

# The Interrelation Between the Law of the Sea Convention and Customary International Law

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## I. INTRODUCTION

The 1982 *United Nations Convention on the Law of the Sea* (LOSC) is a successful attempt by the international community to codify and unify the law of the sea. After long negotiations, the LOSC opened for signature at the Third United Nations Conference on the Law of the Sea

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(UNCLOS III) in 1982. Together with its two formal associations, the *Part XI Implementation Agreement 1994*<sup>1</sup> and the *Straddling and Migratory Fish Stocks Agreement 1995*,<sup>2</sup> it is regarded as one of the most comprehensive documents ever adopted by the international community.<sup>3</sup> The LOSC not only succeeded in addressing all topics covered by its ancestors, the four 1958 *Geneva Conventions*,<sup>4</sup> but it actually succeeded in addressing much more. More importantly, at least to this author's perception, it created a new approach in developing customary international law by adopting a "package deal theory." This article submits that by combining this innovative approach with three other methods specified by the International Court of Justice (ICJ)—that is, to codify or modify preexisting customary international norms, to crystallize emerging customary international norms, and to initiate a progressive process of developing customary international norms—the LOSC represents customary international law to a very wide extent. As a result, at least in the context of the law of the sea, the distinction between treaty law and customary law is blurred.

## II. CUSTOMARY INTERNATIONAL LAW

Customary international law is the law that is derived from state custom or practice. It is continuously evolving, mirroring fundamental shifts produced by the ever-changing needs of the international community,<sup>5</sup> and is honored as "the foundation stone of the modern law of nations."<sup>6</sup> It is also one of the sources of international law recognized

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1. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 42.

2. The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, 34 I.L.M. 1542.

3. BO JOHNSON THEUTENBERG, *THE EVOLUTION OF THE LAW OF THE SEA: A STUDY OF RESOURCES AND STRATEGY WITH SPECIAL REGARD TO THE POLAR REGIONS*, 7 (1984).

4. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 599 U.N.T.S. 285; *Convention on the Continental Shelf, Apr. 29, 1958*, 15 U.S.T. 471, 499 U.N.T.S. 311. *See generally* United Nations Division for Ocean Affairs and the Law of the Sea, "The United Nations Convention on the Law of the Sea (A Historical Perspective)" (1998), available at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm) (last visited Jan. 26 2006).

5. Hugo Caminos & Michael R. Molitor, *Perspectives on the New Law of the Sea: Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871, 882 (1985).

6. MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW*, 28 (Blackstone, 4th ed. 2000) (1990).

by the authoritative statement of Article 38(1) of the *Statute of the International Court of Justice*, which states: "The Court . . . shall apply . . . international custom, as evidence of a general practice accepted as law. . . ." <sup>7</sup> Two elements are identified by the statute to determine whether custom exists in a particular circumstance: (1) general state practice, or the actual behavior of states, and (2) the acceptance of a practice by law, or *opinio juris*—the conviction that the practice is either required or allowed by customary international law. <sup>8</sup>

Traditionally, legal theory requires these two elements be proven in order to establish the existence of a rule of customary international law. In regard to proving actual state practice, several factors should be taken into account concerning the nature of the practice, including the duration and repetition of the practice, the level of compliance by states, uniformity, and consensus. These elements are flexible and depend on surrounding circumstances. <sup>9</sup>

However, modes of developing new rules of customary international law have greatly changed since the Second World War. The result of such changes is that the orthodox approaches to both the sources of international law and the evaluation of evidence of the creation or development of customary international law have been replaced by international multilateral conventions. <sup>10</sup> Although determining that a specific treaty provision has become customary international law is often difficult and complex, <sup>11</sup> conventions are still regarded as a legitimate means of creating law. <sup>12</sup> Also, it is widely recognized that in

7. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060 T.S. 993 [hereinafter I.C.J. Statute]. The other sources are international conventions, the general principles of law recognized by civilized nations, judicial decisions (subject to the provisions of art. 59) and the teachings of the most highly qualified publicists of the various nations. See *id.*

8. MALCOLM N. SHAW, *INTERNATIONAL LAW*, 58-59 (Cambridge Univ. Press, 4th ed. 1997) (1977); R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA*, 5-6 (rev. ed. 1988); Alexei Zinchenko, *The UN Convention on the Law of the Sea and Customary Law*, <http://www.geocities.com/enriquearamburu/CON/col5.html> (last visited Sept. 2005).

9. SHAW, *supra* note 8, at 59-60.

10. See Louis B. Sohn, *The Law of the Sea: Customary International Law Developments*, 34 AM. U. L. REV. 271, 273 (1984); Louis B. Sohn, "'Generally Accepted' International Rules", 61 WASH. L. REV. 1073, 1078 (1986).

11. Kathryn Surace-Smith, *United States Activity Outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage*, 84 COLUM. L. REV. 1032, 1035 (1984).

12. SHAW, *supra* note 8, at 73.

some circumstances conventions can generate customary rules of law that are binding on all states, including nonparties.<sup>13</sup>

The ICJ has identified three relatively uncontroversial circumstances in which international conventions may be relevant to finding customary international law. These circumstances are when a convention: (1) codifies existing customary international law; (2) causes customary international law to crystallize; and (3) initiates the progressive development of new customary international law. In each of these circumstances, states' negotiation and adoption of certain international agreements are evidence of customary international law.<sup>14</sup>

Nonetheless, this does not end the inquiry. Scott and Carr argue that three additional conditions must also be satisfied. First, a treaty must be accepted by a sufficient number of states in the international system; second, there must be a significant number of state parties to the treaty whose interests are significantly affected by the treaty; and third, the treaty provisions may not be subject to reservations by the signatories. Scott and Carr argue that only when these additional conditions are fulfilled is a multilateral treaty generalizable beyond the particulars of the treaty to serve as a basis for customary international law.<sup>15</sup>

In addition to the circumstances addressed by the ICJ, UNCLOS III adopted the "package deal theory"<sup>16</sup> which has, arguably, opened a new avenue in incorporating customary international law. Meanwhile, there is also a proposal to adopt "declarative law." This term refers to those state actions that are "not quite custom and not quite treaty" but might themselves become binding or prompt the creation of more customary law or treaty law.<sup>17</sup> However, for the purpose of discussing the interrelation between the LOSC and customary international law, this article only discusses the three methods depicted by the ICJ and the package deal theory.

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13. Surace-Smith, *supra* note 11 n.10.

14. Jonathon I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 971 (1986); see *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, 37-39 (Feb. 20); Wladyslaw Czaplinski, *Sources of International Law in the Nicaragua Case*, 38 INT'L & COMP. L.Q. 151, 153 (1989).

15. Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y, 71, 72 (1996).

16. Luke T. Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. 541, 566 (1983).

17. Katherine N. Guemsey, Comment, *The North Sea Continental Shelf Cases*, 27 OHIO N.U. L. REV. 141, 157-58 (2000).

### III. THE LOSC AND ITS ASSOCIATED INSTRUMENTS REPRESENT CUSTOMARY INTERNATIONAL LAW TO A WIDE EXTENT

The LOSC 1982 is a remarkable achievement. With 320 articles, nine annexes and two formally associated international instruments—that is, *Part XI Implementation Agreement* 1994 and *Straddling and Migratory Fish Stocks Agreement* 1995—the LOSC is considered one of the most comprehensive documents ever adopted by the international community.<sup>18</sup> The LOSC covers all topics covered by the four 1958 *Geneva Conventions* and many more. While many of its provisions repeat verbatim those of the *Geneva Conventions*, some contain different or more detailed rules on matters covered by the *Geneva Conventions*, and others spell out legal regimes.<sup>19</sup> Environmental issues and the preservation and conservation of the living natural resources of the sea are also given considerable space. The Convention's aim is to rationalize the new tendencies relating to the law of the sea and to achieve uniform international development of new laws.<sup>20</sup> Its adoption is a successful incorporation of a large number of customary international laws,<sup>21</sup> and it serves as a comprehensive multilateral treaty concerning the conduct of ships on the high seas and in the territorial seas of foreign states.

In light of the ICJ's observation mentioned above, this article submits that the LOSC not only represents customary international law to a wide extent, but also constitutes an innovation in the development of customary international law. In addition to codifying and modifying antecedent customary international law, crystallizing emerging customary international law or creating instant customary international law, and initiating a progressive development of customary international law,<sup>22</sup> the LOSC employed—or, more exactly, pioneered—the “package deal” theory. In some circumstances, these methods overlap.

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18. See THEUTENBERG, *supra* note 3.

19. D. J. HARRIS, *CASE AND MATERIALS ON INTERNATIONAL LAW*, 370 (Sweet & Maxwell, 5th ed. 1998).

20. THEUTENBERG, *supra* note 3.

21. Lee, *supra* note 16, at 554.

22. *Id.* at 542-43.

*A. Codifying and Modifying Preexisting Customary  
International Law*

A convention may codify preexisting customary international law and bind non-party states. Apart from the ICJ ruling in the *North Sea Continental Shelf* case,<sup>23</sup> (see Customary International Law, *supra*), the 1969 *Vienna Convention on the Law of Treaties* provides that, although a treaty does not create obligations or rights for a third state without that state's consent,<sup>24</sup> a rule set forth in a treaty may become binding on that state as a customary rule of international law.<sup>25</sup> Caminos and Molitor interpret this concept to mean that provisions of multilateral treaties that reflect customary norms can be invoked either against, or by third states.<sup>26</sup> For example, Article 2(6) of the U.N. Charter provides that states that are not members of the United Nations shall "act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." As used in the U.N. Charter, these principles signify the renunciation of force in international relations,<sup>27</sup> non-intervention by the U.N. in the internal affairs of states,<sup>28</sup> the sovereign equality of states and the right of self-determination.<sup>29</sup> Because these principles have been universally recognized as fundamental to international law,<sup>30</sup> there should be little doubt that they were preexisting customary international norms prior to codification in the U.N. Charter.

Likewise, many antecedent customs have been incorporated into the provisions of the LOSC. An example is innocent passage: the right enjoyed by all ships to travel freely through another state's territorial sea<sup>31</sup> without entering internal waters or calling at a roadstead or port facility.<sup>32</sup> Such passage should not undermine peace, good order or security of the coastal state,<sup>33</sup> and should further be continuous and expeditious, except for any stopping and anchoring incidental to ordinary navigation, or where there is a need to render assistance to persons, ships or aircraft in danger or distress.<sup>34</sup>

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23. See *North Sea Continental Shelf* (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3 (Feb. 20).

24. *Vienna Convention on the Law of Treaties* art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

25. *Id.* art. 38. See also Caminos & Molitor, *supra* note 5, at 879.

26. Caminos & Molitor, *supra* note 5, at 879.

27. U.N. Charter art. 2, para. 3 & 4.

28. *Id.* art. 2, para. 7.

29. *Id.* art. 1, para. 2; see also *id.* art. 2, para. 1.

30. Czaplinski, *supra* note 14, at 156.

31. U.N. Convention on the Law of the Sea, art. 17, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *LOSC*].

32. *Id.* art. 18, para. 1.

33. *Id.* art. 19.

34. *Id.* art. 18, para. 2.

In fact, the rule of innocent passage was an accepted state practice prior to the passage of the LOSC. As early as 1869, the English common law held that there was a public right of navigation in waters within the boundaries of England for citizens and aliens alike.<sup>35</sup> That principle was affirmed in a series of cases.<sup>36</sup> Underlying this idea is the view that territorial seas must be beyond the limits of any single nation, otherwise the right of innocent passage would be undermined. The U.S. Secretary of State acknowledged the rule of innocent passage, articulated in *Foreman v. Free Fishers of Whitstable* in 1886, and asserted it against Spain in 1895 when an American ship was fired on off the coast of Cuba.<sup>37</sup> The *Foreman* rule was codified by several American states, as well as internationally by the German Society of International Law and The Hague Codification Conference.<sup>38</sup> In 1958, the *Geneva Convention* adopted the rule of innocent passage at the First United Nations Conference on the Law of the Sea (UNCLOS I), attended by eight-six states.<sup>39</sup> Considering the duration and extent of practice and uniformity<sup>40</sup> of the UNCLOS I, the first element of customary international law, actual states' practice, is satisfied. In addition, court decisions and conventional provisions lend support to the suggestion that the second element, *opinio juris*, is also satisfied, because the legal obligations imposed by UNCLOS I prevent the practice from being a mere "rule of comity or courtesy."<sup>41</sup>

Apart from innocent passage, the LOSC also incorporates many other principles that derive from custom. An example is the freedom of the high seas guaranteed by Article 87, which states: "The high seas are open to all States, whether coastal or land-locked."<sup>42</sup> Another example is the coastal state sovereignty over territorial waters under Article 2, which provides: "The sovereignty of a coastal State extends, beyond its

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35. See *Foreman v. The Three Fishers and Dredgers of Whitstable*, (1870) 4 L.R.E. & I. App. 266 (H.L.) (U.K.); D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 263-64 (I.A. Shearer ed., 1982).

36. See *R. v. Keyn*, (1876) L.R. 2 Ex. D. 63 (U.K.).

37. O'CONNELL, *supra* note 35, at 265.

38. *Id.* at 266 n.46.

39. Convention on the Territorial Sea and the Contiguous Zone art. 14, Apr. 29, 1958 15 U.S.T. 1610, 516 U.N.T.S. 214. See also CHURCHILL & LOWE, *supra* note 8, at 13; O'CONNELL, *supra* note 35, at 265-69.

40. Taking into account that many states today were the colonies of the British Empire at the time, the number of state attendance should be larger.

41. CHURCHILL & LOWE, *supra* note 8, at 6.

42. *Id.* at 165.

land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”<sup>43</sup>

Nonetheless, convention provisions usually modify customary norms to a certain extent. Otherwise, as Czaplinski notes, the usefulness of codification is put in question, because it is rare for certain conventional and customary regulations to be identical.<sup>44</sup> An example of this is the size of a state’s territorial sea. Prior to the UNCLOS III, the territorial sea limit was three-miles under customary international law.<sup>45</sup> The three-mile limit, suggested by Galiani in 1782 and adopted by the United States in 1793, gained widespread and rapid acceptance, and the limitation survived throughout the 19th century.<sup>46</sup> Although in 1960 the great majority of states still claimed territorial seas of less than twelve miles, there was a steady shift towards wider territorial seas, especially among newly independent states. By the closing stages of the UNCLOS III, the great majority of states had reversed their earlier position, claiming territorial seas of twelve miles or more. Article 3 of the LOSC addressed this issue, modifying the three-mile preexisting customary rule by providing that the breadth of the territorial sea may not exceed twelve nautical miles.<sup>47</sup> This change is a typical example of a modification of preexisting customary international law. However, Article 3 may be a product of the overlap between the modification of preexisting customary international law and the crystallizing of emergent customary international law. The latter will be discussed below.

Other examples of the modification of existing customary international law may be seen in articles governing deep seabed mining and highly migratory species fishing. Traditionally, deep seabed mining was governed by the doctrine of freedom of the high seas,<sup>48</sup> whereas Article

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43. Scott & Carr, *supra* note 15, at 328-30 (discussing customary international law and its influence on the U.N. Convention on the Law of the Sea).

44. Czaplinski, *supra* note 14, at 153-54.

45. O’CONNELL, *supra* note 35, at 165.

46. CHURCHILL & LOWE, *supra* note 8, at 65-66.

47. *Id.* at 66-67.

48. See Surace-Smith, *supra* note 11, at 1036-38 (discussing the freedom of the high seas doctrine and the effect of the 1958 Convention of High Seas on seabed mining). The Preamble of the 1958 Convention of the High Seas states that its purpose is “to codify the rules of international law relating to the high seas” and to recognize “the following provisions as generally declaratory of established principles of international law.” Art. 1 provides: “The term ‘high seas’ means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.” Art. 2 provides: “The high seas being open to all nations . . . Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law.” Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.



134 of the LOSC provides that activities in the seabed<sup>49</sup> shall be governed by Part XI of the LOSC.<sup>50</sup> In addition, the traditional regime allowed free fisheries on the high seas.<sup>51</sup> However, Article 64 of the LOSC requires that “[t]he coastal State and other States . . . shall co-operate . . . with a view to ensuring conservation and promoting the objective of optimum utilization of such species . . . both within and beyond the exclusive economic zone . . . .” These provisions of the LOSC, as viewed by the author, have modified the traditional concept of freedom of the high seas.

*B. Crystallizing Emergent Customary International Law or  
Creating Instant Customary International Law*

In some decisions, the ICJ expressed its willingness to recognize not only a text that codifies preexisting principles of international law, but also one that crystallizes an “emergent rule of customary law.”<sup>52</sup> In the *North Sea Continental Shelf* case, the ICJ held that once a principle is generally accepted at an international conference, a rule of customary international law can emerge even before the convention is signed. That is, “a rule that is conventional in origin can pass into the general *corpus* of international law and be accepted as such by the *opinio juris* and thus ‘become binding even for countries which have never, and do not, become parties to the Convention.’”<sup>53</sup> The Court further added that this constitutes one of the recognized methods by which new rules of customary international law may be formed.<sup>54</sup> The court in *Tunisia v. Libyan Arab Jamahiriya*<sup>55</sup> confirmed this position.<sup>56</sup> As with the *North Sea Continental Shelf* case,<sup>57</sup> the ICJ held that it would “not ignore any provision of the draft convention if it came to the conclusion that the

49. LOSC, *supra* note 31, art. 1, para. 1 (stating that the term “‘Area’ means the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.”).

50. *Id.* at art. 134, para. 2 (stating that “activities in the ‘Area’ shall be governed by the provisions of this Part.”). See also CHURCHILL & LOWE, *supra* note 8, at 182.

51. Convention on the High Seas art. 2(2), April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (explicitly stating that freedom of the high seas comprises, *inter alia*, freedom of fishing).

52. Sohn, *supra* note 10, at 1077.

53. *North Sea Continental Shelf* (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 41 (Feb. 20). See also Sohn, *supra* note 10, at 1076.

54. Sohn, *supra* note 10, at 1076.

55. *Continental Shelf (Tunis v. Libya)*, 1982 I.C.J. 18 (Feb. 24).

56. Sohn, *supra* note 10, at 278.

57. See *North Sea Continental Shelf*, 1969 I.C.J. at 39.

content of such a provision is binding upon all members of the international community because it embodies or crystallizes a preexisting or emergent rule of customary law.”<sup>58</sup> Therefore, it is not difficult to see that crystallizing emergent law is an important step in the formation of customary international law, and represents an efficient way to create it.

In the context of the LOSC, there are also crystallized emergent norms, for example, the adoption of the transit passage regime. Transit passage is the exercise of freedom of navigation and overflight for the purpose of continuous and expeditious transit between one part of the high seas or exclusive economic zones (EEZ) and another part of the high seas or EEZ.<sup>59</sup> In contrast to innocent passage, transit passage permits aircraft to fly through international straits.<sup>60</sup> Additionally, transit passage is allowed in “normal mode”<sup>61</sup> which, as Astley and Schmitt suggest, is “a fact with direct military implications” that “is interpreted to include launching and recovering aircraft and helicopters”<sup>62</sup> and is non-suspendable.<sup>63</sup>

It is widely accepted that transit passage is not a codification of preexisting customary international law.<sup>64</sup> The genesis of transit passage was shaped by several interrelated factors and developments in the law of the sea. Among them is the preservation of the high seas traditional freedom of navigation and overflight in international straits that are girded by often overlapping twelve-mile territorial sea claims.<sup>65</sup> This problem was solved with the creation of the transit passage regime at the UNCLOS III.<sup>66</sup> Thus, transit passage is an emergent rule of customary law that was crystallized by the LOSC. Other examples include the right of archipelagic sea lanes passage,<sup>67</sup> the establishment of Exclusive

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58. Continental Shelf, 1982 I.C.J. at 38.

59. LOSC, *supra* note 31, art. 38, para. 2.

60. *Id.* art. 38, para. 1.

61. *Id.* art. 39(1)(c).

62. John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A. F. L. REV. 119, 133 (1997).

63. LOSC, *supra* note 31, art. 44; *see also*, Astley & Schmitt, *supra* note 62, at 134.

64. Surace-Smith, *supra* note 11, at 1054; Zinchenko, *supra* note 8; Lee, *supra* note 16, at 550; William L. Schachte, Jr. & J. Peter A. Bernhardt, *International Straits and Navigational Freedoms*, 33 VA. J. INT'L L. 527, 530-31 (1993).

65. Schachte & Bernhardt, *supra* note 64, at 530.

66. United Nations Division for Ocean Affairs and the Law of the Sea, *supra* note 4.

67. LOSC, *supra* note 31, art. 53(3)-(4) (stating that “[a]rchipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an [EEZ] and another part of the high seas or an [EEZ]”, and “[s]uch sea lanes and air routes . . . shall traverse the archipelagic waters and the adjacent territorial sea. . .”). *See also* Lee, *supra* note 16, at 563.

Economic Zones (EEZ),<sup>68</sup> recognition of the common heritage of mankind for international seabed areas,<sup>69</sup> and others.<sup>70</sup>

*C. Initiating Progressive Development of Customary  
International Law*

A third method of progressively developing customary international law was formulated by the ICJ in the *North Sea Continental Shelf* cases.<sup>71</sup> There, the ICJ addressed whether the Federal Republic of Germany, which had signed but not yet ratified the 1958 *Geneva Continental Shelf Convention*, should be bound by the delimitation article (Article 6) so that the equidistance principle would be employed to determine the boundary of the continental shelf between Germany, Denmark and the Netherlands. In responding to Germany's argument that it was not a party to the Convention and consequently should not be subject to Article 6,<sup>72</sup> the court accepted that Germany could not be contractually bound by the Convention in the absence of ratification.<sup>73</sup> Nonetheless, the ICJ took the position that the absence of treaty formalities did not necessarily preclude a State from being bound by

68. LOSC, *supra* note 31, part V, art. 55 (stating that "[t]he exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in [Part V of LOSC], under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."). See also Charney, *supra* note 14, at 987.

69. LOSC, *supra* note 31, art. 136 (stating that "[t]he 'Area' [as defined in art. 1(1)] and its resources are the common heritage of mankind"). See also Lee, *supra* note 16, at 563.

70. One of the most noticeable examples is the new definition of the continental shelf. Article 1 of the 1958 Geneva Convention on the Continental Shelf used the term "continental shelf" to refer "(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas"; "(b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands." Convention on the Continental Shelf art. 1, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311. By contrast, the LOSC defines a coastal State's continental shelf as "the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." LOSC, *supra* note 31, art. 76. See also Charney, *supra* note 14, at 988; Lee, *supra* note 16, at 563.

71. *North Sea Continental Shelf* (F.R.G. v. Den. & Neth.) 1969 I.C.J. 3 (Feb. 20).

72. *Id.* at 20, para. 15.

73. *Id.* at 25, para. 27.

estoppel, where the State's past conduct and declarations were sufficient to induce detrimental reliance by other States.<sup>74</sup>

The ICJ rejected the argument that Germany was bound by Article 6 through the doctrine of estoppel, finding Germany's acts did not provide clear acceptance of the delimitation regime.<sup>75</sup> Germany could, however, be bound by general international law or customary international law.<sup>76</sup> The ability of parties to make unilateral reservations to certain provisions undermines the argument that such provisions represent codified preexisting norms or crystallized emergent customary norms.<sup>77</sup> As the ICJ explained, customary international law must be equally binding on all members of the international community.<sup>78</sup> The ability of States to make reservations to Article 6 was taken as evidence that the equidistance method in that provision had not been intended to be an emerging customary law.<sup>79</sup> Despite dismissing the emergent customary status of Article 6, the ICJ created a new avenue for developing customary international rules. The Court noted that, while articles subject to reservation under a convention are generally not regarded as declaratory of previously existing or emergent rules of law, such articles may eventually pass into the general *corpus* of customary international law through positive legal processes.<sup>80</sup> Such transitions can occur through recognized methods of forming new rules of customary international law, including the norm-creating character of the rule itself, the widespread and representative participation of States in the convention, and the existence of subsequent uniform state practice.<sup>81</sup> Charney refers to this method as initiating the progressive development of new law.<sup>82</sup>

This author argues that the method of initiating progressive development of customary international law should be applicable not only to those articles that are subject to reservation, but also to those that are not subject to reservation. In some situations, it may be difficult for certain

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74. In discussing estoppel, the ICJ said [W]hen a number of States . . . have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested . . . it is not lightly to be presumed that a State which has not carried out these formalities . . . has nevertheless somehow become bound in another way. . . . [O]nly . . . the existence of a situation of estoppel could suffice to lend 'substance to this contention.

*Id.* at 25-26, para. 28 & 30.

75. *Id.* at 26, para. 30-31.

76. *Id.* at 28-29, para. 37 (discussing the contentions of the Netherlands and Denmark).

77. *Id.* at 38-39, para. 63.

78. *Id.*

79. *Id.*

80. *Id.* at 39, para. 64.

81. *Id.* at 41-43, art. 71-75.

82. Charney, *supra* note 14, at 971.

non-reservation provisions to fit within any of the aforementioned methods of developing customary international law, despite the provisions' binding force. An example is Part XI 1982 of the LOSC. Article 309 of the LOSC provides that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." In the absence of any reservation article, Part XI 1982 would probably be excluded from the possibility of initiating the progressive development of customary international law simply because it is not subject to reservation.

Likewise, it is difficult for Part XI 1982 to ripen into customary international law by codifying preexisting norms or by crystallizing emerging customary norms. Although the LOSC was originally signed by 119 states,<sup>83</sup> the customary status of Part XI 1982, a seabed mining regime, was cast into doubt due to the objections made by the United States and twenty-two other industrialized states. These states had a strong interest in deep seabed mining activities and the governing provisions no doubt would have affected them significantly.<sup>84</sup> Hence, the absence of consent of these interested states may have rendered the conditions suggested by Scott and Carr (*see* Customary International Law section above) unfulfilled. Consequently, Part XI 1982 could not become customary international law through crystallization of emerging customary norms. For the same reason, this section does not constitute a codification of preexisting customary norms. Further, as the element of state practice was not likely established, Part XI could not claim to be traditional custom.

This article argues that Part XI 1982 should be able to initiate the process of developing customary international law, similar to the reservation provisions described above. Arguably non-reservation provisions are closer to *opinio juris* than those provisions subject to reservation, and such provisions satisfy the third condition suggested by Scott and Carr to finding customary international law. If provisions subject to reservation can initiate a process of developing new customary law, there is no

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83. G.A. Res. 38/59. U.N. Doc. A/RES/38/59 (Dec. 14, 1983), available at <http://www.un.org/documents/ga/res/38/a38r059.htm>. On June 24, 2005, the number of states parties increased to 148. See Press Release, States Parties to Law of the Sea Convention to Meet in New York, U.N. Doc. SEA/1822 (June 16-24, 2005), available at <http://www.un.org/News/Press/docs/2005/seal822.doc.htm>.

84. See *U.S. Policy and the Law of the Sea*, 82 DEP'T ST. BULL. 54 (1982); Bernard H. Oxman, *Law of the Sea Forum: the 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea*, 88 AM. J. INT'L L. 687, 688 (1994).

logical reason why Part XI 1982 should not be able to do so. If this view is accepted, then the subsequent signing of the Part XI Implementation Agreement 1994 by the United States and other industrial states may be regarded—arguably—as a milestone on its journey of becoming recognized customary law.

### *1. Package Deal Theory*

The “package deal” theory was employed by the UNCLOS III in negotiating and adopting the LOSC. This theory rules out any selective application of the LOSC as “the problems of ocean space are closely interrelated and have to be dealt with as a whole.”<sup>85</sup> A remark by Deputy Foreign Minister Gouzenko of the former Soviet Union may be seen as a good background against which to explain this approach:

The new Convention represents a complex and indivisible package of closely interrelated compromise solutions to all major problems of the law of the sea . . . [O]ne cannot adopt a selective approach to the norms of international law. The Convention is not a basket of fruit from which one can pick only those one fancies. As is well known, the new comprehensive Convention has been elaborated as a single and indivisible instrument, as a package of closely interrelated compromise decisions.<sup>86</sup>

Therefore, if it is accepted that the LOSC has generated any customary international norms, those norms must be generated as a whole. That is, new legal rights created by the LOSC cannot be claimed individually by nonparties as customary norms.<sup>87</sup> Furthermore, as mentioned above, the ICJ specified that consensus at a conference by a vast majority of the participants is a legitimate method of creating a general norm of international law.<sup>88</sup> Thus, this article submits that at the time of consensus, Part XI 1982 may have already become customary international law since the majority of the LOSC was adopted as customary international law. By extension, the two international instruments formally related to the LOSC—the *Part XI Implementation Agreement* 1994 and the *Straddling and Migratory Fish Stock Agreement* 1995—should be managed with the LOSC as a whole under the package deal theory, as these instruments form an indivisible trinity by their formal association with the LOSC.

In some circumstances, the methods of developing customary international law discussed above may overlap. For instance, adoption of

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85. U.N. GAOR, 11th Sess., 183rd plen. Mtg. at 3, U.N. Doc. A/CONF.62/SR.183 (Sep. 22, 1982) (quoting statement made by Ambassador Arias-Schreiber of Peru). See Lee, *supra* note 16 n.112.

86. See Caminos & Molitor, *supra* note 5, at 877.

87. Surace-Smith, *supra* note 11, at 1057.

88. See Sohn, *supra* note 10, at 279.

the twelve-mile territorial sea limit at the UNCLOS III may be regarded as both crystallizing the emergent customary international law and codifying and modifying the preexisting norm, as discussed above. Part XI 1982 represents another example where overlapping methods may lead to the development of customary international law. Part XI can be seen as obtaining customary international law status by initiating the progressive development of customary international law, as well as by incorporation under the package deal theory. These methods could also be used to justify awarding customary law status to the two international instruments formally associated with the LOSC. The *Part XI Implementation Agreement* 1994 and the *Straddling & Migratory Fish Stock Agreement* 1995 figured as emergent norms, which became part of the LOSC "package deal" as a result of consensus; they perhaps represent the beginning development of customary international law as well. These agreements may be regarded as either having been incorporated into customary international law or progressing towards customary international law.

On the other hand, some provisions may only represent practical accommodations dependent upon an intricate web of interrelated bargains. "The degree, therefore, to which a given provision may be defined as evidentiary of the present opinion of [s]tates as to existing, emerging, or preferred customary law, is difficult to fix."<sup>89</sup> However, it can be confidently asserted that the LOSC and its formal associates, the *Part XI Implementation Agreement* 1994 and the *Straddling & Migratory Fish Stock Agreement* 1995, represent customary international law to a very wide extent due to the combination of the formulas discussed above.

#### IV. CONCLUSION

Customary international law is constantly evolving in response to the developing needs of the international community. The way in which customary international law is created has also experienced great change. Today, multilateral conventions have become the dominant source of customary international law, and represent both a quicker and more efficient means of establishing international norms than the older methods. Unlike the traditional mode in which customary international

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89. Lee, *supra* note 16, at 567 (quoting Brian Smith, *Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection*, 21 COLUM. J. TRANSNAT'L L. 49, 72 (1982)).

law was developed by establishing actual state practice and *opinio juris*, multiple international conventions create customary international rules through a host of different methods. Three relatively uncontroversial methods were specified by the ICJ in the *North Sea Continental Shelf* case: (1) codifying or modifying preexisting customary international norms; (2) crystallizing emerging customary international norms; and (3) initiating a progressive process of developing customary international norms. All of these methods may be identified in the LOSC, and in its associated Agreements. In addition, the LOSC has pioneered a fourth avenue for creating customary international principles through the adoption of its package deal theory, and is honored as “hav[ing] caused [a] revolution in state practice.”<sup>90</sup> This article submits that, through the combined force of these four methods, the LOSC represents customary international law to a very wide extent, and consequently binds all states to its provisions, governing human activities on the ocean.

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90. Zinchenko, *supra* note 8.