2. The law of treaties through the interplay of its different sources

Enzo Cannizzaro

I. INTRODUCTION: CODIFICATION, DE-CODIFICATION, RE-CODIFICATION

It is commonly accepted that the 1969 Vienna Convention on the Law of Treaties is one of the most ambitious, and perhaps also among the most successful, endeavours to codify international law ever attempted. It has conceptualized a system of the law of treaties that remains relevant to date. Many of its provisions are routinely mentioned in judicial and diplomatic practice as unequivocally corresponding to customary law. The Vienna Convention has also spread its influence over other branches of international law and has contributed to the general development of international law. Its blend of tradition and innovation now constitutes a model for codification.

At closer look, however, the application of the Vienna Convention also reveals some problematic issues and lays bare the fragile paradigm of codification. Although frequently mentioned in judicial and diplomatic practice as the living codification of the law of treaties, the Vienna Convention has certainly not prevented the further development of this area of law. The interplay between the Vienna Convention and other sources of international law is rather bidirectional. The Convention has certainly exerted a robust influence on international practice. However, evolution in the law of treaties and other areas of international law has also had a major impact on the Vienna Convention and has led to the further development of some of its normative solutions. The precise determination of the current scope and content of the law of treaties is therefore a difficult exercise and requires an assessment of the interplay of multiple sources: custom, general principles of law and institutional law.

On a more general note, this interrelation seems to epitomize the fate of codification treaties in international law. On the one hand, the law of treaties is subject to a creeping process of de-codification by virtue of the impact of other sources of law on the Convention. On the other hand, emerging needs in specific sectors of the law of treaties may trigger a

process of re-codification which would update the solutions adopted in the Vienna Convention.[1] The recurrence of de-codification and subsequent re-codification is a prominent feature in the development of the law of treaties and constitutes one of the important threads running through the present study.

II. THE VIENNA CONVENTION AND PRE-EXISTING LAW: THE CLASSICAL SCHEME

From a formal perspective, the relationship between the Vienna Convention and custom is epitomized in the dichotomy between codification and progressive development of the law. Provisions of the Convention embodying previous practice apply to all the members of the international community; innovative provisions of the Convention only apply to its parties. Beyond this simplistic paradigm, however, closer analysis reveals that the interplay between the Vienna Convention and custom is much more varied and multifaceted.

Judicial practice often referred to the Convention as proof of the existence of customary law even before it had entered into force. A few months after its adoption, in its advisory opinion on *Namibia*, the International Court of Justice (ICJ) referred to the Vienna Convention provisions concerning termination of a treaty on account of breach by saying that 'these provisions (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject'.[2] In the two *Fisheries* decisions of 25 July 1974, the ICJ

---

[1] The obvious example is given by the recent adoption of the *Guide to Practice on Reservations to Treaties*, adopted by the International Law Commission (ILC) in 2011. The *Guide*, devoid per se of binding effect, takes into account the most recent practice and attempts to fill some of the incoherences of the regime adopted by the Vienna Convention or even to modify it. For example, the *Guide* enlarges the scope of objections to reservations and recognizes that the objecting State has the power to exclude the application of provisions of the treaty other than those to which the reservation relates, in its relations with the reserving State (Rule 3.4.2).

[2] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep 1971, 16, para 94. See also the case concerning the *Appeal Relating to the ICAO Council (India v Pakistan)*, Judgment, ICJ Rep 1972 (18 August) 46, in which the ICJ applied Article 60 of the Convention, and in particular, the definition of the notion of material breach, *qua* customary law (para 38). In its jurisprudence, the ICJ has quite often referred to provisions of

held that '[t]here can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void'.[3] More recently, the ICJ has continued this tendency to cite provisions of the Convention as unequivocal proof of the existence of customary rules. In its judgment of 20 July 2012 relating to the *Obligation to Prosecute or Extradite (Belgium v Senegal)*, the Court found that Article 28 of the Convention, which concerns the temporal application of treaties, 'reflects customary law on the matter'.[4]

---

the Vienna Convention as unequivocal evidence of the pre-existence of custom. See the case of the *Aegean Sea Continental Shelf*, Judgment, ICJ Rep 1978 (19 December) 3, para 96, referring to the principle of the freedom of forms expressed in Articles 2, 3 and 11; the case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility Judgment, ICJ Rep 1994 (1 July) 112, para 23, referring to the principle that 'international agreements may take a number of forms and be given a diversity of names' embodied in Article 2(1)(a); also see the case of the *Territorial Dispute (Libyan Arab Jamahiriya/Chad),* Judgment, ICJ Rep 1994 (3 February) 21, para 41; the case of the *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Rep 1999 (II) (13 December) 1059, para 18; the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Rep 2007 (I) (26 February) 109, para 160; the case of the *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, ICJ Rep 2009 (13 July 2008) 213, para 47; the case of the *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece*), Judgment, ICJ Rep 2011 (5 December) para 91, all referring to Articles 31 and 32 on treaty interpretation as reflecting customary law.

[3] *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v Iceland)*, Merits, ICJ Rep 1974, 3; *(Germany v Iceland, United Kingdom v Iceland)*, Merits, ICJ Rep 1974, 175.

[4] See para 100. Further on, in para 113, the Court observed that 'under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, Senegal cannot justify its breach of the obligation provided for in Article 7, paragraph 1, of the Convention against Torture by invoking provisions of its internal law …'. See also the case concerning the *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Rep 2010 (20 April) 14, para 122, where the Court mentioned the 'well-established customary rule reflected in Article 27 of the Vienna Convention on the Law of Treaties, according to which "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"'.

Only rarely, however, do international courts take care to specifically demonstrate that a certain rule existed *qua custom* before its incorporation in the Convention. Quite the contrary, in some instances one has the impression that the Vienna Convention is referred to not so much as a proof of the existence of custom, but rather as an essential element of the process of formation of customary law.[5]

This observation leads on to one of a different order, in which the Vienna Convention is seen as a factor in the process of law-making.[6] This role tends to reverse the ordinary sequence of the process of codification. Here it is not that the Vienna Convention embodies rules already formed in State practice, but rather that the Convention establishes a new behavioural model toward which practice tends to converge, in a more or less spontaneous manner. In a slightly different scheme, the Convention can be seen to represent the ultimate step in a process of formation of customary law, already underway at the time of the conclusion of the Convention, and which also influenced the drafting of the Convention's provisions.[7] This phenomenon is also of interest from a sociological viewpoint and testifies to the mutual influence of 'factual law' and 'formal law' in the law of treaties.

---

[5] In his separate opinion in the case of the *Application of the Interim Accord of 13 September 1995* (n 2) Judge Simma seems to have conceived Article 60 of the Vienna Convention as establishing an all-encompassing legal regime governing reactions to a breach of treaties, including reactions falling within the law of State responsibility (see, infra, n 27). It is noteworthy that the ICJ, the *Gabčíkovo-Nagymaros Project*, Judgment, ICJ Rep 1997 (25 September) 7, pointed out that the correspondence between Article 60 and general law was only partial:

> it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties. (para 106)

[6] For a recent discussion of the notion of law-making treaties, see C Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 Nordic J Intl L 383.

[7] See T Treves, 'Customary International Law', in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* ((vol II, OUP, 2012) 937.

III. THE VIENNA CONVENTION AND SUPERVENING CUSTOM

The previous analysis corresponds to the classical legal paradigm of codification. This paradigm is based on a static analysis of the relations between treaties and custom, which tends to fix the legal situation existing at a certain point in time and makes it immaterial in determining their respective temporal sequence. Once ascertained that provisions of the Vienna Convention correspond to customary rules, the establishment of this sequence appears as a purely academic exercise.

However, as is well known, law changes over time. Treaty rules evolve mainly by means of evolutionary or contextual interpretation, and through subsequent practice. Customary law evolves and adapts to the development of social custom more rapidly than treaties. All in all, treaties and custom evolve according to different speeds and their development generally points in different directions.

As a consequence thereof, the identity between 'codificatory' treaties and custom, established at a certain point in time, is doomed, sooner or later, to dissipate. Sometimes the two sets of rules maintain a common bulk, while diverging on matters of detail; in other instances their core contents begin to differ, occasionally even dramatically. This divergence poses the question as to whether the two sources of law still maintain their independence, or rather whether a change in one might have a normative effect on the other.

A formal argument in favour of the respective independence of the two sets of rules is the distinction that can be made between them based on their respective sources. This is a consideration that inspires a number of provisions in the Vienna Convention.[8] The application of this principle of the independent coexistence of customary and treaty rules should lead to the more general conclusion that the vicissitudes of the provisions of the Vienna Convention should not impinge upon the corresponding customary rules on the law of treaties. For example, reservations to the Vienna

---

[8] See, for example, Articles 4 and 43 of the Vienna Convention. According to this latter provision:

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

Convention should not affect the general application of customary rules incorporated into its provisions.[9]

The principle of independent coexistence has been confirmed, albeit in a different setting, by the ICJ in *Nicaragua*. There, the Court found that customary rules do not cease to exist after they have been incorporated in a treaty that reflects customary international law.[10] Rather, custom survives as a source of law and continues to apply even in the relations between parties to that treaty, when and to the extent it is not inconsistent with the new conventional rules.

It can be reasonably assumed that the principle of autonomy applies in the relations between codification treaties and pre-existing practice. It is less reasonable to apply it in the reverse situation, namely to demonstrate that the development of the law has no effect on pre-existing codification treaties. The persistence of a treaty regime could only be justified if that treaty had not just the effect of contracting out of pre-existing custom,

---

[9] See Rule 4.4.2 of the *Guide to Practice* (n 1):

> Absence of effect on rights and obligations under customary international law – A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

A different view can be based on the idea that reservations to a provision of a codification treaty and acceptance thereto ought to be construed as a convention between the reserving and the accepting parties, aimed at derogating, in their mutual relations, from the customary rule reflected by that provision. This idea echoes, *a contrario*, in the famous passage contained in the Human Rights Committee, 'General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (11/04/1994) CCPR/C/21/Rev.1/Add.6, which excludes the possibility of making reservations to provisions of the Covenant 'that represent customary international law (and a fortiori when they have the character of peremptory norms)', because 'human rights treaties are stipulated not in order to exchange reciprocal obligations among the parties, but rather "for the benefit of persons within their jurisdiction"'.

[10] See the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, ICJ Rep 1986 (27 June) 14, paras 175 *et seq*, especially para 178: 'even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence'.

but was also intended to prevent the application of supervening inconsistent custom in the relations between its parties.

Supervening custom interferes with provisions of the Vienna Convention in a number of situations. It may interfere in a relatively limited manner, as for example when it operates in the normative spaces left open by the Convention's provisions, filling the gaps created by ambiguous provisions. But it may also cause significant interference when it purports to establish legal regimes inconsistent with those established by the Convention.

An example of the first type of interference is evident in the tendency to attempt to objectively assess the compatibility of a reservation with the object and purpose of a treaty.[11] This tendency, while still evolving, seems to indicate that the mechanism of individual assessment established by the Vienna Convention is not exclusive and that, at least with regard to treaties protecting collective interests, it must be reconciled with the need to have the compatibility of a reservation determined objectively.

There are, however, situations in which trends in practice seem to be largely inconsistent with the normative system set up by the Vienna Convention. Again with regard to reservations, one cannot but refer to the tendency of States to react to impermissible reservations with objections, which purport to modify the legal effect of provisions other than those to which the reservations relate to. This practice seems at odds with Article 21(3) of the Vienna Convention, which confines the effect of objections to the same provisions the reservations related to.[12]

---

[11] See, for example, the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002, Democratic Republic of Congo v Rwanda)* Jurisdiction of the Court and Admissibility of the Application, ICJ Rep 2006 (3 February) 6, para 66. See G Gaja, 'Il Regime della Convenzione di Vienna concernente le riserve inammissibili', in *Studi in onore di Vincenzo Starace* (Editoriale Scientifica, 2008) 349; A Pellet and D Müller, 'Reservations to Treaties: An Objection Is Definitely Not an Acceptance', in E Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP, 2011) 37; B Simma and GI Hernández, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand ?' ibid, 60.

[12] These objections have been labelled as having 'intermediate' effect by the Special Rapporteur A Pellet, *Eighth Report on Reservations to Treaties*, Add 1, Doc A/CN.4/535/Add.1. See D Müller, 'Article 21 – Convention de 1969', in O Corten and P Klein (eds), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article* (Bruylant, 2006) 921. This situation well exemplifies the process of de-codification and re-codification of some provisions of the Vienna Convention (see the *Guide to Practice*, (n 1) Rule 3.4.2).

The question thus arises as to whether subsequent custom also applies to the relations among parties to the Vienna Convention.

This is not an easy issue. It concerns the degree of resistance the Vienna Convention has to the evolution of custom, and, to my knowledge, this issue has never been dealt with by the international judicature. Two considerations seem of some relevance in solving this problem, but they are not entirely coherent with each other. First, the Convention ought to be generally considered as *lex specialis* among the parties, unless there is clear indication to the contrary. Second, nowhere does the Convention express the intent to set up a self-contained regime of the law of treaties, which blocks the evolution of general law in perpetuity. As stated expressly in its preamble, the Vienna Convention purports to codify and further develop the law of treaties, but not to insulate it from the beneficial influence of the general regime.[13]

It seems, therefore, unreasonable to adopt a one-size-fits-all solution, which is applicable to all possible relations between the Vienna Convention and subsequent custom. Rather, these relations ought to be established on a case-by-case basis, taking into account a number of elements, including not only the generality of the new law and the resilience of the provisions of the Vienna Convention, but also other more impalpable factors such as the quest for uniformity at the general level compared with the interest in maintaining a special regime among the parties. Whereas in principle the Vienna Convention should apply in the relations among its parties *qua lex specialis*, a different solution should not be automatically excluded, the more so when parties to the Convention expressly or implicitly show a certain propensity to contribute to the creation of new law.

---

[13] Indeed, the preamble contains a passage devoted to the relations between the Convention and customary law worded as follows: 'the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention'. This assertion seems to confine the application among the parties of pre-existing customary law to matters not regulated by the Convention. It seems to be a large step to assume that by it the parties also intended to contract out supervening customary law in their mutual relations and, thereby, exclude custom as a source of the law of treaties in matters regulated by the Convention.

IV. CUSTOM AND INNOVATIVE PROVISIONS OF THE CONVENTION

Innovative provisions of the Vienna Convention that prove incapable of serving as a model for future conduct fail to discharge either of the two main purposes of codification. They do not codify pre-existing law and they do not develop new law. Thus, the question arises as to their fate. Will they block the future development of the law and remain in force as a self-contained legal framework applicable to the States parties to the Vienna Convention only, or should their inability to serve as the basis for the creation of new law be considered as grounds for their termination?

This conundrum is not easily solved.

From a formal perspective, the principle of the autonomy of the two sources supports their perpetual coexistence. This solution appears thoroughly reasonable for provisions designed to contract out of custom and create a parallel legal regime applicable in the relations between the parties to the treaty.

This should be the case, for example, where the Vienna Convention prescribes that certain declarations must be made in writing.[14] Arguably, these provisions were laid down to create more legal certainty in the relations among the parties than that required by customary law. The same can be said with regard to provisions establishing other procedural conditions for the exercise of rights and faculties. This might be the case for Article 56(2), for example, which establishes that a party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty. In its advisory opinion of 20 December 1989 on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*,[15] the ICJ did not consider this rule as forming part of

---

[14] See, for example, Articles 35 and 67(1). ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009) 479 (section on 'Article 35'), while admitting that 'the requirement of written consent (in Article 35) may appear as innovative when it was introduced at the conference in 1969', nonetheless, concludes that 'in view of the unanimous adoption in Vienna of Article 35, this requirement has most likely come to share the customary basis of the provision as a whole'.

[15] ICJ Rep 1980 73, para 49: the Court said: 'it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith'. Some indications as to the possible periods involved, as the Court has said, can be seen in provisions of host agreements, including Section 37 of the Agreement of 25 March 1951, as well as in Article 56 of the Vienna Convention on the Law of Treaties and in the corresponding Article of the International Law

customary law, but dealt with it as solely constituting a standard of reference for measuring good faith.[16] The Court appears to conceive Article 56(2) as a rule which has materialized and given a precise content to a pre-existing general rule of good faith.[17] The further development of custom should therefore be, in principle, unable to supersede this established content of the good faith requirement, unless one can demonstrate that the parties to the Convention also contributed to this process of subsequent development of supervening custom.

However, there are situations in which the idea of the persistence of a double legal regime – one customary, which continuously evolves over time, and the other conventional, resisting *in aeternum* the change of social custom – is not convincing. In particular, it seems logical to assume that provisions which have unsuccessfully attempted to create new customary law should, as a consequence of their failure, be set aside even in relations among the parties.

This might be the case in relation to the specific procedural requirements established by Article 65 with respect to invalidity and termination of treaties, designed to reduce the indeterminacy and arbitrariness of unilateral declarations of termination or invalidity of treaties.[18] This procedure has, to my knowledge, never been used. In *Racke*, the ECJ

Commission's Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations.

[16] The ICJ took an analogous stance with regard to some general aspects of Articles 65 to 67. In the aforementioned judgment concerning the *Gabčíkovo-Nagymaros Project* (n 5), the Court said that 'Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith' (para 109).

[17] See para 47:

> A further general indication as to what those obligations may entail is to be found in the second paragraph of Article 56 of the Vienna Convention on the Law of Treaties and the corresponding provision in the International Law Commission's draft articles on treaties between States and international organizations or between international organizations. Those provisions, as has been mentioned earlier, specifically provide that, when a right of denunciation is implied in a treaty by reason of its nature, the exercise of that right is conditional upon notice, and that of not less than twelve months. Clearly, these provisions also are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty.

[18] See M Cosnard, 'Article 65 – Convention de 1969', in Corten and Klein, *Les Conventions de Vienne* (n 12) 2353.

found that 'the specific procedural requirements laid down (by Article 65) do not form part of customary international law'.[19]

In and of itself, the non-use of certain provisions of the Vienna Convention can hardly justify their termination.[20] However, a different conclusion could be reached with regard to innovative provisions of the Vienna Convention, namely those which were laid down with a view to progressively developing the law. It is reasonable to presume that they are tacitly quashed by supervening custom due to their failure to fulfil their purpose.

V. THE VIENNA CONVENTION AND GENERAL PRINCIPLES OF LAW

Considerable perplexities surround general principles of law as a source of the law of treaties, due to a plurality of reasons. In contemporary international law, general principles of law enjoy quite a bad reputation. They are commonly regarded as a proof of the incompleteness of the international legal order: allegedly incapable of filling its gaps through its own sources, it must refer to external, heteronomous, sources. Moreover, recourse to general principles of law is clearly at odds with the tendency of legal scholarship to look at the Vienna Convention as a full-fledged set of rules covering virtually all possible aspects of the law of treaties.

In spite of this, a theoretical discourse on general principles of law and on their function in the system of the law of treaties might be very useful. Precisely in this context, this particular source of law has significantly changed its role. Originally conceived of as the transplantation of concepts and institutions of the law of contract into the international order,[21] more recently 'general principles' have also come to be understood as referring

---

[19] Case C-162/96 *A Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECJR I-3655.

[20] See M Kohen, 'Desuetude and Obsolescence of Treaties', in Cannizzaro (ed), *The Law of Treaties* (n 11) 350.

[21] See the famous passage of the dissenting opinion by Judge Anzilotti to the judgment of the *Diversion of Water from the Meuse*, PCIJ 1937 (28 June) Series A/B, No 70, 50, according to whom:

> the principle underlying this submission *(inadimplenti non est adimplendum)* is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these 'general principles of law recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute.

to principles of law originating in the structure of international legal relations and in the function of international legal rules.

The best example of the dual role of general principles as exemplified in the law of treaties is probably to be found in the celebrated advisory opinion of the ICJ of 28 May 1951 on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[22]

The Court was asked to decide whether a State which had made a reservation could be regarded as a party to a multilateral treaty in spite of an objection to this reservation by another State party. In its answer, the Court took note that the traditional legal regime, inspired as it was by the notion of integrity of treaties, would have given a negative answer to this question. Further, the ICJ observed that this 'concept, which is directly inspired by the notion of contract, is of undisputed value as a principle'.[23] Nonetheless, the Court went on to refer to a variety of circumstances suggesting more flexibility. Among these circumstances, the Court mentioned the 'clearly universal character of the United Nations under whose auspices the Convention was concluded and the very wide degree of participation envisaged by Art. XI of the Convention'.[24] These elements, which allude to the structure of the legal relations of the new emerging international public order, led the ICJ to establish a different legal regime for reservations based not only on the need to secure the integrity of the treaty, but also on the perceived need to preserve the universal aspiration of the Genocide Convention.

The Court can be taken to have referred to the existence of differing, possibly opposing, general principles of law. The first is the classical scheme, in which a domestic principle, which inspires the legal regime of contracts, is subsumed into international law and is used to determine the legal regime of reservations to treaties in international law. The second is a new scheme, in which the legal regime of reservations is based on the principle of universality of multilateral treaties, a principle that is unknown in domestic law and relates to the rise of a category of collective fundamental interests. It is by balancing these competing principles against each other that the ICJ finally established the new legal regime for reservations to treaties, and objections thereto, in international law.

Nor is the impact of general principles of law on the law of treaties confined to the transitory situations of law change. General principles of

---

22 ICJ Rep 1951, 15.
23 Ibid, 17.
24 Ibid, 21.

law can also be invoked to fill apparent gaps in the legal regime of the law of treaties. An example of such use of general principles can be seen in the context of the dispute concerning the *Gabčíkovo-Nagymaros Project*, decided by the ICJ in 1997.[25] In the course of these proceedings, Slovakia invoked the principle of approximate application in order to justify the unilateral construction and operation of the so-called *Variant C*, namely a water management project on the Danube river designed to replace the original project that had been envisaged in a treaty between Hungary and Czechoslovakia. According to Slovakia, this 'is a principle of international law and a general principle of law'.[26] Reference to its alleged dual nature was clearly intended to enhance the authority of the principle and to facilitate its application. The ICJ did not pronounce on the existence of the principle. It merely held that the principle, if in existence, would not apply in the case at hand due to the profound difference between the conduct performed by Slovakia and that required by the original treaty.

From a different perspective, general principles of law can be invoked as a substitute for custom in order to identify the source of rules considered as necessary and inherent in the logic of the international legal system in situations where there is a relative scarcity of practice. In his separate opinion to the judgment of the ICJ of 5 December 2011, in the case of the *Application of the Interim Accord of 13 September 1995*, Judge Simma pointed to general principles of law as a possible source of the rule *inadimplenti non est adimplendum* in international law. He noted that such a rule corresponds to a rule uniformly present in the contemporary law of contract, as applied by domestic judges. In contrast, this rule in international law does not have the benefit of subsequent 'impartial adjudication' and is therefore more prone to abuse. In Simma's opinion, it is precisely this circumstance that explains the reluctance of States to invoke the principle and makes 'the recognition of the principle's consecration as customary international law very difficult'.[27]

The progressive obsolescence of the normative solutions adopted by the Vienna Convention may even increase the role and importance of general principles of law as a source of the law of treaties, in particular in

---

[25] Note 5.

[26] Paras 67 *et seq*. Slovakia relied on the authority of Sir Hersch Lauterpacht, who devoted to this principle a passage of his separate opinion to the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion, ICJ Rep 1956, 46.

[27] *Application of the Interim Accord of 13 September 1995* (n 2), Simma, Separate Opinion, paras 13–14.

their most fascinating guise as principles emerging from the legal structure of international legal relations.

Among their many virtues, general principles of law have the function of diffusing the changes that have taken place in some of international law's sectoral regimes or canonical areas throughout the entire edifice of international law. In other words, in a decentralized and minimally institutionalized legal order such as international law, general principles of law produce an effect analogous to that of the principle of the communicating vessels. As law evolves, general principles tend to balance out the different branches to the same level of development, which likely constitutes the product of the interplay between the innovative tendencies pioneered in one field and the resistance to innovation experienced in others. In this sense, general principles of law operate more as a source of inspiration for determining the state of the law rather than as a source of law-making in the proper sense of the term.

This premise may help one to understand the development of the law of treaties as applied to certain categories of treaties, such as human rights treaties. It is well known that in this field, treaty bodies have put much emphasis on the special character of the relevant treaties, which in their view justifies the adoption of a special regime in the law of treaties whose legal basis is to be found neither in the Vienna Convention nor in State practice.[28] When the existence of such a special regime is determined on the basis of a purely logical process of deduction, it may be reasonable to assume that general principles of international law have a role to play in this process. This role of general principles, as a tool

---

[28] A well-known example comes from the regime of reservations (see the famous decision of the ECtHR in the cases *Belilos v Switzerland* App no 10328/83, (ECHR, 29 April 1988); *Weber v Switzerland* App no 11034/84 (ECHR, 22 May 1990); *Loizidou v Turkey* App no 15318/89 (ECHR, 23 March 1995); see moreover the 'General Comment No 24 …' (n 9); the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, appended to the case of *Armed Activities on the Territory of the Congo* (n 11). A further example comes from the doctrine of the objective nature of human rights, which justified the exercise of jurisdiction by the European Commission of Human Rights in an interstate dispute with regard to conduct performed at a time in which the claimant state was not yet party to the Convention (see the famous decision of the Commission in *Austria v Italy, the Pfunders Case* App no 788/60 (11 January 1961)). This doctrine has been further applied as a legal basis for special regimes in a number of other situations, including the regime of withdrawal from or denunciation of a treaty (see the decision in the case *Baruch Ivcher-Bronstein v Peru*, Inter-American Court of Human Rights (6 February 2001)).

permitting the creation of general law on the basis of a logical process of deduction, is particularly important for the development of the law of human rights treaties. These treaties differ, as to their structure and function, from the vast majority of other treaties, which typically possess reciprocal character.

Finally, recourse to general principles of international law, and in particular the observation of how law develops on the basis of a logical process of deducting new rules from the structure of pre-existing ones, can help to explain the somewhat mysterious process of the evolution of the law of treaties under the pressures coming from other fields of law.

This process can be closely observed in the evolution of the legal regime of *jus cogens*, as laid down in the Vienna Convention and moulded according to the blend of bilateralism and communitarianism which characterizes the Convention's conceptual system. Successively, however, the notion of *jus cogens* has been applied in other areas of the international legal system and, in particular, to the law of State responsibility, where it underwent significant evolution – the particular object and the nature of the interests protected by *jus cogens* account for this development. However, this development did not proceed by linear progression in these two fields, but rather through discontinuous leaps followed by a process of mutual adaptation. Developments in the law of treaties thus prompted analogous developments in the law of international responsibility and vice versa. One of the following paragraphs will be devoted to such a development occurring in the legal regime of *jus cogens* in the law of treaties, one which was possibly inspired by a similar development that had previously occurred in the law of State responsibility.

VI. INSTITUTIONAL LAW-MAKING AND THE LAW OF TREATIES

Albeit quantitatively and qualitatively modest, the contribution of institutional law to the law of treaties is not entirely negligible. It shapes a tendency towards the institutionalization of law-making, which may well acquire more importance in the future.

This contribution is well epitomized in the activities of the United Nations Security Council. Although deprived of normative competences, the Security Council has contributed to the development of the law of treaties in connection with its primary responsibility of maintaining and restoring international peace and security.

This is reflected in the Security Council resolutions which established that accession to certain treaties might be necessary in order to guarantee international peace and security or, conversely, that withdrawal from them amounts to a threat to international peace and security.[29]

At first glance, this is at odds with the function assigned to the Security Council by the UN Charter, which is certainly not to act on the normative plane but rather on the factual plane. It sounds obvious that peace cannot be secured through normative commitments alone, but needs to be ensured through deeds. Nonetheless, States' acceptance of mechanisms of verification set up by treaties might enormously facilitate the Security Council in preventing crises from both arising and escalating. Therefore, it comes as no surprise that the Security Council has promoted widespread accession to the 1968 Non-Proliferation Treaty (NPT) and has encouraged States to accept verifications by the International Atomic Energy Agency (IAEA). The Security Council has even gone beyond this. On the occasion of one State announcing its withdrawal from the NPT, the Security Council issued a declaration in which it seemed to point out, although in quite ambiguous terms, that this withdrawal would be null and void.[30]

This tendency by the Security Council seems to indicate that the need to prevent threats to peace may require States not only to abstain from conduct in breach of fundamental interests of the international community, but also to enter into treaties, or to remain parties to treaties, which impose obligations to respect collective interests and which establish forms of international control over compliance with their provisions. The idea that the institutions set up to protect the collective interests and values of the international community are also entitled to impose a duty to enter into certain conventional engagements or prohibit withdrawal from them is not only fraught with problematic implications; but it also further highlights the public policy dimension of the law of treaties. This is a dimension of the law of treaties that needs to be further considered in order to elaborate some key issues which require in-depth research.

---

[29] See, among many, UNSC Res 1540 (2004), UNSC Res 1887 (2009).

[30] See UNSC Res 1718 (2006), where the Council stated that 'the international regime on the non-proliferation of nuclear weapons should be maintained', and demanded that 'the DPRK [Democratic People's Republic of Korea] immediately retract its announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons'. See also UNSC Res 1695 (2006) and UNSC Res 1874 (2009).

VII. OUTLOOK AND CONCLUSION

1. Contractualism, Objectivism and the Law of Treaties of the Future

If I were called, at the end of this hasty journey, to identify how the law of treaties will develop in the future, I would not be hesitant in pointing to the enduring tension between contractualism and objectivism. By contractualism I mean the tendency to look at treaties as mere international contracts, serving the individual interests of the parties. By objectivism I mean the tendency to look at treaties as normative instruments, serving not only private but also collective interests, and limited by public policy considerations.

The tension between these two tendencies featured in the drafting of the Vienna Convention and re-emerges periodically as one of the main factors prompting the development of the law of treaties.[31] In contemporary international law, treaties serve a plurality of aims. They can be used to set up international organizations, establish common actions and joint enterprises, determine the use of common resources, set up collective mechanisms of compliance and protect collective or universal values.[32] The decentralized structure of the international community and the correspondingly minor role assigned to institutional sources in the international order account for the use of treaties as sources of objective law. Accordingly, the law of treaties seems to be increasingly inspired by public policy considerations, whether pertaining to the community of the parties or to the international community at as a whole.

Many provisions of the Vienna Convention reflect the unsettled tension between antithetical functions assigned to treaties as mere contracts between international subjects or as instruments for creating objective law. This can be observed in the provisions concerning the vicissitudes of multilateral treaties, alternatively conceived of as a unitary normative tool or as a bundle of bilateral relations among the parties.

Article 60(2) is probably the most radical example in which the need for an objective assessment on the existence of a breach, and on the need to terminate or to suspend the treaty in consequence thereof, prevails over

---

[31] For a general account, see J Klabbers, 'The Community Interest in the Law of Treaties: Ambivalent Conceptions', in U Fastenrath, R Geiger, D-E Kahn, A Paulus, S von Schorlemer and C Vedder (eds), (OUP, 2011) 768.

[32] The multifarious nature of international treaties has long been recognized. For an appraisal, see AD McNair, 'The Functions and Differing Legal Character of Treaties' (1930) 11 British Ybk Intl L 100.

the right of unilateral assessment by every single party.[33] Other rules of the Convention, albeit recognizing the existence of collective interests of the parties, rely more heavily on the unilateral power of each party to assess its legal situation vis-à-vis other parties. A notable example can be found in Article 41, which recognizes the power of two or more parties to a multilateral treaty to determine the existence of the conditions allowing them to conclude an agreement to modify the terms of the treaty as between themselves.

In some cases, however, the balance of contractualism and objectivism reflected in the provisions of the Vienna Convention is challenged by the subsequent practice of States.

I have already mentioned the recent vicissitudes of the regime of reservations. Whereas the solutions adopted by the Vienna Convention tend to permit the splitting of the unitary regime of a treaty into a bundle of reciprocal ties among the parties, the most recent practice seems to mark, at least partially, a return towards a regime which can objectively assess the compatibility of reservations and objections with the object and purpose of a treaty.[34]

It is equally interesting to follow the evolving conception of contextual interpretation. According to the terms of Article 31(3) of the Vienna Convention, the context of a treaty for the purpose of interpretation includes both subsequent practice and subsequent treaties that are applicable in the relations between the parties. The purpose of this provision is apparently to contextualize interpretation in the normative background common to the parties. However, this would limit the normative context to be taken into account to the practice and treaties applicable in the relations between *all* the parties. In the case of multilateral treaties this condition will rarely ever be met. The opposite assumption, which would permit the interpretation of a treaty provision in the context of obligations binding on *some* of the parties to the multilateral treaty, would have the effect of splitting the contents of multilateral treaty obligations on a bilateral basis, an effect hardly reconcilable with the objective of contextual interpretation.

Both these antithetical positions are echoed in recent case law. In *Bosphorus,* the European Court of Human Rights interpreted the European Convention on Human Rights (ECHR), a treaty with a broad scope *ratione personae*, in the light of the obligations flowing for some of its

---

[33] See B Simma and CJ Tams, 'Reacting against Treaty Breaches' in DB Hollis (ed), *The Oxford Guide to Treaties* (OUP, 2012) 576.

[34] Supra, n 1 and n 9.

parties by the founding treaties of the European Union, which had more limited personal scope than the ECHR itself.[35] This solution does not appear particularly appropriate as it has the effect of making the protection accorded to individuals by the Convention dependent on international law rules not applicable in the relations between all the State parties. On the other hand, the recent case law of World Trade Organization (WTO) judicial organs points in a different direction: tending to exclude interpretation of WTO provisions in the light of international rules that are not binding on *all* of its parties. This conclusion seems to entail that WTO provisions must be interpreted objectively, in the interest of the community of its parties.[36]

2. Contractualism, Objectivism and the Protection of Fundamental Values

The tendency towards objectivism and the insufficiency of a purely contractualist approach becomes even more evident when the protection of universal values is at stake. Traditionally, the law of treaties was

---

[35] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECHR, 30 June 2005).

[36] See the Panel Report on *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292R, WT/DS293/R, adopted on 29 September 2006, especially para 7.70, where the Panel expressly took the view that Article 31(3)(c) of the Vienna Convention of the Law of Treaties requires 'consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted'. However, the scope of this statement was somewhat limited in para 7.72., where the Panel refused to take a position on whether rules of international law which are binding for all the parties to a dispute but not for all the parties to the WTO must be taken into account. In the same Report, the Panel seems to suggest the fascinating idea that other rules of international law, even if not binding for all the parties to the WTO, could nonetheless be considered as evidence of the 'ordinary' meaning to the given to WTO provisions. This assumption seems to pave the way for a wider consideration of international legal rules, regardless of their scope *ratione personae*, as enlightening the lines along which international law develops. The idea that besides international rules binding for all the parties to the WTO, which must be taken into account as part of the WTO context, other rules of international law, even not binding for all the parties to the WTO, can also be equally considered as informative of the state of the law, seems to shape the contours of a technique of global interpretation. It further reinforces the idea that interpretation of multilateral treaties is an objectively logical operation, which cannot be split according to the reciprocal relations among the parties.

neutral in this regard, as it was narrowly conceived of as the set of rules designed to govern the conduct of States in concluding, applying or terminating contractual engagements. In this respect, the existence of agreements to act in violation of fundamental values of the international legal order does not appear particularly relevant as long as these agreements are not implemented.

This approach has significantly changed with the inclusion of the notion of *jus cogens* in the Vienna Convention, a notion which, by nature, points to the existence of a sphere of values and interests that transcend the reciprocal interests of the parties. The inclusion of *jus cogens* among the grounds for invalidating or terminating a treaty expresses the idea that international law does not tolerate the existence of an agreement to violate fundamental values of the international community, regardless of whether this agreement is put into effect or not.

However, the Vienna Convention maintained an ambiguous approach towards *jus cogens*, which were still conceived as a sort of defence at the disposal of the parties to escape compliance with their contractual engagements. Consistent with this conception, Article 65 of the Convention confers the right to invoke *jus cogens* as grounds for invalidating or terminating a treaty to the parties to the treaty only.[37]

---

[37] This conception might have been borne in mind by the ICJ when it failed to entertain the dispute between Portugal and Australia in the case of *East Timor (Portugal v Australia)*, Judgment, ICJ Rep 1995 (30 June) 90. The decision of the Court did not mention *jus cogens*. It rather focused on the troubled relationship between the consensual nature of the jurisdiction of the Court and the *erga omnes* structure of the principle of self-determination. It is common knowledge that the Court declined to exercise its jurisdiction because a decision on the merits would have involved the assessment of the legal situation of Indonesia, a State not a party to the dispute. Indonesia was thus an indispensible party to that dispute, according to the doctrine established in the case of the *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland, and the United States)* ICJ Rep 1954, 19. However, one could wonder whether the doctrine of the indispensible party should apply at all when fundamental values of the international community are at stake. Its application would render a judicial determination of the breach of rules which establish the consequences of a serious breach of peremptory norms for third States under Article 41 of the Articles on State Responsibility virtually impossible, in particular when no State is especially affected by the violation. For more in-depth analysis on the impact of peremptory law on the traditional bilateralist conception which inspires the law of treaties, see, infra, para VIII. In its recent judgment on *Questions Relative to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, ICJ Rep 2012 (20 July) the ICJ found that:

The notion of *jus cogens* and its legal implications have been further elaborated, in particular in the process of codification of the law of State responsibility. Article 41(1) and (2) of the Articles on State Responsibility, adopted by the ILC in 2001, establish secondary obligations incumbent upon all the States of the international community flowing from a grave breach of a *jus cogens* norm. These include, among others, the obligation to cooperate to put an end to the breach, and the obligation not to recognize as lawful situations created by the breach nor to render aid or assistance in maintaining the breach. One can reasonably assume that a State not directly injured by the breach of a *jus cogens* norm has the right to claim the violation by another State of the secondary obligations incumbent upon all the States of the international community, in accordance with Article 41.[38] The main argument supporting this assumption is of a logical character. Many *jus cogens* rules are established in the interest of individual beneficiaries only, and breach of a *jus cogens* norm does not necessarily entail the existence of an injured State. The contrary assumption that the injured State is the only entity having the power to invoke the violation of the obligations laid down by Article 41 would render the existence of these obligations practically meaningless.

> any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.

This consideration was sufficient for the Court to recognize a *locus standi* to the claimant. If the obligations enshrined in Article 41 were obligations *erga omnes*, this finding would entail that every State is empowered to invoke the responsibility of another State alleged to have disregarded the consequences of a serious breach of peremptory norms of international law. The doctrine of the indispensible party was not applicable in this case, since the claim directly addressed the State alleged to have breached obligations *erga omnes partes*, and not a third State alleged to have disregarded the consequences of the breach. On the power of third parties to invoke the invalidity of a treaty conflicting with *jus cogens*, see, J Verhoeven, 'Invalidity of Treaties: Anything New in/under the Vienna Convention?', in E Cannizzaro (ed), *The Law of Treaties* (n 11) 297.

[38] For different views on this subject, see S Talmon, 'The Duty Not To Recognize as Lawful a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?', in C Tomuschat and JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff, 2006) 99; C Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP, 2006) especially 184; A Gianelli, 'Absolute Invalidity of Treaties and their Non-Recognition by Third States', in Cannizzaro (ed), *The Law of Treaties* (n 11) 333.

The recognition of the existence of a sphere of special secondary obligations arising out of the breach of a *jus cogens* norm, the violation of which could be invoked by all the members of the international community, can also influence the further development of the law of treaties. There seems to be no reason to deny that the special secondary obligations envisaged by Article 41 can be violated either through unilateral action or through the conclusion of a treaty. In recent practice the question has arisen more than once as to whether the conclusion of a treaty designed to regulate the effect of a *jus cogens* breach amounts to a violation of one or more of these obligations. It seems therefore logical to infer that every State of the international community is entitled to invoke the international responsibility of any State which has breached Article 41 through the conclusion of a treaty.

It is quite obvious that the conclusion of a treaty may constitute a violation of international obligations incumbent upon one or more of its parties and there is no point in dwelling upon it. Nevertheless, the assumption that the conclusion of a treaty may constitute a breach of *erga omnes* obligations laid down by Article 41, designed to prevent a *jus cogens* breach from continuing and from producing its intended effect, is quite striking and may have far-reaching implications. It seems to mark a significant step towards the objective nature of *jus cogens*. One can wonder whether this development might also entail the further implication that treaties concluded in breach of these obligations are void and must be terminated.[39]

All in all, the codification of the law of State responsibility is telling as regards the development of international law which occurred between the adoption of the Vienna Convention and the elaborations of the ILC Articles. Still based on a bilateralist scheme, it is nonetheless inspired by

---

[39] The tantalizing but simplistic idea that Article 41 is, by itself, part of *jus cogens* seems to be misguided. It would equate offences against the fundamental values of the international community with conducts of a lesser degree of severity. One can rather suggest that the existence of special consequences flowing from a grave breach of *jus cogens* rules has the effect of enlarging the notion of conflict adopted by Articles 53 and 62 of the Vienna Convention, with the consequence that treaties which purport to regulate unlawful situations arising out of a *jus cogens* breach are, in turn, conflicting with *jus cogens*. This conclusion could be based on the hierarchical nature of the rule of conflict set up by Articles 53 and 64 of the Vienna Convention. Hierarchy expresses the idea that higher values are offended not only by rules which purport to violate them directly, but also by rules which aim to produce effects inconsistent with the *ordre public*. For some discussion of this approach, I refer to my study 'A Higher Law for Treaties', in E Cannizzaro (ed), *The Law of Treaties* (n 11) 425.

a communitarian conception which applies where fundamental interests of the international community are at stake. It seems to point to a road that the law of treaties could follow in the future.