Vanderbilt Journal of Transnational Law

Volume 21
Issue 1 *Issue 1 - 1988*

Article 1

1988

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Arthur M. Weisburd

Vanderbilt Journal of Transnational Law

VOLUME 21 1988 NUMBER 1

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*Arthur M. Weisburd**

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* Associate Professor of Law, University of North Carolina at Chapel Hill. A.B. 1970, Princeton University, J.D. 1976, University of Michigan. The author gratefully acknowledges the support of the North Carolina Law Center. The author also wishes to express his thanks for the extremely helpful comments of Maurice Mendelson and for the assistance of Helen Michael and Angela Ingram.

I. INTRODUCTION

In highly developed legal systems it is rarely necessary for lawyers to spend time agonizing over the problem of locating the rules that law-applying bodies will treat as law. They know that rules of law are to be found in or deduced from constitutions, statutes, administrative enactments and decisions of the courts. Lawyers working in such systems can, therefore, leave musings about sources of law to particularly unworldly legal academics.

In less well-developed legal systems, identifying the sources of law may be more difficult; it may be hard to predict just what a law-applying body will consider in determining the content of a rule of law, and it may be correspondingly difficult to say what that content is. In such a system the question of identifying sources of law is of great practical importance.

Writers dealing with the public international law system have noted over and over again that it is underdeveloped.[1] It lacks a legislature, a judicial system with compulsory jurisdiction, and an executive willing and able to support with coercion those few judicial decisions that may be handed down. Still, commentators often cite article 38 of the Statute of the International Court of Justice[2] (article 38) as providing the standard list of the source of rules of public international law.[3] Article 38 appears, therefore, to permit the international legal system to escape the indeterminacy of the sources problem. This appearance disappears, however, when one examines article 38. The principal sources it lists are treaties, "international custom, as evidence of a general practice accepted as law,"[4] and "the general principles of law accepted by civilized nations."[5] To find at least a general definition of "treaty" is easy, and the general lack of reliance on generally accepted principles of law as a source of substantive rules makes less acute the problem of determining

1. G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 21 (6th ed. 1976); A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 3-4 (1971) [hereinafter A. D'AMATO, CONCEPT OF CUSTOM].

2. Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060; T.S. No. 993.

3. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (3d ed. 1979); G. SCHWARZENBERGER, *supra* note 1, at 21.

4. Statute of the International Court of Justice, art. 38, para. 1(b).

5. *Id.* art. 38, para. 1(c).

which general principles of law civilized nations accept.[6] International lawyers have more difficulty, however, with the second source listed in article 38—international custom. To establish the content of international custom, as the statute defines it, lawyers must determine what the general practice accepted as law is on a particular point. This determination is often difficult.

Of course, it does not matter that the content of customary international law is difficult to determine unless the content of that law is important for some reason. International lawyers, at least, believe that it is.[7] But whether or not one accepts international lawyers' valuation of their own discipline, the content of customary international law must be of at least some concern to American lawyers because of the existence of 28 U.S.C. § 1350 (the Alien Tort Statute).[8]

The Alien Tort Statute confers on United States district courts subject matter jurisdiction over suits by "aliens, for torts only, in violation of the law of nations or a treaty of the United States."[9] Courts have construed, the "law of nations," as used in the statute, as referring to customary international law.[10] Thus, jurisdiction under the statute in a particular case depends on whether the plaintiff alleges that the defendant has violated either a treaty or customary international law. That is, a court cannot resolve the jurisdictional questions the statute presents without agreement on the content of customary international law. And, obviously, courts cannot determine that content without knowing where to look.

One cannot dismiss the Alien Tort Statute as being of trivial importance. Although courts rarely cited it prior to the 1970s, they have relied upon it increasingly in recent years.[11] In addition, if other federal courts

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6. Tribunals, at least, cite article 38, para. 1(c) principally to justify decisions based on such rules as the one that no one may be a judge in his own cause and to justify reliance on such principles as estoppel or res judicata. I. BROWNLIE, *supra* note 3, at 18-19.

7. M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF WORLD COMMUNITY xvii (1981); L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 18-25 (2d ed. 1979); James, *Law and Order in International Society*, in THE BASES OF INTERNATIONAL ORDER 60, 63, 83-84 (James ed. 1973); L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE—PEACE 15 (H. Lauterpacht 8th ed. 1955).

8. 28 U.S.C. § 1350 (1982).

9. *Id.*

10. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

11. Thirty-four cases exist in which the plaintiff asserts jurisdiction under 28 U.S.C. § 1350. Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003

accept the holding in *Amerada Hess Shipping Corp. v. Argentina Republic*[12] that foreign governments sued for alleged violations of international law are not entitled to rely on the defense of sovereign immunity,[13] the statute will present aliens with a means of suing foreign governments, including their own, in American courts on a great variety of causes of action. This prospect raises at least the potential for increased reliance on the statute and, correspondingly, increases the importance of

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(1985); Cohen v. Hartman, 634 F.2d 318 (2d Cir. 1980); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976); Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975); ITT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Abiodun v. Martin Oil Serv., Inc., 475 F.2d 42 (7th Cir. 1973), *cert. denied*, 414 U.S. 866 (1973); Seth v. British Overseas Airways Corp., 329 F.2d 302 (1st Cir. 1964), *cert. denied*, 379 U.S. 858 (1964); Madison Shipping Corp. v. Nat'l Maritime Union, 282 F.2d 377 (3rd Cir. 1960); Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960); Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985); Jaffe v. Boyles, 616 F. Supp. 1371 (W.D.N.Y. 1985); De Wit v. KLM Royal Dutch Airlines N.V., 570 F. Supp. 613 (S.D.N.Y. 1983); Zapata v. Quinn, 564 F. Supp. 23 (S.D.N.Y. 1982); Jafari v. Islamic Republic of Iran, 539 F. Supp. 209 (N.D. Ill. 1982); Trans Continental Inv. Corp. v. Bank of Commonwealth, 500 F. Supp. 565 (C.D. Cal. 1980); Akbar v. New York Magazine Co., 490 F. Supp. 60 (D.D.C. 1980); Soultanoglou v. Liberty Transportation Co., No. 75 Civ. 2259 (S.D.N.Y. June 13, 1980); Papageorgiou v. Lloyds of London, 436 F. Supp. 701 (E.D. Pa. 1977); Canadian Transport. Co. v. United States, 430 F. Supp. 1168 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, 663 F.2d 1081 (D.C. Cir. 1980); Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324 (E.D. Pa. 1966); Damaskinos v. Societa Navigacion Interamericana, S.A. Panama, 255 F. Supp. 919 (S.D.N.Y. 1966); Brandtscheit v. Britton, 239 F. Supp. 652 (N.D. Cal. 1965); Upper Lakes Shipping v. Int'l Longshoremen's Ass'n, 33 F.R.D. 348 (S.D.N.Y. 1962); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963); Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); Pauling v. McElroy, 164 F. Supp. 390 (D.C. Cir. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir. 1959), *cert. denied*, 364 U.S. 835 (1960); O'Reilly de Camara v. Brooke, 142 F. 858 (S.D.N.Y. 1906), *aff'd*, 209 U.S. 45 (1908); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1067); Moxon v. The Fanny, 17 F. Cas. (D. Pa. 1793) (No. 9895); 26 Op. Att'y Gen. 250 (1907).

The court has sustained jurisdiction in four of these cases. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); O'Reilly de Camara v. Brooke, 142 F. 858 (S.D.N.Y. 1906), *aff'd*, 209 U.S. 45 (1908); Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985); Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).

12. 830 F.2d 421 (2d Cir. 1987).

13. *Id. But see In re* Korean Airlines Disaster of Sept. 1, 1983, Misc. No. 83-0345 (D.D.C. Sept. 1, 1985); Siderman v. Republic of Argentina, No. C.F. 82-1772-RMT (C.D. Cal. March 12, 1984) (Foreign Sovereign Immunities Act is the exclusive source of jurisdiction over foreign sovereign).

a correct determination of the content of that body of international law on which jurisdiction under the statute is based.

This Article will not seek to address all issues concerning the sources of customary international law; the subject is too vast for treatment at anything less than book length. Rather, this Article will focus on one category of possible sources—international treaties. Of course, if one considers treaties purely as treaties, they affect relationships between states parties to them, but treaties as treaties are not the subject here. Rather, the inquiry here is, since customary law depends on the practice of states, and because one form of practice in which states engage is entering into treaties, what weight should the legal community accord this particular form of state practice when determining the content of customary law? The importance of this question to the more general issue of the sources of customary law is, one hopes, obvious. Treaties, like statutes, are legal documents, more or less precisely phrased and accessible with relative ease. The more weight given to them in the determination of customary law rules, the easier it is to make such determinations. Conversely, if one considers treaties as merely one more form of state practice, one cannot answer questions as to the content of custom by looking solely at the text of relevant treaties; rather, it becomes necessary to undertake the difficult and confusing effort of figuring out what states are actually doing in the world.

Certain authorities have apparently taken the position that treaties are, at least in some circumstances, conclusive evidence of state practice. They argue that, in these circumstances, if one knows the relevant treaty law, other types of evidence of state practice are simply irrelevant to determining the content of the customary rule, even if such evidence would tend to prove that practice is more varied than treaty texts would suggest.[14]

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14. Some writers have expressly taken this position. *See* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 79-82 (1981). They explicitly reject the relevance of contrary state practice in the context of determining a customary law of human rights, derived in part from treaties on the subject. Other writers subordinate practice to treaty rules in the determination of the content of customary law. For assertions that torture by a state violates customary international law, see, *e.g.*, D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1128-29 (1982) (relying solely on treaties) [hereinafter D'Amato, *Concept of Human Rights*]; Lillich, *Invoking International Human-Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 397-400 (1985) (relying extensively but not solely on treaties); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (relying extensively but not solely on treaties). They do not address at all the effect on the purported rule against torture of contrary

This Article concludes that treaties are simply one more form of state practice and that one cannot answer questions as to the content of customary international law simply by looking to the language of treaties. The discussion supporting this conclusion is in five parts. First, this Article examines more closely the nature of customary international law in order to provide background to the balance of the discussion. In its next two parts this Article examines various aspects of the interplay between treaties and actual state practice. Part V addresses problems presented by one particular type of treaty, those that specify particular, limited consequences for their own breach. Finally, the last section addresses certain arguments in favor of according treaties determinative weight in establishing the content of customary law.

II. CUSTOMARY INTERNATIONAL LAW

In order to understand the problem this Article addresses, one must examine the nature of customary international law. The fact which one must constantly keep in mind with respect to rules of customary international law is that proving the existence of such rules requires proof of two elements: first, the general practice of states must reflect the rule (the generality requirement); and second, states must follow the rule in the belief that such a course is legally required (the *opinio juris sive necessitatis* requirement).[15] Both elements require some comment.

Satisfying the generality requirement does not depend on proof that an overwhelming proportion of states have in fact engaged in the practice; for example, the United States Supreme Court in the *Paquete Habana*[16] case and the Permanent Court of International Justice (PCIJ) in the *Case of the S.S. "Wimbledon"*[17] both deduced rules of customary law from the practice of fewer than a dozen states. While decisions of tribunals necessarily carry much less weight in determining customary international law than in resolving questions in national law,[18] these determi-

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state practice, which is extensive. *See* AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES 2 (1984) (roughly one-third of the states in the world routinely employ torture). Presumably, therefore, the *Filartiga* court and Professors D'Amato and Lillich saw practice as irrelevant to the determination of custom in light of the existence of treaties on the subject.

15. I. BROWNLIE, *supra* note 3, at 7-9.

16. 175 U.S. 677 (1900).

17. 1923 P.C.I.J. (ser. A) No. 1.

18. This follows from the fundamentally different positions of courts in the two systems. In national systems courts are arms of the law-making authority. Not only may they be presumed to speak for that authority, but their decisions will be enforced even if their factual or legal conclusions are mistaken. In contrast, in the international system no

nations are at least suggestive. But if generality in the sense of affirmative acts by most states is not necessary, it must at least be possible to infer acquiescence in a rule by the very large majority of states. Thus, in the *North Sea Continental Shelf Case*[19] the International Court of Justice (ICJ) rejected a proposed rule of customary law regarding delimitation of the continental shelf because it doubted the acquiescence of most states.

It is also worth stressing that the generality requirement concerns generality of practice. Courts have treated various types of activity as practice in various contexts. In *Paquete Habana*,[20] for example, the Court relied on treaties between states, orders from governments to military officers, orders given by military officers and decisions of national courts as examples of practice. In *Lotus* the PCIJ looked to the opinions of publicists (reserving the question of the value of such opinions in establishing a rule), functioning conventions and actual decisions by domestic courts.[21] In *North Sea* the ICJ examined actual delimitations of continental shelves.[22] In other words, practice means just that.

The issue concerning the *opinio juris* requirement that is most important for present purposes seems to have attracted little discussion. This issue is, quite simply, when a state believes that it is legally obliged to obey a certain rule, i.e., when *opinio juris* exists, just what burden does the state believe that it has assumed. In a national legal system, if an obligation may not have been met, officials of the state will scrutinize the conduct of the alleged duty-violator. If this examination leads to a con-

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court is an arm of the law-making authority. National courts dealing with international law questions remain national courts, deriving their power only from the government that established them, not from all governments. They cannot, therefore, be presumed to speak for the body that makes international law, and all governments other than their own can ignore their decisions. The International Court of Justice, despite being a voice for the international community, is unable to enforce its decisions against non-consenting states, thus nullifying those particular decisions. *See, e.g.*, Certain Expenses of the United Nations, 1962 I.C.J. 151, in which the I.C.J. reached a conclusion that the states involved saw as unacceptable. Not only those states but also the General Assembly failed to accept the full implications of the Court's judgment. J. SWEENEY, C. OLIVER & N. LEECH, CASES IN MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 1320 (2d ed. 1981). Thus, the I.C.J.'s decisions are not necessarily good predictors of state practice, and to assert that a proposition is a rule of customary law is to predict that that state's future conduct will be in conformity with that proposition. *See infra* note 98 and accompanying text.

19. 1969 I.C.J. 1.

20. 175 U.S. 677, 686-700.

21. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 26-30 (Sept. 7).

22. 1969 I.C.J. 1, 43-45.

clusion that a duty has indeed been breached, the machinery of the state will act to ensure, by use of force if necessary, that the duty violator fulfills his duty. Presumably, asserting that a state has expressed *opinio juris* as to a putative rule of customary international law means that the state believes if it or any other state breaches the rule, something ought to happen to it or to the other state analogous to the consequences of a breach of a domestic legal rule by a subject of such a system. But what is this something?

It would appear that a state, in asserting that it is legally bound by a given rule, is accepting at least two obligations. First, as a matter of logic, it seems that if a state acknowledges it has a legal duty to behave in a certain fashion, it acknowledges that a state toward which it has not behaved in this fashion has a right to question its conduct. To illustrate, if state *A* accepts the rule of freedom of the seas, which forbids it from interfering with ships flying the flags of other states on the high seas, and state *B* accuses state *A* of interfering on the high seas with a ship flying *B*'s flag, *A* cannot respond, consistent with its acknowledged legal obligation, that the matter is none of *B*'s business. It may deny that the event occurred or claim justification, but it cannot simultaneously accept a legal obligation toward *B* and reject *B*'s right to demand an explanation if it arguably breached the obligation.

The second element of a legal obligation is the duty to correct any breaches of the obligation. This conclusion flows not only from logic but from authority. Commentators frequently state that, as a general principle of international law, breach of an international duty by a state entails a duty to make reparation.[23] According to Brownlie, reparation may take one of three forms: restitution, compensation, or satisfaction, satisfaction meaning some act by the offending state acknowledging its breach of duty.[24] If, therefore, a state acknowledges the breach of some international undertaking or rule of practice and does not assert the existence of mitigating circumstances or exceptions to the rule but nonetheless denies that the breach requires it to make reparation, the state is effectively denying that the undertaking or rule imposes on it a legal obligation.

The foregoing argument assumes that in international law one cannot

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23. *See, e.g.*, Spanish Zone of Morocco Claims, 2 R. Int'l Arb. Awards 615, 641 (1923); Jurisdiction, Chorzow Factory Case (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26); Indemnity, Chorzow Factory Case (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13); *Report of the Int'l Law Comm'n on the Work of its Twenty-Eighth Session 3 May-23 July 1976,* U.N. Doc. A/31/10, *reprinted in* [1976] 2 Y.B. INT'L L. COMM'N 95-97, 110-12, U.N. Doc. A/CN.4/SER.4/1976/Add. 1 (Part 2).

24. I. BROWNLIE, *supra* note 3, at 457-64.

consider an obligation to be a legal obligation unless its breach entails a duty to remedy the breach. This assumption makes sense when one considers what it means to describe an obligation as *legal* in the international law context.[25] In a domestic legal system a formal enforcement system exists, the operation of which permits the identification of legal rules. In the international legal system, in contrast, no such formal system exists. Once one goes beyond the domain of treaty law into the realm of customary law, one can recognize a legal rule only by determining that states acknowledge the rule to be law.[26] Determining whether such acknowledgement exists is not easy because no formal distinctions exist. Even adherence to a rule provides no guidance because such usage does not necessarily prove that actors see themselves as subject to a legal obligation. It would appear instead that the only way to determine whether states see a particular rule as legal is to determine their belief as to the consequence that ought to follow from a breach of the rule. The distinguishing mark of a legal rule in the international system must be that states think their violation will trigger a right to legal remedies. This is not to say, of course, that a rule is not a rule of international law merely because reparation does not always follow clear breaches of the rule; the weakness of the international legal system makes enforcement of rules difficult even in some relatively clear cases. The assertion here is instead that a rule is not a rule of international law unless states acknowledge, at least in principle, a duty to make reparation for its breach.[27]

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25. The assertion in the text fits most comfortably with the positivist theories of law. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (1961). However, John Rawls seems to equate law with the system of formal justice that legal institutions administer. J. RAWLS, A THEORY OF JUSTICE §§ 10, 38 (1971). Ronald Dworkin rejects Hart's argument that legal systems necessarily contain a "rule of recognition," permitting the distinction of legal from other types of rules. R. DWORKIN, TAKING RIGHTS SERIOUSLY 39-45 (1977). Dworkin argues that in hard cases a judge seeking to address an issue not previously addressed by the legal system must justify any conclusion he reaches as consistent with existing statutes and previously decided cases—in effect arguing that rules not presently embodied in the system must at least be derivable from the existing system, making that system a check on the judge's conclusions.

26. *See* I. BROWNLIE, *supra* note 3, at 8.

27. Both Professors D'Amato and Henkin appear to accept the view that a characteristic of a rule of international law is that a state violating a legal rule is obliged to make reparation or, failing that, to suffer retaliation. Professor D'Amato asserts that the international legal system reacts to violation of its rules (in his word, entitlements) by punishing the violator; he notes that if the reaction of other states is not to punish the violator, the violation, instead of being a violation, may be the seed of a new rule. *D'Amato, Concept of Human Rights, supra* note 14, at 1117-18. Presumably one does

Thus, to return to the freedom of the seas hypothetical, if *A* interfered with *B*'s ship by sinking it, and *A* cannot demonstrate some legally recognized justification, one cannot say that *A* has a legal obligation unless it is obliged to somehow make *B* whole for the violation of its duty toward *B*. The form this reparation will take will necessarily depend on the type of obligation breached. In the example given, reparation could take the form of payment of compensation, punishment of the government officials responsible, a formal apology or all three. But it would be a contradiction in terms for *A* to acknowledge a legal obligation to *B*, admit breaching the obligation, admit even that *B* has a right to inquire into *A*'s conduct, but deny that it has any duty to do anything in respect of *B* once the breach of duty is established. One can say, therefore, that the *opinio juris* requirement means that a state must believe that if it breaches a rule the states toward which it owes the duty may inquire into its conduct and that it will be obliged to make those states whole, in some fashion, for its breach.

How does this relate to the problem of treaties and custom? As Professors D'Amato and Baxter have clearly demonstrated,[28] to deny that states very often rely on treaties as evidence of state practice is impossible. This Article does not challenge that fact. It asks instead whether treaties are so exalted a form of practice that states can ignore other evidence of practice if treaties on point exist. Certainly some courts[29] and many commentators[30] have been content to assert the existence of rules of customary law relying solely on the existence of treaties and United Nations resolutions on point and in the face of much contra-

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not go too far to assume that Professor D'Amato would agree that a rule, the violation of which states generally have never seen as entailing punishment, has never been a legal rule. Professor Henkin asserts:

> The duty to carry out international obligations is the heart of the international legal system; and that prime duty implies an ancillary duty to cease and desist from a violation and to give other satisfaction to the state or states to which the obligation was due. The injured state may seek reparation and ask that the violator take measures to prevent repetition, offer an apology, punish the persons who committed the violation, pay a symbolic sum of money, or afford other relief.

Henkin, *Human Rights and "Domestic Jurisdiction,"* in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21, 29-30 (T. Buergenthal & J. Hall eds. 1977).

28. See A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 1, at 113-38; Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 275-76 (1968).

29. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

30. *See, e.g.*, D'Amato, *Concept of Human Rights, supra* note 14; Lillich, *supra* note 14.

dictory practice. Indeed, some commentators have expressly denied the relevance to customary law analysis of practice other than treaties and General Assembly resolutions when such exist.[31]

Section III of this Article will show that, as a matter of history, customary rules based on treaty formulations have been changed by subsequent practice inconsistent with the rules in question. Section IV will show that it would make no sense to insulate customary rules based on treaties from the effects of contradictory practice because contradictory practice can modify or destroy even clear treaty obligations. Section V will demonstrate that, in any case, states must exercise care in relying on certain categories of treaties as examples of practice. Such treaties, specifying in their text exclusive remedies for their breach that do not involve making good the effects of the breach, arguably do not evince *opinio juris.*

III. The Effect of Changes in Practice on Custom Embodied in Treaties

Are treaties such strong evidence of state practice that the existence of a treaty, to which large numbers of states adhere, eliminates the relevance of any other evidence of state practice as to the subject of the treaty? If that were so, one would expect that the mere conclusion of a treaty would freeze customary law as to the matters with which the treaty dealt. In fact, however, it appears that this is not the case. There are clear-cut examples of customary law moving in a direction opposite that of preexisting treaties because of developments in state practice.

The law relating to navigation rights on rivers flowing between states or through more than one state provides one of the best examples. Arguments that navigation on such rivers was open to all states as a matter of customary law, deduced from a number of treaties on the subject concluded among European states, have yielded to contrary state practice.

The first link in the chain was the Final Act of the Congress of Vienna of 1815 (Final Act).[32] Its annex 16 provided that navigation of the

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31. *See, e.g.*, Blum & Steinhardt, *supra* note 14. Professor D'Amato recently reiterated his arguments that treaties alone can generate custom, in the context of a discussion of human rights law. A. D'Amato, International Law: Process and Prospect 123-47 (1987) [hereinafter A. D'Amato, Process and Prospect]. The problem with his discussion is that it addresses only the question of whether treaties can create custom at all. It does not deal with the effect of state practice contrary to the rule that a treaty would establish but contemporaneous with it. This Article addresses the effect on the law of just that situation.

32. Réglement For the Free Navigation of Rivers, Mar. 24, 1815, 64 Parry's T.S.

Rhine, from the sea to the point most distant to which it was navigable from the sea, would be free and forbidden to no one.[33] Free navigation was not in fact the rule on the Rhine until 1868. Under article 32 of annex 16 of the Final Act, opening of the navigation of the Rhine was not to occur until regulations regarding such navigation were complete.[34] Dutch objections to the form of the regulations, however, prevented their promulgation until 1831.[35] In addition, when the regulations were promulgated in the Convention of Mayence,[36] they permitted free navigation only to subjects of riparian states. The mouths of the Rhine were in Dutch territory, so vessels entering the Rhine from the sea destined for portions of the river above Holland would have to cross the Dutch border. The Convention of Mayence, however, granted the right to cross the Dutch border without breaking bulk only to vessels belonging to subjects of riparian states whose owners or masters received licenses from riparian states; such licenses in turn could be issued only to subjects of the particular riparian state.[37] The requirements of ownership of vessels by riparian subjects and limitation of licenses to the same group was not eliminated until the Convention of Mannheim of 1868,[38] and even that agreement limited the right to obtain navigation licenses to domiciliaries of riparian states[39] and required that ships navigating the Rhine be licensed by riparians.[40]

Despite the limitations of the rule of the Final Act as the parties actually applied it, commentators cited it as establishing in international law the principle of free navigation of international rivers. As early as 1824, United States Secretary of State John Quincy Adams asserted that the treaties of the Congress of Vienna amounted to recognition of the rules of the law of nature entitling inhabitants of upper riparian states to navigate a river to its mouth.[41] The Treaty of Paris of 1856 described the

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33. *Id.* art. 1, at 16.

34. *Id.* art. 32, at 24-25.

35. G. KAECKENBEECK, INTERNATIONAL RIVERS 63 (1962).

36. Convention relative to the Navigation of the Rhine, Mar. 31, 1831, 138 Parry's T.S. 307.

37. *Id.* arts. 3, 42, at 310-11, 325.

38. Convention respecting the Navigation of the Rhine, Oct. 17, 1868, 138 Parry's T.S. 167.

39. *Id.* art. 15, at 172.

40. *Id.* art. 22, at 174.

41. Letter to Richard Rush, Minister to Great Britain (June 23, 1823), *quoted in* American State Papers, 1798-1838, VI FOREIGN RELATIONS 757-58.

rules of the Final Act as part of the "public law of Europe."[42] The Treaty of Paris of 1856 itself contributed to the development of the rule of free navigation by opening the Danube to vessels of all states.[43] Similarly, the Treaty of Berlin of 1885,[44] which opened the Congo and Niger rivers to ships of all flags, described the principle as having derived from the Final Act, though characterizing it as conventional.[45] During this period a number of Latin American states had also agreed by treaty or unilateral act to open international rivers to ships of all states, although the treaties in question did not describe international law as requiring the rule of free navigation.[46]

As of the 1890s, therefore, considerable support existed for the proposition that customary international law required that international rivers remain open to ships of all states and that this rule had originated in a treaty—the Final Act. Not only had a number of the most important rivers in the world in fact been opened to the ships of all states, but several of the instruments establishing this rule for particular rivers described it as a requirement of international law and traced the rule's origin back to the Vienna Convention. Not surprisingly, a number of publicists of the period were prepared to view the opening of so many

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42. Treaty of Paris, Mar. 30, 1856, art. 15, 114 Parry's T.S. 409, 415.

43. *Id.*

44. General Act of the Conference of the Plenipotentiaries respecting the Congo, Feb. 26, 1885, 165 Parry's T.S. 485.

45. *Id.* Preamble, art. 4, at 490. The Act originally described these principles as having "passed into the domain of public law," but the drafters changed this language at the insistence of the United States delegate. G. KAECKENBEECK, *supra* note 35, at 168.

46. *See, e.g.*, Venezuela Statute of May 14, 1869, *quoted in* 2 J. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1696-98 (1898) (opening Orinoco to foreign vessels but in article 4 providing that rights granted by statute "can in no case be made a matter of an international claim"); Treaty for the Free Navigation of the Rivers Parana and Uruguay, July 10, 1853, United States-Argentine Confederation, 10 Stat. 1001, T.S. No. 3; Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, Paraguay-United States, 12 Stat. 1091, T.S. No. 272; Treaty of Commerce and River Navigation, Brazil-Colombia, Aug. 21, 1908, 207 Parry's T.S. 355; Treaty of Delimitation, Commerce and Navigation, Brazil-Peru, Sept. 8, 1909, 209 Parry's T.S. 323; Treaty of Delimitation and Navigation, Brazil-Colombia, Apr. 24, 1907, art. 4, 204 Parry's T.S. 102; Decree of Brazil, Dec. 7, 1866, LVIII BRITISH AND FOREIGN STATE PAPERS 551 [hereinafter STATE PAPERS]; Decree of the Emperor of Brazil, Jan. 25, 1873, LXV STATE PAPERS 607; Decree of Argentine Confederation, Oct. 3, 1852, XLII STATE PAPERS 1313; Law of Province of Buenos Aires, Oct. 18, 1852 XLII STATE PAPERS 1314; *but see* Treaty of Peace, Friendship, Commerce and Navigation, Bolivia-United States, May 13, 1858, art. XXVI, 12 Stat. 1003, T.S. No. 32 (opening Amazon and La Plata to all nations "[i]n accordance with fixed principles of international law").

rivers by so many states as establishing the general practice of states on this subject.[47]

Even at this time, however, there was reason to challenge this view. In the first place, a number of rivers had been opened to riparian states only. Thus the agreement between Spain and Portugal regarding the Douro,[48] the agreement between the United States and Mexico regarding the Rio Grande[49] and the agreement between the United States and Great Britain regarding the St. Lawrence,[50] all opened the rivers in question to riparians only.[51] Moreover, much of the practice in this area was that of the Latin American states, and very often the treaties and unilateral acts whereby these states opened their rivers either indicated that the states in question saw their action as a matter of grace only, not compelled by international law,[52] or failed to reveal the acting states' views of their international obligations on this subject.

After World War I the divergence between state practice and the rule of the Congress of Vienna grew more apparent. The actual reluctance of states to accord a general right of free navigation became clear with the

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47. *See, e.g.*, E. ENGLEHARDT, DE RÉGIME CONVENTIONNEL DES FLEUVES INTERNATIONAUX 92 (1879); Vallotton, *Du Régime Juridiave des Cours d'Eaux Internationaux de l'Europe Centerale*, 15 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARIE 271 (II Serie, 1913) [hereinafter R.D.I.]; Nys, *Les Flevues Internationaux Traversant Plusieurs Territories*, 5 R.D.I. 517 (II Serie, 1903); 1 J. WESTLAKE, INTERNATIONAL LAW 157 (1904); *See also* ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 153-88 (1888) (debate on draft regulations on river navigation).

48. Convention relative to the Douro, Aug. 31, 1835, Portugal-Spain, 85 Parry's T.S. 255.

49. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, art. VII, United States-Mexico, 9 Stat. 992, T.S. No. 207; Gadsden Treaty, Dec. 30, 1853, art. IV, United States-Mexico, 10 Stat. 1031, T.S. No. 208.

50. Treaty of Washington, May 8, 1871, art. XXVI, United States-United Kingdom, 17 Stat. 863, T.S. No. 133.

51. It is possible that, in practice, vessels of non-riparians were permitted to use each of these rivers, but the writer is aware of no evidence that any such practice, if it existed, was undertaken by riparian states in the belief that they were legally bound to do so.

52. *See, e.g.*, Venezuela Statute of May 14, 1869, art. 4, 2 J. MOORE, *supra* note 46, at 1696-98; Treaty for the Free Navigation of the Rivers, Parana and Uruguay, July 10, 1853, United States-Argentine Confederation, art. I, 10 Stat. 1001, T.S. No. 3; Treaty of Friendship, Commerce and Navigation, Feb. 4, 1859, United States-Paraguay, art. II, 12 Stat. 1091, T.S. No. 272; Statement of Brazilian Minister of Foreign Relations to President of Brazil, Sept. 30, 1907, U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1907, Vol. I, at 111, 113 [hereinafter FOR. REL. PAPERS] (referring to Brazil's permitting passage of Colombian vessels on certain rivers "as a concession, made of its own will and for that reason as proof of its sovereignty").

lukewarm reception accorded the Barcelona Convention on the Regime of Navigable Waterways of International Concern (Barcelona Convention).[53] Although proclaiming in its preamble a desire to "[carry] further the development as regards the international regime of navigation on internal waterways,"[54] the Barcelona Convention established through its annexed statute no general right of free navigation and accorded rights only to its signatories.[55] Even so, only twenty-one states eventually adhered to the Barcelona Convention, including only one state from the Americas, although over forty states participated in the conference at which the convention was drawn.[56] In addition, statements by delegates in the course of the conference indicated widespread rejection of the idea that the Final Act had given rise to a rule of general customary law.[57] In particular the Chilean publicist Alvarez, speaking for the subcommittee on navigable waterways, stressed the divergence between Latin American and European practice.[58]

The variation between state practice and European assertions concerning the content of customary law began to make an impact among scholars and tribunals. Thus, during the 1920s and 1930s a number of distinguished scholars rejected the argument that customary law established a right in all states to navigate international rivers.[59] Similarly, the PCIJ in the *Oder*[60] case, though acknowledging the development of international fluvial law growing out of the Final Act, described that law as

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53. 1 M. HUDSON, INTERNATIONAL LEGISLATION 638 (1931).

54. League of Nations Doc. C.479. M.327, 1921. VIII (1921), *reprinted in* 1 M. HUDSON, INTERNATIONAL LEGISLATION, *supra* note 53, at 639.

55. Statute on the Regime of Navigable Waterways of International Concern, annexed to Barcelona Convention on the Regime of Navigable Waterways of International Concern, art. 4, *reprinted in* 1 M. HUDSON, INTERNATIONAL LEGISLATION, *supra* note 53, at 647.

56. 1 M. HUDSON, INTERNATIONAL LEGISLATION, *supra* note 53, at 638-39.

57. LEAGUE OF NATIONS, BARCELONA CONFERENCE, VERBATIM RECORDS AND TEXTS RELATING TO THE CONVENTION ON THE REGIME OF NAVIGABLE WATERWAYS OF INTERNATIONAL CONCERN AND TO THE DECLARATION RECOGNIZING THE RIGHT TO A FLAG OF STATES HAVING NO SEA-COAST 16-18 (Polish delegate), 22-24 (French delegate), 25-29 (Brazilian delegate), 38 (Spanish delegate), 65 (Venezuelan delegate), 89 (Italian delegate), 96-97 (Rumanian and Czech delegates) (1921).

58. *Id.* at 224-25.

59. 1 L. OPPENHEIM, INTERNATIONAL LAW 320 (3d ed., R. Roxburgh ed. 1920); Winiarski, *Principles Généraux du Droit Fluvial International*, 45 RECUEIL DES COURS 75 (1933). *See also* B. VITANYI, THE INTERNATIONAL REGIME OF RIVER NAVIGATION 134-43 (1933).

60. Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No. 23.

based on "the perfect equality of all riparian states"[61] and characterized the Treaty of Versailles' provisions granting free use of rivers to nonriparians as an innovation.[62]

Since World War II the argument that customary law establishes a right of free navigation on international rivers has largely been abandoned. A number of rivers in Europe and Africa previously labelled international and opened to nonriparians have fallen under more restrictive regimes.[63] Similarly, Argentina has in recent decades taken a restrictive approach to use of the Plata.[64] Scholars have also concluded that customary law confers on nonriparians no right of navigation on international rivers,[65] and in its Helsinki Rules on the Uses of the Waters of International Rivers the International Law Association asserted only that riparian states were entitled to rights of navigation and, in commentary, asserted that international law did not support a claim that nonriparians were entitled to rights of free navigation on international streams.[66]

In sum, then, a clear evolution in thinking occurred about the international law of navigation of international rivers. During the last half of the nineteenth century the treaty practice of the leading states of Europe, accompanied by assertions by those states of *opinio juris*, made plausible the assertion that customary international law had established a general right to navigate international rivers. Although not accompanied by assertions of *opinio juris* similar to those made by European states, confirmatory practice from Latin America fortified this notion. Even at this time elements of practice did not fit the pattern, but the international community tended to overlook them. After the turn of the century, however, these divergences of practice began to be more prominent. Some of these items of practice were themselves treaties, but others were simply unilateral acts by states and, in the case of non-adherents to the Barcelona Convention, the refusal to become parties to a treaty. Currently,

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61. *Id.* at 27.

62. *Id.* at 28.

63. B. VITANYI, *supra* note 59, at 108-14; Johnson, *Freedom of Navigation for International Rivers: What Does it Mean?*, 62 MICH. L. REV. 465, 468-69 (1964).

64. Hayton, *The Plata Basin*, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 298, 390-97 (A. Garretson, R. Hayton, C. Olmstead eds. 1967).

65. *See, e.g.*, R. BAXTER, THE LAW OF INTERNATIONAL WATERWAYS 155-59 (1964); B. VITANYI, *supra* note 59, at 151; 1 C. HYDE, INTERNATIONAL LAW 564 (1947); I. BROWNLIE, *supra* note 3, at 272; G. SCHWARZENBERGER, *supra* note 1, at 89.

66. *Helsinki Rules on the Uses of Waters of International Rivers, Art. XIII and Commentary Thereon*, INTERNATIONAL LAW ASSOCIATION REPORTS OF THE FIFTY-SECOND CONGRESS 506-07 (1967).

evidence of practice different from that envisioned by nineteenth century European doctrine is so overwhelming that the original position is no longer tenable, even though certain of the treaties which provided the basis for that position—those dealing with the Rhine—remain in force. One can debate whether the European treaties established a rule which contrary practice subsequently undermined, or whether there never was in fact any customary rule at all. It is at least clear, however, that the establishment of treaties on the navigation of international rivers did not freeze customary law.

River law is not the only instance of customary law developing in a manner contrary to what a relevant treaty would suggest. The law of the sea provides another example.

In 1958 the First United Nations Conference on the Law of the Sea produced four conventions dealing with various aspects of the law of the sea.[67] Of the four, only the Convention on the High Seas (Convention) described itself as being declaratory of customary international law;[68] commentators have accepted this internal description as an accurate statement of the law in 1958 concerning those provisions of the Convention relevant to this discussion.[69] The Convention defined the high seas as the area beyond the territorial sea and contiguous zone.[70] Neither the Convention nor the Convention on the Territorial Sea and the Contiguous Zone defined the maximum breadth of the territorial sea; the latter does, however, set the maximum for the outer limits of the contiguous zone, defined as an area beyond the territorial sea,[71] at twelve miles from shore.[72] Thus, one must read the Convention on the High Seas as including within the high seas all ocean areas more than twelve miles from shore. This is significant because the Convention provides that "no state

67. Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, *opened for signature* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

68. Convention on the High Seas, *supra* note 67, preamble.

69. I. BROWNLIE, *supra* note 3, at 237, 240-41; C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 47-48, 401-02 (1979); R. LUMB, THE LAW OF THE SEA AND AUSTRALIAN OFF-SHORE AREAS 27 (2d ed. 1978).

70. Convention on the High Seas, *supra* note 67, art. 1.

71. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 67, art. 24. Commentators had hoped that the territorial sea convention could address the subject of the maximum breadth of the territorial sea; it did not.

72. *Id.*

may validly purport to subject any part of [the high seas] to its sovereignty" and that "freedom of the high seas" includes "freedom of fishing."[73] If state practice cannot alter customary law embodied in a treaty, therefore, it follows that no state can lawfully claim exclusive fishing rights to any part of the sea more than twelve miles from its coast. Clearly this is no longer the law.

As noted above, the Convention on the High Seas does not define the breadth of the territorial sea. The disagreement on this point reflected the basic disagreement between the conferees as to the breadth of the area over which coastal states should have jurisdiction to control fishing. But after the conferees concluded the Convention, practice began to change.[74] By 1974, on the basis of state practice as reflected by votes in international conferences that did not result in treaties and by certain bilateral and multilateral treaties,[75] the ICJ could conclude that the concept of preferential fishing rights even beyond the twelve mile limit had become for some coastal states a principle of customary law.[76]

Nor did the evolution of custom halt at this point. The Third United Nations Conference on the Law of the Sea introduced the concept of the exclusive economic zone, an area 200 miles broad in which coastal states would have exclusive control of all economic activities, including fishing.[77] Although the Convention on the Law of the Sea[78] that the Conference produced and more than 140 states signed included the concept, that treaty is not yet in force, and, thus, one cannot say that conventional law embodies the exclusive economic zone principle.[79] More than 100 states, however, have proclaimed 200-mile zones labelled either "territorial seas," "exclusive fishing zones" or "exclusive economic zones," frequently in documents describing the practice as sanctioned by international law and thus evincing *opinio juris*.[80] These states include almost

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73. Convention on the High Seas, *supra* note 67, art. 2.

74. *See* description in Fisheries Jurisdiction Case (U.K. v. Iceland), 1974 I.C.J. 1, 22-23 (Merits, Judgment).

75. *Id.* at 24-26.

76. *Id.* at 26.

77. United Nations Convention on the Law of the Sea, U.N. CONF. 62/122, *reprinted in* 21 I.L.M. 1261, 1279 (1982).

78. *Id.*

79. The Treaty becomes effective when sixty states ratify it. *Id.* at 1327. As of December 31, 1986, 32 states had done so. *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1986*, U.N. Doc. ST/LEG/SER.E/5, at 725-26.

80. R. SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS 11-12 (1986). The proclamations or national legislation or both of Cape Verde, *id.* at 95; the Dominican Republic, *id.* at 119, Guatemala, *id.* at 185; Haiti, *id.*

all those facing seas broad enough to accommodate 200-mile zones.[81] Presumably on the basis of the coastal states' overwhelming acceptance of the 200-mile zone concept, the ICJ has held that the concept has entered customary law[82] and has even delimited a boundary between fishing zones extending far beyond twelve miles from the coast.[83] Thus both state practice and the secondary evidence of customary law that the ICJ's opinions provide force the conclusion that the concept of limited sovereignty for coastal states over a 200-mile belt of sea has become an element of customary law despite the existence of the Convention on the High Seas. The Convention did not freeze customary law; customary law changed as state practice changed. That change, one should note, principally took the form of unilateral acts by coastal states.

Looking then at these two areas of the law, it is clear that the conclusion of important treaties in both these cases failed to freeze custom.[84] This is true even though the river treaties in Europe involved many important states and the treaties in both cases purported to apply rules of customary law. This is significant since, as this Article pointed out above, one would expect the opposite result if the mere conclusion of treaties by significant numbers of states, acting in the belief that their treaties declare custom, provided conclusive evidence of the content of custom. As to the river treaties, however, despite the assertions in the Danube and Rhine treaties, contrary practice in the Ameri-

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at 201; Honduras, *id.* at 205; India, *id.* at 219; Indonesia, *id.* at 227; Kenya, *id.* at 243; Madagascar, *id.* at 254-55; the Philippines, *id.* at 369; Sao Tone and Principle, *id.* at 405; Trinidad and Tobago, *id.* at 456; and the United States, *id.* at 467, all expressly assert that state practice or international law permit such 200-mile zones.

81. *See id.* at 482-83 (map).

82. Case Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 74 (Judgment of Feb. 27, 1982); Case Concerning the Continental Shelf, 1985 I.C.J. 13, 33.

83. Gulf of Maine Case (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12, 1984).

84. Professor D'Amato would limit the custom-generating effects of treaties to those expressing generalizable norms. He would exclude from this category treaties purporting to divest a state of territory. D'Amato, *Concept of Human Rights, supra* note 14, at 1143. Accepting *arguendo* his generalizability principle and his qualification to it, both the river treaties and the High Seas Convention should generate custom. The river treaties collectively embody rules about the use of rivers flowing through more than one country or between countries. These rules divest no one. Certainly rules regarding the *use* of territory are capable of entering customary law. For example, the rule that coastal states must permit innocent passage through the territorial sea is clearly part of the customary law. I. BROWNLIE, *supra* note 3, at 203. Obviously rules preserving freedom of the seas beyond the territorial sea were long part of customary law, G. SCHWARZENBERGER, *supra* note 1, at 108-10.

cas—involving both treaties and unilateral acts of states—developed concurrently and with sufficient strength to prevent the insertion in the General Act of the Berlin Conference of an assertion that Europe's practice had become general law. More importantly, such divergences in practice led to the failure of the Barcelona Convention. Further, writers and tribunals now consider this practice to be sufficiently important to force rejection of the 19th century European view as to the state of the law. Similarly, despite the declaration in the Convention on the High Seas that it states custom, writers and tribunals now clearly see as lawful the assertion of much broader jurisdiction over the oceans than the Convention permits, a view based on changes in state practice since the Convention was concluded. Given the development of both the law of navigation of international rivers and the law of the sea, therefore, it is clear that treaties alone, excluding evidence of practice, cannot determine the content of customary law.[85]

IV. THE EFFECT OF CHANGES IN PRACTICE ON TREATIES

The foregoing section demonstrates that even treaties that are considered declarative of custom at the time of their conclusion cannot freeze the content of customary law and insulate that body of law from the effects of changes in state practice. This conclusion is reinforced when consideration turns from examining the effect of changes in practice on custom embodied in treaties to analyzing the effect of such changes on treaties themselves. As the discussion below will show, changes in state practice can alter even conventional law. So far from being able to shield customary law from the effects of contrary practice, even the vitality of treaties cannot necessarily be maintained when practice contradicts them.[86]

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85. *Accord* M. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 207-26 (1985); H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 130-321 (1972).

86. The *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF. 39/27 (1969) [hereinafter *Vienna Convention*], *reprinted in* 8 I.L.M. 679 (1969), contains no reference to modification by practice, and an article of the International Law Commission's draft of the Convention, permitting modification of treaties by subsequent practice of the parties, was deleted at the Vienna Conference itself. *Official Records, United Nations Conference on the Law of Treaties*, at 215, U.N. Doc. A/CONF. 39/11. It is also true that representatives of a number of states made clear that they opposed this article because of disagreement with the idea that practice can modify a written agreement. Others, however, supported the deletion in the belief that the article was redundant in light of the language in what is now article 31 permitting interpretation of the treaty by reference to subsequent practice of the parties. *Id.* at 207-15. The ILC clearly believed

The *Gulf of Maine* case,[87] decided by the ICJ in 1984, presents an excellent example of this phenomenon. In that case, the United States and Canada asked the court to delimit a single maritime boundary for both the continental shelves and the fisheries zones of Canada and the United States in the Gulf of Maine.[88] The Convention on the Continental Shelf (Shelf Convention),[89] to which both Canada and the United States are parties,[90] provides in article 6 that, as between adjacent states unable to agree on a boundary between their continental shelves and absent special circumstances, the boundary between the shelves of the two states would be a line, every point of which was equidistant from the nearest points of the baselines from which the respective territorial seas were measured.[91] Because Canada and the United States could not agree on a boundary, their status as parties to the Shelf Convention would have appeared to have required that the ICJ apply article 6 to delimit the shelf boundary and some other principle of law to delimit the fisheries zone boundary.

In fact the Court refused to do this. It observed that if the controversy involved only a question of delimiting the shelves, application of article 6 would be mandatory. Because the issue presented was not delimitation of the shelf alone, however, but delimitation of both the shelf and the fisheries zone, the Court held that article 6 did not apply.[92] It reasoned that since the subject matter involved in the case was much broader than that of the shelf, it could not read a treaty obligation involving only the shelf as applying to a broader subject matter.[93] Moreover, the court noted, applying the Convention on these facts would make the water overlying the shelf "a mere accessory" of the shelf,[94] a result which the court found unacceptable.

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that modification by practice was possible. *Commentary to Draft Article 38*, at 65-66, U.N. Doc. A/6309/Rev. 1. Since they included article 31 in the final text, complete with its reference to practice, the thrust of the Convention concerning the effect of subsequent practice is somewhat unclear. In any event, as the text of this Article points out, developments since 1969 relating to the law of the sea clarify that practice can change treaties.

87. Gulf of Maine Case (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12, 1984).

88. *Id.* at 263-64.

89. Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

90. *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1986*, *supra* note 79, *at* 718.

91. 15 U.S.T. 471, 474, T.I.A.S. No. 5578, 499 U.N.T.S. 311, 316.

92. 1984 I.C.J. 301.

93. *Id.* at 303.

94. *Id.* at 301.

Clearly the Court, in holding article 6 inapplicable to the case, gave decisive weight to the fact that the parties were seeking to delimit not only a shelf boundary but a boundary covering both the shelf and the fisheries zones. Adding the fisheries zone delimitation issue, in the opinion of the court, had the effect of relieving the parties of the otherwise mandatory obligation to rely on article 6 to resolve disputes over shelf boundaries. The Court reached this conclusion despite the fact that when read literally, article 6 applies to all shelf boundary disputes; it contains no exceptions for disputes involving lines intended to divide not only shelves but also fisheries zones. Taking into account fisheries zones was, nonetheless, so important to the Court that it read its exception into article 6.

This is important for present purposes because the concept of the fisheries zone was unknown to international law in 1958, the year the Shelf Convention was concluded. As this Article explained in the preceding section, the international legal community has recognized the legality of creating fisheries zones only because of the development of state practice since 1958. In effect, therefore, the Court held that state practice since 1958, although uncodified in any treaty, modified the absolute treaty obligations of Canada and the United States.

This example is not isolated. Considerable authority exists for the proposition that desuetude, long-standing and consistent practice by parties to a treaty inconsistent with the treaty, can have the effect of not merely modifying but actually terminating the treaty.[95] Termination of a treaty by this means is most uncommon, but certainly not unknown.[96]

Thus, even if one confines the focus to the law of treaties, it is impossible to ignore contrary state practice. Such practice can modify or terminate a treaty never formally altered in any way. And if one cannot ignore practice in determining the content of what is no more than a treaty obligation, it follows that practice must receive at least as much attention in determining the content of an obligation supposedly derived from the

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95. I. BROWNLIE, *supra* note 3, at 614-15; G. SCHWARZENBERGER, *supra* note 1, at 137; A. VAMVOUKOS, TERMINATION OF TREATIES IN INTERNATIONAL LAW 266-67, 276, 302-03, (1985); A. MCNAIR, THE LAW OF TREATIES 508, 516-18 (1961); Pinto, *La Prescription en Droit Internationale*, 87 RECUEIL DES COURS 387, 431-32 (1955); M. VILLIGER, *supra* note 85, at 213-14 (1985). To be sure, the Vienna Convention, *supra* note 86, *reprinted in* 8 I.L.M. 679 (1969), makes no reference to termination of treaties by practice. However, article 54 permits termination by consent of all the parties, which includes termination by desuetude if, as Vamvoukos suggests, desuetude can be seen as a tacit consent. A. VAMVOUKOS, *supra*, at 292-93.

96. *See, e.g.*, A. MCNAIR, *supra* note 95, at 508; A. VAMVOUKOS, *supra* note 95, at 267-76; M. VILLIGER, *supra* note 85, at 213.

general practice of states.

V. Treaties and Opinio Juris

As this Article noted above, the existence of a rule of customary international law depends on two elements: the rule must reflect the general practice of states, and states must adhere to this practice in the belief that the law obligates them to do so. Accordingly, in considering the contribution that treaties can make to the formation of customary rules, it is not enough to examine the extent to which the treaties amount to practice. One must also determine in each case whether, assuming a given treaty can fairly be treated as an instance of state practice, adherence to the treaty satisfies the *opinio juris* requirement. As noted above, this requirement means that a state acknowledges the right of states to whom it owes a putative duty to inquire about possible breaches of the duty and also acknowledges its obligation to make reparation for any breaches of duty.

With respect to many treaties, this determination can lead to the conclusion that the treaty is not merely an example of practice, but in addition, an example of practice believed to be legally binding. This is most obviously true of treaties that state explicitly that they are declarative of custom. Even when this type of statement is an inaccurate description of the state of law as of the date of the treaty's conclusion, it amounts to an explicit acknowledgement by the parties to the treaty that they would be legally bound to the treaty's rules even if the treaty did not exist. This acknowledgement makes it easy to include those parties in the tally of states that not only follow a given practice but do so in the belief that the practice is law. One can even view treaties that are silent as to their relationship to custom as evidence of practice accepted as law—to the extent one can see them as practice at all. This follows, since the parties will perceive their own behavior under the treaty as a matter of legal obligation toward one another, not merely as practice from which they are legally free to depart. Absent evidence that the parties do not see this obligation as binding outside the treaty context or do not see it as legal at all, it would seem that such treaties would be helpful indicators of states' views of their obligations. Of course, some commentators disagree with this view, arguing that treaties, given their contractual character, do not express *opinio juris*.[97] In any case, as Professor D'Amato has pointed out, tribunals and states have long deduced rules of customary interna-

97. *See, e.g.*, Akehurst, *Custom as a Source of International Law*, 45 Brit. Y.B. Int'l L. 1, 42-52 (1975).

tional law from such treaties.[98]

Even conceding these points, however, it does not follow that conclusion of a treaty necessarily implies *opinio juris*, that is, that the parties believe that the treaty's provisions would legally bind them outside the treaty. As is true for the subjects of any legal system, subjects of international law may assume obligations that would not otherwise bind them without that assumption suggesting that they believe the obligations would be otherwise binding. As this Article will show, it is easy to imagine circumstances in which a particular treaty not only fails to express *opinio juris*, but actually denies *opinio juris*, that is, provides evidence that the parties would reject any duty to behave as the treaty required had the treaty not been concluded.

In discussing the indicators of this type of rejection, however, I should point out one consequence of that rejection. If a treaty demonstrates that the parties believe they would have no legal obligation to behave as the treaty requires but for the treaty, it follows that practice under the treaty cannot supply the usage element necessary to establish a rule of customary international law. This follows because all usage does not create a rule of customary law—only usage informed by *opinio juris* does so. While considerable disagreement exists among scholars concerning when usage *is* informed by *opinio juris*, it would seem obvious that if one can establish that particular usage is *not* informed by *opinio juris*, that usage is irrelevant to the formation of a customary rule. This is the clear opinion of the ICJ in the *North Sea Case*, in which the Court held that to constitute a rule of customary law, "[n]ot only must the acts concerned amount to a settled practice, but they must also be such . . . as to the evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[99] Practice undertaken despite a belief that it is *not* obligatory is not, therefore, that practice which contributes to the formation of a rule of customary law.

Assuming that treaties may deny *opinio juris* and that practice under such treaties is irrelevant to the formation of a customary rule, which treaties can one view as denying *opinio juris*? First, and most obviously, treaties would have this character if they declare themselves as entered into by the parties purely as an act of grace. This was the case with some of the Latin American treaties described above, which opened certain rivers to the ships of all states.[100] In such circumstances it seems

98. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 1, at 113-38.

99. 1969 I.C.J. 4, 44.

100. *See, e.g.*, Treaty for the Free Navigation of the Rivers Parana and Uruguay, *supra* note 46, art I; Treaty of Friendship, Commerce and Navigation, *supra* note 46,

impossible to assert that adherence to the treaty evinces *opinio juris*. Such an assertion would ignore the parties' express characterization of their adherence to the treaty; it would amount to labelling an assertion that "x is not true" as an expression of the belief that "x is true." This is not to say that parties to such a treaty could not express *opinio juris* by some other means, but only to stress that the treaty is not such an expression.

It seems clear, then, that a treaty is not evidence of *opinio juris* if the parties expressly deny in the treaty text any *opinio juris* as to the legal status of the treaty's rules outside the instrument. The issue is one of the parties' beliefs. But if belief is the key issue, it would seem to follow that a treaty may deny *opinio juris* even without an express statement to that effect if the treaty contains other evidence demonstrating that the parties would not see the treaty's rules as binding but for the treaty. This is not to say that such treaties are not binding as treaties, or to say that such denials of *opinio juris* in the treaty would preclude the emergence of a customary rule on the subject outside the treaty. It is only to say that one cannot consider such a treaty itself to be evidence of the customary law status of the rules it establishes.

Consider, then, a treaty that imposes obligations on states but expressly or by necessary implication limits the right of parties to the treaty to inquire into one another's observance of its terms and forecloses the availability of any legal remedies for breach of treaty obligations. This type of treaty can hardly be an expression of *opinio juris* concerning the customary law status of the obligations contained in the treaty because these customary law rules would, as shown above, necessarily carry with them the right in states to whom a duty is owed to make inquiry and a duty to make reparation for breaches of the rules.[101] An agreement purporting to create obligations but forbidding inquiry into breaches of those obligations and excluding remedies for such breaches is hardly evidence of a belief that there exist outside the treaty rules creating not only similar obligations but also a right of inquiry and a duty to remedy breaches. Indeed, such a treaty excludes the indicia of legal obligation and thus suggests that its subject matter does not involve legal obligation, outside the treaty context at least. In addition, such a treaty would not count toward the practice element necessary to establish the existence of a customary rule because, as this Article noted above, usage not informed by *opinio juris* is not relevant to a demonstration of state practice.

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art. II.

101. *See supra* text accompanying notes 23-27.

This argument is of more than scholastic interest. If it is correct, certain treaties often described as instances of state practice supporting purported rules of customary international law do not, in fact, support such rules. For example, the court in *Filartiga v. Pena-Irala*[102] listed the International Covenant on Civil and Political Rights (Covenant)[103] as an example of state practice supporting the proposition that torture by a state of its nationals violates customary international law.[104] But that treaty, although in its operative sections imposing on parties the duty to, for example, refrain from torturing their nationals,[105] limits the rights of parties to examine one another's conduct. Although the Human Rights Committee (Committee) that the Covenant establishes may request reports from states parties on their compliance, the Covenant expressly forbids the Committee from acting on charges made either by individuals or by other parties that a party has violated the Convention, unless the accused party has specially consented to the Committee's hearing such charges.[106] The Covenant also imposes no duties of reparation, restitution or satisfaction for its breach. The only reference in the Covenant to the availability of remedies other than a reporting obligation is its article 44, which preserves as between parties to the Convention any enforcement measures established by "general or special international agreements in force between them."[107] The Convention makes no reference to enforcement techniques not established by agreement. Further, the Committee has no power even to recommend to states parties changes in domestic law, much less to prescribe actions parties are bound to take.[108] Indeed, the Committee even treats certain of its decisions involving human rights—those initiated by charges from other parties under article 41 or by individuals under the Optional Protocol—as confidential, thus eliminating whatever useful effect publicity might provide.[109]

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102. 630 F.2d 876 (2d Cir. 1980).

103. International Covenant on Civil and Political Rights, Dec. 19, 1966, No. 14,668, 999 U.N.T.S. 171 (1976).

104. 630 F.2d at 883-84.

105. International Covenant on Civil and Political Rights, art. 7, *supra* note 103, at 175.

106. *Id.* arts. 40, 41, at 181-82; art. 1, at 302. Of the 85 parties to the Covenant, only 38 have adhered to the Optional Protocol; 14 of the 38, plus 6 other states, have given the consent required by article 41. *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1986*, *supra* note 79, at 128, 138-40, 151.

107. International Covenant on Civil and Political Rights, *supra* note 103, art. 44, at 184.

108. A. ROBERTSON, HUMAN RIGHTS IN THE WORLD 48-50 (1982).

109. *Id.* at 40.

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[110] is a relatively new document that the General Assembly adopted only on December 10, 1984.[111] It is nonetheless relevant to this discussion because it illustrates the same weaknesses as the Covenant on Civil and Political Rights and because courts have cited the General Assembly declaration[112] that inspired it as supporting the argument that torture violates customary international law.[113] As with the Covenant, under the Torture Convention states must submit reports to a committee (here, the Committee Against Torture [Committee]) at regular intervals and also when requested.[114] The Committee has the power to conduct its own investigation of reports that a state is engaging in torture when it receives reliable information to that effect,[115] but states parties may prevent such investigations by declining to recognize the Committee's competence in this regard.[116] As was true with the Covenant on Civil and Political Rights, the Committee cannot hear charges from other parties that a party has violated the Torture Convention unless both the accused and the accusing state have previously agreed to such a procedure.[117] Similarly, the Committee cannot hear accusations by individuals against parties who have not consented to the Committee's hearing such charges against them.[118] And, as was true with the Covenant, the Torture Convention makes no reference to any duties of reparation, restitution or satisfaction in the event of breach, though the Committee is at least per-

110. U.N. Doc. E/CN.4/1984/72, *reprinted in* 23 I.L.M. 1027 (1984), *as amended* 24 I.L.M. 535 (1985) (entered into force June 26, 1987, 26 I.L.M. 1490 (1987)).

111. 24 I.L.M. 535.

112. *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452, 20 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975).

113. Filartiga v. Pena-Irala, 630 F.2d 876, 882-83 (2d Cir. 1980). This Article does not address the relationship between customary law and General Assembly resolutions. Nonetheless, the Torture Convention and the Declaration, taken together, illustrate the danger of reading too much into such resolutions. Despite condemning torture in the Declaration, the Assembly was unwilling in the Convention to impose sanctions even on torturing states that had by treaty expressly agreed not to torture. This refusal to sanction even Convention violators casts doubt on the Assembly's willingness in the Declaration to see torture as something for which international law imposed a duty of reparation, i.e., something to be avoided as a matter of legal duty.

114. U.N. Doc. E/CN.4/1984/72, art. 19, *reprinted in* 23 I.L.M. at 1032.

115. *Id.* art. 20, *reprinted in* 23 I.L.M. at 1033; 24 I.L.M. at 535.

116. *Id.* art. 28, *reprinted in* 24 I.L.M. at 535.

117. *Id.* art. 21, *reprinted in* 23 I.L.M. at 1033.

118. *Id.* art. 22, *reprinted in* 23 I.L.M. at 1035.

mitted to make suggestions in response to reports from parties.[119]

Both these treaties severely limit the right of parties, to whom, presumably, the treaty obligation is owed, to inquire into breaches of that obligation. One might argue that each treaty confers the right of inquiry on a third party—the relevant committee in each case. Under both treaties, however, parties can effectively limit the evidence that the relevant committee can use to justify a request for a report. Further, if a report is inadequate, the Covenant provides the Human Rights Committee with no means to supplement it; the Committee Against Torture could carry out its own investigation, but only against a state that has not denied its competence in this regard. Thus, neither treaty compels states to acknowledge more than a severely limited right of inquiry.

More important, neither treaty contains provisions requiring parties violating their obligations under the treaties to make reparation. Professor Henkin, to be sure, has argued that the normal remedies for treaty violation are available when such treaties are violated.[120] But, in fact, no instances exist of parties to the Covenant on Civil and Political Rights seeking to enforce its provisions outside the framework it establishes, and such an interpretation of treaties like those discussed seems strained.[121] Logically, a violating party could owe such a duty either to the relevant committee, to other states parties or to individuals. Since neither individuals nor the committees are parties to the treaties, one would expect that the treaties would spell out any duty of reparation to these entities. Neither does. Even as to other parties, the argument seems doubtful. This follows when one recalls that the treaties clearly evince an intent to limit the parties' exposure to accusations against them by other states and, for that matter, by the committees and by individuals. It would make little sense to protect parties from being accused by another state before a committee with power to do nothing but make a report containing suggestions, while leaving to the other state the full panoply of traditional remedies for a treaty violation. The more reasonable interpretation is that these treaties do not and are not intended to carry with them a duty to make good any violations.

One might also argue that the foregoing argument's focus on state

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119. *Id.* art. 19, *reprinted in* 23 I.L.M. at 1032-33.

120. Henkin, *Human Rights and "Domestic Jurisdiction,"* in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21, 29-33 (T. Buergenthal & J. Hall eds. 1977).

121. For another writer's doubts about Henkin's positions, see Frowein, *The Interrelationship Between the Helsinki Final Act, the International Covenants on Human Rights, and the European Convention on Human Rights*, in *id.* at 71, 78-80.

parties' lack of recourse against one another is inapposite because these treaties are not synallagmatic and because other parties would not have an interest that the violations would affect. But the fact that treaty duties are not reciprocal would not preclude giving parties rights to enforce the treaties against one another, if the parties chose to confer such authority. Clearly, treaties could confer standing to protest violations and establish individuals' rights to reparation. None of this was done in either treaty. And to concede that states parties have no interest in one another's adherence to the treaties is presumably to deny the argument of human rights proponents that international law now recognizes that human rights questions are matters of international concern. To deny that such questions are matters of international concern is presumably to deny that they are subjects of customary international law, despite the treaties.

Limiting as they do the right of parties owed an obligation to investigate breaches of the obligations, and precluding as they apparently do any duty of the parties to make good to any entity violations of the treaties, these treaties do not evince *opinio juris*. Indeed, the treaties would seem to deny *opinio juris*. This follows from a consideration of their approaches to the question of reparation. As noted above, the treaties are best interpreted as imposing no duty of reparation. If one considers them reflections of customary law obligations carrying a duty of reparation outside the treaty context, however, the apparent intention to shield parties from any such duty under the treaty could not be achieved because the parties would still owe a duty of reparation for acts that violated both the treaty and custom. At least achievement of the goal of limiting exposure would require treaty language to that effect. Neither treaty contains such language. This omission indicates the parties' beliefs that they risk no such exposure, that no rules of customary law exist on the subjects of the treaties. In short, they deny *opinio juris*. And, as argued above, one cannot view a usage coupled with a denial of *opinio juris* as a rule of international law. Thus, these treaties cannot represent practice informed by *opinio juris* and can contribute little to establishing their prohibitions as rules of customary international law. This does not mean that customary law rules on the subjects these treaties address do not or cannot exist, but only that these treaties are an inadequate basis for asserting that such rules exist. By extension, any treaty structured as these two are is a similarly inadequate basis for an alleged customary law norm.

VI. Responses to Counterarguments

As noted above, a number of writers have disagreed with the position that this Article takes. They have asserted in their writing, expressly or

by implication, that courts can ignore actual practice of states in determining the content of customary international law if treaties, particularly multilateral treaties, exist dealing with the area of the law at issue.[122] This portion of the discussion will examine the arguments in support of this position and demonstrate their flaws.

A. *Violations of a Rule Do Not Destroy the Rule*

It is sometimes argued that practice contrary to a purported rule of customary law derived from treaties can be ignored on the theory that mere violations of a legal rule cannot destroy that rule. Thus, the court in *Filartiga* dealt with practice contrary to the rule against torture it enunciated by quoting Brierly's analogy between the lack of effect of an individual's violations of municipal law on the content of that law and the assertedly similar lack of effect on the content of international law of violations by states.[123] Professor Sohn has drawn a similar analogy.[124] Professor D'Amato, seeking to establish that human rights treaties have created a customary law of human rights, has argued that practice contrary to human rights ideals no more established the legality of such practice than the flourishing condition of piracy in the seventeenth century, due in part to failures by states to act against pirates, established the legality of piracy.[125] Professor Schachter has also argued that "when norms are regarded as meriting high priority, it does not make sense to treat them as 'paper rules' because they are violated from time to time."[126] These arguments are flawed for two reasons: they beg the question, and they draw false analogies between municipal legal systems and the international legal system.

These arguments beg the question in their characterization of the problem they are addressing. To label the issue as one of deciding the effect on a rule of violations of that rule assumes that a rule exists in the first place. Yet the very question at issue is whether a rule of customary law can come into existence when it is embodied in treaties but when state practice concurrent with but outside the treaty context contradicts the proposed rule. Given the presumably crucial importance of state practice in determining the content of customary law, avoiding the prob-

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122. *See supra* notes 14, 29-31 and accompanying text.

123. Filartiga v. Pena-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 1980).

124. Sohn, *The International Law of Human Rights: A Reply to Recent Criticism*, 9 HOFSTRA L. REV. 347, 350 (1981).

125. D'Amato, *Concept of Human Rights*, *supra* note 14, at 1126.

126. Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 5, 381 n.712.

lem by labelling it as one of dealing with "violations" of "norms . . . meriting high priority" does not explain how the norms could come into existence in the face of contrary practice.

The analogy to domestic legal systems is false because it fails to recognize the double character of every act of a state in the international legal system. States are not only subjects of international law; they are also legislators. One can evaluate the act of an individual in a domestic legal system under the rules of that system, but under all existing systems, acts of individuals cannot change the rules because the system does not grant to individuals authority to change the law by ignoring it. Rather, lawmaking authority vests in a relatively small group of people connected with the government. In the international system, in contrast, every act of state is potentially a legislative act. One can, of course, evaluate each act under existing legal rules, as is true of acts of subjects of domestic law. But because all members of the international community are simultaneously subjects of the law and legislators, an act of state is simultaneously a transaction requiring evaluation under existing law and a vote in favor of the legality of such an act in the international system. As Professor D'Amato has pointed out, violations of customary law can be the seeds of a new rule[127] and, indeed, as he says, "The only way customary international law can change—and it certainly has changed significantly in the practice of states over the centuries—is by giving legal effect to departures from preceding customary norms."[128] If acts contrary to existing law can change that law, it follows that when law is unsettled, there is even less warrant to ignore certain acts by states and to give weight to others. Thus, references to murderers are beside the point. Murder by an individual is never a legislative act; murder by a state may well be. Even Professor D'Amato's reference to the significance of state inaction as to seventeenth century piracy is ambiguous, because the illegal act itself—the piracy—was once again the act of individuals, not of states, and thus, not of a legislative character.

Thus, dismissing acts of practice contrary to a purported customary rule as mere violations does not work. It begs the question by characterizing acts arguably of a legislative character as violative of a rule. Further, it relies on an analogy to domestic law that, in failing to take account of the legislative character of acts of state, ignores a fundamental difference between the international legal system and domestic legal systems.

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127. D'Amato, *Concept of Human Rights*, *supra* note 14, at 1118.
128. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 1, at 93-94.

B. *Reliance on Contrary Practice Ignores Confirmatory Practice and the Need for Opinio Juris*

A second set of arguments against the position this Article takes does not simply stigmatize acts contrary to rules derived from treaties as violations but seeks to discount their legal significance. This argument takes at least two forms. Messrs. Blum and Steinhardt, dealing with human rights law, argue that emphasis on practice contrary to purported human rights rules undervalues confirmatory practice.[129] Professor Sohn, also addressing human rights issues, argues that state actions denying human rights to their citizens are without legal significance because the states involved never assert a right to violate human rights and thus never assert the *opinio juris* element necessary to support a rule of international law permitting violation of human rights.[130]

While these arguments are not identical, they suffer from the same weakness: each ignores the fundamental nature of customary international law as expounded in the *Lotus* case.[131] In that case, noted earlier, the PCIJ evaluated Turkey's assertion of criminal jurisdiction over an officer of the French merchant marine in connection with a collision on the high seas. The Court clearly viewed its task as determining whether a rule existed limiting Turkish jurisdiction, rather than applying an established rule. Among many other arguments, France—attacking Turkey's claim of authority—asserted that international law furnished no rule supporting Turkish jurisdiction on the facts. The Court rejected this characterization of the problem, asserting that the question was rather whether international law contained any rules forbidding Turkey's claiming jurisdiction, holding that "[r]estrictions upon the independence of states cannot . . . be presumed."[132] The court also held that no restriction on Turkish jurisdiction could be established, commenting that state practice was at best divided on the point and holding that such divided practice could not give rise to a restriction on state authority.[133]

Application of this teaching to the arguments described above reveals their mistake. Here again, it is important to stress that the issue is not—as these arguments assume—whether an existing rule has been violated, but whether a rule has ever come into existence. Thus, if the putative new rule derived from a treaty is one that restricts state freedom, as would, for example, a rule forbidding a state to violate certain of its

129. Blum & Steinhardt, *supra* note 14, at 80.
130. Sohn, *supra* note 124, at 350-51.
131. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).
132. *Id.* at 18.
133. *Id.* at 22-31.

nationals' human rights, the *Lotus* approach requires a demonstration that opinion among states is not divided but supports the rule before it can be decided that the rule has entered the corpus of customary law. Evidence of state practice contrary to the rule renders irrelevant, therefore, evidence of confirmatory practice because such practice could, in the face of contrary practice, at best show that states were divided on the issue. And, as *Lotus* makes clear, divided opinion among states does not establish a rule of customary law. What a party must show is that a rule represents a general practice of states.[134] If a party can show that too many states reject the rule to permit characterizing it as representing a general practice, the rule cannot be a rule of customary law regardless of how many states' practice conform to the rule. Customary international law is, after all, not a matter of majority rule.

For similar reasons, *opinio juris* is irrelevant to the evaluation of practice contrary to an asserted restrictive rule of customary international law. Since courts will not presume that restrictions on states' independence exist, in the case of an asserted restrictive rule, what a party must demonstrate is that the restriction exists. If, as was true in the *Lotus* case, state practice does not clearly demonstrate the existence of a restriction, the conclusion is that none exists. At no point is it necessary to demonstrate affirmatively that there is no restriction in order to defeat the rule. Since what a party must show in order to support the rule is general practice in line with the restriction and informed by *opinio juris*, it is enough to defeat the restriction to show that there is no such general practice—that is, that practice is divided. Whatever the motives of states whose practice does not comport with an asserted rule, their contrary practice shows at least that practice supporting the rule is not general. Since practice is not general, no restrictive rule exists, and the issue of the psychological element of customary law simply does not arise.

Further, if the psychological element is relevant in such circumstances, the very fact of the contrary practice provides evidence on that score. Presumably the fact that a state takes a particular action suggests that the state believes it has a right to take the action. One can view action unaccompanied by any explanation, against the background assumption that restriction is not presumed, as evidence that the acting state sees no restriction affecting the action in question.

Indeed, it is contrary to intuition to label as legally irrelevant practice contrary to an asserted customary rule that does not include articulated denials of the rule's existence. In almost all legal systems the presump-

134. *See supra* text accompanying notes 15-22.

tion is in favor of freedom from restraint. Individuals are not usually called on to demonstrate an affirmative right to engage in the common acts of daily life—eating, breathing, wearing clothes. Rather, we take it for granted that they are free to act as they wish unless a prohibition exists. Similarly, states, when enacting domestic legislation, do not feel the need to demonstrate that they are dealing with matters that international law permits them to address. We assume such freedom unless a restriction applies. But to argue that practice contrary to a restrictive rule is irrelevant unless accompanied by articulated *opinio juris* is to demand that states establish their freedom from restriction before acting; it is to assume that the presumption is restriction rather than freedom, turning the normal presumption on its head.

All this is not to deny that there are circumstances in which it is relevant to consider practice confirming a rule and articulations of a state's legal position concerning contrary practice. One such circumstance exists when the issue is not whether a new restrictive rule has been created but whether an absence of restriction has replaced an existing restrictive rule. For example, as noted above, it is now clear that customary international law permits states to assert jurisdiction over that portion of the sea within 200 miles of their coasts. It is equally clear that prior to the 1950s, restrictive rules of customary law forbade states to claim authority over such broad belts of sea.[135] During the period of transition from one rule to another, confirmatory practice would have been relevant to prove that the rule had not changed. Further, in the face of an established restrictive rule the actions taken by states in violation of the restrictions would have been ambiguous had they not taken place in the context of frequent assertions of the legality of such actions—that is, it would not have been clear whether the actions amounted to simple violations of the existing rule or to rejections of that rule.

This section, however, has addressed the issue of the relevance of confirmatory practice and of the absence of justifications for actions contravening restrictions not in the context of erosion of an existing restriction but, rather, in dealing with an alleged new restrictive rule derived from treaties. And, as shown above, in that context those considerations lack relevance.

A second circumstance can arise in which any articulation of views of legality accompanying practice contrary to a purported rule of customary law affects the evaluation of the legal effect of the practice. This occurs when the acting state in some way disavows the action it, or more accu-

135. *See supra* notes 67-73 and accompanying text.

rately, its agent, has committed. A sufficiently strong disavowal would even preclude categorizing the transaction as contrary practice. For example, if, after its agent acts in violation of a purported rule of customary international law, a state's foreign ministry apologizes for the action and offers compensation for any damage, the series of events would amount to practice supporting the existence of the purported rule. One could see even a disavowal limited to denying responsibility for the action or to denying that the action occurred as being supportive of the rule in question because one could view the state as implicitly acknowledging that if the action occurred and is attributable to the state the state would be legally responsible.[136] Caution is necessary in this latter circumstance, however. As noted above, the very fact that a state has acted in a particular way presumably indicates that the state feels that it has a right to act in that way. Before one seeks to overcome this presumption by reliance on a denial of responsibility, it is necessary to consider non-legal reasons a state may have for not wishing to acknowledge responsibility, such as fear of worsened political relations with an important aid donor. Further, the legal significance of denials would seem to decrease in proportion to the frequency of the conduct. For example, if a state routinely tortures political prisoners while routinely denying that it does so, the repeated practice of torture is presumably the best evidence of the state's views as to its rights. Denials do not necessarily overcome the claim of right implicit in the state's action, but if the denials are not attributable entirely to political motives and the conduct is not so routine as to mark the denials as utterly cynical, one should take them into account.

But as to the basic arguments against the position in this Article, resting on the importance of confirmatory state practice or on the absence of articulated *opinio juris* as to contrary state practice, both fail. The former misconceives the relative weights accorded the two kinds of practice in determining the existence of a customary rule. The latter would, in effect, require states to prove their freedom to act before acting rather than put the burden on those seeking to limit state freedom to demonstrate the existence of a restrictive rule of law.

C. *The Argument from Formality*

Commentators have also argued that treaties are entitled to overwhelming weight as state practice on account of the formality with which they are concluded. According to this view, acts invested with a high degree of formality better indicate a state's view of customary inter-

136. I am indebted to Professor Maurice Mendelsohn for this observation.

national law than "sporadic derogations . . . by individual officials."[137]

This formulation of the argument begs the question, in a sense, because it assumes that one can categorize practice by a state contrary to a treaty commitment as a sporadic derogation, that is, an aberrant act not reflecting the view of the state. One may doubt that clearly aberrant acts would be very relevant to customary law formation under any theory on that subject but, in any case, ample evidence exists of practice contrary to rules established by multilateral treaties, even by parties to the treaties, which cannot be considered aberrational. For example, information that Amnesty International provided indicates systematic, not aberrational, use of torture by a number of states[138] that are parties to the Covenant on Civil and Political Rights, which forbids torture.[139] The question that arises, therefore, is not one of determining the legal effect of a divergence between rules laid down in formal treaties, on the one hand, and aberrational acts on the other. Rather, what the question involves is figuring the consequence for determining the content of customary international law of a state's systematic conduct contemporaneous with a given treaty but contrary to a rule of customary law purportedly derived from the treaty.

In considering this question it is helpful to reflect on the state practice element of customary international law. Professor D'Amato has suggested that this requirement is a consequence of the fact that customary international law consists of those rules that states, in the persons of their officials, believe it includes. Any individual official seeking to determine what legal rules bind his own state is, therefore, in effect seeking to determine what officials in other states believe the rules to be.[140] A state's practice is important because it is the least ambiguous indication other states can receive of the limitations a given state has imposed on its independence. Knowledge of such limitations, in turn, tells other states what claims against it the given state is likely to acknowledge and what claims it would consider bringing against other states. States use state practice, in other words, as a predictive device, to predict a state's willingness to be constrained in the future and the constraints that state will

137. Blum & Steinhardt, *supra* note 14, at 82.

138. AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES, *supra* note 14.

139. International Covenant on Civil and Political Rights, *supra* note 103, art. 7, at 171, 175.

140. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 1, at 33-38. *See also* Mendelsohn, *The Legal Character of General Assembly Resolutions: Some Considerations of Principle*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 95, 104-05 (K. Hossainl ed. 1980) ("basic norm" of international law is that states must fulfill legitimate expectations of other states).

consider asserting against other states.

If one considers the predictive function of state practice in the theory of customary law, it becomes easier to evaluate the formality argument. Clearly, it is reasonable to assume that explicit and well-considered decisions to commit to future courses of action are especially good predictors of what those future courses of action are likely to be. It is also reasonable to assume that, precisely because of the formalities attending it, a decision to adhere to a particular explicit treaty will also be well considered. Thus it seems manifestly reasonable to predict that a state will behave in the future as it has committed itself to behave in a treaty, and it is likewise reasonable to rely on that prediction in assessing state practice in general concerning the subject matter of the treaty, absent other evidence.

That last caveat is necessary because the issue, as noted above, is prediction. Evidence that casts doubt on the value of a particular state's adherence to a treaty in predicting that state's future conduct greatly weakens the argument for basing predictions on that adherence. In other words, the assumption that a state is willing to see its freedom of action limited according to a treaty's restrictions is unjustified if, despite its treaty obligation, the state behaves as though it is subject to no restrictions.

Of course, this point is in one sense irrelevant to a state's legal obligations because the treaty will in any case bind the state. But if adherence to the treaty is relevant to the formation of customary law only because such adherence permits predictions of future conduct, the state's legal position under the treaty regime is irrelevant to the question of the bearing its activities have on assessments as to the content of state practice. On that latter point the issue is whether one can predict how a state will act in the future. To say the state will have breached a treaty unless it behaves in a certain way provides no answer to the question, because the issue is how the state will act in fact, not how it ought to act to satisfy its treaty obligations.

If this reasoning is correct it is clear that the formality of a treaty commitment does not justify ignoring systematic conduct contrary to the treaty rule in assessing the practice of states as to a given subject. Contrary practice shows that the predictive value of a state's adherence to the treaty at issue is very limited. And since, as argued above, the reason for examination of practice is to predict future behavior, it would make no sense to give controlling weight to the fact of a state's adherence to a treaty once one could demonstrate that the state's adherence did not permit the assumption that it would behave as it had promised to behave. Indeed, in the special case of treaties that exclude sanctions for their

violation, the fact of contrary practice—since the state risks no legal sanctions for violating the treaty and has by its conduct manifested at least some intention of behaving in a fashion contrary to the treaty rule—means that the best prediction is that the state will violate the treaty rule, not adhere to it. And, as argued above, the practice most relevant to a determination of the content of customary law is that which best indicates a state's future behavior. The argument from formality, then, is no reason to ignore systematic practice contrary to a rule derived from a treaty in determining the content of customary international law.

D. *State Practice is Irrelevant to Newer Modes of International Law-Making*

Yet another argument against the relevance of practice contrary to treaty rules focuses on alleged changes in the processes by which international law is made. Commentators have argued that since World War II, international law has come to be made by methods fundamentally different from those used prior to 1945.[141] According to that argument it is now possible to determine the content of international law simply by examining documents such as multilateral treaties and resolutions of the United Nations General Assembly. Positions such documents assert, commentators argue, are law, without regard to the content of state practice.

The purpose of this Article is not to provide a full scale discussion of changes in the way international law is made. Extensive literature exists on this subject already.[142] For present purposes it is enough to reveal an important flaw in the logic of the argument.

It is clear that creation of the types of documents on which this "new modes of law-making" argument relies does not always create customary law. In this connection it will be helpful to recall what is meant by the statement that a legal rule has been created. At least this statement must mean that, on violation of the rule, the violator has an obligation to make good his violation. Clearly, states have created documents of this type without acknowledging an obligation to make good violations of the rules derived from the documents. For example, commentators have described the United Nations General Assembly's Declaration on Torture, discussed above,[143] as the type of document that plays a role in this new

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141. Blum & Steinhardt, *supra* note 14, at 72-74.

142. *See, e.g.*, J. CASTANEDA, THE LEGAL EFFECTS OF UNITED RESOLUTIONS (1969); M. VILLIGER, *supra* note 85; H. THIRLWAY, *supra* note 85.

143. *See supra* text accompanying note 112.

form of law-making.[144] Yet the General Assembly apparently did not see passage of this Declaration as creating a rule since its Convention Against Torture[145] excluded any obligation to make a violation good; such an exclusion would, of course, make no sense if the members of the General Assembly believed that a duty existed in any case, outside the convention context.

But if such newer law documents do not always create legal rules, it is necessary to develop a method of determining when such rules have been created. The only reliable method is to examine state practice to determine if states generally obey the rule allegedly created and to hold violators to an obligation to make good their violations. But this is nothing other than the type of inquiry one must undertake to determine the content of customary international law anyway. Thus, the inevitable uncertainty in the so-called newer law-making methods means that far from providing a shortcut around traditional examination of state practice, such an examination is required to determine whether those methods have in fact created law in a particular case. These arguments, then, do not justify giving determining weight to treaties in deciding the content of customary international law.

E. *There is a Presumption that Humanitarian Treaties State Customary Law*

Professor Baxter, while asserting that one cannot assume treaties creating new law give rise to new rules of customary law absent evidence of state practice outside the treaty context, suggested that humanitarian treaties might be an exception to this rule.[146] This proposition seems questionable.

First, the authority for such a proposition is weak. Certainly various of the war crimes tribunals established after World War II were quick to hold that certain treaties forbidding particular methods of waging war had passed into customary law. But, as Baxter stresses, these tribunals were unable to explain satisfactorily their conclusions.[147] Further, clear examples from state practice contradict the special status for humanitarian treaties argument. The subject of submarine warfare provides one example. Article 22 of the London Naval Treaty of 1930 forbids submarines from attacking merchant vessels without first removing passengers,

144. Blum & Steinhardt, *supra* note 14, at 75.

145. *See supra* text accompanying notes 109-18.

146. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 299 (1968).

147. *Id.* at 280-83.

crews and ships' papers to a place of safety.[148] Germany, Japan and the United States had all adhered to this limitation before World War II.[149] Nonetheless, during World War II the United States and Germany ignored the limitation, ordering their submarines to attack merchant ships without warning; the United States followed this policy from the date it entered the war.[150] Indeed, because of Allied violations of the rules against submarine warfare, the International Military Tribunal assessed no sentence against the German Admiral Donitz on account of his ordering German submarines to engage in such activity.[151] While academic opinion is divided as to whether this development casts doubt on the continuing validity of the legal standards in the London Treaty,[152] at a minimum this series of events casts doubt on the way submarines would conduct themselves in future wars, and thus on the continuing practical significance of the London Treaty. Thus practice has rendered nugatory, at least arguably, a clearly humanitarian treaty provision.

Again, a number of instances of genocide have occurred since World War II.[153] While such actions have generally provoked verbal condemnation, many states have, on concrete terms, refused to treat those responsible for such activity as criminals.[154] Such lukewarm reactions cast doubt on the customary law status of the Genocide Convention, the one humanitarian treaty Baxter seems to believe may have passed into custom.[155]

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148. 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1055, 1070; 46 Stat. 2858, 2881-82; T.S. No. 830.

149. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES IN FORCE ON DECEMBER 31, 1941, at 26 (1941).

150. INTERNATIONAL MILITARY TRIBUNAL, 1 TRIAL OF THE MAJOR WAR CRIMINALS 313 (1947).

151. *Id.*

152. *Compare* 1 H. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 162-63 (1986) (rules still valid) *with* Parks, *Conventional Aerial Bombing and the Law of War*, 108 U.S. NAVAL INSTITUTE PROC., 98, 106 (1982) (rules of historical interest only).

153. *See, e.g.*, SECRETARIAT OF THE INTERNATIONAL COMMISSION OF JURISTS, THE EVENTS IN EAST PAKISTAN, 1971 (Geneva, 1972) (in Bangladesh); Kamm, *The Agony of Cambodia*, N.Y. Times, Nov. 17, 1978, § 6 (Magazine), at 40 (in Cambodia); AMNESTY INTERNATIONAL, ANNUAL REPORT 1977, at 111 (in Uganda).

154. For examples of tepid reactions to Cambodian and Ugandan incidents, see Lane, *Mass Killings by Governments: Lawful in the World Legal Order?*, 12 N.Y.U. J. INT'L L. & POL. 239, 274-77 (1979). For an example of India's refusal to try Pakistani officers alleged to have participated in Bangladesh genocide, see N.Y. Times, Apr. 10, 1974, at 1, col. 5.

155. Baxter, *supra* note 146, at 294-95.

Baxter's suggestion presumably reflects the change in the attitude of states toward human rights. Before World War II international law hardly addressed human rights matters. Aside from efforts made to end the slave-trade and to reduce the suffering of both combatants and noncombatants in war, the international legal community did very little to address the vast range of humanitarian problems the world presented.[156] Since World War II, however, states have paid more attention to human rights at the international level. States, acting through international organizations, have repeatedly expressed strong rhetorical support for the proposition that international law protects a wide variety of human rights. Through these international organizations they have created a variety of bodies intended to protect human rights. States have also entered into a broad range of agreements purporting to impose upon signatories concrete human rights obligations toward their nationals.[157]

Nonetheless, Baxter's suggestion does not in fact reflect the practice of states. The activity the foregoing paragraph described has not led to a generally increased willingness on the part of states to acknowledge international controls on their treatment of individuals. As noted above, many states clearly and systematically reject in their actual conduct of government even the most basic human rights limitations such as prohibitions on torture.[158] States have adhered to human rights treaties in impressive numbers but have drafted the treaties to preclude enforcement of their provisions against parties who violate them,[159] and violations by parties are common.[160] Clearly the degree of attention international law pays to human rights has increased and the degree of protection it affords has improved somewhat relative to the pre-World War II situation. But, though one must acknowledge that relative change, one cannot assert, consistent with states' actual behavior, that the position of human rights is now so exalted as to justify Baxter's argument from human rights' special status.[161]

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156. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in INTERNATIONAL LAW ASSOCIATION, THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75, 75-78 (1973).

157. *Id.* at 82-105.

158. *See* AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES, *supra* note 14.

159. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 103; Draft Convention Against Torture, *supra* note 110.

160. AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES, *supra* note 14.

161. The number of authorities who would disagree with this proposition is legion, and the author will list only a few here. For views emphatically contrary to those expressed in the text, see Bauer, *The Observance of Human Rights and the Structure of the System for Their Protection in the Western Hemisphere*, 30 AM. U.L. REV. 5, 11

F. *Taking Account of Practice Would Doom Efforts to Construct a World Order*

Blum and Steinhardt have argued against according weight to practice contrary to rules derived from treaties because such an approach would doom efforts to construct a world order. They argue that giving weight to practice would mean that norms established by means other than conventions would be either "superfluous or incompetent,"[162] in that norms as to which derogations existed would not be norms, while norms as to which no derogations existed would not be necessary. They assert further that "by the common consent of states," the "international community" has downgraded the importance of contrary state practice so as to permit the development of norms by means other than the use of conventions.[163]

The authors cite no instances of state practice supporting their assertions, and, indeed, their only citation is to the work of Messrs. McDougal, Lasswell and Chen in the field of human rights law.[164] The portion of that work which they cite does not address at all the question of contrary state practice although it does make assertions similar to those of Blum and Steinhardt to the effect that human rights rules have entered customary international law through mechanisms such as resolutions of international organizations.[165] The authority for their assertion, in turn, consists of lists of subjects on which United Nations organs have passed

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(1981); I. BROWNLIE, *supra* note 3, at 513; T. BUERGENTHAL, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 26-33 (1977); Carbonneau, *The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement*, 25 VA. J. INT'L L. 99, 103 (1984); A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 1, at 158; Delbrueck, *International Protection of Human Rights and State Sovereignty*, 57 IND. L.J. 567 (1982); Domb, *Jus Cogens and Human Rights*, 6 ISRAEL Y.B. HUM. RTS. 104, 118-21 (1976); Goldstein, *The Human Rights Phenomenon: An Example of International Law as Authoritative Consensus*, 42 ALB. L. REV. 663 (1978); Higgins, *Reality and Hope in International Human Rights: A Critique*, 9 HOFSTRA L. REV. 1485 (1982); Maki, *General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention*, 10 CAL. W. INT'L L.J. 272 (1980); M. MCDOUGAL, H. LASSWELL & W. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 313 (1980); McKay, *The Common Core of Human Rights*, in HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS 65 (A. Henkin ed. 1979); A. ROBERTSON, *supra* note 108, at 17; J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 55 (1984); G. TUNKIN, THEORY OF INTERNATIONAL LAW 79-83, 157-60 (1974).

162. Blum & Steinhardt, *supra* note 14, at 82.

163. *Id.*

164. M. MCDOUGAL, H. LASSWELL & L. CHEN, *supra* note 161.

165. *Id.* at 317-32.

resolutions, quotations from other writers who share their views, and recountings of the facts that many national constitutions reflect human rights principles and that state officials frequently "invoke" such instruments as the Universal Declaration of Human Rights.[166]

This mode of argument simply will not suffice. As noted above, the only real test of whether rules produced by a given process create obligations in international law is whether, in their practice, states treat such rules as legally binding. Legally binding means that states generally obey such rules or, when the rules are violated, the violation is the basis for some type of sanction by other states against the violator. It is obviously circular to argue that, for example, General Assembly resolutions create international law because subsequent General Assembly resolutions cite them. Even references to constitutions and invocations by officials do not obviate the need for an examination of state practice since, as Professor Schachter has noted:

> General statements by international bodies . . . are not without their significance, but their weight as evidence of custom cannot be assessed without considering actual practice. National constitutions and legislation similarly require a measure of confirmation in actual behaviour. One can readily think of numerous constitutions that have incorporated many of the provisions of the Universal Declaration or other versions of human rights norms, but these provisions are far from realization in practice. Constitutions with human rights provisions that are little more than window dressing can hardly be cited as significant evidence of practice or "general principles" of law.[167]

The assertions of Blum and Steinhardt are, then, utterly unsupported, even in a derivative way, by actual evidence that states are treating as legally binding rules produced by mechanisms other than treaties as to which contrary practice is irrelevant. Indeed, as to the subjects that Blum, Steinhardt, McDougal, Lasswell and Chen addressed, considerable evidence exists that many states ignore the rules cited and do not enforce them against violators.[168] Strong reason exists to doubt that the processes to which these authors refer have in fact produced rules that states treat as legally binding.

Moreover, the argument of Blum and Steinhardt contains a more fundamental error. In effect they assert that, because classical approaches to the importance of contrary practice will make the creation of a world order difficult, it follows that such a view cannot represent the law. The

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166. *Id.*

167. Schachter, *supra* note 126, at 335.

168. AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES, *supra* note 14.

context of their assertion makes clear that they regard conventions as inadequate vehicles for the world order they wish to construct. One must conclude, therefore, that the inadequacy they see in a system giving weight to practice contrary to rules derived from conventions is that it offers no basis for binding states legally by rules that states oppose.

Nowhere do Blum and Steinhardt explain why they assume that the international legal system necessarily contains mechanisms for creating legal rules by means other than conventions or truly general assent. They point out the flaws in such a system—that it lacks a means of creating rules binding on opponents of the rules if there are significant numbers of opponents—but they do not explain why the international legal system is not such a flawed system. Apparently they take for granted that any legal system must have a means of binding dissenters.

This does not follow, of course. Indeed, one would not expect to find such a coercive arrangement in the international legal system, whatever one might expect of other systems. As Blum and Steinhardt note, the international legal system is horizontal, not vertical.[169] It does not consist of law-making institutions composed of a small number of actors making law for a much larger group of subjects of the law but, rather, involves an arrangement whereby all subjects of the law are also legislators, and all the acts of these legislators are simultaneously subject to evaluation under existing law and possibly creative of new law. Traditionally, moreover, the fact that customary law ultimately rests on the consent of the states bound by the custom has meant that no state is compelled to accept as legally binding a pronouncement of any other state or group of states even if that group comprises a majority of states.[170] The situation that Blum and Steinhardt apparently consider absurd—that a norm in such a system must be either "superfluous or incompetent"—is, of course, an accurate description of the traditional operation of customary international law and of any system in which a new rule cannot bind a subject of the law over his own objection. No reason exists, presumably, why states could not choose to adopt a different system, but Blum and Steinhardt offer no evidence other than second-hand ipse dixit that they have done so.

The world order argument fails, therefore, on two accounts. It assumes that new types of law-creating mechanisms have supplanted traditional mechanisms without demonstrating that assumption. Further, it takes for granted that the international legal system must have a means of coercing states into accepting legal rules when such an assumption

169. Blum & Steinhardt, *supra* note 14, at 80 n.111.
170. I. BROWNLIE, *supra* note 3, at 10-11.

ignores completely the fact that no state is legally subject to any other state or grouping of states.

VII. CONCLUSION

This Article has sought to demonstrate that in determining the content of customary international law, the existence of treaties dealing with a particular subject does not justify ignoring the actual practice of states in addressing that subject. It has shown, first, that customary international law has not in the past been frozen by treaties dealing with a particular subject. It has also shown that practice can even modify or destroy treaty obligations themselves, which of course suggests that practice can be at least as important in its effects on customary rules that are derived from treaty obligations. This Article has also demonstrated that one must take care in considering particular treaties as representing state practice informed by *opinio juris* because these treaties may show that, far from believing the treaty to represent a rule of custom, the parties to them believe that but for the treaty, they would have no obligation to adhere to a particular rule. This belief, moreover, may be reflected in the express language of the treaty or implied by the parties' treating the obligations as not carrying the constraints that would apply if the obligations were legally binding. Finally, the Article has sought to show the errors in arguments opposed to the position it has advanced.

The approach states take to this subject will affect the proper interpretation of the law of the United States, but that is not the only reason that one must carefully consider this subject. The utility of international law is also at issue. The position this Article opposes is, in effect, that it makes sense to label as international law rules that many states will not obey and that very few states are willing to enforce against violators. If one were to accept this view, the world would soon witness repeated violations of rules that scholars insisted were legally binding. Thus, the discipline of international law would in effect be describing itself as ineffectual. Acknowledging that rules of international law are only those rules that states accept limits the subjects which the law can pretend to regulate, but it permits at least the assertion that international law really does guide state behavior in those limited areas it purports to regulate.

Even beyond this prudential point there are questions of intellectual honesty at issue here. The arguments this Article seeks to counter claim for international law an authority greater than it possesses and depend on ignoring the facts of political power in the world. They assert, at bottom, that there is some authority superior to individual states to which those states are legally compelled to bow. This simply is not true. Entities with political power create legal authority. Currently, a source

of power strong enough to compel states to accept its dictates does not exist. Absent this type of authority, law can consist only of the rules to which states assent. Assertions that state practice is legally irrelevant are, in effect, assertions that there is an easier way of creating international law than that of generating a genuine consensus among states. There is no easier way, and respect for truth demands that we acknowledge the fact.