The Removal of Offshore Installations and Conflicting Treaty Obligations As a Result of the Emergence of the New Law of the Sea: A Case Study

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Treaty obligations in the law of the sea context can be amended, modified, or terminated in a variety of ways. Frequently the substantive coverage of a new or proposed treaty will overlap the scope of a preexisting treaty already in force. Alternatively, the subsequent practice of states parties may depart from the generally accepted norm thereby creating a new norm and justifying the divergent practice. This complex manner in which international law evolves can be illustrated by examining the rules regarding the removal of offshore installations. This Article analyzes the interacting factors that produce binding obligations on states parties by tracing the development of the law governing offshore installation removal.

INTRODUCTION

Recent focus in the development of the new customary law of the sea has been upon norm creation. However, much of the 1982 United Nations Convention on the Law of the Sea (LOS Convention)¹ and the practice and opinio iuris which it does and will pro-


duce, are inconsistent with conventional rules already in existence dealing with the same or similar subject matter. Chief amongst these earlier instruments are, of course, the four Geneva Conventions of 1958. While international treaty law defines, as specifically as possible, solutions to the conflict of lawmaking treaties, such solutions have no role until a later treaty enters into force because, until that point, there is no conflict as regards treaty obligations. Indeed, the solutions chosen by the LOS Convention itself to the problems of its relationship and those of its parties to earlier treaty obligations presently suffer from the same lack of effect.

The position of the LOS Convention with regard to pre-existing instruments is, unfortunately, even less well-defined under rules of customary law. While the Convention remains inchoate, it does have a degree of authority in terms of those provisions which are generally held to be declaratory of customary international law, and those which are at least generative of such norms. Accordingly, states have claimed and no doubt will claim in the future that their earlier obligations may no longer apply to them as a result of the existence of the later multilateral, law-making treaty. However, such claims must be treated with an element of caution. Professor O'Connell has written of the oceans and the legal regime by which they are governed as one of the most obvious areas of tension between the desire for change and the need for stability in international law. He has pointed out that state practice has become less of a reflection of the old rules and more of a means for producing new ones quickly. Nevertheless, even in the context of the Third United Nations Conference on the Law of the Sea (UNCLOS III) process, it is necessary


4. See Galligan, Wrapping up the UNCLOS III "Package": At Long Last the Final Clauses, 20 Va. J. Int'l L. 347 (1980). Article 3111(1) states that the new Convention shall "prevail" as between states parties over the 1958 Convention. LOS Convention, supra note 1, art. 3111(1), para. 1.

to ensure that the desire for change and the requirement of stability remain in balance. The fundamental norm of *pacta sunt servanda* should not lightly be overriden.

A current problem which illustrates this dichotomy in actual practice concerns the rules regarding the decommissioning and abandonment of offshore installations. A possible conflict has arisen between the earlier 1958 rules and the later rules of the 1982 LOS Convention. This inconsistency provides an interesting case study of the complicated process whereby the existence of new norms may operate to invalidate or supersede earlier ones, particularly in the context of the new law of the sea.

**DEVELOPMENT OF THE ABANDONMENT PROBLEM**

*Description of the Physical and Economic Problem*

Although, hitherto, there have been few abandonments of offshore installations, awareness of the implications of the issue has recently increased in both the United States and the United Kingdom, as well as in other countries.6 Although most of the estimated 5,500 platforms within the United States jurisdiction are located in less than 400 feet of water, making them relatively easy and inexpensive to remove, costs rise dramatically for structures located in deeper areas.7 A recent study estimates that expenses can run as much as $7 billion.8 In the United Kingdom, where the water depth offshore demanded enormous technological advances, the structures employed are the largest and most sophisticated in the world.9 Although there


7. DISPOSAL OF OFFSHORE PLATFORMS, *supra* note 6, at 18-20.

8. *Id.* at 21.

9. British Petroleum's "Magnus" platform weights 40,000 tons, is anchored in 600 feet of water, and stands 1,000 feet from the seabed to its tip. THE NORTH SEA PLATFORM GUIDE 507 (1985).
are only 139 platforms in the United Kingdom sector of the North Sea, to completely remove them, even if now technically possible, would cost some $10 billion. As the price of oil declines, the life of each field is shortened thereby, making the possibility of abandonment ever more likely.

Governments are now seeking ways, therefore, to accommodate these huge abandonment costs with regimes for the taxation of offshore operations. Currently, in the United Kingdom, some seventy percent of the costs of field abandonment would fall on the taxpayer, since conveying and treatment costs are allowable expenses for royalty relief. Before such regimes can be instituted, it is necessary to know the exact extent of the removal requirement demanded by international law. The figures quoted above are estimates for complete removal, but there are a number of other alternatives, including leaving the installations in place or partially removing them. Such solutions would result in enormous savings. It is also necessary to know what states are permitted to do with structures once they have been removed, since dumping offshore is financially preferable to bringing the remains onshore.

Increasingly, it is apparent that those states likely to be particularly affected by international law in this regard, favor a flexible policy of partial removal depending upon the particular circumstances. A recent report commissioned by the United States Department of the Interior recommended “determination of the ultimate disposal of platforms on a case-by-case basis in accordance with pre-determined
standards and criteria." Such standards would have to be "consistent with international law and preferably the product of explicit international agreement." In the United Kingdom, the present government has also stated its intention of redetermining abandonment obligations in order to permit partial removal in certain circumstances. Both views mirror those of the Oil Industry International Exploration and Production Forum, an international technical organization of oil industry operators, which, since 1984, has pressed for a policy which would require complete removal of only those structures located in water depths of less than 40 meters.

Development of the International Legal Regime

Article 5(5)-1958

The 1958 Continental Shelf Convention provides that, in exercising its sovereign rights to explore for and exploit the natural resources of the submarine areas adjacent to its coast, the coastal state is entitled to place "installations" or other "devices" on its shelf. This right is limited by article 5(1) which prohibits a state from any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea in erecting offshore structures. To that end, article 5(5) specifically requires that "due notice must be..."
given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed." 19

Article 60(3)-1982

When the proceedings at UNCLOS III began, the rights and obligations of coastal states in their offshore areas were amongst the issues of greatest importance. The question of offshore installations was addressed in terms of both the Continental Shelf and the newly emerging concept of an Exclusive Economic Zone (EEZ). Article 56(1) of the LOS Convention states that within its EEZ, a coastal state has sovereign rights to explore for, exploit, conserve and manage the natural resources of the seabed and subsoil. 20 The coastal state also has jurisdiction over the establishment and use of artificial islands, installations and structures. 21 But the state is required, in establishing and using such structures to respect the other provisions of the LOS Convention. 22 With respect to the continental shelf, article 78(2) states that the exercise of such rights must not interfere with navigation nor with the rights and freedoms of other states as provided in the LOS Convention. 23 Article 60(3) provides:

Any installations or structures which are disused or abandoned must be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other states. Appropriate publicity shall be given to the depth, position and dimensions of any installations not entirely removed. 24

Article 60(3) satisfied most delegates to the LOS Convention. 25

19. Id., art. 5, para. 5. There was no such provision in the draft articles submitted by the International Law Commission although the requirement of entire removal in the interests of safety of navigation was alluded to in the Commentary of the Commission to an earlier draft article 71(4) which stated only "Due notice must be given of any such installations constructed, and permanent means for giving warnings of their presence must be maintained."

Paragraph 5 of the Commentary stated that although in principle there was no duty to disclose, in advance, plans of installations to be constructed, "if installations are abandoned or disused they must be entirely removed." The proposal to amend article 71(4) so that installations should be entirely removed was put forward by the United Kingdom delegate but was made more peremptory by a Pakistani amendment to replace "should" for "must." Removal of Installations, supra note 6, at 3-4.

20. LOS Convention, supra note 1, art. 56, para. 1(a).
21. Id., art. 56, paras. 1(b), 2.
22. Id., art. 56, para. 2.
23. Id., art. 78, para. 2.
24. Id., art. 60, para. 3. The provision of article 60 also applies to the continental shelf by virtue of LOS Convention article 80. Id., art. 80.
25. For the drafting history of article 60(3), see Removal of Installations, supra note 6, at 13-19. Following concern voiced by the oil industry that the "entire removal" rule repeated in article 60(3) would require mandatory removal of all installa-
A number of points regarding this new rule, which clearly envisages partial removal, have yet to be clarified. The first relates to the fate of installations once they have been removed. The text of article 60(3) makes no reference to the eventual disposal at sea of structures or their dismantled components, although such "dumping" is likely to be a favored option in abandonment plans. Article 210(5), when read together with article 1(5) of the LOS Convention which defines dumping as, *inter alia,* the deliberate disposal of platforms and other man-made structures at sea, appears to leave the decision to the discretion of the coastal state upon whose continental shelf an installation is to be dumped.26

Thus, while installations must be removed in accordance with international legal requirements which will be discussed below, the ultimate disposal may, for the most part be a matter for the law of the state immediately concerned. However, there are two major international instruments regulating dumping: the London Convention, which is global, and the regional Oslo Convention.27 Of these, the
former addresses "any deliberate disposal at sea of vessels, aircraft, or platforms or other man made structures;" the latter is less clearly applicable. There may, therefore, be a number of different multilateral or domestic provisions which could lead to conflicts of standards and of jurisdiction.

The second problem is interrelated with the first in that the competent international organization, the International Maritime Organization (IMO), has not yet produced the standards which could provide the basis for a universal regime. Until that time, the content of LOS Convention article 60(3) and of international, overriding standards will be unclear and there will be a degree of legal uncertainty as to what actions the new Convention permits. Nevertheless, the United Kingdom has asserted that international law now permits partial removal in certain circumstances. These circumstances are accepted as existing when there is no material risk to navigation, fishing or the environment. The United Kingdom Government may decide to implement regulations under its Petroleum Act of 1987 prior to the drawing up of international standards. It would appear that opinion in the United States finds such possible actions less appropriate.

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29. Oslo Convention, supra note 27, art. 19(1), regulates dumping "by or from ships." The 10th meeting of the Oslo Commission, the body set up to supervise the operation of the convention, was held in 1984. In answer to a question on this point, it was suggested that the Oslo Convention does cover the dumping of platforms. Although a majority said "yes," there was no unanimity. It was proposed that the Maritime Safety Committee of the IMO address the problem.
30. The IMO generally is accepted as being the "competent international organization" to which article 60, paragraph 3 of the LOS Convention refers. The IMO is required to establish generally accepted international standards with respect to removal of abandoned or disused platforms. Recently the IMO began its work on this topic, receiving submissions from the United States, West Germany, Norway and certain other interests. It established a set of Preliminary Draft Guidelines and Standards for the Removal of Offshore Installations and Structures in the EEZ and Continental Shelf. See 33rd Session, IMO Sub-Committee on Safety of Navigation, IMO Doc. NAV. 33/ WP.4/Rev.1 (1987) [hereinafter Navigation Safety Committee].
31. See generally UK Dep't of Energy, supra note 15.
32. The contents of such regulations are a matter of speculation. While shallow water platforms would be required to be completely removed, those in deeper water are more likely to be subject to a case-by-case approach. Oil companies would be required to submit an abandonment plan for approval by the Secretary of State.
33. "Any means of disposition involving leaving a platform on-site ... will require either a change in applicable international law or an interpretation of international law that would allow a change in present U.S. requirements." DISPOSAL OF OFFSHORE PLATFORMS, supra note 6, at 42. The West German delegation in supporting the British proposal at UNCLOS III "understood that IMO would quickly develop appropriate standards with which coastal states would have to comply." U.N. Doc. A/CONF. 62/ SR. 161 at 29.
Policy Considerations

The evolution of this branch of the law of the sea will be guided by the weight of the various interests which favour either total or partial removal. For a number of years the major objection to partial removal has been its likely detrimental effect on navigational interests. Recently, however, fisheries, environmental, and even defense interests have begun to query the efficacy of a policy of partial abandonment.\textsuperscript{34} Undoubtedly, the enormous costs involved in total removal may persuade governments to accept a standard of less than total removal. However, since the fact that the LOS Convention was not unanimously adopted necessarily means that the new law of the sea will emerge in a piecemeal fashion, the abandonment issue provides the foundation for an interesting analysis of the formation of new law in this context as a result of state practice and discussion in international forum. This study is particularly useful in that it focuses on the competing provisions of the 1958 Continental Shelf Convention and the unratified 1982 LOS Convention.

Although, as Professor O'Connell points out, the history of the oceans is characterized by pragmatic responses to changing demands and requirements, and by the susceptibility of ocean law to change as a result of initial unilateral acts,\textsuperscript{35} the law creation process, nevertheless, still merits discussion. As traditional advocates for the processes of change in international law, nations such as the United Kingdom and the United States have to tread a cautious path between maximum utilization of energy resources and the lowest possible expenditure of taxpayers' funds towards that unitisation. Conversely, norms such as \textit{pacta sunt servanda} must be upheld and a degree of certainty in international relations maintained.

The 1958 Continental Shelf Convention remains in force and both the United States and the United Kingdom are parties to it, along with some 52 other states.\textsuperscript{36} Article 5(5) of that Convention therefore remains extant both as a prima facie binding treaty obligation and as part of a general multilateral law-making treaty.\textsuperscript{37} A number

\textsuperscript{34} Fisheries' interests have been vociferously asserted in the United Kingdom, whereas the United States and the Soviet Union expressed a concern that installations left in place should not impede the navigation of submarines under the surface. \textit{See Navigation Safety Committee}, \textit{supra} note 30, at 2.

\textsuperscript{35} D. O'CONNELL, \textit{supra} note 5, at 29.


\textsuperscript{37} Arbitration on the Delimitation of the Continental Shelf (Fr. v. U.K.) 1979,
of states, some of whom are not parties to the Continental Shelf Convention, have enacted legislation which enables them to implement article 5(5). In the United States, the policy has been that installations should be removed, in accordance with the international obligation incumbent upon the nation. In the United Kingdom, where there have been no opportunities for requiring abandonment, the law with regard to the removal of installations is less specific than international law. A number of statutes do provide powers which could be employed to establish conditions for abandonment. The result is that the minister concerned has discretionary power to impose conditions upon the abandonment of wells although the extent of removal of installations is not prescribed per se. In France, the Netherlands and the Federal Republic of Germany, the requirement of complete removal is spelled out, although recent legislation in Norway expressly permits partial removal under certain circumstances. Other states make no provision for abandonment although their legislation enables them to enact regulations on the subject. There is also some removal practice governed by specific bilateral treaties and industry procedures.

From this practice, the Report of the Netherlands Branch of the International Law Association argued that it is questionable whether the rule of removal in the 1958 Continental Shelf Convention had become customary international law, binding upon states not parties to that convention. In addition, it suggested that the failure of most states to strictly implement the 1958 removal rule had resulted in a process of "desuetude" by which the rule had lost its force, even for...

38. See infra note 41.
39. "Existing international law as interpreted to be applicable to the United States requires complete removal of any installation at the conclusion of its useful economic life." DISPOSAL OF OFFSHORE PLATFORMS, supra note 6, at 42. The requirement has been enforced on the United States outer continental shelf by the Minerals Management Service of the Department of the Interior.
40. The principal regulations are the Petroleum Production Regulations of 1982 as amended, issued under the Petroleum (Production) Act 1934, and particularly Schedules 5 and 7 of the Regulations. Although there is no specific provision for entire abandonment, a policy as reflected in a Notice issued by the Department of Energy in 1979 would appear to require complete removal. The position is somewhat different for wells which are suspended as opposed to abandoned or disused.
41. See generally Syverson, supra note 11. The Norwegian Act of March 22, 1985, No. 11 relating to Petroleum Activities, clearly spells out partial removal. The French seem to oppose partial removal, but indicate a willingness to comply with the international standards that may evolve.
42. These states include Belgium, which is not a party, Denmark and Sweden.
43. Transboundary agreements relating to pipelines in the North Sea between the United Kingdom and Norway and between Germany and Norway, as well as the Frigg Field Unitization Agreement of 1976 between the United Kingdom and Norway do not refer explicitly to entire removal. REMOVAL OF INSTALLATIONS, supra note 6, at 9-10.
44. Id. at 23.

states parties to the Continental Shelf Convention.\textsuperscript{45} It recognized, however, that it was too early to conclude that most states had failed to implement the removal rule. Other authorities have gone somewhat further and suggested that article 60(3) of the LOS Convention now represents the rule of customary international law.\textsuperscript{46} However, in neither case has any effort been made to analyze the informal process whereby the formal rules of the Continental Shelf Convention have been overridden despite the critical nature of this question to the law of the sea as a whole.

Professor Brown has written that the obligation in article 5(5) of the Continental Convention remains incumbent upon all states parties, pointing out that “[i]nternational law is not concerned with the means whereby effect is given to this obligation by states parties, so long as, in fact, the entire removal of such structures is ensured.”\textsuperscript{47} Thus, what state practice or legislation there is on abandonment may be of questionable relevance, where no actual abandonments have taken place.

\textit{The Conflict of Legal Obligations}

International treaty law under the Vienna Convention of 1969\textsuperscript{48} addresses the conflict in treaty obligations. However, the solutions put forward, as noted above, are dependent upon the entry into force of the later treaty since before that event, there is no conflict in terms of pure treaty law. Accordingly, the LOS Convention’s attempted solutions to the problem of earlier treaty rules can have no effect until its entry into force. What remains is the problem of the legal effect of an inchoate instrument on a prior treaty provision, not simply as the basis for the creation of new law, but also as a mechanism to invalidate old law. The two processes are intertwined.

However, abrogating the obligations of article 5(5) of the Continental Shelf Convention for states parties can occur in ways other than the formal termination of the treaty or the creation of a new rule of customary law. The question will be addressed of whether by interpretation, particularly as a result of subsequent practice of the parties, the strict nature of the ‘entire’ removal rule has been altered sufficiently to constitute an informal modification or amendment of

\textsuperscript{45} Id.
\textsuperscript{46} See, e.g., Bentham, supra note 6, at 843.
\textsuperscript{48} Vienna Convention, supra note 3.
the rule. Informal amendment may also arise in other ways. The tacit agreement of states parties may be evidence of their consent to the recission of a rule or the operation of independent rules of international law such as the rule on fundamental change of circumstances may also operate to remove an obligation.

Each of these factors will be examined in turn.

THE INTERPRETATION OF ARTICLE 5(5)

A strict reading of Continental Shelf Convention article 5(5), "any installations . . . must be entirely removed," initially seemed to indicate that the article would have to be amended if states parties wished installations, or parts of them, to be left in place. As a consequence there appeared to be a conflict between the terms of article 5(5) and the new article 60(3) which was clearly designed to replace it. Whether such is, in fact, the case, will not be decided by the maxims of derogation noted above. Instead, it is necessary to analyze possible interpretation of the earlier provision, particularly in light of the subsequent practice of states parties.

Although divergences arise as to both the meaning of "abandonment" and the nature of the "installations and devices" which have to be removed, the major point of contention turns upon the exact meaning of article 5(5) that requires installations to be "entirely" removed. While Brown has argued that such clear wording in article 5(5) means that if greater flexibility is permissible, there will need to be a change in the law, others have asserted that the general rules of treaty interpretation may be employed to reduce the strictness of article 5(5) means that if greater flexibility is permissible, there will need to be a change in the law.61 others have asserted that the general rules of treaty interpretation may be employed to reduce the strictness of

49. The point at which an obligation to abandon an installation actually arises is a matter of some dispute. Fisher, Abandonment of Oil and Gas Installations: The Legal Background, in RECENT DEVELOPMENTS IN UNITED KINGDOM PETROLEUM LAW (Proceedings of a Seminar, Univ. of Dundee Center for Petroleum & Mineral Studies (June 15, 1981)). Fisher argues that the obligation will arise once there has been "deliberate cessation" of operations. Cf. DISPOSAL OF OFFSHORE INSTALLATIONS, supra note 6, at 4, where it is suggested, "It means the voluntary relinquishment of all right, title, claim and possession of a thing, with the intention of not reclaiming it, or the giving up of a thing absolutely, without reference to any particular person or purpose, as to vacating property." However, the difficulty of establishing "abandonment" or "disuse" is held common both by article 5(5) and article 60(3).

50. Regarding the structures which are subject to the removal obligation, Continental Shelf Convention article 5(5) refers only to installations being entirely removed, whereas other paragraphs of article 5 refer to "installations and other devices" and "installations or devices." It thus is arguable that article 5(5) may not be sufficiently expansive to cover installations which were not permanently fixed, or even pipelines. Article 60(3), on the other hand, clearly applies the more limited removal obligation to "artificial islands, installations or structures." This wider category may then be in conflict with respect to a limited number and type of installation, albeit the most important category. It generally is accepted that neither the provisions of article 5(5), nor those of article 60(3) apply to pipelines.

the article 5(5) provision.⁵²

Articles 31 and 32 of the Vienna Convention on the Law of Treaties sets out the "general rule" of treaty interpretation, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁵³

The starting point for the consideration of subsequent state practice in the interpretative process must be articles 31 and 32 of the Vienna Convention of 1969, which now arguably represent customary international law.⁵⁴ At the Vienna Conference the drafts presented by the International Law Commission sought to prescribe, in article 31, a general rule for treaty interpretation which combined the approaches of several different schools of thought into a single interpretative operation.⁵⁵ The starting point of article 31 is the principle of good faith. Thereafter, a treaty is to be interpreted "... in accordance with the ordinary meaning to be given to the terms of the treaty in their context."⁵⁶ The treaty terms must be considered

⁵². Removal of Offshore Installations supra note 6, at 7-8; see also Bethham, supra note 6, at 843.

⁵³. Vienna Convention, supra note 3, arts. 31, 32.

⁵⁴. There is a vast literature on both the formation and current status of these articles. See generally A. McNair, The Law of Treaties ChXX-XXVIII (1961); S. Rosenne, The Law of Treaties (1970); M. McDougall, H. Lasswell & B. Miller, The Interpretation of Agreements and World Public Order (1967); M. Viliger, Customary International Law and Treaties 327-56 (1985); I. Sinclair, supra note 3.

⁵⁵. A number of international judicial decisions also have referred to the status of the Vienna Convention articles on interpretation: "Articles 31 to 33 enunciate in essence generally accepted principles of international law..." Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) (1975); see also Young Loan Arbitration, 59 I.L.R. 529 (1980).

⁵⁶. "[T]he application of the means of interpretation in the article would be a simple combined operation. All the elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation..." ILC Commentary, Draft Articles presented by the International Law Commission, [1966] 2 Y.B. INT'L L. COMM'N 219, para. 8 U.N. Doc. A/CN. 4/ser. A/1966 [hereinafter ILC Commentary].
not only in light of the text itself but in the context of the entire treaty, including the means set out in paragraphs 2 and 3 of article 31.67

The "ordinary meaning" is then determined by the "object and purpose" of the treaty, a provision which permits some reference to the teleological approach.68 The preparatory work of the treaty and the circumstances of the conclusion of the treaty may be referred to under article 32 if it is necessary to confirm the meaning resulting from article 31, or where there is an ambiguous or obscure meaning or the meaning as a result of the process under article 31 leads to a result which is unreasonable. A recent study has shown, nevertheless, that the textual approach now predominates.69

If the object and purpose of the removal obligation is to ensure that abandoned installations will not unjustifiably interfere with other legitimate users of the sea, then, insofar as they will not do so, there is no duty to remove. Arguably, any other interpretation leads to a "manifestly absurd or unreasonable" result, a result which permits supplementary means of interpretation to be called into play. It is also arguable that state practice subsequent to the treaty does not support such an expansive interpretation of the removal requirement.

The possible flaws in such arguments have been alluded to elsewhere and are at least three in number. First, the wording of the text of Continental Shelf Convention article 5(5) is clear and it does not support the view that the parties did not intend the provision to mean what it said. If the drafters' intention was that removal should take place only where there was a risk of unjustifiable interference, then a different form of words could have been employed. Second, the fact that such an interpretation may lead to a manifestly unreasonable result is questionable. But even if resort to the travaux preparatories of the Continental Shelf Convention is employed, it is clear, as the Netherlands Branch itself alludes to, that article 5(5) was intended "to impose a strict and specific obligation on the

57. See supra note 55 and accompanying text.
58. It is only "in the light of" the object and purpose of a treaty that the "ordinary meaning" to be given to the terms of the treaty in their "context" is to be analyzed. The location of the object and purpose is not necessarily a search for the common intention of the parties, nor is it an invitation to employ a teleological approach to interpretation. See I. SINCLAIR, supra note 3, at 130-35.
59. M. VILLIGER, supra note 54, at 327-56. The author analyzes state practice and judicial decisions and concludes that most interpretative organs now rely primarily on the meaning of the text.
60. Id.
coastal state.” Finally, to adopt an interpretation which removes the clear meaning of the “entire removal” provision of article 5(5) would risk prejudicing the attainment of the result sought by the Convention in this regard by leaving an unacceptable margin of discretion to coastal states. Given an ordinary interpretation of the text of article 5(5), there appears to be a conflict between it and article 60(3). Thus, the practice of states following the language of the LOS Convention becomes of great significance. However, such practice must be placed in its proper interpretative context and its significance analyzed not only for the interpretation of the treaty provisions but also as an indication of possible amendment or modification.

**The Role and Legal Effect of the Subsequent Practice of States in the Process of Treaty Interpretations**

Subsequent state practice has been described as “a guide post to whoever applies a treaty and fulfills, on the whole, a stabilizing function within the legal order, while at the same time facilitating adjustment to new needs and circumstances.” The inherently static and conservative character of written law may represent the belief or aspirations of the parties at the time of its formation, but it does not always represent their present or future requirements. Technological change, alterations in the structure, expectations and values of the international community all operate to compel parties to deviate from conventional requirements without formally denouncing or withdrawing from the earlier rules. This is particularly true in the context of the 1958 conventions, and the creation of exclusive fisher-

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62. *Removal of Offshore Installations*, *supra* note 6, at 4. When the United Kingdom proposal was being discussed, the Rapporteur noted that the specific removal obligation might be unnecessary as such an obligation was implicit in the provision that exploitation must not result in unjustifiable interference with navigation. This interpretation did not receive general support. *See generally id.*

63. While a number of the studies alluded to the practice of states, none analyzes the role of such practice in the interpretative process being content to state general conclusions such as: “From this brief sketch, one may conclude that there is no general rule for entire removal among North Sea states.” Bentham, *supra* note 6, at 844. “[T]he conclusion seems justified that, in light of state practice as reflected in legislation that and governmental consideration since 1958 . . . the rule (in the 1958 Convention) has not become customary international law . . . [O]ne might go one step further and consider whether failure of most of the states concerned to implement the 1958 removal rule would not show that this rule — through a process of desuetude — had lost its binding force even for those states which are party to that Convention.” *Removal of Offshore Installations*, *supra* note 6, at 23.

ies zones, economic zones and the regime of the continental shelf are frequently cited examples of this process. Nevertheless, as a matter of law, the usefulness of subsequent practice as an aspect of the interpretative process in determining prior treaty obligations is somewhat circumscribed.

The role of the subsequent practice of the parties in this process was originally a secondary one, and was included by Sir Humphrey Waldock in his draft articles presented to the International Law Commission as a supplementary means of interpretation. However, subsequent practice was included in his second set of draft articles amongst the principal means of interpretation. The resultant qualification of the textual approach to interpretation can be described as an innovation in the interpretative provisions of the Vienna Convention. Paragraph three of article 31 requires that the following should be taken into account in evaluating a treaty: a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; b) any subsequent practice between the parties regarding the interpretation of the treaty or the application of its provisions.

However, this paragraph by no means resolves the issue. Especially in the abandonment context the meaning of "practice" and its effect are issues which must be addressed.

One question is whether the practice of both parties and non-parties to a treaty may be called in to this interpretative process. Authors agree that whereas article 31(3)(a) provides specifically for interpretative agreements between the parties, article 31(3)(b) refers only to any subsequent practice in the application of the treaty that is party-orientated. The practice of non-parties may, however, be significant under article 31(3)(c) where it is stated that "any relevant rule of international law applicable in the relations between the parties" shall be taken into account. Thus, where a new rule of international law has evolved, the practice of non-parties also becomes important in the interpretative process. Whether all the parties to the treaty must contribute to its interpretation or whether only a small number need do so, depends upon the degree of inter-

65. See, e.g., M. Villiger, supra note 54, at 214.
67. Id. at 199.
68. Vienna Convention, supra note 3, art. 31, para. 3, includes any relevant rule of international law applicable in the relations between the parties.
69. W. Karl, supra note 64, at 383; J. Sinclair, supra note 3, at 138: "It should of course be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice — that is to say concordant subsequent practice common to all the parties." See also M. Villiger, supra note 54, at 344.
70. Vienna Convention, supra note 3, art. 31, para. 3.
pretative concordancy and consistency which, by subsequent practice, states parties may evidence.\textsuperscript{71} Clearly, the material and active actions of some states could lead to a new interpretation indicated by subsequent practice, whereas, other states could show assent to novel interpretations simply by remaining passive or consenting, in other words, by acquiescing. Since formal agreements on interpretation of the kind envisaged in article 31(3)(a) are rare, it is necessary to analyze state practice and case law to determine like situations in which subsequent practice was held to interpret a treaty.\textsuperscript{72} It is necessary to determine whether subsequent practice relates to the original or subsequent intentions of the parties, and what the effect of such practice may be in terms of rescinding the apparently strict obligation of a treaty, as in the case of Continental Shelf Convention article 5(5).

Traditionally, subsequent practice, in those cases where it was admissible as an interpretative factor, was employed in order to clarify the original intention of the parties at the time the treaty was concluded.\textsuperscript{73}

However, some authors recently have argued that by placing subsequent practice into article 31 as a primary means of interpretation, it was intended to have a more independent role which enables parties to give effect to their subsequent intentions but still remain within the framework of the original text.\textsuperscript{74} This approach would be

\begin{itemize}
\item 71. I. Sinclair, \textit{supra} note 3, at 137: "The value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent. A practice is a sequence of facts or acts and cannot in general be established by one isolated fact or act or even by several individual applications." Cf. M. Villiger, \textit{supra} note 53, at 344: "The practice of some parties will suffice if it is consistent rather than arbitrary; if it occurs with a certain frequency; and if all other parties acquiesce in it, and none raises an objection." See also I. Brownlie, \textit{Principles of Public International Law} 627 (3d ed. 1979) (Subsequent practice by individual parties has a certain probative value).
\item 72. The reason for the rarity of explicit interpretative agreements chiefly is due to the interests of states in perpetuating an element of ambiguity in order to maintain the instrument's flexibility. See, e.g., I. Sinclair, \textit{supra} note 3, at 136 (concerning United States—France Air Services Agreement of March 27, 1946: "The text of the entire agreement is as significant for what it omits as for what it specifies. It is silent concerning most of the major operational issues facing an air carrier.").
\item 73. In the case concerning the interpretation of article 3, paragraph 2 of the Treaty of Lausanne, the Permanent Court of International Justice stated, "the facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court insofar as they are calculated to throw light on the intention of the parties at the time of the conclusion of that Treaty." Advisory Opinion, P.C.I.J. (ser. B) No. 12, at 26.
\item 74. W. Karl, \textit{supra} note 64, at 381-82. As an independent factor of interpretation, Karl suggests subsequent practice may indicate a current understanding of the treaty. See generally M. McDougall, H. Lasswell & B. Miller, \textit{supra} note 54.
\end{itemize}
taken as a result of a more dynamic or teleological interpretative exercise and seems to be the approach of states such as the United Kingdom, which have not denounced the earlier treaty.

The question might also be addressed in the abandonment context, whether subsequent practice of the parties had the effect not only of permitting a given interpretation but of informally amending or modifying the obligation in article 5(5) of the Continental Shelf Convention. Article 38 of the 1966 Draft of the International Law Commission was entitled “Modification of Treaties by Subsequent Practice” and stated, “A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.” However, since the independent rule that a treaty could be modified in this way was not accepted, the draft article did not receive support at the Vienna Conference and finally was deleted from the draft by a large majority vote. Nevertheless, by means of assigning subsequent practice to a role in the interpretative process, the provision was included in article 31(3)(b). It must still be possible that subsequent practice, although interpretative in nature, may have the effect of amending or modifying a treaty and therefore the obligations of a party under it.

(They view subsequent practice as widening the social reality of the treaty which may then serve as a precedent for future decisions and provide guidelines for uniform application of the treaty.)

75. ILC Commentary, supra note 55, at 236.
76. The vote was 53 to 15 with 26 abstentions. United Nations Conference of the Law of Treaties, 1st Vienna Conference Committee of Whole 215 (1968). Notwithstanding its deletion, certain authors have pointed to the fact that draft article 38, which enabled subsequent practice to actually modify treaties, represented the position at customary law. See, e.g., Capotorti L’Extinction et la Suspension des Traitres’, 134 Rec. des. Cours III 519 (1971); W. Karl, supra note 64, at 295. See, e.g., Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 4 (Judgment of June 15, 1962), where it appears the court took into consideration the conduct of the parties as an alternative means of interpretation where there was doubt as to the clear meaning of a treaty provision, and also as a means whereby the obligation of the parties under the treaty could be modified. “Both parties, by their conduct recognized the line and therefore in effect agreed to regard it as being the frontier line.” Id. at 33. Sir Gerald Fitzmaurice added in a separate opinion that what had occurred “was not in the legal sense a departure from the treaty provision concerned but the mutual acceptance of a certain result of being its actual outcome.” Id. at 56. In Young Loan Arbitration, the majority opinion decided that the practice of the parties to the agreement was of little assistance since the parties had always differed in their interpretations of the provision in dispute. Young Loan Arbitration, 59 I.L.R. at 541-43. The dissenting opinion stated that a treaty imposing a general principle should not be given a restrictive interpretation merely because one of the parties had intended it to have only a restricted application. Id. at 568-73. See also the 1978 United States/France Air Transport Arbitration where the tribunal undertook an examination of subsequent practice in light of its own judgment on the text and in the absence of a clear answer to be found there. United States v. France, 54 I.L.R. 327, 335 (1979).
77. See, e.g., W. Karl, supra note 64, at 379-80. Acts which clearly are contrary to the treaty norm no doubt will be protested by other states and thus their relevance as
Such a distinction, between interpretative acts and acts which have the effect of modifying the treaty, may cause some confusion. The line between interpretation, which always involves some change in the original terms of the treaty if only with respect to the parties involved in the interpretative exercise, and modification which suggests a clear altering effect, is blurred. While interpretation may be said to relate to a present case, and modification to all future cases, again the distinction is unsatisfactory.

Acts classified as permissible on the basis of asserted interpretations may be so distant from the meaning of a text as to amount to derogations from it. In that situation, whether the derogatory acts have any influence upon the interpretation of the text is a matter for some conjecture. In addition, the effect of statements made subsequently at a lawmaking convention such as UNCLOS III must be placed into the context of subsequent practice as an interpretative device. What is the status of such claims regarding the creation of new norms upon rules of law which they were specifically designed to replace? While some might argue that the felt need for a new provision may, in the dynamic sense of treaty interpretation, add a gloss upon pre-existing rules, it also can be argued that the intent to create a new rule has no interpretative validity for an earlier agreement. Perhaps, however, in the situation where there is evidence of opinio iuris on the growth of a new general rule of international law, the claims could be subsumed into Vienna Convention article 31(3)(c).

Subsequent Practice as Regards Continental Shelf Convention Article 5(5)

It has been asserted by the Netherlands Branch of International Law Association that the conduct of states might evidence implied termination of the norm of entire removal, on the basis of the failure to implement, in domestic legislation, provisions requiring installa-

an authentic interpretation is minimized. However, the situation is less clear where there is a derogating treaty.

78. The study of the practice of states as regards the abandonment obligation in the 1958 Convention was carried out by the Netherlands Branch of the International Law Association. See Removal of Installations, supra note 6. It analyzed the domestic legislation and license terms of ten countries. Those countries were the United Kingdom, Norway, Netherlands, France, the United States, Sweden and Denmark, which are parties to the Convention, the Federal Republic of Germany, Belgium and Ireland which are not parties, the Ekofish Treaty (UK/Norway), Germany/Norway, Unitisation of the Frigg Field, the Dumping Conventions. In addition, certain bilateral treaties and industry practice, as well as the proceedings at UNCLOS III, were studied. Id. at 6-13.
tions to be entirely removed. In the interpretative sense, such practice is, however, of doubtful value. First of all, in seeking to interpret the Continental Shelf Convention, article 5(5), only the practice of parties is significant, under Vienna Convention article 31(3)(a) and (b). Again, although involving a number of important states likely to be specifically affected by the abandonment issue, the sample analyzed is too small to be of great value since only seven of some fifty-four contracting parties have been analyzed and the preponderance of these are European states. Nor does the practice alluded to show the clear element of consistency or concordance required to point to an alternative interpretation of the “entire” removal obligation. While some states, both parties and nonparties, have implemented the “entire” removal rule, others have granted an element of discretion to the minister involved, still others have placed the removal obligation into license conditions or have remained silent. In sum, there is no clear support for a norm of partial removal. The utility as an interpretative indicator of such, as yet, untested provisions must be questionable since international law presumes that a state will comply with its international obligations and will not employ domestic law as an excuse for avoiding them. Of course, there was widespread support for the norm of partial removal at UNCLOS III, encapsulated in article 60(3) of the LOS Convention; however, that practice is subject to the legal question mark which hangs over all those proceedings, particularly regarding its status as a source of international law. These points will be discussed below where it is concluded that practice at UNCLOS III must be supported by practice and *opinio iuris* outside of the LOS Convention if it is to be valid as a source of law.

The United Kingdom and Norway have already taken steps to alter their obligations under Continental Shelf Convention article 5(5). The Norwegians have empowered the state to demand that installations be wholly or partly removed, and the United Kingdom also anticipates partial removal in certain circumstances. Of the sample, only the United States was not a state of Northern Europe. *Id.*

80. The United States and the Netherlands formerly have implemented entire removal whereas the United Kingdom, Norway, and France appear to leave the decision to the discretion of the minister. *Id.* Some commentators suggest that the French legislation requires entire removal. *See, e.g.,* Ferry, *supra* note 6, at 927-28 (pointing to the French law of 1968, which envisages complete, not partial, removal of offshore installations). The other states analyzed are silent. Of nonparties to the treaty, the Federal Republic of Germany requires complete removal whereas Ireland leaves it to the Department of Industry and Commerce to decide. *Removal of Installations, supra* note 6, at 8.


These positions may be seen as overt efforts at the creation of new law and may be viewed as attempts to interpret less restrictively existing obligations under article 5(5). Whether they have the effect of modifying the norm of article 5(5) so that it is no longer inconsistent with article 60(3) is difficult to judge. In this respect other parties may be required to contest such a view if they are to prevent a future interpretative body from deciding that a departure from the original norm, as a result of deviating state practice, has taken place, particularly if sufficient numbers of states parties follow the path being laid by the United Kingdom and Norway. In the Beagle Channel Arbitration, the tribunal made some observations which oppose this point. However, in analyzing the subsequent practice of states it favored a Chilean interpretation, which may naturally reflect the meaning of the text and found in response to Chilean act and jurisdiction, Argentina’s silence permitted the inference that the acts tended to confirm an interpretation of the meaning of the treaty independent of the acts of jurisdiction themselves.

Other Legal Mechanisms for the Removal of the Obligation of Article 5(5)

The conduct of the parties, apart from interpretative significance, may also result in the tacit or implied termination of an earlier treaty obligation. As well as being an indication of the attitude of states parties towards the treaty, such conduct may also give rise to a new rule of customary international law which, in the absence of a hierarchy of treaty or custom, may override the earlier obligation. Both of these occurrences often have been subsumed into the notion of the desuetude of the earlier treaty obligation. It is to the parameters of this legal process in the abandonment context that the remainder of this article is devoted.

Tacit Agreement to Modify or Terminate the Treaty

It has already been noted, that as an ultimate consequence of the interpretative process, modification of a treaty based on the conduct

83. Beagle Channel Arbitration, 52 I.L.R. at 224.
84. See W. Karl, supra note 64, at 295; M. Villiger, supra note 54, at 226 (although he views modification as a result of subsequent practice as more likely in a situation where a treaty has only few parties, rather than in a general multilateral agreement).
of the parties may arise. Tacit termination of treaty obligations is more clearly spelled out in international law, but may be more problematic.

Article 26 of the Vienna Convention provides that only those treaties which are "in force" will continue to be subject to the norm of *pacta sunt servanda*. Thus, there is no obligation to observe a treaty which is no longer in force. Under article 42(2) of the Convention, "The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention." Article 54 provides, *inter alia*, that such termination may take place "at any time by consent of all the parties." Such consent may be overt, for example, by written agreement between the parties after a conscious decision to terminate the treaty.

Formal consent is, however, rare, and one need only consider the 1958 Conventions themselves to find an example of this. Article 54(1) therefore permits of covert or implied termination, for example, by conclusion by all the parties to the earlier treaty of a subsequent treaty relative to the same subject matter. However, in the absence of the conclusion of a later treaty, there are further grounds for termination of an earlier treaty outside of formal procedures.

The concept of tacit termination was bound up with the treatment of such theories as desuetude and obsolescence received during the discussions of the ILC and at the Vienna Convention. Sir Gerald Fitzmaurice, in his second report to the ILC, indicated that a tacit agreement by the parties to regard a treaty as terminated or to disre-

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85. See Vienna Convention, *supra* note 3. Article 57 of the Convention stipulates that the operation of a particular provision may be suspended at any time by consent of all the parties after consultation with the other contracting states. It also should be noted that the Vienna Convention adds the procedural requirement that termination or supervision should only come about after prior consultation with the other contracting parties, although the importance of such a requirement should not be overestimated. *Id.*, art. 57.

86. Article 58 also authorizes suspension of agreements on a more limited basis between certain parties with neglect to the earlier treaty but only on the more limited inter se basis. Part V of the Vienna Convention is silent. See I. Sinclair, *supra* note 3, at 185. Even if the 1982 LOS Convention were in force, the unanimity rule set out by the Vienna Convention would prohibit implied termination, since it is unlikely that all the parties to the earlier treaty also will become party to the later.

87. Vienna Convention, *supra* note 3, art. 54, para. 1. For conduct to lead to desuetude: 1) violations of the treaty must have occurred; 2) acquiescence in light of such violations has occurred frequently; 3) the instances of violation must attributable to the government; 4) such instances are not capable of reasonable explanation; and 5) such instances have not been contradicted by protests whereby the injured party reserved its rights. McNair, *supra* note 54, at 518. Desuetude was discussed by the ILC in 1966 in its commentary to Draft Article 39. *ILC Commentary, supra* note 55, at 237.

88. "Such an agreement [to terminate] can . . . only be inferred from the conduct of both sides, or of all the parties, sufficiently long continued." *ILC Commentary, supra* note 55, at 237.

89. *Id.*

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gard it could be implied by the failure of all the parties over a long period of time to apply or invoke a treaty. The legal basis of such termination is, the ILC stated, "the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty." It has also been noted that although the form of consent to termination is not outlined by international law, where a treaty is terminated other than by its provisions, the consent of all the parties would be necessary. In the end, the notion of tacit termination, one of the aspects of the general term, desuetude, was not addressed by the Vienna Convention. However, it is generally accepted that since customary international law continues to govern those areas not addressed by the Convention, desuetude in the form of tacit termination continues to have a place. Nevertheless, a number of the uncertainties surrounding this method of termination are brought into relief by the abandonment problem.

The major issue is how to identify tacit acts leading to the ending of treaty obligations. Nonapplication of a treaty or treaty provision is not, per se, a ground for termination or suspension of an obligation. What must be looked to are rules of general international law which evidence the intention of the parties in the absence of any clear indication. In that context, concepts such as acquiescence and estoppel provide the basis of tacit consent. One argument suggests that there should be a real intention apparent on the part of the terminating state; however, the existence of such an intention is difficult to assess and identify. Instead, a manifestation of will should suffice. The rule of good faith and the legitimate expectations of the parties may then be employed to evaluate that manifestation of will. In this situ-

90. Id.
92. I. Brownlie, supra note 71, at 614-15 states: "'The topic' of 'desuetude' which is probably not a term of art, is essentially concerned with the discontinuance of use of a treaty and its implied termination by consent ... irrespective of the agreement of the parties, an ancient treaty may become meaningless and incapable of practical application." Cf. Nuclear Tests Cases where the joint dissenting opinion concluded that desuetude had been intentionally omitted from the Vienna Convention insofar as it was not covered by the provisions on termination. (Austl. v. Fr.), 1974 I.C.J. 253, 337 (Judgment of Dec. 20, 1974).
93. W. Karl, supra note 64, at 387-88. Since the evidence of intention on the part of a state is so difficult to detect, the meaning a declaration receives under accepted practice, good faith and the legitimate expectations of the parties should lead to the evaluation of tacit acts. The concept of acquiescence is of greater significance in this respect. There is abundant evidence to show that tacit acts may result in derogations from treaty norms.
ation the nature of the treaty itself or the particular rule or principle which may be altered by the tacit acts of the parties could prove a valuable source of evidence.

The consequence of tacit agreement to end a treaty is that parties are enabled to derogate from it. However, the requirements of proof of such tacit termination in the light of state practice and judicial decisions appear fairly stringent. In the Nuclear Tests Cases, an issue arose over the continuing validity of the General Act for the Pacific Settlement of International Disputes of 1928. France declared that the instrument had fallen into desuetude as a result of the demise of the League of Nations. The majority judgment did not review this issue, however, in a joint dissenting opinion, four judges referred to the ILC's point that the legal basis of implied termination is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to it. They then stated that the termination of a multilateral treaty required the consent of all the parties, whether express or tacit. An analysis of the conduct of France prior to the case, in relation to the General Act, did not reveal consent to abandon it.

Judge de Castro, in a dissenting opinion, stated not only did the Vienna Convention not contemplate tacit abrogation, but if it did, "it would be necessary to produce proof of the facta concludentia which would have to be relied on to demonstrate the contraria consensus of the parties, and proof of sufficient force to relieve the parties of the obligation undertaken by them under the treaty."

This notion of conclusive evidence was addressed by other judges in the Nuclear Tests Cases and was returned to by the tribunal in the Anglo-French Continental Shelf Arbitration. The tribunal referred to a French assertion that all the Geneva Conventions on the law of the sea, including the Continental Shelf Convention, had been "rendered obsolete" by the recent evolution of customary law stimulated by the work of UNCLOS III. The tribunal admitted that a development in customary law could, under certain conditions, show the assent of states to the modification or termination of previously existing treaty rights and obligations, referred to recent statements

94. A. Vamvakos, THE TERMINATION OF TREATIES IN INTERNATIONAL LAW 263-65 (1985). The practice shows that while desuetude often has been asserted by states as a valid method of treaty termination, the stringent requirements of proof have meant that it has rarely been successfully evoked. Id. at 266-27.
97. Id. at 337-38.
98. Id. at 381.
100. Id. at 416.
by the states involved. These proved that the Continental Shelf Convention was a treaty "in force" and the tribunal held "only the most conclusive indications of the intention of the Parties to the 1958 Convention to regard it as terminated could warrant this Court in treating it as obsolete and inapplicable as between the French Republic and the United Kingdom in the present matter."\textsuperscript{101}

Therefore, from a contractualist viewpoint, the requirements of proof of tacit termination or modification include clear evidence of the intention of the parties and unanimous consent. As has written, "there must be sufficiently repeated instances of opposition by a party to the application of the treaty in question when invoked by other parties and a final renunciation by the latter of their rights to insist on the performance of the treaty."\textsuperscript{102} Abrogative effect cannot, it is argued, arise simply from the conduct of one party alone, nor from the non-use of the treaty provision over a period of time.

Nevertheless, the 1958 Conventions may soon be classified, if they are not already, as "dwelling in a kind of chiaroscuro, formally in force if one took account only of express denunciation but somewhat dormant."\textsuperscript{103} In that situation, the contractualist perception of the requirements for tacit termination would appear to be a very difficult burden of proof to overcome since it would require not only clear evidence of intent to terminate the obligations in the treaty but such evidence would also be required to be uniform in its character and to reveal the intentions of all the states parties.

However, a more appropriate approach, particularly as regards abandonment, is to analyze the effect of conduct in a particular treaty provision, which may have the effect of terminating only that provision rather than an entire treaty. This approach is possible because the Vienna Convention does envisage an element of separabil-

\textsuperscript{101} Id. at 417. See also the pleadings in Aegean Sea Continental Shelf (Greece v. Turk.), 1980 I.C.J. 1 (Judgment of Dec. 1977). Professor O'Connell, Counsel for the Greek Government, stated, "[F]or a treaty to terminate after inactivity, one would have to prove more than the mere fact of disuse, one would have to prove consent — that is consent to abandon the treaty, and one would, in the case of a multilateral convention, have to prove universal consent, not particular consent." \textit{Id.} at 7. See also Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12, 1984), in which Judge Gros stated, "it is up to those who support the current legal vacuum to demonstrate that the 1958 Convention has in fact become obsolete and that the 1982 Convention, which the United States did not sign and which is not in force, has nonetheless uncovered a customary rule on this point." \textit{Id.} at 375.

\textsuperscript{102} A. VAMVOUKOS, \textit{supra} note 94, at 261.

\textsuperscript{103} Nuclear Tests Cases 1974 I.C.J. at 296.
ity in the approach to the termination of treaty provisions.\textsuperscript{104}

Given such a situation, the type of treaty provisions would be all-important. Evidence of desuetude, in the sense of tacit termination, is much more likely to arise and to become apparent in cases where the treaty provision demands a continuous course of conduct of the parties, which then do not comply, rather than where the activation of its obligations is conditional either on the will of the parties or some uncertain event which may occur in the future. It may not, therefore, be surprising that tacit termination has rarely been successfully invoked. Indeed, in the context of a provision such as Continental Shelf Convention article 5(5) which demands a course of conduct only upon the occurrence of a particular event — the final decommissioning of a structure — non-compliance by some states and the absence of reaction on the part of others could rapidly lead to a treaty's implied termination. However, the current questions as to the status of article 5(5) arise in a situation where no such practice has taken place.

Thus, in the abandonment context, the creation of new legislation permitting partial removal in a number of states, and the passive reactions by other states in the face of such actions, will be required to be weighed evidentially and could constitute acquiescence.\textsuperscript{106} An acquiescing state will be estopped from asserting the old rule or challenging the validity of a position in which it has acquiesced. In addition, such acquiescence may be seen as a tacit agreement to terminate article 5(5). With the enactment of Norwegian and British legislation permitting partial removal in certain circumstances and the likelihood of similar legislation in other states, it seems clear that the stage is now set for the evolution of a clear process of tacit termination, by virtue of the acquiescence of states as implying consent to the alteration of article 5(5).

\textsuperscript{104} Article 44 of the Vienna Convention states that the invocation of grounds for the termination or suspension of a treaty will normally apply only to the whole treaty. Vienna Convention, supra note 3, art. 44. However, there are certain strictly defined exceptions in article 44(3). These are where the clauses are separable from the remainder of the treaty with regard to their application, and it appears that the acceptance of these clauses were not an essential basis of the consent of the other parties to be bound by the treaty as a whole and continued performance would not be regarded as unjust. Whether, when read together, these conditions would be met, said the ILC, would “necessarily be a matter to be established by reference to subject matter of the clauses, to the travaux preparatories and to the circumstances of the conclusion of the treaty.” ILC Commentary, supra note 55, at 238.

\textsuperscript{105} A factor in the formation of customary international law and prescriptive rights whereby consent to a rule is not in the form of positive statements or action but takes the form of “silence or absence of protest in circumstances which demand . . . a positive reaction in order to preserve a right.” MacGibbon, The Scope of Acquiescence in International Law, 31 BRIT. Y.B. INT’L L. 143, 182 (1954).
MODIFICATION OR TERMINATION AS THE RESULT OF AN OVERRIDING NORM OF CUSTOMARY INTERNATIONAL LAW

Most studies do not address the nature of the process whereby earlier conventional rules are amended or modified by nonidentical customary rules. This has particularly been the case in the context of the UNCLOS III process, where many studies have focused on material elements for the creation of new norms.\textsuperscript{106} The effect of such new emergent customary norms upon pre-existing treaty rules in the law of the sea context is unclear, and as previously stated, while the Vienna Convention addresses the relationship of conflicting treaties in force, it does not address the effect, if any, that inchoate treaties have on pre-existing ones. In 1964, the ILC unanimously adopted the following draft article 68(c):

\textbf{ARTICLE 68.} Modification of a Treaty by a Subsequent Treaty, by Subsequent Practice or by Customary Law.

The Operation of a treaty may also be modified . . . c) By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.\textsuperscript{107}

Of those members of the ILC who expressed an opinion, the United Kingdom delegate felt that treaties ought to be modified only with the consent of the parties and that, in any case, there would be difficulties in determining the precise moment that a customary law arose.\textsuperscript{108} The United States delegate felt there was uncertainty surrounding customary law and that the provision lay outside the scope of the law of treaties.\textsuperscript{108} When considered at the 1966 Session, article 68(c) was deleted for a number of reasons, including the fact that “the question formed part of the general topic of the relationship between customary and treaty norms,”\textsuperscript{110} which, in a later reference to draft article 38 on modification of treaties by subsequent practice, the Commission described as “too complex for it to be safe


\textsuperscript{108} ILC Commentary, supra note 55, at 345.

\textsuperscript{109} Id. at 358. With the exception of Pakistan, which did not give any reason for its objections, the remaining states accepted the provision or did not offer any opinion.

\textsuperscript{110} Id. at 236. Special Rapporteur Waldock considered that the remarks of the United Kingdom delegate were well-founded and he recommended the deletion of article 68(c). Six delegates also were opposed to the provision, although three voted for its inclusion.
to deal only with one aspect of it..." \footnote{111}

The significance of the deletion of article 68(c) for the continuing ability of customary law to modify treaty norms is debatable. Villiger has written that, "with few exceptions, the principle of modification was not called into question," although he recognizes that the scope and conditions of the process are unclear. \footnote{112} Such a proposition is supported by judicial decision.\footnote{113}

Naturally, the development of the law of the sea itself provides the most interesting examples, where the provisions of the 1958 Conventions have been modified. These include the extension of the Contiguous Zone from 12 miles in article 24(2) of the Territorial Sea Convention, to 24 miles as a result of article 33 of the LOS Convention, the extension of the outer limit of the Continental Shelf to 200 nautical miles in article 76 of the LOS Convention when article 1 of the Continental Shelf Convention is generally recognized as placing the limit at the 200 metre isobath and the creation of the EEZ, limiting the provision of freedom of fishing in the High Seas Convention.\footnote{114} All of these "modifications" of earlier treaties are of somewhat controversial status since much of the 1982 Convention is not, as yet, customary international law. Nevertheless, they provide examples of the alterations which will almost certainly occur in time.

If Continental Shelf Convention article 5(5) is to be modified as a result of this process, first it is necessary to decide whether there is, in fact, an impossibility of both article 5(5) and LOS Convention article 60(3) being applied simultaneously. It has already been noted that interpretation can, to a degree, neutralize the conflict, but that on the whole, an approach which regards alteration or modification of article 5(5) as necessary is to be preferred. To the extent that this is the case, \textit{qua} customary rule, article 60(3) will be required to fulfill the conditions which international law prescribes for the material elements of custom. However, considering the fact that the consent

\footnote{111. \textit{Id.} Since the process of modification or termination, in the Vienna Convention, is governed exclusively by articles 42 and 54, and since these do not include desuetude or the growth of a subsequent customary law (the two processes often are not distinguished), a question remains as to whether these processes were permitted in this. Vienna Convention, \textit{supra} note 48, arts. 43, 54. \textit{See also} M. Villiger, \textit{supra} note 54, at 211-12.}

\footnote{112. M. Villiger, \textit{supra} note 54, at 210.}

\footnote{113. \textit{Legal Consequences for States of the Continental Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (Advisory opinion of June 21). \"[The] ... silence of a treaty as to the existence of a right of termination on account of breach\} cannot be interpreted as implying the exclusion of a right which has its source outside the treaty.\" \textit{Id.} at 47. Emphasis also should be placed on the process in light of the fact that there is no hierarchy of a treaty and custom in international law.}

\footnote{114. LOS Convention, \textit{supra} note 1, arts. 33, 56 & 76. \textit{See} Territorial Sea Convention, \textit{supra} note 2, art. 24, para. 2; Continental Shelf Convention, \textit{supra} note 2, art. 1; High Seas Convention, \textit{supra} note 2, art. 2. \textit{See also} Hudson, \textit{Fishery and Economic Zones as Customary International Law}, 17 \textit{San Diego L. Rev.} 661 (1980).}
of states is otherwise paramount in treaty termination or modification, and that treaties might be so modified or terminated by the emergence of a customary rule in which a state had taken no part or did not agree with, are there any greater requirements of proof of custom which may modify a treaty? In addition, the effect of the emerging customary norm on the predating lex scriptum remaining in force also will need to be analyzed. As in the areas discussed above, the development of a new customary rule to supersede article 5(5) may be traced. First, there are the discussions which took place at UNCLOS III and the provision which was reached there. More recently, there has been a degree of state practice emerging from discussions in the International Maritime Organization and as a result of legislation on the matter by states parties.

The Material Elements of Custom in the Abandonment Context

A general starting point for the meaning of state practice is the text of the 1950 ILC report to the U.N. General Assembly, which outlined six different subheadings of customary international law: “1) treaties, 2) decisions of national and international courts, 3) national legislation, 4) diplomatic correspondence, 5) opinions of national legal advisers, and 6) the practice of international organizations.”

The relevant treaty provision is article 60(3) of the LOS Convention. Subsequent to the drawing-up of that provision, Norway and the United Kingdom passed legislation on the subject which is, with respect to the removal requirement, generally in accordance with the provision. The United Kingdom Government has gone on record as stating that article 60(3) represents international law on the subject. However, the comments of states within the framework of the relevant international organizations provide the strongest indication of the nature of the new emergent norms.

The major dispute concerning the current evaluation of state practice, and one of particular importance in the law of the sea context,

116. LOS Convention, supra note 1, art. 60, para. 3.
117. United Kingdom Petroleum Act, 1987, ch. 12, § 1, para. 4(c); Norwegian Petroleum Act, art. 30(5).
118. U.K. Dep’t of Energy, supra note 15, at para. 5: “It is the Government’s view that under international law, total removal of offshore installations is only required where this is necessary to prevent unjustifiable interference with other users of the sea. Otherwise, partial removal is permissible. . . .”
lies in the statements and actions taken within the United Nations and the value of any texts or documents that arise out of those proceedings. A narrower view, an "act-oriented" view of state practice, sees little or no value in the positions or votes taken at international conferences, because to hold otherwise would be an inhibitory factor upon states expressing a view by which they might later be bound. Particularly in the context of UNCLOS III, Laylin has argued, voting by consensus and the "package-deal" concept strip such assertions of any positive "law-making" significance. Therefore, the fact that article 60(3) as it now stands received a great deal of support at UNCLOS III, and that the text of the LOS Convention containing the article was adopted by 130 votes in favor to 4 against, with 17 abstentions are not necessarily indicative of the law on the matter, in the absence of entering the Convention into force for the supporting states.

However, it is recognized that such "claims" may provide the impetus for the creation of new rules and the destruction of old ones. Claims followed by uniform and consistent state practice could lead to the formation of new rules, thus rendering such claims generative of customary international law. In the alternative, a number of authors assert that more abstract acts, do, per se, constitute state practice and point to the development of the law of treaties, the law of the sea, and the decision of courts to support such an accepted fact in international life.

119. "The position taken by many delegations reflected not their country's view as to the existing law or the desirable new law, but a trading ploy." Laylin, Emerging Customary International Law of the Sea, 10 INT. LAW. 670 (1976). See also H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 57 (1972); MacGibbon, Means for the Identification of International Law in INTERNATIONAL LAW: TEACHING AND PRACTICE (B. Cheng ed. 1982): "[W]hat is actually done by a State to another State or its nationals or property in the course of its day to day activities in the area of international relations concerned, or what it tolerates at the hands of others in that area...[is what is meant by state practice]." Id.; A.A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 223-263 (1971); dictum of Judge Read in Fisheries Jurisdiction Case (U.K. v. Nor.), 1951 ICJ 191: "Customary law is the generalization of the practice of states. This cannot be established by citing cases where coastal states have made extensive claims..."

120. For a description of the discussion of article 60 paragraph 3, see the debates in Plenary meetings in U.N. Doc. A/CONF. 62/L.93 where a wide number of states expressed support, including the United Kingdom, the United States, Norway, the Federal Republic of Germany, Sweden, Denmark, Japan, Ireland.


122. M. VILLIGER, supra note 54, at 6. "[A] qualified series of instances [of state practice] is required, and statements at a Conference would lose any value if they were not followed by uniform and consistent [state] practice." Id.

123. Id. at 7-8. It can be argued convincingly that verbal acts, particularly within conferences producing legal texts, should be classified as state practice on the basis that states themselves regard it as such, that several decisions including the North Sea Confi-
In practice, in the abandonment context, the state practice that has emerged subsequent to the drafting of article 60(3) on the whole supports this view, although its uniformity and consistency can be challenged. For example, the United Kingdom, which proposed and supported article 60(3), voted against the Convention as a whole, and now supports the norm of article 60(3). A more subtle distinction can be seen in the conduct of West Germany, which supported article 60(3) in the negotiations, voted against the Convention, and now seems to reject the norms of partial removal encapsulated therein.\textsuperscript{124}

Since the universalization and politicization of the U.N. process, it has become increasingly difficult to distinguish political reaction from the assertion of legal positions. To exclude, because of this possible ambiguity, a fertile source of conferences and documents would give international law too static and conservative a character, but the abandonment problem reveals some justification for the criticism of those who wish to place a restrictive interpretation upon “practice” in that it is impossible in the United Nations framework to find the true conviction of states on any matter — because statements made or drafts achieved, particularly in the law of the sea negotiations, represent not the true positions of states but only elements of “trading ploys” or parts of “package deals.”\textsuperscript{125} Arguably, such an approach ignores the important element of the reliance which other states place upon a statement. Whether or not a state’s articulations are made \textit{lex lata} or \textit{de lege ferenda}, is not dispositive since such statements may still have an element of validity in the sphere of practice.

The attribution of validity to such articulations will be reinforced if followed by the other material elements necessary for the creation of a new customary rule. Thus, later inconsistent actions could significantly deprive texts achieved at UNCLOS III of the uniformity and consistency required for the emergence of valid state practice. Indeed, the UK Secretary of State for Foreign and Commonwealth Affairs stated in 1981, “Various provisions of the Law of the Sea

\textit{nental Shelf} cases (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 4 (Judgment of Feb. 20, 1969) and \textit{Fisheries Jurisdiction Case} support the idea that a restricted view of state practice does not engender the same beneficial functions in the international law-making process as that of a wider view.

\textsuperscript{124} Note by the Government of the Federal Republic of Germany, presented to Sub-Committee on Safety of Navigation, 33rd Session, IMO Doc. NAV. 33/7/2, para. 2 (1987) [hereinafter \textit{Note on Safety}].

\textsuperscript{125} See Laylin, \textit{supra} note 119, at 670-71.
draft Convention reflect customary law but the draft as such does not establish it, State practice is also important.\textsuperscript{128}

The major degree of non-UNCLOS III state practice is now emerging from the IMO.\textsuperscript{127} Removal must “take into account” any “generally accepted international standards established in this regard by the competent international organization.”\textsuperscript{128} That organization is generally accepted as the IMO and, in that respect, the organization began the task of promulgating agreeable standards in early 1987. Several delegations in the Maritime Safety Committee including the United States, Federal Republic of Germany, Norway, and oil and fisheries interests submitted texts to the Sub-Committee on Safety of Navigation on the issues raised.\textsuperscript{129} Some of these texts reveal positions which are less favorable towards the development of a norm of partial removal than might have been thought when the article 60(3) achieved support at UNCLOS III. For example, the United States submitted a draft resolution which stated, “Article 60(3) of UNCLOS adopts the same requirement for total removal as article 5(5) of the 1958 Convention on the Continental Shelf. . . . At the same time article 60(3) recognizes that there may be an occasional limited exception to this rule.”\textsuperscript{130} The paper continues, “[t]his resolution should reiterate and stress that the international requirement continues to be the total removal of abandoned or disused installations and structures . . . it should also address the limited exceptions to this rule.”\textsuperscript{131} Such exceptions were to be limited to two percent or an agreed specification that would limit the amount of such installations not completely removed.\textsuperscript{132}

The Soviet Union adopted a similar position as to the total removal requirement, although it recommended that exemptions should not be extended to installations and structures in shallow seas where the water depth was less than 300 metres.\textsuperscript{133}

The West German delegation appeared even more emphatic in its rejection of article 60(3), stating, “for the safety of the activities mentioned as well as for reasons of environmental protection, it is mandatory to completely remove abandoned or disused offshore in-

\textsuperscript{126} 52 BRIT. Y.B. INT'L. L. 372 (1981).
\textsuperscript{127} Current IMO Committees include the Committee on Maritime Safety and the Sub-Committee on Safety of Navigation.
\textsuperscript{128} LOS Convention, supra note 1, art. 60, para. 3.
\textsuperscript{130} U.S. Proposed Draft, supra note 14, para. 3.
\textsuperscript{131} Id., para. 5.
\textsuperscript{133} Id., para. 7.9.
The United Kingdom, on the other hand, argued that a policy which called for entire removal would be contrary to article 60(3) of the LOS Convention from which IMO’s mandate for establishing such standards flowed. While the Sub-Committee did produce a set of draft guidelines, it recognized that there was not consensus as to their content and that further work would have to be done. The content of the rules of article 60(3), the circumstances for partial removal and the general parameters remain undefined. Clearly, the formation of a new rule on the matter, at present, may not meet generally accepted requirements for article 60(3) to constitute a declaratory rule.

In the North Sea Continental Shelf cases, the court required that for the formation of a declaratory rule of customary international law, state practice should have been extensive. What this signifies is the requirement of a common widespread practice which is representative of all major political and socio-economic systems. Without such a general practice, there will be no customary rule which is binding erga omnes, although there may develop a rule of special customary law. Indeed such widespread and representative participation as the court alluded to in the North Sea Continental Shelf cases had also to refer specifically to those states whose interests were specially affected. This means that without the practice of such states, a new rule will not come about.

The United Kingdom, as a state likely to face the most expensive decommissioning and abandonment of the largest structures in the deepest waters, has enacted legislation which permits partial removal on a case-by-case basis, although the legislation is open ended and the United Kingdom has argued that it will regulate the matter in accordance with its international obligations. The United States

134. See Note on Safety, supra note 124.
135. Disused Offshore Platforms, supra note 132, para. 7.8.
136. Id., para. 7.12.
138. For the proposition that a special customary law may have arisen as regards article 60(3), see Bentham, supra note 6, at 847-48.
139. "A very widespread and representative participation is the [1958 Continental Shelf Convention] might suffice of itself, provided it included that of states whose interests were specially affected." North Sea Continental Shelf, 1969 I.L.J. at 38.
140. In the United Kingdom, the regulations which the Secretary of State for Energy has power to make will determine the actual content of the abandonment obligation on the United Kingdom's shelf. See U.K. Dep't of Energy, supra note 15, para. 5. "The standards we adopt will of course have to be consistent with our international obligations." Id.
might also be regarded as specially affected in this way, given the
number of installations on its shelf, although these generally are in
shallower waters. What weight should, therefore, be accorded the
opposition of states such as West Germany or even France which,
comparatively, have few installations on their shelves? As Villiger
points out, if all specially affected states engage in a similar practice,
a new customary rule may not necessarily come about, since the
practice of other states may be inconsistent.144 In the abandonment
context, just because states such as Norway and the United King-
dom are specially affected, it does not follow that the practice of
other states is immaterial. Instead, the test more likely to achieve the
objective set out by the court is that explicit or implied support for a
rule will be required by any state which has the opportunity to en-
gage in such practice. The large number of states parties to the 1958
Conventions which have not taken part in the IMO Sub-Committee
on Safety of Navigation may have their say when any draft regula-
tions it produces are submitted to the general meetings of the IMO.
What, however, is to be concluded from their current silence on the
matter?

If a state can be classified as a persistent objector to the emer-
gence of a new rule, then it will not be bound by it, provided it main-
tained its objection since the birth of the new rule and consistently
adhered to such objection.142 However, the absence of objection, or
passive conduct may still constitute part of general practice towards
the formation or creation of a customary rule. In the law of the sea
context, the ICJ in the Continental Shelf (Tunisia/Libya) Case was
invited to analyze the "new emergent trends" of UNCLOS III. The
court implied it would invoke customary rules which the parties had
not expressly accepted and would not ignore "any provisions of the
draft (LOS) Convention if it came to the conclusion that the content
of such a provision was binding upon all members of the interna-
tional community because it embodies or crystallizes a pre-existing
or emergent rule of customary law."143

It seems apparent that where a state has not protested earlier and
other states might have expected such a reaction, its silence will be

141. M. Villiger, supra note 54, at 14. Particularly in the law of the sea context,
where the LOS Convention seeks to establish a global regime for the oceans, including
the exploitation of the common heritage of mankind, and where almost all world states
participated, there can be few states which are not specially affected.
142. I. Brownlie, supra note 71, at 10. "[A] state may contract out of a custom
in the process of formation." Id. Another situation involves the subsequent objector who
departs from a customary rule after its formation. If objecting alone, this may be a
violation of the general rule, but if accompanied by a sufficient number of other objec-
tions, the result may be to modify or terminate the earlier customary rule.
143. Concerning the Continental Shelf (Tunisia v. Libyan Arabs Jamahiriya),
construed as acquiescence upon which other states may place reliance. The possibility of such silence being construed in a different manner because a state was unaware of the need for a reaction is very unlikely. In the abandonment context, the subsequent passive conduct of those states who voted in favor of LOS Convention article 60(3) at UNCLOS III and their subsequent votes on the text may be qualified as contributing toward the new norm.

In the alternative, the voluntarist school of international law does not see silence as tacit acceptance. This approach demands some evidence of general recognition of a legal norm. In its strict form the voluntarist approach would preclude the creation of any law since few states even express their true attitude on all matters at all times. However, Tunkin has sought to alleviate such a construction by adding the requirement that acceptance will only be assumed where a state's interest is involved and it still fails to object. But in its less strict manifestation, there is much similarity between the voluntarist approach and the traditional view.

The number of states which may remain passive presents a problem. If a number of inconsistent acts occur, then it seems clear that more states will be required to contribute towards the formation of the customary rule. The implications are clear for article 60(3) and the domestic practice it inspires, although the IMO may provide a harmonizing function.

Two final requirements were set forth by the court in the North Sea Continental Shelf Cases: 1) that state practice should have been both extensive and virtually uniform in the sense of the provision invoked and 2) that the duration of the practice also be considered.

The most significant form of state practice would be actual abandonments, particularly by those states which have expressed a view of the law. In the absence, at present, of such abandonments on the North Sea Shelf, what practice there is remains confined to statements within the IMO and expressions in domestic legislation.

144. Having its support in Eastern European countries but its origins as far back as Grotius. See, e.g., G. TUNKIN, THEORY OF INTERNATIONAL LAW (1974).
145. Id. at 129.
146. The greatest degree of harmonization will occur if support can be achieved for any draft resolution which the IMO may reach on the matter.
147. North Sea Continental Shelf, 1969 I.C.J. at 43. "Within the period of time in question, short though it might be, State practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked . . . ." Id.
While the opinions in the *North Sea Continental Shelf* cases did not specifically define what constitutes practice, other scholars have attempted to do so. Villiger states that "the condition of uniform practice requires that the instances of practice of individual states, and of states in general, circumscribe, apply, or refer to, and thereby express, the same customary rule . . . a substantial, virtual uniformity or consistency of practice suffices."\(^{148}\) This means that for the norm of article 60(3) to become crystallized, a corresponding identical implementation of the rule in domestic law would probably, although not absolutely necessarily, have to come about. The rule, dependent to a large extent, as it is, on standards to be set by the IMO, will permit an element of flexibility in the creation of a new customary law.\(^{149}\)

As regards the temporal element of a state's practice, the International Court of Justice has never required that a particular practice last for a specific duration. It is generally agreed that this is a relative requirement, although a certain length of time is necessary for a number of reasons: to enable claim and counterclaim to take place, to distinguish different types of practice and to seek for the developing sense of legal obligation, *opinio iuris*.\(^{150}\) Therefore, while it is clear that the adoption of a text at the UN may speed up this process of claim and counterclaim, it is not by itself adequate to indicate the formation of a new rule of customary law and the problems encountered in the IMO illustrate this. The existence of affirmative votes on article 60(3) cannot in itself result in the creation of new law, particularly where the parameters of that law have yet to crystalize.

The practice of states, whether within or outside of international conferences, is only one factor in the law creation process.\(^{151}\) Again, the *North Sea Continental Shelf* cases give some indication of the thinking of the International Court of Justice on this point, "the acts concerned . . . must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by

149. The general nature of any rule which emerges may result in a "lowest common denominator" approach. That element of practice which is common to all the parties to the new rule could become the basis of that rule.
150. In the *North Sea Continental Shelf* cases, the court stated, "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law . . . within the period in question, short though it might be, state practice . . . should have been both extensive and virtually uniform." *North Sea Continental Shelf*, 1969 I.C.J. at 43.
151. In P. Lotus, VSS P.C.I.G. 1927 P.C.I.J. (ser. A) No. 10, at 28, the court held that in the context of the failure by states to invoke criminal proceedings, that only if such failure "were based on . . . (states) . . . being conscious of having a duty to abstain would it be possible to speak of an international custom . . . ."
the existence of a rule of law requiring it.\textsuperscript{152} The need for such a belief, i.e., the existence of a subjective element, is implied in the very notion of \textit{opinio juris sive necessitatis}. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. When such \textit{opinio iuris} combined with the requirement of state practice is present, a general consensus may evolve that a particular rule has passed into customary law. It is the parallelism of a sufficient number of \textit{opinios} which results in the new rule.\textsuperscript{183}

The criticism of this psychological or subjective element rests on the difficulty of proving its existence. Express statements of belief that a rule is customary law are not few, but the question remains whether \textit{opinio} can be discovered in the absence of such statements by analyzing the circumstances surrounding an act and the general uniform and consistent approach to it adopted by states parties. Indeed, some authorities assume this existence of \textit{opinio} if a state acts in a general way, reversing the presumption and requiring proof of the absence of an \textit{opinio iuris}.\textsuperscript{154}

In the context of a lawmaking conference such as UNCLOS III, or in the UN process in general, controversy surrounds the status of acts which are indicative of \textit{opinio iuris}. While some argue that votes or large majorities in favor of a rule may, in certain circumstances, indicate \textit{opinio iuris},\textsuperscript{155} others deny that they have any effect, particularly in the case where they are followed by discordant practice.\textsuperscript{156} Thus, although many crucial elements of the process of forming a new norm of customary law regarding abandonment remain controversial, clearly the role and importance of practice, however defined, and emergent \textit{opinio iuris} will be determinative of the issue.

The focus has hitherto been upon the creation of the new norm.

\textsuperscript{152}. \textit{North Sea Continental Shelf} at 1969 I.C.J. 44.

\textsuperscript{153}. For a lucid explanation of this phenomenon, see Cheng, \textit{On the Nature and Sources of International Law}, in \textit{INTERNATIONAL LAW: TEACHING AND PRACTICE} 203 (B. Cheng ed. 1982): "[I]t would appear that rules of general international law are formed by the consensus i.e. the concurrent 'opinio individuales juris generalis' of States directly concerned." \textit{See also} M. Villiger, \textit{supra} note 54, at 27: "The basis of the binding character of customary law results from the general consensus of states."

\textsuperscript{154}. I. Brownlie, \textit{supra} note 71, at 8.

\textsuperscript{155}. \textit{See}, e.g., de Arechaga, \textit{International Law in the Past Third of a Century}, 159 \textit{REC. DES COURS} 1, 34 (1978).

\textsuperscript{156}. MacGibbon, \textit{supra} note 119, at 17-24. Also, in the case of Texaco v. Libya, 53 I.L.R. 493 (1979), it was held that voting patterns had to be reinforced by an examination of the general pattern of relations between states.
Notwithstanding this process, the existence of a widely adhered to
text, *ius scriptum*, necessarily plays a certain role in the manner in
which new law arises. It is still necessary to address the issue of
when, and if so, how, the old *lex scriptum* is removed for states par-
ties. In addition to the uncertainty alluded to above, there are other
factors which must be taken into account.

**The Influence of Pre-existing Conventional Law on Custom**

Of course, where a new customary rule is created through the ab-
sence of persistent objection, the desuetude and recension of the old
rule are necessarily implied. The real question remains in the case
where a customary rule grows outside a conventional framework and
when there is not reaction from the parties to a convention whether
the existence of a new rule can be imputed. This question can be
resolved by inferring that a state’s passive conduct constitutes assent,
particularly if, as in the abandonment case, there is a new text which
invites support or criticism. Nevertheless, it remains unclear.

Another problem posed by the existence of the text of an earlier
rule, protected as it may be by the fundamental norm of *pacta sunt
servanda*, is the delaying effect it may have upon the practice of
states which might contribute toward a new norm.\(^{157}\) Reanalysis of
the earlier rules has been embarked upon by many states precisely
because of their reluctance to be seen as departing from the existing *lex scriptum*. The existence of many parties to the old treaty will
add to the uncertainty. And while the new text achieves a degree of
the authority, the earlier treaty may continue to be the focus of the
parties’ support. Hence, one reason for establishing that the earlier
rule has fallen into desuetude by tacit consent or by the operation of
other rules of international law, is that once that has occurred, the
stigma of potential illegality in following a future rule is removed.
The decisive factor which invests a new text with the necessary de-
gree of authority to enable states to override their earlier treaty obli-
gations, is the urgency with which the community of states as a
whole asserts the new rule. In this situation, article 5(5) of the Con-
tinental Shelf Convention has continued to have a surprising degree
of vitality. Few of the submissions to the IMO as to the content of
the new law fail to mention the earlier rule, and those states which
have invoked it include a state which is not a party to the Conven-
tion, that is, West Germany.\(^{158}\)

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\(^{157}\) Akehurst, *The Hierarchy of Sources of International Law*, 47 BRIT. Y.B.
INT’L. L. 276 (1974/75). In support of the need for parties to apply the rule are I G.
Schwarzenberger, *International Law* 535 (3d ed. 1957) and A. Vamvakos,
supra note 94.

\(^{158}\) Admittedly, however, that the invocations are to some extent qualified by the
emergence of LOS Convention article 60(3).
One of the most significant factors in the effect of practice upon preexisting conventions is the notion that there is a presumption against change as regards the provisions of conventions. In that situation, it is argued, a greater amount of evidence is required in order for a customary rule to replace a conventional rule than is normally the case in the development of custom. This would be particularly true in a situation where there was a failure to denounce a previous conventional rule.

Some authors have suggested that such a presumption against change may exist simply as part of the difficult task of proving the material elements of custom. Such a test is stringent, irrespective of the existence of a prior treaty. It may be, therefore, that in certain circumstances the effect of the existence of prior conventional law and the reluctance of states parties to be seen as breaking the rules unless their overriding interests so require, operates to make it more difficult to prove the new rule. This is particularly so in terms of the temporal aspects of proof alluded to above. However, whether as a matter of law, greater evidence of material proof is required to override the pre-existing rule, is unclear.

The arguments against such a proposition are persuasive. Significantly for the abandonment argument, it may be even less applicable in those cases where only a single conventional rule is altered. In addition, it has been pointed out that the presumption is inapplicable in terms of non-parties which are not bound by a non-declaratory convention rule in any case.

Presumption or no presumption in law, it is necessary to analyze the point at which emergent trends harden and crystallize into law. Does the presumption have the effect, in law, that until the proof has shown conclusively that the new rule has been created, the old law is still applicable? Is the onus upon those objecting to the conventional rule, in the alternative, simply to show that the old law is no longer applicable as a result of emergent trends so that the law is a kind of tertium genus, neither old nor new but subject to flexible approaches?

As the detail of the new norms have been worked out, states have evidenced a reluctance to depart from the earlier provision, while

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159. M. Villiger, supra note 54, at 220.
160. Akehurst, supra note 157, at 276; D. O'Connell, supra note 5, at 23, 47.
admitting that it may not represent the last word on the removal obligation. This conservative approach, despite the fact that the new LOS Convention was intended to “prevail” over the previous Geneva Conventions illustrates the influence which generally accepted treaty provisions in the law of the sea may continue to exercise on the law creation process. But how does this, in practice, affect the inevitable march toward the solidification of the norms of the LOS Convention through the practice they generate as declaratory of international law?

In the abandonment context, the existence of Continental Shelf Convention article 5(5) continues to influence the positions of states both parties and non-parties to that Convention. In its absence, with article 60(3) safely included in the text of the LOS Convention and with IMO drafting removal standards on the basis of its contents, states might already have begun to legislate and to regulate affairs on their continental shelves, confident that a new rule of customary law had emerged. However, as long as the Continental Shelf Convention continues to be a treaty in force, article 5(5) will, for better or worse, delay the formation of such international law. The standards likely to emerge may, as a result of this conflict, constitute neither the old rule, nor the rule which was intended to replace it. Until that time, the process of change and alteration in the law of the sea can be analyzed as if with a microscope.

Other Methods of Termination of the Earlier Obligation

The Vienna Convention envisages a number of other methods of the termination of treaties or treaty obligations, arising from the application of rules of general international law. These include supervening impossibility of performance and fundamental change of circumstances.\(^{163}\) The latter particularly may be applicable to the abandonment situation since, it has been argued, the costs of entire removal were never considered when the initial obligation under Continental Shelf Convention article 5(5) was entered into.\(^{164}\)

The concept of _clausula rebus sic stantibus_, or fundamental change of circumstances, has been accepted as a device which may operate to bring about the termination of a treaty.\(^ {165}\) However, be-

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163. In the absence of emergence of a norm of _jus cogens_, the Vienna Convention incorporates four methods of termination which do not depend on a subsequent treaty but have their basis in general international law. These are: denunciation of a treaty containing no provision for denunciation (article 56); breach (article 60); supervening impossibility of performance (article 61) and fundamental change of circumstances (_rebus sic stantibus_) (article 62). Vienna Convention, _supra_ note 3, arts. 56, 60, 61 & 62.

164. See, e.g., _Removal of Installations_, _supra_ note 6, at 23-24.

165. For an analysis of literature and practice, see A. VAMVOUKOS, _supra_ note 94, at pt. 1; Toth, _The Doctrine of Rebus Sic Stantibus in International Law_, _JURID. REV._ 56 (1974); Lissitzyn, _Treaties and Changed Circumstances_, 61 _AM. J. INT. L._ 736.
cause the concept has been regarded as open to abuse, its application is subject to certain limitations. The provision incorporated into the Vienna Convention as article 62 is formulated in negative terms. A fundamental change which has occurred regarding circumstances existing at the time of the conclusion of a treaty cannot be invoked as a ground for terminating or withdrawing from it unless a) the existence of those circumstances constitutes an essential basis of the consent of the parties to be bound by the treaty; and b) the effect of the change is to radically transform the scope of the obligations still to be performed under the treaty.

While this could be applicable to the abandonment obligation, since the effect of the change in technology is to alter the obligations of parties, there are several factors that must be noted. First, article 62 is not applicable where there is merely a change in policy. Second, at least for those parties to the Vienna Convention, the obligation is circumscribed by certain procedural safeguards. Finally, states should first attempt to reach an agreement upon altering the obligation with other parties, perhaps on an inter se basis. In addition, the stability of treaties would be endangered if the fundamental change argument is applied in circumstances where it is not clearly applicable.

Another possible development which might free states from the obligation under Continental Shelf Convention article 5(5) would be

(1971).

166. The ILC noted wide acceptance of the view that the doctrine could justify the demand for termination of a treaty, but questioned the right of any state unilaterally to terminate a treaty on this ground. See Off. Rec., 1st and 2d sessions, Vienna Convention on Law of Treaties, Draft Articles presented by the International Law Commission, U.N. Doc. A/CONF 39/11.

167. Vienna Convention, supra note 3, art. 62.

168. The definition of fundamental change in article 62 is designed to exclude "abusive attempts to terminate a treaty on the basis merely of a change of policy." I. SINCLAIR, supra note 3, at 194.

169. "Having regard to the extreme importance of the stability of treaties to the security of international relations, specific procedural safeguards should be attached to article 62." ILC Commentary, supra note 55, at 260. The ILC decided that article 62 ought to be subject to the general procedural safeguards governing dispute settlement under Part V of the Convention. See generally id. In Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3 (Jurisdictional Phase), the court emphasized "the procedural compliment to the doctrine of changed circumstances" and the requirement that a state invoking a fundamental change should permit such an assertion to be subject to impartial adjudication. Id. at 299. In addition, the United Kingdom argued the invocation of the changed circumstances rule failed, not only because the circumstances were not of a fundamental or vital character, but also because the doctrine did not have the effect of terminating treaties automatically but subjected them to the procedures in articles 65 and 66 of the Vienna Convention. Id.
the development of a special custom. This is a real possibility in the context of abandonment, particularly in the North Sea area. If such a custom is to apply between this regional grouping of states, it has the same result as an *inter se* modification of a treaty provision between certain treaty parties. The states adhering to the special custom *inter se* would, nevertheless, be obliged to apply the conventional rule to other parties *erga omnes*. In the context of a once-and-for-all obligation such as partial removal, it is difficult to see how the special custom and the general rule could co-exist. The more likely scenario is the developing adherence to a new rule in a regional forum which provides a large segment of practice and *opinio iuris* that might contribute to the erosion and replacement of the earlier rule in toto.

**Conclusion**

The ultimate state of the abandonment obligation has yet to evolve. Even if every state were to uphold the 1958 rule, the fact that the rule may not be representative of customary international law means that the issue of the status of the conventional rule would be of greatest importance between states parties that had a demonstrable interest to object. Nevertheless, as an example of the process in which the law of the sea is to evolve, the effect and status of the pre-existing rule must be addressed. From this, it can be seen that until the entry into force of the LOS Convention:

a) The interpretative process may resolve conflicts between prior and existing norms. Particularly for the future law of the sea, the role of subsequent practice in this interpretative process may take on a greater significance than has been the case hitherto. This is especially so where a textual interpretation leads to the conflict. However, the point at which such subsequent practice has the effect of amending or modifying the prior treaty obligation is unclear. In the abandonment context there appears, thus far, to be insufficient consistency in the subsequent practice of states parties to provide an indication of a uniform, authentic interpretation which may result in modification.

b) Prior treaty obligations also may be removed informally as a result of other processes, most of which again are linked to the con-

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170. A.A. D'AMATO, supra note 119, at 247.
171. *Inter se* modulation of the Continental Shelf Convention rule would be possible under article 41 of the Vienna Convention, where the modifications in question are not prohibited by the treaty, the enjoyment of the other parties of their rights under the treaty or the performance of their obligations is unaffected and it does not relate to a provision, derogation from which would be incompatible with the effective execution of the object and purpose of the treaty. Vienna Convention, supra note 3, art. 41. These are onerous criteria which in the abandonment context, as in others, might be difficult to fulfill.
sistency and uniformity of subsequent practice in establishing the collective will of the states parties. Of these, the requirements of tacit proof of agreement to terminate a treaty are traditionally onerous. However, by focusing on the nature of the treaty or provision whose binding nature is in question, and the responses required as a result of that nature, the doctrines of acquiescence and estoppel play a determinative role.

In the alternative, the growth of an overriding norm of customary international law may also result in the “desuetude” of earlier treaty obligations. However, the identification of the material elements of custom in the law of the sea context has proven controversial. As a result, the concordant practice of states, and this is particularly so in the abandonment context, must be looked to in order to confirm the positions taken and claims made in the international forum. The legal influence that pre-existing treaty provisions have as evidence of the growth of a new norm requires further investigation. At this point, the binding nature of treaties freely entered into must be measured against the necessary element of flexibility in international law. The proposition of a “presumption against change,” and its concomitant legal effects does not explain the status of legal norms during a process of gradual erosion. Other doctrines of international law such as the clausula rebus sic stantibus may again be inappropriate, in situations where their applicability is subject to dispute.

As the law of the sea develops through state practice and international co-operation, these issues no doubt will require further clarification.