

The Role of Treaties in the Contemporary International Legal Order

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Abstract. The aim of this paper is to examine the role played by treaties in a diverse and diversifying international society. Through the course of the century, it has been suggested that treaties are the best means of law-making in the present world. It is argued here that while there are some advantages to treaty law-making, it does not seem that treaties are able to meet the demands sought to be placed upon them by those who believe in increased codification.

1. Introduction

A marked feature of the international law-making process in the twentieth century has been the increased, and increasing, move towards treaties as *the* authoritative medium for law-making. Writing just after the second World War, Jennings regarded the implementation of Article 13 of the United Nations Charter regarding the codification and progressive development of international law as “a task the urgency and importance of which yield place to none of the other problems that face the international lawyer to-day”.¹ Many have explained this perceived phenomenon, usually while expressing misgivings about the continued utility or efficiency of international custom as evidence of international law and as a medium for law-making in the contemporary world. Their explanations refer to a number of now-familiar themes, all related to recent and on-going changes in the world. For example, the expansion of the international community this century has meant that there is less homogeneity in the identity as well as the values of the community. States with different interests, as well as sub-State and supra-State actors, now vie for influence in a new and ever-changing international environment.²

¹ R. Y. Jennings, “The Progressive Development of International Law and its Codification”, (1947) XXIV *BYBIL* (*British Yearbook of International Law*), 301 at p. 329. See also H.W.A. Thirlway, *International Customary Law and Codification* 1972, especially Chapter 1, for analysis of the trend towards international *lex scripta*.

² Henry Kissinger has written that “in effect, none of the most important countries which must build a new world order have had any experience with the multistate system that is

The contemporary world faces problems of general concern such as those regarding the environment, human rights, outer space and the international economy, all of which require some form of regulation.³ The nature of customary international law (based traditionally as it is on the accumulation of the individual practices and perceptions of States) and the consequent tardiness in the customary law-making process tend to result in the view that international custom is unable to address these issues satisfactorily. Customary law would seem to be better-suited to an international law of co-existence as distinct from the demands of an international law of co-operation and interdependence.⁴

The general response to this problem, as Simma puts it, is “to insist upon the fullest possible removal of unwritten international law from controversy through its codification and progressive development in treaty form”.⁵ The purpose of this paper is to examine the claims made upon treaties as a significantly better way of making or articulating laws in the international legal system. In doing this, it is hoped that some explanation of the nature of inter-

emerging. Never before has a new world order had to be assembled from so many different perceptions, or on so global a scale. Nor has any previous order had to combine the attributes of the historic balance-of-power systems with global democratic opinion and the exploding technology of the contemporary period”; *Diplomacy* (1994), at p. 26.

³For discussion of the tensions between a centralised (“metropolitan”) approach which these global problems would seem to demand on the one hand, and the “cosmopolitan” regime of international economic law with its free-market policy assumptions on the other, see D. Kennedy, “Receiving the International”, (1994) 10 *Connecticut Journal of International Law* 1.

⁴W. Friedmann, for example, has written that ‘It is an obvious reflection of the radically different methods of international relations in our time that custom can no longer be as predominant or important a source of law as it was in the formative period of international law . . . custom is too clumsy and slow-moving a criterion to accommodate the evolution of international law in our time . . . custom is an unsuitable vehicle for international “welfare” or “co-operative law”. The latter demands the positive regulation of economic, social, cultural and administrative matters, a regulation that can only be effective by specific formulation and enactment . . . Even in some of the domains of classical international law, as in various aspects of the Law of the Sea, multilateral conventions arising out of the preparatory work of international legal bodies and international conferences, tend to displace custom’; *The Changing Structure of International Law* (1964), pp. 121–123. C. de Visscher has written that ‘Malleable as it is, custom can neither establish itself, nor evolve and so remain a source of living law, when owing to the rapidity with which they follow each other or to their equivocal or contradictory character, State activities crystallise into a “general practice accepted as law”. Acceleration of history, and above all diminishing homogeneity in the moral and legal ideas that have long governed the formation of law – such, in their essential elements, are the causes that today curtail the development of customary international law’; *Theory and Reality in International Law* (Corbett transl., 3rd ed. 1960) pp. 161–162 (pp. 140 et seq., generally). See also Thirlway, op. cit. *supra* n. 1, pp. 1–7.

⁵See generally B. Simma, “Consent: Strains in the Treaty System”, in R.St.J. MacDonald and D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), 485 at p. 486. See also A. Cassese, *International Law in a Divided World* (1986), pp. 180–192.

national law and the way it operates in a diverse and diversifying world will be provided.

2. The Attraction of Treaties

It can hardly be questioned that many treaties either do work smoothly or at least achieve some useful purpose (and this, presumably, is a further explanation of the increased recourse to treaties as distinct from custom). It is difficult, for example, to imagine the creation of the legal orders governing the United Nations or the European Union by any means other than a treaty. But the idea that treaties are significantly superior to customary law raises several important questions.

2.1. Precision

Adjectives that have been used to describe custom include ‘clumsy’ and ‘equivocal or contradictory’.⁶ Cassese speaks of the ‘insecurity inherent in its unwritten character’.⁷ Treaties, then, would appear to have much greater potential to bear the demands made by the ideals of legal certainty and precision, and would seem to engender ‘clear’, ‘easy’ or ‘plain’ cases to a significantly greater extent than customary law. This issue of precision will now be examined.

The presumption underlying the perceived advantage of treaties seems to be that the written word is superior in terms of its capacity for instruction when compared to instruction provided through example or ostension. Clear cases are those where the language of the applicable legal demands is determinate;

⁶ See the statements by Friedmann and de Visscher, *op. cit. supra*, n. 4.

⁷ A. Cassese, *op. cit. supra*, n. 5, p. 487. See also G.I. Tunkin, *Theory of International Law*, (translated by W.E. Butler, 1974), pp. 133–134 (‘An international treaty possesses specific features which make it a highly suitable and important means of creating norms of international law in our day. It is an agreement of states clearly expressed. This fact is of great significance for ascertaining the existence and content of a particular norm of international law’); G. Danilenko, *Law-Making in the International Community* (1993), p. 130 (‘Customary norms are often vague and uncertain both as to their content and scope of application. Efforts aimed at reducing this deficiency in the law inevitably result in a strong emphasis on the treaty process, which generally leads to the adoption of more precise and stable written rules . . . In contrast to treaties, which usually introduce a system of norms governing a given matter, the customary process tends to generate only individual rules. Such a method is not particularly suited to deal with complex contemporary problems posed by global issues’); R.P. Dhokalia, *The Codification of Public International Law* (1970), p. xi; (1976) *Yearbook of the International Law Commission*, vol. II, p. 85 (‘in the international legal order, the task of establishing common rules of conduct devolves not only on international custom, but also on international treaties, in particular multilateral treaties, for in the international community there is no authoritative instrument, like legislation, for establishing rules of objective law’).

furthermore, the more determinate type of legal rule or principle is that which is written. The presumption is that the task of law-discovery is facilitated to a far greater extent with the existence of an authoritative treaty text as compared to the situation in customary law where the *opinio juris* of States must be discerned from practice through a process of induction. Thus, the substance of the legal obligation is, on this view, directly derived from the treaty text itself (*qua contractus litteris*). In Oppenheim's words, '... [i]n so far as conventional rules are concerned, it is to a certain extent easy to find them. They are written rules. Their scope, their meaning, and their extent can in many cases be grasped at first glance ... [i]f we only possess accurate copies of the authentic documents in which these rules are embodied, and if we are able to master the language in which these documents are drawn up, we often get at their meaning without great difficulty.'⁸ It would seem, to take the argument further, that unlike the case with international custom which requires an inductive method of reasoning from the particular to the general or the drawing of analogies,⁹ the application of treaty laws seems an relatively uncomplicated exercise of applying general rules to the particular instance in a deductive (and even syllogistic) fashion.

However, it has been written that 'Much of the jurisprudence of this century has consisted of the progressive realization (and sometimes the exaggeration) of the important fact that the distinction between the uncertainties of communication by authoritative example (precedent), and the certainties of communication by authoritative general language (legislation) is far less firm than this naive contrast suggests ... In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide'.¹⁰ The 'progressive realization' mentioned here will now be discussed under a number of closely related headings.

2.1.1. *The Philosophical Dimension: Rule-Formulation and Rule-Following*

Let us begin by conceding, for the sake of argument, the possibility of a rule being formulated so precisely that there is no doubt as to its meaning. Even if such were the case, there is debate among philosophers concerning the relationship between a rule and its application.¹¹ Some argue that there is an 'internal' logical relation between a rule and its application, that there is no

⁸ L. Oppenheim, "The Science of International Law: Its Task and Method", (1908) 2 *AJIL* (*American Journal of International Law*) 313 at p. 333.

⁹ Reasoning by analogy is sometimes treated as one kind of inductive reasoning; W. Twining and D. Miers, *How to do Things with Rules: A Primer of Interpretation*, (3rd ed., 1991), p. 256.

¹⁰ H.L.A. Hart, *The Concept of Law* (2nd ed., 1994), p. 126.

¹¹ Much of this debate follows the work of L. Wittgenstein, especially his *Philosophical Investigations* (3rd ed., translated by G.E.M. Anscombe, 1967), §§185–242.

sense in talking about a ‘rule’ without knowing precisely when it is to apply. On this view, rules themselves have ‘result-determining force’, so that a new formulation of the rule is required where it does not clearly determine the case at hand.¹² Others argue that there is no logical connection between a rule and its application, that, for example, ‘community agreement’ lies at the root of rule-following.¹³ This would seem to suggest that, at the fundamental philosophical level, there is debate as to the extent to which a particular formulation can guide those who wish to follow the rule in question. The assumption that the written word is superior would seem to ignore this debate. Many of the following sub-sections are linked to this important question.

2.1.2. *Syllogism and the Treaty Process*

The concession made thus far in the preceding sub-heading (regarding the possibility of absolute precision) will now be withdrawn. The reality is that the codification of legal demands are seldom conclusive. It is true that the establishment of a customary rule always involves induction, based as it is on what is essentially an empirical inquiry into the practices and perceptions of States. And ‘[i]t hardly needs any mentioning that any inductive “proof” of a rule of international law always remains provisional; it is liable to be disproved at any moment by better evidence that, in making any particular assessment, was not available or was overlooked’.¹⁴ The treaty rule, by contrast, is there waiting to be applied. Treaties, the argument runs, would seem to bypass this inductive prologue. They would appear to invite deduction which holds the possibility of conclusive results in classical logic. The difficulty in seeking an entrenchment of the rule in terms of a semantic formulation has been overcome by the very authoritativeness of the treaty-text.¹⁵ The major premiss in the syllogistic scheme is already in place.

The difficulty with this line of argument, however, is that there is a difference between words and their meaning. As Hart has put it, ‘Logic does not prescribe interpretation of terms; it dictates neither the stupid nor intelligent interpretation of any expression. Logic only tells you hypothetically that if you give a certain term a certain interpretation then a certain conclusion fol-

¹² See, e.g. G.P. Baker and P.M.S. Hacker, “Malcolm on Language and Rules”, (1990) *Philosophy* 167; A. Marmor, *Interpretation and Legal Theory* (1992), p. 149 et seq.

¹³ See, e.g., N. Malcolm, “Wittgenstein on Language and Rules”, (1989) 64 *Philosophy* 6; B. Bix, *Law, Language and Legal Determinacy* (1993), Chapter 2. See also J. Burton, *Judging in Good Faith* (1992), p. 174 et seq. (‘[R]ules can guide conduct by serving the framework function and providing determinate reasons for action even when they do not dictate results’; at p. 175), and W.J. Waluchow, *Inclusive Legal Positivism* (1994), pp. 168–174 (divorcing the question of validity from institutional efficacy), both of whom may also be placed in this second category.

¹⁴ G. Schwarzenberger, *The Inductive Approach to International Law* (1965), p. 5.

¹⁵ See Oppenheim, op. cit. *supra* n. 8, and accompanying text.

laws. Logic is silent on how to classify particulars'.¹⁶ The fact that something has been put into written form does not necessarily determine its meaning.

Illustrations of this point abound. The field of international environmental law is particularly appropriate for present purposes, because of its importance in the present-day world and because it is an area regulated to a very significant extent by treaty law.¹⁷ One of the important principles which have developed in this field is the so-called precautionary principle, which is concerned with ensuring that States 'agree to act carefully and with foresight when taking decisions which concern activities that may have an adverse impact on the environment'.¹⁸ This principle has been adopted in several treaties in recent years, but there has been a great deal of disagreement as to precisely what it requires.¹⁹ Its precise formulation is not identical in those treaties, and interpretations differ. One version runs thus: "Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation",²⁰ while another stronger version would reverse the burden of proof and place it on the person proposing an act to show that it will not cause environmental harm.²¹ Furthermore, it is not clear *when* the principle becomes applicable to a given activity, and there is no stipulation of what measures the principle, *as such*, demands to be taken. Yet major treaties like the 1992 Maastricht Treaty on European Union provides that Community policy on the environment "shall be based on the precautionary principle", without any elaboration.²² The fact of codification does not, therefore, necessarily remove the need for induction before determining the actual meaning of the treaty provision; anyone charged with applying the precautionary principle would still have

¹⁶H.L.A. Hart, "Positivism and the Separation of Law and Morals", (1958) 71 *Harvard Law Review* 593, at p. 610.

¹⁷'Treaties are now the most frequent method of creating binding international rules relating to the environment': P. W. Birnie and A. E. Boyle, *International Law and the Environment* (1992), p. 11; 'Treaties . . . are the primary source of international legal rights and obligations in relation to environmental protection': P. Sands, *Principles of International Environmental Law* (1995), vol. 1., p. 104.

¹⁸Sands, *ibid.*, at p. 212.

¹⁹The principle and its different formulations are analyzed by Birnie and Boyle, *op. cit. supra* n. 17, at pp. 95–98, and Sands, *ibid.*, at pp. 208–213. Birnie and Boyle (at p. 98) went so far as to conclude in 1992 (just before Rio) that 'Despite its attractions, the great variety of interpretations given to the precautionary principle, and the novel and far-reaching effects of some applications suggest that it is not yet a principle of international law'.

²⁰Para. 7 of the Bergen Ministerial Declaration on Sustainable Development (Economic Commission for Europe) 1990, (1990) 20 *Environmental Policy and Law*, p. 100.

²¹Annex II, Art. 3(3)(c), 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), (1992) 32 *ILM (International Legal Materials)*, p. 1068.

²²Treaty on European Union, Title XVI, Art. 130r(2), (1992) 31 *ILM*, p. 247.

to look at the perceptions and practices of States. The inductive prologue to the identification of the major premiss, i.e. the rule to be applied, is not necessarily banished from the treaty process. Meaning is to be sought, in such cases, outside the treaty itself. Another familiar example of this phenomenon is provided by the reference to the ‘inherent’ right of self-defence in Article 51 of the Charter of the United Nations.²³ The problem is particularly obvious when particular provisions are put into a treaty as a political compromise.²⁴

2.1.3. *The Open Texture of Language*

The problem in identifying the major premiss (i.e. the precise formulation of the rule to be applied) has another aspect. Quite distinct from the technical problem of identifying the precise meaning of *legal* concepts like ‘precautionary principle’ and ‘self-defence’, language itself poses problems. Treaties may normally court ‘easy’ cases, as they may include explicit statements of the general classes of persons, acts, circumstances and so on, which are to fall within their scope. In fact, many treaties contain provisions defining what particular terms mean or include. But this does not always remove the demands necessitated by the open texture of the language in which the rules are expressed.²⁵ In harder cases, where there are reasons both for and against the use of a particular term, ‘the authoritative general language in which a rule is expressed may guide only in an uncertain way much as an authoritative example [i.e. custom] does’.²⁶ The idea that particular cases arrive ready-made for subsumption under a particular rule expressing the general class of cases to which it is applicable is misleading. It courts the difficulty of *overdetermination*; that is to say, it could well be possible to subsume a particular case at hand under more than one rule. Conversely, the idea that a rule arrives with the possible range of cases to which it applies readily mapped out is just as inaccurate. It courts the problem of *underdetermination*²⁷; the rule might simply be unclear as to its extension to a particular case. The problems of overdetermination and underdetermination pose general philosophical dif-

²³ See, e.g., D.J. Harris, *Cases and Materials in International Law* (4th edn. 1991), pp. 848–851, for a synopsis of the debate as to the meaning of Article 51.

²⁴ See the examples of ‘dilatatory textual compromises’ discussed by Simma, op. cit. *supra*, n. 5, at pp. 491–493.

²⁵ Hart, op. cit. *supra*, n. 10, at pp. 121–144; Marmor, op. cit. *supra*, n. 12, at pp. 127 et seq.; Bix, op. cit. *supra*, n. 13, Ch. 1.

²⁶ Hart, *ibid.*, p. 127.

²⁷ On the problems of underdetermination and overdetermination in rule-following, see Hart, *ibid.*, n. 10., pp. 124 et seq. (formalism is a myth, there is always the problem posed by the “open texture” of language); Patterson, “Law’s Pragmatism: Law as Practice & Narrative”, (1990) 76 *Virginia Law Review* 937 at p. 942 et seq. See also the works cited in nn. 11–13, *supra*.

faculties which cannot be resolved by reference to the device (i.e. treaty or custom) through which standards of behaviour are communicated.

Neither is it easy to sustain the claim that treaties provide for certainty of linguistic reference because the words used in the treaty stand for certain empirically observable fixed ‘things’. It has been demonstrated that an empirically observable phenomenon is not to be equated with the sum total of the evidences for it, since the background circumstances that provide for its regular nature cannot, as a matter of logic, be grasped in their totality. As such, no list of the characteristics of an empirically observable phenomenon can be complete. Empirical concepts are ‘open textured’, and this is closely related to the ‘essential incompleteness’ of empirical descriptions.²⁸ Furthermore, it may be that some, if not all, seemingly empirically observable concepts do not possess a ‘core of certainty’ at all in terms of their necessary characteristics.²⁹ It has also been demonstrated that, with the exception of proper nouns, words do not denote ‘real’ things.³⁰ And there are also linguistic usages which, far from being descriptive of particular states of affairs or things, perform particular actions.³¹ In short, it would seem that any assumption that treaty norms are grounded in and thus guaranteed by certain inescapable (empirical) facts to which the language of these treaty norms refers rests upon a precarious premiss.

²⁸ See Waismann, “Verifiability”, (1945) *XIX Proceedings of the Aristotelian Society*, supplementary vol., p. 101.

²⁹ Waismann’s thesis must be distinguished from the talk of “vagueness” where what is meant is some *intrinsic* “vagueness” that is peculiar to particular kinds of concepts. Whilst an empirical concept can ordinarily be “clear”, it cannot avoid “essential incompleteness” in its description. On the other hand, the notion of *intrinsically vague* concepts would allow for boundaries of meaning to be drawn arbitrarily, something which is not permissible in the case of “clear” concepts despite the “essentially incomplete” descriptions that attend them. See, similarly, Sainsbury, “Is There a Higher Order of Vagueness”, (1991) 41 *Philosophical Quarterly*, p. 167, and “Tolerating Vagueness”, (1988–89) *LXXXIX Proceedings of the Aristotelian Society*, p. 33 (towards a non-classical way of looking at concepts and classifications, a way upon which vagueness is the norm, and sharpness an artefact). See generally Bix, *op. cit.*, n. 25, at p. 11 and p. 20 for an excellent account. *Contra* Gallie – ‘Essentially Contested Concepts’, (1956) *LVI Proceedings of the Aristotelian Society* (New Series), p. 167 for the view that even in the case of concepts plagued with intrinsic vagueness (“essentially contested concepts”), “original exemplars” may be used in discriminating between contesting interpretations; thus the standard is one of success in furthering the achievements of the “original exemplar”. It must be noted, however, that whilst Waismann’s and Sainsbury’s claims are universal, Gallie draws a distinction between “essentially contested” concepts and those which do not suffer from such intrinsic vagueness.

³⁰ See Wittgenstein, *op. cit. supra*, n. 11, at §§37–42, esp. para. 39 (the “Excalibur” example) and para. 40 (the example of “Mr. N.N.”); D. Bloor, *Wittgenstein: A Social Theory of Knowledge* (1983), p. 23.

³¹ See J.L. Austin, *How to Do Things with Words*, J.O. Urmson and M. Sbisà (eds.), 2nd edn. 1982.

2.1.4. *The Distinction between Law and Fact*

It may still be contended, in support of the general superiority of treaties, that treaties overcome at least the *legal* dimension of the difficulty of legal-normative regulation in international law. It could be argued that the problem of whether particular factual situations fall within an expressed legal stipulation is not essentially a legal one. Lawyers, as social beings, cannot remove themselves from the background of the general language, the necessary means of communication, in their society, so that whatever linguistic difficulties are posed by the meaning of ordinary words are unavoidable. In contrast, custom seems inferior in so far as the *legal* dimension to the problem still requires resolution in the form of a generally formulated and thus semantically entrenched legal norm.

This distinction between rules and facts is, conceptually, a plausible one. Any rule contains two elements, namely the *protasis* (which ‘describes a type of situation – it indicates the scope of the rule by designating the conditions under which the rule applies’)³² and the *apodosis* (which ‘is prescriptive – it states whether the type of behaviour governed by the rule is prohibited’).³³ If our purpose were to analyze the capaciousness of rules concerning physical acts, conduct or things in the world (rule-world relation), as distinct from rules concerning other rules within a shared logical system,³⁴ such as the rules relating to the identification of other rules of international law (rule-rule relation), it can indeed be assumed that the *protasis* relates to matters of fact. It is therefore possible to draw this distinction between “factual” and “legal” dimensions to problems.

However, the response to this would be that the social context in which the rule operates is elided. The rule is there to regulate behaviour, and the reference to behaviour is a reference to the world of facts. Any general formulation

³² See Twining and Miers, *op. cit. supra*, n. 9, at pp. 141–142.

³³ *Ibid.*

³⁴ For the distinction between “rule-rule” relations and “rule-world”/“rule-fact” relations, see Hart, *op. cit. supra*, n. 10, pp. 26–33 (the distinction between “power-conferring” and “duty-imposing” rules); N. MacCormick, *H.L.A. Hart* (1981), pp. 20–21 (Hart’s distinction between “primary” and “secondary” rules) and pp. 103–104 (rules “laying down categorical requirements” and rules “conferring power”, “parasitic” and “non-parasitic” rules, rules concerning “actions involving physical movement or change” and rules regarding “the creation or variation of duties or obligations”); *contra* pp. 76–77 (Hart’s distinction between “duty-imposing” and “power-conferring rules” is defective to the extent that it assumes that there is a logical distinction between the two concepts so that there are, in actuality, pure “power-conferring” rules individuated from pure “duty-imposing” rules; it is conceivable that the two types of functions may be incorporated into the same rule since powers can be conferred subject to certain limitations expressed in terms of duties, thus the act of conferring a power at law may also confer concomitant duties); Marmor, *op. cit. supra*, n. 12, at p. 128 (distinction to be drawn between “rule-rule” and “rule-world” relations, logic and “analyticity” pertain to the former but not to the latter).

coupled with semantic entrenchment must logically include a range of possible factual circumstances contemplated as being logically connected to the meaning and content of the rule itself. This point becomes more important for present purposes when it is remembered that recourse to treaties is suggested by their greater ability to deal with changes in the international society.³⁵ As such, whenever a “hard” case is encountered, where it is not known whether the facts of the present case can be subsumed under any particular rule or whether any particular rule extends to the present case, there is little to be gained in indicating this (articulated, formulated, defined) aspect of treaty laws.

To put the point differently, it has been seen that the application of laws can be expressed in terms of a syllogism. In the two immediately preceding subsections, problems relating to formulating the *major* premiss were discussed. The problem now relates to articulating the *minor* premiss. The minor premiss normally involves issues of fact. Surely, the application of legal rules in any case must depend on what the fact-situation is. A great deal can, and often does, turn on what the decision-maker or rule-applier believes to be the facts of the case.³⁶ To deny this is to ignore the *social* function of the rule. It is no answer to our inability to “know what happened” in a definite way, so as to be able to apply a rule with ease, to divorce legal from factual problems, when the issue is the ability of law to deal with changed and changing circumstances

³⁵ See n. 4, *supra*.

³⁶ The writings of Jerome Frank have highlighted the legal difficulties encountered as a result of the unwieldy nature of facts. He wrote, in the context of municipal law: ‘If one accepts as correct the conventional description of how courts reach their decisions, then any decision of any lawsuit results from the application of a legal rule or rules to the facts of the suit. That sounds rather simple, and apparently renders it fairly easy to prophesy the decision, even of a case not yet commenced or tried, especially when as often happens, the applicable rule is definite and precise . . . But particularly when pivotal testimony at the trial is oral and conflicting . . . the trial court’s “finding” of the facts involves a multitude of elusive factors. First, the trial judge in a non-jury trial (or the jury in a jury trial must learn about the facts from the witnesses; and witnesses being humanly fallible, frequently make mistakes in observation of what they saw or heard . . . Second, the trial judges or juries, also human, may have prejudices . . . In that respect, neither judges nor jurors are standardized . . . The chief obstacle to prophesying a trial-court decision is, then, the inability, thanks to these inscrutable factors, to foresee what a particular trial judge or jury will believe to be the facts . . . These difficulties have been overlooked by most . . . who write on the subject of legal certainty or the prediction of decisions’ (*Law and the Modern Mind* (6th impression 1949), at pp. x–xi (paragraph breaks suspended). For the movement known as “fact-scepticism” in general, see M.D.A. Freeman, Lloyd’s Introduction to Jurisprudence, (6th ed., 1994), at pp. 659–661 (especially n. 26, at p. 660)]. Frank’s views may be applied to the field of international law, specifically to the issues of precision and the *a priori* determinability of treaty-laws, and may indeed be compared with Henkin’s remark that ‘[a]t times whether there is a violation of [international] law may depend on complex, ambiguous, or disputed issues about facts and how they may properly be characterized’; Henkin, *How Nations Behave: Law and Foreign Policy*, (2nd ed., 1979), p. 73.

in the world. The difficulty would exist whether we are dealing with a treaty rule or a customary rule.

To sum up on the issue of precision, treaties are not to be presumed superior in terms of being more precise simply as a result of the deliberate manner in which general treaty rules are formulated. Neither is this superiority indicated by reason of there being a solution, contained within treaties, to the universal problems faced by lawyers in dealing with issues of ‘fact’.

2.2. *Participation*

Turning from the issue of precision, the idea that the treaty law-making *process* is superior to the customary law-creating process and thus contributes towards the overall superiority of treaties will now be considered. As stated earlier, one of the reasons for the move towards treaties is the perceived inability of the customary law system to cope with the growing interdependence of States, and to put into effect an international law of co-operation.³⁷ The question that arises in the context of this concern for co-operation is this: what is it about treaties that necessitates, or facilitates, or is conducive to co-operation rather than co-existence?

2.2.1. *Participation in Law-Making and the Ideal of Co-Operation*

The individualistic character of the process of customary law-making means that custom does not necessarily apply to all states.³⁸ But it is obvious that treaties cannot be any better in this respect. Treaties, if anything, are more individualistic than custom³⁹; in de Visscher’s words, ‘[f]ar from benefitting

³⁷ As Simma (op. cit. *supra*, n. 5, p. 485) puts it, ‘[T]he growing interdependence of states and the increasingly serious danger signals in all spheres of life create an almost irresistible pressure towards co-operation . . . International customary law is certainly not capable of serving as the vehicle for this “international law of co-operation”. In the contemporary situation traditional customary liberties as well as the formation of new customary law primarily accommodate individualistic interests: most of these new rules consolidate extensions of national sovereignty or jurisdiction, and impede the creation of law in the common interest’.

³⁸ For an excellent account of the process of customary law-formation, see A.V. Lowe, “Do General Rules of International Law Exist?”, (1983) 9 *Review of International Studies*, p. 207. Note also the operation of the persistent objector rule, according to which a State which consistently and persistently manifests its dissent from a rule of customary international law from the early days of the formation of the rule will not be bound by it (see I. Brownlie, *Principles of Public International Law* (1990), pp. 10–11; A. Cassese and J. Weiler (eds.), *Change and Stability in International Law-Making* (1985), p. 112; M. Akehurst, “Custom as a Source of International Law”, (1974–75) XLVII *BYBIL* 1 at pp. 23–27. An extreme version of individualism is traditionally attributed to Soviet writers; see Tunkin, op. cit. *supra*, n. 7, at pp. 123–133; K. Grzybowski, *Soviet Public International Law: Doctrines and Diplomatic Practice* (1970), p. 28.

³⁹ Cheng has written: ‘The most important difference is of course that, while treaties are binding on only parties to them, rules of general (i.e. customary) law are binding on all parties

from the strong community impulse that the national concentrations of the nineteenth century brought to the codification of municipal law, the codification of international law, by its direct dependence upon the explicit agreement of States, elicits the full measure of their natural individualism'.⁴⁰ Generally speaking, no State has an obligation to become a party to a treaty, and even if there were such an obligation, there is nothing in the treaty process itself which would ensure in fact that the State does become a party. Even where States do become parties to treaties, the faculty of making reservations to specific treaty provisions allows States to opt out of undesirable obligations (provided that to do so is not incompatible with the objects and purposes of the treaty).⁴¹ It does not seem, therefore, that it is the ability of treaties to create obligations binding on all participants that necessarily realizes the ideal of co-operation.

It could be that the reason why treaties are more favoured, then, is the 'important "legitimation" effected by codification under United Nations auspices whenever new states are given the opportunity to participate on an equal footing with the "old states" in the reformulation of ever larger areas of international law shaped by the "North"'.⁴² The treaty-making conference is a modern phenomenon which permits all States to participate in the formation of rules on issues of general interest or concern, so there does seem to be a clear move towards an international law of co-operation.⁴³ But participation in a treaty-negotiating process is quite different from co-operation in the sense of consent to the completed text of the agreement; in this sense, bargaining/negotiation is not co-operation. Well-known and striking examples of this distinction in recent times is the Third United Nations Conference on the Law

to the international legal system (*erga omnes*) . . . the applicability of rules of general customary law is normally unconditional, subject only to such rules such as those relating to reprisals and desuetude'; "Custom: The Future of General State Practice in a Divided World", in MacDonald and Johnston (eds), *op. cit. supra*, n. 5, p. 513, at p. 539. See also Arts. 34–38 of the Vienna Convention on the Law of Treaties, (1969) 8 *ILM* 679, adopting the maxim *pacta tertiis nec nocent nec prosunt*, and I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), pp. 98–106.

⁴⁰ *Op. cit. supra*, n. 4, at p. 149.

⁴¹ See, e.g., Sinclair, *op. cit. supra*, n. 39, Ch. III; C. Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", (1993) LXIV *BYBIL* 245; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) *ICJ Reports*, p. 15.

⁴² *Op. cit. supra*, n. 5, at p. 486.

⁴³ As L. Ferrari-Bravo points out, treaty-making conferences sont souvent les seuls endroit où, d'une manière ou de l'autre, la voix de ces pays qui, autrement, n'auraient vraisemblablement pas l'occasion de participer à la formation des règles coutumières se manifeste'; "Méthodes de recherche de la coutume internationale dans la pratique des États", 192 III *Recueil des Cours* 243 at p. 254.

of the Sea⁴⁴ and the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities.⁴⁵ Simma has underlined the gap obtaining between participating in negotiation on the one hand and the creation of a resulting obligation on the other.⁴⁶ Political considerations (which may include political pressure on the part of States not to be seen to be hostile to the need for co-operation) may lead towards the creation of a ‘deceptive atmosphere of concord’,⁴⁷ obscuring the truth that there may often be too little common ground either in relation to a particular area requiring regulation or in relation to a given provision of a treaty. The result is that formal acceptance of the treaty obligation becomes difficult to achieve. ‘Voting behaviour at the time of adoption of a text does not . . . allow conclusions to be drawn about the actual readiness of participants to accept for themselves the relevant treaty obligations’.⁴⁸ This is especially true where many States require, as a matter of their internal constitutional law, compliance with certain domestic procedures before ratification may take place even where signature has already been obtained. In this regard, specific views in relation to the separate provisions of the treaty in question may alter as a result of further ‘national reflection’ during domestic debate.

The resort to consensus⁴⁹ in the treaty-drafting process as means of forging agreement means that the treaty process may sometimes be used to create the illusion of consent where it may not truly exist, with all possible consequences

⁴⁴ See, e.g. R.R. Churchill and A.V. Lowe, *The Law of the Sea* (2nd edn. 1988), Chapter 12, and Harris, op. cit. *supra*, n. 23, pp. 440–449. See now D.H.N. Anderson, “Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea”, (1993) 42 *ICLQ* (*International and Comparative Law Quarterly*), p. 654, and “Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea”, (1994) 43 *ICLQ* 886; Law of the Sea Forum, “The 1994 Agreement on Implementation of the Seabed Provisions of the Law of the Sea”, (1994) 88 *AJIL* 687.

⁴⁵ 402 *UNTS*, p. 71. The 1991 moratorium on mining in Antarctica (Art. 7 of the Madrid Protocol (1991) 30 *ILM* p. 1455) has stalled the process of provision of regulated exploitation provided for by the Convention. The moratorium rests largely on the need by some States (e.g. France and Australia) to preserve extant sovereignty claims to parts of Antarctica, and thus depends on resolution of some of the legal and political controversies relating to the Convention on the issue of sovereignty. See C. Redgwell, Current Developments section, (1990) 39 *ICLQ* 474, and (1991) 40 *ICLQ* 976; see also “Environmental Protection in Antarctica: The 1991 Protocol”, (1994) 43 *ICLQ* 599.

⁴⁶ Simma, op. cit. *supra*, n. 5, at pp. 487 et seq.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ See Cassese, op. cit. *supra*, n. 5, §108, pp. 195–198; Harris, op. cit. *supra*, n. 23, at pp. 347–351 (on UNCLOS III and the ‘package deal’ method of achieving international consensus, and the reluctance on the part of the International Court of Justice in the *Gulf of Maine* case, (1984) *ICJ Reports*, 1984, p. 246, at p. 294); G. Danilenko, op. cit. *supra*, n. 7, at pp. 193–202 (consensus as an independent source of international law based upon an incipient drive, within the legal order, towards the personification of the international community as a whole). See also G.J.H. Van Hoof, *Rethinking the Sources of International Law* (1983), at pp. 224–234.

for the efficacy of the treaty.⁵⁰ Even where the consensus technique may be considered successful, it must be remembered that the treaty law-making process holds its appeal largely in the light of the ability of States to influence effectively the resulting laws in accordance with their individual interests, very much in much the same way, *mutatis mutandis*, that customary law operates. Thus, silence may indeed constitute acquiescence in the course of the application of the consensus technique of treaty law-making⁵¹ as indeed, would be the case with silence in the face of an emerging customary norm.⁵² Again, the inherent advantage of treaties over custom is not obvious.

The point then is that it is the need and desire for co-operation that should properly suggest a preference for recourse to treaty, and not the other way round. Where there is no real desire for co-operation the treaty is unlikely to create it. To overstate the case, if there were agreement as to the law, there would perhaps not be any real need for a treaty; the result achieved by the treaty in such a case would not possess any additional normative force. Conversely, the less initial common ground there is for a generally acceptable instrument to arise, the less likely it is that a treaty, or at least a useful treaty, will come into existence.⁵³ In sum, there is nothing inherent in the nature of the treaty system which singles it out as *the* vehicle for making the ideal of an international law of co-operation a reality. The advantage of the modern multilateral treaty, rather, is that the negotiating process *can* provide real examples of diplomatic history and the perceptions and practices of States.

2.2.2. *The Relationship between Treaties and Custom*

Two further arguments need to be considered in relation to the assumptions that commonly attach to perceptions concerning the utility of the treaty law-making process.

First, there is the all-too-common assumption that where there is an emerging customary norm that has not yet fully crystallized, a well-timed treaty

⁵⁰ See Simma, *op. cit. supra*, n. 5 at pp. 488–489; *contra* Van Hoof, *ibid.*, at p. 234. Despite the apparent disagreement, it would appear that whilst Simma is concerned with the actual practical success of treaties founded on the consensus technique of achieving ‘agreement’, Van Hoof is concerned with the effect of silence during the negotiations thereto on the part of a participating State strictly as a matter of legal doctrine.

⁵¹ Van Hoof, *ibid.*, at p. 234.

⁵² See the works cited *supra*, n. 38.

⁵³ Simma, *op. cit. supra*, n. 5, at pp. 488–489, gives the stillborn 1962 Brussels Convention on the Liability of Operators of Nuclear Ships (see (1963) 57 *AJIL* 268), and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (UN Doc. A/CONF.67/16) as examples of this phenomenon. To this may be added the initial response of the United States to the Convention on Biological Diversity (see (1992) 31 *ILM* 822): for discussion, see M. Chandler, “The Biodiversity Convention: Selected Issues of Interest to the International Lawyer”, (1993) 4:14 *Colorado Journal of International Environmental Law and Policy*, p. 141.

conference does go some way towards providing the necessary impetus for its full development. This itself is not controversial; the proceedings of the conference may provide much valuable evidence of relevant State practice.⁵⁴ Nevertheless, this is not to say that the treaty law-making process is therefore superior to the customary law-making process because it provides this impetus. That would be like saying that the process of constructing a hammer is superior to the process of inserting a nail into a wall. Although the treaty law-making process is related to the customary law-making process in so far as both involve processes of international law-making which may complement each other, they are indeed separate. They may go together in constructing an overall result, namely the creation of international law, or the insertion of a nail into a wall. But in so far as customary laws can be created without the assistance of the treaty law-making process and in so far as nails can be inserted into walls without the use of hammers, there is no necessary, as distinct from contingent, relationship between the two sets of processes in each case. The treaty process is not there to remedy the failure of the customary process to generate rules. Indeed, as we have seen, treaties cannot create consent; it is consent that ensures the efficacy of the treaty.

Secondly, it is accepted that subsequent practices that build upon existing treaty laws can actually result in the creation of new customary laws.⁵⁵ For example, the practice that emerged from attempts to interpret the provisions of the United Nations Charter on self-determination may be taken as having contributed towards the formation of customary international law rules on

⁵⁴ For example, Netherlands and Denmark cited, *inter alia*, the replies of Governments and the attitude adopted by States at the Geneva Conference on the Law of the Sea 1958 in support of their arguments concerning the appropriate method for the delimitation of the North Sea Continental Shelf in their dispute with the Federal Republic of Germany. The Court rejected their arguments only because it believed that such claims had been advanced *de lege ferenda*. The Court did not deny that a customary rule could have resulted from these proceedings if the Conference had the principle of equidistance been put forth as *lex lata*; *North Sea Continental Shelf case*, *ICJ Reports* (1969), p. 3, at p. 38; *Fisheries Jurisdiction case*, *ICJ Reports* (1974), p. 3, at p. 26 (cf Akehurst, *op. cit. supra* n. 38, at p. 5). See also the *Tunisia–Libya Continental Shelf case*, *ICJ Reports* (1982), p. 47–49, *Gulf of Maine case*, *ICJ Reports* (1984), pp. 294–295. See O. Schacter, “Entangled Treaty and Custom”, in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of S. Rosenne* (1989), p. 717.

⁵⁵ *North Sea Continental Shelf case*, *ibid.* at pp. 39, 41, and 244 (it must be noted that the Court sought evidence of accompanying *opinio juris*; see pp. 41, 43, and 44–45); Art. 38, *Vienna Convention on the Law of Treaties*, *op. cit. supra*, n. 39; J. Roxburgh, *International Conventions and Third States* (1917), at pp. 72–95. See Danilenko, *op. cit. supra*, n. 7, at pp. 156 et seq.; Akehurst, *ibid.* at pp. 42 et seq. What seems to receive little support is the view that treaties *ipso facto* create custom (that is, without any reference to the concepts of ‘usus’ and ‘*opinio*’); Danilenko, *ibid.*, at pp. 158–162; Akehurst, *ibid.*, at pp. 42–44; *contra* D’Amato, *The Concept of Custom in International Law* (1971), Ch. 5.

self-determination.⁵⁶ It could then be argued that subsequent practice building upon existing treaties may be of a specifically *interpretive* kind, and that, as such, cannot be dislocated from the existence of those specific treaties themselves.⁵⁷ But it is not clear how this demonstrates the superiority of the treaty law-making process since there is no bar to the parallel development of similar, if not identical, rules of customary international law.⁵⁸ Furthermore, bearing in mind the arguments put forward in Section 2.1, the very existence of divergent interpretive practice serves to undermine the objectivity/precision supposed to have been created by the treaty.

2.3. *A Summation*

The perception that treaties are better suited as a source of international law to the present demands of the international legal order because they tend towards precision is problematic. The conceptual problems encountered in relation to the issue of precision in the articulation of legal demands are of a universal character, and they arise whenever the occasion arises calling for the resolution of a difficult social issue through law. These conceptual difficulties relate to (a) the precarious nature of any guarantee of smooth legal regulation resulting from deliberate rule-formulation which, itself, includes problems raised by issues of fact in legal deliberation and the problem concerning the ability of rules to guide and direct; (b) the flawed assumption that treaty-words are grounded in, and guaranteed by, the ‘things’ they refer to; and (c) the assumption that there is something within language itself that guarantees or fixes meaning.

If we focus upon the ability of the treaty-making process to better overcome the anarchy of power-politics, the test *must* lie beyond the kind of unilluminating evidence provided by a whole collection of treaties which run

⁵⁶ See, e.g. M. Pomerance, *Self-determination in Law and Practice: The New Doctrine in the United Nations* (1982), Chapter 2.

⁵⁷ Indeed, such forms of State practice are ordinarily seen to simply constitute an aid to treaty interpretation. See (e.g.) G. Fitzmaurice, “The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points”, (1951) XXVIII *BYBIL* 1, at pp. 9 and 20–22 and (1957) XXXIII *BYBIL* 203, at pp. 211–212 and pp. 223–225; H.W.A. Thirlway, “The Law and Procedure of the International Court of Justice 1960–1989 (Part Three)”, (1991) LXIV *BYBIL* 1 at pp. 48–57 for the principle of “subsequent practice” in treaty interpretation.

⁵⁸ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Merits)*, *ICJ Reports* (1986), p. 14, at p. 92 ff; see also *North Sea Continental Shelf*, *ICJ Reports* (1969), p. 3, at pp. 41–44. See Danilenko, *op. cit. supra*, n. 7, at p. 160. *Contra* M.H. Mendelson, (1989) 26 *Coexistence*, p. 85.

smoothly.⁵⁹ In any event, there are undoubtedly more (and more important)⁶⁰ rules of customary international law which do run smoothly. Furthermore, the displeasure that appears to stem from the seemingly open-ended, and thus insecure, reasoning attendant upon customary law, to the very limited extent that it is justified, is not so much a problem of logic. Rather it simply reflects the perceived need for the careful exercise of legal craftsmanship in the face of global political contestation. And in this regard, as has been seen, treaties do not seem more favoured than custom. The identification of ‘hard cases’ with cases involving customary international law is misconceived.

3. Codification and the Promise of Global Law

3.1. *Law and Politics: The Paradox of Treaty Law-Making*

Any attempt at global regulation must face an essential difficulty. Such attempts must seek to establish legal norms which are (a) by and large, immune from arbitrary political challenge and interpretive controversy (precision), and which (b) enjoy the political support of those to whom those legal norms are addressed (participation).⁶¹ Treaty law-making seems an attractive way of dealing with these issues. On the one hand, being written, treaty rules would seem to enjoy a high degree of immunity from arbitrary political challenge and interpretive controversy. On the other hand, given the context of the modern phenomenon of the treaty-making conference, they would seem to enjoy the political support of those States and other legal persons which are party to that law-making process or those parties that have subsequently acceded to their demands. It has been argued in Section 2 above that there are real conceptual difficulties with this perception of the ability of treaty law to deal with the issues of precision and participation. There the problems of precision and participation were considered as discrete problems. The reality, however, is that the questions of precision and participation are not discrete.

⁵⁹ ‘Certainly there are thousands of treaties which work smoothly . . . But such treaties are not common where international law attempts to restrain the violent games of politics, inexactitude and instability being the penalty’ (Simma op. cit. *supra*, n. 7, p. 487).

⁶⁰ This must be true if we consider that the basic constitutional doctrine of the international legal system is largely unwritten, at least until relatively recently; see L. Henkin, *International Law: Politics and Values* (1995), pp. 29 ff (esp. pp. 31–32).

⁶¹ See, e.g., M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Finnish Lawyers’ Publishing Company, Helsinki, 1989; D. Kennedy, “Theses About International Law Discourse”, (1980) 23 *German Yearbook of International Law*, p. 353; N. Purvis, “Critical Legal Studies in Public International Law”, (1991) 32 *Harvard Journal of International Law*, p. 81; A. Carty, “Critical International Law: Recent Trends in the Theory of International Law”, (1991) 2 *European Journal of International Law*, p. 66.

It will now be argued that the relationship between them places a fundamental paradox at the heart of the treaty process.

For effective positive laws to take shape within a social context where there is an absence of a genuine monopoly of power and authority by any one member of that society, such laws must receive the support of the majority of the members of that society. Thus it is said that the participation or expression of the concordant 'will' or 'consent' or 'consensus' of States, in one form or another, lies at the root of international law.⁶² This consent must be 'genuine'. As Hart has put it, for the rudimentary legal rules of a Stateless society to continue to flourish, there must be an acceptance of such rules as critical common standards by the majority of the members of that society.⁶³ These rule-standards, being the subject of a 'critical reflective attitude' on the part of the majority of the members of that society, *do not continue to hold because of fear of sanction or mere prudence* on the part of those whose behaviour it regulates. The members of that society grasp the rule-standards as being applicable to themselves and to other members of that society in general, such that deviation from the demands of these rules would invite criticism based upon the rules themselves. For international lawyers, the condition precedent for a valid international legal rule lies in the existence of consent towards that rule. The scope of application ascribed to the rule is thereby made to be dependent upon the breadth of the consent gathered in its support. Thus the kind of political intercourse or diplomatic participation in law-making that is necessary for the creation of an effective and stable legal order is one that is largely free of constraint.

Such participation, however, requires, and is the subject of, some kind of procedural regulation. There are rules on the entry into force of treaties, on the permissibility of reservations, the effect of interpretive declarations, rules determining what amounts to 'consent' by reference to the concepts of *usus* and *opinio*, and so on. In relation to treaties in particular, the Vienna

⁶² See, e.g., R. Jennings and A. Watts, *Oppenheim's International Law* (Vol. 1 1992), p. 14, and 15–16 ('The emergence of 'consensus' as an appropriate procedure for the adoption of many decisions at international conferences and in such bodies as the United Nations General Assembly has mitigated the consequences which would otherwise flow from rigid requirements of consent . . . and has permitted the continued development of international law in accordance with the general consent of the international community'); I. Brownlie, *Principles of Public International Law* (4th edn. 1990), p. 2; G. Schwarzenberger, *op. cit. supra*, n. 14, at p. 6 (' . . . the inductive treatment of international law is not intended as an exercise in logic. It is an empirical device, based on the unimpeachable authority of near-universal consent . . . '); J. Westlake, *Collected Papers* (L. Oppenheim (ed.), 1914; 'And consent is the immediate source of international law, in the sense that the social nature of man and his material and moral surroundings may furnish principles of action, but only the consent of a society can establish rules'); L. Henkin, *op. cit. supra*, n. 60.

⁶³ *Op. cit. supra*, n. 10, Chapter V.

Convention on the Law of Treaties of 1969⁶⁴ and the Convention on the Law of Treaties between States and International Organisations⁶⁵ reflect the preference for procedural rules which are themselves laid down in treaty regimes.

Therein lies the problem. The conceptual difficulties identified in Section 2 above that attend the preference for treaty-based substantive international law also apply to treaty-based procedural law. The investment placed upon broad political participation in law-making, which is intrinsic to the preference for treaty-based substantive law, does not sit easily with a concomitant preference for the procedural regulation or restriction of such participation. Nowhere is this more apparent than in relation to the law on reservations to multilateral treaties.⁶⁶ The ideal of the widest participation possible pulls in one direction while the need for precision pulls in another. A decentralized yet 'legal' society must depend upon the political support of the members of that society towards its legal rules and principles for that legal order, in turn, to flourish. At the same time, a 'public order' necessarily denies absolute freedom of action on the part of those whose actions are regulated by that legal order. Can this ambivalence be accommodated by an ever-expanding treaty-base for international law? Can the ideal of codification resolve this tension between the ideal of law and the reality of politics? It would seem not. The fact that treaty rules are open to interpretive dispute at the time of their application suggests that treaties cannot themselves be the basis for entrenched rules which will serve to engineer a balance between broad political participation and procedural regulation within the law-making process. The conceptual difficulties faced by substantive treaty laws cannot be resolved through recourse to further rules of procedure laid down by treaty. Recourse to treaty law itself cannot solve the conundrum posed by the consideration that politics is not only valuable but also necessary to the continued rigour and relevance of the law, while at the same time being the subject of constraint by the law.

3.2. *Concluding Remarks: Prospects and Proposals*

The difficulties described above are exacerbated by the consideration that it is not always the original law-makers that rely on provisions of treaty regimes. The simplest example of this is where there is a later accession, adhesion or adherence to an established treaty by a new State which may, in the future, determine the meaning of a provision within that treaty in a manner that was originally not envisaged by those States that brought the treaty into being in the

⁶⁴ Op. cit. *supra*, n. 39.

⁶⁵ (1986) 25 *ILM* 543.

⁶⁶ See the references in n. 41, *supra*.

first place. A relatively recent example is provided by the newly decolonized States calling upon the Charter to convey legitimacy on their efforts for further decolonization during the 1960s. Similarly, new actors, such as major non-State groups on the international plane now seek to rely on various treaty provisions which were arguably not established with their participation in the international legal order in mind.⁶⁷ The treaty rules themselves can neither halt nor accommodate such an expanded participation which was not originally envisaged. This must be so since the global legal order itself (of which the various treaty regimes are but a part) is undergoing rapid changes, notably in relation to the law on personality.⁶⁸ The expansion of international society by virtue of the increased and increasing participation of new types of legal subjects on the international plane challenges the supposition that the application of a treaty rule is somehow immune from political contestation and interpretive controversy due to the different interests that these new actors represent.

It follows from all this that the stability and effectiveness of the international legal order cannot be guaranteed by anything that is inherent in the regulatory medium of the international treaty itself. As has been seen, it is not a coincidence that treaty regimes work smoothly where political consensus supporting their operation already exists; the continued efficacy of a treaty is not a question of treaty law.⁶⁹ Thus in developing areas of international legal regulation where solid consensus is yet to emerge, and in cases where the circumstances which provided the context for securing genuine political agreement in relation to contents of the treaty have changed, customary rules, broad principles of law and 'soft law' must continue to serve an indispensable function.

We may conclude with Sinclair's observations on the Vienna Convention on the Law of Treaties, which sums up some of what has been argued in this section. He wrote, in 1984, that 'The "treaty on treaties" has accordingly had little or no impact *as a treaty*. But as a code – or rather as a restatement or consolidation of existing or emergent principles of treaty law – it has a dynamic and continuing influence . . . the fate of the Convention *qua* treaty instrument demonstrates clearly the restrictions which the law of treaties

⁶⁷ An example of this would be the attempt by indigenous groups to include themselves as a beneficiary of the right to self-determination in international law.

⁶⁸ For the argument that the right-duty construal utilized in relation to the determination of the subjects of international law should be abandoned in favour of the concept of participation on the international plane, see R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon, Oxford, 1995), Ch. 3.

⁶⁹ See A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986), p. 67, citing J. Westlake, *International Law* (Vol. I, 1910), pp. 359–361; see also pp. 295–297.

itself (and by its very nature) imposes upon the application of conventional instruments. It is indeed the existence of these very restrictions which puts a premium upon the operation of customary law as a vehicle for determining the rights and obligations of States, even in the field of the law of treaties itself.⁷⁰

Acknowledgement

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⁷⁰Op. cit. *supra*, n. 39, p. 252. See generally pp. 251–258, in particular, his discussion of the views of Baxter and Thirlway regarding the value of codification.