exclusive fishing rights of Iceland over an area extending 50 miles from baselines around its coasts, were contrary to general international law. During the pendency of proceedings before the International Court of Justice, the two parties had entered into an interim agreement regulating fishing by British vessels in the disputed area for a period of two years from 13 November, 1973.

"Counsel for the United Kingdom was asked whether the agreement definitively regulated, for the period indicated, the relations of the two parties, so far as the fisheries in question were concerned, or whether it would be possible for the Court to replace that regulation with another. The reply was that the judgement would state the rules of customary international law between the parties, defining their respective rights and obligations. However, that would not mean that the judgement would completely replace the interim agreement with immediate effect in the relations between the parties, for as the British Government saw the matter, the agreement would remain as a treaty in force. In any event, the Parties would be under a duty to regulate their relations in accordance with the terms of the judgement as soon as the interim agreement ceased to be in force i.e. on 13 November 1975, or at such an earlier date as the Parties might agree. On the other hand, the judgement would have immediate effect in so far it dealt with matters not covered in the agreement".81

The difficulty which resulted, in the view of Judge Petren, who had raised this question, was the following:

"What the United Kingdom is requesting of the Court is to state the law which would have been applicable to the relations between the Parties in the event that they had not concluded that agreement. Yet the essence of the judicial function is to declare the law between the Parties as it exists, and not to declare what the law would have been if the existing law had not existed. The conclusion of the interim agreement has therefore had the effect of rendering the application of the United Kingdom without object, so far as the period covered by the agreement is concerned".82

Judge Petren did not consider that there were any 'matters not covered in the agreement' to which the judgement could be of immediate application.83 Nor did he consider that the Court could or should endeavour to declare what the state of customary international law was going to be on the date of the expiration of the

81 Dissenting Opinion of Judge Petren, ibid. at p.156.
82 Ibid. at p.157.
83 Ibid.
interim agreement, in view of the imminence of a further Law of the Sea Conference and the general state of flux in this domain.\textsuperscript{84} For Judge Petren,

"if the dispute concerned the interpretation of a treaty, an interim agreement concerning its application over a given period would not hinder the Court from ruling before the end of the period on the interpretation and future application of the treaty,"\textsuperscript{85}

Presumably because the treaty law regime established by that treaty would remain unaffected during the currency of the interim agreement.

Judge Petren's argument is based upon the implied premise that the existing law between states is solely that which is directly applicable and that if the general law is displaced by the conclusion of a treaty, then that law ceases to exist as law between the parties. It was true, as Judge Petren stated, that "it was only on 13 November 1975 that customary international law will again govern the conditions under which the fishing is carried out in the disputed area\textsuperscript{86}, but does it logically follow that the customary international law applicable to fishing rights and the law of the sea ceased to exist between the parties on 13 November 1973, to revive again in November 1975?

The judgement of the International Court of Justice treated the point as one of the powers of the Court rather than a matter of principle as to the relationship of treaty law and customary international law. It emphasised the danger, if Judge Petren's argument were adopted, of discouraging States from interim arrangements, and thus running contrary to the purpose of the Charter as to peaceful settlement of disputes.\textsuperscript{87} The essential point of its ruling was:

"The Court is of the view that there is no incompatibility with its judicial function in making a pronouncement on the rights and duties of the parties under existing international law which would clearly be capable of having a forward reach; this does not mean that the Court should declare the law between the parties as it might be at the time be at the time of the expiration of the interim agreement, a task beyond the power of any tribunal. The possibility of law changing is ever present; but that cannot relieve the Court from its obligation to render a judgement 'on the basis of the law as it exists at the time of its decision'. In any event, it cannot be said that the issues now

\textsuperscript{84} Judge Petren observed that no difficulty would have arisen if the interim agreement had been drawn to expire on the date of the judgement; unfortunately, this possibility had been excluded by Iceland's boycotting of the proceedings before the Court. \textit{Ibid.} at p.158.

\textsuperscript{85} \textit{Ibid.} at p.159.

\textsuperscript{86} \textit{Ibid.}

\textsuperscript{87} \textit{Ibid.} at p.20.
before the Court have become without object; for there is no doubt that the case is one in which "there exists at the time of adjudication an actual controversy involving a conflict of legal interests between parties".18

As a matter of practical administration of justice, the Court's approach is undoubtedly sound; but the crucial question remains: Can the International Court of Justice be said to be giving judgement 'on the basis of the law as it exists at the time of its decision', when the parties have mutually released each other from compliance with the law until the expiration of the agreement? Certainly, customary international law continues to exist and develop 'behind' the treaty, but is it 'law' for the parties to the treaty so long as the treaty endures? No satisfactory answer could be given in the above case and therefore these knotty issues were to rear their head once again in subsequent decisions.

(3) The Nuclear Tests Cases

The claim of Australia and New Zealand in these cases was that 'the carrying out of further atmospheric nuclear weapons tests in the South Pacific Ocean is not consistent with the applicable rules of general international law' and the International Court of Justice was asked to order that 'France shall not carry out any such further tests'.90 In short, the contention was that under customary international law, France was obliged to stop the tests. The Court made no finding on the validity of this claim; but it found that France had entered into a binding unilateral obligation to stop the tests, so that the proceedings had become without object.91

The unilateral obligation was, while not being a pactum, was definitely a servandum.92 On the assumption therefore that the applicants contention was correct- and the Court was careful to leave the point entirely open93 - France would have been under two distinct obligations requiring identical conduct. The unilateral obligation, being lex specialis, presumably prevailed but the position in customary international law remains undecided. The question of the position under customary international law is hypothetical vis-a-vis the instant case but is of considerable interest regarding the issue of co-existence of treaties and custom.

91 Ibid. at p.259.
92 For a classification of the different forms of legal obligations of states in international law see generally, Dixon, International Law, 23 (1997).
The Court, in the instant case, had not yet determined its jurisdiction to entertain the claim of Australia and New Zealand on the merits; as it expressly stated it had, therefore, to refrain from entering into the merits of the claim.\footnote{Ibid.} For the purposes of its decision, therefore, the question remained entirely open whether France was under an obligation, under customary international law, to stop conducting atmospheric nuclear tests. The basis of the Court’s decision was that the object of the claim had disappeared, so that there was nothing on which to give judgement.\footnote{Ibid. at p.272.} The basic postulate was that, as a result of the French unilateral statements, the situation had changed. But what was that change? The Court emphasised the unilateral statements constituted ‘an undertaking possessing legal effect’, so that the French Government had ‘undertaken an obligation’.\footnote{Ibid. at pp.269-270.} That obligation was merely an obligation to do what it said it would do: stop the nuclear tests. \textit{But}, if France was already bound by customary international law to stop the tests, the new obligation merely paralleled the existing obligation, and there was no change in the situation justifying the conclusion that the case had become ‘moot’. The situation had only changed if the French Government was not previously under an obligation under general international law; but the Court had refrained from ruling on this, because it constituted the merits of the case.

The situation would have been otherwise if the French statements had been, or could have been interpreted to be, an admission of the existence of an obligation under customary international law, and an undertaking to comply with it in the future. \textit{This} element would have constituted the change in the situation which justified the Court’s decision that the claim was without object. It was, however, impossible to construct the French statements in such a manner. Now, it might be argued that the change in the situation which justified the Court’s decision was that, whether or not there was an obligation to cease testing before the French declaration, after them there was an \textit{admitted} obligation to do so. However, it is submitted, it was not the admission which was the object of the claim; it was the legal assurance that further tests would constitute the breach of an obligation.

It does not appear that the Court was conscious that the implied basis of its judgement was a finding on merits- which it recognised it was not entitled to make at that stage. The obligation created by the unilateral declarations seems to have been seen as somehow qualitatively different from the obligations of customary international law which Australia and New Zealand claimed to exist, and which could not be excluded as possibly existing.
(4) The Case of United States Diplomatic and Consular Staff in Tehran

A further case before the International Court of Justice in which questions of the relationship between customary international law and treaty law were germane to the decision was that of the United States Diplomatic and Consular Staff in Tehran⁹⁷. In this case, the Court was seized primarily on the basis of the Optional Protocols to the Vienna Conventions on Diplomatic and Consular Relations, whereby it had jurisdiction over 'disputes arising out of the interpretation or application of' the relevant convention.⁹⁸ At first sight, therefore, the Court was limited to determining the dispute between the parties so far as it involved interpretation or application of the two Conventions, and was not called upon to rule upon their relations under customary international law.

However, when finding that the Iranian Government had failed to comply with the provisions of the two conventions, the Court went on to say:

"In the view of the Court, the obligations of the Iranian Government in question are not merely contractual obligations established under the Vienna Conventions of 1961 and 1963, but also obligations under general international law".⁹⁹

The Court was thus ruling on a question which was to assume particular importance in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua¹⁰⁰: whether, between two parties to a multilateral convention, obligations of customary international law which have been incorporated into the convention regime may be said still to exist as customary law obligations.

The Court held, later in its judgement, that:

"....Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions....and the applicable rules of general rule of international law, has incurred responsibility towards the United States".¹⁰¹

This proposition put forth by the World Court lays to rest one doubt which one might otherwise feel at the co-existence of a customary obligation and a treaty obligation: if the two require identical conduct, breach of the two obligations is only a single internationally wrongful, and involves only a single duty of reparation.

⁹⁸ Ibid. at p.31.
⁹⁹ Ibid.
This being so, the question remains why the Court thought it appropriate to mention the existence of the obligation in customary international law. One reason may be the emphasis which the Court wished to lay on the 'extreme importance of the principles of law which is called upon to apply in the present case'; the Court thought it desirable to make it clear that Iranian Government had not merely breached a treaty but had acted in a way likely to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital to the necessity and well being of the complex international community of the present day.

Another possible reason (though this is speculation on behalf of the author) may be deduced from the reference to 'continuing breaches' of Iran's obligations. If before the situation of the hostages was regularised, Iran were to denounce the Vienna Conventions and the Optional Protocols, it might claim that (at least) it was no longer in breach of a treaty obligation which no longer bound it. By emphasising the customary international law backing of the obligation, the International Court of Justice was doing all it could to demolish this excuse in advance.

(5) Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)

The complications arising from a reservation attached to the United States acceptance of jurisdiction under the Optional Clause placed the Court in the very curious position, in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua, of having to decide the case in disregard of treaty rights and obligations known to exist between the parties to the case, and known to be relevant to the solution of the affair.

The so called 'multilateral treaty reservation' attached to the United States declaration had the effect, as the Court found, that the jurisdiction conferred upon it by the declaration did not permit the Court to entertain claims of Nicaragua that the United States had breached certain articles of the United Nations Charter and the Charter of the Organisation of American State, since other States parties to those instruments which might be affected by the decision were not parties to the proceedings; this finding was however 'without prejudice either to other treaties.

102 Ibid. at p.43.
103 Ibid.
104 Ibid.
106 Ibid. at p.38.
or to the other sources of law enumerated in Article 38 of the Statute'. The United States contended that the claim of Nicaragua based on 'customary international law' could also not be heard, because they

"cannot be determined without recourse to the United Nations Charter as the principle source of that law, and they also cannot be determined without reference to the 'particular international law' established by multilateral conventions in force amongst the parties".108

As the Court explained further:

"The United States contends that the only general and customary international law on which Nicaragua can base its claims is that of the Charter: in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the 'principal source of the relevant international law', namely, Article 2(4) of the United Nations Charter. In brief, in a more general sense 'the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary international law'. Thus, the United States concludes that that since 'the multilateral treaty reservations bars the adjudication of claims based on those treaties, it bars all of Nicaragua's claims'. Therefore, the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua's claims by applying the multilateral treaties in question: it further prevents it from applying in its decision any rule of customary international law the content of which is also the subject of a provision in those multilateral treaties".109

The above objection of the United States raised a number of distinct problems. The first was whether there could be a set of rights and obligations deriving from customary international law, in force between the United States and Nicaragua, in the areas of law governed by the articles of the Charter invoked by Nicaragua. If the existence of the conventional relationship deriving from the Charter had the effect of superseding or excluding the customary law rules in the same field, or putting them in abeyance between the Parties, then the Court could not find the United States in breach of customary obligations, however flagrant its violation of the Charter.

Even assuming that such a customary international law obligation did exist, the International Court of Justice was placed by the multilateral treaty reservation in a something of a dilemma. If the rules of customary international law relating to

107 Ibid. at p.92.
108 Ibid.
109 Ibid. at p.93.
non-intervention, the use of force etc., were identical to the norms in the United Nations Charter, it was difficult to refute the contention that, by deciding on issues in accordance with customary international law, it would in effect be deciding at the same time what was the law of the Charter on them, in contravention of the multilateral treaty reservation. If however, the customary rules and the treaty law diverge markedly from each other, then the same situation would arise as in the *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, that the Court would be purporting to determine the dispute by reference to rules of law which were those not applicable between, and binding upon, the parties.

The Court's solution to the problem was as follows:

"The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all customary rules which may be invoked have content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content."\(^\text{111}\)

In the following paragraph of the judgement, the Court gave some examples to establish that there are certain areas where the content of the treaty law and the customary international law do not strictly overlap.\(^\text{112}\) However, the Court did not evade the issue and continued to hold:

"But in addition, even if a treaty norm and a customary norm relevant to the present were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which is the same as, or analogous to, that of the treaty law rule which had caused the reservation to become effective."\(^\text{113}\)

It would be pertinent, at this stage, to consider the dissenting opinion of Judge Robert Jennings who pointed out that

"The Court also rejected the argument that for it to decide the dispute on the basis of customary international law only, when reference to the treaty

\(^\text{112}\) *Ibid.*
\(^\text{113}\) *Ibid.*
obligations are barred, would in its result be a wholly academic exercise. In
doing so, the Court found that the content of the treaty rules and the customary
law was not so different as to make a judgement to the law ineffective....this
suggests that were the differences greater, the conclusion might not be the
same".\textsuperscript{114}

The above observation puts the \textit{ratio} of \textit{Nicaragua} in suspicion but it is
submitted that the International Court of Justice categorically asserted the "Parallel
Streams" doctrine that treaties and custom continue to co-exist side by side and
the existence of a treaty does not negate the existence of the parallel custom.\textsuperscript{115}
The aforementioned observation of the Court should be understood as the
International Court of Justice exercising abundant caution in justifying its
jurisdiction over the matter, which was a hotly contested issue, and not retracting
from its "Parallel Streams' doctrine.

The Court addressed much of its argument in the judgement on this point to
demonstrate that "customary international law continues to exist and apply,
separately from international treaty law, even when the two categories of law have
an identical content".\textsuperscript{116} This, however, would have hardly required demonstration-
as the Court itself observed, it was already implicit in the \textit{North Sea Continental
Shelf} judgement\textsuperscript{117} - had it not been for the near universality of the membership of
the United Nations, which renders the idea of separate of customary international
law identical with Charter law virtually meaningless in practical terms.

However, it must be kept in mind that the question is not whether customary
law and treaty law can exist side by side \textit{in general}, but whether they can continue
to exist side by side \textit{as between the same parties}. If the United Nations Charter
had been acceded to by every State of the world, the question whether customary
international law continued to exist on matters dealt with in the Charter would
have become academic. So long that is not the case, however, the question is
whether the two states bound \textit{vis-a-vis} each other by a treaty obligation identical
to a precept of customary international law are also bound by that precept.

\section{Conclusion: The Interplay of Treaties and Custom}

\textit{"There are two conditions which often look alike,}
\textit{Yet differ completely, flourish in the same hedgerow"}

T.S. Eliot, \textit{Little Gidding}.

\textsuperscript{114} \textit{Ibid.} at p.97.
\textsuperscript{116} \textit{Ibid.} at p.96.
For most international lawyers, customary international law along with treaties constitute the two central forms of international law. Indeed, until the twentieth century, custom was often viewed as the principle source of international law.\(^{118}\) However, the post World War era has seen a remarkable surge in the popularity of treaties as international instruments.\(^{119}\) Nonetheless, treaties, despite their considerable proliferation, leave many international topics untouched and most states are not parties to most treaties. So, custom remains a very useful second source of international law, supplementing treaty rules and having the potential to reach out more generally to regulate parties in their international relations. The fundamental idea behind the notion of custom as a source of international law is that states in and by their international practice may implicitly consent to the creation and application of international legal rules.\(^{120}\) In this sense, the theory of customary international law is simply an implied side to the contractual theory that explains why treaties are law.

It is worthwhile to note that international publicists after conceptualising the sources of international law, treaties and custom (amongst others), have been guilty of neglecting the study of the intriguing issues concerning the interplay of these sources with each other. Initially, such publicists utilised the benefit of the old adage “ignorance is bliss” and therefore, confidently proclaimed that treaties and custom are two distinct and separate sources of international law bearing no relationship vis-a-vis each other.\(^{121}\) Credit is due to the writings of Anthony D’Amato which, irrespective of their merit, shook up the “establishment” and made them rethink about this crucial aspect of international law.\(^{122}\) Thanks to D’Amato, international law discourse now has proponents of the proposition, that treaties are in fact being given excessive weightage in the determination of international law.\(^{123}\)

The bottom line is that the fate of treaties as a form of international law is intrinsically linked to that of customary international law. This is so, firstly, because the basic principle of treaty law, the norm that treaties are legally binding, *pacta sunt servanda*, is itself a rule drawn from the customary practice of states. Secondly, treaties must often be interpreted in the light of the rules of customary international law. Thirdly, treaties may supersede or be superseded by customary international law. Fourthly, treaties may codify, crystallise or generate rules of customary international law. Fifthly, treaties serve as state practice in the international arena.


\(^{120}\) *Ibid.* at p.36.

\(^{121}\) For the writings of publicists regarding the relationship between treaties and custom see an earlier section of the paper, *Publicists and the Paradigm Shift*.

\(^{122}\) *Ibid.*

which coupled with *opinio juris*, give rise to customary international law on their own accord.

In its resolution of 1 September 1995 on “Problems Arising from a Succession of Codification Conventions on a Particular Subject”, the Institute of International Law tried to describe the relationship between treaty and customary international law as:

("Conclusion 10: As Sources of International Law:-

Treaty and custom form distinct, interrelated sources of international law. A norm deriving from one of these two sources may have an impact upon the content and interpretation of norms deriving from the other source. In principle, however, each retains its separate existence as a norm of treaty law or customary law respectively.

*Conclusion 11: Hierarchy of Sources:-*

There is no *a priori* hierarchy of between treaty and custom as sources of international law. However, in the application of international law, relevant norms deriving from a treaty will prevail between the parties over norms deriving from customary international law".\(^{124}\)

It is submitted that the aforementioned conclusions are fairly indicative of the relationship of customary international law and treaties. Both these sources are distinct, separate and retain their own independent existence. However, they have significant impact on the nature and content of each other and insofar they give rise to rights and obligations of the same actors i.e. States in the same arena i.e. public international law, they overlap and co-exist.

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